

No. A08-763

A08-965

STATE OF MINNESOTA
IN COURT OF APPEALS

Softchoice, Inc.,

Appellant,

vs.

Martin Schmidt and Michael Johnson,

Respondents.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	vii
STATEMENT OF CASE	1
INTRODUCTION	3
I. STATEMENT OF FACTS	5
A. Schmidt’s Employment With Software Plus and Softchoice.....	5
1. Schmidt Was A Key Employee of Software Plus and Softchoice.....	5
2. Because He Was a Key Employee, Schmidt Was Offered the Opportunity to Participate in Software Plus’ Employee Retention Plan in Exchange for Signing a Noncompete Agreement	6
a. The Terms of the Plan	7
i. The payout schedule	8
ii. The forfeiture events depended entirely upon Schmidt’s conduct.	9
iii. The Plan’s restrictive covenants.....	10
b. The Terms of the Agreement.....	10
B. Schmidt Joins En Pointe, A Direct Competitor, And Solicits Softchoice Customers In Violation of His Agreement.	12
1. Schmidt’s Business Plan upon Joining En Pointe was to Solicit His Former Softchoice Customers.....	12

2.	Schmidt Induces Several Major Softchoice Accounts to Work With En Pointe Instead Of Softchoice.....	13
a.	Alliant Techsystems.....	14
b.	Fastenal	15
c.	Other Softchoice Customers Solicited by Schmidt	16
C.	Softchoice Sues To Enforce The Agreement And Is Granted A Temporary Restraining Order.	16
II.	ARGUMENT	17
A.	Standard of Review	17
B.	The District Court Erred In Denying Softchoice’s Preliminary Injunction Motion.....	18
1.	The Employee Retention Plan Is Sufficient Consideration for Schmidt’s Noncompete Agreement.	19
a.	Schmidt Received Bargained-For Consideration For The Agreement.	19
b.	Missouri Law Applies To The Interpretation And Construction of The Plan And The Agreement.....	21
c.	A Conditional Promise Is Sufficient Consideration Under Missouri Law.....	21
d.	Noe Does Not Support The District Court’s Holding That the Agreement Lacked Sufficient Consideration.	23
e.	Other Jurisdictions Also Find That A Conditional Promise Is Sufficient Consideration.....	25
2.	Schmidt’s Agreement Was Reasonable.....	29
a.	The Agreement’s Noncompete And Nonsolicit Provisions.....	29

b.	The Noncompete Provisions Are Reasonable and Enforceable Under Missouri Law.....	30
c.	The Nonsolicit Provisions Are Reasonable and Enforceable Under Missouri Law.....	33
d.	Even If Some Of The Restrictions Are Overbroad, Schmidt Breached The Agreement Under Any Circumstances, And The Agreement Can Be Modified Going Forward.	34
3.	Softchoice Met Its Burden of Proving All of the Remaining <i>Dahlberg</i> Factors.	36
a.	The Nature of the Parties' Relationship Favors An Injunction.	37
b.	Softchoice Will Suffer Immediate and Irreparable Harm If Schmidt and Johnson Are Allowed To Work For En Pointe.....	37
c.	Public Policy Considerations Favor Softchoice.	39
d.	A Preliminary Injunction Would Not Impose an Administrative Burden on the Court.	40
4.	Schmidt Breached the Agreement.	40
CONCLUSION	41

TABLE OF AUTHORITIES

FEDERAL CASES

Benfield v. Moline, 351 F. Supp. 2d 911 (D. Minn. 2004) 38

Jump v. Manchester Data Sciences Corp., 424 F. Supp. 442 (E.D. Mo. 1976)vii, 22

Latuszewski v. Valic Fin'l Advisors, Inc., 2007 WL 4462739 (W.D. Pa,
Dec. 19, 2007)..... 28

Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978)..... 28

Quaker Chem. Co. v. Varga, 509 F. Supp. 2d 469 (E.D. Penn. 2007) 37

Sigma Chemical Co. v. Harris, 794 F. 2d 371 (8th Cir. 1986)..... 36

Smith, Barney, Harris, Upham & Co. v. Robinson, 12 F.3d 515 (5th Cir. 1994)..... 27, 28

STATE CASES

AAE-EMF, Inc. v. Passmare, 906 S.W.2d 714 (Mo. Ct. App. 1995) 33

Aetna Retirement Serv., Inc. v. Hug, 1997 WL 396212 (Conn. Super. Ct.,
June 18, 1997)..... 25, 26, 27

Alex Sheshunoff Mgmt Serv., L.P. v. Johnson, 209 S.W.3d 644 (Tex. 2006)..... 23

Aon Consulting, Inc. v. Midlands Financial Benefits, Inc., 2008 WL 2004273
(Neb., May 9, 2008) 27

Bankers Capital Corp. v. Brummett, 637 S.W.2d 424 (Mo. Ct. App. 1982).....vii, 21, 22,
..... 23

Bell v. Olson, 424 N.W.2d 829 (Minn. Ct. App. 1988) 18

Berggren v. Town of Duluth, 304 N.W.2d 24 (Minn. 1981)..... 18

Currie Stat Bank v. Schmitz, 628 N.W.2d 205 (Minn. Ct. App. 2001)..... 39

<i>Dahlberg Bros., Inc. v. Ford Motor Co.</i> , 137 N.W.2d 314 (Minn. 1965)	19, 36, 40
<i>Earth Protector, Inc. v. City of Hopkins</i> , 474 N.W.2d 454 (Minn. Ct. App. 1991)	19, 40
<i>Field v. Alexander & Alexander of Indiana, Inc.</i> , 503 N.E.2d 627 (Ind. Ct. App. 1987)..	28
<i>Garnter Group Inc. v. Mewes</i> , 1992 WL 4766 (Conn. Super. Ct., Jan. 3, 1992)	26
<i>Glenwood Bridge, Inc. v. City of Minneapolis</i> , 940 F.2d 367 (8th Cir. 1991)	38,39
<i>Healthcare Serv. Of the Ozarks v. Copeland</i> , 198 S.W.3d 604 (Mo. 2006).....	29, 30
<i>House of Tools and Eng'g., Inc. v. Price</i> , 504 S.W.2d 157 (Mo. Ct. App. 1973)	32
<i>Medtronic, Inc. v. Advanced Bionics, Inc.</i> , 630 N.W.2d 438 (Minn. Ct. App. 2001)	21,
.....	38, 40
<i>Metropolitan Sports Facilities Comm'n v. Minnesota Twins P'ship</i> , 638 N.W.2d 214 (Minn. Ct. App. 2002)	39
<i>Mid-States Paint & Chem. Co. v. Herr</i> , 746 S.W.2d 613 (Mo. Ct. App. 1988)	32, 35
<i>Miller v. Foley</i> , 317 N.W.2d 710 (Minn. 1982).....	17
<i>National Starch & Chem. Corp. v. Newman</i> , 577 S.W.2d 99 (Mo. Ct. App. 1978).....	35
<i>National Motor Club of Mo. V. Noe</i> , 475 S.W.2d 16 (Mo. 1972)	23, 24, 25
<i>Orchard Container Corp. v. Orchard</i> , 601 S.W.2d 299 (Mo. Ct. App. 1980).....	35,36
<i>Pro Edge, L.P. v. Gue</i> , 374 F. Supp. 2d 711 (N.D. Iowa 2005)	38
<i>Schott v. Beussink</i> , 950 S.W.2d 621 (Mo. Ct. App. 1997).....	31, 32, 33
<i>Seach v. Richards, Dieterie & Co.</i> , 439 N.E.2d 208 (Ind. Ct. App. 1982)	31
<i>Systematic Bus. Serv., Inc. v. Bratten</i> , 162 S.W.3d 41 (Mo. Ct. App. 2005).....	30, 32, 33,
.....	34
<i>Thermorama v. Buckwald</i> , 125 N.W.2d 844 (Minn. 1964)	38

USA Chem, Inc. v. Lewis, 557 S.W.2d 15 (Mo. Ct. App. 1977).....30, 31, 32
Vondras v. Titanium Research & Dev. Co., 511 S.W.2d 883 (Mo. Ct. App. 1974).....22
Weinstein v. KLT Telecom, Inc., 225 S.W.3d 413 (Mo. 2007).....20

STATE STATUTES

Minn. Stat. § 325C.01 1

STATEMENT OF ISSUES

1. Whether the District Court erred in denying Appellant's motion for a preliminary injunction on the basis of its finding that Respondent Schmidt's agreement was not supported by adequate consideration.

