

A08-763

No. A08-965

STATE OF MINNESOTA  
IN COURT OF APPEALS

Soffchoice, Inc.,

Plaintiff/Respondent,

vs.

Michael Johnson,

Defendant/Appellant, and

Martin Schmidt,

Defendant.

BRIEF OF APPELLANT MICHAEL JOHNSON

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## STATEMENT OF LEGAL ISSUES

1. Softchoice promoted its employee Michael Johnson to Branch Manager and Johnson began working as Branch Manager. Ten days later, Softchoice required Johnson to sign a non-solicitation agreement but offered no additional consideration. Can the earlier promotion serve as consideration for Johnson's later execution of the non-solicitation agreement?

The District Court held that it did.

Most apposite cases:

Bennett v. Storz Broadcasting Co., 134 N.W.2d 892 (Minn. 1965)

Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736 (Minn. 1982)

Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161 (Minn. App. 1993)

Freeman v. Duluth Clinic, Inc., 334 N.W.2d 626 (Minn. 1983)

2. Johnson had no knowledge of any Softchoice trade secrets and, for the full year of his employment as Branch Manager, had no direct responsibility for any customer accounts. Did Softchoice have a legitimate interest in preventing Johnson from soliciting any Softchoice customers after he left Softchoice?

The District Court's Order did not directly address the legitimacy of Softchoice's interest under the non-solicitation provision.

Most apposite cases:

Bennett v. Storz Broad. Co., 134 N.W.2d 892 (Minn. 1965)

Eutectic Welding Alloys Corp. v. West, 160 N.W.2d 566 (Minn. 1968)

Webb Publ'g v. Fosshage, 426 N.W.2d 445 (Minn. App. 1988)

3. The non-solicitation agreement bars Johnson for one year after leaving Softchoice from directly or indirectly soliciting any business from any company that Johnson solicited or became acquainted with through Softchoice. Did the injunction impose restrictions that are broader than necessary to protect the any legitimate interest of Softchoice?

The District Court's Order did not address whether Softchoice had justified the breadth of the non-solicitation provision, but the court's grant of an injunction imposing the full one-year limitation implies that it did not find the restriction overbroad.

Most apposite cases:

Bennett v. Storz Broad. Co., 134 N.W.2d 892 (Minn. 1965)

Overhold Crop Ins. Serv. v. Bredeson, 437 N.W.2d 698 (Minn. App. 1989)

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#### **STATEMENT OF THE CASE**

Plaintiff/respondent Softchoice, Inc. brought this lawsuit seeking injunctive relief and damages against defendant/appellant Michael Johnson and his codefendant Martin Schmidt. After a 20-minute hearing on January 23, 2008, Softchoice obtained a temporary restraining order barring Johnson from engaging in certain practices in competition with Softchoice. AA-10.

Softchoice moved the District Court for a temporary injunction and, on March 19, 2008, the court held a five-hour evidentiary hearing on that motion. On April 15, 2008,

the District Court, the Honorable John H. Holahan presiding, issued an order granting a temporary injunction against Johnson as follows:

Until January 23, 2009, Defendant Johnson is restrained from the following activities: 1) directly or indirectly soliciting, enticing or inducing any client or vendor referral source who Mr. Johnson solicited or did business with on behalf of Softchoice, or with whom Mr. Johnson otherwise became acquainted as a result of his employment with Softchoice, to become a client, of any other person, firm or corporation with respect to products and/or services then sold or under development by Softchoice or competitive with the products and/or services then sold or under development by Softchoice; 2) from directly or indirectly soliciting, enticing, or inducing any client or vendor referral source who Mr. Johnson solicited or did business with on behalf of Softchoice, or whom Mr. Johnson otherwise became acquainted as a result of his employment with Softchoice to cease doing business with Softchoice, and 3) Mr. Johnson is restrained from contacting or approaching any such person, firm, or corporation for such purpose or authorizing or knowingly approving the taking of such actions by any other person.

AA-9.<sup>1</sup> Notice of filing of the April 15, 2008 Order was served on April 17, 2008. AA-56. The present appeal from that Order followed.

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<sup>1</sup> In the same Order, the District Court denied Softchoice's motion for a temporary injunction against codefendant Martin Schmidt. Softchoice has appealed the denial of its motion as to Schmidt in a separate appeal, no. A08-763. Although Softchoice elected to sue Johnson and Schmidt in the same action, the two men never worked together and Softchoice's claims against them are quite different. Johnson and Schmidt held different positions, signed different contracts with different non-compete or non-solicitation provisions of different durations, and had different experiences at Softchoice. In addition, the District Court decided Softchoice's motions for injunctions against them under different states' laws.

## STATEMENT OF FACTS

### I. THE NATURE OF THE BUSINESS.

#### A. Resellers and “LARs.”

Respondent Softchoice is a reseller of computer software and hardware. Resellers buy software from publishers and hardware from manufacturers (collectively “vendors”) and sell them to end customers. AA-119. Softchoice’s largest vendor is Microsoft. Tr-173:23-25. Microsoft deals with a limited number of resellers, commonly referred to as Large Account Resellers or “LARs.” Non-party En Pointe Technologies, Inc. (“En Pointe”), appellant Michael Johnson’s current employer, is also an LAR and buys software from Microsoft.<sup>2</sup>

#### B. The Customer Sales Team: Outside and Inside Representatives.

Sales teams at Softchoice, as at most LARs, consist of “outside” and “inside” representatives. AA-77-78. Outside representatives have face-to-face meetings with customers and call on prospective costumers to get new accounts. AA-63. Once an account is established, it is also serviced by an inside representative. Tr-125:18-19, 146:4-5. Inside representatives handle the day-to-day details of the account, including pricing, and have much more daily contact with existing customers than outside representatives. AA-60 (26:19-21), 65 (140:13-17), 78, 101 (¶ 23), 177; Tr-146:12, 15 (“at least five times as much”). The inside representative’s “daily duties are...creating

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<sup>2</sup> Although nuances exist between the terms LAR and reseller in other contexts, they are not important here and this brief uses the terms interchangeably.

quotes, placing orders, and any of the daily communications between Softchoice and the customer.” Tr-146:7-9. Chris Illingworth, Softchoice’s Director of Enterprise Sales, confirms the significance of the inside representatives, calling them the customer’s “gateway to Softchoice.” AA-77-78, 101 (¶ 23). Between them, this sales team of outside and inside representatives are “Softchoice’s primary, and often exclusive, contact with each of its customers.” AA-175-176.

**C. The Branch Manager.**

In contrast to the outside and inside representatives, a branch manager at Softchoice is a supervisor and a member of the management team. Tr-160:1-12; AA-127. Branch managers cannot be account representatives on any accounts and are not eligible to receive commissions as a sales representative. Tr-159:4-7, 8-16. Instead, the branch manager serves full-time as a manager, overseeing and supervising the work of the outside and inside representatives, who are directly responsible for serving the accounts. Tr-211:22-25; AA-66 (172:19-24), 117.

A Branch Manager does not serve and is not expected to serve as a primary or secondary customer contact; it is not a Branch Manager’s role to maintain close relationships with individual customers. Tr-159:21-22; AA-63 (84:4-17), 66 (172:19-24), 77 (96:6-18). A Branch Manager will attend sales calls only with an outside representative, and only to observe and train the representative. Tr-160:1-12; AA-95 (117:23-25). A branch manager would not take the primary speaking role on a sales call. Tr-160:3-5.

## II. JOHNSON'S WORK AT SOFTCHOICE.

### A. Johnson's early work as a Softchoice "Outside Representative."

Appellant Michael Johnson joined Softchoice in 2001 as an outside representative, and the company assigned him to certain accounts. He had the primary responsibility for developing and maintaining the customer relationships for those accounts, and he received commissions for those accounts' purchases. See, e.g., AA-85.

