

No. A08-763  
408-765

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Softchoice, Inc ,

Plaintiff/Respondent,

vs.

Michael Johnson,

Defendant/Appellant, and

Martin Schmidt,

Defendant.

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BRIEF OF RESPONDENT MARTIN SCHMIDT

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## STATEMENT OF LEGAL ISSUES

1. The only purported consideration Schmidt received for signing Softchoice's non-compete agreement was participation in Softchoice's Employee Retention Plan, which itself provides that Schmidt forfeits all his benefits if he competes. Did the District Court abuse its discretion in concluding that Softchoice was unlikely to succeed in proving that Schmidt received adequate consideration for signing the non-compete agreement?

*The District Court held that Softchoice failed to prove it was likely to succeed in establishing the Plan as consideration for the non-compete agreement.*

Most apposite cases:

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

Timmons v. Bender, 601 S.W.2d 688 (Mo. App. 1980)

Alldredge v. City of National Bank and Trust Co., 468 S.W.2d 1 (Mo. 1971)

2. Softchoice offered no evidence that the non-compete agreement was intended to protect customer contacts, and Missouri law does not recognize employee retention as a legitimate interest justifying a non-compete agreement. Did Softchoice establish that it had a legitimate interest in preventing Schmidt from soliciting any of Softchoice's customers (regardless of whether he had any contact with them) or competing with Softchoice in any way?

*The District Court did not reach this issue.*

Most apposite authorities:

Sturgis Equipment Co. v. Falcon Indus. Sales Co., 930 S.W.2d 14 (Mo. App. 1996)

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. 2006)  
28 Mo. Stat. Ann. § 431.202.1(3)

3. Softchoice conceded that the two-year non-compete agreement was unnecessary, and had previously asked Schmidt to sign a new one-year non-solicitation agreement. Softchoice's established sales representatives for the five customers assigned to Schmidt retained three of those customers after he left. Did Softchoice establish that the non-compete agreement and the one- and two-year restrictions in the Plan were no more restrictive than necessary to protect Softchoice's legitimate interests?

*The District Court did not reach this issue.*

Most apposite cases:

Sturgis Equipment Co. v. Falcon Indus. Sales Co., 930 S.W.2d 14 (Mo. App. 1996)

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

4. Did Softchoice establish that the other four Dahlberg factors (prior relationship, balance of harms, public policy, and administrative burden) weighed in favor of a temporary injunction?

*The District Court did not reach this issue.*

Most apposite cases:

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (1965)

Miller v. Foley, 317 N.W.2d 710 (Minn. 1982)

5. In denying Softchoice's motion for temporary injunction, the District Court did not address two of the three requirements for an enforceable non-compete agreement or four of the five Dahlberg factors. If this Court concludes that the District Court abused its discretion in denying the motion, must this Court remand rather than ordering an injunction, so that the District Court may consider these disputed factual issues for the first time?

Most apposite cases:

State by Drabik v. Martz, 451 N.W.2d 895 (Minn. App. 1990)

Unlimited Horizon Marketing, Inc. v. Precision Hub, Inc., 533 N.W.2d 63 (Minn. App. 1995).

#### STATEMENT OF THE CASE

Plaintiff/appellant Softchoice, Inc. brought this lawsuit seeking injunctive relief and damages against defendant/respondent Martin Schmidt and his codefendant Michael Johnson. RA-1-25.<sup>1</sup> After a brief hearing on January 23, 2008, Softchoice obtained a temporary restraining order barring Schmidt from engaging in certain practices in competition with Softchoice. A.20-26.<sup>2</sup>

Softchoice moved the District Court for a temporary injunction and, on March 19, 2008, the court held a five-hour evidentiary hearing on that motion. On April 15, 2008, the District Court, the Honorable John H. Holahan presiding, issued an order denying a

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<sup>1</sup> References to "RA-\_\_" are to respondent Schmidt's appendix.

<sup>2</sup> References to "A. \_\_" are to appellant Softchoice's appendix.

temporary injunction against Schmidt.<sup>3</sup> A.27-35. Notice of filing of the April 15, 2008 Order was served on April 17, 2008. RA-36. The present appeal from that Order followed.

## STATEMENT OF FACTS

### A. Brief Background on the Industry and Appellant

#### 1. Resellers and LARs

Appellant Softchoice is a reseller of computer software and hardware. Resellers buy software from publishers and hardware from manufacturers and sell them to end customers. RA-103. Customers buy from more than one reseller at the same time. RA-44 (61:19-62:15). Softchoice's largest vendor is Microsoft. Tr-173:23-25. Microsoft deals with a limited number of resellers, commonly referred to as Large Account Resellers or "LARs." Tr-50:14-18. Both Software Plus Ltd., respondent Michael Schmidt's former employer that has since been acquired by Softchoice, and non-party En

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<sup>3</sup> In the same Order, the District Court granted Softchoice's motion for a temporary injunction against codefendant Michael Johnson. Johnson has appealed the grant of the temporary injunction against him in a separate appeal, no. A08-965, and the Court has since consolidated the two cases for appeal and decision. Order (6/12/2008). Although Softchoice elected to sue Johnson and Schmidt in the same action, the two men never worked together, and Softchoice's claims against them are quite different. Johnson and Schmidt held different positions, signed different contracts with different non-compete or non-solicitation provisions of different durations, and had different experiences at Softchoice. In addition, the District Court decided Softchoice's motions for injunctions against them under different states' laws.

Pointe Technologies, Inc. (“En Pointe”), Mr. Schmidt’s current employer, are also LARs and buy software from Microsoft.<sup>4</sup>

## **2. Appellant Softchoice Corporation**

Appellant Softchoice Corporation is a Canadian company that reported annual revenues for the year ending December 31, 2006 of \$703 million, with gross profits of approximately \$100 million. Tr-98:19-99:2. Softchoice works with thousands of vendors. RA-42 (32:11-13). Softchoice has over 10,000 customers in the U.S., including 3,000 in the Central Region (which includes Minneapolis) and about 350 in the Minneapolis Branch alone. RA-43 (34:25-35:9).

## **3. Software Plus Ltd.**

Software Plus was a small LAR owned by Larry Malashock that operated primarily in the Midwest and Florida. RA-60 (10:13-21). Like Softchoice, Software Plus worked with thousands of vendors. Tr-63:12-15. When Softchoice acquired it, Software Plus had thousands of customers, and 40 to 60 salespeople. RA-60 (10:6-9, 12:1-4); Tr-66:7-8.

## **B. Schmidt’s Brief and Unpleasant Experience with Softchoice**

Schmidt worked for Softchoice as an outside sales representative (an Account Manager) for just over one year from 1999 to 2001. RA-120. Schmidt was with

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<sup>4</sup> Although nuances exist between the terms LAR and reseller in other contexts, they are not important here and this brief uses the terms interchangeably.

Softchoice so briefly because he believed Softchoice was not the kind of company he wanted to work for; it was not the right place for him, and it was not a place where he could have a career. RA-55 (185:15-17), 74 (135:6-9); Tr-65:16-66:2. Softchoice had a very high turnover of sales representatives. RA-74 (135:12-14), 108.

**C. Schmidt's Career With Software Plus**

Schmidt left Softchoice to go to Software Plus. Tr-66:3-4. Schmidt worked for Software Plus as a Business Development Manager from 2001 through December 2007. RA-120. His duties were "to determine prospective clients and/or customers, find what their IT requirements are as far as what they procure on a regular basis, and help them with those requirements, in other words, sell software and hardware to the customers." RA-84 (84:12-24). Over the years, Schmidt was assigned to certain accounts. He shared responsibility for developing and maintaining the customer relationships for those accounts, and he received commissions for those accounts' purchases. See, e.g., A.42.

**1. After Spring 2006, Schmidt had only five customers.**

Although Schmidt had handled additional accounts for Software Plus in earlier years, for most of his last year with Software Plus he handled only five customers: Alliant Techsystems, Inc. (a/k/a ATK), Fastenal Company, American Dental Partners, Inc., Land O'Lakes Inc., and Andersen Corporation. Tr-66:12-20 ("I was specifically working with five accounts"). His other customers had either stopped purchasing from Software Plus, been acquired by other companies, or been transferred to another Software Plus outside representative, Jamie Gipp. RA-72 (125:20-24); Tr-66:21-67:4. These five accounts

represented less than one quarter of a percent (0.25%) of Software Plus's customers, and less than one one-hundredth of a percent of Softchoice's customers.

**2. Schmidt was never the exclusive contact for any customer.**

Sales teams at Software Plus, as at Softchoice and most LARs, consisted of "outside" and "inside" representatives. RA-71-72. Outside representatives like Schmidt have face-to-face meetings with customers and call on prospective customers to get new accounts. RA-46. Once an account is established, an inside representative is also assigned to it. Tr-125:18-19, 146:4-5. Inside representatives handle the day-to-day details of the account, including setting the prices for their customers, and have much more daily contact with existing customers than outside representatives have. RA-41 (26:19-21), 50 (140:13-17), 71, 93 (¶ 23), 143 (¶ 23), 147; Tr-146:12, 15 ("at least five times as much"). Inside representatives "were the only sales representatives that serviced those customers on a day-to-day basis." RA-143 (¶ 23), 41 (26:19-22), 50 (140:13-17). The inside representative's "daily duties are...creating quotes, placing orders, and any of the daily communications between [the company] and the customer." Tr-146:7-9. Chris Illingworth<sup>5</sup> confirms the significance of the inside representatives, calling them the customer's "gateway" to the LAR. RA-70-71, 93 (¶ 23); A.63 (181:8-11).

