IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-00407

BUSINESS COMMUNICATIONS, INC. PLAINTIFF/APPELLANT

VS.

ALBERT BANKS DEFENDANT/APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE ALBERT BANKS

Oral Argument Not Requested

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BUSINESS COMMUNICATIONS, INC. PLAINTIFF/APPELLANT

VS.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Appellant

(1) Business Communications, Inc. ("BCI")

Counsel for Appellant

(2) Stephen J. Carmody, Esq.
(3) John C. Hall, Esq.
(4) BRUNINI, GRANTHAM, GROWER & HEWES, PLLC

Appellee

(5) Albert Banks

Counsel for Appellee

(6) Silas W. McCharen, Esq.
(7) Brandi Smith Shafer, Esq.
(8) DANIEL, COKER, HORTON & BELL, P.A.

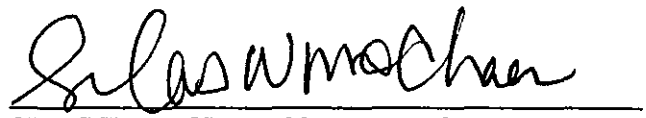
Madison County Circuit Court Judge

(9) Hon. William W. Chapman

Other Interested Persons/Entities

(10) Tony Bailey, President and CEO of BCI
(11) Gerard Gibert, CEO of GKR Systems, Inc. d/b/a Venture Technologies

This, the 14th day of April 2010.



SILAS W. McCHAREN, Attorney for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Albert Banks ("Banks"), submits that pursuant to MISS. R. APP. P. 34, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the appellate record. Accordingly, this Court's decisional process will not be aided by oral argument.

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I. STATEMENT OF THE ISSUES

BCI's "Statement of the Issues" merely recited an outline of its argument of the "issues" on appeal. Banks, however, does not accept BCI's "argument" as the issues on appeal. Pursuant to MISS. R. APP. P. 28(b), Banks is providing his own statement of the issues on appeal:

(1) Whether the trial court erred in granting Banks' motion for judgment notwithstanding the verdict and entering a judgment as a matter of law in favor of Banks on BCI's breach of contract claim for damages regarding the Business Protection Agreement?

(2) Whether the trial court erred in granting Banks' motion for judgment notwithstanding the verdict and entering a judgment as a matter of law in favor of Banks on BCI's breach of contract claim regarding an unsigned Reimbursement of Costs agreement?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

BCI appeals the trial court's order granting Banks' Motion for Judgment Notwithstanding the Verdict which set aside the legally improper jury verdict rendered in BCI's favor. [R. 1384-1386].

B. DISPOSITION IN THE COURT BELOW

1. Complaint

On March 10, 2006, BCI filed the underlying action in the Chancery[1] Court of Madison County, MS, naming Banks and GKR Systems, Inc. d/b/a Venture Technologies ("Venture") as defendants. [R. 15-29]. BCI's complaint asserted two causes of action against Banks: (1) breach of the Business Protection Agreement ("BPA")[2] and (2) misappropriation of trade secrets and

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[1] The case was thereafter transferred to the Circuit Court of Madison County, MS. [R. 11-12].

[2] BCI's original Complaint was devoid of any reference to training costs or breach of an unsigned Reimbursement of Costs Agreement ("RCA") incorporated into a BCI Employee Handbook. **Had BCI asserted a separate claim for breach of contract of an unsigned RCA, Banks would have moved (pre-trial) to dismiss the claim as a matter of law as being contrary to the legal and equitable principles of**

confidential/proprietary information in violation of the BPA and Mississippi law; and three causes of action against Venture: (1) tortious interference with contract, (2) intentional interference with business relations and prospective business advantage, and (3) misappropriation of trade secrets and confidential/proprietary information in violation of the BPA and Mississippi law. BCI's claims arose out of Banks' March 2006 decision to leave the employ of BCI to begin new employment with Venture. Banks and Venture timely answered BCI's complaint denying all claims for relief asserted against them. [R. 65-76; R. 92-106].

2. Motion for Injunctive Relief

Along with its March 10, 2006 Complaint, BCI filed a Motion for Temporary Injunction and Restraining Order seeking numerous forms of injunctive relief, including but not limited to, restraining Banks from merely working at Venture. [R.32-37]. Venture timely responded in opposition to BCI's Motion for Temporary Injunction and Restraining Order asserting that BCI was attempting to restrict fair and honest competition. [R.57-64]. In support of its opposition to BCI's motion for injunctive relief, Venture offered the following two documentary exhibits:

> (1) an agreement entered into between Banks and Venture (on February 13, 2006) wherein Banks' employment with Venture would be restricted so as to prevent Banks from unfairly competing with BCI by using his knowledge of BCI confidential information or trade secrets, if any, and that would prevent Banks from soliciting/servicing former BCI customers [R. 62-64; P-11]; and
>
> (2) an affidavit from Venture's President, Gerard Gilbert, swearing under oath that Venture and Banks had both adhered to their agreements to prevent any unfair competition by Banks against BCI. [R. 61].

3. Agreed Order on Injunctive Relief

Mississippi contract law.

On August 6, 2006, the trial court entered an Agreed Order on BCI's Motion for Temporary Injunction and Restraining Order. [R. 629-631]. The Agreed Order essentially memorialized the agreements and obligations already undertaken by Banks and Venture in their February 2006 agreement. [R. 62-64]. The Agreed Order permitted Banks' continued employment at Venture. [R. 629]. The Agreed Order enjoined Banks from disclosing BCI confidential information and soliciting/serving any BCI customers. Accordingly, as of August 2006, the mere fact that Banks was working at Venture was no longer an issue and BCI's claims were limited to damages (if any existed) BCI sustained as the result of Banks' going to work for Venture.

4. Amended Complaint

On March 29, 2007, after conducting discovery, BCI filed an Amended Complaint eliminating all the claims against Banks and Venture except: (1) one breach of contract claim against Banks under the BPA; and (2) one claim for tortious interference with contract against Venture. [R. 654-662][3]. Banks and Venture timely answered BCI's Amended Complaint denying all claims for relief asserted against them. [R. 663-675; R. 676-686]. Like its original complaint, BCI's amended complaint made no claim or reference to an unsigned RCA regarding alleged training costs. Again, had BCI asserted a separate claim for breach of contract of an unsigned RCA, Banks would have moved (pre-trial) to dismiss the claim as a matter of law.

5. Summary Judgment Dismissal of BCI's Claim Against Venture

On December 7, 2007, the trial court granted summary judgment and dismissed with prejudice BCI's claim for tortious interference with contract against Venture. Accordingly, after

[3]BCI's amended complaint abandoned its previous claim for misappropriation of trade secrets and confidential and proprietary information in violation of the BPA and Mississippi law against Banks and Venture and its previous claim for intentional interference with business relations and prospective business advantage against Venture.

devoting over two and a half years in pursuing what turned out to be a futile action against Venture, BCI was then left with pursuing its one and only claim against Banks - breach of the BPA.

6. October 2008 Trial

On October 14, 2008 the underlying action proceeded to trial. Undoubtedly realizing that it could not demonstrate that Banks harmed any business interest protectable under the BPA, BCI decided to assert, for the first time, a separate breach of contract claim regarding a training cost reimbursement contract[4] that was never signed or even agreed to by Banks.

The uncontested evidence showed the following facts:

Banks Had Extensive Education & Experience In the Field of Information Technology Prior to Coming to BCI :

- Banks came to BCI with approximately 12 years total experience: 4-6 years of graduate and undergraduate education in computer science and internet technology ("IT") and 6 years of work experience in the information systems field. [Tr. 424-436].

Banks' Prior Certifications and Training:

- ***At no cost to BCI***, Banks brought with him valuable computer certifications, specifically including his Cisco Certified Internetwork Expert ("CCIE") certification, all of which **BCI benefitted and profited** from throughout Banks' five years of employment at BCI. [Tr.104].

BCI Lost No Customers as a Result of Banks Working for Venture

- Despite litigating against Banks for over two and a half years, Thomas Hinds (BCI's Information Technology Solutions Group President) and Tony Bailey (BCI's Owner/CEO), both admitted that BCI had lost no customers as a result of Banks going to work for Venture. [Tr. 105-106, 332, 341].

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[4] The one page unsigned RCA, which facially required a signature of the employee as well as the signature of a witness, was incorporated into a 44 page amended BCI Employee Handbook which was merely emailed by BCI to its employees and for which BCI never requested its employees, much less Banks, to assent to.

No Proprietary/Confidential Information Was Disclosed by Banks:

- Hinds and Bailey admitted that they were not aware of any BCI proprietary/confidential information[5] which Banks ever disclosed (including the BCI documents which were stuck in Banks' personal belongings and inadvertently taken from BCI by Banks when he left[6]). [Tr. 123, 349].
- Hinds admitted that BCI, by being a downstream distributor/service of other companies' products (*e.g.* Cisco products), **holds no patents or trade secrets.** [Tr. 110-11].

Banks' Training at BCI was General/Ordinary On-The-Job Training:

- BCI requires its employees to participate in on-the-job studying to stay up-to-date with computer technology. [Tr. 93].
- Hinds testified that BCI encourages its employees to devote up to 25% of their working time per year for this up-to-date studying/training. [Tr. 276].
- The only "training" evidence presented by BCI consisted of Banks' reading/studying training manuals. [Tr. 93].
- None of the training manuals were proprietary products of BCI, but were from other companies such as Cisco, Microsoft, etc. [Tr. 93].
- None of this "training material" was unique to BCI but was the type of training material that any computer engineer would review at any job. [Tr. 478-480].
- BCI produced no evidence reflecting the actual expense (i.e., costs of manuals/books) incurred for Banks' required on-the-job reading/studying. Instead, BCI presented proof of Banks' salary - a costs BCI would have incurred whether Banks was studying/reading, billing a client or goofing off at his desk.

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[5] As it did in the trial court below, BCI claims that the BCI employee handbook and the BPA itself are forms of confidential/proprietary information. Contrary to BCI's bare assertions in this appeal (and in the trial court below), BCI's employee handbook and the BPA itself are not the type of information which anyone would consider proprietary to BCI and worthy of confidentiality. The BCI handbook merely offers BCI employees information concerning employment policies, vacation time, sick leave, termination procedure, legal rights, etc. The very nature of the BPA, a legal contract, presumes that it will be disclosed to others. If BCI felt that such documents should remain confidential, it (as the drafter) should have specifically included **CONSPICUOUS** language in its employee handbook and on the BPA itself providing that such information was confidential. **Lastly, BCI failed to show any damage or harm it suffered as a result of Banks merely disclosing the BPA to Venture or inadvertently taking the handbook.** Accordingly, BCI's assertions concerning the confidential/proprietary nature of its employee handbook and the BPA itself are unworthy of credence and without merit.

[6] As Banks testified, the handful of documents he inadvertently took from BCI were immediately returned to BCI (via Banks' counsel) at the time they were discovered (in his garage) while preparing responses to BCI's discovery requests. [Tr. 451-53]. Banks further testified that he never disclosed this information to anyone other than his legal counsel and specifically testified that such information was never given to Venture. [Tr. 452].