Although the entire Minneapolis branch had about 350 customers, AA-62 (35:8-9), Softchoice offered the District Court evidence concerning Johnson's contacts with only 13 of those customers while he was an outside sales representative. The record contains no evidence concerning the nature and extent of any contacts that Johnson may have had during that time with the other 96 per cent of the Minneapolis branch's customers.

Even as to those 13 accounts, Softchoice offered little evidence and few specifics concerning Johnson's claimed relationships with those clients. For two of them, HCMC and Skyline, Johnson was never the account representative at all.<sup>3</sup> For the remaining 11 accounts at issue, the record shows only that Johnson was the account representative for these accounts "at some point" between 2001, when he joined Softchoice, and January 7,

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<sup>3</sup> With respect to HCMC, Johnson's coworker Tom Parker was the outside representative from the beginning. AA-88. Johnson's relationship with his contact at HCMC pre-dated his employment with Softchoice; they were family friends. AA.77. With respect to Skyline, Johnson never even attended a Skyline sales call; the customer was transferred to outside representative Lesley Broederdorf and then, after Broederdorf left, to outside representative John Zimney. Tr-136:16; AA-92.

2007, when he was promoted to Branch Manager. Tr-136:18-19. For some of these accounts, the company replaced Johnson with a different representative even before Johnson was promoted. Tr-169:19-21; AA-95. For example, Johnson had not been assigned to the Bonestroo account since 2004 or 2005. Tr-126:12-13; AA-86 (54:13-14).<sup>4</sup>

Johnson served as a Softchoice outside sales representative only until January 2007, nearly a year before he left the company.

**B. Johnson's Promotion to Branch Manager.**

**1. January 7, 2007: Johnson is Interviewed for the Branch Manager Position.**

When the Minneapolis Branch Manager position opened up at the end of 2006, Johnson told Douglas Stabenow, Softchoice's Director of Sales for the Central Region, AA-58 (2:18-19), that he was interested in the position. Stabenow invited Johnson to interview for the job, and directed Johnson to talk to other Branch Managers, Jonathan Leaf and Paul Carrillo, about the job. Tr-147:18-19. Johnson did so, asking them about the position's responsibilities and compensation and how to handle the panel interview. Tr-147:24-148:2.

Johnson had no reason to suspect that a non-solicitation agreement was in any way a requirement of the Branch Manager job. Tr-148:22-25. At the time he interviewed, Johnson knew of no Softchoice employees who were subject to non-solicitation

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<sup>4</sup> Again, the company had assigned this account to Broederdorf, and then to Zimney. Tr-126:8; AA-86.

agreements, Tr-148:15-17, and neither Leaf nor Carrillo suggested to Johnson that they had such agreements. Tr-148:18-21. In fact, unbeknownst to Johnson, Softchoice was still in the early stages of the process of rolling out such agreements and including them in its employment contracts. AA-59.

Johnson interviewed for the Branch Manager position with a panel of Softchoice executives (including Stabenow) on January 7, 2007, at a company-wide meeting in Toronto. Tr-118:8. Johnson knew of no other candidate for the position, Tr-147:12-15, and nothing in the record suggests that Softchoice was considering any other candidate. The record contains no suggestion that anyone at the interview even hinted that Johnson would need to sign a non-solicitation agreement if he accepted the promotion. “Shortly after” the interview, Stabenow told Johnson that he was happy with how the interview had gone and that he would get back to Johnson soon with the company’s decision. Tr-148:3-7.

**2. January 7, 2007: Johnson is promoted to Branch Manager.**

Later on January 7, the day of the interview, and before Johnson left Toronto, Stabenow sent him an email: “You are the new BM in Minny!!!!” AA-123. Stabenow also called Johnson and told Johnson that he had the Branch Manager job. Tr-148:7-10, 149:7-13, 183:4-14. Stabenow had the authority to do this; he “had hiring and firing authority for the managers who reported to” him, and Stabenow “had the power to make [Johnson] branch manager” in Minneapolis. Tr-149:14-16, 213:17-214:1.

Stabenow told Johnson that a “formal offer out of HR” would be coming, and that it would “formalize everything.” Tr-183:13-24. Stabenow did not tell Johnson that he

would be asked to sign a non-solicitation agreement or that the promotion was conditioned on Johnson's execution of such an agreement. Tr-148:11-14. At that time, Johnson still did not know that Softchoice used non-solicitation agreements. Tr-148:15-17.

**3. January 8: Stabenow announces Johnson's promotion. Congratulations pour in.**

Early the following morning, on January 8, to "celebrate the good news," Stabenow sent an email to every Softchoice employee in the United States and Canada announcing Johnson's promotion:

I am very pleased to announce the promotion of Mike Johnson (a.k.a. 'MJ') to the Branch Manager's position in Minneapolis!...I know he will bring great leadership to the Minneapolis Branch!

AA-126; Tr-152:7-18, 184:3-7. In response to this announcement, Johnson received more than 50 congratulatory emails from Softchoice employees. Tr-152:19-21; e.g., AA-149-162.<sup>5</sup> Even Nick Foster, Vice President, Growth and People (that is, the head of human resources) e-mailed his congratulations to Johnson on January 8. AA-149 ("Congratulations Michael!"); Tr-153:23-154:4, 214:17-18.

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<sup>5</sup> For example, Luke Black, Corporate Account Manager: "Way to go MJ!"; AA-151; Dalia Bishara, Pricing and Contract Manager: "well deserved"; AA-153; Daniel Basque, Sales Director – Eastern & Western Canada: "Congrats Mike! Good luck in '07"; AA-155; Patrick Duggan, Enterprise Account Executive: "Good to see you landed the job."; AA-157; Scott Reid: "I'm thrilled for you"; AA-159; Joel Kindon, HR Generalist: "Good luck with the new position!!" AA-161.

Later that morning, Stabenow sent an email to the Central Management Team announcing that Michael Johnson was “a new member of the Central Management team” and stating that “MJ will be running the Minny branch effective 8am this morning!” AA-127-128; Tr-151:1-14. Within a short time, almost all of Johnson’s fellow managers sent their congratulations. Tr-152:2-6; AA-139-148.<sup>6</sup>

Stabenow’s announcements succeeded; by the afternoon of January 8, the news of Johnson’s promotion had spread to Microsoft, Softchoice’s most important vendor, Tr-173:23-25, and Johnson received more congratulations from Microsoft. AA-112; Tr-156:16-22. Johnson was very surprised at how quickly the word had spread outside the company that morning. AA-172 (Amar Sheth, XAPT Business Solutions, Inc.: “Congrats on the promotion buddy”; Michael Johnson: “WOW, I guess the word is spreading fast.”). Also on January 8, Johnson told his family about his promotion and his father congratulated him. AA-170; Tr-156:12-15.

Nowhere in any of the announcements of Johnson’s promotion did Stabenow use conditional language or say that Johnson “will be the Branch Manager.” Tr-153:20-22. Instead, he consistently said that Johnson *was* the Minneapolis Branch Manager as of January 8. Stabenow admits that “that statement was true.” AA-67 (194:13-18).

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<sup>6</sup> Heather May: “welcome to the team!”; AA-139; Robert Burke: “Glad to have you MJ.”; AA-141; Paul Carrillo: “Alright!! Great Suff, MJ!”; AA-143; Jonathan Leaf: “Nicely done, MJ!”; Id.; Jordan Schroeder: “Congratulations MJ!. Welcome to the Team.” AA-147

**4. January 8: Johnson begins working as Minneapolis Branch Manager.**

On the morning of January 8, Johnson began performing his responsibilities as Branch Manager. Tr-154:5-7, 214:2-3 (Stabenow: “[he] started doing the job then, absolutely”). Stabenow acknowledges that Johnson became a member of the management team on Monday, January 8, and that Johnson was running the Minneapolis Branch “effective” immediately, that is, as of 8 a.m. that morning. AA-68 (197:23-198:4); Tr-151:15-17.