The District Court found that Schmidt's noncompete and nonsolicitation agreements were not supported by adequate consideration because Schmidt did not receive any money in exchange for the post-employment restrictive covenants.

Apposite authorities:

Bankers Capital Corp. v. Brummet, 637 S.W.2d 424 (Mo. Ct. App. 1982).

Jump v. Manchester Data Sciences Corp., 424 F. Supp. 442 (E.D. Mo. 1976).

STATEMENT OF CASE

Appellant Softchoice, Inc.¹ (“Softchoice”) commenced this case on January 15, 2008, in Hennepin County District Court alleging claims that Respondent Martin Schmidt and another employee, Michael Johnson, breached their post-employment restrictive covenants, misappropriated Softchoice’s trade secrets in violation of Minn. Stat. § 325C.01, *et seq*, tortiously interfered with Softchoice’s prospective economic relationships, and breached their duties as employees of Softchoice. Softchoice also moved for a temporary restraining order enjoining Schmidt and Johnson from further breaching their employment agreements and from misappropriating Softchoice’s trade secrets.

On January 23, 2008, the Honorable Judge John L. Holahan issued a temporary restraining order prohibiting Respondents from breaching their agreements and from misappropriating Softchoice’s trade secrets until a hearing on Softchoice’s preliminary injunction motion could be heard.

On April 15, 2008, Judge Holahan issued an order partially granting Softchoice’s request for a preliminary injunction. The order enjoined Respondent Johnson from further breaching his nonsolicitation contract, which the court found was supported by consideration. The order did not enjoin Respondent Schmidt from breaching his noncompetition and nonsolicitation contract, which the court found was not supported by

¹ The name of the company was incorrectly identified as Softchoice, Inc. in the caption in the District Court. The correct name of the company is Softchoice Corporation. However, for consistency we have continued to identify the company as Softchoice, Inc.

consideration because Respondent Schmidt did not receive immediate payment of money in exchange for entering into the contract. The court did not restrain the Respondents from misappropriating Softchoice's trade secrets because the court found that the evidence at the hearing did not establish that Softchoice was likely to succeed on its misappropriation of trade secrets claim.

On May 2, 2008, Softchoice filed a timely notice of appeal of the District Court's denial of Softchoice's motion for a preliminary injunction against Schmidt.

INTRODUCTION

In November 2006, Martin Schmidt entered into a noncompete and nonsolicitation agreement with Softchoice's predecessor in interest, Software Plus, Inc. Schmidt entered into the agreement voluntarily so that he could participate in an Employee Retention Plan that had been developed by Software Plus to reward and retain key employees. Upon signing the agreement, Schmidt in fact became a participant in the Software Plus Employee Retention Plan and, shortly thereafter, Software Plus transferred \$25,000.00 to an account held in trust for Schmidt under the Plan.

In December 2007, Softchoice acquired all of the assets of Software Plus, including Schmidt's noncompete and nonsolicitation agreement. Schmidt apparently did not want to work with Softchoice and resigned effective December 31, 2007. He accepted a position with En Pointe, Inc., which is a direct competitor of Softchoice, and immediately began soliciting his Softchoice customers to transfer their business to En Pointe. He was successful in these efforts, diverting hundreds of thousands of dollars in sales from Softchoice to En Pointe within a matter of weeks.

Having flagrantly violated the clear terms of his noncompete and nonsolicitation agreement, Schmidt now argues that the agreement is unenforceable for lack of consideration because he did not actually receive any payment from the Employee Retention Plan. The District Court accepted Schmidt's position and refused to enter a preliminary injunction prohibiting Schmidt from further violation of his agreement.

The District Court erred as a matter of law in denying the injunction because the consideration for Schmidt's noncompete and nonsolicitation agreement was the opportunity for him to participate in the Employee Retention Plan, which he voluntarily accepted. If Schmidt had lived up to the promises he made, he would have received his promised benefits from the Plan. There is no requirement under Missouri law, which governs Schmidt's agreement, or under Minnesota law, that consideration must involve an immediate transfer of cash from one party to another. Rather, the law requires only an exchange of promises to support an agreement, such as Software Plus's promise to allow Schmidt to participate in the Employee Retention Plan and receive its benefits in exchange for his promise not to compete with Softchoice or solicit its customers after his termination from the company. Because the District Court's ruling denying the preliminary injunction rests upon a fundamental misinterpretation of the applicable law, it must be reversed.

I. STATEMENT OF FACTS

A. Schmidt's Employment With Software Plus and Softchoice

Martin Schmidt was first employed by Softchoice in 1999. (T. 65.) Schmidt worked for Softchoice for approximately one year, but left to join Software Plus, Inc., then a competitor of Softchoice. (T. 65-66.)

Both Softchoice and Software Plus provided essentially the same services, which included primarily software licensing. (T.62-63.) Both were considered Large Account Resellers ("LARs"). (T. 62-63.) Only approximately fifteen companies in the United States are LARs. (A.3, ¶15.)

On December 11, 2007, Softchoice purchased all of the stock of Software Plus, acquiring all of Software Plus' assets. (*Id.* at ¶12.) At the time Softchoice purchased Software Plus, Schmidt had been a Software Plus employee for over six years. When the purchase was completed on December 11, 2007, Schmidt became an employee of Softchoice. (A112-A.116.)

1. Schmidt Was A Key Employee of Software Plus and Softchoice.

As an employee of Software Plus, Schmidt was responsible for fifteen major accounts, which were valued at approximately \$10,000,000 in revenue and \$625,000 in gross profit annually. (A.7, ¶ 5). By December 2007, Schmidt had turned all of his attention to five specific accounts: Alliant Techsystems, Inc., Fastenal Company, American Dental Partners, Inc., Land O'Lakes, Inc., and Andersen Corporation. (T. 66.)

As a Software Plus employee, Schmidt's goal was to develop strong business relationships with all of these customers. (T. 37.) To that end, he invited representatives of these companies to Software Plus-sponsored events, he sent them Software Plus marketing materials, he took them out to lunches paid for by Software Plus, and he regularly visited their places of business at Software Plus' expense. (A.40; A.43-A.46; T.36-37; T. 81.) For all five of these major accounts, Schmidt was the only outside account representative at Software Plus who worked with these customers as of December 2007. (A.39; A.42; A.44; A.46; T.35.)

2. **Because He Was A Key Employee, Schmidt Was Offered the Opportunity To Participate in Software Plus' Employee Retention Plan in Exchange for Signing A Noncompete Agreement.**

Schmidt did not have a noncompete agreement at the outset of his employment with Software Plus. (A.2, ¶6.) On November 21, 2006, Larry Malashock, owner and vice president of Software Plus, presented Schmidt with the opportunity to participate in Software Plus' Employee Retention Plan ("the Plan"). (A.104-111.) The purpose of the Plan was to provide a monetary incentive to key Software Plus employees. (A.76.) Employees invited to participate in the Plan—including Schmidt—also were asked to sign a noncompetition and nonsolicitation agreement that restricted certain post-employment activities in order to protect Software Plus' customer relationships.

Larry Malashock provided Schmidt copies of the Plan and the proposed noncompetition and nonsolicitation agreement ("Agreement") on or about November 21, 2006. (T. 26-27; A.91-103; A.104-111.) Malashock told Schmidt that it was necessary to

agree to the noncompete and nonsolicit terms in order to participate in the Plan. (T. 29-30.)

Schmidt read the Agreement, as well as the other documents related to the Plan. (A.37-38.) After reviewing the Agreement, he elected to sign all of the documents, including the Agreement, on November 28, 2006. Schmidt saw the Plan as a benefit and wanted to participate in it, even though he understood that he would not immediately receive a benefit from it. (*Id.*; A.38; T.29-30; T. 71; T. 100-101.) He also understood that he could not participate in the Plan without signing the Agreement and understood that the Agreement was a noncompete. (T. 29-30.)

