

A08-763

No. A08-965

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Softchoice, Inc.,
Plaintiff/Respondent,

vs.

Michael Johnson,
Defendant/Appellant,

and

Martin Schmidt,
Defendant.

REPLY BRIEF OF APPELLANT MICHAEL JOHNSON

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

Softchoice's brief ignores this question: What did Johnson receive for signing the non-solicitation agreement on January 17, 2007 that he did not already have before he signed on the dotted line? The answer: Nothing.

Johnson had been promoted to Branch Manager 10 days earlier. He was already entitled to all the benefits attached to that position. Johnson and his boss, Doug Stabenow, had already proudly told the entire company and its customers that Johnson was "the BM in Minny."

Softchoice calls this "an illusory 'timing' issue." Softchoice Br. at 18. But the issue of timing is not illusory. It is critical. The central rule of the cases on which both sides rely focuses on timing: "A covenant not to compete, signed *after* the employment relationship has commenced, must be supported by independent consideration." Twin City Catering, Inc. v. LaFond, 2001 WL 1335685 (Minn. App. Oct. 30, 2001) (emphasis added, citing Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn.1982)).

The record establishes beyond peradventure that Softchoice offered and Johnson accepted the Branch Manager position on January 7, 2007. The deal was done. Period. Johnson knew it, Stabenow knew it, and Softchoice not only knew it but announced it to the world. Softchoice's after-the-fact attempts to undo this agreement, whether by fabricating ongoing "negotiations" or by trying to split the promotion into two separate contracts, cannot change what all the participants knew happened in the real world.

Because Softchoice imposed the non-solicitation agreement only after Johnson had accepted the promotion and started his new job, Softchoice can enforce the agreement only if it is supported by independent consideration. Softchoice provided no such independent consideration for Johnson's non-solicitation agreement and therefore cannot as a matter of law enforce the agreement. The district court therefore erred in granting the injunction.

A. Softchoice Offered and Johnson Accepted the Branch Manager Promotion on January 7, 2007.

Johnson's original brief details the chronology of Softchoice's offer of the Branch Manager position to Johnson, Johnson's acceptance of the position, Softchoice's announcement of the promotion, and Johnson's actions in reliance on the promotion. See Johnson Br. at 7-13, 22-24. In a nutshell, everyone knew that Johnson had been promoted to Minneapolis Branch Manager as of January 7, 2007, and everyone acted based on that knowledge. Stabenow announced the promotion, Softchoice gave Johnson the tools and access he needed as a Branch Manager, and Johnson started working at the job. Even the Softchoice personnel department regarded the promotion as an accomplished fact because that was what Stabenow told them. See AA-96 (1/8/07 email from personnel asking Stabenow to forward "the offer letter that *has been signed*" (emphasis added)). Nothing in anyone's conduct suggested that Johnson's promotion was preliminary, tentative, conditional, incomplete, temporary, or contingent. As of January 7, 2007, Johnson *was* (as Stabenow himself put it) "the new BM in Minny!!!!" AA-123.

In contrast, after Johnson signed the January 17 letter, Softchoice made no announcement and entered no new information in its personnel system. Johnson's duties did not change, and Stabenow did not treat him any differently. Indeed, the record is devoid of any suggestion that Johnson's actual signature on the "offer letter" had *any* real-world consequence at all. Why not? Because Johnson's promotion had already occurred, on January 7.

Even Softchoice's own brief tacitly acknowledges that Johnson's promotion to Branch Manager was complete well before Softchoice ever brought up the issue of a non-solicitation clause:

- "The undisputed evidence is that Johnson would not have received the benefits of his promotion to branch manager...*if he had not continued as branch manager* after signing the employment agreement in January 2007." Softchoice Br. at 16 (emphasis added).
- "Stabenow...testified that Johnson *would not have continued as branch manager* if he had not signed the employment agreement that accompanied his formal offer letter." Softchoice Br. at 17 (emphasis added).