No Unfair Competitive Advantage:

- Hinds admitted that he knew of no unfair competitive advantage Venture received as a result of Banks leaving BCI to go work for Venture:

Q. Can you tell this jury one single unfair competitive advantage that Venture Technologies has gotten as a result of Al Banks going to work there?
A. **I don't know of any.**
Q. You don't know?
A. I don't know of any.
Q. You didn't know in March of 2006 [when lawsuit was filed], did you?
A. **No, I didn't.**
Q. And you don't know today, do you?
A. **Correct.**
Q. BCI's interest in protecting itself from unfair competition has not been harmed by Al Banks' employment at Venture Technologies, has it?
A. **I can't say that it has.**

[Tr. 108] (emphasis added).

BCI Suffered No Damage as a Result of Banks going to Work for Venture:

- Hinds and Bailey specifically testified that BCI had suffered no damage as a result of Banks leaving BCI and going to work for Venture:

Q. Now, other than simply not wanting Al [Banks] to go to work for Venture, which he could quit and do, he could quit and go somewhere, what is it about the fact that he went to work for Venture that has caused you [BCI] any monetary damage?
A. **I don't know of any.**
Q. None. Isn't that correct?
A. **Not that I know of.**
Q. It's been two-and-a-half years now. If you don't know today, how are you going to know.
A. **I've told you the same answer, I don't know.**

[Hinds Testimony, Tr. 115] (emphasis added).

Q. The truth is there isn't any proof that you have that you have been harmed as a result of Al Banks' actions?

. . .

A. The only evidence is we spent a lot of time and money trying to defend [sic] something, and I go back to the point that I know he took some things, and we have been harmed from dealing with this in time, money, and effort. So, yes, we have been harmed, **but maybe not in the way that your talking about.**
Q. **Monetary damages.**
A. **Yeah.**

Q. **I believe you testified to the fact that the business has grown maybe 30 percent a year?**
A. **Yes.**
Q. That's been since Al left, correct?
A. Correct.
Q. **So Al's leaving and going to work for Venture did not cause your business to not to continue to develop.**
A. **No, it did not.**

[Bailey Testimony, Tr. 358-59] (emphasis added).

Presented with claims not specified in its amended complaint[7], improperly admitted evidence[8], being improperly instructed on the law, along with other trial errors, the jury rendered a verdict in BCI's favor in the amount of $10,000. [R. 1159]. The $10,000 verdict awarded $1,000 as damages for Banks' alleged breach of the BPA and $9,000 as damages for Banks' alleged breach of the unsigned RCA. [R. 1159]. A Final Judgment was entered on October 31, 2008. [R. 1161].

7. Trial Court Grants Banks' Motion for JNOV

Banks thereafter timely filed his MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR A REMITTITUR OF THE DAMAGES AWARDED on November 10, 2008. [R. 1164-1183]. Pursuant to U.C.C.C.R. 4.03, Banks submitted a memorandum of authorities in support of his post-trial motions on November 26, 2008.[9]

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[7] A new and separate breach of the contract claim regarding an unsigned RCA.

[8] Evidence of Venture's agreement to indemnify Banks up to $10,000 which should have been excluded under MISS. R. EVID. 403 and 411.

[9] At footnote 2 of its Brief, BCI requests the Court award it attorneys' fees and costs as outlined in its Motion filed with the trial court. Since the motion for attorneys fees is not an issue on appeal, such a request is improper and should be denied. However, it should be noted that BCI sought attorneys fees in the amount of $63,597.31 **(i.e. over six times the amount of the improperly rendered jury verdict).**

BCI responded to Banks' post-trial motions on January 5, 2009. [R. 1294-1316]. BCI's response, however, failed to address the overwhelming legal authority which supported setting aside the verdict and entering judgment as a matter of law in Banks' favor. Instead, BCI's response was nothing more than a regurgitation of one sentence quotes from Mississippi cases and/or misleading paraphrases of what BCI opined such cases hold. None of the Mississippi cases cited by BCI were applicable to the specific facts of the instant case.

Moreover, the out-of-state authority offered by BCI was either out-dated[10] or clearly inapplicable to the specific facts of this case. Even more compelling, was that BCI's response (1) did not challenge one single fact offered by Banks; (2) did not respond to approximately 99% of the legal authorities (controlling and persuasive) offered in Banks' motion and memorandum[11]; and (3) did not offer any analysis applying its authorities to the facts of this case. BCI failed to offer any valid or credible argument why the trial court should not have granted Banks' post-trial motions. Banks timely filed his Reply/Rebuttal on January 20, 2009. [R. 1335-1357].

After (1) considering the motions, responses, and replies (2) reviewing numerous documentary exhibits, (3) having an opportunity to re-examine all of the evidence and witness testimony presented at trial, and (4) conducting two post-trial hearings (January 20, 2009 and March 2, 2009), the trial court orally, and in a written order, granted Banks' Motion for JNOV specifically finding as follows:

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[10] BCI's appellate brief relies on many of the same out-dated authorities (1909-1976) it relied in response to Banks' post trial motions.

[11] It was particularly noteworthy that BCI's response excluded any reference to the very law journal article (Duke Law Journal) it so heavily relied on at trial while challenging Banks' evidentiary objections and motion for directed verdict regarding "on-the-job training" as a legitimate business interest protectable under a non-compete agreement. The Duke Law Journal article will be analyzed below.

5.

As to breach of the BPA, the Court finds as a matter of law that the evidence presented by BCI at trial was insufficient to satisfy its burden to prove all of the essential elements of its case. **Covenants not to compete only protect against "unfair" competition by a former employee. Being disfavored by law, these agreements are never enforced to prevent fair competition in the marketplace.** BCI's proof failed to show that it was subjected to unfair competition as a result of Banks' employment by Venture Technologies.

The Court notes that BCI and Venture Technologies were competitors before Banks started work for Venture and remained competitors after Banks was working there. **The evidence failed to show that there was any change in competition between these two companies as a result of Banks' employment. Because BCI's proof, as a matter of law, failed to show that it suffered any unfair competition, the jury's verdict cannot stand and must be set aside.**

6.

Regarding breach of the 2005 RCA, the Court finds that BCI's proof was legally insufficient to show that there ever existed a legally valid and binding contract. **First, the 2005 RCA was never signed by Banks or witnessed by anyone.** It was contained in a revised Employee Handbook that Banks never saw or acknowledged receiving.

Second, the course of dealings between the parties showed that Banks had earlier signed a stand-alone RCA in March of 2001 which was duly witnessed by his supervisor. **The unsigned 2005 RCA was materially different from the signed March 2001 RCA regarding the period of time Banks would be required to reimburse BCI for certain items of expense. There was no proof of a "meeting of the minds" regarding this purported material change.**

Finally, the March 2, 2001 offer letter signed by Banks and later incorporated into his employment agreement, **expressly stated that "[n]either the Employee Handbook nor any explanation of BCI's policies and guidelines you may receive will constitute an express or implied contract for any purpose or otherwise affect your status as an employee at-will."** (emphasis added).

Accordingly, the Court finds that there was never a valid, legally enforceable RCA between the parties and the jury's verdict cannot stand.

[R. 1384-1386] (bold emphasis added). The trial court, thereafter, entered an AMENDED FINAL JUDGMENT rendering a judgment as a matter of law in Banks' favor and dismissing all of BCI's causes of action with prejudice. [R. 1383].

BCI now appeals the trial court's order granting Banks' JNOV and AMENDED FINAL JUDGMENT. [R. 1387-1388].

C. STATEMENT OF THE FACTS

Actions to enforce covenants not to compete (like the underlying action) are by their nature fact specific and must be viewed in the specific factual context in which they arose. Such actions are to be judged and examined on a case-by-case basis.[12] Unlike BCI's woefully inadequate two-page fact statement, the following detailed statement of facts provides this Court with a clear picture of what is relevant to this appeal.

1. Banks' Educational Background and Prior Employment Experience

BCI clearly provided Banks with neither specialized training or education that he did not already possess before coming to work for BCI, nor any special and/or unique type of training that he could not have received anywhere other than BCI. [Tr. 478-80].

Banks received his undergraduate degree from the University of Alabama where he majored in business management and minored in computer science. [Tr. 425]. Banks thereafter pursued, but was one class short of obtaining, a master's degree in the field of Information Systems at LSU. [Tr. 425]. The master's degree Information Systems program at LSU included graduate studies in the following areas: databasing, data analysis, expert systems, neural networks and telecommunications.

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[12] *See Donahoe v. Tatum*, 134 So.2d 442, 445 (Miss. 1961) (In analyzing covenant not to compete cases this Court stated that "**[t]he circumstances in each case will be carefully scrutinized** to determine whether it falls within or without the boundary of enforceability") (emphasis added).

Banks paid for both his graduate and undergraduate education and was never offered reimbursement for those expenses by any employers, much less BCI.

While he was pursuing his master's degree, Banks worked part time as a Unix computer operating system consultant. After leaving LSU, Banks worked as a service and network administrator (a "jack of all trades" in the computer/information systems department) for Cajun Electric, a power cooperative company in Baton Rouge. [Tr. 426-28]. After working a year for Cajun Electric, Banks and his family moved to Jackson, MS to be closer to his wife's family. In Jackson, he began working in the information systems department for Telephone Electronics Corporation ("TEC"). [Tr. 428-30]. Banks then worked for Southern Farm Bureau Casualty as a network analyst. [Tr. 430-31]. While at Farm Bureau Banks received additional technology training and certifications. Banks specifically received the following certifications: Advanced Cisco Router Configuration, Microsoft Certified Systems Engineer, and Cisco Certified Network Association. While at Southern Farm Bureau and/or TEC, Banks also began studying toward his CCIE certification. [Tr. 431-32].

Banks left Farm Bureau to work for Skytel as a systems analyst. [Tr. 432-33]. While at Skytel, Banks continued his CCIE training and studies and eventually earned his CCIE certification. [Tr. 436]. At its own expense, Skytel provided Banks continued CCIE certification training and test certification and never requested reimbursement from Banks. [Tr. 436]. After eight months with Skytel, Banks accepted a job with another company that was interested in hiring a CCIE certified computer engineer: that company was BCI.

Accordingly, before ever going to work for BCI, Banks had approximately four-six years of graduate and undergraduate education in computer science and information systems and he had approximately six years of work experience in the field of information systems. Banks also brought

with him to BCI valuable computer certifications, specifically his CCIE certification, all of which BCl benefitted from without having to expend any of its own resources.

2. Banks Begins Working for BCI in 2001

a. March 2, 2001 Offer of Employment by BCI to Banks

On March 2, 2001, BCI extended a written offer of employment to Banks as a computer engineer. [P-1]. BCI's written offer of employment specifically provided the following:

> This letter **is not an express or implied contract of employment** for any specific purpose or term . . . Upon joining BCI, you may receive an employee handbook and a more detailed, formal explanation of BCI's policies and guidelines. **Neither the employee handbook nor any explanation of BCI's polices and guidelines** you may receive **will constitute an express or implied contract for any purpose** . . . .

[P-1] (emphasis added)[13]. Accordingly, neither BCI nor Banks had any contractual rights against each other.

Banks accepted BCI's employment offer and began working at BCI on or about March 8, 2001.

b. Banks Is Provided with BCI's Employee Handbook in March 2001

On March 8, 2001, Banks was provided with a copy of BCI's Employee Handbook for which he signed an acknowledgment of receipt. The acknowledgment Banks was required by BCI to sign specifically provided that the BCI handbook **did not create a contract of employment**:

> I acknowledge and agree **that nothing in this Employee Handbook is intended to create or constitute and employment agreement with any employee.** As an employee covered by this Employee Handbook, I acknowledge and agree that my employment is for no definite period of time and may be terminated, with or

[13] It is noteworthy that BCI's appellate brief is devoid of any reference to this very statement from its written offer of employment with Banks, specifically that the BCI Employee Handbook and any other BCI policies/guidelines WOULD NOT constitute a "contract for any purpose."

without cause, at any time in accordance with the Employee Handbook, at my option or at the option of BCI.