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<sup>5</sup> Illingworth (now Director of Enterprise Sales at Softchoice) was employed by Software Plus for two and a half years, most recently as a National Sales Manager. RA-59 (7:19-25, 8:1-8), 140 (¶ 2). Before and after the stock purchase, Illingworth's duties primarily included sales management. RA-140 (¶ 3).

Under this system, Schmidt was never the exclusive point of contact between Software Plus and a customer. Tr-80:2-5, 17-19, 211:22-25; RA-75 (179:17-20). There was always an inside representative in contact with the customer, and the inside representative communicated with the customer "a lot more often than" Schmidt did. Tr-80:20-81:3; RA-75 (179:13-16). Although Schmidt tried to visit the customers once or twice a month, or at least once every three to four months, Tr-81:4-9, the inside representative had daily contact with the customers and did not even notify Schmidt of every deal that was done for the customer. Tr-211:19-21; A.63 (182:11-14).

Further, until August or September 2006, just over a year prior to his departure, there was also a third representative (Jen Tolan) assigned to Schmidt's accounts. She was a combination inside and outside representative because she met with customer contacts in person. Tr-35:7-22; A.42 (47:18-25), A.44 (54:10-12, 21:22, 55:1-4). It was not until Tolan left Software Plus in August or September 2006 that Schmidt and the inside representatives were servicing accounts alone for Software Plus. Tr-36:1-2; A.44 (55:5-7).

Although Schmidt was the outside representative for these customers *at Software Plus*, Tom Parker *at Softchoice* was assigned to at least two of these customers, ATK and Fastenal, and was trying to sell to the accounts before Softchoice bought Software Plus. RA-53 (152:10-14), 57 (219:23-220:16).

**3. Software Plus's Employee Retention Plan and Non-Competition Agreement.**

Schmidt worked for Software Plus for over five years without a non-competition agreement. In November 2006, Larry Malashock presented Schmidt with the opportunity to participate in Software Plus's Employee Retention Plan ("the Plan"). A.104-111. Three documents were sent to Schmidt, including the Employee Retention Plan, a Confidentiality and Non-Compete Agreement, and a Trust Agreement. A.64-67; RA-114-119; A.76-82. Software Plus alleges that the three documents together comprise the Plan. Appellant's Br. at 6. On or about November 28, 2006, Schmidt signed the Retention Plan (which included both a forfeiture-for-competition provision) and the separate non-compete agreement with different terms. A.67, 82.

**i. The features of the Employee Retention Plan.**

The Plan contains several provisions at issue in this appeal. Although the Plan contemplated that Software Plus would make payments into an account for participants like Schmidt, the Plan gave the company complete discretion to make or not to make such deposits and to decide how much any such deposits would be:

Award of Retention Credits. Simultaneously with the establishment of the Plan and each fiscal year of Company thereafter, the Board may award credits ("Retention Credits") to Participants. The Retention Credits for each fiscal year of Company shall be allocated to Participants in amounts as determined solely in the Board's discretion.

A.76; see also RA-114, 115. Although Schmidt was a participant in the Plan, the Plan gave the company discretion to eliminate him as a participant:

Participant: means a management or key employee of Company who is chosen by the Board of Directors of Company ("Board") to participate in

the Plan. The employees chosen by the Board as participants may change from one year to another, *including elimination of some employees from the category of Participants*; however, such subsequent year designation by the Board shall not impact Retention Credits (as defined in Section 2) that have previously been credited to a Participant.

Id. (emphasis added).

Even if the company deposited funds into Schmidt's account, the Plan did not guarantee that those funds would ever go to Schmidt, even if he fully complied with each and every obligation of the Plan and the separate non-compete agreement. The account remained in effect unfunded, and all funds "deposited" remained unsecured assets of the company, subject to the Company's creditors:

The participant and beneficiaries shall have no preferred claim on or any beneficial ownership interest in any assets of the trust. Any rights created under the plan and this trust agreement shall be mere unsecured contractual rights of the participant and beneficiaries against the company.

A.80; see also RA-115.

Although the Plan did not prohibit Schmidt from competing with Software Plus, it did provide that Schmidt would automatically forfeit any undistributed funds in his account if he competed with Software Plus within a year of leaving the company:

Timing of Payment of Retention Benefits...To the extent a participant violates or breaches any of the covenants in Section 5 [listing various types of competition] prior to the payout of the entire Employee Retention Benefit, any amounts that have not been paid prior to such violation or breach shall be forfeited.

A.77 (¶4). Section 5 in turn provides:

Non-Competition, Confidentiality and Non-Solicitation. Notwithstanding anything else contained in this Plan or any other Company incentive plan to the contrary, Participant shall not be entitled to receive any Employment Retention Benefit if upon the termination of Participant's employment with the Company or

for a period of one (1) year thereafter, regardless of how such employment ends,  
Participant: [engages in any of a list of acts in competition with the Company]

A.78 (¶5). Section 5 goes on to list a number of competitive acts that would disqualify Schmidt from receiving money from the Plan, including soliciting any customer with whom the Company did business in the preceding 24 months, regardless of whether he had any prior contact with them, and from working with another LAR for one year without geographic limitation. The supposed consideration for this stand-alone agreement was the Employee Retention Plan. A.82.

The Plan also provided for forfeiture of any benefit to which Schmidt might be entitled based on events that had nothing to do with violating the non-competition agreement. RA-62 (34:25-35:18). For example, Schmidt would get nothing if he were terminated for cause, RA-61 (32:6-9), or if he left Software Plus voluntarily. Id. (32:16-20).

Software Plus did not keep Schmidt regularly apprised of the specifics regarding the trust account. Tr-101:23. Schmidt was not aware of when deposits were made or how much was put into the account. A.38 (14:24-15:2). He did not receive monthly statements. Id. (15:3-5, 8, 16:6-7). Schmidt did not even understand what the trust account was until after Softchoice sued him. Id. (15:20-21).

In sum, under the terms of the Plan, Schmidt has not received, and will never receive, a single dollar from the Plan. See, e.g., Tr-32:8-15, 71:12-13, 72:7-12, 101:3-7 (“knowing what I know about Softchoice, I don’t think they will pay it out”); RA-64 (43:1-44:6, 42:22-23) (Illingworth: “I don’t think he would be paid for it, no.”).

**iii. The separate Non-compete Agreement.**

The stand-alone Non-Competition Agreement, A.64-67, prohibits Schmidt for two years from soliciting or doing business with any person or entity who has done business with Software Plus, or has been solicited by Software Plus, regardless of whether Schmidt had any contact with the person or entity or involvement in the business or solicitation. A.64. This Agreement also has no geographic limitation.

**D. Softchoice's Non-Solicitation Agreement.**

About the same time that Software Plus offered Schmidt its Plan in 2006, its competitor Softchoice decided to rollout its own non-solicitation agreement. RA-39 (9:10-13). Softchoice debated between non-compete agreements and non-solicitation agreements and "determined that the non-solicit agreement was adequate to protect the company's interest." RA-40 (14:5-8). Stabenow's testimony at the injunction hearing sums up the contrast between (a) Schmidt's non-compete agreement with Software Plus that Softchoice seeks to enforce in this case and (b) Softchoice's own non-solicitation agreement:

- Q. And you don't characterize that [Softchoice's own agreement] as a non-compete? You characterize that as non-solicit agreement, right?
- A. Correct.
- Q. And that agreement you would agree with me is much less restrictive than Mr. Schmidt's agreement?
- A. I would agree with that.
- Q. It leaves a lot more options open to the employee than Mr. Schmidt's agreement?
- A. Yes.
- Q. And that agreement is adequate to protect Softchoice's interests, is it not?
- A. We felt it is. We felt it was a fair balance.
- Q. And you still feel that way?
- A. I do.

Q. In other words, you don't need the non-compete to protect your interests? Your view is that the non-solicit is adequate, true?

A. I believe it is.

Tr-206:7-24; see also RA-65 (49:11-16), 66 (53:8-11, 53:20-54:7, 54:22-55:2), 67

(59:20-60:3) ("I don't believe that there is or should be a restriction placed upon his ability to go call on that new customer, no."), 68 (64:7-25).

**E. Softchoice's Acquisition of Software Plus and Schmidt's Brief Second Stint with Softchoice**

Software Plus's employees were summoned to a mandatory conference call/webcast on the morning of December 11, 2007. At this meeting, much to his surprise and disappointment, Schmidt learned that Softchoice had acquired Software Plus and he was suddenly an employee of the very company he had left years earlier. Tr-84:18-22.

**1. Schmidt was with Softchoice only 10 days and had no access to its systems or information.**

Schmidt worked under Softchoice for only 10 days. Tr-84:25-85:2. During that 10-day period, he was working for Software Plus, a Softchoice company. RA-80 (24:5-9). During this brief period in December 2007, the systems of Software Plus had not yet been integrated. Tr-85:14-16. Further, Schmidt was never given access to, much less trained on, Softchoice's databases and systems. Tr-85:11-13, 208:11-13; RA-45 (75:6-14). (Schmidt was not "with the company long enough to learn anything like that"); see also, RA-69 (87:1-5). As he had done before the acquisition, Schmidt worked entirely from home, so he never even went into work in the Softchoice offices. Tr-85:6-7. He

obtained no information of any kind regarding Softchoice's methods of doing business. Tr-85:17-20, 208:3-7, 14-16; RA-47 (97:14-17).

