COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000693

DONALD E. BROWN and
STANDLEE HAY COMPANY, INCORPORATED APPELLANTS

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2011-CA-000629-MR
and
FAYETTE CIRCUIT COURT
ACTION NO. 09-CI-00779

CHARLES T. CREECH, INCORPORATED APPELLEE

RESPONSE BRIEF OF APPELLEE CHARLES T. CREECH, INCORPORATED

CERTIFICATE OF SERVICE

The Undersigned does hereby certify that copies of this Brief were served upon the following named individuals by U.S. mail on this the 16th day of August, 2013: Judge Hon. Kimberly N. Bunnell, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507, Wilma Fields Lynch, Clerk, Fayette Circuit Court,103 Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507, Hon. Jon A. Woodall, Hon. Ryan C. Daugherty, McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 East Main Street, Suite 900, Lexington, Kentucky 40507, Hon. David R. Irvin, Hon. James M. Mooney, Moynahan, Irvin, & Mooney, P.S.C.,110 N. Main Street, Nicholasville, Kentucky 40356, Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned does also certify pursuant to CR 76.12(6) that the record on appeal was not withdrawn by the undersigned (or the party filing this brief) from the Fayette Circuit Clerk's office on or before this date.

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STATEMENT CONCERNING ORAL ARGUMENT

For the reasons set out in the principal brief filed by Charles T. Creech, Inc. ("Creech"), (in Case No. 2012-SC-000651-D), an oral argument is requested.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Throughout this litigation, and before this Court, Standlee and Brown (collectively, "Counter-Appellants") have attempted to portray Brown as an unskilled, untrained employee who was forced to sign a covenant not to compete, only to be peremptorily demoted and then forever barred from a non-specialized industry which depends only upon the use of publicly-available information. While sympathetic, that version of events is inaccurate, and based almost entirely upon self-serving Affidavits that the Court considered and dismissed. The Counter-Appellants' claim that Brown's job responsibilities required no specialized training, that he received no meaningful on-the-job training from Creech, that a published directory was his "primary source" for potential customers, and that his "stature changed dramatically" after he signed the Conflicts of Interest Agreement ("COI" or "Agreement") (Counter-Appellants' Brief ("Brief"), pp. 1-2) are conclusory assertions, found only in Affidavits that are controverted by Affidavits submitted by Creech. These and other material facts were disputed at the time the Circuit Court entered summary judgment despite the existence of (Creech's) outstanding discovery requests and (Creech's) pending Motion to Compel responses to those requests[1]. Because it viewed a CR 65.07 Order entered by the Court of Appeals as dispositive, the Circuit Court did not address these disputed issues of fact.

Despite its undeveloped nature, however, the record flatly contradicts much of the Counter-Appellants' Statement of the Case.

[1] The issues of fact referenced herein are not material to the trial court having originally granted temporary injunctive relief in favor of Creech that was subsequently dissolved by the appellate court by its CR 65.07 Order. The injunctive relief should be reinstated by the trial court upon remand with Creech's damages claims to be pursued through completed discovery and final judgment.

First, Brown and Standlee's assertion that Brown received neither special training nor confidential information during his eighteen years of employment with Creech is belied by the COI Agreement which he signed. The Agreement provided:

> The company requires that all employees strive to avoid any situation, which does or may involve a conflict between their personal interest and the interests of the company . . .
>
> **The following listing will serve as a guide to the types of activity which might cause conflicts of interest:**
>
> - **Providing information, including but not limited to names, locations, types of purchases, contact names, or contact information about any of the company's customers, employees or suppliers with or without compensation without management's consent, or sharing any such information with anyone outside the company, especially with competitors or potential customers.**
> - Directive, managerial or consultative services performed with or without compensation to any customer, supplier, or other outside concern which does business with or is a competitor of the company.
> - **Competition with the company by an employee, directly or indirectly in the purchase or sale of products or services or property rights or interests either during employment or after leaving the company.**

(R.A. at 8, (Appx. 5 to Brief of Movant, Charles T. Creech, Incorporated filed June 14, 2013, hereinafter "Creech's appellate brief" (emphasis added)).[2] The Agreement further provided:

> All proprietary information will be held in strict confidence. **As an employee of Creech, Inc., you will have access to sensitive company, customer and supplier information. Such information has been obtained through the over 25 years that the company has been in business and is, therefore, the property of Creech, Inc.** If at any time, either during employment or after leaving the company, you share such information with competitors of other third parties, Creech, Inc. reserves the right to pursue all legal avenues to recoup damages as well as legal fees accrued in such legal action from the employee or former employee.

[2] All citations to the Appendix refer to the Appendix to Brief of Movant, Charles T. Creech, Incorporated, i.e., "Creech's appellate brief" filed June 14, 2013 in Case No. 2012-SC-000651-D, with this Court.

> The industries that Creech, Inc. operates within are highly competitive. **We require that all employees agree and understand that after leaving the company they are not permitted to work for any other company that directly or indirectly competes with the company for 3 years after leaving Creech, Inc., without the companies [sic] consent.**

(R.A. at 8 (emphasis added)).

At the least, for purposes of the summary judgment granted Brown and Standlee that dismissed Creech's case, a disputed issue of material fact exists as to the training and information received by Brown as part of his job duties with Creech. For its part, and before the case was dismissed by the Circuit Court on the basis of an interlocutory order by the Court of Appeals dissolving the injunction before any real discovery could be initiated, Creech provided evidence that Brown was a trusted employee who received valuable and proprietary information within a highly competitive industry. Brown rose through the ranks at Creech, holding positions such as driver, dispatcher, and salesperson. (R.A. at 14 (Creech February 12, 2009, Affidavit ¶ 4 (Appx. 3 to Creech's appellate brief)). He obtained confidential information about the specific, unique needs and desires of Creech's customers. (*Id.*, ¶ 5). Creech invested resources in Brown, and trusted him with proprietary information. (*Id.*). Despite his attempt to characterize himself as an unskilled worker who brought what little expertise was needed to work in the hay industry with him when he joined Creech in 1990, Brown was a highly-trusted employee who received from Creech over eighteen years of on-the-job training in a highly competitive industry and who was given access to critical proprietary information.