In December 2006, immediately following Schmidt's acceptance of the Plan and the Agreement, Software Plus deposited \$25,000 into a trust account created for Schmidt under the terms of the Plan. (T. 31; A.68-75.)

As part of Softchoice's acquisition of Software Plus on December 11, 2007, Softchoice became the beneficiary of Schmidt's promises under the Plan and the Agreement. The evidence at the hearing was that Schmidt's trust account remains open and holds the funds deposited by Software Plus. (T. 31-32.)

a. The Terms of the Plan

The Plan and the Agreement provided that Schmidt would be awarded money, or "Retention Credits," which would eventually be paid out to Schmidt if he complied with the terms of the Plan and the Agreement. (A.76-82.) Although Software Plus had

discretion over the initial deposits into the trust accounts, once money was deposited into a participant's trust account, the Plan allowed for only two non-discretionary outcomes: payout or forfeiture. None of the payout or forfeiture events allowed the company to act unilaterally or in its sole discretion. Instead, only Schmidt controlled whether the payout would be forfeited.

i. The payout schedule

The Plan provided for several payout scenarios. If Schmidt remained employed with Software Plus through December 31, 2011, and Software Plus did not merge with another company or was not sold in the meantime, the Plan would pay Schmidt's benefits to him in three annual installments beginning on January 15, 2012. But if Schmidt died, terminated because of disability, or if he was terminated for reasons *other than* "for Cause" prior to December 31, 2011, Schmidt would be entitled to a lump sum payment of the retention credits upon the occurrence of any of those events. (A.76-77.)

A different set of payout terms applied if the company was sold or merged with another company before December 31, 2011. Under those circumstances, Schmidt was entitled to a lump sum payment if he was *not* offered a job with the successor company. (*Id.*) If he was offered a job with the successor, Schmidt was entitled to a lump sum payout at the time of termination if he remained with the successor for at least six months, or if he was terminated for reasons other than cause before the end of the six month period. (*Id.*) If Schmidt was offered employment with the successor but did not remain

employed with the successor for six months, his benefits would be paid to him in three annual installments starting on January 15, 2012. (*Id.*)

ii. **The forfeiture events depended entirely upon Schmidt's conduct.**

The Plan allowed for a forfeiture of Schmidt's retention credits only in limited circumstances, the occurrence of which were completely in Schmidt's control. For example, Schmidt's right to a payout would be forfeited if Schmidt was terminated "for Cause." The Plan specifically identifies, and therefore limits, the conduct that will lead to a "for cause" termination: (1) intoxication at work, (2) drug addiction, (3) gross neglect, (4) any act which brings any negative notoriety to the company, affecting the company's reputation or profitability, (5) any act of fraud or dishonesty committed by the participant in connection with his or her employment with the company, (6) any breach by participant of any term or covenant in the Plan, or (7) failure of the participant to perform the duties of his or her job description after written warning. (A.77.) Only Schmidt, therefore, could control whether he would forfeit his Plan benefits as a result of a termination for cause.

Schmidt could also forfeit his payments under the Plan if he voluntarily terminated his employment with Software Plus before December 31, 2011. (*Id.*) This forfeiture provision, however, was triggered *only if* Software Plus was not sold or did not merge with another company before December 31, 2011. (A.76-77.) If, as happened here,

Software Plus was sold or merged with another company before that date, Schmidt could voluntarily terminate and still receive a lump sum payout, as discussed above. (*Id.*)

Finally, regardless of Schmidt's employment as of December 31, 2011, if he violated or breached the noncompetition, confidentiality, or nonsolicitation provisions of the Plan document, the company could elect not to make a payout to him. (A.77-78.)

All of these forfeiture scenarios required some affirmative action by Schmidt. The Plan does not provide for any circumstance under which Software Plus or its successor could unilaterally or in its sole discretion cause Schmidt's payout to be forfeited.

iii. The Plan's restrictive covenants

Software Plus asked Schmidt to agree to post-employment restrictive covenants in exchange for participating in the Plan. The Plan includes a one-year nonsolicitation provision, a one-year prohibition on the disclosure or use of confidential information, and a one-year prohibition on working with another LAR. (A.78.) The Plan provided that if Schmidt breached any of the post-employment covenants in the Plan, the Company could elect not to make a payout to Schmidt. (A.77-78.)

b. The Terms of the Agreement

Schmidt also was asked to and did sign a stand alone noncompetition and nonsolicitation agreement in consideration for his inclusion in the Plan. (A.64- 67; A.91-111; T.29-30.) The Agreement states that it, *together with Plan*, contains "the entire agreement between the parties and supersedes any prior oral or written agreement

between the parties pertaining to the subject matter of this Agreement.” (A.65) (emphasis added).

The Agreement contains detailed noncompetition and nonsolicitation provisions. It provides that, for a period of one year following the termination of Schmidt’s employment, he could not — without the consent of Software Plus (now Softchoice) — compete, as an officer, employee, agent, consultant or representative with Software Plus (now Softchoice) within the State of Minnesota. (A.64-65.) The Agreement also requires that, during his employment and for two years following termination (the “Nonsolicitation Period”), Schmidt could not provide services substantially similar to those marketed, offered or provided by Software Plus to any person or entity who had received such services from Software Plus or who had been solicited by Schmidt or Software Plus at any time during the Nonsolicitation Period. (*Id.*) The Agreement further states that during the Nonsolicitation Period Schmidt could not solicit, divert, take away, or interfere with Software Plus’ relationship with any person or entity that was an agent, supplier, or customer of Software Plus at the time Schmidt was employed by Software Plus, and he agreed not to solicit, employ, or interfere with Software Plus’ employees. (*Id.*)

Finally, the Agreement states that Schmidt cannot acquire any interest in, or be employed by, or otherwise associated with or affiliated with, any person who is a LAR as that term is defined by Microsoft. (*Id.*)

The Agreement further contains an acknowledgement by Schmidt that a breach of its terms will result in irreparable injury to Software Plus, and that in the event of a breach, Software Plus was entitled to injunctive relief as well as damages. (*Id.*)

B. Schmidt Joins En Pointe, A Direct Competitor, And Solicits Softchoice Customers In Violation of His Agreement.

After Softchoice acquired Software Plus on December 11, 2007, Schmidt decided that he did not want to work for Softchoice. (T.84-85.) Schmidt notified Softchoice of his resignation on December 21, 2007, and took a paid vacation from Softchoice through December 31, 2007. He began working as an En Pointe sales representative on January 3, 2008. (A.41; A.47; A.47.01.) En Pointe is a direct competitor of Softchoice. (T. 34).

When Schmidt gave Softchoice notice of his resignation, he refused to tell Softchoice that he planned to join En Pointe, even though he had all but settled on accepting En Pointe's offer by that time. (T.105-108.) Immediately upon starting with En Pointe, Schmidt began soliciting the customers with whom he worked at Softchoice.

1. Schmidt's Business Plan upon Joining En Pointe was to Solicit His Former Softchoice Customers.

Immediately after leaving Softchoice, Schmidt began to solicit the customers that he had serviced for Softchoice and to try to convince those customers to move their business from Softchoice to En Pointe. (T.38-39; T.55-56.) Schmidt's campaign is noteworthy because it was virtually his entire promotional effort. Between his departure from Softchoice in December 2007 and the March 19, 2008, preliminary injunction hearing, Schmidt did not set up a single meeting with any entity other than Softchoice

customers, he did not submit a single bid or quotation to any entity other than Softchoice customers, and he communicated with only one potential customer (via an electronic mail) that was not a Softchoice customer. (T. 58.) Schmidt's own testimony thus reveals that his *entire business plan* upon joining En Pointe was to solicit customers away from Softchoice to En Pointe.