**2. Schmidt asked but never got answers to several important questions**

Having worked for Softchoice before, Schmidt had insight into Softchoice's compensation system, quotas, and sales goals for employees, and methods for coverage of accounts, and he was curious to know how Software Plus's version of these systems would change after the acquisition. A.47 (68:7-13); RA-89 (209:20-23). Given Softchoice's lay off of 21 Software Plus employees the day after the acquisition, id. (210:5-11), these were reasonable concerns. RA-74 (134:22-25). Schmidt repeatedly asked his new supervisors these questions, RA-72 (128:9-16), 107, 111, but received nothing "concrete" in response. RA-73 (129:4), 83 (70-8-12).

**3. Softchoice tried to get Schmidt to sign a waiver and release to try to make the non-compete agreement enforceable, but Schmidt refused.**

During his 10 days with the company after the acquisition, Schmidt discussed his non-compete agreement with Chris Illingworth. Tr-86:7-11. In talking to Illingworth "regarding the release, there was mention of the fact that Softchoice didn't like the language in the trust and the non-compete." Tr-103:15-17. Softchoice sent Schmidt a proposed Waiver and Release (RA-136-137), and Chris Illingworth called him to discuss it. Tr-87:1-3. The Waiver and Release proposed an agreement in which Softchoice would pay Schmidt real money from the Plan, and in exchange Schmidt would "acknowledge" that the non-competition obligations would "remain" in effect. RA-136; Tr-87:23-24. Schmidt would have to sign the Waiver and Release to get the money, Tr-

87:7-10, 18-20, and Illingworth wanted Schmidt to sign the agreement so the money from the trust could be paid out. Tr-87:4-6.

Schmidt reviewed the Waiver and Release and had attorneys review it. Tr-89:6-10. He then emailed Illingworth, trying to “get a better understanding of what the situation was regarding the [the Plan], new non-compete I guess you would call it, the old non-compete, and things like that.” RA-134; Tr-88:6-11. He described his understanding of his options, Tr-88:12-15, which were essentially: if I sign the document I am subject to non-compete, and if I don’t sign the document I am not subject to a non-compete. Tr-88:16-19. Illingworth responded that “that is kind of the way he understood it but he would have to run it by the Softchoice people ...because they were the ones doing this.” Tr-104:6-14; RA-63 (38:5-40:22). Illingworth did not follow up with Schmidt after that call. Tr-104:15-16. Neither Illingworth nor anyone else ever got back to Schmidt and told him he was wrong or disagreed with his interpretation. Tr-88:20-89:1. Schmidt decided not to sign the Waiver and Release because he had no intentions of working for Softchoice. Tr-89:2-5.

#### **4. Schmidt resigns.**

Schmidt left Software Plus because Softchoice had acquired the company and he did not want to work for Softchoice. Tr-84:6-8, 85:4-5. He sent his letter of resignation to Chris Illingworth on Friday, December 21, 2007, 10 days after the announcement of the acquisition. RA-81 (26:2-5). From then through the end of the year, when Schmidt spoke to customers, he directed them to contact Jeremy Krueger, their longstanding inside representative. RA-81 (28:12-18), 82 (31:6-8). During the same time period,

Schmidt boxed up the contents of his home office and sent them to Illingworth at Software Plus. Tr-92:13-16.

**F. Softchoice's Enforcement of the Non-Compete**

**1. Softchoice Threatened Schmidt.**

When Softchoice's Douglas Stabenow heard that Schmidt had resigned, he called him and threatened him. Tr-90:1-3. Even though Stabenow did not feel that a strict non-compete was necessary or even fair, Tr-206:7-24, he told Schmidt that there was a strict non-compete in place. Tr-90:4-9, 193:11-13. Stabenow also told Schmidt that "Softchoice was going to use the legal process to make life hell for me and my family if I decided to go and work for a competitor." Tr-90:6-9 (emphasis added), 99:8-10, Tr-218:18:19, 219:2-10; RA-83 (70:25-71:6), 55-56 (187:4-16, 188:11-189:1) ("Yeah, I probably said that.").

**2. Schmidt consulted attorneys concerning the non-compete agreement and then accepted a position with En Pointe.**

Before accepting his current position with En Pointe, Schmidt talked with three different attorneys about the enforceability of the non-compete agreement. RA-85-86 (90:7-10, 92:10-12, 95:5-14).<sup>6</sup> The attorneys told him that the agreement was unenforceable because it was overly broad, overly restrictive, and lacked consideration. RA-86 (93:6-11, 19-20). They also told him that under his particular circumstances,

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<sup>6</sup> In fact, Schmidt had already consulted one of the attorneys before he resigned on December 21, 2007.

including the corporate acquisition, the resulting change in his pay, and “the entire situation surrounding the noncompete and the threats, the threatening conversation that Douglas Stabenow had had with me,” it would be very difficult for a court to find the noncompete agreement enforceable. RA-87 (97:14-23).

After these discussions, and lacking any “concrete” information to the contrary from Softchoice (other than Stabenow’s threats), he accepted employment with En Pointe, went to work, and starting doing his job. RA-88 (102:15-16). Once at En Pointe, his marketing plan did not focus solely on his five former Software Plus customers, although he did contact all of them shortly after he started working. RA-131; Tr-58:22-24, 59:1-3, Tr-68:15-24, 92:3-7.

**3. Softchoice seeks a TRO to enforce a non-compete agreement that its highest levels of management believe is unfair and not required**

Shortly after Schmidt started at En Pointe, Softchoice commenced this lawsuit. Although Softchoice did not name En Pointe as a defendant, Softchoice admits that it filed this action against Schmidt partially “for the effect it would have on En Pointe.” Tr-201:10-13. Softchoice also acknowledges that it sued Schmidt in part “to demonstrate to [its] remaining employees that [it was] being very aggressive.” Tr-202:4-10. Softchoice wanted the lawsuit “to be a deterrent to folks who were considering leaving.” Tr-203:14-16; RA-39 (9:6-10:4).

**G. Softchoice’s Effort to Retain Customers has Succeeded.**

After Schmidt’s departure, Softchoice/Software Plus continued its relationships with the five customers that had been assigned to Schmidt through the assigned inside

sales representative, who had already served as the “gateway” for these customers for well over a year. RA-93 (¶ 23). Specifically, Jeremy Krueger had daily contact with the customers, and served as a resource to assist with passing contact information along to Softchoice. Tr-211:19-21; RA-54 (160:9-15).

Stabenow also immediately put in place an action plan to retain the Software Plus customers to which Schmidt had been assigned. RA-49 (136:7-9), 52 (147:21-148:6). As a part of this plan, Softchoice assigned an experienced outside sales representative, Tom Parker, to fill Schmidt’s spot on each client team. RA-48 (132:12-14). Parker had been with Softchoice for over three years and was very experienced. RA-133. Softchoice acknowledged that a senior person like Parker “would probably be able to ramp much more quickly than...someone green.” A.62 (94:1-5).

Prior to the hearing on the motion for temporary injunction, which was three months after Schmidt resigned, Softchoice had contacted all five of the customers formerly assigned to Schmidt, and Parker had initiated relationships with and Softchoice had received business from at least three of those customers. RA-51 (144:9-12) (American Dental Partners: Tom Parker has “had some good calls there and things are going pretty well”); 51-52 (144:16-20, 144:25-145:3) (Anderson Corporation: “so far they appear to be purchasing on a regular basis...that one is going in terms of this group of customers, going fairly well.”); 52 (145:15-21) (Land O’Lakes continues to do business with Softchoice. Parker is the rep; Parker’s “got the initial relationship started”).

Both of the remaining two customers, ATK and Fastenal, have informed Softchoice that they do not intend to do business with Softchoice. RA-108. Notably, Parker had prospected ATK over the years, and Fastenal for the last three years (while Schmidt was still with then-competitor Software Plus), so neither Parker nor Softchoice was new to these companies. RA-53 (152:10-14), 57 (219:23-220:16). Fastenal and ATK listened to what Parker had to say and decided that they did not want to do business with Softchoice. Fastenal explained its reasoning: “We are aware of the frequency of changes to sales teams and representatives, we are not interested.” RA-57 (217:17-218:4), 108.

#### **SUMMARY OF ARGUMENT**

This case involves two elements: (a) an Employee Retention Plan with a forfeiture-on-competition provision and (b) a freestanding non-compete agreement. Schmidt executed both agreements on November 28, 2006, while he worked for Software Plus. The Employee Retention Plan does not forbid Schmidt from competing with the company, but instead provides that if he does so within one year of leaving the company, he forfeits any right to receive any money from his Plan Account. A.78. In contrast, the non-compete agreement forbids Schmidt for two years after leaving the company from soliciting customers of Software Plus or anyone who was solicited by Software Plus, “whether or not [Schmidt] [was] involved in providing such products or services or involved in soliciting such person or entity.” A.64. The final page of the Plan, captioned “Acknowledgement and Acceptance,” recites that the non-compete agreement is additional consideration for the Employee Retention Plan. A.82.

Softchoice seeks to have the parties' exchange of promises in the Employee Retention Plan serve as separate consideration for the non-compete agreement, despite the fact that the Retention Plan is a stand-alone executory contract that automatically eliminates its own consideration if its conditions are not met. In a nutshell, Softchoice automatically got all of its money back when Schmidt elected to work for a competitor, yet Softchoice still wants the Court to enforce the now-unsupported promise not to compete. Softchoice cannot have its contract and eat it too.