(Emphasis added). Accordingly, the handbook itself expressly stated that it created no contract rights between BCI and Banks.

c. Banks Signs a Reimbursement of Costs Agreement of One Year's Duration

Along with acknowledging his receipt of the BCI Employee Handbook, Banks was made to sign a separate, "stand alone," agreement entitled "REIMBURSEMENT OF COSTS" ("2001 RCA"). [P-3]. The 2001 RCA required Banks to date and sign and print his name, which he did. [P-3]. The 2001 RCA additionally required Banks' signature to be witnessed. [P-3]. Banks' former supervisor, Derrick Lindsey, signed the RCA acknowledging his witness of Banks' signature. [P-3]. The 2001 RCA provided, in pertinent part, as follows:

> I understand that during the course of my employment, [BCI] may necessarily incur certain fees and expenses related to my employment. **Therefore, I hereby agree that should I terminate my employment with [BCI] within one year of my date of hire, I will be responsible for reimbursing to [BCI] all expenses which may have been incurred by the Company with regard to my relocation, training, and/or certification of any kind.** I understand and agree that a sum equal to this amount will become immediately due and payable, with or without notice, and without demand therefore, on the date of my separation from employment, and I agree to immediately reimburse to [BCI] this amount.
>
> . . .
>
> */s/ Derrick D. Lindsey* — Witness
>
> */s/ Al Banks* 3/8/01 — Signature Date
>
> Al Banks — Print Name

[P-3] (emphasis added). As emphasized above, the 2001 RCA **terminated on Banks' one year anniversary at BCI.** After one year, BCI would have recouped its investment in Banks' training. No one from BCI ever explained to Banks what type of training expenses would be reimbursable

should he leave BCI's employ before one year, nor was it ever explained to him how the training expenses would be calculated.

d. Banks Signs the Business Protection Agreement

Although there was a dispute about the date of signing[14], it is undisputed that Banks signed the BPA.

e. Banks' Training Costs Reimbursement Obligations Terminate/Expire in March 2002

Banks continued to work for BCI and on March 7, 2002, the training costs reimbursement obligations enumerated in the 2001 RCA he signed and assented to terminated/expired.

3. BCI Creates a New and MATERIALLY ALTERED Reimbursement of Costs Agreement (Still Requiring the Employee's Signature) and Inserts it Into BCI's New Employee Handbook in 2005 Which BANKS DOES NOT SIGN

On or about March 31, 2005, BCI issued a new 44 page Employee Handbook and distributed it to its employees via email.[P-6; Tr. 89]. Unlike the previous handbook he received in 2001, Banks was never required or even asked to sign an acknowledgment of receipt of the 2005 Handbook, nor were any of the other BCI employees for that matter. In fact, Banks was never required by BCI to even review the 2005 Handbook.

Now, **no longer a separate and stand alone agreement as before**, BCI buried into its newly issued 44 page handbook a new "REIMBURSEMENT OF COSTS" agreement ("RCA"). [P-6 at p. 35]. At first glance, BCI's new RCA *appears* to be similar to the one-year training costs reimbursement agreement signed by Banks in March 2001. A closer examination of the new RCA, however, reveals

[14] [P-2; D-3]. Banks testified that he did not actually sign the BPA on March 8, 2001 as documented on P-2 but was asked by Derrick Lindsay to backdate it March 8, 2001 - to match up with the dates of the documents he signed when he first started working at BCI. [Tr. 441]. Per D-3 and Banks' testimony, Banks actually signed the BPA on June 15, 2001. [Tr. 440].

that it is materially different from what Banks originally signed and agreed to in 2001. Instead of the employee's training expense obligation terminating after one year of employment (like the 2001 RCA), under the new RCA, the employee's training expense obligation **would never terminate but would renew itself every year**:

> I understand that during the course of my employment, [BCI] may necessarily incur certain fees and expenses related to my employment. **Therefore, I hereby agree that should I terminate my employment with [BCI], I will be responsible for reimbursing [BCI] all expenses which may have been incurred by [BCI] with regard to my relocation, training, and/or certification of any kind within the previous twelve months**. In addition, I agree to returned [sic] or reimburse [BCI] for any outstanding advances, per diems, travel, tools or equipment that have been issued to me. I understand and agree that a sum equal to this amount will become immediately due and payable, with or without notice, and without demand therefore, on the date of my separation from employment, and I agree to immediately reimburse to [BCI] this amount.
>
> . . .
>
> _____ _____
> Witness Signature Date
>
> _____
> Print Name

[P-6 at p. 35] (emphasis added).

The new RCA, therefore, made every departing employee INDEBTED to BCI for all training received during the 12 month period preceding the employee's departure.[15] Under the new RCA, employees who are required to study/train every year (i.e., computer engineers like Banks), would **ALWAYS BE INDEBTED** to BCI. Thomas Hinds testified that BCI requires its employees to be up-to-date on the latest technology and, in fact, encourages its employees to devote up to 25% of

[15] For example, under the materially altered new RCA, an employee who devotes 30 years of his life to working at BCI would be obliged to reimburse BCI for the training he was required to participate in during his 29th year.

their yearly time to studying/reading manuals and staying up-to-date with the latest technology when they are not working on a specific BCI project, i.e., billing a customer. [Tr. 276].

The new and *perpetual* RCA failed to define what "training expenses" were covered or how BCI would calculate the amount owed for such "training expenses." At trial BCI offered its own "everything and the kitchen sink" explanation/interpretation of "training expenses" covered under the RCA. BCI, however, offered no evidence or testimony indicating that it actually informed its employees (specifically Banks) that it interpreted "expenses" to include not only out-of-pocket costs, but that "expenses" would also include the ***time the employee spent training/studying***[16], despite the fact that salaried employees (such as Banks) were entitled to be paid whether or not they were billing customers or training/studying. BCI further failed to offer any evidence or testimony indicating that its employees were aware of ***how BCI intended to "calculate" these training/studying expenses.***[17] The new RCA also failed to define the 12 month measuring period or how it would be determined.

Most importantly, despite the fact that the RCA itself expressly required (1) the employee's signature, (2) the employees' printed name, (3) a date and (4) a witness signature, **Banks never signed the new RCA.** As plainly seen from a review of P-3, the very contract BCI was seeking to enforce against Banks was **BLANK!** In fact, BCI never requested Banks sign the new RCA. [Tr. 496]. Furthermore, Banks was never told that this new reimbursement policy was a condition of continued employment with BCI or that BCI would seek to enforce it against him should he leave.

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[16] Whether that time was spent attending a seminar or reading/studying books and manuals while at work **or on the employee's own time while at home.**

[17] BCI calculated the training/studying expense by multiplying the amount of time the employee spent training/studying by his gross hourly rate (before taxes), plus benefits, plus overhead. [P-12]. BCI's "calculation" further did not take into account the tax benefits/deductions BCI received for training its employees.

4. Banks Leaves BCI and Begins Working for Venture Technologies

After devoting approximately five years of service to BCI (with no raise [Tr. 442]), and facing employment uncertainty, Banks began seeking other and better employment opportunities outside BCI. [Tr. 443-44][18]. Banks found that opportunity at Venture. Concerned about the BPA[19] he was required to sign at BCI, Banks discussed it with Venture, and relayed to Venture his concerns and intentions to not harm BCI in anyway by coming to work for Venture. [Tr. 449-50]. Similar to the actions undertaken by the parties in *Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 976 (Miss. 1992)[20], Banks and Venture both sought legal advice concerning the BPA's validity and whether or not it was enforceable. Venture thereafter determined the BPA was not likely to be enforceable to **merely prevent Banks from leaving BCI to go work for Venture**:

> Venture Technologies has determined that the BCI agreement you signed, if otherwise binding on you, would be enforced to prevent you from using the advantage of your inside knowledge about BCI and its customers to assist a BCI competitor to solicit or to serve those customers for the one and perhaps three year restraint period and believes that the agreement prohibits you to transfer to us any of BCI's genuinely confidential business information. **We do not believe that BCI would be able to use this contract to outlaw fair, open competition that it would face if we had instead hired a similarly skilled engineer who had not worked for BCI**.

[P-11] (emphasis added).

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[18] Banks testified that in seeking other employment, **he did not want to relocate his family**. [Tr. 444]. Banks did interview for a job with Cisco Systems in the Washington D.C. The only reason Banks interviewed for this job was because **he had family in the D.C. area**. [Tr. 483]. Banks, however, was not offered the job with Cisco. [Tr. 446].

[19] Banks had no concerns about any training expenses incurred by BCI on his behalf, **because the RCA he signed in 2001** had **expired** four years earlier **in March 2002**.

[20] Which this Court stated were measures undertaken by the employee and new employer to avoid litigation and protect Empiregas' (the former employer's) interests. *Id.* at 976.

Because Venture and Banks recognized that BCI did have an interest in (1) preventing Banks from soliciting BCI customers to leave BCI for Venture; and (2) preventing Banks from disclosing to Venture BCI confidential business information, Venture and Banks undertook more than reasonable efforts to protect those interests:

> Therefore, our offer to you is extended with the mutual understanding that you will never disclose to us or to our customer or business affiliate any BCI confidential business information that you may have acquired through your BCI employment. We also have the mutual expectation that you will not, at any time within three years following your BCI employment, solicit any BCI customer to stop doing business with BCI, nor will you, within one year of the end of your BCI employment, serve any BCI customer that you served while your were a BCI employee. **In other words, the competition, if any, that BCI will face from you in the near future should only be the fair competition that BCI would face from any other similarly skilled engineer we might have hired instead.** We both consider this to be feasible because BCI has lost to a third party the business that was the basis for your BCI employment.

[P-11; R. 62-64] (emphasis added).

Because of the risk inherent in predicting BCI's behavior, Venture agreed that should BCI attempt to enforce the BPA against Banks, Venture would, at its own expense, retain counsel and defend Banks against BCI's claims. [P-11]. Venture further agreed that it would indemnify Banks, up to $10,000, for the cost of settlement or judgment on BCI's claims. [P-11].

Banks accepted Venture's offer and Banks agreed (1) not to disclose any confidential and/or proprietary information of BCI; (2) not to solicit any BCI customers for three years; and (3) not to serve any BCI customer within one year of his termination from BCI. [P-11].[21] Venture's President and Banks both testified that Banks has adhered to this agreement and has never done anything which would harm BCI's legitimate business interest.[Tr. 389; Tr. 450].

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[21] As previously stated, the trial court's August 6, 2006 Agreed Order regarding injunctive relief incorporated the same terms and conditions and Banks' and Venture's agreement.

III. SUMMARY OF THE ARGUMENT

BCI comes to this Court seeking monetary relief for alleged breach of a covenant not to compete (BPA) despite there being **no evidence of unfair competition** and despite the fact that **it has suffered no harm or damages**. BCI also asks this Court to enforce a separate "contract" (RCA), requiring the payment of money, which was never signed or assented to by the party against whom enforcement is sought.