On January 8, Stabenow sent Johnson an email with the outline of a strategic plan for the Branch. AA-124; Tr-150:2-8. The email’s subject line was “Minnie Branch Thoughts,” and it set out the priorities for the Branch for the “1<sup>st</sup> 30...60-90...[and] 90+ days” of Johnson’s tenure as Branch Manager. AA-124. It closes with Stabenow’s “Words of Wisdom,” including “put your own stamp on your new branch.” AA-125. Johnson viewed this email as stating as the “responsibilities that [he] had as the branch manager for Minneapolis.” Stabenow told Johnson to assume those responsibilities “right away.” Tr-150:9-14.

On January 8, Stabenow also sent Johnson a “branch config for Minny” so that Johnson could move accounts around and rearrange the territories assigned to the sales representatives in his branch. AA-111. On January 9, Stabenow deferred to Johnson with respect to a meeting in Minneapolis to discuss the Minneapolis Branch. AA-115 (Stabenow: “Now that you are the BM – you tell me how you want Monday to go.”).

Also by January 9, Johnson had begun setting up interviews for the vacant sales representative positions in his Branch. AA-114.

Johnson quickly gained Branch Manager level access to Softchoice's customer databases. Tr-154:8-21; AA-69 (202:2-7), 163 (January 8 email Re: "Branch Manager access"). He even changed his signature block for his internal and external emails to read "Mike Johnson, Minneapolis Branch Manager," Tr-155:1-15; AA-168, and began using that signature block shortly after receiving the promotion. Tr-155:1-15. He also requested Branch Manager business cards on January 9. AA-168.

**5. January 8: Stabenow and Human Resources take action to document Johnson's promotion.**

On January 8, after receiving Stabenow's broadcast email announcement of Johnson's promotion, Softchoice's Human Resources department asked Stabenow for "the offer letter that *has been* signed." AA-96 (emphasis added). Stabenow, however, had never asked Johnson to sign an offer letter. AA-69 (203:7-9). In fact, Stabenow had not even asked HR to prepare such a letter. AA-70 (206:12-207:3). Stabenow responded to HR's email by tacitly acknowledging his oversight and by asking for the first time that HR generate an offer letter for Johnson: "can you add Michael Johnson to the batch of offer letters that HR is working on." AA-70, 96.

At the same time, Stabenow complied with the Softchoice internal procedures necessary to make the promotion effective, submitting a Personnel Action Form ("PAF"), which is the "communication to HR that you *have taken* some personnel action like hiring or firing or promotion ...your notification to them of a personnel action that you

*have taken.*” AA-70 (emphasis added). In the PAF, Stabenow informed HR “that effective 1/1/07 Mr. Johnson’s new title was branch manager.” Id.

**6. January 16: Johnson receives the letter containing the non-solicitation clause.**

Over a week later, on January 16, Johnson received an email with an attached “offer letter” from Stabenow. AA-129; Tr-157:11-13, 184:18-22. The letter and the email noted that it did not contain Johnson’s complete compensation plan as a Branch Manager because, as Stabenow explained, the compensation plan is separate from offer letters, and compensation is “a supplemental document that we have annually.” AA-71.

The letter did, however, contain a non-solicitation clause that stated:

I agree that I shall not, during my employment at the Company and for a period of twelve (12) months immediately following the termination of my relationship with the Company for any reason (whether voluntarily or involuntarily), either directly or indirectly, on my own behalf or in the serviced or on behalf of others:

- (i) Directly or indirectly solicit, entice, or induce any client or vendor referral source whom I solicited or did business with on behalf of the Company, or with whom I otherwise became acquainted as a result of my employment with the Company, to become a client, of any other person, firm or corporation with respect to products and/or services then sold or under development by the Company or competitive with the products and/or services then sold or under development by the Company, or to cease doing business with the Company, and I shall not contact or approach any such person, firm or corporation for such purpose or authorize or knowingly approve the taking of such action by any other person...

AA-131. Stabenow has acknowledged that Softchoice’s purpose in inserting this non-solicitation agreement into employment contracts was to stem an exodus of Softchoice employees fleeing to better paying jobs elsewhere. Tr-205:12-14; AA-59.

Johnson had received similar HR letters almost every year (though without the non-solicitation provision), Tr-113:12-15, so he did not read the letter carefully. Contrary to Stabenow's representation, however, the letter did not merely "formalize" the nine-day-old promotion. Tr-183:13-24. The letter purported to add a new and previously undisclosed non-solicitation provision. Unaware "that there was any type of non-solicitation in this documentation," Tr-114:15-16, Johnson signed the letter on January 17 and returned it to Stabenow. Tr-113:1-2, 116:3-4. Had Johnson refused to sign the letter that included the non-solicitation agreement, he would have been demoted back to account manager. Tr-186:15-18 (Stabenow: Johnson would have had to "go back to being a, -- you know, his account manager job."), 215:13-23. Such a "demotion" would have been particularly difficult given that Softchoice itself had widely announced that Johnson was the Branch Manager "effective" immediately and that Johnson's new position was already well known to his customers, vendors (including Microsoft), coworkers, friends, and family. AA-82.

**C. Johnson's Role as Branch Manager.**

Consistent with the role of a branch manager, Johnson's duties after his promotion to Minneapolis Branch Manager changed from sales and customer contacts to oversight and supervision. At Stabenow's directive, Branch Manager Johnson could not serve as account representative on any account and was no longer eligible to receive commissions as a sales representative. Tr-159:4-16 ("all the accounts were transferred [by the]...beginning of March" 2007). The strategic plan that Stabenow sent Johnson on his first day as Branch Manager emphasized Johnson's role of overseeing the outside and the

inside representatives: (1) “make sure the [inside representatives] are really engaged with all accounts,” and (2) within your first 60-90 days, “divide the remaining territory into 2 for the new [outside] reps...you become a full time manager with three [outside] reps – all accounts assigned.” AA-124-125; see also AA-111 (“Mike [Johnson] will not be tagged to any accounts – be a full time manager.”).

Johnson’s promotion also fundamentally changed the nature of his contacts with customers. Tr-159:17-19. In his role of supervising the outside representatives, AA-63 (84:7-17), 66 (172:19-24), Johnson “was no longer the primary contact or even the secondary” contact, Tr-159:21-22; AA-63, and no longer held any key relationships with the customers. AA-66. Johnson did not collaborate with the sales team in pricing decisions. AA-95 (119:8-14). He would “cover” for outside representatives only when they were absent or if the Branch was understaffed. AA-63, 66.

Although Johnson would sometimes attend sales calls, he never did so without the outside representative, and his role was as an “escort” to train the representative. Tr-160:1-12; AA-95. He was an observer “listening to how the Softchoice rep was presenting Softchoice...[a]nd just kind of filling in or *training them when we would get back to the office*, based off how they would handle those calls.” Tr-160:3-10 (emphasis added). Stabenow agreed that “Johnson as branch manager was not the exclusive contact with his customers, *clearly*.” Tr-212:14-16 (emphasis added). As long as Johnson was Branch Manager, “[t]here would be a sales rep underneath him” that dealt with the customer. AA-63.