2. Schmidt Induces Several Major Softchoice Accounts To Work With En Pointe Instead Of Softchoice.

Schmidt admitted that when he joined En Pointe, his primary focus was to solicit those customers who he solicited and worked with as a Softchoice employee. (A.48; T. 38; T.58-59.) On his first day with En Pointe, Schmidt contacted all of the most profitable customers with whom he had fostered relationships as a Softchoice employee at Softchoice's expense. (A.41-43; A.45-47.) The e-mail message that Schmidt sent to each of his Softchoice customers was virtually identical. Dated January 3, 2008, it said in pertinent part:

As you might have heard, Software Plus was acquired by a Canadian reseller named Softchoice a few weeks ago. Also, as you may or may not know, I left Softchoice seven years ago to work for Software Plus. Knowing what I do about Softchoice having worked there previously, I knew it was now time for me to leave Software Plus. I researched my options, talked to several publishers, partners and resellers and decided that En Pointe Technologies has the best overall resources and solutions that I can pass along to my customers.

I resigned from Software Plus — a Softchoice Company effective December 31st, 2007 and join the En Pointe team as of today. I'm very excited to continue offering Software Licensing expertise along with the value-added services that En Pointe provides such as Desktop Deployment Services, Infrastructure Optimization, Security Services, just to name a few.

In addition to all of this, they allow me to be very aggressive with discounted pricing that I can offer you.

...

One of the main reasons I've decided to work with En Pointe was the fact that they are very strong and well-known in the Pacific Northwest but have had limited exposure to the Midwest and the Minnesota market specifically. I am excited to join a very talented team and look forward to helping make the Minneapolis/St. Paul team a great success.

I was with Software Plus for 7 years and am very grateful for the opportunity given to me by Larry and Patty Malashock (owners of Software Plus prior to Softchoice purchase). It was a difficult decision to leave but I would not have done so if I didn't think En Pointe had more to offer my customers. I'll be in touch with you in the near future but please make note of my new contact information below.

(*Id.*; A.84-85.)

For at least two customers, Alliant Techsystems, Inc. ("ATK") and Fastenal Company, Schmidt's solicitation efforts caused them to switch their business from Softchoice to En Pointe. These "wins" were noted by Schmidt's En Pointe supervisor in an e-mail titled "WAR & New Team Activity." (A.83.) The e-mail also announced that the value of Schmidt's "wins" to En Pointe was \$600,000.

a. Alliant Techsystems

In addition to sending the January 3, 2008, electronic mail to his ATK contacts, Schmidt also told them that they should move their business to En Pointe because of his unique knowledge of Softchoice's work for ATK. (T. 42-43; A.86-87.) Schmidt told his ATK contacts that "it would be the easiest transition for all parties if we could keep it

‘business as usual’ for Microsoft items and just change the logo under which I am working.” (*Id.*)

As a result of Schmidt’s solicitation, his unique knowledge of Softchoice’s relationship with ATK, and his pressure for ATK to move quickly, ATK executed the documents necessary to move its business from Softchoice to En Pointe on January 16, 2008. (A.53; A.88.) Softchoice’s efforts to keep the ATK business were rebuffed because, as an ATK representative explained, ATK “didn’t have any interaction with Software Plus outside of Marty [Schmidt].” (*Id.*)

b. Fastenal

Schmidt also successfully solicited a second critical account, Fastenal. Schmidt was in a privileged position to solicit Fastenal after he moved to En Pointe because he had learned Fastenal’s business while at Software Plus and he knew that there were no other outside account representatives assigned to Fastenal at Softchoice. (A.42.)

Schmidt immediately took advantage of this opportunity after arriving at En Pointe by sending his contacts at Fastenal the January 3, 2008, electronic mail outlining En Pointe’s competitive advantages. (A.43-44; T. 55.) Schmidt’s efforts to solicit Fastenal were quickly successful. Fastenal agreed to move its business from Softchoice to En Pointe on January 16, 2008. (A.56.01.) Schmidt’s success in moving the business was noteworthy, given that he himself acknowledged that Fastenal told him “they had never heard of En Pointe” before Schmidt began soliciting their business. (A.56; A.56.01; A.89-90.)

c. **Other Softchoice Customers Solicited by Schmidt**

Although Schmidt's efforts to solicit ATK's and Fastenal's business for En Pointe were notable because of their immediate success, and because they represented an immediate loss of business for Softchoice, they are not the only examples of Schmidt's efforts to use the relationships he developed at Software Plus to his own and En Pointe's profit. He also contacted each of the remaining three customers of the five that made up the vast bulk of his business before he left Softchoice. American Dental Partners, Andersen Corp., and Land O'Lakes all were substantial customers of Softchoice with whom Schmidt had developed long-term relationships while at Software Plus. (A.44-47.) Schmidt contacted each of these three Softchoice customers immediately after joining En Pointe. (T.60-61.) As with ATK and Fastenal, Schmidt admitted that his purpose in contacting American Dental Partners, Andersen, and Land O'Lakes was to try to convince them to move their existing business from Softchoice to En Pointe. (T.60-61.)

C. **Softchoice Sues To Enforce The Agreement And Is Granted A Temporary Restraining Order.**

Softchoice first learned that Schmidt solicited Softchoice's customers on behalf of En Pointe, and in violation of the Agreement, when ATK notified Softchoice on January 11, 2008, that it planned to follow Schmidt to En Pointe. (A.12-13.) On January 10, 2008, Fastenal also notified Softchoice that it also planned to move its business to En Pointe. (*Id.*, A.14-15.) ATK and Fastenal were two of the most profitable Softchoice accounts in Minnesota. In 2007 alone, ATK's Softchoice account produced

\$640,000 in revenue and Fastenal's Softchoice account produced over \$155,000 in revenue. (A.7-8, ¶ 10.)

On January 15, 2008, within a week of receiving notice that Schmidt had successfully solicited ATK and Fastenal on behalf of En Pointe in breach of the Agreement, Softchoice moved for a temporary restraining order to enjoin Schmidt from continuing to breach the Agreement and using Softchoice's trade secrets. (A.16-19.) On January 28, 2008, the District Court granted Softchoice's motion and enjoined Schmidt from violating the Agreement and using Softchoice's trade secret information. (A.20-26.)

After the January 28, 2008, Order granting Softchoice's motion for a temporary restraining order, discovery commenced. On March 19, 2008, the District Court heard Softchoice's motion for a preliminary injunction. The District Court's April 15, 2008 Order on Softchoice's preliminary injunction motion is the subject of this appeal.

II. ARGUMENT

A. Standard of Review

This Court reviews an order denying a motion for a preliminary injunction for abuse of discretion. *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). The Court "consider[s] the likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief. [It] also evaluate[s] the relationship between the parties preexisting the dispute and the relative hardships that would result if the temporary restraint were denied or issued."

Berggren v. Town of Duluth, 304 N.W.2d 24, 26 (Minn. 1981) (citations omitted); *see also Bell v. Olson*, 424 N.W.2d 829, 832 (Minn. Ct. App. 1988) (listing factors to be considered on review).

B. The District Court Erred In Denying Softchoice’s Preliminary Injunction Motion.

The District Court’s denial of the motion for a preliminary injunction as to Schmidt was founded solely upon its conclusion that: “[t]he employee benefit plan is not sufficient consideration for the Schmidt Agreement. Both parties agree that Schmidt never received any money from the employee retention plan, nor will he.”² (A.34, ¶18.) The District Court’s conclusion is clearly erroneous as a matter of law because the actual payment of money is *not* required to establish consideration for a noncompetition agreement. Instead, the parties’ *exchange of promises*, like those between Schmidt and Software Plus, is adequate consideration to support a noncompetition agreement, even if there is no actual exchange of funds.

Here, Software Plus promised to pay Schmidt a retention bonus in exchange for Schmidt’s promise to abide by the terms of the Plan and the Agreement. Because the exchange of these promises provided adequate consideration for Schmidt’s Agreement—whether or not Schmidt ever received a payout—the District Court erred in denying Softchoice’s motion for a preliminary injunction against Schmidt. Further, the District

² The District Court’s factual finding that “[b]oth parties agree that Schmidt never received any money from the employee retention plan, nor will he,” is also clearly erroneous. There is nothing in the record to support the District Court’s finding that Softchoice agreed that Schmidt has not, and will not, receive any money under the Plan.