With regard to the BPA, Mississippi encourages fair competition in the market place and requires evidence of *unfair competition* by the former employee. These contracts are not "ordinary" contracts and are only enforced to protect the employer from unfair competition. Otherwise, such contracts would be illegal restraints of trade. Furthermore, the pursuit of an action for breach of a covenant not to compete, like any other contract, requires proof of damages. BCI's own witnesses readily admitted that BCI suffered no damage as a result of Banks merely leaving BCI to go work for Venture. BCI's business, in fact, prospered after Banks left its employ.

Moreover, BCI's own actions - (1) by expressly disclaiming that its employee handbook (and policies therein) created a contract for any purpose and (2) by expressly requiring Banks' signature on the RCA - alone warrant dismissal of BCI's claim for breach of the RCA. The enforcement of the subject RCA, also cannot withstand scrutiny under Mississippi contract law requirements. Lastly, the *perpetual* nature of the training costs reimbursement BCI is seeking to enforce[22] is void as a matter of public policy and renders it an illegal form of involuntary servitude.

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[22] Requiring employees who desire to terminate their employment from BCI to pay back part of their salary for general on-the-job studying/training which BCI required participation (i.e., "You stay or you pay!").

BCI's actions are nothing more than a vengeful attempt to hurt Banks for his merely going to work for another company. BCI does not seek redress for any damage/harm because, as BCI readily admitted, it sustained no damages. The trial court, which presided over this action for almost three years, recognized this and properly applied the law to the evidence (or lack of evidence) presented by BCI.

After hearing all the evidence offered by BCI in support of its claim(s) and Banks' evidence in opposition to BCI's claim(s) and having had approximately four months to analyze the trial evidence and the applicable law, the trial court correctly concluded that BCI's claim for breach of the BPA and breach of the unsigned RCA failed as a matter of law. The trial court did not weigh the credibility of the evidence but instead applied the law to the evidence as presented and reached the conclusion that such claims were not supported under the law.

Because BCI's claims fail as a matter of law, the trial court's order granting Banks' Motion for JNOV should be AFFIRMED. An affirmance of the trial court's JNOV and dismissal of BCI's appeal should act as a sign to future litigants that such litigious conduct[23] is improper and will not be condoned.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant of motion for JNOV. *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150 (Miss. 2008) (*citing White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). The standard by which this Court reviews an appeal of a JNOV is the same standard

[23] (1) Pursuit of a breach of contract claim for which the **plaintiff sustained no damages** and (2) pursuit of a breach of contract claim **regarding a document which was never signed or agreed to** (and is a form of involuntary servitude).

employed by the trial court and this Court's review will be "predicated on the fact that the trial judge applied the correct law." *White*, 932 So. 2d at 32 (*quoting Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373, 376 (Miss. 1997)).

B. THE TRIAL COURT DID NOT ERR IN GRANTING BANKS' MOTION FOR JNOV REGARDING THE BPA

Frierson v. Sheppard Bldg. Supply Co., 154 So.2d 151, 156 (Miss. 1963), guides the Court's analysis of covenants not to compete: "These restrictive contracts are in restraint of trade and individual freedom and are **not favorites of the law**." (Emphasis added). This Court and the Mississippi Court of Appeals, repeatedly citing to *Frierson* and/or its progeny, have time and time again held that covenants not to compete are not favored in the law because they restrict trade and individual freedom.[24]

Despite not being "favorites of the law," this Court has recognized that because "there is such a thing as **unfair competition** by an ex-employee," these types of restrictive covenants are not void *ab initio*, but will be "carefully scrutinized" to determine whether or not "there is a reasonable basis for the covenant"; i.e., whether the covenant is "reasonably necessary for the protection of the employer, without imposing undue hardship on the employee." *Thames v. Davis & Goulet Ins. Co.*, 420 So. 2d 1041, 1043 (Miss. 1982), *Texas Road Boring Co.*, 194 So. 2d at 888. Such covenants are reasonable only to the extent they protect a former employer's (1) **legitimate business interest** from (2) **unfair competition** by the ex-employee, and the burden of proving this rests *entirely* on the employer seeking to enforce the covenant.

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[24] *Kennedy v. Metropolitan Life Ins. Co.*, 759 So. 2d 362, 364 (Miss. 2000); *Herring Gas Co. v. Whiddon*, 616 So. 2d 892, 897 (Miss. 1993); *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982); *Texas Road Boring Co. v. Parker*, 194 So. 2d 885, 888 (Miss. 1967); *Cain v. Cain*, 967 So. 2d 654, 661 (Miss. Ct. App. 2007); *Easy Reach, Inc. v. Hub City Brush, Inc.*, 935 So. 2d 1140, 1142-1143 (Miss. Ct. App. 2006); *Redd Pest Control Co. v. Foster*, 761 So. 2d 967, 972 (Miss. Ct. App. 2000).

1. Proof of *Unfair Competition* Is A Prerequisite For Damages for Breach of a Covenant Not to Compete

BCI claims that the trial court erred in granting Banks' motion for JNOV regarding the BPA because Mississippi law does not require a showing of unfair competition. However, protection from "unfair competition" is the only reason Courts enforce restrictive covenants not to compete. They are never enforced to prevent mere "competition." In support of BCI's "no unfair competition" argument, BCI relies on three Mississippi cases, *Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971 (Miss. 1992); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885 (Miss. 1967); and *Taylor v. Cordis Corp.*, 634 F. Supp. 1242 (S.D. Miss. 1986). All three of these cases, however, involved clear cases of unfair competition by the departing employee. Furthermore, these cases did not address **claims for damages** caused by the former employee's alleged breach of the covenant but only addressed the employers' claims for injunctive relief.[25]

In *Empiregas*, the former salesman did in fact solicit Empiregas customers in violation of his covenant not to compte. 599 So. 2d at 973, 974.[26] The unfair competition in *Texas Rd Boaring Co.* consisted of the former employee illegally duplicating Texas Road Boaring's proprietary machinery, hiring away of Texas Road Boaring personnel, and soliciting Texas Road Boaring customers. 194

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[25] BCI's agreed to injunctive relief that allowed Banks to continue to work for Venture. BCI's only claim against Banks under the BPA was for damages. Accordingly, to prove its case BCI was required to show how and to what extent, if any, it had been damaged from Banks going to work at Venture.

[26] Despite a solicitation of customers, this Court did not enforce the covenant not to compete, reasoning that it would have a far more oppressive effect on the employee in enforcing it (i.e., requiring a lengthy commute by the employee or uprooting his family from its home) than its non-enforcement would have on Empiregas. *Empiregas*, 599 So.2d at 976. The facts in *Empiregas* provided a much stronger case for enforcement than the facts of this case.

So. 2d 885. In *Taylor*, the former salesman solicited Cordis' customers contrary to his covenant not to compete.[27]

Thus, BCI is incorrect in its assertion that a showing of unfair competition is not required under Mississippi law. *See Herring Gas Co. v. Whiddon*, 616 So. 2d 892 (Miss. 1993).[28] *Herring Gas* states what type of "competition" is prohibited under a covenant not to compete in an employment contract:

> The essential line of distinction between the two (2) settings is that: . . . the purchaser is entitled to protect himself against [ordinary] competition on the part of the vendor, while **the employer is not entitled to protection against mere [ordinary] competition on the part of a servant**.

616 So. 2d 892, 897 (Miss. 1993) (emphasis added). The very authority offered by BCI, *Taylor v. Cordis, supra*, also confirms that **something more** is required to enforce such agreements than the mere fact that a former employee is simply competing (i.e., ordinary competition) against the former employer contrary to his/her covenant not to compete:

> The Mississippi Supreme Court has held that certain non-competition agreements are valid and enforceable. *See, e.g., Donahoe v. Tatum*, 242 Miss. 253, 134 So. 2d 442 (1961). The court has recognized, however, that such an agreement "restricts the exercise of a gainful occupation [and] is a restraint of trade." Accordingly, the Mississippi courts **require more**

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[27] Despite this wrongful solicitation and the proven loss of Cordis' customers, the District Court still allowed Taylor to work for the competing company but prohibited (via an injunction) Taylor from further solicitation of Cordis' customers.

[28] BCI is also incorrect in its assertion Banks failed to submit a jury instruction regarding unfair competition. See Jury Instruction D-10 [R. 1087]. Jury Instruction D-10 would have instructed the jury that covenants not to compete are unenforceable if they seek merely to avoid fair competition in the marketplace and counsel for Banks explicitly argued this before the trial court. [Tr. 567-68]. The Appellate Record excluded the jury instruction page of D-10 and only included the legal citation page. [R.1087]. If the Court wishes to review the language from D-10, the same is quoted in Banks' Motion for New Trial. [R. 1179]. Furthermore, the Table of Contents of the Appellate Record incorrectly documents Jury Instruction D-10 as being "withdrawn." The trial court's refusal to instruct the jury on D-10 was specifically argued in Banks Motion for New Trial and therefore was never withdrawn.

> **than the fact that an employer has a written agreement that the employee will not, on leaving his employment, compete with his employer, that the employee breaks that agreement, that the employee quits his employer, that the employee starts working for a rival, and that the rival thereby becomes a more efficient competitor .... to enforce a non-competition agreement.** *Thames v. Davis & Goulet Ins. Co.*, 420 So. 2d 1041, 1043 (Miss. 1982).

Id. at 1247-1248 (emphasis added). Mississippi is not alone in requiring proof of unfair competition. It is uniformly held throughout the country, that *ordinary competition* is not protected under convents not to compete.[29] It could not be otherwise. Fair competition in the marketplace is the foundation of the nation's economy.

Therefore, the mere fact that a former employee goes to work for a competitor is not enough to warrant injunctive relief and/or damages under a covenant not to compete; i.e., just because the employee was required to sign an agreement that he would not "merely compete" does not mean that the agreement is enforceable. The employer is required to show that the ex-employee is *unfairly*

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[29] **Arkansas**: *Statco Wireless v. Southwestern Bell Wireless*, 95 S.W.3d 13, 21 (Ark. Ct. App. 2003) ("the law will not enforce a [covenant not to compete] contract that merely prohibits ordinary competition."); *Bendinger v. Marshalltown Trowell* Co., 338 Ark. 410, 418 (Ark. 1999) ("the law will not protect parties against ordinary competition"). **Kansas**: *Allen, Gibbs & Houlik, L.C. v. Ristow*, 32 Kan. App. 2d 1051, 1054 (Kan. Ct. App. 2004) ("If the sole purpose is to avoid ordinary competition, it is unreasonable and unenforceable"). **Massachusetts**: *Oceanair, Inc. v. Katzman*, 14 Mass. L. Rep. 414 (Mass. Super. Ct. 2002) ("Protection of the employer from ordinary competition, however, is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced"). **Missouri**: *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006) ("such restrictions are not enforceable to protect an employer from mere competition by a former employee"). **Nebraska**: *AON Consulting, Inc. v. Midlands Fin. Benefits, Inc.*, 275 Neb. 642, 653 (Neb. 2008) ("An employer. . . is not entitled to protection against ordinary competition from a former employee"). **Ohio**: *Convergys Corp. v. Wellman*, 2007 U.S. Dist. LEXIS 90729 (S.D. Ohio Nov. 30, 2007) ("non-competition agreements were not intended to prevent ordinary competition"). **Oklahoma**: *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27 (Okla. 2002) (citing to the 15 Okl. St. § 217, the Oklahoma Supreme Court stated an employer may only contractually protect itself from unfair competition and not from ordinary fair competition).**Tennessee**: *Fadalla v. Life Auto. Prods.*, 2007 U.S. Dist. LEXIS 69082 (W.D. Tenn. Sept. 18, 2007) ("an employer cannot restrain ordinary competition by contractual obligations."). **Wisconsin**: *Wausau Medical Ctr., S.C. v. Asplund*, 182 Wis. 2d 274, 283 (Wis. Ct. App. 1994) ("An employer is not entitled to be protected against legitimate and ordinary competition of the type a stranger could give.").

competing. Therefore, BCI's damages must result from an unfair competitive advantage Venture gained as a result of Banks' employment.