In addition, Softchoice's apparent request that this Court decide factual issues crucial to the requested injunction that the District Court did not reach misapprehends the role of this Court. Before any injunction could issue on any legal ground, the case would need to be remanded to the District Court for determination of those issues in the first instance. As discussed below, those other factors favor Schmidt in any event.

## **ARGUMENT**

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

Missouri law<sup>7</sup> disfavors non-solicitation agreements as restraining trade and restricting an employee's right to earn a living. See, e.g., Sturgis Equipment Co. v. Falcon Indus. Sales Co., 930 S.W.2d 14, 16-17 (Mo. App. 1996) (noting that “[c]ovenants not to compete are not favored in the law” and that “[r]estrictive covenants

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<sup>7</sup> As Softchoice's brief notes, the Software Plus Employee Retention Plan provides that it “shall be governed by and construed in accordance with the laws of Missouri.” A.80.

limiting individuals in the exercise or pursuit of their occupations are in restraint of trade.” (citations omitted)). Courts therefore review non-solicitation agreements strictly and construe them narrowly. Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 610 (Mo. 2006).

Although applying Missouri substantive law, a Minnesota court evaluates a request for a temporary injunction based on a non-competition or non-solicitation agreement using the five factors the Minnesota Supreme Court laid out in Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (1965):

1. The nature of the relationship between Softchoice and Schmidt prior to the dispute,
2. The harm to Softchoice if the temporary relief is denied compared to the harm to Schmidt if relief is granted,
3. Softchoice’s likelihood of success on the merits,
4. The public interest, and
5. Administrative burdens in supervising and enforcing the order.<sup>8</sup>

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

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

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<sup>8</sup> Softchoice acknowledges that Minnesota law governs the procedural requirements for the issuance of a temporary injunction through its own discussion of Minnesota’s Dahlberg factors. See Appellant’s Br. at 36-40.

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

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

Although Softchoice briefly acknowledges that this Court reviews denials of motions for temporary injunctions for abuse of discretion, Appellant’s Br. at 17, it never mentions the standard of review again and never actually asserts that the District Court abused its discretion in any specific finding or conclusion. Instead, Softchoice argues that the District Court “erred” in various general respects and asks this Court to substitute its own judgment for that of the district judge. See, e.g., Appellant’s Br. at ii, vii, 4, 18-19, 23, 29, 36, 40. Moreover, Softchoice appears to ask this Court to make its own

findings on disputed issues of fact that the District Court did not reach because it did not need to.

Neither of these requests recognizes the proper role of this Court. The District Court did not abuse its discretion in denying the injunction against Schmidt, and this Court should affirm.

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT SOFTCHOICE WAS UNLIKELY TO SUCCEED IN ESTABLISHING CONSIDERATION FOR SCHMIDT'S NON-COMPETE AGREEMENT.**

The District Court correctly concluded that Softchoice was unlikely to succeed at trial because it was unlikely to be able to prove that Schmidt received any consideration for the non-compete agreement. At the conclusion of its three-paragraph discussion of consideration, A.34 (¶¶ 16-18), the District Court made the following conclusion:

The 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 would he.

Id. (¶18).<sup>9</sup> This succinct conclusion is amply supported by the record, and the District Court did not abuse its discretion in denying the motion for temporary injunction.

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<sup>9</sup> Softchoice also argued in the District Court that Schmidt's mere continued employment with Softchoice constituted consideration for the non-compete agreement. See, e.g., Plaintiff's Memorandum of Law in Support of Its Motion for a Preliminary Injunction at 24 (3/17/08). The District Court rejected this argument on the ground that Softchoice also continued to employ others in Schmidt's position without requiring them to sign a non-compete agreement. See A.34 (Order ¶¶ 16-17). Softchoice has abandoned that argument on appeal.

**A. Schmidt Has Not Received and Will Never Be Entitled to Receive Any Employee Retention Benefit from the Softchoice Account.**

The central pillar of Softchoice's argument is its assertion that Schmidt never proved that he would *not* be entitled to receive the money in the trust accounts, Appellant's Br. at 18 n.2, and that the District Court clearly erred in finding that Schmidt would not receive any money from the account. *Id.* at 18. This critical premise fails for two reasons.

First, the record here not only permits but compels the conclusion that Schmidt will never be entitled to receive any money from the Employee Retention Plan. The Plan itself contains this forfeiture provision:

To the extent a participant violates or breaches any of the covenants in Section 5 [listing various types of competition] prior to the payout of the entire Employee Retention Benefit, any amounts that have not been paid prior to such violation or breach shall be forfeited.

A.77 (¶4). Echoing this, Section 5 of the Plan states:

Notwithstanding anything else contained in this Plan or any other Company incentive plan to the contrary, Participant shall not be entitled to receive any Employment Retention Benefit if upon the termination of Participant's employment with the Company or for a period of one (1) year thereafter, regardless of how such employment ends, Participant [engages in any of a list of acts in competition with the Company]

A.78 (¶5). Because Schmidt did engage in some of the listed competitive acts, under the plain language of the contract he "forfeited" any unpaid amounts in his account and was "not entitled" to receive any Employee Retention Benefit." In other words, he lost any interest in and had no right to receive any money that might have been in his account.

The record thus fully supports the District Court's conclusion that he would not receive any money.

Second, Softchoice overlooks the undisputed fact that it, not Schmidt, bears the burden of proof on this issue. If Softchoice intended to dispute the plain language of its own contract and demonstrate that Schmidt in fact had received or might receive money from the plan, Softchoice was obligated to offer evidence supporting that claim. Despite ample opportunity and clear notice that Schmidt would argue a lack of consideration, Softchoice did not even try to do so. Indeed, the District Court noted that "[b]oth parties agree that Schmidt never received any money from the employee retention plan, nor will he," A.34, and Softchoice cites nothing in the record to suggest that it in fact disputed this issue below.

Softchoice also misleads this Court with its assertion that "[t]he evidence at the hearing was that Schmidt's trust account remains open and holds the funds deposited by Software Plus (T.31-32)." Appellant's Br. at 7. The hearing testimony Softchoice cites, Tr.31-32, fails to support this assertion. This citation merely refers to Schmidt's testimony that he does not know whether the money is still being held for him. Softchoice was in the best position to offer evidence concerning whether Schmidt's account still held any money. Indeed, Softchoice used an earlier, March 2007 brokerage statement for the account in deposing Schmidt. See A.68-75. Nevertheless, despite bearing the burden of proof, Softchoice failed to call a witness or offer a document at the hearing to show that the account still contained any money. No evidence contradicts the District Court's finding that Schmidt had not received and would not receive any money.

**B. That a Promise May Sometimes Provide Consideration Does Not Dispose of the Issue Here.**

Seeking to avoid the legal consequences of this conclusion, Softchoice suggests that Schmidt argued, and that the District concluded, that a promise cannot serve as consideration. See, e.g., Appellant's Br. at 4, 18-20, 21-23. In fact, Schmidt never made such an argument, and the District Court never reached such a conclusion. There is no question that a promise of future performance may sometimes provide consideration for a contract. E.g., Career Aviation Sales, Inc. v. Cohen, 952 S.W.2d 324, 326 (Mo. App. 1997).

Softchoice uses this straw-man argument to try to avoid the consequences of a number of relevant facts, including:

- Softchoice's Retention Plan purports to be consideration *both* for the executory agreement embodied in the forfeiture-for-competition provision *and* for the inconsistent current promise not to compete. E.g., A.82.
- The company could unilaterally eliminate Schmidt as a Plan participant for any year. A.76 (¶1).
- The company had complete discretion to determine what (if anything) would be contributed to Schmidt's account. *Id.* (¶2).
- The money contributed to the plan was still subject the company's obligations to its general unsecured creditors.
- Schmidt could lose any chance of receiving any money from the Plan for many reasons, including termination for a variety of causes. A.77 (¶3.3)

After all, argues Softchoice, if a conditional promise can serve as consideration, none of these facts matter.

In fact, of course, these facts do bear on the issue of consideration. The issue here is not whether a conditional promise may *ever* constitute consideration, but whether the *specific* promise Software Plus made here was sufficient to constitute consideration for the add-on non-compete agreement. In other words: Was the promise here real? Did it inure either to the benefit of Schmidt or to the detriment of Softchoice? Was it independent of Softchoice's discretion? Did other provisions of the Plan take it away? And did the Retention Plan elect its own exclusive remedy? An examination of these questions demonstrates that the District Court's conclusion was correct, and that the non-compete agreement is unenforceable for lack of consideration.

**C. Because the Plan Does Not Prohibit Competition, It Cannot Provide Consideration Entitling Softchoice to the Anti-Competitive Injunction It Seeks.**

The Employee Retention Agreement cannot provide consideration for the freestanding non-compete agreement because it is an illusory promise, it is entirely one-sided, it is subject to Softchoice's unbridled discretion, it is forfeited if the Plan's conditions are not met, and it contemplates an improper double remedy. In essence, Softchoice asks the Court to read the parties' exchange of promises as follows:

- If you don't compete, we might pay you;
- If you do compete, we won't pay you; and
- If you do compete, we can force you not to compete, and we *still* won't pay you.