Court erred when it failed to address whether Softchoice met its burden of proving all of the remaining *Dahlberg* factors necessary for the issuance of an injunction. *Earth Protector, Inc. v. City of Hopkins*, 474 N.W.2d 454, 456 (Minn. Ct. App. 1991) (“The trial court *must* consider five factors before granting or denying a temporary restraining order or temporary injunction . . . [listing *Dahlberg* factors]”) (emphasis added).

1. **The Employee Retention Plan Is Sufficient Consideration for Schmidt’s Noncompete Agreement.**

Schmidt voluntarily and knowingly accepted the restrictions on his post-termination employment in exchange for the opportunity to participate in the Plan. Under Missouri law, which governs in this case, this exchange of promises provided sufficient consideration for the Agreement.

a. **Schmidt Received Bargained-For Consideration For The Agreement.**

Software Plus gave Schmidt the opportunity to participate in the Plan and to receive its benefits in exchange for his agreement to restrict his post-termination activities in competition with Software Plus. When Schmidt elected to participate in the Plan and agreed to the noncompete and nonsolicitation provisions in the Agreement, Software Plus deposited \$25,000 into a trust account held for Schmidt under the terms of the Plan. As long as Schmidt met the Plan’s requirement that he remain employed by Software Plus for a specific period of time, and he did not violate the terms of his Agreement, Software Plus promised to pay Schmidt the amounts held in the trust account.

Schmidt testified that he wanted to participate in the Plan because he believed it provided a benefit, albeit a future benefit. (A.37-38; T.30; T.70-71; T.100-101.) He also testified that he read the Agreement, understood that it contained a noncompetition and nonsolicitation provision, and understood that he had to sign the Agreement in order to participate in the Plan. (A.37-38; T.29-30.) Knowing all of this, Schmidt willingly agreed to the terms of the Plan and the Agreement, presumably because he perceived it was to his benefit to do so.

Under the terms of the Plan, Schmidt would have received the \$25,000, plus interest, if he had remained employed by Softchoice for just six months after the December 11, 2007, sale. Schmidt chose not to do so. But his failure to take the actions necessary to receive the \$25,000 payout does not render Software Plus' promise to pay insufficient consideration for Schmidt's promises not to engage in certain post-employment activities. Adequacy of consideration is measured at the time the contract is formed and is not dependent upon whether the bargain ultimately results in an economic benefit. *Weinstein v. KLT Telecom, Inc.*, 225 S.W. 3d 413, 415-416 (Mo. 2007). Because the parties' exchange of promises was adequate consideration for the Agreement in November 2006, when Schmidt signed it, Schmidt could not later void his obligations under the Agreement simply by choosing to forfeit the benefits he had been promised under the Plan.

b. **Missouri Law Applies To The Interpretation And Construction of The Plan And The Agreement.**

Missouri law governs disputes regarding the Plan and the Agreement because that was the parties' choice of governing law. (A.33.) As the District Court recognized, Minnesota courts give effect to the parties' choice of law in a contract. *Medtronic, Inc. v. Advanced Bionics, Corp.*, 630 N.W.2d 438, 449, 454 (Minn. Ct. App. 2001).

c. **A Conditional Promise Is Sufficient Consideration Under Missouri Law.**

Missouri courts hold that a promise to perform in the future, even if conditional, is sufficient consideration to support a contract. *Bankers Capital Corp. v. Brummet*, 637 S.W.2d 424, 429 (Mo. Ct. App. 1982). In *Bankers Capital*, a lender agreed to provide a loan to a borrower based upon a promise by another company to purchase certain assets of the borrower for the outstanding amount of the loan in the event the borrower defaulted on the loan. *Id.* at 427-28. When the borrower defaulted and the lender sought to enforce the agreement, the promisor argued that the agreement was unenforceable for lack of consideration because, by the time of default, the assets that were the subject of the agreement had become worthless. *Id.* at 429. The Missouri Court of Appeals rejected that defense on the ground that a conditional promise provides consideration for another promise because the promisor is under a legal obligation to perform the promise if the conditions are met. *Id.* The fact that the assets to be purchased had lost all their value did not void the contract because, at the time the contract was entered into, the promisor believed that they were valuable, and because the lender relied, to its detriment, on the

promise. *Id.* This *possibility* of a detriment provides consideration in exchange for another promise, *whether or not* the conditions are ultimately met. *Jump v. Manchester Data Sciences Corp.*, 424 F. Supp. 442, 445 (E.D. Mo. 1976) (citing *Vondras v. Titanium Research & Dev. Co.*, 511 S.W.2d 883, 885 (Mo. Ct. App. 1974)). And while it is true that “contracts which depend upon the wish, the will, or the pleasure of one of the parties are unilateral and cannot be enforced” because the promise is illusory, if the conditions are not controlled by the promisor, the risk that the detriment will occur is a real one, and thus is sufficient to constitute consideration. *Id.*; *see also Bankers Capital*, 637 S.W.2d at 429.

In this case, Software Plus promised that it would pay Schmidt the money earned under the Plan if Schmidt promised to remain a Software Plus employee for a certain period of time, and if Schmidt promised to comply with the noncompetition and nonsolicitation covenants in the Plan and the Agreement. Although Software Plus’ promise to pay Schmidt was conditional upon the occurrence of certain events, the Plan provided that Software Plus was under a legal obligation to pay the money to Schmidt if the conditions were met. Moreover, the fact that Schmidt may not ultimately receive the benefits of his promise is a less compelling reason in this case to void the Agreement than in the *Bankers Capital* case because here, unlike the promisor in *Bankers Capital*, Schmidt controlled the circumstances that determined whether or not he would receive the benefit he bargained for.

Software Plus' promises under the Plan constituted sufficient, non-illusory consideration in exchange for Schmidt's promises under the Plan and the Agreement because Software Plus undertook a risk that it would have to pay Schmidt if certain conditions outside of Software Plus' control were met.³ Thus, whether Schmidt was actually paid benefits under the Plan is irrelevant to the determination of whether Schmidt's post-employment promises were supported by consideration. It was Software Plus' conditional promise to pay that conferred the requisite consideration in exchange for Schmidt's promise not to compete or solicit. This is the same type of conditional promise that the *Bankers Capital* court held was sufficient consideration to support a contract. The District Court therefore erred when it concluded that the mere fact that Schmidt did not receive actual payments from the Plan was determinative of the consideration issue.

d. **Noe Does Not Support The District Court's Holding That the Agreement Lacked Sufficient Consideration.**

The District Court relied on *National Motor Club of Mo. v. Noe*, 475 S.W.2d 16, 21 (Mo. 1972), in support of its finding that the Agreement was not supported by sufficient consideration. (A.34.) But *Noe* does not stand for the proposition that a conditional promise is not sufficient consideration for a noncompete agreement; it holds

³ Schmidt argued to the District Court that Software Plus' promise in the Plan was illusory for an additional reason: because, under the Plan, Software Plus could in its discretion decide not to deposit any money into Schmidt's trust account. But the fact that Softchoice initially had discretion over depositing funds into the account is irrelevant because the undisputed facts show that Software Plus actually deposited \$25,000 into Schmidt's account shortly after he signed the Plan and the Agreement. If Software Plus' promise under the Plan was initially illusory, the promise was no longer illusory once the money was deposited. See, e.g., *Alex Sheshunoff Mgmt Serv., L.P. v. Johnson*, 209 S.W.3d 644, 649-50 (Tex. 2006) ("If the employee merely sought a promise to perform from the employer, such a promise would be illusory because the employer could fire the employee and escape the obligation to perform. If, however, the employer accepts the employee's offer by performing, in other words by providing the training, a unilateral contract is created in which the employee is now bound by the employee's promise.")

only that past consideration is insufficient. *Noe* therefore, does not support the District Court's holding in the circumstances of this case.