Johnson could not have "continued" as Branch Manager if he was not Branch Manager to begin with. Thus, despite its artful paraphrasing of documents and deposition transcripts, even Softchoice cannot help but acknowledge that Johnson's promotion to Branch Manager was offered, accepted, and carried out long before Softchoice unveiled its non-solicitation agreement. As a consequence, the non-solicitation agreement "can be

sustained only if supported by independent consideration.” National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982) (citing Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978)).

B. Softchoice Did Not Make Two Offers, One Informal and One Formal.

Softchoice mischaracterizes the record in an attempt to bifurcate Johnson’s promotion into an *ineffective* “informal offer,” Softchoice Br. at 1, 18, 20, 26, 29, and an apparently *effective* later “formal offer” that resulted in a “formal promotion.” Softchoice Br. at 1, 4-6, 17, 19, 26, 27. This sophistry ignores the reality of the parties’ actual conduct at the time.

For example, Softchoice asserts that “Stabenow also told Johnson that he would receive a formal offer of a promotion in the form of a letter that would include Softchoice’s proposal for the terms of Johnson’s promotion.” Softchoice Br. at 4 (citing Tr. 118:18-21; 183:13-18). The testimony Softchoice cites, however, is quite different:

[Stabenow:] And I guess the next morning I shot him an email and said, hey, you got the job. Congratulations. It is exciting. I said you are going to get your formal offer out of HR. You should get that, you know, shortly, and that will formalize everything. That will have your new salary, your car allowance, etc., but we should have that in a few days.

Tr. 183:12-18 (emphases added). This is not a “proposal,” as Softchoice now argues. On January 8, Stabenow unambiguously says: You are promoted, and you will get a letter from HR detailing the benefits you will receive as a result.

Even the passage Softchoice itself cites thus demonstrates that the events of January 7 were not the first stage of a sequence of informal and formal offers but the exchange of a real offer and a real acceptance that the company would later reduce to

writing. As Stabenow testified, “You don’t break out the offer letter until they go through the panel interview and *they really get the job* and then, you know, we get that done.” Tr. at 184:11-13 (emphasis added). All that remained was for Softchoice’s HR department to “formalize” the agreement, that is, to provide a more formal imprimatur for an agreement that had already been completed. See, e.g., Traver v. Farm Bureau Mut. Ins. Co., 418 N.W.2d 727, 729 (Minn. App. 1988) (“The [parties] eventually reached an agreement whereby Renner would confess judgment in the amount of \$ 300,000 per person. ... They scheduled a confession of judgment hearing to *formalize* this settlement.” (emphasis added)).

Johnson’s promotion involved one offer and one acceptance. Both occurred on January 7, 2007. The meeting of the minds that occurred on that date did not include a non-solicitation agreement.

C. Softchoice and Johnson Did Not Make Two Agreements, One on January 7 and Another on January 17.

At several points, Softchoice argues that Johnson’s signing of the offer letter formed a *second* contract, completely independent of his promotion to Branch Manager. See, e.g., Softchoice Br. at 19, 21, 28-29 (“The New Benefits That Johnson Received Are Sufficient Stand-Alone Consideration For the Non-Solicitation Agreement.”). In this argument, Softchoice asserts:

Even if Johnson’s acceptance of the expanded responsibilities of the branch manager position was not sufficiently contemporaneous to the non-solicitation agreement to constitute consideration therefor, the pay increase and other benefits he received indisputably were linked to his acceptance and execution of the agreement. Those benefits, therefore, separately

constitute independent consideration for Johnson's non-solicitation agreement without regard to the timing of the promotion.

As a threshold matter, this "two-contract" argument of course contradicts Softchoice's other argument, discussed in the previous section, that Softchoice made Johnson a two-stage offer that resulted in a single agreement. Putting that inconsistency aside, however, Softchoice points to nothing in the record that would support its "two-contract" theory, and the theory makes no sense under the circumstances.

The parties had a single agreement that Softchoice offered and Johnson accepted on January 7: Johnson would accept the responsibilities of Branch Manager of the Minneapolis Branch, and Softchoice would provide him with the standard benefits commensurate with the Branch Manager position (as Stabenow described them on January 8, "your new salary, your car allowance, etc.," Tr. 183:16-17). Indeed, Softchoice's own brief repeatedly refers to the promotion as having been "finalized" by the offer letter. Softchoice Br. at 1, 27, 29.