In other words, Softchoice would have this Court allow it to retain or reclaim every bit of the money it “paid” Schmidt for his promise while allowing it to enforce that promise as well. The Court should reject this effort for several reasons.

- 1. The Plan cannot provide consideration for the non-compete agreement because under the Plan, Softchoice enjoys all of the value and Schmidt receives nothing.**

The reason the Employee Retention Plan cannot provide consideration for an enforceable non-compete agreement is built into the Plan itself: under the Plan’s own terms, if Schmidt chooses to compete with Softchoice, Softchoice receives back—and here in fact has received back—every dollar it paid into Schmidt’s account. Softchoice cannot *both* escape the cost of its bargain *and* receive the benefit of that now-unsupported bargain.

The character and terms of the Plan itself are clear. Softchoice’s brief describes the agreement in executory terms as follows:

The Plan and the Agreement provided that Schmidt would be awarded money...which would eventually be paid out to Schmidt *if he complied with the terms of the Plan and the Agreement.*

Appellant’s Br. at 7 (emphasis added). Of course, if Schmidt does not meet the conditions of the Plan, Softchoice has no obligation to pay Schmidt any additional money. So far, so good—the parties have exchanged promises, and if one does not perform, the other need not perform.

Softchoice, however, does not stop there. Softchoice wants the Court to compel Schmidt to perform the acts specified in the non-compete agreement (that is, to refrain

from competing) despite the absence of any obligation that Softchoice pay Schmidt any money from the Plan account—ever.

Here is how Softchoice’s argument would apply in a more familiar situation—a purchase agreement for a house. Say that Softchoice had agreed to buy Schmidt’s house. Under the contract, Softchoice puts the purchase price into escrow, and promises that if Schmidt conveys title to the house on the closing date, Softchoice will direct the escrow account to transfer the money to Schmidt. The contract also provides that, should Schmidt fail to convey title to the house on the closing date, the escrow agent will immediately transfer the money back to Softchoice.

On the closing date, Schmidt does not deliver title to the house and, pursuant to the contract’s terms, Softchoice receives a full refund of the purchase price from the escrow agent. In the real world, that would be the end of it. One party has failed to fulfill a condition of the contract, and the other party has received the remedy provided in the contract. According to Softchoice’s position here, however, Softchoice would be entitled *both* to the return of the full purchase price *and* to an order forcing Schmidt to deliver title to the house for nothing. No court would allow such an absurd result.

The situation is the same here, but in the employment context. Although Softchoice has retained or recovered all of the money in the Plan—the supposed “consideration” for the promise not to compete—it nonetheless asks the Court to force Schmidt to comply with the non-compete promise as if he had actually received the consideration for the promise.

As it would if confronted with the house example, this Court should reject Softchoice's request for a double remedy. Ordinarily, a party claiming a breach of contract would have to elect between available contract remedies such as rescission/refund and specific performance. Timmons v. Bender, 601 S.W.2d 688, 690 (Mo. App. 1980) ("where plaintiff has received anything of value under a claim thus asserted, he cannot thereafter pursue another and inconsistent remedy" (quoting Johnson-Brinkman Commission Co. v. Missouri Pac. Ry. Co., 126 Mo. 344, 28 S.W. 870, 872 (1894))). Here, however, Softchoice has already elected its remedy through the Retention Plan that its predecessor Software Plus drafted. The Plan provides that, should Schmidt compete with the company, all the money in his account "shall be forfeited." A.77 (¶ 4). By electing this automatic forfeiture of the consideration on failure to meet the contract condition, Softchoice has foreclosed itself from seeking the alternative remedy that it seeks here—an injunction to force compliance with the promise that rested on that consideration. See Hughes v. Estes, 793 S.W.2d 206, 210 (Mo. App. 1990) ("Recovery upon the basis of the loss of the bargain is not available when the transaction has been rescinded." (citing Salmon v. Brookshire, 301 S.W.2d 48 (Mo. App. 1957))).

This conclusion does not change merely because the freestanding non-compete agreement provides that Software Plus "shall be entitled to obtain... injunctive relief" against Schmidt. A.93 (¶ 4). Indeed, this inconsistency demonstrates the whole problem with Software Plus tacking the separate non-compete agreement onto the already inherently integrated Plan. Softchoice cannot assert a remedy under the non-compete agreement based on the Plan as consideration when the Plan itself has already eliminated

that consideration by its own terms. The forfeiture language is automatic (“shall be forfeited”), and the forfeiture occurs as soon as Schmidt competes, without any need for Softchoice to do anything. In contrast, the quoted language from the freestanding non-compete agreement merely allows Software Plus to seek an injunction, assuming that it has not already received a remedy. But of course it has. Turning back to the house-sale analogy: even if Softchoice had attached an addendum to the sales contract permitting Softchoice to obtain an injunction forcing Schmidt to transfer title to the house, the company still would not be entitled to that remedy if it had already received back all the consideration it had paid. Such is Softchoice’s situation here.

In sum, the District Court did not abuse its discretion in concluding that Softchoice was unlikely to succeed in carrying its burden to prove non-illusory consideration for the non-compete agreement. Whether one takes the view that the consideration never existed or that it fails now because the contract itself required its return to Softchoice, the necessary conclusion is that the Plan cannot and does not now provide a basis for injunctive relief barring Schmidt from pursuing his career. See Wilmar, Inc. v. Liles, 185 S.E.2d 278 (N.C. App. 1971) (“A consideration cannot be constituted out of something that is given and taken in the same breath” (quoting Kadis v. Britt, 224 N.C. 154, 163, 29 S.E. 2d 543, 548 (1944))).

**2. Viewing the Plan as a forfeiture-for-competition agreement, the result is the same.**

Viewed another way, if the non-competition agreement in the Plan is enforceable at all, it is enforceable only as in the context of the forfeiture-for-competition provision;

that is, Schmidt can compete, he just cannot do so *and* still receive the benefits of the Plan. Indeed, this is a logical reading of paragraph 4 of the Plan, which unambiguously states that the money in Schmidt's account "shall be forfeited." A.77. In this context, a "forfeiture" is "[a] destruction or deprivation of some estate or right because of the failure to perform some obligation or condition contained in a contract." Black's Law Dictionary 661 (7<sup>th</sup> ed. 1999).

The Plan's forfeiture provision was self-executing—once Schmidt left and began competing, the contract's own terms deprived him of the right to obtain any money set aside in the trust account, without the need for Softchoice to take any affirmative action to bring about the forfeiture. Softchoice's brief tries to gloss over this point, vaguely asserting that under the agreement, the company "could elect not to make a payout" to Schmidt if he breached the non-compete provision. Appellant's Br. at 10 (using quoted language twice). In fact, the contract language gives the company no such "election." The contract states, in mandatory terms:

To the extent a participant violates or breaches any of the covenants in Section 5 prior to the payout of the entire Employee Retention Benefit, any amounts that have not been paid prior to such violation or breach *shall be forfeited*.

A.77 (emphasis added). Softchoice itself admits elsewhere in its brief that it had no discretion in this regard: “only Schmidt controlled whether the payout would be forfeited.” Appellant’s Br. at 8.<sup>10</sup>

As with the house-sale example, under such a forfeiture-for-competition clause, Softchoice is not entitled *both* to reclaim the consideration promised to Schmidt for the non-compete *and* at the same time to demand specific performance of Schmidt’s obligations allegedly obtained in exchange for that very consideration. Case law in Missouri, Minnesota and beyond supports this common-sense conclusion. Allredge v. City of National Bank and Trust Co., 468 S.W.2d 1, 4 (Mo. 1971) (“[t]he reasoning is that the former employee is not prohibited from engaging in such employment or activity, but...he may not...be entitled to the benefits” of the plan); Harris v. Bolin, 247 N.W.2d 600, 602 (Minn. 1976) (noting that courts have based approvals of forfeiture-for-competition agreements on the conclusion that “employer could not obtain an injunction preventing an employee from competing with the employer”); Naftalin v. John Wood Company, 116 N.W.2d 91, 99 (Minn. 1962) (same, though regarding forfeiture of commissions); Van Pelt v. Berefco, Inc., 208 N.E.2d 858, 865 (Ill. App. 1965) (“[h]e is free to engage in competition...but he is not free to do so while accepting benefits of the

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<sup>10</sup> Of course, that statement is not completely accurate. Although Softchoice had not discretion, the Plan was formally “unfunded” and Schmidt was in line behind creditors for any payout.

retirement plan”); Rochester Corp. v. Rochester, 450 F.2d 118, 123 (5<sup>th</sup> Cir. 1971) (same).<sup>11</sup>

**3. Softchoice’s “detriment” argument misreads the facts here.**

Softchoice also tries to characterize the Plan as consideration based on the argument that it suffered “detriment” as a result of entering into the agreement with Schmidt. See Appellant’s Br. at 21-23. Although a detriment to the promisor may serve as a substitute for affirmative consideration to the promisee, Softchoice misapplies the case law and mistakes the relevant facts in the present case.