In *Noe*, the plaintiff sought damages under a noncompete agreement pursuant to which the defendant employee agreed to reimburse the employer for training he had received if he took a job with a competing company within three years of termination from the employer. The employee, however, had received the training that was the subject of the reimbursement provision before he signed the noncompete agreement. *Id.* Because the agreement not to compete was in exchange for a benefit the employee had already received, the court held that the training constituted past consideration, and therefore was not sufficient to support the employee's new promise not to compete. *Id.* The court, finding that "[n]o money, promises or written promises," or "anything new" was given in exchange for the employee's assent to the agreement, therefore refused to enforce the contract. *Id.* (emphasis added).

The holding in *Noe* does not support the District Court's conclusion in this case. It is undisputed that Software Plus' promise to provide Schmidt the benefits of the Plan was contemporaneous with Schmidt's agreement to the terms of the Plan and the Agreement. Therefore, the issue raised and decided in *Noe* – that *past* consideration does not support a noncompete – does not even arise in this case. Indeed, the *Noe* court indicated that if the contract had provided a promise of a future benefit, the contract would have been

enforceable. *Id.* On that principle, the *Noe* decision supports enforcement of Schmidt's Agreement, rather than the District Court's holding that it lacks consideration.

e. **Other Jurisdictions Also Find That A Conditional Promise Is Sufficient Consideration.**

The Missouri rule that a conditional promise is sufficient consideration to support a contract is not an aberration but a widely-held principle that has been specifically applied to similar employment contracts in many other jurisdictions.

For example, in *Aetna Retirement Serv., Inc. v. Hug*, a case very similar to this one, the court found that an employer's retention bonus program provided sufficient consideration for an employee's noncompete agreement, *even though the employee never received a payment under the bonus program*. 1997 WL 396212, *9 (Conn. Super. Ct. June 18, 1997). (A.117-126.) In *Aetna*, as here, the company offered key employees the opportunity to participate in a program that would result in substantial payouts if the employees remained with the company for a certain period of time and agreed to the terms of a noncompetition agreement. *Id.* at *3. When one of the participating employees resigned to join a competitor before the retention bonus vested, Aetna sued to enforce the noncompetition agreement. *Id.* at *8. Like Schmidt, the employee in *Aetna* argued that the noncompetition agreement was unenforceable for lack of consideration because he never received any payment from the retention bonus program. *Id.* at *9.

The court rejected the employee's position, stating,

The fact that Defendant, by his free election, ended his employment with Plaintiffs before he actually received either of the bonus payments to which he would otherwise have been entitled does not make Plaintiffs' promises

illusory. *Had Defendant otherwise fulfilled his promises, Plaintiffs would have had a legal obligation to pay Defendant his Retention Bonus.*

Aetna, 1997 WL 396212, at *9 (emphasis added); *see also Garnter Group Inc. v. Mewes*, 1992 WL 4766, at *2 (Conn. Super. Ct. Jan. 3, 1992) (employer's conditional promise to pay money to employee under a "tenure fund" was sufficient consideration for employee's noncompete agreement because "a promised performance expressly conditioned upon the happening of an uncertain future event is sufficient consideration for a counter-promise. If the event fails to happen the promise is performed with no resultant detriment or benefit, *yet the chance that the condition may happen involves sufficient possibility of detriment to constitute consideration.*" (emphasis added) (citing 1A Corbin, *Contracts*, Sec. 186 at 163). (A.150-154.)

The facts presented to the *Aetna* court are virtually identical to those here, and the same result should follow. Like the defendant in *Aetna*, it was Schmidt's own actions that determined whether or not he received a payment under the Plan. Schmidt freely elected to end his employment with Softchoice before he actually received any money from the Plan. But once Software Plus had deposited the \$25,000 into Schmidt's trust account—which is an undisputed event—Software Plus became legally obligated to pay that amount to Schmidt as long as Schmidt otherwise fulfilled his promises. This legal obligation to pay Schmidt the retention bonus upon the occurrence of certain events was a promise of a future benefit that, as in *Aetna*, constituted sufficient consideration to support Schmidt's Agreement.

Other courts have reached the same conclusion as the *Aetna* court. A recent decision by the Supreme Court of Nebraska, in *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, rejected the argument that the promise to allow participation in a severance plan for which the employee never received a payout was insufficient consideration for a noncompete agreement. ___ N.W.2d ___, 2008 WL 2004273, *9 (Neb. May 9, 2008). (A.127-249.) The court stated:

Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other. In the nonsolicitation agreement, A & A undertook to pay severance compensation in the event that Pearson left its employment for reasons other than death, disability, or retirement. This undertaking constituted a benefit to Pearson and a detriment to A & A which would not otherwise have existed in their employment relationship. The fact that Pearson claims not to have received a severance payment following termination does not alter the fact that A & A's agreement to make such a payment constituted valid consideration for the nonsolicitation agreement.

Id.

Similarly, the Fifth Circuit in *Smith, Barney, Harris, Upham & Co. v. Robinson*, applying Louisiana law, found that the employer's *promise* of a future benefit— participation in an employee incentive plan—was sufficient consideration to support a noncompete agreement. 12 F.3d 515, 519 (5th Cir. 1994). When the employer sought to enforce the agreement after the employee left to join a competitor, the employee argued, like Schmidt here, that the agreement was not supported by adequate consideration because the compensation from the plan was not paid, and because he was required to repay an advance he received prior to his breach of the agreement. *Id.* The employee

argued that because “Smith Barney has sought refund of that advance in the arbitration proceeding, he will have retained no consideration for not soliciting Smith Barney’s employees.” *Id.* The Fifth Circuit rejected the employee’s argument, holding that “[t]he Agreement is not a deed or a promissory note; it is a bilateral, commutative contract, the mutual and reciprocal promises of which supply the consideration for entering into the contract. There is no failure of consideration in this instance.” *Id.* at 519-520. *See also Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1267-68 (8th Cir. 1978) (applying Minnesota law and finding that the employer’s promise to pay *in the event a particular condition* was met was sufficient consideration for the employee’s noncompetition agreement, whether or not the employer ultimately had to make the payments) (emphasis added); *Field v. Alexander & Alexander of Indiana, Inc.*, 503 N.E.2d 627, 631 (Ind. Ct. App. 1987) (finding that a “promise to allow employees in the defined class to participate” in a long-term incentive program was sufficient consideration for a noncompete); *Latuszewski v. Valic Fin’l Advisors, Inc.*, 2007 WL 4462739, *12 (W.D. Pa. Dec. 19, 2007) (finding sufficient consideration for a noncompete agreement where no money was paid and stating, “[b]enefits that are contingent, or *that provide only the potential to realize financial gains or other benefits, can be considered in determining whether there is new consideration*”) (emphasis added). (A.155-174.)

Missouri law, which generally recognizes that a conditional promise is sufficient consideration to support a contract, is in accord with those jurisdictions that have

examined the issue in the particular circumstances presented here. Where an employee, such as Schmidt, agrees to terms of a noncompetition agreement in exchange for the right to obtain the benefits of an employee retention plan, the noncompete is supported by adequate consideration and is enforceable, even if the employee does not ultimately receive payment from the plan. The District Court erred, therefore, when it found that Schmidt's Agreement was not based on adequate consideration because no money exchanged hands.

2. Schmidt's Agreement Was Reasonable.

Because the District Court determined that the Agreement was not supported by consideration, it did not reach the separate issue of whether or not the Agreement is reasonable. Softchoice demonstrated below, however, that the Agreement is reasonable under Missouri law.

Agreements such as the Schmidt Agreement are enforceable in Missouri so long as they are supported by consideration, are reasonable, and seek to protect the employer's trade secrets or customer contacts. *Healthcare Serv. of the Ozarks v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006). The Schmidt Agreement meets all of these criteria.

a. The Agreement's Noncompete And Nonsolicit Provisions

The Agreement contained two noncompete provisions and two nonsolicit provisions. The first noncompete provision prohibited Schmidt, for one year after termination, from being employed by a company that competes with Software Plus in

Minnesota. (A.64.) The second noncompete provision prohibited Schmidt from working for a LAR for two years after termination. *Id.*

The first nonsolicit provision prohibited Schmidt from marketing, offering, or providing the same products or services provided by Software Plus to any Software Plus customers for a period of two years following his termination. *Id.* The second nonsolicit provision generally prevented Schmidt from soliciting, diverting, or otherwise interfering with Software Plus' customers for two years. *Id.*

b. The Noncompete Provisions Are Reasonable and Enforceable Under Missouri Law.