Softchoice's suggestion that it made two offers, one of the promotion itself and a second of the "benefits" of the promotion, defies logic in this situation. If Softchoice and Johnson entered into two separate agreements, what was the consideration for Johnson's original acceptance of the promotion and his commencement of work in his new job? If all the benefits—the increased salary, the car allowance—resulted from Johnson's January 17 signature, what did Johnson get in return for immediately assuming the responsibilities of Branch Manager on January 8, as Stabenow urged him to do? Johnson did not apply for the Branch Manager promotion just because he thought it would look

good on his resume. Both he and Stabenow knew it was a package deal: the promotion and the benefits went together. Neither Johnson nor Stabenow believed Johnson was volunteering to take the Branch Manager responsibilities without getting anything in exchange.

Softchoice cites no authority for regarding the promotion and the benefits as separate contracts, and the case law is to the contrary. For example, in National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982), the Minnesota Supreme Court held that “[t]he training that appellants received and which was set forth as consideration in the written contract did not, in fact, constitute consideration for the noncompetition clause because it was part of the oral employment agreement.” Id. at 741.

Likewise here, the benefits Johnson received as Branch Manager were part and parcel of his January 7 promotion. They could not serve as consideration for the later non-solicitation agreement because Softchoice was already obligated as of January 7 to provide them. See Tonka Tours, Inc. v. Chadima, 372 N.W.2d 723, 728 (Minn.1985) (“A promise to do something that one is already legally obligated to do does not constitute consideration.”).

D. Softchoice and Johnson Did Not “Negotiate” the Other Terms of the Promotion After Johnson Had Accepted Softchoice’s Offer.

Softchoice makes this factual assertion: “The Terms of Johnson’s Promotion Were Being Negotiated Between January 7 and 16, 2007.” Softchoice Br. at 19-20. The assertion is false, and nothing in the record supports it. On the contrary, consistent with

Stabenow's promise, the HR department's January 16 "offer letter" simply informed Johnson of the benefits he would enjoy in the Branch Manager position he had already accepted and that Stabenow had already reported to his HR department. See Tr. 183:13-18; AA-70 (207:7-208:16 (question: "So you were informing your HR personal [sic] records that effective 1/7/07 Mr. Johnson's new titled was branch manager, true?" Stabenow: "Right.") Neither the letter nor Stabenow's cover email invites Johnson to negotiate; they simply "formalize" the already-agreed-on promotion. AA-129 (Stabenow: "This offer letter formalizes your promotion to Branch Manager").

The record also contradicts Softchoice's assertion that Johnson had no knowledge of the salary and benefits of his new Branch Manager position until he received the offer letter. Softchoice Br. at 13, 19, 23. When Johnson first expressed interest in becoming Branch Manager, Stabenow urged him to talk about the job with other Branch Managers, Jonathan Leaf and Paul Carrillo. Tr-147:18-19. Johnson did as Stabenow suggested, talking with them about the position's responsibilities and compensation. Tr-147:24-148:2. Stabenow himself told Johnson about the "new salary, car allowance, etc." when he told him about the promotion on January 7. Tr. 183:17-18. There is no evidence that these items varied among Branch Managers; they are simply the benefits a Softchoice Branch Manager receives. The facts simply do not bear out Softchoice's suggestion that Johnson knew nothing about the "terms" of his promotion to Branch Manager.

Finally, the record belies Softchoice's suggestion that the parties "negotiated" the non-solicitation agreement between January 7 and 17. Softchoice Br. at 19-20. Quite the opposite: far from being openly announced and negotiated, the non-solicitation

agreement was effectively a “stealth” term sprung on Johnson after the fact. When Johnson spoke with Branch Managers Leaf and Carrillo, neither told him anything about a non-solicitation agreement; the agreements were something new. Tr-148:18-25. Indeed, Johnson knew of no Softchoice employees who were subject to non-solicitation agreements. Tr-148:15-17.