Second, and contrary to the Counter-Appellants' implication, neither Creech nor Standlee conducts business by simply looking up the names and telephone numbers of horse farms in a directory available for sale in Keeneland's gift shop. Instead, both

companies operate in a highly competitive industry, and require the ongoing collection and use of proprietary information. While employed by Creech, Brown was entrusted with highly confidential and proprietary information, including not only the names of horse farms that might be potential or actual customers, but also specific contacts at those farms, cell phone numbers for those contacts, supplier prices, customer prices, and unique customer needs and desires. During his eighteen years with Creech, Brown developed (and was encouraged by Creech to develop) personal contacts and rapport with those customers. (R.A. at 14-16 (Creech Aff. ¶ 7, Appx. 3)). The Counter-Appellants' attempt to paint both the industry and Brown as requiring nothing more than a telephone directory in order to do business is contradicted by the testimony of Standlee's president, Mike Standlee, during the hearing on Creech's renewed Motion for Temporary Injunction. Mr. Standlee, who was placed under oath, stated that, if Brown was enjoined from selling hay in Kentucky, then Standlee would have to "seriously consider" discontinuing Brown's employment because "that's what he was specifically hired to do" – "to sell hay and purchase hay and to hit all the farm accounts and all the tracks" in Kentucky, and to "specifically target all the farms" in counties contiguous to Fayette County." (R.A. Certified copy of video hearings[3], 4/30/09, 22/9/09 CD 57 1:56:18-3:32-31 at 2:08:33, 3:08:25, 3:13:01, 3:15:30) (Appx. 4)). Brown's value to Standlee, in other words, consisted of the experience and customer contacts and proprietary information that he had developed through his eighteen years' experience with Creech, and that he sought to exploit on Standlee's behalf and at the expense of his former employer.

Third, Brown and Standlee have repeatedly – and inaccurately – insisted that Brown was "demoted" after he signed the Agreement. This simply did not occur.

[3] A CD/DVD copy of all the trial court hearings cited is found in Creech's appellate brief at Appendix 4.

Brown's salary did not change after he signed the Agreement. He continued to work for Creech for almost two years after he signed the Agreement and until he elected to terminate his employment and take a job with Creech's competitor, Standlee.

Fourth, and although apparently now abandoned by the Counter-Appellants as grounds for reversal of the Court of Appeals' August 17, 2012, Opinion, Creech did not waive the enforcement of the COI Agreement. In their attempt to cast Brown as the victim of an over-reaching, coercive employer, Standlee and Brown misrepresent the correspondence exchanged between each company's counsel following Brown's decision to quit his job with Creech. Prior to leaving his job, Brown met with Creech's president, Charles T. Creech ("Mr. Creech"), and assured him that he did not intend to call on farms and/or existing customers of Creech. (R.A. 10-11). Brown told Creech that, instead, he would call only on "Big Box" stores (such as Walmart, Home Depot or Tractor Supply Company) on behalf of Standlee. Through counsel, Creech sent a letter to Brown on November 13, 2008, which both confirmed that conversation and reminded him of his obligations under the Agreement, stating:

> **Based on the statements you made to Charles T. Creech, Inc.**, we understand that the work you will be doing for Standlee Hay Company will not be related to those pursuits of Standlee Hay Company which are in competition with the interests of Charles T. Creech, Inc.

(R.A. at 10-11 (Appx. 6) (emphasis added)). The letter further stated: **"[b]ased on the representations made by you,"** Creech was willing to permit Brown's employment with Standlee. (*Id.* (emphasis added)). The letter continued to state:

> **Charles T. Creech, Inc. does not, however, waive any other provisions of the Conflicts of Interest Agreement.**
>
> **We must therefore respectfully request and demand that you do not directly or indirectly use any proprietary information gained during**

> **your employment with Charles T. Creech, Inc. to benefit the business pursuits of Standlee Hay Company. This prohibition includes, but is not limited to, disclosure of any of Charles T. Creech, Inc.'s client information, supplier information, business models, finances, business plans, or any other company records or company information you have obtained knowledge of during your employment with Charles T. Creech, Inc.**
>
> Based on the business relationship you and Charles T. Creech, Inc. have enjoyed through the years, we have no doubt that you will abide by the promises you made when you entered into the Conflicts of Interest Agreement. **If you have any question whether information known by you is considered to be proprietary information by Charles T. Creech, Inc., we respectfully request and demand that you contact us prior to the disclosure of the information.**
>
> **Contacting us prior to the disclosure of any information will allow us to avoid any inadvertent disclosures which could result in harm to Charles T. Creech, Inc. and thereby compel Charles T. Creech, Inc. to take action against you or your new employer.**

(*Id.*) (emphasis added).

When Standlee's attorney responded by letter dated November 17, 2008, that Brown would act as a salesperson and would "no doubt" and "without question" contact Creech's customers on Standlee's behalf – in direct contradiction with Brown's assurances to Mr. Creech – Creech filed a Complaint for injunctive relief and for damages. The Complaint asserted claims for breach of the Agreement, intentional interference with Creech's contractual rights, Standlee's aiding and abetting of Brown's breach of contract, intentional interference with current and prospective business contracts, and fraud in the inducement. Brown is not, therefore, the victim of some abrupt reversal on Creech's part as to whether it would enforce its rights under the

Agreement. Instead, Brown affirmatively misled his long-time employer as to the nature of the job he planned to take with Standlee.[4]

With its Complaint, Creech also filed a Motion for Temporary Injunction, which asked that Brown be enjoined according to the terms of the Agreement as written. (R.A. 20-29; see also R.A. 153, Addendum). Finding the geographic scope of the Agreement to be overly broad, the Court denied Creech's initial Motion. (R.A. Certified copy of video hearings, 3/18/2009, 22-0-09 CD #37 10:01:54 (Appx. 4)).

Creech then sought and obtained permission to file an Amended Complaint, as well as a second Motion for Temporary Injunction based upon the Amended Complaint. (R.A. 88, Motion for Leave to File Amended Complaint; R.A. 169, Order granting leave; R.A. 235-243, Amended Complaint; R.A. 127-146, Motion for Temporary Injunction). The Amended Complaint asserted the same claims against Standlee and Brown, but, like the Renewed Motion for Temporary Injunction, asked the Court to exercise its equitable power to modify the non-compete language within the Agreement to enjoin Brown from contacting Creech's customers and to enforce the nondisclosure provisions in the Agreement.

During the hearing on Creech's renewed Motion for Temporary Injunction, the Circuit Court heard testimony and considered other evidence about the geographic scope of Creech's business interests, Standlee's business interests in Kentucky, and the role that Standlee expected Brown to play within Kentucky. Standlee's counsel informed the

[4] Brown and Standlee cite the amount of time that has elapsed since Brown's departure from Creech (Brief, p. 8), as though this somehow excuses his breach of the COI Agreement. It does not. Any delay in resolution of this matter is the consequence of Brown's direct misrepresentation to Mr. Creech of the nature of the work he intended to do on behalf of Standlee, and the Counter-Appellants' continued refusal to abide by the contract entered between Brown and Creech.