Consistent with this, as soon as Johnson was promoted, Softchoice began transferring Johnson's customer accounts to other sales representatives now working under Johnson in the Minneapolis Branch. Between March 2007, when the transfers were complete, and December 2007, when Johnson left the company, Johnson did not serve as account representative for any of the 350 customers of the Minneapolis Branch. Tr-159:4-16. During this period, each of these accounts was assigned both to an experienced outside representative who had been on the account for between 10 months and three years<sup>7</sup> and to a dedicated Softchoice inside representative, whom the company referred to as the customer's "gateway to Softchoice." AA-77-78 (96:19-97:9), 101 (¶ 23).

### **III. JOHNSON LEAVES BEHIND SOFTCHOICE AND ITS INFORMATION.**

Ten months after his promotion to Branch Manager, Johnson was earning less than he had earned as an outside sales representative. AA-81. Stabenow had conditioned Johnson continuing as Branch Manager on Johnson meeting quotas, and Johnson did not

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<sup>7</sup> The sole exception was a handful of accounts left without an outside representative when Softchoice fired outside representative John Zimney in November 2007. As Branch Manager, Johnson was responsible for ensuring that Softchoice properly served these customers until they were reassigned to another outside representative. Tr-25:24-126:5. All of these Zimney accounts had a dedicated inside representative. Tr-125:17-19, 161:2-4; AA-86 (55:7-8). Inasmuch as Johnson's year-end responsibilities as Branch Manager prevented him from devoting much attention to these accounts himself, Tr-126:1-5, 160:17-18, he had a discussion "with the inside sales manager to make sure all of the inside reps were heavily engaged with all of ...[these] accounts, because [he] was not going to have time in December to individually meet with those accounts and work with them." Tr-160:18-23. Johnson received no commissions from the Zimney accounts. AA-91 (78:14-16).

think the quotas could be reached.<sup>8</sup> Tr-163:11-14. When Johnson shared this view with Stabenow, Stabenow told him: “you can take a demotion and be an account rep again or you can look for other employment.” AA-84 (43:13-17); see also, AA-64 (85:11-17), 83 (34:8-12).

On December 27, 2007, Johnson made his decision and announced that he would resign effective at the end of the year. AA-110; Tr-163:23-25. On December 28, 2007, Johnson was isolated from the Softchoice computer system. Tr-165:7-12. Stabenow badgered Johnson and threatened that Johnson should not work for a Softchoice competitor (although the non-solicitation agreement does not prohibit such employment). AA-72 (214:19-215:11). Stabenow admits that he even “might have told” Johnson that he was “going to make his life a living hell.” Tr-218:3-11.

In January 2008, after he left Softchoice, Johnson went to work for En Pointe as an outside sales representative. Shortly after that, Softchoice filed this lawsuit against Johnson. Although Softchoice did not name En Pointe as a defendant, Softchoice admits that it filed this action against Johnson partially “for the effect it would have on En Pointe.” Tr-201:10-13. Softchoice also acknowledges that it sued Johnson in part “to demonstrate to [its] remaining employees that [it was] being very aggressive.” Tr-202:4-

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<sup>8</sup> The quotas were surprising, and Johnson talked to other managers and they had not heard of such a thing. Tr-163:15-22. It was particularly troubling because Stabenow informed Johnson of the quotas during the middle of the quarter in which he was expected to reach them. Tr-163:15-22.

10. Softchoice wanted the lawsuit “to be a deterrent to folks who were considering leaving.” Tr-203:14-16.

## ARGUMENT

### I. BURDEN OF PROOF AND STANDARD OF REVIEW

Minnesota law disfavors non-solicitation agreements as restraining trade and restricting an employee’s right to earn a living. *E.g.*, Bennett v. Storz Broadcasting Co., 134 N.W.2d 892, 899-900 (Minn. 1965). Courts therefore review non-solicitation agreements strictly and construe them narrowly. Menter Co. v. Brock, 180 N.W. 553 (Minn. 1920).

In this context, courts evaluate requests for temporary injunctions arising out of non-competition and non-solicitation agreements using the five factors the Minnesota Supreme Court laid out in Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (1965):

1. The nature of the relationship between the parties prior to the dispute,
2. The harm to Softchoice if the temporary relief is denied, as compared to the harm to Johnson if injunctive relief is granted,
3. Softchoice’s likelihood of success on the merits,
4. The public interest, and
5. Administrative burdens in supervising and enforcing the order.

Of these, the most important factor is the likelihood of prevailing on the merits at trial.

Dahlberg, 137 N.W.2d at 322.

The burden of satisfying the Dahlberg factors is high, and “[i]njunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury. The burden of proof rests upon the complainant to establish the material allegations entitling him to relief.” North Central Public Service Co. v. Village of Circle Pines, 224 N.W.2d 741, 746 (Minn. 1974) (quoting AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 504, 110 N.W. 2d 348, 351 (Minn. 1961)).

“A decision on whether to grant a temporary injunction is left to the discretion of the trial court and will not be overturned on review absent a clear abuse of that discretion.” Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 209 (Minn. 1993) (citations omitted). “A district court’s findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous.” LaValle v. Kulkay, 277 N.W.2d 400, 402 (Minn. 1979). Legal issues arising in the context of the grant or denial of a motion for temporary injunction are reviewed *de novo*. See, e.g., Care Providers of Minnesota, Inc. v. Gomez, 545 N.W.2d 45, 47 (Minn. App. 1996).

In the present case, the District Court abused its discretion in granting the injunction against Johnson. Inasmuch as the District Court based its decision primarily on its evaluation of the parties’ respective likelihood of success on the merits at trial, the Dahlberg factor that the District Court called the “primary factor,” AA-7, this brief will address primarily that factor.

## II. JOHNSON RECEIVED NOTHING IN EXCHANGE FOR SIGNING THE NON-SOLICITATION AGREEMENT.

The non-solicitation provision on which the injunction rests is without consideration as a matter of law. The determination of whether sufficient consideration underlies an agreement raises a question of law, which this court reviews *de novo*. Brooksbank v. Anderson, 586 N.W.2d 789, 794 (Minn. App.1998). Because the non-solicitation agreement is without consideration, the District Court abused its discretion in granting a temporary injunction based on that provision, and this Court should reverse.

To be valid and enforceable, a non-solicitation agreement must be supported by consideration. See Bennett v. Storz Broadcasting Co., 134 N.W.2d 892, 899 (Minn. 1965). In the employment context, a non-solicitation agreement is void and unenforceable if it is not either bargained for as part of the initial employment offer and acceptance, or supported by independent consideration. See National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982); see also Cannon Services, Inc. v. Culhane, 2004 WL 950414, \*2-3 (D. Minn., April 30, 2004) (if Plaintiff did not inform Defendant “of the *terms of the non-compete at or before* the April 5 meeting, it is invalid and cannot justify injunctive relief”) (emphasis added). Put another way, mere continued employment alone is not sufficient consideration to sustain the imposition of a non-compete or non-solicitation provision in an employment contract. See National Recruiters, 323 N.W.2d at 740-741.

**A. The District Court Erred in Finding That Johnson's Promotion was "Contingent" on Agreeing to the Non-Solicitation Provision.**

The District Court here abused its discretion in granting the injunction against Johnson because the non-solicitation agreement was not supported by consideration as a matter of law, and the finding of fact on which the District Court based its implicit conclusion to the contrary is clearly erroneous. The District Court correctly noted that the non-solicitation agreement would be valid and enforceable only if it is "supported by consideration," AA-6 (citing Bennett, 134 N.W.2d at 899), but the Court's conclusions of law fail to address the issue of consideration as to Johnson. The closest the Court came was its finding of fact that "[Johnson's] promotion was contingent on signing the agreement to [sic] containing the nonsolicitation provision." AA-3. Inasmuch as the Court made no other finding or conclusion concerning consideration for Johnson's non-solicitation agreement, the entire injunction rests on this finding of a "contingent" offer. This finding is clearly erroneous.