More troubling is the silence of Stabenow, the supervisor who urged Johnson to seek the promotion. Despite his management position, Stabenow never mentioned the non-solicitation requirement to Johnson, either when he interviewed Johnson, when he offered Johnson the promotion, when he urged Johnson to get to work immediately in his new job as Branch Manager, or even when he sent the “offer letter” that contained the provision. Tr-148:15-25.

Stabenow’s silence permits only two conclusions, neither very flattering to Softchoice:

- (1) Stabenow was entirely ignorant of the non-solicit requirement when he offered Johnson the promotion, and Softchoice later tried to sneak the requirement into the offer letter, or
- (2) Stabenow knew about the non-solicit requirement and deliberately withheld the information from Johnson until Johnson had accepted the promotion and was too committed to realistically back out.

Either way, the non-solicit requirement was not part of the agreement when Softchoice offered and Johnson accepted the Branch Manager promotion.

In sum, Johnson's situation is the same as that of the plaintiffs in National Recruiters, Inc. v. Cashman, 323 N.W.2d 736 (Minn. 1982):

Appellants in the case at bar were told of National's compensation provisions and pension plan before beginning work. They agreed to work for National and, in fact, did begin work before being presented with the noncompetition clause and told they were required to sign it. The clause was not bargained for. It was not ancillary to the employment agreement. It must be supported by independent consideration.

Id. at 740. Here, Johnson was told about the Branch Manager job and its benefits and compensation by the existing Branch Managers to whom Stabenow had directed him. Johnson agreed to accept the promotion, and started work in his new position before being presented with the non-solicitation clause and being told he had to sign it. The clause was not bargained for and was not ancillary to Johnson's acceptance of the promotion. The non-solicitation agreement must therefore be supported by independent consideration, consideration in addition to the benefits Johnson received as a part of the promotion to branch manager. There was no such independent consideration here.

E. The Case Law on Which Softchoice Relies is Inapposite

Softchoice's argument relies heavily on the Minnesota Supreme Court's decision in Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 130-31 (Minn 1980).

Softchoice Br. at 16-17, 21, 28, 33, 39. The Davies case is readily distinguishable and is not helpful to Softchoice for several reasons.

First, the issue in Davies with respect to defendant Davies was the "adequacy of consideration," not the lack of consideration. See Davies, 298 N.W.2d at 131 ("there was adequate consideration to support the noncompetition agreement"). "Adequate

consideration” is “[c]onsideration that is fair and reasonable under the circumstances of the agreement.” Black’s Law Dictionary at 301 (7th ed. 1999). In the present case, the issue is not whether the benefits Johnson received as a result of his promotion would have been “fair and reasonable” consideration for the non-solicitation agreement, but whether Johnson received any consideration at all for the non-solicitation agreement where he was not presented with that agreement until *after* he was offered and accepted the promotion that included those benefits. As the facts demonstrate, he did not.

Second, the Davies court itself notes that the “[t]he adequacy of consideration for a noncompetition contract or clause in an ongoing employment relationship *should depend on the facts of each case.*” 298 N.W.2d at 130. The Davies case had a number of unique facts that likely influenced the outcome as to defendant Davies (for example, the contract was between father and son, Davies was not even 21 when he signed it, and he worked for more than ten years after signing the non-compete provision). Although the fact-specific results in the cases the parties cite certainly assist the Court in its analysis, each case must be considered on its own facts. Here, Johnson received no consideration for his post-promotion signature on the non-solicitation agreement.

Third, Softchoice’s discussion of the Davies court’s analysis of the consideration issue is incomplete. Although the case does note the “real advantages” Davies received, it also noted that those real advantages had been bargained for. The full quotation from which Softchoice pulled its fragment states: “In cases such as these presently before the court, the agreement may be bargained for and provide the employee with real advantages.” Davies, 298 N.W.2d at 130-31 (emphasis added). Here, the non-

solicitation agreement was *not* bargained for. On the contrary, as discussed above, it was slipped into the documentation of the promotion agreement without Johnson's advance knowledge, and the document provided him with no "real advantages" to which he was not already entitled as a result of the promotion itself.