Court that Standlee had made a "substantial investment" in its Kentucky operations. (R.A. Certified copy of video hearings, 4/30/09, 22/9/09 CD 57 1:56:18-3:32:31 at 2:08-33 (Appx. 4)). The testimony of Standlee's corporate counsel, quoted above, makes clear that Brown was part of that substantial investment. Mr. Creech's February 12, 2009, Affidavit averred that multiple customers of Creech had reported "Brown's effort to solicit their business away from Creech", and that he had witnessed Standlee hay at the farm of a current Creech customer. (R.A. 15, Appx. 3, ¶¶ 15, 17). In addition, the Court conducted an *in camera* review of a list of Creech's customers and buyers, listed by city and state. (R.A. Certified copy of video hearings, 4/30/09, 22/9/09 CD 57 at 3:15:30 (Appx. 4)).

At the conclusion of the hearing, Judge Bunnell partially enforced the Agreement by inserting the word "Kentucky" within the non-compete language, thereby precluding Brown from working for Standlee (or any other company) that directly or indirectly competes with Creech in Kentucky for a period of three (3) years after leaving Creech. (*Id.* at 3:26:26-3:28:00). An Order establishing a temporary injunction consistent with the Judge's findings at the hearing was entered on May 5, 2009. (R.A. 244-250, Appx. 9).

Following that ruling, Brown (but not Standlee) filed a motion with the Court of Appeals for interlocutory relief under CR 65.07. Without substantively addressing Creech's argument that the Motion was untimely, the Court of Appeals granted that Motion on July 7, 2009 (R.A. 380), through an Order that was later replaced by a Corrected Order on July 13, 2009. (R.A. 10). In the Order, Judge Van Meter concluded that the Circuit Court had abused its discretion by imposing a geographic limitation upon the Agreement, that the Agreement was unreasonable because it had been presented to

Brown years after he began his employment, that there was insufficient evidence to establish that Brown had acquired confidential and proprietary information while he worked for Creech, that the Agreement was a "contract in restraint of trade," and that Creech had waived the non-compete obligation contained within the Agreement. (R.A. 388-395).

After entry of the CR 65.07 Order, back at the trial court both Standlee and Brown filed motions for summary judgment. In granting those Motions, and contrary to the Counter-Appellants' representation, the Circuit Court did not "agree[ ] with the points of law set forth in the CR 65.07 Order" (Brief, p. 35). Instead, Judge Bunnell simply held that she believed herself to be bound on the merits of the case by the Court of Appeals' CR 65.07 Order. She stated on the record:

> I still think I was right . . . but I thought they [the Court of Appeals] did a thorough job of explaining why they respectfully disagreed with me.
>
> . . .
>
> Mr. Pisacano, I do agree that I could keep going forward, but I don't think they could have been any more clear as to their interpretation of that agreement and as such I will follow what they have told me in this case . . . In this case, **I will follow their directive and I do believe that based upon their ruling that it would be insufficient to go forward on the other claims.** I don't think there's a basis for the other claims. **But that's only because of what they told me** because I – I still thought the other stuff was pretty good . . . I don't think they could have been any more clear. They were pretty clear. Based upon their opinion – and I kind of thought maybe you all had just gone away . . . I now sustain the motion, and **totally based upon the Court of Appeals' directive to me**.

Id. (emphasis added).

By dismissing the case, "totally based upon the [ ] directive" perceived to be contained within the Court of Appeals' Order on an interlocutory appeal of a temporary injunction, the Circuit Court denied Creech the opportunity to conduct any further

discovery in support of its claims – including discovery as to the issues which are now before this Court. Unacknowledged by the Counter-Appellants is the reality that the Circuit Court entered summary judgment while Creech's Motion to Compel Brown to respond to discovery requests was pending (R.A. 691). No depositions had been taken. Although Standlee had partially responded to a single set of discovery requests propounded by Creech, its responses created, rather than eliminated, questions of fact. For example (and as set out in Creech's brief to the Court of Appeals), Creech asked Standlee to identify customers to whom Standlee had sold products since Brown's employment (including contact information for those customers – names, addresses, and phone numbers), and its hay suppliers (including the cost of product sold and contact information). Standlee responded that all of this requested information was confidential and proprietary; yet, the Circuit Court presumably found no questions of fact as to Creech's claim that it was entitled to protection of the very same type of information pursuant to its Agreement with Brown, instead relying entirely on the Court of Appeals' "directive" that, at the temporary injunction stage, Creech had failed to establish that any of the information received by Brown during his employment with Creech was confidential and proprietary.

Creech filed an appeal from the entry of summary judgment with the Court of Appeals. Judge Van Meter, who issued the CR 65.07 ruling that the Circuit Court found to be controlling on the merits of Creech's claim, was assigned to the appellate panel. Because Judge Van Meter's CR 65.07 expressed his conclusion that Creech's claims could not succeed on the merits, and because that conclusion formed the sole basis for the Circuit Court's entry of summary judgment, Creech filed a Motion with the Court of

Appeals asking Judge Van Meter to recuse himself from the panel. That Motion was denied. (Motion for Recusal, filed December 2, 2011, and February 7, 2012, Order denying the Motion, Appx. 12).

On August 17, 2012, the Court of Appeals issued a to-be-published Opinion, holding that Creech "was entitled to additional discovery to resolve the dispute and entry of summary judgment was premature." (Opinion, p. 2 (Appx. 1)). The Opinion acknowledged that Kentucky law both granted the Circuit Court the equitable authority to modify the Agreement in order to make it partially enforceable (e.g., in Kentucky), and recognized that continued employment constitutes adequate consideration for a covenant not to compete. However, the Court of Appeals' criticism of Creech's position, first expressed in the CR 65.07 Order, was apparent even in its reversal of the Circuit Court's premature entry of summary judgment. Despite holding that Creech was entitled to additional discovery and that summary judgment was premature, the Court of Appeals included in its Opinion a footnote which (incorrectly) stated that Creech had made no mention of the "nondisclosure clause" of the Agreement in its appellate brief, and so the "issue" of the "nondisclosure agreement" had not been preserved. (Opinion, p. 2 n.1). The Court of Appeals also created a new, lengthy test by which covenants not to compete are to be judged, "in nearly every case." That new test (which sets out a "series of factors" which, in turn, pose a variety of largely unanswered questions), as well as the improper characterization of the nondisclosure obligation of the Agreement as a separate "issue" or "claim" to be preserved, are the subject of Creech's appellate brief with this Court (filed June 14, 2013) and so are not addressed herein.

After the Court of Appeals' denied Creech's Petition for Modification and Rehearing, all parties sought discretionary review from this Court. Both Petitions were granted on April 27, 2013.