BCI boldly claims that the "mere signing" of the BPA prevented Banks from competing whether fairly or unfairly with BCI. Tony Bailey and Thomas Hinds testified that it made no difference whether BCI was harmed when Banks left. They admitted that there was no proof that any legitimate business interest of BCI's was ever harmed when Banks went to work for Venture. Their testimony is an unequivocal admission that BCI was, and still is, trying to prohibit *ordinary* competition, not unfair competition. This testimony alone warrants dismissal.

2. BCI Failed to Prove Any Legitimate Business Interests Worthy of Protection Which Was Harmed When Banks Went to Work for Venture

Unfair competition is the "legitimate business interest" of the employer; i.e. what the covenant was designed to protect against. "[T]he ex-employer ... [is required] to demonstrate to the trial court the economic justification, the reasonableness, of the restraint which is sought to be imposed." *Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 976 (Miss. 1992). The most commonly recognized "business interests" are an employer's (a) customer base/good will and (b) confidential information, such as trade secrets.[30] Banks agrees these interests are worthy of protection under covenants not to compete. Unfair competition is the result if the departing employee steals his former employer's customer; benefits from his former employer's "good will" or uses truly "inside" confidential information or trade secret to his advantage.[31] The evidence at trial, however,

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[30] BCI, however, admitted that it possesses no trade secrets. [Tr. 110-11].

[31] *See Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (stating, "The primary right of the employer is that of 'protecting the business from loss of customers by the activities of the former employees who have peculiar knowledge of the relationships with the employer's customers.'") (*quoting Redd Pest Control Co.*, 157 So. 2d at 136); *Texas Rd. Boring Co. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967) (holding covenant was necessary for protection of business and good will of employer which "was largely

demonstrated that these types of business interests were never harmed when Banks quit working for BCI and went to work for Venture. **The evidence instead demonstrated that these legitimate business interests were in fact PROTECTED.** BCI admitted that it could not name a single customer lost as a result of Banks going to work for Venture or that Banks ever disclosed any BCI confidential information. [Tr. 105-106, 123, 341, 349].

a. General "On-the-Job" Training/Studying is Not a Protectable Interest

Because BCI failed to demonstrate any resulting harm to its customer base and/or the unauthorized use of BCI's "confidential information," BCI asserts that the "protectable interest" harmed was the training and education it provided to Banks. However, not all "on-the-job" training amounts to a legitimate protectable interest of the former employer. No Mississippi case, however, has ever addressed the specific issue of whether "on-the-job training"or what types of on-the-job training constitutes a protectable business interest of the former employer that is worthy of protection of the law.

BCI relies upon several Mississippi cases to support its argument that the kind of "training" it provided Banks is a "protectable" interest. Citing *Redd Pest Control v. Foster*, BCI asserts that

> The [c]ourt of [a]ppeals held that the chancellor erred in failing to enforce the covenant not to compete in part because the covenant protected "the money and time involved in training employees." *Foster*, 761 So. 2d at 973.

Foster **never issued any ruling, in part or otherwise, regarding employee training expenses.** The language BCI quotes is nothing more than the court's *recitation* of what the former employer testified to at hearing:

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dependent upon the contractor, customer relationship as is the competing business of [departing employee]"); *Donahoe v. Tatum*, 134 So. 2d 442, 443 (Miss. 1961) (stating, "Purpose of the contract was to protect his agency in its business, because it was a personal and confidential type of operation, with trade secrets and confidential relations with large employers and applicants for jobs.").

> Sergeant testified that the restrictive covenants were used in this particular business for the following reasons: (1) the money and time involved in training employees, (2) money spent advertising, and (3) the technician that services the house is how the customers identify with the company in the community.

Id. at 973. Besides this mere recitation of testimony, the *Foster* court never discussed or made reference to employee training. *Foster* involved the employer's interest in protecting its **customer base** from **unfair competition**. *Id.* The former employer in *Foster* provided testimony that it had lost more than 100 customers and submitted evidence of a projected two year loss of profits of $50,000. Accordingly, *Foster* is factually and legally distinguishable from the instant case and provides no support for BCI's arguments.

BCI next relies on *Taylor v. Cordis*. An interest in employee training was discussed in *Taylor*, however that case turned on the intentional solicitation of customers by the former employee; *i.e.*, **unfair competition**.[32] The employee training in *Taylor* was completely different from what Banks received. The employee in *Taylor* had no prior experience/training, and it provides no authority for BCI's argument that it has a protectable interest in the "on-the-job," staying "up-to-date" studying of a previously trained, highly experienced and highly educated employee such as Banks.

Unlike Banks, the employee in *Taylor* began working for Cordis **with no prior experience** in marketing or selling heart pacemakers or pacemaker products. *Taylor*, 634 F. Supp. at 1243. The training at issue in *Taylor* consisted of a technical training course in anatomy, physiology and electrophysiology in Memphis and a training course on Cordis products in Miami. *Id.* Judge Lee provided further analysis with regard to Taylor's training:

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[32] Therefore, unlike this case which concerns only one alleged business interest and no evidence of unfair competition, *Cordis* concerned two alleged business interests and clear evidence of unfair competition.

> Cordis' vice-president of sales and marketing . . . testified at trial that the extent of the training that a new salesman must receive **depends upon his prior sales experience and his knowledge of pacemaker technology**. [Cordis' vice-president] stated that the pacemaker sales industry is a highly technical, dynamic and competitive one and that it requires even a superlative salesman some time to "work up to speed" in the field of pacemaker sales. Although Taylor had extensive experience in sales of medical supplies in the Mississippi area and was familiar with the local physicians who regularly implanted pacemakers, he received technical training on pacemakers during his employment with and at the expense of Cordis. **It appears that it took him over a year to develop sufficient technical expertise,** combined with cultivating the trust and confidence of implanting physicians, to attract any significant portion of the market.

Id. (Emphasis added). Despite the extensive training provided to Taylor, and the fact that Cordis was in danger of losing customers because of to Taylor's unfair competition, the court did not prohibit Taylor from merely competing with Cordis. Instead, the Court narrowed the scope of the **covenant** to prevent Taylor (for six months) from selling medical products to physicians who had previously purchased Cordis products from him. Otherwise, Taylor was allowed to **fairly compete** against Cordis and sell competing medical products to any physician so long as they were not one of his previous Cordis customers. It is also noteworthy that unlike BCI's "double-dip" request for both injunctive and monetary relief, Cordis did not sue for damages or seek to recoup any training costs from Taylor. The facts and legal issues in *Taylor* are clearly distinguishable and do not offer support of BCI's argument that on-the-job studying is a protectable interest warranting damages under a covenant not to compete.

BCI's reliance on the 1967 decision in *Texas Rd. Boaring v. Parker* is likewise misplaced. After leaving the employ of Texas Road Boaring, Parker opened his own competing road boaring business. *Parker*, 194 So. 2d at 886. Training, however, was not an issue in *Parker*. In fact, the word "training" was never even used in the case. Furthermore, unlike this matter, *Parker* involved a clear case of unfair competition by the former employee (duplicating employer's proprietary machinery,

hiring away of employer's personnel, and soliciting employer's customers). Accordingly, *Parker* offers no support regarding training expenses and BCI's reliance thereon is without merit.

Lastly, BCI's reliance on *Redd Pest Control v. Heatherly*, 157 So. 2d 133, 136 (Miss. 1963) also fails because the employer never claimed to have had an investment in the "training" it provided to Heatherly. The sole issue in *Heatherly* was Heatherly's solicitation and taking away of his former employer's customers and the fact that the former employer spent large sums of money over a period of time to establish the business and acquire the customers." *Id.* at 135 (emphasis added). The facts in *Heatherly* are clearly distinguishable from the facts herein, and BCI's reliance thereon is unavailing.

Besides relying on easily distinguishable Mississippi authority, BCI (in footnotes 3 and 4) cites to approximately 23 out-of-state cases (consisting primarily of string cites), which it *claims* supports its argument that Banks training/studying is a protectable interest under the BPA..[33] Out of the 23 cases cited, BCI briefly paraphrases the following four cases: *Orkin Exterminating Co. v. Murrell*, 206 S.W.2d 185 (Ark. 1947); *Davey Tree Expert Co. v. Ackelbein*, 233 Ky. 115, 120 (Ky. 1930); *Chandler, Gardner & Williams, Inc. v. Reynolds*, 250 Mass. 309 (Mass. 1924); *Mel-Way, Inc. v. Wesley*, 290 So. 2d 454 (La.App. 2 Cir. 1974). [BCI Brief at p. 13, fn. 3].

BCI argues that the 1947 opinion of the Arkansas Supreme Court in *Orkin* "stressed" as a protectable business interest "the fact that the appellee had been given special training to enable him to carry on appellant's work." The *Orkin* case, however, does not support this argument. Despite there being evidence of "special" training (unlike the on-the-job studying herein), the *Orkin* court's

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[33] Due to appellate page limitations, Banks cannot address every out-of-state authority offered by BCI. A review of the cases, however, demonstrates the same to be either out-dated (ranging from 1909-1976) or clearly inapplicable to the specific facts of this case.

holding did not revolve around training but, like the Mississippi cases, concerned the *unfair* competition by the employee. 206 S.W. 2d 185. The employee in *Orkin* admitted that he had solicited and in fact procured a large number of Orkin's customers. *Id.* at 188. BCI's interpretation of this case is also refuted by the Arkansas Supreme Court's later decision in *Orkin Exterminating Co. v. Weaver*, 257 Ark. 926, 928 (Ark. 1975), wherein it specifically stated that the type of training Orkin renders is not special or unique to Orkin nor is it "training . . . not readily obtainable elsewhere." (Emphasis added).

BCI's reliance on the 1930 *Davey Tree* case is likewise misplaced because the training provided was "special" training - a three-week training course **unique** to Davey Tree's methods - and **the employee had no prior training or experience** in tree surgery before working at Davey Tree. *Davey Tree*, 233 Ky. 115. BCI's reliance on the 1924 *Chandler* opinion, is inapplicable and unavailing for the same reasons as in *Davey Tree*. The employee in *Chandler* **had no experience or training** in embalming, and because of his lack of experience the employer "would have to devote considerable time to instructing him." *Chandler*, 250 Mass. at 311.

The final out-of-state authority paraphrased by BCI is the 1974 Louisiana Court of Appeals decision in *Mel-Way*. This decision, however, does not support BCI's contention that general on-the-job training/studying (involving no out-of-pocket expenses by the employer) is a protectable interest. Unlike the BPA in this case, the covenant at issue in *Mel-Way* specifically stated and the employee acknowledged that the employer "would expend considerable **time, effort, and expense in training the employee in the methods used by [the employer]**." 290 So. 2d at 455 (La. App. 2 Cir. 1974) (emphasis added). The BPA in this case made no reference to any interest BCI had in Banks'

training, and BCI cannot assert that it expended "considerable time, effort and expense in training" Banks. Accordingly, *Mel-Way* is not applicable to this case.