Finally, Softchoice ignores the fact that the Davies court's second holding actually *affirmed* the district court's rejection for lack of consideration of the restrictive covenant signed by Davies's codefendant Buckingham, whose situation is much more similar to Johnson's situation here than Davies's. Buckingham was recruited for a management position at the insurance agency. Id. at 132. Although he knew about the requirement of a non-compete agreement before he joined the agency, he did not see a copy of the agreement or learn its terms until 10 days after he joined the agency. Id. Buckingham signed the agreement and worked for the agency for about a year and a half. Id. at 133. Under these circumstances, the Minnesota Supreme Court affirmed the district court's conclusion that the agreement "was without consideration and unenforceable." Id. Johnson's situation here is similar, including the much shorter time he and Buckingham spent in their respective jobs (as opposed to Davies's 10 years). Indeed, Johnson's circumstances are even more compelling than Buckingham's because Softchoice did not even tell Johnson about the restrictive-covenant requirement until after his promotion had occurred and Johnson was working in his new job.

In sum, Softchoice's heavy reliance on the Davies case provides it with no assistance here.

F. That Johnson was Promoted Rather Than Hired Does Not Change the Result Because the Date of Johnson's Promotion Was Not Ambiguous.

Softchoice also argues that it was free to blind-side Johnson with the non-solicitation because his position as Branch Manager was a promotion rather than a new employment relationship. Softchoice Br. at 24-27. Ignoring Minnesota precedent,¹ Softchoice relies entirely on a single Oregon federal district court case, Nike, Inc. v. McCarthy, 285 F.Supp.2d 1242 (D. Ore. 2003). In Nike, the federal court applied Oregon law to a set of ambiguous facts concerning the precise date of an employee's promotion, and the relationship of that date to his execution of a non-compete agreement. Id. at 1246-47. The Court considered a number of factors in addressing the ambiguity, and concluded based on the facts before it that the non-compete agreement had predated the actual promotion. Id.

Even if a court wanted to apply the Oregon case instead of settled Minnesota law, Johnson's situation is quite different. Here, there was no ambiguity about the date of the promotion: it occurred on January 7, 2007. Softchoice unqualifiedly made the offer and Johnson unqualifiedly accepted. Perhaps as significantly in *Nike* terms, Softchoice announced the promotion to the company and the world, and the expected waves resulting from the splash of that promotion began spreading. See Johnson Br. at 7-13,

¹ Johnson's initial brief cited two analogous Minnesota cases on this issue, Nat'l Recruiters, 323 N.W.2d at 738 (invalidating post-acceptance noncompete provisions even where the employees had been "unemployed for a period of time" thus has no bridges to burn) and 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).

22-24 (detailing consequences of promotion and announcement). No one had any doubt that Johnson had been promoted to Branch Manager on January 7, 2007, until Softchoice's decision to sue Johnson required it to create an ambiguity to try to justify its post-promotion imposition of the non-solicitation agreement.

The date of Johnson's promotion was not ambiguous, and the Court need not run through a *Nike*-like exercise to figure out that the promotion occurred on January 7, 2007.

II. THE NON-SOLICITATION AGREEMENT DOES NOT PROTECT A LEGITIMATE INTEREST OF SOFTCHOICE.

Softchoice had no legitimate purpose for imposing the non-solicitation agreement on Johnson. Its actual purpose—preventing employees from leaving for better jobs—cannot justify the restrictive covenant.

For example, Softchoice's stated alternative plan for Johnson undercuts its claim that its purpose for the non-solicitation agreement was to protect customer relationships. Softchoice asserts that if Johnson had refused to sign the non-solicitation agreement, Softchoice would have demoted him from Branch Manager back to account manager (that is, outside representative). Tr-186:15-18, 215:13-23. However, as detailed earlier, Johnson Br. at 6-7, 14-16, an outside representative has far closer "customer relationships" than a Branch Manager. Thus, logically, Softchoice's threat to punish Johnson for not signing the nonsolicitation agreement by demoting him to a job with closer "customer relationships" and yet no non-solicitation obligation contradicts Softchoice's belated claim that it intended the non-solicitation agreement to protect customer relationships. This conclusion is buttressed by the fact that, despite

Softchoice's claim of Johnson's close "customer relationships," no evidence suggests that Johnson was able to take any of their business with him when he left Softchoice.