ARGUMENT

A. The Agreement, As Modified by the Circuit Court, Is Enforceable

The Circuit Court's modification and partial enforcement of the Agreement, restricting Brown from competing with Creech within Kentucky, was not based upon a whim, nor did it constitute some exotic form of judicial activisim heretofore exercised by only "the most liberal" of American jurisdictions. (Brief, p. 17). The Circuit Court's enforcement of the Agreement was instead based upon and consistent with not only well-settled Kentucky law, but also with the "reasonableness test" now adopted by a majority of jurisdictions. See *Kegel v. Tillotson*, 297 S.W.3d 908 (Ky. App. 2009) ("we are empowered to reform or amend restrictions in a non-compete clause if the initial restrictions are overly broad or burdensome"); *Ceresia v. Mitchell*, 242 S.W.2d 359, 363 (Ky. 1951) (if a non-compete agreement is otherwise reasonable but lacks a time limit, "it is quite possible for the court to grant injunctive relief for a specific and reasonable time"); *Davey Tree Expert Co. v. Ackelbein*, 25 S.W.2d 62, 64 (Ky. 1930) ("although the covenant in question may be too broad, yet, if it can be cut down to what is reasonable and enforced to that extent, the [employer] is entitled to such relief as may be necessary for the full protection of its business"); *Ellis v. James V. Hurson Associates, Inc.*, 565 A.2d 615, 617 (D.C. App. 1989) ("In keeping with the great weight of modern authority, we join those jurisdictions which have rejected the view that covenants not to compete must be enforceable in whole or not at all").

Confronted with the weight of case law permitting Courts to partially enforce covenants not to compete by tailoring the obligation so that it serves both the employer's and employee's legitimate interests, the Counter-Appellants attempt to distinguish this case by emphasizing that the Agreement here was entered between an employer and employee, not as part of the sale of an ongoing business. While covenants not to compete entered in an employment context naturally receive greater scrutiny than those executed in a sale transaction, Kentucky's test for enforceability of those covenants has remained consistent (at least, until the Court of Appeals created its new "series of factors," multiple-question test in this case in 2012): an agreement not to compete is reasonable and therefore enforceable "if, on consideration and circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted." *Cent. Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681, 685 (Ky. App. 1981) (applying test to covenant not to compete entered by employee with employer); see also *Ceresia v. Mitchell*, 242 S.W.2d 359, 364 (Ky. 1951) (applying test to covenant not to compete entered as part of the sale of a business).

As an initial matter, the Agreement that Brown signed with Creech is not as sweeping and unlimited as the Counter-Appellants pretend. The Agreement states that, for a period of three (3) years after leaving Creech, an employee may not (without Creech's consent) "work for any other company that directly or indirectly competes with" Creech. The Agreement is thus limited to those markets (geographical or otherwise) in which Creech actually competes. In the absence of a specifically-identified city, state, or

other physical territory, the Agreement applies wherever Creech does business. This, in itself, is a type of geographic scope, however broad.[5]

Nevertheless, through its Amended Complaint and Renewed Motion for Temporary Injunction, Creech asked the Circuit Court not for worldwide enforcement of the Agreement, but for an equitable modification and partial enforcement of the Agreement. That relief is squarely within the parameters of the discretion rightly afforded to Kentucky's Circuit Courts. The authority to modify and partially enforce non-compete covenants under the "blue pencil doctrine" was reaffirmed by the Court of Appeals in *Kegel*, 297 S.W.3d 910, only a few months after Judge Van Meter held in the CR 65.07 Order entered in this case that no such authority existed.

The Counter-Appellants attempt to characterize *Kegel* as involving a transaction more akin to the sale of a business than employment, and its holding concerning the blue pencil doctrine as *dicta*. Neither characterization finds support from a basic reading of that case. *Kegel* did not involve a buyer of a business extracting a covenant not to compete from a seller. In *Kegel*, the defendant was an independent contractor who worked for Unique Promotional Products, a business owned by a close friend. Some months after that relationship began, the owner and the defendant entered a contract containing a non-compete clause, prohibiting the defendant from marketing, selling, or taking orders for the purchase of promotional or advertising merchandise within a 350-mile area for a period of five (5) years. Seven years later, the plaintiffs, the Kegels,

[5] In today's increasingly globalized marketplace, other jurisdictions have recognized that worldwide covenants not to compete are not per se unreasonable. See, e.g., *Boart Longyear Ltd. v. Alliance Industries, Inc.*, 869 F.Supp.2d 407, 410 (S.D.N.Y. 2012), reconsideration denied (July 26, 2012) (holding that plaintiff stated a claim for breach of a non-compete clause that excluded defendants from engaging in any business that competed with any portion of plaintiff's business "anywhere in the world"); *Universal Engraving, Inc. v. Duarte*, 519 F.Supp.2d 1140, 1153 (D. Kan. 2007) (finding that world-wide restriction against competition was not patently unreasonable). Indeed, had the record been permitted to develop in this case, Creech would have established that it buys and sells hay throughout the world.

purchased the company. Although the plaintiffs offered employment to the defendant, she terminated her relationship with the company and began her own competing business. While the *Kegel* Court did consider (and resolve) the question of whether the covenant was assignable by the prior owner to the Kegels, it also held that the trial court had prematurely found the geographic and temporal scope of the agreement to be unconscionable and void. In *Kegel*, as here, "no depositions had been taken, substantial evidence had not been gathered, and only one set of interrogatories had been exchanged." *Id.* at 913. The Court held that the determination of "whether or not a particular non-compete clause is conscionable is an issue that is highly fact specific and, we believe, will more appropriately be addressed in the course of discovery." *Id.* at 913.

> In addition, our courts have adopted a "blue pencil" rule, whereby we are empowered to reform or amend restrictions in a non-compete clause if the initial restrictions are overly broad or burdensome. As stated by this Court in *Hammons, supra,* at 315, "[w]here the covenant as originally drawn has been found too broad, courts have had no difficulty in restricting it to its proper sphere and enforcing it only to that extent." *See also Ceresia v. Mitchell,* 242 S.W.2d 359 (Ky.1951).
>
> Accordingly, we believe it appropriate to remand this matter to the court below for additional findings on the issue of unconscionability, as well as a determination as to what, if any, action is appropriate by the court under the "blue pencil" rule.