Nothing in this record suggests that Johnson's promotion to Branch Manager was contingent on his agreement to the non-solicitation provision. To the contrary, the undisputed facts set out above show that, long before anyone said anything to Johnson about any non-solicitation agreement, Stabenow promoted Johnson, Stabenow and Johnson announced the promotion to the world, and Johnson started performing his duties as Branch Manager. He was the "BM in Minny." AA-123.

The details of Johnson's promotion are not disputed. Stabenow, who had the unfettered authority to promote Johnson to the Branch Manager position, headed the

panel that interviewed Johnson on January 7, 2007, and told Johnson that same day—both by telephone and by email—that Johnson had received the promotion. Although Stabenow told Johnson that an “offer letter” from Human Resources would later “formalize everything,” Stabenow did not condition Johnson’s promotion on either the HR “offer letter” generally or on a non-solicitation agreement specifically.

Other undisputed evidence likewise demonstrates that Johnson’s promotion was immediate and real. On January 8, 2007, the company announced Johnson’s promotion with much fanfare to all company personnel, and congratulations poured in to Johnson from coworkers and others. That same day, Johnson became a member of the Central Management Team, was given Branch Manager level access to Softchoice databases, and actually assumed and began performing the duties of Branch Manager. Stabenow even urged him to “put your own stamp on your new branch.” AA-125.

The record is undisputed that Softchoice did not present or even mention the non-solicitation agreement to Johnson until *after*:

- Johnson discussed the Branch Manager position, including compensation, with other managers, Tr-147:24-148:2,
- Softchoice interviewed Johnson for the Branch Manager position, Tr-118:8,
- Softchoice offered Johnson the promotion to Branch Manager, AA-123,
- Johnson accepted the promotion to Branch Manager, Tr-149:14-16,
- Johnson’s supervisor announced Johnson’s promotion to Branch Manager to the Central Management Team, to all U.S. and Canadian employees, AA-126, 127, to customers, AA-82, and to vendors, AA-112,

- Nick Foster, Softchoice's head of HR, congratulated Johnson on the promotion, AA-149,
- Johnson shared news of his promotion with his family and friends, AA-170,
- Johnson ordered new business cards identifying his new position, AA-168,
- Johnson changed his email signature block to reflect his new position, AA-168,
- Johnson assumed the position of Branch Manager, Tr-157:17-20,
- Johnson began performing the duties of Branch Manager, including attending management meetings, making presentations, and meeting with subordinates, Tr-151:1-14; AA-115, 169,
- Johnson began interviewing to fill vacant subordinate positions in his Branch, AA-114, 124, and
- Johnson configured his Branch and planned for its coming year. AA-111, 114, 115, 124-125.

Only *after* all these events did Softchoice finally give Johnson the January 16, 2007 "offer letter" that contained the non-solicitation agreement. As Stabenow himself acknowledged, Johnson "did assume the position of branch manager" before signing the non-solicitation agreement. Tr-215:13-20. The non-solicitation agreement contained in that letter did not merely "formalize" the already effected promotion; it attempted to impose a new condition on an already existing employment contract without additional consideration. Softchoice made Johnson an offer of the promotion, Johnson accepted the offer, and both parties began to perform under the terms of the new agreement. At that

point, any new condition Softchoice wanted to impose on the contract would have required new consideration. The record contains no evidence of any such additional consideration.

The District Court's finding that "[Johnson's] promotion was contingent on signing the agreement to [sic] containing the nonsolicitation provision" thus has no support in the record, is clearly erroneous, and cannot be sustained. See Davis v. City of Princeton, 401 N.W.2d 391, 396 (Minn. App. 1987). The consideration on which the District Court based its decision—the consideration that the District Court itself noted was critical—simply was not there. Without consideration, the non-solicitation agreement is without force, and the injunction cannot stand. See Cannon Services, Inc. v. Culhane, 2004 WL 950414, \*2-3 (D. Minn., April 30, 2004) (if Plaintiff did not inform Defendant “of the *terms of the non-compete at or before* the April 5 meeting, it is invalid and cannot justify injunctive relief” (emphasis added)).

**B. Johnson's Continued Employment Cannot Constitute Consideration for the Non-Solicitation Agreement.**

Softchoice cannot rely on Johnson's mere continued employment as consideration for the non-solicitation agreement. Minnesota courts have repeatedly and consistently held that non-compete agreements entered into *after* employment offers have been made and accepted fail for lack of consideration. See, e.g., Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982) (holding noncompete clause “was not bargained for” where employees “did begin work before being presented with the noncompetition clause and told [sic] they were required to sign it”); Sanborn Mfg. Co. v. Currie, 500 N.W.2d

161, 164 (Minn. App. 1993) (holding restrictive covenant invalid where new employee had already accepted job offer, even though employee signed additional restrictive covenant before first day of work); Kari Family Clinic of Chiropractic, P.A. v. Bohnen, 349 N.W.2d 868 (Minn. App. 1984) (holding agreement employer required employee to sign two months after starting work was unenforceable because, “[o]ther than non-compete covenant, the terms of the contract basically restated the terms of the oral contract”).<sup>9</sup> These cases reflect the situation at issue here: Softchoice required Johnson to sign the non-solicitation agreement well after he had accepted the promotion, and indeed after he had actually started working at his new job.

This rejection of post-agreement consideration is not limited to new-hire cases in which a new employee has left an old job, where the employee had effectively “burned his bridges” so as to be at the mercy of the new employer. On the contrary, case law, both in Minnesota and elsewhere, has applied the doctrine broadly. For example, the Minnesota Supreme Court has invalidated post-acceptance noncompete provisions even

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<sup>9</sup> See also Orkin Extermination Co. v. Devine, 1988 WL 59224, \*1 (Minn. App., June 14, 1988) (employee was never informed about noncompete clause when he was hired, then several weeks later he was told he must sign it); College Craft Companies, Ltd. v. Perry, 1995 WL 783612, \*10 (D. Minn., Aug. 9, 1995) (applying Minnesota law, finding no evidence that employee received any benefits after signing the noncompete agreement “that were not available to him upon his initial hiring”); Western Water Management, Inc. v. Heine, 1996 WL 208489, \*2 (Minn. App., April 30, 1996) (finding no consideration where employee “received no additional benefits after signing the noncompetition agreement”); Nat’l Recruiters, 323 N.W.2d at 741 (holding that non-compete agreements received by employees within a week of start date were not contemporaneous and not supported by adequate consideration).

where the employees had been “unemployed for a period of time” thus having no bridges to burn. Nat’l Recruiters, 323 N.W.2d at 738. Similarly, the Eleventh Circuit has invalidated a noncompete provision signed shortly after an existing employee’s promotion on the ground that the agreement lacked consideration. See Bryan v. Hall Chem. Co., 993 F.3d 831, 835 (11th Cir. 1993) (applying projected Ohio law<sup>10</sup>); see also Freeman v. Duluth Clinic, Inc., 334 N.W.2d 626, 630 (Minn. 1983) (invalidating noncompete requested from employee shortly after promotion on grounds that agreement was not bargained for and lacked consideration); Hopper v. All Animal Pet Clinic, 861 P.2d 531, 542 (Wyo. 1993) (holding that prior promotion from part-time to full-time work did not constitute consideration for later non-compete agreement). The case law thus makes clear that the rule here rests on a basic tenet of contract law: Before a person may be bound to the terms of a contract, that person must receive something of value in exchange. See, e.g., Deli v. Hasselmo, 542 N.W.2d 649, 656 (Minn.App.1996) (noting consideration is “something of value given in return for a performance or promise of performance”). When Softchoice’s Minneapolis Branch Manager Johnson signed the offer letter on January 17, 2007, he received nothing he did not already have.