Unlike BCI's reliance on inapplicable and clearly distinguishable cases regarding employee training, Banks provided the trial court with extensive authorities which directly addressed and analyzed the issue of whether general on-the-job training was a protectable interest under a covenant not to compete. One of the primary authorities holding that training (whether general or unique) **is not a protectable interest** under a covenant not to compete was one of the very authorities relied upon by BCI during the trial - Brandon S. Long, Note, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L. J. 1295 (2005).[34] Under the sub-topic titled "Traditional Noncompetes Are Unsuitable Protection Against Training Investment Loss", Long's Note provides as follows:

> The increasing volume of employee training suggests that employers will continue to use noncompete agreements as a way to protect their training investments. **However, courts have historically disfavored covenants designed solely to protect an employer's investment in training.**[35] A survey of 105 noncompete cases did not even find the employer's investment in training significant enough to warrant discussion. Although some contemporary courts have occasionally held these

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[34] Long's note proposes that the employer's need for protection with regard to its investment in training is best protected under employee training reimbursement agreements. As will be addressed below BCI's unsigned and perpetual cost reimbursement is not the same type of training reimbursement agreement discussed by Long, but instead is an illegal form of involuntary servitude.

[35] *See USA Chem, Inc. v. Goldstein*, 512 F.2d 163, 167 n.4 (2d Cir. 1975) ("The fact that a former employee was trained by the employer is not a basis for granting an injunction enforcing a restrictive covenant."); *Kelsey-Hayes Co. v. Maleki*, 765 F. Supp. 402, 407 (E.D. Mich. 1991), vacated, 889 F. Supp. 1583 (E.D. Mich. 1991) (holding that "whatever expertise defendant developed as a computer programmer at Kelsey-Hayes, with the assistance of on-the-job instruction and published manuals, has been his alone, historically, and would not fall within the proscription of contracts protecting an employer's propriety or confidential information"); *Clark Paper & Mfg. Co. v. Stenacher*, 140 N.E. 708, 711-12 (N.Y. 1923) (refusing to protect an employer's investment in the general training of a wrapping paper salesperson); *Kidde Sales & Serv., Inc. v. Peairson*, 493 S.W.2d 326, 330 (Tex. Civ. App. 1973) (stating the court's unwillingness to enforce noncompetes to protect training "even if the training was complex and extensive").

> investments to be protectable when the cost is significant, courts generally have not accorded investment in training the same "protectable" status granted to trade secrets and customer lists.

Id. at 1311-12 (emphasis added). In concluding that training expenses should not be a protectable interest under a covenant not to compete, Long made the following observation:

> Traditional noncompetes protecting training investment restrict an employee from working for a competitor for a defined duration after employment is terminated. Distinguished from other, alternative noncompete agreements, traditional noncompetes are generally intended to bind the employee throughout the entire duration of employment. **Nevertheless, at some point during an employee's tenure, the employer will earn back its investment in training the employee.** Under a traditional noncompete, **the employee will be bound from competing against the employer even after the employer has safely recouped its investment.** Because an important justification for upholding a traditional noncompete is to foster investment in training by helping employers protect that investment, **a noncompete barring an employee from competing once the investment has been recovered seems patently unfair**. Put differently, traditional noncompete agreements **provide a windfall to the employer when they continue in force after the training investment has been repaid**.

Id. at 1315 (emphasis added).

Of the jurisdictions that do recognize training as a protectable interest, they all uniformly hold that only *specialized*, *unique* or *extraordinary* training is protected and *ordinary* training is not. The underlying reason for refusing to recognize ordinary training as a protectable interest, as stated by one court, is that "employees must necessarily take knowledge with them when they change jobs." *Allen, Gibbs and Houlik, L.C. v. Ristow,* 32 Kan. App. 2d 1051, 1058 (Kan. App. 2004). A frequently cited authority in this regard is the 1960 HARVARD LAW REVIEW article authored by Harlan M. Blake. *Employee Agreements Not to Compete,* 73 HARV. L. REV. 625 (1960).

> It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain **exclusively to the employee. The fact that they were acquired or developed during the employment does not, by itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive**

> **and costly**. In the absence of special circumstances the risk of future competition from the employee falls upon the employer and cannot be shifted, even though the possible damages is greatly increased by experience gained in the course of the employment.

Id. at 652 (emphasis added).[36]

The Kansas Court of Appeals held:

> A person who leaves the employment of another has the right to take with him all the skill he has acquired, all the knowledge that he has obtained, and all the information that he has received, so long as nothing is taken that is the property of the employer . . . **skill and knowledge acquired or information obtained cannot be left behind so long as those things exist within the mind of the employee. All that knowledge, skill and information, except trade secrets, become a part of the equipment for the transaction of any business in which he may engage, just as any part of the skill, knowledge, information or education that was received by him before entering the employment.** Those things cannot be taken from him, although he may forego them, forget them or abandon them.

Allen, 32 Kan. App. 2d at 1058 (emphasis added); *see Wichita Clinic, P.A. v. Louis*, 39 Kan. App. 2d 848, 855 (Kan. Ct. App. 2008) (*quoting Allen* and reiterating that training is not a legitimate protectable business interest). Another court discussing this topic, the Indiana Supreme Court, has held:

> While an employer, under a proper restrictive agreement, can prevent a former employee from using his trade or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers, **he has no right to unnecessarily interfere with the employee's following any trade**

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[36] *See Nike, Inc. v. McCarthy*, 379 F.3d 576, 585 (9th Cir. Or. 2004) (citing to Blake's article, the Ninth Circuit held that the employee's "general skills in sales and product development as well as industry knowledge that he acquired while working for Nike [was] not a protectible interest of Nike's that would justify enforcement of a noncompete agreement"); *RAM Prods. Co. v. Chauncey*, 967 F. Supp. 1071, 1092 (N.D. Ind. 1997) ("Defendant Chauncey brought considerable experience and knowledge with him to RAM. Similarly, he brings his experience with him to his current employer, Replex. This is not the proper subject matter for a restrictive covenant.").

> **or calling for which he is fitted and from which he may earn his livelihood and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment. Public policy prohibits such undue restrictions upon an employee's liberty of action in his trade or calling.**

Donahue v. Permacel Tape Corporation, 127 N.E.2d 235, 240 (Ind. 1955) (emphasis added). *See also Brunner v. Hand Industries, Inc.*, 603 N.E.2d 157, 160 (Ind. Ct. App. 1992) (*quoting Donahue*). Numerous other jurisdictions apply this same principle.[37]

In a case analogous to the instant case, the U.S. District Court for the Eastern District of Michigan rejected the employer's claim that it had a protectable interest in the on-the-job training of its computer programmer. *Kelsey-Hayes Co. v. Maleki,* 765 F. Supp. 402, 407 (E.D. Mich. 1991), *vacated* per settlement[38], 889 F. Supp. 1583 (E.D. Mich. 1991). The *Kelsey-Hayes* court held that

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[37] *See USA Chem, Inc. v. Goldstein*, 512 F.2d 163, 167 (2nd Cir. 1975) (applying New York law) (The fact that a former employee was trained by the employer is not a basis for granting an injunction enforcing a restrictive covenant); *Clark v. Paper Mfg. Co. v. Stenacher,* 140 N.E. 708, 711-12 (N.Y. 1923) (refusing to protect an employer's investment in the general training of a wrapping paper salesman); *Spinal Dimensions, Inc. v. Chepenuk,* 2007 NY Slip Op 51533U, 6 (N.Y. Sup. Ct. 2007) ("free economy is based upon competition, and workers cannot be compelled to erase from their minds all of the general skills, knowledge, and acquaintances and the overall experience acquired during employment upon taking another job"); *Wilmington Trust Co. v. Consistent Asset Mgmt. Co.*, 1987 Del. Ch. LEXIS 409 (Del. Ch. Mar. 25, 1987) ("Although an employee may have begun as an unskilled worker, the knowledge and skills he gained, through his apprenticeship and training in another's business are unquestionably his own");*Cummings v. Dickson*, 1989 U.S. Dist. LEXIS 17121 (S.D. Ind. July 27, 1989); *Kidde Sales & Serv., Inc. v. Pearson,* 493 S.W. 2d 326, 330 (Tex. Cir. App. 1973) (court unwilling to enforce non competes to protect training even if the training was complex and expensive); *Boisen v. Petersen Flying Service, Inc.*, 222 Neb. 239, 247 (Neb. 1986) (because employee's on-the-job training was no different than what he would have received from an employer in the same business, the court did not enforce the covenant); *Bryceland v. Northey*, 160 Ariz. 213, 217 (Ariz. Ct. App. 1989) (applying Michigan law) ("an agreement that merely prohibits an employee from exercising the use of general knowledge or a skill is invalid").

[38] Although, *Kelsey-Hayes Co,* was vacated per a settlement agreement, the district court's rational therein has been adopted and cited by numerous courts, including the Sixth Circuit Court of Appeals. *See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 547 (6th Cir. 2007) (*quoting Kelsey-Hayes*: "[a]n employer may not reasonably prohibit future use of general knowledge or skill"). *United Rentals, Inc v Keizer*, 202 F. Supp. 2d 727 (WD Mich. 2002) affirmed 353 F.3d 399 (2004) ("the employer's business interest justifying such a restrictive covenant must be greater than mere competition .... In order to be reasonable, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with his employer, but not prohibit the employee's future use of general

> whatever expertise defendant developed as a computer programmer at Kelsey-Hayes, **with the assistance of on-the-job instruction and published manuals, has been his alone**, historically, and would not fall within the proscription of contracts protecting an employer's propriety or confidential information.

Id. at 407 (emphasis added). In reaching its decision to dismiss, the *Kelsey Hayes* court went on to state that the "defendant learned nothing more than a nationally published computer code, and had no contact with customers, lists, prices, or any other information which might furnish him with some unfair advantage over his former employer." *Id.* at 407. Like the training evidence offered in *Kelsey-Hayes*, the general training Banks received at BCI was nothing more than reading and studying nationally published IT materials. As elicited by BCI's own counsel through leading questions, Banks testified that this type of general "staying up-to-date" training is done throughout the industry. [Tr. 478-80] Accordingly, BCI's claim that it has a protectable interest in this type of training is without merit and justification.

In *Hapney v. Central Garage, Inc.*, 579 So. 2d 127 (Fla. Dist. Ct. App. 1991), the court considered the extent to which employer-provided training gives rise to a "legitimate business interest" that is protectable by law. The *Hapney* court recognized that employee training may be a protectable interest under a non-competition agreement, however, **such training must be "*extraordinary or specialized*" and not general in nature.** *Id.* at 132. In explaining the difference between extraordinary or specialized training and training of a general nature the *Hapney* court stated:

> To constitute a protectable interest, however, the providing of training or education must be extraordinary. **"Extraordinary" is that which goes beyond what is usual, regular, common, or customary in the industry in which the employee is**

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knowledge or skill").

> **employed**.[39] The rationale is that if an employer dedicates time and money to the extraordinary training and education of an employee, whereby the employee attains a unique skill or an enhanced degree of sophistication in an existing skill, then it is unfair to permit that employee to use those skills to the benefit of a competitor when the employee has contracted not to do so. The precise degree of training or education which rises to the level of a protectable interest will vary from industry to industry and is a factual determination to be made by the trial court. Needless to say, skills which may be acquired by following the directions in the box or learned by a person of ordinary education by reading a manual do not meet the test. . . . No evidence in this record shifts Hapney's training to such a protected category.