Softchoice rests its argument primarily on Bankers Capital Corp. v. Brummett, 637 S.W.2d 424 (Mo. App. 1982). In Bankers Capital, a third party guaranteed a borrower’s loan from a lender by promising to purchase certain assets for the outstanding balance of the loan if the borrower defaulted. Id. at 427-28. When the borrower

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<sup>11</sup> In contrast, the cases on which Softchoice relies have substantially different contractual provisions and are not apposite. See, e.g., Aetna Retirement Serv., Inc. v. Hug, 1997 WL 396212, \*9 (Conn. Super. Ct. June 18, 1997) (holding promise of nondiscretionary later bonuses constituted consideration for non-compete); Aon Consulting, Inc. v. Midlands Financial Benefits, Inc., 748 N.W.2d 626, 639 (Neb. 2008) (holding promise of severance package on termination or resignation constituted consideration for non-compete agreement); Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1267-68 (8th Cir. 1978) (finding consideration non-compete agreement where employer had option of continuing employee’s salary after his departure or letting him compete); Field v. Alexander & Alexander of Indiana, Inc., 503 N.E.2d 627,631 (Ind. App. 1987) (holding options worth \$50,000 provided consideration for non-compete agreement); Latuszewski v. Valic Fin’l Advisors, Inc., 2007 WL 4462739, \*12 (W.D. Pa. Dec. 19,2007) (listing multiple *current* benefits employees enjoyed in consideration for non-compete agreement).

defaulted and the assets turned out to be worthless, the guarantor argued that the contract lacked consideration. The Court rejected the guarantor's argument based on its express finding that the lender has suffered an identifiable *detriment* because it had loaned the borrower \$60,000 *in reliance on the third party's promise*. *Id.* at 429 ("there can be no question but that Bankers suffered detriment" as a result of "reliance on that contract"). That detriment was sufficient to constitute consideration. *Id.* (citations omitted).<sup>12</sup>

Softchoice's situation here is much different. With one exception (discussed below), the only way that Softchoice could have suffered detriment from Schmidt's participation in the Employee Retention Plan was if Softchoice voluntarily chose to do so. Any allocation of money to Schmidt's account was entirely discretionary with Softchoice, and the company could eliminate Schmidt as a plan participant whenever it wanted. A.76 (¶¶ 1, 2). As Softchoice's own Jump case observes, such "contracts which depend for performance upon the wish, the will or the pleasure of one of the parties are unilateral and cannot be enforced," Jump v. Manchester Data Sciences Corp., 424 F.

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<sup>12</sup> Contrary to the assertion in Softchoice's brief, neither Jump v. Manchester Data Sciences Corp., 424 F. Supp. 442, 445 (E.D. Mo. 1976), nor Vondras v. Titanium Research & Dev. Co., 511 S.W.2d 883, 885 (Mo. App. 1974), stands for the proposition that the "*possibility* of a detriment" serves as consideration for a promise. Appellant's Br. at 22 (emphasis in original). Indeed, neither decision even uses either the word "possibility" or the word "detriment." Jump involved a promise to repay an advance "when, as, and if" the defendant had the capability of repaying it. 424 F.Supp. at 444. The court held that this *present* contingent obligation to perform in the future was adequate consideration. *Id.* at 445 ("Defendant is obligated to repay the moneys advanced should that capability, from profits or cash flow, exist."). Vondras likewise has nothing to do with future contingent detriment, but involved an employer's breach of a current and continuing obligation to employ an employee for a set period.

Supp. 442, 445 (E.D. Mo. 1976) (citing Fullington v. Ozark Poultry Supply Co., 327 Mo. 1167, 39 S.W.2d 780, 782 (Mo. 1931)).

The sole exception to this “discretionary detriment,” and the item on which Softchoice’s brief focuses much of its attention, is the \$25,000 payment Softchoice made into Schmidt’s Retention Plan account after he signed the agreement. See A.68-75. Even Softchoice all but concedes that, without this existing “deposit,” Softchoice’s complete discretion in putting money into Schmidt’s account rendered its promise illusory. See Appellant’s Br. at 23, n.3.

As a matter of law, however, this \$25,000 payment cannot constitute consideration sufficient to enforce a promise not to compete because Softchoice faced no *actual* risk of losing that money if Schmidt broke the promise and competed. As noted above, under the Plan, if Schmidt competed with Softchoice, Softchoice automatically received back every penny of the money it put into Schmidt’s account, including earnings on the investments. Moreover, even while the money was in Schmidt’s account, it was still subject to claims by Softchoice’s general unsecured creditors. A.80 (¶ 16).

**4. Softchoice misreads the District Court’s citation of Noe.**

Softchoice’s attempt to undermine the District Court’s decision by disputing the court’s citation to National Motor Club of Mo. v. Noe, 475 S.W.2d 16 (Mo. 1972) misreads both the case and the District Court’s use of it. Repeatedly citing page 21 of the Noe decision, Softchoice’s brief suggests that the Noe court discussed at that page the employer’s consideration for the covenant not to compete. See Appellant’s Br. at 23-24 (“Because the covenant not to compete was in exchange for a benefit the employee had

already received...”). In fact, a careful reading of Noe makes clear that the court’s discussion of consideration on page 21 addressed *only* Count IV of the complaint, in which the employer sought to recover the cost of the departed employee’s training, and did not address any attempt to enforce any non-compete provision. Noe, 475 S.W.2d at 21. The Noe court’s discussion of the employee’s noncompetition provision appears on the following page, page 22, where the court invalidates the noncompetition provision on the ground that it lacked any territorial limitation. Id. at 22. The Noe case in fact never discussed the issue of consideration for the covenant not to compete, nor did the District Court suggest that it did.

The District Court here cited Noe for the more general proposition that consideration for a contract provision, whether a current benefit or the promise of a future benefit, must be real and not illusory. See A.34 (§ 18). Here, as the District Court noted and as discussed above, Software Plus’s promise was not real.

**5. Softchoice recognized and tried unsuccessfully to cure the problem.**

A final fact supporting the District Court’s exercise of discretion is Softchoice’s failed attempt to remedy the lack of consideration in the Software Plus agreement. Shortly after its acquisition of Software Plus, Softchoice presented Schmidt with a proposed “Waiver and Release.” That document provided that Softchoice would give Schmidt \$27,367.49 from the plan if Schmidt would “acknowledge” that the non-competition obligations would “remain” in effect. RA-136. Schmidt asked Softchoice point-blank to confirm his understanding that the noncompetition obligation would not

apply if he did not sign the “Waiver and Release.” RA-134. In response, a Softchoice executive indicated that Schmidt’s assessment was “pretty much right” and told him that the reason for the proposed new agreement was that Softchoice did not like Software Plus’s non-competition agreement. Tr-104:6-14; RA-63 (38:5-40:22).

In exercising its discretion, the District Court was entitled to infer from these facts:

- That Softchoice knew that the noncompete agreements it had taken over from Software Plus were unenforceable for lack of consideration, and
- that Softchoice knew that, in order to have an enforceable non-compete, it needed to have Schmidt sign a new agreement, supported by the payment of real money.

The District Court appropriately took these actions into account in considering the appropriateness of the equitable remedy Softchoice sought.

### **III. SOFTCHOICE FAILED TO ESTABLISH THE OTHER ELEMENTS NECESSARY FOR AN ANTI-COMPETITIVE INJUNCTION.**

Because it found that the non-compete agreement lacked consideration, the District Court properly refrained from ruling on the issues of the legitimacy of Softchoice’s interests and the reasonableness of the injunction sought, and on the other Dahlberg factors. Softchoice nevertheless argues all these issues in its brief, apparently asking this Court to resolve these issues without the participation of the District Court. But determining as an initial matter whether the facts support an injunction is not this Court’s role. See State by Drabik v. Martz, 451 N.W.2d 895, 896 (Minn. App. 1990) (“We will not engage in *de novo* review of a temporary injunction.” (citing Sunny Fresh

Foods v. Microfresh Foods, 424 N.W.2d 309, 310-11 (Minn. App.1988))). If a court denies a motion for a temporary injunction on incorrect grounds, as Softchoice argues it did here, but does not reach other issues necessary to the requested injunction, this Court will ordinarily remand to the district court for further findings. See, e.g., Unlimited Horizon Marketing, Inc. v. Precision Hub, Inc., 533 N.W.2d 63, 67 (Minn. App. 1995). Softchoice offers this Court no reason to depart from that procedure.

Because Softchoice devoted a substantial section of its brief to arguing these issues, Schmidt will address these issues to the extent the record and the District Court's decision permit. The record here demonstrates that the non-compete agreement does not protect a legitimate business interest of Softchoice, and is far broader than would be necessary to protect any such legitimate interest. With respect to the Dahlberg factors, three of the remaining four factors favor Schmidt and weigh against an injunction, and the fourth is at most neutral. Schmidt does not ask the Court to resolve these issues of fact but, given the state of the record, Schmidt submits that granting the injunction Softchoice sought would have been an abuse of discretion.

**A. The Non-Compete Agreement Does Not Protect a Legitimate Interest of Softchoice.**

The District Court was correct in denying Softchoice's motion for temporary injunction because Softchoice did not prove that its non-compete agreement served a legitimate business interest. Softchoice has the burden of identifying a legitimate interest justifying protection by the non-competition agreement. Sturgis, 930 S.W.2d at 17

(citing Continental Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. App. 1980)).<sup>13</sup>

These legitimate interests are limited to the company's trade secrets and customer relationships. Sturgis, 930 S.W.2d at 17; 28 Mo. Stat. Ann. § 431.202.1(3). The District Court found that Schmidt possessed no trade secrets, A.31-32, and Softchoice has not appealed from that ruling. Softchoice must therefore rely entirely on its claim that the non-compete agreement was intended to protect customer relationships. See Appellant's Br at 6, 31 ("to protect Softchoice's legitimate interest in its customer contacts").