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<sup>10</sup> Although Ohio has since adopted the rule (rejected by Minnesota) that continued employment may serve as consideration for a noncompete clause, see Lake Land Employment Group of Akron, LLC v. Columer, 804 N.E.2d 27, 32 (Ohio 2004), the Bryan court’s holding was consistent with what it believed the Ohio rule to be and with what the Minnesota rule actually is.

In sum, Johnson's continuing employment in his new position failed as a matter of law to provide consideration for the otherwise unsupported non-solicitation agreement. The agreement thus fails, and the District Court's issuance of the injunction based on that agreement was an abuse of its discretion.

### **III. THE NON-SOLICITATION AGREEMENT DOES NOT PROTECT A LEGITIMATE INTEREST OF SOFTCHOICE.**

Even assuming for the sake of argument that Softchoice had provided legally sufficient consideration for the non-solicitation agreement, the non-solicitation agreement is invalid because it does not protect any legitimate interest of Softchoice. Because the law disfavors the limitations non-solicitation agreements place on people's right to work, courts strictly scrutinize an employer's motives in imposing on its employees such restrictions, and will enforce such agreements only if they protect *legitimate* interests of the employer. See Bennett v. Storz Broad. Co., 134 N.W.2d 892, 899 (Minn. 1965). Here, the non-solicitation agreement imposed on Johnson fails this requirement, and the District Court abused its discretion in entering the injunction based on that agreement.

Softchoice argued in the District Court that the non-solicitation agreement at issue was intended to protect two legitimate interests: trade secrets and relationships with customers. AA-49. Inasmuch as the District Court flatly rejected Softchoice's claims of trade secrets, AA-5, Softchoice's "legitimate interest" must necessarily rest on its relationships with its customers. To be sure, Minnesota law allows employers to protect key relationships between its employees and its customers that comprise the employer's goodwill. See, e.g., Bennett, 134 N.W.2d at 898. The record, however, demonstrates

that Softchoice imposed the nonsolicitation agreements, not to protect the company's goodwill, but to keep employees from quitting to seek higher-paying jobs, to punish those that did, and to thwart competitors like En Pointe who offered more attractive positions.

**A. Softchoice's campaign to prevent employees from leaving for better-paying jobs is not a legitimate purpose.**

The record here establishes through Softchoice's own admissions that its purpose in imposing the non-solicitation agreements was not to protect customer contacts, but to prevent employees from leaving to take jobs at better-paying competitors like En Pointe.

Softchoice's Stabenow himself acknowledged this motive:

Q. Were you part of the decision-making process to include that [nonsolicitation] language in the standard offer letter?

A. I didn't have any authority to put that in.

Q. Did you have an understanding as to why it was being put in?

A. Sure.

Q. ... What was your understanding of why it was put in there?

A. We were losing a lot of folks to competition. Specifically En Pointe.

Q. So it was in direct response to the choices that some of your folks made to go to En Pointe instead of Softchoice, is that right?

A. Right. ...

Q. That was to basically stem the tide of people leaving the company, is that right?

A. Yes. ...

Q. Did you make any inquiries as to why you were losing a lot of folks to En Pointe?

A. Yes. ... We talked.

Q. Did you look into the question why so many people were leaving?

A. Yes.

Q. What did you find out?

A. We found out it was about money.

AA-59.

Under Minnesota law, preventing an employee from leaving to work for a competitor is not a legitimate purpose for a non-solicitation clause:

[it] may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns.

Bennett, 134 N.W.2d at 899 (quoting Menter Co. v. Brock, 180 N.W. 553, 555 (Minn. 1920)). The Minnesota Supreme Court has rejected such covenants in strong and unequivocal terms:

Restrictive covenants that serve primarily to prevent an employee from working for others or for himself in the same competitive field so as to discourage him from terminating his employment constitute a form of industrial peonage without redeeming virtue in the American enterprise system.

Eutectic Welding Alloys Corp. v. West, 160 N.W.2d 566, 571 (Minn. 1968). So here, Softchoice cannot claim a legitimate purpose in punishing its employees who quit, in intimidating its employees who remain, or in preventing competition for employees from other companies prepared to offer better wages and working conditions.

**B. Softchoice's conduct furthered its improper purpose of trapping employees in underpaying jobs.**

Softchoice's conduct with respect to Johnson in particular reinforces Stabenow's admission that Softchoice intended its nonsolicitation agreements to prevent employee flight rather than to protect client contacts. To protect customer goodwill, employers have the right to protect only against a former employee's use of customer relationships established during employment with the company. Webb Publ'g v. Fosshage, 426

N.W.2d 445, 450 (Minn. App. 1988). At Softchoice, these customer relationships were developed and maintained by the inside and outside sales representatives, a position that Johnson himself most recently held nearly a year *before* his promotion. AA-63 (84:4-17), 175-176. Softchoice did *not*, however, require Johnson to execute a non-solicitation agreement when he was a sales representative from 2001 through 2006, the only period during which he had actual, regular contacts with the customers and served as the “face of the company.” Counterintuitively, it was only after Softchoice promoted Johnson to Branch Manager, a position that by its nature insulated Johnson from direct client contact and relationship building, that the company required Johnson to execute a nonsolicitation agreement supposedly intended to “protect client relationships.”

Johnson’s actual experience as Branch Manager emphasized this contradiction. From his January 2007 promotion through his December 2007 resignation, Johnson had at most only secondary contact with those customers. AA-63. Softchoice required Johnson to focus on managing the branch, and assigned other account representatives to manage the customers. AA-63, 111, 124-125; Tr-159:4-16. For example, Softchoice sales representatives earned commissions on customer accounts, Tr-146:16-19, tying a sales representative’s success with the company to the representative’s success in client relationships. As a Branch Manager, however, Johnson earned no commissions, Tr-159:4-7; his success was measured by, and his compensation was dependent on, the success of the sales representatives under his supervision. Tr-163:11-22. The nature of Johnson’s position as a manager thus meant that, by the time he left Softchoice, he no

longer had any of those key relationships that Softchoice supposedly intended the non-solicitation agreement to protect. AA-66 (172:19-24).

The District Court's decision confuses Johnson's two distinct periods of work at Softchoice and as a result errs in finding that Softchoice had a legitimate interest in Johnson's customer contacts. The District Court's decision states:

Michael Johnson started as a sales representative for Softchoice in 2001. During his tenure, Michael Johnson developed extensive relationships with Softchoices' [sic] customers at Softchoices' [sic] expense.

AA-7. In basing its injunction on Johnson's earlier conduct as an outside representative, the District Court essentially permits Softchoice to use the non-solicitation agreement Johnson signed as a Branch Manger to retroactively protect customer relationships Johnson developed when he was a customer representative, when he was *not* subject to a non-solicitation agreement.

The sanction Softchoice says it would have imposed on Johnson had he not signed the non-solicitation agreement also contradicts Softchoice's assertion that this provision was intended to protect client relationships. According to Stabenow, if Johnson had not signed the offer letter containing the non-solicitation agreement, Johnson would have had to "go back to being a, -- you know, his account manager job." Tr-186:15-18, 215:13-23. But as an account manager, Johnson was not subject to any non-solicitation agreement; he was free to leave that job at any time and immediately solicit his former accounts at Softchoice. In other words, to coerce Johnson into signing a non-solicitation agreement for a branch manager job with no primary customer contact duties, Softchoice would have been willing to demote Johnson to a position that focused on customer contacts but

imposed no non-solicitation requirement. This position is irreconcilable with any claim to a legitimate concern over the protection of client contacts.