Id. (Emphasis added).[40] Thus where an employee's training merely gives him the "tools of the trade," the employer does not have a legally protectable interest in the training.

Moreover, even those courts that have considered specialized or extraordinary training to be a protectable interest have required that the employer produce evidence **in addition to** the training in order for the covenant to be enforceable. The *additional* evidence usually is that the employee

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[39] All computer engineers must continue their training to stay abreast of ever changing technology in the industry. On-the-job training which kept Banks up-to-date with general industry technology was not extraordinary or special but was merely training which was "usual, regular, common, or customary in the industry in which [Banks was] employed." [Tr. 478-80]

[40] *See also Girtman & Assocs. v. St. Amour*, 2007 Tenn. App. LEXIS 271 (Tenn. Ct. App. Apr. 27, 2007) Affirming the trial court's conclusion that the employer failed to demonstrate a "legitimate business interest" the Tennessee appellate Court held that the training "courses imparted general knowledge of the door and hardware industry, but none of it was specific to Girtman's way of conducting business. Thus, the training did not give Mr. St. Amour an unfair advantage in competition and did not endow Girtman with a protectable business interest." *Id.* at *23. "We agree with the trial court that the non-compete provision was unenforceable because Girtman failed to prove it had a protectable business interest that would justify preventing Mr. St. Amour from using the knowledge and skill he gained through the generalized training he received. Consequently, **neither the injunctive relief nor the damages sought by Girtman is available or warranted**." *Id.* (Emphasis added).

See also Corbin v. Tom Lange Company, Inc., 2003 Tenn. App. LEXIS 702, holding that the employee's informal 12 year "on-the-job" training, including among others staying up-to-date with the law of produce industry and various statutory regulations, was not enough to establish a protectable interest. "Obviously, after twelve years of employment, Corbin had acquired considerable knowledge of the produce market. However, the evidence does not preponderate against the trial court's finding that Corbin did not receive specialized or unique training." *Id.* at *25.

misappropriated trade secrets or confidential, proprietary information or in some other way acquired an unfair competitive advantage through the use of such information. *Vantage Technology, LLC v. Cross,* 17 S.W. 3d 637, 646 (Tenn. Ct. App. 1979) ("the totality of all of this [specialized training "coupled" with the special relationship with former employer's clients and confidential information former employee received] amounts to a legitimate business interest properly protectable by a covenant not to compete"); *see also American Express Financial Advisors, Inc. v. Scott,* 955 F. Supp. 688, 692 (N.D. Texas 1996).

Given Banks' extensive background and knowledge of information technology and contrasting it with the "training" Banks received at BCI, no Court would hold that BCI has a protectable interest in Bank's general on-the-job studying/training. Banks did not come to BCI as "a blank slate" lacking the proper education or skills in the field of IT. To the contrary, Banks came to BCI with approximately six years of education and six years of IT field experience. Banks also came to BCI with a number of IT certifications, specifically including his CCIE certification.

The only "training" evidence offered by BCI at trial was of the garden variety type and not the "extraordinary or specialized training" that would give rise to a protectable interest, even under the most liberal standards. As testified to by Thomas Hinds, Banks' training was merely to keep him up-to-date with the latest technology. Banks did not receive specialized or extraordinary training which he could not have received from any other company. The type of on-the-job training evidence submitted by BCI - participating in lunch meetings, studying and reading manuals and guides - would not have given Banks' new employer (Venture) any unfair competitive advantage over BCI. The on-the-job training BCI provided to Banks is merely a "cost of doing business" and is not a property interest worthy of protection under the law.

In the absence of any evidence that Banks' conduct (going to work for Venture) harmed a legitimate business interest, BCI suffered no legally cognizable damages, even nominal damages. Since damages are an essential element for recovery under a breach of contract theory, and BCI could show no damages, BCI failed to make out its *prima facie* case. Accordingly, the trial court was correct in setting aside the jury verdict holding Banks liable for breach of the BPA.

3. Reasonableness of the BPA and Immaterial Breaches Which Caused BCI No Harm/Damage

BCI devotes four pages of its brief [pp. 14-17] regarding the "reasonableness" of the subject BPA. The reasonableness of the BPA, specifically the duration and geographical scope, are irrelevant to this case given that such issues were addressed at the injunctive phase. The trial and the subject appeal concern whether BCI sustained any damage as result of Banks merely going to work for Venture; accordingly, no response to BCI's argument regarding the reasonableness of the BPA is necessary. Banks simply asserts that he was entitled to earn a living in the profession he chose, and that BCI failed to show any protectable interest of BCI's (customers, confidential information, training) which was ever harmed.

BCI devotes three pages of its brief [pp. 17-19] regarding Banks' alleged breaches of the BPA by disclosing the BPA itself and inadvertently taking alleged "confidential information." Notwithstanding that the BPA itself is not the type of confidential BCI information worthy of protection, BCI admitted that it sustained no damages or harm as the result Banks disclosing the BPA to Venture. Furthermore, BCI admitted that its suffered no damages or harm from Banks inadvertently taking BCI documents with him on his last day of employment. The inadvertently taken documents were immediately returned to BCI upon discovery and were never disclosed to any third party. [Tr. 451-53]. If anything, these were immaterial and not willful breaches. Furthermore, these

immaterial breaches **caused BCI no damage** and under Mississippi contract law, damage is an essential element to a claim for breach of contract.[41]

C. THE TRIAL COURT DID NOT ERR IN GRANTING BANKS' MOTION FOR JNOV REGARDING THE UNSIGNED RCA

As stated above, it wasn't until this action proceeded to trial, in October 2008, that BCI first asserted an additional cause of action against Banks for allegedly breaching the unsigned RCA.[42] The undisputed evidence at trial revealed the following:

(1) BCI's employment offer to Banks specifically disclaimed any creation of contractual rights regarding BCI's Handbook or policies incorporated therein.
(2) Despite the RCA requiring a signature, Banks never signed the RCA;
(3) BCI never asked Banks to sign or even review the RCA;
(4) The BCI Handbook, into which the RCA was incorporated, was never signed by Banks;
(5) The RCA did not define training expenses or discuss what type of training expenses are required to be reimbursed;
(6) BCI never advised or informed Banks what the training expenses actually meant under the RCA or what type of training expenses required reimbursement;
(7) The RCA did not explain how the training expenses would be calculated; and
(8) BCI never advised or explained to Banks how it would calculate the training expenses reimbursable under the RCA.

Notwithstanding all of this, BCI claims that Banks owes it money for the time BCI required him to spend studying/training.

1. The RCA is Not a Valid and Enforceable Contract

"It is simple contract law that a valid and enforceable contract is required to maintain an action for breach of contract." *HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1103 (Miss. 2003). In

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[41] *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992) (*quoting* 17A C.J.S. Contracts, § 590(d) (The elements of a breach of contract are: "(1) the existence of a valid and binding contract; and (2) that the defendant has broken, or breached it; and (3) **that the plaintiff has been thereby damaged monetarily**").

[42] There was confusion about this claim because until trial Banks reasonably believed that the "training costs" evidence was only relevant as "proof" of BCI's alleged "legitimate business interest" protected by BPA, not as a separate and distinct claim for damages for alleged breach of the RCA.

order for a contract to be valid, the party seeking to enforce the contract must show following: "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." *Rotenberry v.Hooker*, 864 So. 2d 266, 270 (Miss. 2003).

(1) two or more contracting parties

The evidence presented at trial made clear that there were never two parties who intended to contract with regard to training expenses. The only party was BCI, and BCI alone. BCI never offered the new RCA to Banks for his consideration and acceptance, much less explained the terms and conditions of the new RCA to him.

(2) consideration

Given that BCI never even discussed the new RCA with Banks, it goes without saying that there was no consideration for this agreement.

(3) an agreement that is sufficiently definite

A contract is unenforceable if the material terms are not sufficiently definite. *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991). "A contract is said to enjoy the level of specificity predicate to enforceability: if it contains matter which will enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence." *Id.* (*quoting Duke v. Whatley*, 580 So. 2d 1267, 1274 (Miss. 1991). If the contract does not pass this test of specificity, the court should find it unenforceable.

When examining a contract, a court should first examine the four corners of the contract to determine how to interpret it. *McKee v. McKee*, 568 So. 2d 262, 266 (Miss. 1990). If the language in the contract is clear and unambiguous, the intent of the contract must be effectuated. *Pfisterer v.*

Noble, 320 So. 2d 383, 384 (Miss. 1975); *see also Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990). Vagueness and ambiguity are more strongly construed against the party drafting the contract [in this case BCI]. *Lamb Constr. Co. v. Town of Renova*, 573 So. 2d 1378, 1383 (Miss. 1990).

Despite the fact that Banks never assented to the new RCA, Banks testified that he was never aware of BCI's interpretation of "training expenses." Banks testified that had he even signed this new RCA he would have only interpreted it to mean "out-of-pocket" training expenses incurred by BCI. He would have never interpreted the RCA to mean that he was obligated to re-pay BCI for every type of training expense imaginable, much less that he would be required to pay back part of his salary (including benefits and overhead) received while he was participating in this mandatory studying/training.

(4) parties with legal capacity to make a contract

This contractual element is not at issue.

(5) mutual assent

Mutual assent - the active agreement to enter into a contract - is the most important element of contract formation. A party cannot be bound to something he/she did not assent to or agree to undertake. "It is fundamental in contract law that courts cannot make a contract where none exists, nor can they modify, add to, or subtract from the terms of a contract already in existence," *Wallace v. United Miss. Bank*, 726 So. 2d 578, 584-85 (Miss. 1998), and a court cannot "draft a contract between two parties where they have not manifested a mutual assent to be bound." *Copeland Enterprises v. Pickett & Meador, Inc.*, 422 So. 2d 752, 754 (Miss. 1982).

The evidence presented at trial unequivocally established that there was never a meeting of the minds between BCI and Banks with regard to the new RCA sought to be enforced [P-6 at p. 35]. Banks does not deny that when he began working at BCI in 2001 he signed an RCA which obligated him to reimburse BCI for out-of-pocket training expenses BCI incurred within a year of his hire date should he choose to leave BCI's employ before one year. [P-3]. **This obligation however expired in 2002.** Banks never signed the new RCA [P-6 at p. 35] nor did he even sign the handbook into which the new RCA was incorporated. Merely providing an employee with a copy of a proposed agreement does not equate to mutual assent. BCI seeks to enforce an unsigned document (which BCI itself drafted) that explicitly required the employee's assent be in writing and witnessed.[43] Furthermore, BCI's own written offer of employment disavows the formation of a contract for any purpose with regard to policies incorporated into its handbooks. [P-1].

(6) no legal prohibition precluding contract formation

Lastly, the burden is on the party seeking enforcement of the contract to prove that there is no legal prohibition to its formation. As previously stated, the subject RCA would cause every employee to be perpetually indebted to BCI. This Court has never addressed the issue of employment cost reimbursement agreements; however, other jurisdictions have addressed the enforcability of such provisions and offer guidance in analyzing the subject RCA.