Softchoice failed to prove that claim.

**1. Softchoice failed to prove that the Employee Retention Plan was intended to protect customer relationships.**

As a threshold matter, nothing in the record supports Softchoice's contention that Software Plus intended its non-compete agreement with Schmidt to protect its customer relationships. On the contrary, the record demonstrates that Software Plus's adoption of the "Software Plus, Ltd. *Employee Retention Plan*" was, as the document's title states, a plan to retain employees. The Employee Retention Plan does not mention any intention to protect customer relationships, but states instead that the company adopted the Plan because of its desire to "encourage continued employment of participants." The Plan also repeatedly uses terms like "retention credits," "Employee Retention Benefits," and

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<sup>13</sup> Although Missouri's non-compete statute, 28 Mo. Stat. Ann. § 431.202.1(4), would allow a non-compete agreement of less than a year even in the absence of a legitimate interest, Softchoice here seeks to enforce a two-year agreement. See Appellant's Br. at 31.

“Employee Retention Event,” see A.76-77, all compelling the conclusion that employee retention was indeed the central —indeed, the only—goal of the Plan. Softchoice offered no testimony to dispute the contract’s statements or to demonstrate Software Plus’s intentions in entering into the non-compete agreement.

Softchoice’s executives acknowledged that Softchoice itself had adopted its non-solicitation agreements to prevent employees from accepting better-paying jobs from competitors. RA-39 (9:6-10:4). Softchoice implemented that purpose here, using the Software Plus non-competition agreement to threaten to make Schmidt’s life “hell” when he resigned. RA-55 (185:10-187:16).

These *actual* purposes for adopting and enforcing non-compete agreements—tying employees to underpaying jobs and punishing them if they leave—are not legitimate purposes under either Missouri or Minnesota law:

The purpose of the restrictive covenant is *not* to punish employees, but to protect employers from unfair competition by former employees, without imposing unreasonable restraint on the employees.

Sturgis Equipment Co. v. Falcon Indus. Sales Co., 930 S.W.2d 14, 17 (Mo. App. 1996); see also Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 610 (Mo. 2006) (holding non-compete restrictions “are not enforceable to protect an employer from mere competition by a former employee, but only to the extent that the restrictions protect the employer’s trade secrets or customer contacts.”); Eutectic Welding Alloys Corp. v. West, 160 N.W.2d 566, 571 (Minn. 1968) (noting such restrictive covenants “constitute a form of industrial peonage without redeeming virtue in the American enterprise system”).

In sum, regardless of whether the protection of customer relationships might under some circumstances constitute a legitimate interest supporting a non-compete agreement, nothing in the record here remotely suggests that Software Plus or Softchoice actually intended such a legitimate purpose for the noncompete provisions in question. Softchoice did not meet its burden of demonstrating a legitimate interest, and the District Court correctly denied its motion for temporary injunction.

**2. Softchoice has no legitimate interest in protecting all of its customer relationships from competition by Schmidt.**

Even if Software Plus had intended its Employee Retention Plan to protect customer relationships, Softchoice's present effort to use the non-compete agreement do not represent a legitimate interest under the circumstances here. A customer is someone who "repeatedly has business dealings with a particular tradesman or business." Empire Gas Corp. v. Graham, 654 S.W.2d 329, 330-31 (Mo. App. 1983). In determining whether the relationships are reasonably subject to protection, the Court measures the quality, frequency and duration of the employee's exposure to customers. Superior Gearbox Corp. v. Edwards, 869 S.W.2d 239, 248 (Mo. App. 1997).

For the last year Schmidt was an outside representative at Software Plus, he had relationships with only five customers. Even with respect to these customers, the inside representative (whom Softchoice calls the "gateway" to the company) had much more frequent contact than Schmidt had. RA-93. The inside representative handled the vast majority of day-to-day calls, generated the vast majority of quotes, and worked on a day-to-day and a first name basis with the customers' purchasing departments. RA-41

(26:19-21), 50 (140:13-17); 93, 143, 147; Tr-146:12, 15. Thus, although Schmidt had contact with these five customers, the record demonstrates that he was neither the primary nor the most frequent contact. Softchoice has multi-person relationships with these customers and lacks a legitimate interest in protecting the customer relationships Schmidt had developed.

Even more obviously, Softchoice lacks a legitimate interest in severing Schmidt's relationships with customers with whom Schmidt had no relationship. Softchoice has—as Software Plus had—customers across the United States. Software Plus alone had 40 to 60 salespeople and at least 2,000 customers. RA-60 (10:6-9, 12:1-4). And, of course, Softchoice and Software Plus have made numerous unsuccessful contacts with additional potential customers. Other than the five customers discussed above, Schmidt had already shifted his relationship with all Software Plus customers to other representatives more than six months before he left the company. RA-72 (125:20-24); Tr-66:21-67:4.

Softchoice has no legitimate interest in barring Schmidt from contacting any of these customers or prospective customers, most of whom he does not even know. Softchoice executives concede this point. See RA-66 (54:3-7) (“[I]f Marty had targets that he did no business with, I don’t believe this would have issue with him going after other customers that he had not worked with in the past.”) Yet Softchoice argues in its brief that it has a legitimate interest in barring Schmidt from contacting any of these companies, regardless of whether Schmidt was involved in the sale or solicitation and regardless of whether the companies are or have ever been actual customers. Softchoice has no legitimate interest in defending these customer relationships (to the extent any

exist) from Schmidt, merely an illegitimate interest in preventing competition. The law will not sustain a non-compete agreement based on such an interest.

**B. The Injunction Sought is Far Broader Than Necessary to Protect Any Legitimate Interest of Softchoice**

The District Court was also correct in denying Softchoice's motion because the injunction the company sought was far broader than necessary to protect any arguable legitimate interest. Under Missouri law, "to determine whether a restriction is reasonable, courts inquire whether it is no greater than fairly required for the protection of the party seeking to enforce it." Sturgis Equipment Co. v. Falcon Indus. Sales Co., 930 S.W.2d 14, 17 (Mo. App. 1996). See also Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 610 (Mo. 2006) (holding scope of covenant must be "no more restrictive than is necessary to protect the legitimate interests of the employer"). Softchoice fails to meet this burden for several reasons.

**1. Softchoice ignores the necessarily fact-specific nature of the reasonableness determination.**

Softchoice tries to justify the reasonableness of the noncompete and nonsolicit agreements here largely by citing other cases involving other circumstances that have upheld agreements with similar periods and similar geographic scope. See Appellant's Br. at 30-34. The problem with that approach is that the evaluation of "reasonable" is unavoidably case-specific. Exactly what is "necessary to protect the legitimate interests of the employer" will depend on a variety of factors including, as the Sturgis court noted:

the circumstances surrounding the restriction, including its subject matter, the purpose it serves, the situation of the parties, the limits of the restraint, the specialization of the business involved, the consideration supporting the

restraint, the threatened danger to the employer absent the restriction, and the economic hardship imposed on the employee.

Sturgis, 930 S.W.2d at 17. For example, Softchoice relies on Schott v. Beussink, 950 S.W.2d 621 (Mo. App. 1997), in which the court held that a nonsolicitation agreement was enforceable because it did not deny employees “the right to practice accounting universally.” Id. at 626. The market for accountants, of course, is both larger and broader than that for a commercial software salesman, but Softchoice’s discussion makes little attempt to address that difference.

The intensely factual nature of this inquiry is, of course, why the issue is left to the district court in the first instance, as discussed above. Despite this, Softchoice’s discussion of this issue mentions few facts and cites the record rarely, and when it does it often misses the point. For example, Softchoice asserts 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.” Appellant’s Br. at 35 (citing A.62). But that is not the standard, and Softchoice cites no law to suggest that it is. A non-compete provision is not intended to preserve a particular level of business, but merely to give the former employer a fair chance. The restraint may not exceed the period during which the company’s goodwill is subject to appropriation by the employee. AEE-EMF, Inc. v. Passmore, 906 SW.2d 714, 723 (Mo. App. 1995). Under that standard, Softchoice failed to meet its burden of demonstrating that the restrictions it sought were reasonable.

**2. Softchoice acknowledges that the restrictions in the Software Plus Employee Retention Plan exceed what is necessary.**

Softchoice executives concede that Schmidt's agreement with Software Plus exceeded what was necessary to protect any legitimate interests Softchoice might have, particularly with respect to scope. Tr-206:7-24 ("Q. In other words, you don't need the non-compete to protect your interests? Your view is that the non-solicit is adequate, true? A. I believe it is."). When Softchoice looked at what would be reasonable for the protection of its customer contacts, it settled on something far less onerous.

For example, outside the context of litigation, Softchoice itself regards three months as sufficient to train a replacement representative to handle new accounts. Stabenow's strategic plan for Minneapolis called for Michael Johnson to hire, train, and divide the territories for new representatives within 60 to 90 days. RA-112-113. Likewise, when Softchoice needed to train two new outside representatives in January 2007, its training and development team concluded that "it would take them... four months to be up to speed and producing reps." RA-77-78 (76:21-77:25).<sup>14</sup>

**3. Softchoice already had its own existing customer relationships with the five accounts.**

Moreover, it is important to remember that Schmidt handled his five accounts for *Software Plus*, not for Softchoice. Softchoice in fact already had its own sales representatives prospecting on some of these accounts, RA-53 (152:10-14), 57 (219:23-

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<sup>14</sup> Consistent with this, En Pointe, Schmidt's current employer, uses a non-solicitation provision for sales representatives with only a three-month term. RA-127.