The lack of a legitimate interest by Softchoice in barring Johnson from soliciting Softchoice's customers is also evident in what Softchoice did to reestablish those customer relationships after Johnson left: Nothing. AA-66 (172:9-24). Softchoice did not need to assign a new representative to any of its customers or get a new representative trained and up to speed because all of Softchoice's customers had at least one and usually two Softchoice representatives already assigned to them. AA-63, 66, 77-78, 101 (¶ 23). These representatives were experienced, knew the customers, and had been handling the customers for 10 months or much longer *before Johnson left*. Tr-169:19-21; See also, e.g., AA-87 (62:13-18), 88 (65:14-16), 89 (70:17-22), 92-93 (92:22-93:1), 94 (104:5-10). Stabenow acknowledged that Johnson thus was not the exclusive Softchoice contact with the customers, and, as a result, that Softchoice still had a representative in place with a relationship with the customers when Johnson left. AA-63, 66. Consistent with this, Illingworth testified that a manager's removal from customer relationships means that the manager is less of a competitive threat on leaving. AA-75 (68:21-24), 76 (70:2-5, 14-19), 77 (96:6-18).

Finally, Stabenow's reaction to Johnson's resignation confirms the true character of Softchoice's interest in the non-solicitation agreement. Stabenow did not even mention customer contacts. Instead, he stridently objected to Johnson working at En Pointe at all, AA-72 (214:19-215:11), even though nothing in the non-solicitation agreement forbade such employment. And, of course, Stabenow "might have" threatened

to make Johnson's life a "living hell." Tr-218:3-11. This is not the conduct of a party that thinks it must "do equity" in order to "seek equity" to protect a legitimate interest in valued customer relationships. See, e.g., Gully v. Gully, 599 N.W.2d 814, 825 (Minn.1999). It is instead the conduct of a company trying to show its employees that it is "very aggressive" and using litigation as a "deterrent to folks who were considering leaving." Tr-202:4-10, 203:14-16.

#### **IV. THE INJUNCTION IS FAR BROADER THAN NECESSARY TO PROTECT ANY LEGITIMATE INTEREST OF SOFTCHOICE.**

Even assuming for the sake of argument that the non-solicitation agreement were supported by consideration *and* that the agreement protected a legitimate interest of Softchoice, the Johnson non-solicitation agreement is far broader than necessary to protect that interest, and the District Court abused its discretion by its wholesale incorporation of that language into its injunction.

A valid and enforceable non-solicitation agreement may not impose restrictions that are broader than necessary to protect the employer's legitimate interests. See Bennett v. Storz Broad. Co., 270 Minn. 525, 533, 134 N.W.2d 892, 899 (1965). To make this determination, a court must take into account the nature of the employment, the temporal restriction imposed, and the geographic scope of the restriction. See id. Where restrictions are broader than necessary to protect the employer's legitimate interest, they "are generally held to be invalid, and the determination of the necessity for the restriction is dependent upon the nature and extent of the business, the nature and extent of the service of the employee, and other pertinent conditions." Id. (citations omitted).

Here, the District Court Order granting the injunction against Johnson does not discuss or seek to justify the scope of the injunction, with respect to either which customers Johnson was barred from contacting or how long that bar would last. AA-6-7. Instead, the Order simply adopts the broadly worded non-solicitation language of the Softchoice offer letter. AA-9. A critical examination of the offer letter's restrictions (which the District Court did not conduct) demonstrates that those restrictions go far beyond anything arguably necessary to protect any legitimate interest Softchoice might posit. The District Court therefore abused its discretion in imposing those restrictions.

**A. The District Court Abused Its Discretion in Prohibiting Johnson from Soliciting Anyone He Knew from His Work at Softchoice.**

The District Court abused its discretion in barring Johnson from soliciting any client or vendor that Johnson contacted or became acquainted with while at Softchoice. AA-9. Given the District Court's rejection of Softchoice's trade secrets claim, AA-5, the Court must measure the breadth of the injunction against Softchoice's sole remaining claimed legitimate interest: protection of client relationships. See Bennett, 134 N.W.2d at 898-99 (noting that employers may protect key relationships between its employees and its customers that comprise the employer's goodwill). The appropriate breadth of an injunction to protect that interest depends on "the nature of the employee's work, the time necessary for the employer to train a new employee, and the time necessary for the customers to become familiar with the new employee." Overhold Crop Ins. Serv. v. Bredeson, 437 N.W.2d 698, 703 (Minn. App. 1989). Measuring Softchoice's claimed

interest against these factors, and especially “the nature of [Johnson’s] work,” the injunction’s broad restriction fails.

Softchoice offered little evidence concerning the nature of Johnson’s prior work that would tend to prove that any Softchoice customer relationships needed protection, and none at all concerning his work as Branch Manager. At most, Softchoice offered evidence of Johnson’s contacts with 13 specific customers, and all of that evidence related to Johnson’s work when he was a sales representative (during which he had no non-solicitation agreement). Softchoice did not and could not prove that Johnson had a key or primary relationship with any customer while he was Branch Manager. The reason: he had none.

Despite this limited customer contact as Branch Manager, the non-solicitation agreement (and thus the injunction that tracks it) bars Johnson from soliciting even people with whom he had no relationship of any sort at Softchoice. It includes people he dealt with infrequently, people he dealt with only once, and even people he cold-called. This is beyond any arguably reasonable scope. Compare Benfield, Inc. v. Moline, 351 F. Supp.2d 911, 918 (D. Minn. 2004) (holding covenant was not overly restrictive where it limited ex-employee’s contact with “twelve former clients” and permitted solicitation of “over one thousand other potential” clients). A broad bar on Johnson’s contacts was not necessary to protect any arguable interest of Softchoice, and the District Court abused its discretion in granting the injunction adopting such a broad restriction.

**B. The District Court Abused Its Discretion by Enjoining Johnson Until January of 2009.**

The District Court also abused its discretion in enjoining Johnson's solicitation of Softchoice contacts for a full year, until January 23, 2009.<sup>11</sup> As noted above, where such an injunction is based on the protection of client relationships (Softchoice's only remaining ground here), the proper duration of an injunction depends on "the time necessary for the employer to train a new employee, and the time necessary for the customers to become familiar with the new employee." Overhold Crop Ins. Serv. v. Bredeson, 437 N.W.2d 698, 703 (Minn. App. 1989). Consideration of those elements here provides no justification for a one-year injunction. Even assuming *arguendo* that Softchoice had a legitimate interest to protect, that interest could justify at most a three-month restriction.

The District Court made no findings of fact and offered no explanation in support of the one-year duration of its restriction, other than an *ipse dixit* reliance on the non-solicitation agreement itself. Similarly, although Softchoice's motion paid lip service to limits on the breadth of its requested injunction, it never actually analyzed the application of those limits on Johnson or sought to justify the one-year ban. In fact, the record evidence from Softchoice itself demonstrates that, assuming that Softchoice needed any

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<sup>11</sup> Although the District Court issued the temporary injunction against Johnson on April 15, 2008, the earlier temporary restraining order had similarly restricted Johnson's work since January 23, 2008. AA-15-16.

time at all to act to preserve customer relationships, a three-month term would have been sufficient.

For example, outside the context of litigation, Softchoice itself regards three months as sufficient to train a replacement representative to handle *new* accounts. Stabenow's strategic plan for Minneapolis called for Johnson to hire, train, and divide the territories for new representatives within 60 to 90 days. AA-124-125. This was, of course, training to go out and develop new business. Taking over *existing* accounts, as would be necessary when a sales representative leaves, would take even less time; they "can do that after [their] first week of training." Tr-161:23-162:2.