The Duke Law Journal article, so heavily relied upon by BCI, thoroughly examined and analyzed such cost reimbursement agreements. 54 DUKE L.J. 1295. Despite promoting an employer's

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[43] In considering the meritless nature of BCI's pursuit to enforce an unsigned contract, Banks invites the Court's attention to *Tricon Metals & Services, Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989), wherein this Court affirmed a trial court's awarding of sanctions against an employer who sued a former employee under a covenant not to compete which was never signed. The sanctions imposed on the former employer required it to pay the former employee's attorneys' fees.

use of employee training cost reimbursement agreements, Long's article does not support the enforcement of the **perpetual** type of agreement that BCI seeks to enforce. Recognizing that at some point the employer **will recoup its investments in training** its employees, Long promotes the use of ***amortized***[44] training costs reimbursement agreements. Unlike BCI's agreement, all of the cost reimbursement agreements cited in Long's article and held enforceable by the trial courts were **limited in duration.** Long concluded his analysis by stating that for any such agreement to be enforceable, the "the amount of any repayment for the cost of training should be **commensurate with its actual original cost** to the employer." *Id.* (Emphasis added).

The Eastern District Court of Wisconsin, examining and analyzing an expense reimbursement agreement in *Heder v. City of Two Rivers*, 149 F. Supp. 2d 677, 691 (E.D. Wis. 2001), held as follows:

> Courts **must scrutinize** training repayment agreements in terms of **amount, duration, schedule of repayment credit for time worked, and other terms**, to ensure that they are **reasonably necessary to protect the employer's interests** and are commensurate with the benefits secured to the employee. **Among the factors to be considered are the fact that employers subject to income tax may take current deductions for the full cost of ordinary and necessary training expenses**, 26 U.S.C. § 162; Rev. Rul. 96-92, 1996-2 C.B. 9, and the fact that employers may use the offer of general training as a recruitment tool, *Stone, supra*, 48 UCLA L. Rev. at 591.

Unlike the RCA in this matter, the cost reimbursement agreement in *Heder*, which was signed by the employee, was limited in duration (three years). *Id.* at 682. In ultimately concluding on appeal that the cost reimbursement agreement was an enforceable contract, the Court of Appeals for the Seventh Circuit equated the agreement with a loan, which could ultimately be paid back by the debtor:

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[44] Meaning that the reimbursement obligation would eventually liquidate.

> A worker who left before the loan had been forgiven would have to come up with the funds from his own sources, just as Heder must do. If that system is lawful, as it is, then the economically equivalent system that Two Rivers adopted must be lawful. **The cost of training equates to the loan, repayment of which is forgiven after three years.**

Heder v. City of Two Rivers, 295 F.3d 777, 781-782 (7th Cir. Wis. 2002) (emphasis added).

In concluding that a cost reimbursement agreement signed by an employee did not violate the Fair Labor Standards Act ("FLSA"), the California appellate court in *City of Oakland v. Hassey*, 163 Cal. App. 4th 1477, 1488 (Cal. App. 1st Dist. 2008), made a distinction between an employer seeking "reimbursement for an employee's *salary*[45] paid while receiving training, as opposed to the cost of the training reimbursement of training expenses actually incurred." (Emphasis in original). The former (an employee's salary) cannot be sought back in a reimbursement of training costs agreement. See U.S. Dept. of Labor, Wage & Hour Div., Opn. Letter (May 31, 2005, FSLA2005-18) [2005 WL 2086807]; U.S. Dept. of Labor, Wage & Hour Div., Opn. Letter (Oct. 21, 1992) [1992 WL 845111].

Applying the factors discussed above, the enforcement of the subject RCA is **not** "reasonably necessary to protect [BCI's] interest." The agreement is not limited in duration and does not seek recoupment of the actual training expenses incurred by BCI in training Banks (i.e., the costs of the books and manuals). Despite being in the computer industry itself, BCI failed to utilize any computer software to calculate the actual costs of Banks' training. Instead, BCI "calculated" its expenses by multiplying the amount of time Banks spent training by his hourly rate, plus benefits, plus overhead. This "calculation" is clearly not reasonably related to the actual cost of the on-the-job training. Such a calculation is inequitable and preposterous! This is not only taking away Banks' salary (which is

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[45] Part of Banks' salary is exactly what BCI seeks to recover in this appeal.

illegal) but, as stated in the Duke Law Journal article which BCI relies, would serve as a " windfall" to BCI.

Moreover, BCI's "calculation" excluded federal and state income taxes that Banks is required to pay and it further excluded the federal tax deductions BCI itself receives for training its employees. Because of such errors, the calculation is speculative and did not provide a reasonable basis for any damage award.

In effect, the RCA would require any employee to agree in advance to reimburse BCI up to 25% of their gross salary, benefits, and overhead if they decided to leave. The effect of enforcement of such a provision would be to place the departing employee in the position of either **(1)** pay to leave or **(2)** stay employed with BCI. Under such an agreement, there would be no way for any employee to ever earn his way out of this obligation. This Court has specifically refused to adopt a construction of a contract that "no man in his right mind would have agreed to."

> Parties are bound by what they promise in writing.[46] But, we are not bound to adopt a construction not compelled by the instrument in which we would have to believe **no man in his right mind would have agreed to.** A construction leading to an **absurd, harsh or unreasonable result in a contract should be avoided,** unless the terms are express and free of doubt.

Frazier v. Northeast Mississippi Shopping Ctr, Inc., 458 So. 2d 1051, 1054 (Miss. 1984) (emphasis added); *see also Crisler v. Crisler*, 963 So. 2d 1248, 1252-1253 (Miss. Ct. App. 2007) (*quoting Frazier*).

This RCA is also a form of involuntary servitude which is prohibited by law and should be judicially declared invalid and void making it not only unenforceable against Banks but also

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[46] In this case, however, Banks did not promise anything in writing or otherwise regarding the new training costs reimbursement policy.

unenforceable against any of BCI's current employees. The Thirteenth Amendment prohibits a court from enforcing a contract whereby an employee's debt to his employer, payable on his departure, deprives him of the legal right to leave that employment. While arguably more subtle than a contract of indenture, the RCA has the same effect. *Pollock v. Williams*, 322 U.S. 4 (1944). This illegal employment practice should be prohibited and not condoned by this Court.

The evidence undisputably established that the subject RCA was never a valid and enforceable contract (as none of the five contractual elements addressed above could be proved) and therefore any action by BCI claiming a breach thereof failed as a matter of law.[47] [R. 1305-06]. Moreover, enforcing the 2005 RCA (signed or unsigned) against its employees would create a perpetual debt obligation and windfall for BCI.[48] BCI should be estopped by its own conduct[49] from claiming the existence of a contract under the unsigned RCA.

2. The Mere Fact Banks Was in Possession of BCI's Employee Handbook (Which Incorporated an Unsigned RCA) Does Not Create an Affirmative Contractual Obligation on Banks' Part to Pay BCI Money

BCI argues that the RCA is a valid and enforceable contract simply because the RCA was in a BCI handbook that Banks possessed at one time. BCI disregards the elements required to create a valid and enforceable contract (which clearly cannot be proved) and therefore support a finding that no contract ever existed - ultimately warranting an affirmance of the JNOV.

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[47] Which the trial court considered and agreed with by holding that "BCI's proof was legally insufficient to show that there ever existed a legally valid and binding contract."

[48] As Banks noted before the trial court, BCI's silence regarding the windfall it would receive from this perpetual obligation speaks volumes.

[49] BCI's own conduct consisted of (1) expressly disclaiming any contract for any purpose regarding documents/policies in its handbooks, and (2) drafting a document which expressly requires an employee's signature.

BCI's argument relies on the cases of *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086 (Miss. 1987); *Robinson v. Bd. Of Trustees of East Central Junior College*, 477 So.2d 1352 (Miss. 1985)[50]; *Bobbitt v. Orchard, Ltd.*, 603 So.2d 356 (Miss. 1992); *Nichols v. City of Jackson*, 848 F. Supp. 718 (S.D. Miss. 1994); and *Hawkins v. Toro Company*, 1995 U.S. Dist. LEXIS 21677 (N.D. Miss.).[51] These cases address totally different legal issues (i.e., employees suing their employers regarding their termination) and are not relevant to this case. Contrary to BCI's assertions, these cases do not support enforcing contractual obligations on the employee, but instead support enforcing contractual obligations **on the employer** as the drafter of the handbook. *See Bobbitt*, 603 So. 2d at 357 (with "**employer** will be required to follow its own manual"); *Nichols*, 848 F. Supp. at 724 ("a manual issued by an employer to its employees . . . creates an obligation on the part of the **employer**"); *Hawkins*, 1995 U.S. Dist. LEXIS 21677, *11 ("the **employer** will be required to follow its own manual")[52]. Furthermore, these cases have been limited to the employer's duty to follow procedures in the handbook concerning "reprimanding, suspending and discharging employees" and have not been extended outside this limited realm.

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[50] BCI's *quote* from *Robinson*, is inaccurate as this Court in *Robinson* never made such a statement.

[51] BCI inappropriately and incorrectly implies that *Hawkins* was decided by the Fifth Circuit Court of Appeals. [BCI's Brief at p. 22]. The Fifth Circuit did not provide an opinion or "address" the enforcability of an unsigned acknowledgment page in an employee handbook" as BCI's brief states. The Fifth Circuit merely affirmed, **without a written opinion**, the district court's dismissal of Hawkins' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *Hawkins v. Toro Co.*, 66 F.3d 321 (5th Cir. 1995).

[52] The District Court in *Hawkins*, paraphrasing *Nichols, supra,* incorrectly asserted that the **employee** has the duty to follow provisions of a handbook. *Nichols*, however, did not concern any affirmative duties (specifically contractual duties) on the part of the employee but instead concerned "the **employer['s]** . . . duty to follow the provision of a manual only so long as a reasonable employee would believe it still to be current."

The most glaring deficiency in BCI's reliance upon these line of cases is that **no contractual rights are created when the employer expressly disclaims the creation of a contract** (which BCI did). The discharged employee in *Hawkins* attempted to assert a breach of contract claim against his employer based on the employer's failure to follow the provisions in its handbook regarding termination. *Id.* Relying on *Bobbitt* and *Perry*, the district court in *Hawkins* held that no contract ever existed because the employer expressly disclaimed any contractual rights. *Id.* at *12. In the instant case, BCI provided Banks with a written employment offer which explicitly disclaimed that any handbook or other policies and guidelines therein would "constitute and express or implied contract for any purpose." [P-1]. BCI cannot have it both ways: it cannot disclaim a contract in one breath, yet in the next claim a contract exists.

It is readily apparent that BCI's *subtle* changes in the words of the new RCA from the words in its old RCA, and then burying the new RCA in the middle of a 44 page employee handbook without seeking the employee's written consent (which is still required under the RCA), was nothing more than an attempt to extort money from its employees if they ever choose to leave.

V. CONCLUSION

This appeal is nothing more than a vindictive former employer's continued attempt to harass and hurt a former employee who merely went to work with a competitor. It is further an attempt to take advantage of employees by making the employee reimburse the employer for employer required ordinary, on-the-job training despite the fact that the employee never agreed to undertake such an obligation. Such conduct by an overbearing employer should not be condoned but instead should be stopped and sanctioned.

Based on the record evidence and the above and forgoing law, Banks respectfully requests this Court to AFFIRM the trial court's order granting Banks JNOV and dismissing BCI's claims as a matter of law.

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CERTIFICATE OF SERVICE

I, Silas W. McCharen, of counsel for Appellee, Albert Banks, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing document to:

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Honorable William E. Chapman, III
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THIS, the 14th day of April, 2010.

SILAS W. McCHAREN