Compare Webb Publ'g v. Fosshage, 426 N.W.2d 445, 450 (Minn. App. 1988) (upholding legitimacy of employer's interest in protecting employee's strong customer relationships based on customers' departure with employee).

Softchoice struggles hard in its brief to retroactively create a credible and acceptable purpose for imposing on Johnson the non-solicitation agreement by noting that some customers who had worked with departed sales directors followed them to competitors. Softchoice Br. at 9. First, by Stabenow's own testimony, these were sales directors, not Branch Managers, and Softchoice offers no legitimate explanation of why it should treat the two different positions the same.

But even if Softchoice could come up with such an explanation now, it would simply be closing the barn door after the horse has left for a new employer. The test is not whether an employer can construct an after-the-fact justification of a non-solicitation agreement in view of what happens after the employee departs; the issue is whether the employer actually had that purpose when it entered into the contract. See Midway Center Associates v. Midway Center, Inc., 237 N.W.2d 76, 78 (Minn. 1975) (noting that courts look at "the position of the parties at the time the agreement was negotiated and executed" and "endeavor[] to arrive at what the parties must have reasonably contemplated"); Williams v. Thomson, 174 N.W. 307, 308 (Minn. 1919) (the test is whether the "restraint contracted for appears to *have been* for a just and honest purpose" (emphasis added, citations omitted)); Granger v. Craven, 199 N.W. 10, 12 (Minn. 1924)

(“*when* he employed defendant...plaintiff had a legitimate interest to protect” (emphasis added)). Here, no evidence supports an inference that Softchoice imposed the non-solicitation agreements to protect Branch Manager customer relationships.

On the contrary, as noted in Johnson’s original brief, all the evidence in the record demonstrates that Softchoice adopted the non-solicitation agreements simply to prevent its employees from leaving for better-paying jobs. Johnson B. at 28-29. This is precisely what has concerned the Minnesota Supreme Court:

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. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable.

Bennett v. Storz Broadcasting Co., 270 Minn. 525, 535 (Minn. 1965) (quoting Menter Co. v. Brock, 180 N.W. 553, 555 (Minn. 1920)).

Softchoice’s purpose in imposing the non-solicitation agreement on Johnson was to prevent him from leaving for a better paying job and to permit Softchoice to make his life “a living hell” if he tried to do so. Tr-218:3-11. This is not a proper purpose, and the District Court erred in granting the injunction based on the agreement.

III. THE INJUNCTION IS FAR BROADER THAN NECESSARY TO PROTECT ANY LEGITIMATE INTEREST OF SOFTCHOICE.

Softchoice’s brief also fails to justify either the broad scope or the year-long duration of the non-solicitation agreement and the temporary injunction.

With respect to duration, Softchoice rests most of its argument on its description of the supposedly “year-long” process involved in developing new customers. E.g., Softchoice Br. at 7-9 (citing Tr. 178:24-181:4), 37-39. Even setting aside Softchoice’s stretching of the record to create the premise of its argument, the argument simply does not apply here. As Softchoice’s own brief demonstrates, these are not “new” customers, but customers with whom Softchoice already has existing relationships. See Softchoice Br. at 3, 10, 11 (listing existing Softchoice customers). Thus, virtually none of the customer-development tasks recited in Softchoice’s brief (for example, making initial contacts, determining the client’s technology needs) would be necessary for these existing clients.

Moreover, as noted in Johnson’s original brief, when Branch Manager Johnson left Softchoice, the company already had an inside representative with a continuing relationship and nearly daily contact with these customers. Tr-125:18-19, 146:4-9, 12, 15; AA-60 (26:19-21), 65 (140:13-17), 77-78, 101 (¶ 23), 175-177. Softchoice also did not hire new outside representatives to handle these accounts. The vast majority (over 97%) already had already been serviced by experienced outside representatives for months before Johnson left. Tr. 159:4-16, 212:14-16; AA-63, 111, 124-25. For the handful that were unassigned, an experienced representative was assigned promptly on Johnson’s departure. AA-66.