A noncompete agreement is reasonable under Missouri law if “it is no more restrictive than is necessary to protect the legitimate interests of the employer.” *Copeland*, 198 S.W.3d at 610. In determining reasonableness, courts generally look to the geographic and time limitations in the agreement, but a geographic restriction is not necessary if the noncompete provision does not act as a total bar to the pursuit of the employee's profession. *Systematic Bus. Serv., Inc. v. Bratten*, 162 S.W.3d 41, 50 (Mo. Ct. App. 2005). Under these standards, the Schmidt noncompete agreement is reasonable.

First, the restriction on Schmidt's competition with Softchoice for one year in the state of Minnesota is nearly identical to the restriction upheld in *USA Chem, Inc. v. Lewis*, 557 S.W.2d 15 (Mo. Ct. App. 1977). There, the court enforced a restriction that prohibited an employee from competing with his former employer in the territory in which he had worked for the employer for a period of 18 months. Here, Schmidt's

territory was the state of Minnesota. As in *Lewis*, it is reasonable to restrict Schmidt's ability to compete with Softchoice in his former territory, for one year, in order to protect Softchoice's legitimate interest in its customer contacts.

The prohibition on working for a LAR is also enforceable under Missouri law, despite the fact that it does not have a geographic limitation and imposes a two-year restriction. In *Schott v. Beussink*, for example, the Missouri Court of Appeals found that a nonsolicitation agreement was enforceable, even without a geographic restriction, based in part on the fact that the employees were not "denied the right to engage in the practice of accounting universally, but [were] prohibited from soliciting employer's clients for whom [the] employer had done business with during the fifteen-month period preceding the termination of the contracts." 950 S.W.2d 621, 626 (Mo. Ct. App. 1997). Citing a decision from the Indiana Court of Appeals, the Missouri Court of Appeals stated, "As the specificity of limitation regarding the class of persons with whom contact is prohibited increases, the need for limitation expressed in territorial terms decreases." *Id.* at 627 (citing *Seach v. Richards, Dieterie & Co.*, 439 N.E.2d 208, 213 (Ind. Ct. App. 1982)).

Although the *Schott* case involved a nonsolicitation agreement, its logic applies as well to the enforceability of the provision prohibiting Schmidt from working for a LAR for two years. As in *Schott*, the fact that the LAR provision does not include a geographic restriction is not fatal because preventing employment with a LAR is specific

and does not universally restrict Schmidt's employment as a sales representative in his chosen profession. *Bratten*, 162 S.W.3d at 50. There are only approximately fifteen LARs in the United States, but many more companies that provide services similar to those that Schmidt is experienced in selling. The LAR noncompete provision does not prevent Schmidt from working with those companies. Furthermore, Missouri courts also find that a two-year limitation on competition is reasonable. See *Mid-States Paint & Chem. Co. v. Herr*, 746 S.W.2d 613, 617 (Mo. Ct. App. 1988) (finding two-year limitation on competitive activities not unreasonable); *House of Tools and Eng'g, Inc. v. Price*, 504 S.W.2d 157, 159 (Mo. Ct. App. 1973).

The noncompete provisions in the Agreement and the Plan only limited Schmidt's ability to compete with Softchoice in Minnesota, his former territory, for one year, and his ability to go to a directly competing LAR for two years. These restrictions, which were narrowly tailored to give Softchoice protection only in the territory in which Schmidt represented Softchoice and with the competitors to whom it would be most vulnerable, did not limit Schmidt's ability to practice his profession altogether. Therefore, under the reasoning of *Bratten*, *Lewis*, and *Schott*, the noncompete provisions in the Agreement and the Plan are reasonable and enforceable.

c. **The Nonsolicit Provisions Are Reasonable and Enforceable Under Missouri Law.**

As indicated by the decision in *Schott v. Beussink* discussed above, Missouri courts generally enforce nonsolicit agreements where they do not prohibit the employee from engaging in his or her chosen profession. *Schott*, 950 S.W.2d at 626.

The court's decision in *Bratten*, as applied to the enforceability of nonsolicit provisions in an employment contract, is particularly apt here. In *Bratten*, an employer sought to enforce noncompete and nonsolicitation provisions against a former employee who, the court found, had substantial and significant contact with the employer's customers, including many of its largest customers. 162 S.W.3d at 51-52. As to the nonsolicit provisions, the court stated:

Customer contacts are a protectable commodity because goodwill develops between the customer and the employer, through its employees whose job it is to meet and converse with the customer while representing the employer . . . The resulting goodwill is essential to the employer's success and is a reason that the employee is remunerated. . . . Sales result from the goodwill that develops. The employer, therefore, has a protectable right in both customers and goodwill.

Id. at 51 (citing *AAE-EMF, Inc. v. Passmare*, 906 S.W.2d 714, 720 (Mo. Ct. App. 1995)) (citations omitted). In light of its recognition of an employer's protectable interest in its customer contacts and goodwill, the *Bratten* court held that provisions in the defendant's employment agreement that prevented him from soliciting the employer's customers for two years after termination were reasonable and enforceable. *Id.* at 52.

All of the facts and circumstances that supported enforcement of the nonsolicitation provision in *Bratten* are present here. The evidence is undisputed that Schmidt's goal was to develop strong relationships with many of Softchoice's most important customers. (T.37.) In some cases, he was the sole representative of Softchoice to his customers, as most keenly demonstrated by the comments of the ATK representatives that they "didn't have any interaction with Software Plus outside of Marty [Schmidt]." (A.88.) As in *Bratten*, Softchoice had a reasonable and legitimate interest in protecting those customer contacts and goodwill.

Similar to the nonsolicit provisions in *Bratten*, Schmidt is prohibited specifically from selling competitive products to his Softchoice customers and generally from soliciting Softchoice's customers for two years. Schmidt's actions already have demonstrated the severe adverse consequences to Softchoice in the absence of any restrictions on Schmidt's ability to solicit Softchoice's customers. Therefore, a two-year prohibition on Schmidt's ability to solicit Softchoice's customers is plainly reasonable under Missouri law.

d. **Even If Some Of The Restrictions Are Overbroad, Schmidt Breached The Agreement Under Any Circumstances, And The Agreement Can Be Modified Going Forward.**

Schmidt argued at the District Court that the Agreement is overbroad because Softchoice and Software Plus had post-employment covenants with other employees that were limited to one year or less or did not contain a noncompete. These circumstances

are insufficient to render the undisputed terms of Schmidt's Agreement unenforceable against him.

As an initial matter, whether Softchoice and Software Plus had different nonsolicitation periods for other employees is irrelevant to the Court's inquiry as to whether or not Schmidt's restrictions are reasonable. Employers are free, if not required, to tailor noncompete and nonsolicitation provisions to the particular facts and circumstances of the affected employee. *Nat'l Starch & Chem. Corp. v. Newman*, 577 S.W. 2d 99, 104-105 (Mo. Ct. App. 1978). Moreover, when Software Plus negotiated Schmidt's Agreement, Schmidt explicitly agreed that a two-year period restricting his competition and solicitation was reasonable. (A.64-65.) This is appropriate because the evidence below was that it takes at least one and one-half years to train a new sales representative to perform at a service level similar to that of a previous sales representative such as Schmidt. (A.62.)

And although the Agreement is not overbroad in its restrictions on Schmidt's activities, even if it was, overbreadth does not render a noncompete unenforceable in Missouri. Missouri courts have modified noncompetition agreements by narrowing an unreasonable geographic scope to a reasonable, enforceable limitation. *Mid-States Paint & Chem. Co.*, 746 S.W.2d at 616 ("an unreasonable restriction against competition in a contract may be modified and enforced to the extent that it is reasonable, regardless of the covenant's form of wording"); *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299,

300-304 (Mo. Ct. App. 1980) (modifying a noncompetition agreement's geographic scope from 200 miles to 125 miles and enforcing the agreement as modified); *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 374-75 (8th Cir. 1986) (applying Missouri law and modifying a noncompetition agreement that did not contain any geographic limitation).