220:16), and once Schmidt left, Softchoice succeeded in selling to three of the five. In this context, the agreement is too restrictive under both Missouri and Minnesota law. See Mills v. Murray, 472 S.W.2d 6 (Mo. App. 1971) (injunction should be limited to those whom employee had served during the last year); Benfield, Inc. v. Moline, 351 F. Supp.2d 911, 918 (D. Minn. 2004) (agreement not overly restrictive where limited to “twelve former clients,” while permitting solicitation of “over one thousand other potential” clients).

**4. Softchoice had successfully placed experienced account representatives on Schmidt’s five customers even before the hearing on Softchoice’s motion for temporary injunction.**

Also telling is how little time Softchoice needed to find a replacement for Schmidt, train that replacement, establish relationships with the customers formerly assigned to Schmidt, and start generating business from those accounts. For the six months before he left, Schmidt was handling only five customers for Software Plus. RA-72 (125:20-24); Tr-66:12-67:4. Immediately after Schmidt left, Softchoice created an action plan to retain those customers. Softchoice assigned an experienced outside representative to each of the five customers and kept the same inside representative who had served the customers for well over a year. RA-49 (136:7-9), 52 (147:21-14:6). Even before the hearing on Softchoice’s motion for temporary injunction, the experienced outside representative had developed a relationship with, and generated business from, at least three of the customers. RA-51-52 (144:9-12, 144:16-20, 144:25-145:3, 145:15-21). The other two companies, Alliant Tech Systems and Fastenal, had been prospected by Softchoice for years, but listened to Softchoice again and, as of the temporary injunction

hearing, had already told Softchoice that they did not intend to do business with Softchoice. RA-108.

In sum, Softchoice had a reasonable opportunity to develop and maintain relationships with Software Plus's customers. Sometimes it succeeded, and sometimes it failed, but it had the opportunity. At this point, the question is not how long it would take to establish a relationship; the transition is complete, but just was not successful in all cases. Under these circumstances, Softchoice cannot tenably argue that excluding Schmidt from the marketplace for two years is "no more restrictive than is necessary to protect the legitimate interests of" Softchoice, not at the time of the hearing, and certainly not now, months later. See Copeland, 198 S.W.3d at 610 (Mo. 2006).

**C. The Other Dahlberg Factors Weigh Against Any Injunction Against Schmidt.**

**1. Schmidt's prior employment with Softchoice weighs against an injunction.**

A court considering a motion for temporary injunction is to examine "[t]he nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief." Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982) (quoting Dahlberg, 137 N.W.2d at 321-22). In other words, a court must look beyond the current dispute to the parties' *past* relationship to determine if any facts weigh for or against one party or the other. See, e.g., County of Winona v. Winona, 453 N.W.2d 710, 711 (Minn. App. 1990) (holding county's long reliance on city's participation in solid waste plan was prior relationship favoring injunction based on city's "belated change in position").

Softchoice's brief focuses on the relationship between Schmidt and *Software Plus*, the company for which Schmidt worked for six years. Appellant's Br. at 37. It is not Software Plus, however, that sought the injunction; *Softchoice* sought the injunction, and it is therefore Schmidt's prior relationship with *Softchoice* that bears on the equitable remedy under Dahlberg.

The past relationship between Schmidt and Softchoice weighs heavily against an injunction. Schmidt worked briefly for Softchoice and left in 2001. RA-120. He left because he did not like the company, its policies, or the way it treated people. It simply was not the kind of company he wanted to work for. RA-55 (185:15-17), 74 (135:6-9); Tr-65:16-66:2. Schmidt apparently was not alone in this view; Softchoice's sales representatives do not remain there for very long. RA-108.

After leaving Softchoice, Schmidt found the right home at Software Plus. He enjoyed working there, and found it to be a good working environment. He stayed seven contented years. Then the hammer dropped: the company from which he had escaped swallowed up the company that had been his refuge.

It is in this respect that the present case differs dramatically from most non-compete cases. In most cases, whatever the later differences between the parties, the employer's initial hiring of the employee is usually accompanied by enthusiasm and optimism on both sides. Here, in sharp contrast, Schmidt did not willingly rejoin Softchoice at all; the employment was involuntarily thrust upon him, and he was dragged kicking and screaming back to a former employer from whom he thought he had freed himself years earlier. Schmidt had no advance warning of this involuntary transfer; by

the time he and other Software Plus employees learned of the acquisition, it was a *fait accompli*. Tr-84:18-22. In fact, Schmidt never really went back to Softchoice at all. He never accepted training in any of the company's methods or systems and never even appeared at the company's premises. Tr-84:25-85:2, 85:6-7, 11-20, 208:3-7, 11-16; RA-45 (75:6-14), 69 (87:1-5), 80 (24"5-9).

Schmidt's worst fears were realized as he quickly found that the character of his old company had not changed. Using the noncompete agreement, Softchoice tried first to mislead and then to threaten Schmidt into staying with the company, RA-136; Tr-90:6-9, 99:8-10, 218:18:19, 219:2-10; RA-83 (70:25-71:6), 55-56 (187:4-16, 188:11-189:1), essentially treating him as so much chattel. As soon after the merger as Schmidt could escape Softchoice again, he did so, willingly forfeiting any claim to money in his Plan account. As he wrote to customers:

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.

A.84. Softchoice would now have the Court hold that Schmidt had only two choices: Either work for a company he detested or abandon his chosen profession for two years.<sup>15</sup>

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<sup>15</sup> Moreover, because Softchoice is larger than Software Plus, Softchoice is asking to the Court to wall Schmidt off from an even longer list of customers and potential customers than he bargained for, or than there would have been had there been no acquisition.

**2. The balance of the harms weighs against an injunction.**

The balancing of harms factor, see Miller, 317 N.W.2d at 712, favors Schmidt. Softchoice is a large corporation with ample means and the ability to absorb damages, had any occurred, while the litigation runs its course. Moreover, the record shows that by March 2008, barely 10 weeks after Schmidt's departure, Softchoice had an action plan in place and had already successfully fostered new relationships between an experienced Softchoice representative and the customers that still wanted to do business with Softchoice. RA-48 (132:12-14), 49, (136:7-9), 51-52 (144:9-12, 144:16-20, 144:25-145:3, 145:15-21, 147:21-14:6), 133.

In contrast, Schmidt is a successful software and hardware salesman who would have lost—and did lose during the 11 weeks the TRO was in effect—substantial income through a broad, geographically unlimited non-compete agreement enforced by a company for which he would never voluntarily have been working. Had the District Court balanced these harms as Dahlberg directed, the only reasonable conclusion would have been that this factor favors Schmidt and weighs against any injunction.

**3. Public policy favoring freedom of employment weighs against an injunction.**

The District Court correctly acknowledged that the law reflects “a strong public policy argument favoring competition in a free market society,” A.33, favoring Schmidt and weighing against an injunction. See also Bennett v. Storz Broadcasting Co., 134 N.W.2d 892, 899-900 (Minn. 1965).

Minnesota law has recognized the public policy against using a non-compete agreement to prevent an employee from leaving to work for a competitor—the Employee Retention Plan’s stated goal. See id. at 899 (quoting Menter Co. v. Brock, 180 N.W. 553, 555 (Minn. 1920)). The Minnesota Supreme Court has rejected such covenants in strong and unequivocal terms:

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

Eutectic Welding Alloys Corp. v. West, 160 N.W.2d 566, 571 (Minn. 1968). Public policy thus weighs against the grant of an injunction here.

**4. The administrative burden is unknowable under the present circumstances.**

The final factor, the burden on the Court of administering and enforcing the injunction, is difficult to evaluate at this point. The Court cannot easily determine the precise nature and shape the injunction that would be necessary to grant Softchoice the relief it seeks, especially because the requested relief involves both a forfeiture-for-competition clause and a non-solicitation agreement with different and sometimes inconsistent terms. To make matters more complicated, Softchoice has declined to identify the customers that it claims Schmidt should not be allowed to contact, calling the administrative manageability of its requested injunction further into question.

Moreover, even Softchoice acknowledges that the District Court would have the power to modify the terms of the agreement (and thus of the injunction) should it need to

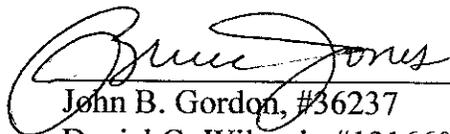
do so to make the agreement “reasonable.” Appellant’s Br. at 34-36. Given these unknowns, Schmidt submits that this factor cannot be realistically weighed, at least in this Court at this time.

### CONCLUSION

For the reasons discussed above, respondent Martin Schmidt urges this Court to affirm the District Court’s Order denying Softchoice’s motion for a temporary injunction against him. In the alternative, should the Court find any fault with the District Court’s Order, Schmidt urges the Court to remand the case to the District Court so that it can address for the first time whether Softchoice has met its burden with respect to the remaining requirements for enforcement of a non-compete agreement and with respect to the remaining Dahlberg factors.

Dated: July 2, 2008

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Softchoice, Inc.,

Plaintiff/Respondent,

vs.

Michael Johnson,

Defendant/Appellant et al.

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CERTIFICATION OF  
BRIEF LENGTH

Appellate Court  
Case Number: A08-763

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,322 words. This brief was prepared using Microsoft Word 2003 software.

Dated: July 2, 2008

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