Kegel v. Tillotson, 297 S.W.3d 908, 913-14 (Ky. App. 2009). This holding was not *dicta*. The lower court in *Kegel* found that the agreement was not assignable, but also held that, even if it was assignable, the geographic radius of the non-compete obligation was unconscionable and also void. "It is from that order that the Kegels now appeal to this

Court." The appeal was not taken solely on the question of assignability, and the Court did not limit its holding to that issue.[6]

Kegel was not an aberration, nor a ground-breaking extension of Kentucky law. On the contrary, *Kegel* simply reaffirmed "the best considered modern cases" that were approved by Kentucky's highest Court in *Ceresia*, 242 S.W.2d at 363. While the Counter-Appellants emphasize that *Ceresia* involved a covenant not to compete extracted by a buyer of a business from a seller, Kentucky Courts have not adopted one set of rules for those types of transactions and another set exclusively applicable to employers and employees. Instead, the same principle underlies both *Kegel* and *Ceresia*: an overly broad restriction against competition may be partially enforced. That principle applies to covenants not to compete contained within employment agreements as well as to those contained within purchase agreements. *Hammons v. Big Sandy Claims Service, Inc.*, 567 S.W.2d 313, 315 (Ky. App. 1978). See also *Davey Tree Expert Co. v. Ackelbein*, 25 S.W.2d 62 (Ky. 1930) (applying to a covenant not to compete entered between an employee and employer the rule that "[t]he whole includes the part, and if the covenant is too broad, there is no reason why the parties should not receive protection to the extent of the reasonable part included in the whole").[7]

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[6] The fact that *Kegel* concerned an independent contractor rather than an ordinary employee is a distinction without a difference. If anything, enforceability of a non-compete agreement against an independent contractor would seem to create a much greater risk of overreaching or unreasonable restraints of trade, since independent contractors, unlike employees, typically work for short periods of time and often do not engage in the "regular work" of their employers. See *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965) (listing distinctions between employee and independent contractor).

[7] The Counter-Appellants make much of the alleged disparity in bargaining power between employers and employees, again citing their (disputed) characterization of Brown as a wholly unskilled, untrained employee who was at the mercy of a fickle employer, Creech. (Brief, p. 27). The undisputed fact, however, is that Brown chose to leave his job with Creech to work for Creech's competitor, Standlee. Even if the Court embraces the Counter-Appellants' generalized characterization of employment relationships as inherently unequal, this alone will not render a contractual obligation unenforceable. See, e.g., *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341-42 (Ky. App. 2001) (rejecting argument that an

Confronted with these holdings, the Counter-Appellants ask this Court to draw an arbitrary line between cases in which the trial court is asked to use its proverbial "blue pencil" merely to strike through or erase offensive and divisible terms from those cases where, as here, the Court supplies a missing term which, based upon consideration of the evidence, renders a previously unlimited restraint both limited and reasonable. The "doctrine of divisibility" proposed by the Counter-Appellants (Brief, p. 15-16), however, elevates form over substance.[8] Under the Counter-Appellants' reasoning, the Agreement entered in this case would have been properly modified to apply to Kentucky if it had prohibited competition "anywhere in the United States," "anywhere in the Northern Hemisphere," or even "anywhere in the world," but, because no geographic scope was expressly stated, the entire Agreement must be voided. Such a result is inconsistent with any reasonable expectation of any contracting party. It cannot be logically supposed that Brown and Creech intended the Agreement to be an absolute nullity, which is precisely the effect of the Counter-Appellants' all-or-nothing analysis. See also *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984) ("Partial enforcement involves much less of a variation from the effects intended by the parties than total

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arbitration clause was unconscionable and therefore void, and holding that the doctrine of unconscionability is "directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain").

[8] In *Ceresia*, Kentucky's then-highest Court rejected a similar argument by approvingly citing the following except from Corbin on Contracts:

> 'An agreement restricting competition may be perfectly reasonable as to a part of the territory included within the restriction but unreasonable as to the rest. Will the courts enforce such an agreement in part while holding the remainder invalid? It renders no service to say that the answer depends upon whether or not the contract is 'divisible.' 'Divisibility' is a term that has no general and invariable definition; instead the term varies so much with the subject-matter involved and the purposes in view that its use either as an aid to decision or in the statement of results tends to befog the real issue.'

Ceresia, 242 S.W.2d at 362.

nonenforcement would. If the arguments in favor of partial enforcement are convincing, no court need hesitate to give them effect." (citing Williston & Corbin, *On the Doctrine of Beit v. Beit,* 23 Conn.B.J. 40, 49–50 (1949)).

While the blue pencil doctrine was historically limited to the erasure of divisible conditions or restraints, Courts no longer apply such mechanical, artificial distinctions. The development of the law governing the partial enforcement of covenants not to compete is outlined in *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975). That Court observed that, originally, all agreements in restraint of trade were presumptively void. "Working men entered skilled trades only by serving apprenticeships. Mobility was minimal. Restrictive covenants either destroyed a man's means of livelihood, or bound him to his master for life." *Id.* at 546. "Later, as the character of the work-a-day world became more flexible, courts sought a means to lift the blanket prohibition on employment restrictions." *Id.* One such means was the traditional "blue pencil test," which "allowed courts to claim they were not actually 'rewriting' private contracts." The *Raimonde* Court explained that, in practice, however, "the test has not worked well." *Id.* Under that older test, an entire contract would fail if an offending provision could not be characterized as divisible and then stricken. Employers were forced to draw overly-narrow restrictions in an effort to ensure that the entire contract would not be set aside.

Rejecting the hyper-technical approach of the traditional version of the "blue pencil" doctrine, Courts instead adopted a test of reasonableness, under which they may determine, "on the basis of all evidence, what restrictions would be reasonable between the parties." *Id.* at 546-47. In *Raimonde*, the employment agreement, entered by a veterinarian with his employer, provided that he would not accept similar employment or

practice his profession within 30 miles of Defiance, Ohio, for a period of three (3) years after termination. The trial court upheld the contract, but limited enforcement to an 18-mile radius. The Court of Appeals reversed, holding that, under the old version of the blue pencil doctrine, the trial court could only strike divisible offensive terms, and could make no modification. Without a modification, the Court of Appeals held, the contract was an unreasonable restraint of trade and therefore completely invalid.

Reversing, Ohio's Supreme Court observed that rigid limitations on the Court's discretion to modify covenants not to compete had produced "arbitrary and inconsistent results." The employee offered the same argument urged here by the Counter-Appellants: that the rule of reasonableness "would allow employers to dictate restraints without fear, knowing that judges will rewrite contracts if they are taken to court." The Ohio Supreme Court rejected that fear as unfounded, as should this Court. "Most employers who enter contracts seek to do so in good faith, and seek only to protect legitimate interests." *Id.* The Court held:

> In determining the validity of a covenant or agreement in restraint of trade, each case must be decided on its own facts. We hold that a covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. Courts are empowered to modify or amend employment agreements to achieve such results.

Id. at 25-26 (citation omitted).