Finally, and perhaps most significantly, there is no evidence that any of the customers Softchoice lists ceased to do business or altered their purchasing with Softchoice in any way. Although Softchoice tries hard to imply that Johnson’s post-

departure contacts with Softchoice customers somehow harmed Softchoice or its business Softchoice Br. at 10-11 (suggesting Johnson “targeted” companies he knew were “especially susceptible”), a careful reading of this section reveals that Softchoice never *actually* claims that it lost *any* business at all as a result of Johnson’s actions.

In sum, nothing in the record supports a year-long bar on Johnson’s solicitation of existing Softchoice customers who have ongoing, established relationships with Softchoice representatives.

With respect to scope, Softchoice makes little effort to justify the injunction’s bar on Johnson’s solicitation of any customer Johnson “became acquainted with”—whatever that means—while he was at Softchoice. Indeed, Stabenow’s own testimony acknowledged that the agreement need only restrict a former employee from soliciting his own former customers:

And we just, said, hey, if you go to work for a competitor, you just can’t call on the customers you called on while you were at Softchoice. So we said, yeah, that is fair, we think that is a fair thing to do.

Tr. at 190:9-13. Even assuming that Softchoice had a legitimate interest in protecting customer relationships that Johnson himself had developed, Softchoice suggests no basis for the Court to forbid Johnson from soliciting business from mere “acquaintance” customers of Softchoice for whom he had never even worked and with whom he never had a customer relationship. The District Court’s decision never addresses the scope of

the restriction on Johnson,² and the Court therefore abused its discretion in issuing the temporary injunction. See Webb Publ'g v. Fosshage, 426 N.W.2d 445, 450 (Minn. App. 1988) (remanding “for consideration of the appropriate scope of the restraint” where district court’s original decision did not address the issue).

IV. OTHER DAHLBERG FACTORS ALSO WEIGH IN JOHNSON’S FAVOR.

The remaining Dahlberg factors are discussed in Johnson’s opening brief. The one point worthy of note here is Softchoice’s steadfast refusal to acknowledge the strong public policy against the restrictive, anticompetitive contracts that Softchoice seeks to enforce here. E.g., Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533 (Minn. 1965) (“Such contracts are looked upon with disfavor, cautiously considered, and carefully scrutinized.” (citing Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N.E. 2d 685 (1952))).

Yes, Minnesota supports enforcing valid contracts. Softchoice Br. at 43. But how can Softchoice simply ignore our clear, oft-expressed policy disfavoring restrictive covenants? The District Court itself expressly noted in its order that “there is a strong public policy argument favoring competition in a free market society.” AA-7. Indeed, one of the cases Softchoice itself cites on this issue makes the same point: “Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade.” Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 456 (Minn. App.

² The District Court’s decision mentions that an enforceable non-solicitation agreement “must...have restrictions that are no broader than necessary to protect Softchoice’s legitimate interests,” AA-6 (¶ 7), but never actually applies this standard before issuing the temporary injunction against Johnson.

2001) (quoting Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 265 (Minn. App. 1996), cited at Softchoice Br. at 43).

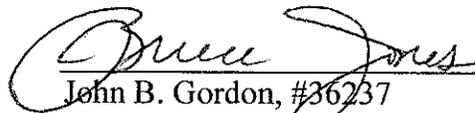
Softchoice's refusal to address this point is not helpful to the Court's consideration of the issues before it.

CONCLUSION

Appellant Michael Johnson has been wrongly restricted since January in trying to earn a living and support his family. He has been walled off, not only from customers with whom he had a relationship, but also from those with whom he "became acquainted" at Softchoice, a term which he and his current employer have interpreted broadly to assure compliance with the District Court's misguided temporary injunction. For the reasons set forth above and in his original brief, 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: July 21, 2008

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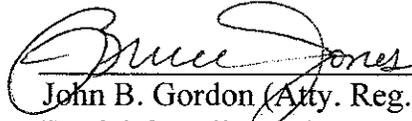
CERTIFICATION OF
BRIEF LENGTH

Appellate Court
Case Number: A08-965

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 5,081 words. This brief was prepared using Microsoft Word 2003 software.

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