Likewise, when Johnson was to train two new outside representatives in January 2007, Softchoice's "training and development team informed [him]...that it would take them...four months to be up to speed and producing reps." AA-90-91. Again, that is "four months to be able to bring in new business. You can just step right in and manage existing accounts." AA-91.<sup>12</sup>

Thus, even if Johnson had still been a sales representative at the time he left Softchoice, the company could have brought a replacement up to speed in three to four months. Johnson, of course, was not a sales representative in December 2007. As a Branch Manager, Johnson was a full step further removed from the customer

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<sup>12</sup> Consistent with this, En Pointe, another LAR in the industry and Johnson's current employer, uses a non-solicitation provision for sales representatives with a three-month term. AA-138.

relationships Softchoice claims it needed to protect, making justification of a full-year bar on solicitation even harder to justify.

Chris Illingworth, a Softchoice company representative, acknowledged that Softchoice does not need as long a non-solicitation restriction for a manager as for a sales representative because managers do not have assigned customer accounts like sales representatives do. AA-75 (68:21-24), 76 (70:2-5). Specifically, Illingworth testified that his non-solicitation period was one quarter the length of a sales representative's because "I don't believe that I have as much a competitive threat because I'm not working directly with accounts...." AA-76. The manager's relationship with the customer is not as direct as either the outside representative's or the inside representative's. AA-77-79. Thus, when a manager leaves, "it would not have the same impact on the company's relationship with its customers as if the salesperson for that customer left...because [when a manager leaves] the salesperson with the relationship with the customer still exist[s]." AA-77.

Illingworth's comments describe the circumstances of Johnson's departure precisely. For every one of the accounts in Branch Manager Johnson's Minneapolis office at the time he left in December 2007, the company had *both* an experienced inside representative and (for all but a few accounts) an experienced outside representative already on the account. For these existing accounts, these experienced representatives continued to maintain the customer relationships and preserve the company goodwill that they had themselves developed. Customers knew Johnson's "replacements" before Johnson left. This is not a case where a customer would identify Softchoice with Johnson

because of an exclusive relationship, and where a restricted period would therefore be necessary to enable Softchoice to have another employee establish a relationship with the customer. Those relationships already existed.

Under the undisputed facts here—where no training was necessary, no replacements were necessary, and Softchoice already had inside and outside representatives in place for all its customers—the Court’s imposition of a one-year restriction is unreasonable and an abuse of discretion. See, e.g., Dean Van Horn Consulting Assocs. v. Wold, 395 N.W.2d 405, 408-409 (Minn. App. 1986) (holding that temporal restriction was three times too long in light of period it would take to train replacement).

In sum, in light of Softchoice’s failure to demonstrate consideration for the non-solicitation agreement, a legitimate interest supporting that agreement, or a justification for the scope and duration of the agreement, Softchoice failed to show a likelihood of success on the merits of its claims against Johnson. The District Court therefore abused its discretion in granting the injunction based on that “primary factor.”

**V. OTHER DAHLBERG FACTORS ALSO WEIGH IN JOHNSON’S FAVOR.**

Although Softchoice’s failure to establish likelihood of success on the merits is determinative, the District Court also abused its discretion in addressing several of the other Dahlberg factors.

With respect to the nature and background of the parties’ prior relationship, the District Court held that this factor favored Softchoice, because it was Johnson “who created the controversy and who distributed [sic] the long-standing relationship.” AA-7.

This conclusion, however, mistakes the Minnesota Supreme Court's directions in Dahlberg.

A court considering a motion for temporary injunction is to examine “[t]he nature and background of the relationship between the parties *preexisting the dispute giving rise to the request for relief.*” Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982) (emphasis added, quoting Dahlberg, 137 N.W.2d at 321-22). Here, however, the District Court did not look at the parties’ relationship *prior to* the dispute underlying the motion for injunction; instead, it looked only at the *new* dispute underlying Softchoice’s motion itself. See AA-7 (stating that Johnson “created the controversy” by quitting and disrupting the long relationship). Such an inciting event by one party or the other, however, will have occurred in *every* motion seeking an injunction, and could not have been what the Dahlberg court had in mind. The Dahlberg court instructed courts to look beyond the current dispute to the parties’ *past* relationship to determine if any facts weighed for or against one party or the other. See, e.g., County of Winona v. Winona, 453 N.W.2d 10, 711 (Minn. App. 1990) (holding county’s long reliance on city’s participation in solid waste plan was prior relationship favoring injunction based on city’s “belated change in position”).

Moreover, even if the parties’ relationship after Johnson resigned were relevant to this factor, the record demonstrates that Softchoice, not Johnson, acted inequitably. When Johnson expressed concern about the quota for the Minneapolis office, Softchoice threatened to demote or fire him. AA-83-84. When Johnson resigned to go to competitor, Softchoice shut him off from the computer system, Tr-165:7-12, and sent him

a cease and desist letter invoking a later agreement that even Softchoice has conceded is invalid. AA-116A. The District Court abused its discretion in finding this factor favored Softchoice.

With respect to the balancing of harms factor, see Miller, 317 N.W.2d at 712, the District Court described the parties' relative harms, but did not actually compare them or come to any conclusion concerning this factor. AA-7. When such a comparison is made, a balancing of the relative harms favors Johnson. Softchoice is a large corporation with ample means and the ability to absorb damages, had any occurred, while the litigation runs its course. In contrast, Johnson is an individual in the prime of his wage-earning years who is being asked to wait out a non-solicitation agreement, broad in scope and substantial in duration, for which he received no consideration. Johnson suggests that, had the District Court balanced these harms as Dahlberg directed, the only reasonable conclusion would have been that this factor favors Johnson and cuts against any injunction.

With respect to the public policy concerns implicated by the injunction, the District Court correctly acknowledged that the law reflects "a strong public policy argument favoring competition in a free market society," AA-7, favoring Johnson and weighing against an injunction.

Finally, with respect to judicial burden, the District Court concluded that the administrative burden on the court of enforcing the injunction would be "minimal." AA-7. Although Johnson does not claim that the District Court abused its discretion in arriving at this conclusion, Johnson submits that this factor is of minimal importance

under the circumstances here and cannot carry enough weight to tip the scales in light of the other factors.

In sum, an examination of the remaining Dahlberg factors reinforces the conclusion that the District Court abused its discretion in granting the temporary injunction against Johnson.

### CONCLUSION

Softchoice offered Michael Johnson the promotion to Branch Manager and Johnson accepted the promotion, all without any mention of a non-solicitation agreement. Softchoice announced the promotion widely, and Johnson began work at his new job, again without any mention of a non-solicitation agreement. Then, after Johnson was in his new position, Softchoice required him to sign a non-solicitation agreement without offering him any new consideration. Based on this invalid non-solicitation provision, Softchoice persuaded the District Court to support Softchoice's improper purpose of preventing employee departure for better jobs by issuing an injunction with a scope far beyond anything justified by either Softchoice's circumstances or the nature of Johnson's work.

The District Court abused its discretion in granting the injunction, and appellant

Michael Johnson urges this Court to reverse the judgment of the District Court and to dissolve the injunction unduly restricting his ability to pursue his chosen trade.

Dated: June 9, 2008

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Softchoice, Inc.,

Plaintiff/Respondent,

vs.

Michael Johnson,

Defendant/Appellant.

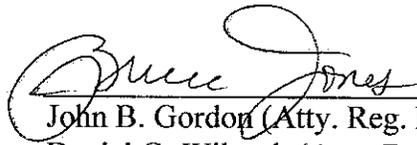
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CERTIFICATION OF  
BRIEF LENGTH

Appellate Court  
Case Number: A08-\_\_\_\_\_

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,446 words. This brief was prepared using Microsoft Word 2003 software.

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