Iowa's Supreme Court likewise considered – and rejected – the Counter-Appellants' prophecies of over-reaching and oppression:

> In adopting the rule that restrictive covenants in employment contracts should be enforced to a reasonable extent where possible without injury to the public or injustice to the parties we need not retreat from our approval of the language in *Hudson Foam Latex Products, Inc. v. Aiken* stated in *Baker v. Starkey*, supra, 259 Iowa at 495, 144 N.W.2d at 898. If the evidence disclosed the circumstances discussed therein, the good faith of the employer would become an issue. No covenant placed in the contract for reasons other than an attempt to protect the employer's legitimate interests should be enforced in equity.
>
> 'In considering this rule many authorities point to the danger that its application might tend to encourage employers and purchasers possessing superior bargaining power to insist upon oppressive restrictions. **However, these contracts are always subject to the test of whether their purpose is contrary to public policy, and if there is any credible evidence to sustain a finding that they are deliberately unreasonable and oppressive, such covenants must be held invalid whether severable or not.**' *Fullerton Lumber Co. v. Torborg* (1955), 270 Wis. 133, 70 N.W.2d 585, 592.
>
> **On the other hand, equity should not permit an injustice which might result from total rejection of the covenant merely because the court disagrees with an employer's judgment as to what restriction is necessary to protect his business.**
>
> 'In a very large number of cases, however, partial enforcement has been asked and has been granted, even though the contract contained no express provision for partial enforcement and even though no political or geographical territories have been separately named. These recognize the absence of personal fault or turpitude; they recognize the injustice of a total refusal of enforcement, rewarding the promise breaker and defrauder; they see only general benefit to the public instead of harm; and they find no difficulty in determining in a practical and commonsense fashion between the reasonable and the unreasonable. This is not making a new contract for the parties; it is a choice among the possible effects of the one that they made, establishing the one that is the most desirable for the contractors and the public at large . . . If the arguments in favor of partial enforcement are convincing, no court need hesitate to give them effect. Ample judicial support can be found in the reports.' 23 Conn.Bar Jour., supra, at 49—50.

Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 374 (Iowa 1971) (emphasis added), reh'g denied and opinion modified, 190 N.W.2d 413 (Iowa 1971) (modifying covenant not to compete that prohibited employee from competing within 150 miles for a period of

two (2) years to a restriction against contacting or soliciting business from specifically identified customers of the employer).

In adopting the same rule, New Jersey's highest Court pointed out the inconsistent and unfair consequences of a rigid refusal to partially enforce an overly broad covenant not to compete:

> As the cited judicial opinions indicate, the rule of divisibility or selective construction has, at the expense of the basic values, exalted formalisms and rewarded artful draftsmanships. In the process individual results have been reached which hardly conform with any sound equitable concepts. In some instances, judges have upheld sweeping noncompetitive agreements in circumstances which suggest that, if their equitable power to do so had been recognized, they would have cut them down to satisfy the particular needs at hand. See *Pilgrim Coat, Apron, &c., Inc. v. Krzywulak*, 141 N.J.Eq. 212, 217, 56 A.2d 584 (Ch. 1948); Cf. *Artistic Porcelain Co. v. Boch*, 76 N.J.Eq. 533, 74 A. 680 (Ch.1909); *Voices, Inc. v. Metal Tone Mfg. Co., Inc.*, 119 N.J.Eq. 324, 182 A. 880 (Ch.), aff'd, 120 N.J.Eq. 618, 187 A. 370 (E. & A.1936). In other instances, they have stricken noncompetitive agreements in their entirety, as too broad, though justice and equity seemed to cry out for the issuance of appropriately limited restraints which would simply protect the legitimate interests of the covenantee in reasonable fashion, would not subject the covenantor to any undue hardship, and would not impair the public interest. See *Creter v. Creter*, Supra, 52 N.J.Super. 197, 145 A.2d 149; Cf. *Hudson Foam Latex Products, Inc. v. Aiken, Supra*, 82 N.J.Super. 508, 198 A.2d 136; *Magic Fingers, Inc. v. Robins*, Supra, 86 N.J.Super. 236, 206 A.2d 601.

Solari Industries, Inc. v. Malady, 55 N.J. 571, 584, 264 A.2d 53, 60 (1970). Solari, like Ehlers, confirmed that an employer who, in bad faith, extracts deliberately oppressive and unreasonable noncompete covenants will not receive equitable relief from the courts.

> However, an employer may act in full good faith and nonetheless may still find that the terms of the noncompetitive agreement are later judicially viewed as unnecessarily broad. Here courts have often differed as to whether the agreement should (1) be considered wholly void or (2) be afforded judicial sanction to the extent reasonable under the circumstances. Williston and Corbin have given their strong support to the latter alternative. 5 *Williston*, Supra, §§ 1659, 1660; 6A *Corbin*, Supra, §§ 1390, 1394.

> Williston saw 'no reason why effect should not be given to a restrictive promise indivisible in terms, to the extent that it is lawful.' 5 Williston, Supra, § 1660 at 4683. Similarly, Corbin noted that 'the fact that the restriction on an employee goes too far to be valid as a whole does not prevent a court from enforcing it in part insofar as it is reasonable and not oppressive'; as he put it, the injunction might be made operative only as to 'reasonable space and time' or it might preclude merely 'the disclosure of secrets or the solicitation of old customers without requiring the employee to refrain wholly from renewing employment in the same vicinity.' 6A Corbin, Supra, § 1394 at 104-06. A steadily increasing number of courts have recently embraced the persuasive views of Williston and Corbin and have issued lesser restraints against particularized competitive activities where the circumstances disclosed that such was the fair and reasonable course. See *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955); *Ebbeskotte v. Tyler*, 127 Ind.App. 433, 142 N.E.2d 905 (1957); *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So.2d 133 (1963); *Credit Bureau Management Co. v. Huie*, 254 F.Supp. 547 (D.Ark.1966); *Wood v. May*, 73 Wash.2d 307, 438 P.2d 587 (1968); *Blake*, Supra, 73 Harv.L.Rev. at 674, 682; 17 C.J.S. Contracts § 289 at 1224 (1963); Cf. *Cedric G. Chase Photo. Lab. v. Hennessey*, 327 Mass. 137, 97 N.E.2d 397 (1951); *John Roane, Inc. v. Tweed*, 33 Del.Ch. 4, 89 A.2d 548 (1952); *Plunkett Chemical Co. v. Reeve*, 373 Pa. 513, 95 A.2d 925 (1953); *Denny v. Roth*, 296 S.W.2d 944 (Tex.Ct.Civ.App.1956); *Ramey v. Combined American Ins. Co.*, 359 S.W.2d 523 (Tex.Ct.Civ.App.1962); but Cf. *Baker v. Starkey*, 259 Iowa 480, 144 N.W.2d 889 (1966); *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, 200 N.E.2d 297 (1964).

Id. at 576-77.

Ceresia is cited by other Courts as standing for "[t]he better test," under which enforcement of a non-compete "does not depend on mechanical divisibility" but whether "partial enforcement is possible without injury to the public and without injustice to the parties." *Wood v. May*, 438 P.2d 587, 591 (Wash. 1968) (citing *Ceresia*, 242 S.W.2d 359). Affirming that precedent and the discretion exercised by the Circuit Court in this case will not, as the Counter-Appellants claim, place Kentucky in a minority of "the most liberal of" jurisdictions, but will instead align the law of this Commonwealth with the majority of other states that have considered the matter, including surrounding states.