Finally, any overbreadth argument is moot given Schmidt's immediate solicitation of customers for En Pointe that he had been servicing only days earlier for Softchoice. Even if Schmidt had been restricted from soliciting Softchoice's customers for one month, he would have been in blatant violation of that term. Mere overbreadth, therefore, is not a sufficient basis to nullify enforcement of the Agreement in its entirety.

3. Softchoice Met Its Burden of Proving All of the Remaining *Dahlberg* Factors.

In its Order, the District Court only discussed Softchoice's likelihood of success on the merits with respect to Schmidt, without examining the remaining *Dahlberg* factors. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965). However, with respect to Michael Johnson, against whom the District Court granted a preliminary injunction in favor of Softchoice, the District Court found that Softchoice had adequately demonstrated that all of the remaining *Dahlberg* factors favored issuance of the injunction. For the same reasons that support the issuance of the injunction against Johnson, the District Court erred in denying an injunction against Schmidt.

a. **The Nature of the Parties' Relationship Favors An Injunction.**

Schmidt was an employee of Software Plus for over six years, and had been subject to the Agreement containing the noncompete and nonsolicitation terms since November 28, 2006. Software Plus gave Schmidt the opportunity to participate in the Plan because he was a key employee of the company. Schmidt specifically agreed to the restrictions on his post-termination employment when he joined the Plan, and at no time during his employment with Software Plus did he express concern that he did not receive adequate consideration for the Agreement or that he did not believe he was bound by its provisions. Softchoice, therefore, reasonably believed that the Agreement provided adequate protection against unfair competition by Schmidt, and relied thereon. It wasn't until after Schmidt received an offer from En Pointe that he determined to take the calculated risk of ignoring the promises he had made in the Agreement.

It was Schmidt's actions, therefore, that upset the status quo in the parties' relationship, which favors issuance of a preliminary injunction in this case.

b. **Softchoice Will Suffer Immediate and Irreparable Harm If Schmidt and Johnson Are Allowed To Work For En Pointe.**

Schmidt explicitly agreed that a breach of the Agreement would constitute irreparable harm. Where an employee expressly agrees that injunctive relief is necessary, courts have found the employee's agreement is relevant to the irreparable harm inquiry. *Quaker Chem. Co. v. Varga*, 509 F.Supp. 2d 469, 479 (E.D. Penn. 2007).

Moreover, Minnesota courts have routinely recognized that the breach of a valid noncompete agreement causes irreparable harm to the employer. *Thermorama v. Buckwald*, 125 N.W.2d 844, 845 (Minn. 1964). See *Medtronic, Inc.*, 630 N.W.2d at 451. See also *Benfield v. Moline*, 351 F.Supp. 2d 911, 918-19 (D. Minn. 2004) (finding irreparable harm due to former employee's breach of restrictive covenants, which threatened employer's goodwill, reputation, and relationships with clients); *Pro Edge, L.P. v. Gue*, 374 F.Supp.2d 711, 750 (N.D. Iowa 2005) (noting that "customer relations and goodwill are two very important commodities that monetary damages are completely incapable of compensating"). Here, Schmidt's breach of his Agreement has already resulted in the loss of two of Softchoice's most important customers to En Pointe, as well as incalculable damage to its goodwill and remaining customer relationships. This is harm that is not adequately redressed by an award of damages.

Further, Schmidt's testimony shows that his business plan at En Pointe has exclusively focused on soliciting all of the customers with whom he worked as a Softchoice employee. (A.48.) Absent injunctive relief, Schmidt would be free to continue raiding Softchoice's customers and benefiting from the knowledge, reputation, and goodwill that Softchoice paid him to develop with its customers.

Even if money damages may be available to compensate for *some* of the harm to Softchoice, a preliminary injunction is warranted because intangible injuries cannot be easily valued or compensated. See *Glenwood Bridge, Inc. v. City of Minneapolis*, 940

F.2d 367, 371-72 (8th Cir. 1991) (concluding that the availability of money damages did not preclude a preliminary injunction because money damages would not fully compensate movant). The precise amount of money damages that might flow from Schmidt's wrongful acts will be difficult to ascertain. Such difficulty in ascertaining the amount of damages weighs further in favor of an injunction, because granting an injunction would allow the Court to prevent the harm from occurring in the first instance. *See Metropolitan Sports Facilities Comm'n v. Minnesota Twins P'ship*, 638 N.W.2d 214, 223 (Minn. Ct. App. 2002).

In contrast, only limited harm would befall Schmidt if the motion were granted. En Pointe continued to pay Schmidt after the temporary restraining order was issued. Further, Schmidt is free to find employment in his chosen profession so long as he subscribes to the limitations to which he agreed. Accordingly, the balance of harms weighs strongly in favor of Softchoice.

c. Public Policy Considerations Favor Softchoice.

It is the public policy of the State of Minnesota to enforce valid contracts. *See Currie State Bank v. Schmitz*, 628 N.W.2d 205, 210 (Minn. Ct. App. 2001). Softchoice is seeking to enforce a valid contract with Schmidt, and one that he freely and willingly entered into. The public interest is disserved if a knowing, intentional, and blatant breach of contract is tolerated simply because one party unilaterally decides that the terms of the contract no longer serve his interests. Therefore, it is in the public interest to restrain Schmidt from violating his agreement with Softchoice.

d. **A Preliminary Injunction Would Not Impose an Administrative Burden on the Court.**

The preliminary injunction that Softchoice proposed to the District Court did not involve any administrative burden for the court. Softchoice only seeks a continuation of the restrictions imposed in the TRO. Administration of the TRO required no involvement of the court, and Softchoice does not anticipate that a continuation of the injunction will require any additional involvement of the court. A finding of no administrative burden upon issuance of a temporary injunction favors the issuance of a preliminary injunction. *See Medtronic*, 630 N.W.2d at 456.

Because the District Court erred in finding that Softchoice was not likely to succeed on the merits of its claim against Schmidt, the District Court also erred when it did not discuss any of the remaining *Dahlberg* factors. *Earth Protector, Inc.*, 474 N.W.2d at 456. As with Michael Johnson, Softchoice demonstrated that the balance of the remaining *Dahlberg* factors favor issuing an injunction against Schmidt as well.

4. **Schmidt Breached the Agreement.**

Although the District Court did not reach the issue of whether Schmidt breached the Agreement, Schmidt has never disputed that his actions violated the terms of the Agreement. He could not have done otherwise, of course, because the undisputed evidence was that Schmidt went to work for a competitor within days of his termination from Softchoice and that he knowingly and intentionally ignored the terms of the Agreement when he immediately set out to convince all of his former Softchoice

customers to terminate their business relationship with Softchoice and move it to En Pointe. Not only did Schmidt violate the terms of the Agreement, he made a calculated decision to do so.

CONCLUSION

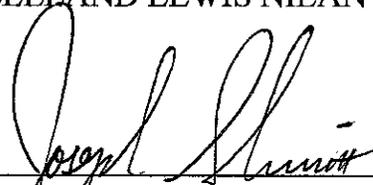
Schmidt's argument that he did not receive adequate consideration for his agreement not to compete with Softchoice or to solicit its customers is an after-the-fact excuse concocted to shield him from the consequences of his intentional, voluntary actions. Schmidt knowingly and willingly agreed to the terms of the Agreement because he wanted to receive the benefits of the Plan. Missouri law is clear that Schmidt received adequate consideration for the Agreement under those circumstances. Schmidt then took a knowing and calculated risk when he decided to work for En Pointe and to solicit Softchoice's customers for En Pointe, despite his earlier promises not to do so. In doing so, he caused enormous damage to Softchoice, both in terms of diverted sales and in damage to Softchoice's goodwill and existing customer relationships.

Missouri courts recognize that it is appropriate for employers to use post-termination restrictive covenants to prevent just such harm and, therefore, enforce agreements such as Schmidt's. This Court should reject Schmidt's baseless efforts to avoid his promises and reverse the District Court's decision denying Softchoice a preliminary injunction against Schmidt's activities in violation of the Agreement.

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Dated: June 2, 2008.

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