Raimonde, 325 N.E.2d 544; *Central Adjustment Bureau, Inc.*, 678 S.W.2d 28, 37 (Tenn. 1984) (rejecting both the "all-or-nothing" approach to covenants not to compete as well as the formalistic version of the "blue pencil" rule that would permit the Court to strike only divisible provisions, and instead adopting the "rule of reasonableness" as the "better rule").[9]

The Counter-Appellants offer no sound distinction between the trial court's (already recognized) authority to change territorial and temporal restrictions and the authority (exercised in this case) to insert a missing geographic scope. If anything, changing a specified temporal or geographic scope is far more "liberal" and dramatic than providing a missing scope in order to partially enforce of the Agreement in this case. Kentucky Courts have long had the authority to consider extrinsic evidence and then construe agreements that are made ambiguous by missing terms in order to effectuate the parties' intentions. See, e.g., *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) ("Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties"). By considering testimony and other evidence and then enforcing the Agreement only within Kentucky, the Circuit Court did exactly that.

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[9] The *Restatement (Third) of Employment Law*, § 8.08, first drafted in 2010 and updated in June 2013, states that only "a minority of states" follows the "strict version of the blue-pencil doctrine," under which a court may modify a restrictive covenant only by eliminating grammatically severable portions, but cannot revise or add language. An even smaller number of jurisdictions refuse to reform unreasonable covenants not to compete in any way (and one of those jurisdictions, Wisconsin, did so by statute). *Id.* See also 54 Am. Jur.2d *Monopolies and Restraints of Trade*, § 965 (updated May 2013) (noting that the majority of jurisdictions have abandoned the version of the blue pencil rule under which the divisibility of the covenant governs whether it may be modified, in favor of a rule of reasonableness as the standard for judicial modification of a noncompetition covenant which is unenforceable as written).

B. Kentucky's Public Policy Is Served By Recognizing the Circuit Court's Authority to Modify and Partially Enforce Covenants Not to Compete

The Counter-Appellants present the Court with a spectrum of disastrous consequences threatened by the Circuit Court's equitable modification of the Agreement to apply to a reasonable geographic space. None of those dire predictions is plausible.

As an initial matter, many of the Counter-Appellants' policy arguments are simply arguments against covenants not to compete in general, regardless of scope and regardless of the trial courts' authority to make equitable modifications. It is true that, as observed in the above-quoted opinions, all restraints on trade were once held to be presumptively invalid. As industries developed to place a higher premium on skill, knowledge, and information, however, the rule rightly changed. The enforcement of covenants not to compete now provides an important incentive to employers to invest in long-term employment relationships (like the one enjoyed here by Brown). Employers make that investment in many ways – not only through formalized classes or apprenticeships (which, the Counter-Appellants complain, were not offered here), but also through years of sharing methods, customer contacts and rapport, pricing information, and other propriety ways of doing business. Like any other investment, it is made with the expectation of some return. If covenants not to compete are disregarded, an employee is free to use that training and experience in order to demand higher compensation from a competitor, and the competitor is free to poach well-trained employees without having to incur or invest in the costs of training. An employer's incentive to invest in a Kentucky workforce would consequently, and understandably, diminish.

The *in terrorem* effect feared by the Counter-Appellants (Brief, p. 30), under which an employee will be too afraid to take a better job even if he or she believes an existing non-compete agreement to be unenforceable, obviously did not come to pass in this case. To the contrary, Creech went out of its way to accommodate Brown's desire to seek a new job with Standlee by allowing the employment with Standlee contingent upon Brown's (mis)representation that he intended to call only upon "big box" stores (i.e., non-competitors). There is no evidence that the Agreement was presented by Creech to Brown in bad faith, or that the Agreement was "deliberately oppressive". Again, Brown - not Creech – terminated the employment relationship and breached the parties' contract.

Moreover, the Counter-Appellants overlook the reality that recognition of the Circuit Court's discretion to modify a covenant not to compete so that it is reasonably tailored to both parties' interests is not a mandate for such a modification, nor is there any indication that Courts will reform covenants "on a whim" (Brief, p. 30). Here, the Circuit Court heard testimony, considered significant evidence, and reviewed Creech's customer list before modifying the non-compete obligation to apply only to Kentucky. As pointed out by the Counter-Appellants, the Circuit Court began the hearing by stating: "I don't want to just randomly say you know, Fayette County, nor do I want to say Kentucky, or Kentucky and all states that touch Kentucky, or all [Creech's] current customers, so I don't want to just do that because I don't have any concept of what that really means." (Brief, p. 16 n. 10 (citing R.A. 234)). The Circuit Court then conducted a lengthy hearing in order to educate itself as to the extent of Creech's and Standlee's business interests in and outside of Kentucky. There was nothing random about the Circuit Court's holding.

Contrary to the Counter-Appellants' argument, a disaffirmance of the trial courts' authority to modify covenants not to compete will not provide employees with greater protection, nor would such a holding necessarily result in more narrowly-drafted contracts. If the Courts are stripped of the ability to modify non-compete covenants so that they are tailored to protect only the employer's legitimate interests, as weighed against the interests of the employee to accept other positions (and of the public in free competition), employers are likely to draft those contracts to contain even more sweeping terms. In this case, for example, Creech does business throughout the United States and, indeed, the world. Had the Agreement expressly identified the United States or some other large area (even "the world") as the geographic scope of Brown's non-compete obligation, then the Circuit Court might well have found the Agreement to be enforceable.

C. The Agreement Is Supported By Adequate Consideration

Kentucky law is as consistent as it is clear: continued employment supplies adequate consideration for a covenant not to compete, even if it is presented to the employee for execution well after the employee's first day of work. The Counter-Appellants attempt to distinguish the long-standing holding in *Higdon Food Service, Inc. v. Walker*, 641 S.W.2d 750 (Ky. 1982), by arguing that, in *Higdon*, this Court "actually required that there be something more than mere continued employment to constitute adequate consideration for a covenant not to compete." *Higdon* contains no such requirement.

In that case, a wholesale grocery company, Higdon, hired Walker as a warehouseman and a truck driver (a position arguably akin to the non-skilled, untrained

position which Brown claims – inaccurately – to have held with Creech). For several years, Walker had no written contract with Higdon. Years after beginning work, however, he was required to sign a non-compete agreement. Three years later, Walker – like Brown – elected to quit his job and go to work for his employer's competitor. Walker argued that the non-compete agreement was unenforceable because it was a "one-way street, providing certain protections for Higdon but nothing for Walker that he did not already have." This Court began its analysis with a clear holding that the non-compete agreement constituted a new employment arrangement, and that "hiring itself (or rehiring, if one prefers that word" provided the necessary consideration:

> In the first place, whatever may have been the employment arrangement before, it was succeeded and superseded by the contract. In this respect it was the same as a new employment. Higdon was under no more of an obligation to continue or renew the employment than Walker was. The hiring itself (or rehiring, if one prefers that word) was sufficient consideration for the conditions agreed to by Walker. **It makes no difference that Higdon could have discharged him the next day. The point is that it did not have to hire him—or keep him on—at all.**

Id. at 751 (emphasis added).

The Court's discussion of "something more" was not, as the Counter-Appellees' claim, a "requirement" in order for adequate consideration to exist, but instead merely *dicta* or, at best, an alternative holding: "Actually, however, one-sided as it was, we think Walker did acquire something more under the contract." *Id.* at 752. The Court interpreted certain language in the Agreement (which stated that termination would occur upon the employer's conclusion that Walker's services were no longer satisfactory or needed) as imposing an obligation of good faith upon the employer. *Id.* Under Kentucky law, of course, all agreements include the implied covenant of good faith. See, e.g.,

Ranier v. Mount Sterling Nat. Bank, 812 S.W.2d 154, 156 (Ky. 1991) ("In every contract, there is an implied covenant of good faith and fair dealing").

Had Creech mandated that Brown execute the COI Agreement only to then peremptorily fire him, then Brown would arguably have a claim for violation of that implied covenant. Like Walker in the *Higdon* case, however, it was Brown – not the employer – who elected to terminate the employment relationship. That critical fact distinguished the *Higdon* scenario (and the scenario presented in this case) from an earlier decision, *Crowell v. Woodruff*, 245 S.W.2d 447, 449 (Ky. 1951), in which the employer fired the employee four and a half months after the employee executed a covenant not to compete. The *Higdon* Court held:

> The inequitable circumstance on which *Crowell v. Woodruff* turned does not exist in this case. To the contrary, it was Walker himself who terminated the employment in order to earn more compensation elsewhere and who now seeks to repudiate the contract after having worked under it for 2½ years. Although we need not so decide, it seems to us that under the principles of equity he might very well be estopped.

641 S.W.2d at 752.

As set out above, Creech denies that Brown was "demoted." The Counter-Appellants acknowledge, as they must, that Brown's salary remained unchanged. The Affidavit on which the Counter-Appellants rely makes no mention of a "demotion." And, contrary to the Counter-Appellants' insistence (Brief, p. 33), Kentucky law has never required cash or training or any other type of special, heightened type of consideration in order to support a covenant not to compete.[10] See *Dunn v. Gordon Food*

[10] The Counter-Appellants appear to argue in favor of some type of heightened consideration ("training, acquisition of technical skills at the employers [sic] expense, cash, some guarantee of employment . . . , promotion, etc" (Brief, p. 33) where the employee is, at least in his or her own view, working in an "unskilled, non-technical" position. Setting aside the disputed issues of fact surrounding Brown's self-serving characterization of the position he held with Creech, no case is cited for such a rule. Kentucky Courts do not require that an employee hold a particular type of degree in order to find that covenant not to

Services, Inc., 780 F.Supp.2d 570, 574 (W.D. Ky. 2011) (under *Higdon*, "dictating to an employee that he must sign an agreement or risk losing his position was adequate consideration where the employee was retained following the agreement's execution"); *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681, 685 (Ky. App. 1981) (where a covenant not to compete is signed by the employee after the date of his employment, and where the employer in fact continues to employ the employee for an appreciable length of time after he signs the agreement but the employee elects to voluntarily resign, then "the employer has fulfilled an implied promise to continue the employee's employment and that promise is sufficient consideration to support enforcement of the employee's promise not to compete"). Creech lived up to that implied promise. Brown was not fired; instead, Brown quit - but only after misrepresenting to Mr. Creech the nature of the work he planned to do with Standlee, a direct competitor.

D. Creech Has Not Waived Its Rights Under the Agreement

The previously-briefed issue of waiver has now itself been waived by the Counter-Appellants, whose brief makes no mention of the issue in either the "Argument" section or in the list of issues as to which they have asked this Court to review (Brief, p. 8). Waiver is, therefore, only briefly addressed here.

A party claiming waiver must prove "a knowing and voluntary surrender or relinquishment of a known right." *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003).

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compete to be enforceable, nor are such covenants limited to industries considered to be "technical." Instead, Kentucky Courts have upheld non-compete agreements entered by employees who repair watches, *Stiles v. Reda*, 228 S.W.2d 455 (Ky. 1950), who adjust insurance claims, *Hammons v. Big Sandy Claims Service, Inc.*, 567 S.W.2d 313 (Ky. App. 1978), who clean carpets, *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 320 (Ky. App. 2009), who work as salesmen for a wholesale grocery, *Higdon Food Service, Inc. v. Walker*, 641 S.W.2d 750, 751 (Ky. 1982), and who perform collections work, *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681 (Ky. App. 1981).

Waiver can be implied only from "decisive, unequivocal conduct reasonably inferring the intent to waive . . . ." *Id.* Creech's counsel's November 14, 2008, letter cannot conceivably be read as an unequivocal waiver of its rights under the COI Agreement. Instead, the letter reaffirms the Agreement ("If you need a copy of this agreement, feel free to contact me"), details the substance of the Agreement ("This agreement forbids Mr. Brown from accepting employment with the direct or indirect competitor of Charles T. Creech, Inc. for three years . . ."), and clearly states that Creech's willingness to allow Brown's employment with Standlee was based upon Brown's (mis)representation to Mr. Creech that he would not be calling on any of Creech's customers on behalf of Standlee. The letter clearly states Creech's expectation that Brown refrain from directly or indirectly using any proprietary information (with specific examples provided in the letter), and counsels Brown to contact Creech with any questions in order to "avoid any inadvertent disclosures" which might compel Creech to take action against Brown and Standlee. No waiver can be found on these facts.

CONCLUSION

For the reasons set forth above, Creech respectfully requests that this Court affirm the reversal by the Court of Appeals as to Creech's claims insofar as they are based upon the non-competition obligation, but reverse the Court of Appeals' "Footnote 1" holding (concerning the nondisclosure provision) and the new "series of factors" test. Creech further requests that this Court hold that non-competition agreements in Kentucky continue to be enforceable where they are reasonable in light of the interests of the employer, the employee, and the public, without the need for the "series of factors" test, and affirm the Circuit Courts' authority to modify and partially enforce non-competition

agreements to the extent necessary to protect the parties' legitimate interests. By so holding, this matter may be returned to the Circuit Court with instructions to reinstate the temporary injunction and to complete the balance of the case, including discovery and establishing Creech's damages.

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