IN THE SUPREME COURT OF MISSISSIPPI
CASE No. 2009-TS-00407

BUSINESS COMMUNICATIONS, INC. **PLAINTIFF/APPELLANT**

vs.

ALBERT BANKS **DEFENDANT/APPELLEE**

BRIEF OF APPELLANT, BUSINESS COMMUNICATIONS INC.

On Appeal from the Circuit Court of Madison County, Mississippi

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Submitted by:
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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons listed have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

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Circuit Judge

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Respectfully submitted,

BUSINESS COMMUNICATIONS, INC.

By: _____
One of Its Attorneys

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Business Communications Inc. ("BCI") sued Al Banks ("Banks"), its former Vice-President for Emerging Technologies,[1] for unlawful breach of his employment contract which contained a Business Protection Agreement ("BPA") and for the violation of the terms of the training Costs Reimbursement Provision ("CRP") contained in the BCI Employee Handbook which was also considered a part of his employment contract. BCI and Venture Technologies, Inc. ("Venture") are the two main companies in metro Jackson, Mississippi, that specialize in providing network and communication systems integration and consulting. As such, they are direct competitors. Banks went to work with Venture in February, 2006 in violation of his employment agreement. Banks also disclosed confidential information belonging to BCI to two of its biggest competitors, BellSouth and Venture. Banks also violated the terms of his BPA by taking business materials and other property belonging to BCI after his employment ended. Pursuant to the BCI employee handbook, Banks was also required to reimburse BCI for the training expenses for the year before his separation from BCI. He failed to reimburse these training costs.

BCI filed an Amended Complaint in the Circuit Court of Madison County, Mississippi, seeking damages from Banks. At the conclusion of a four day jury trial, BCI prevailed and the jury awarded $1,000.00 to BCI for breach of the BPA and $9,000.00 as damages for his breach of the CRP. However, the lower court granted Defendant's Motion for Judgement Notwithstanding the Verdict ("J.N.O.V.") and held that there was no breach of the BPA because BCI failed to prove that

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[1]From November 27, 2001 through the date of his resignation in February 2006, BCI employed Al Banks as its Vice-President of Emerging Technologies. In his capacity as Vice-President, he was exposed to confidential and proprietary information and trade secrets that BCI uses when competing with Venture. He was also the "name and face" of BCI as well as its primary contact for several BCI customers.

it was subjected to unfair competition as a result of Banks' employment by his new employer. The lower court also granted a J.N.O.V. reversing the jury verdict finding a breach of the CRP because there was no proof of a meeting of the minds between the parties. BCI now seeks to reverse the lower court's decision and to reinstate the jury verdict in its favor because there is no legal or factual justification to support the lower court's granting of a J.N.O.V. First, the trial court erred by granting a J.N.O.V. on the issue of the BPA breach because the trial court required an additional showing of unfair competition even though (1) the jury was not instructed on this heightened element, and (2) this element of proof is not required under Mississippi law. Second, the trial court also erred by setting aside the jury's verdict even though the evidence introduced at trial established both the validity and violation of the terms of the CRP. BCI seeks to reinstate the Madison County jury's verdict because it was supported by the proof at trial and is proper as a matter of law.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Procedural History.

BCI filed its Amended Complaint on March 29, 2007, seeking damages for breach of contract from Banks. *(R. at 654).* Banks timely filed his Answer. The Court conducted a jury trial in the Madison County Circuit Court on October 14, 2008. At the conclusion of a four day jury trial, BCI prevailed and the jury awarded $1,000.00 to BCI for breach of the BPA and $9,000.00 as damages for his breach of the CRP. On October 31, 2008, a Judgment in BCI's favor in the amount of $10,000.00 was entered. *(R. at 1161-1162).* On November 10, 2008, Defendant's 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 were filed. *(R. at 1164-1183).* BCI filed its Motion for Attorneys' Fees and Costs on November 21, 2008.[2] *(R. at 1184-1215).* BCI's Response to Defendant's Motion For J.N.O.V. or in the Alternative, for a New Trial or in the Alternative, for a Remittitur of the Damages Awarded was filed on January 6, 2009. *(R. at 1294-1316).* The Order Granting Defendant Albert Banks' Motion for Judgment Not Withstanding the Verdict was entered on March 2, 2009. *(R. at 1384-1386).* BCI timely filed its Notice of Appeal on March 5, 2009. *(R. at 1387-1388).*

B. Facts and Background.

On March 2, 2001, BCI offered employment to Banks as a Lead Consulting Engineer. *(Exb. P-1).* The offer was contingent upon Banks' signing BCI's BPA (Business Protection Agreement).

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[2]The lower court did not rule on this Motion because it became moot upon the granting of Defendant's Motion for J.N.O.V. BCI respectfully requests this Court to reinstate the jury verdict below and to award BCI its attorneys' fees and costs as outlined in its Motion.

(Id.) Banks executed the BPA, which is dated March 8, 2001. *(Ex. P-2).* The BPA contains a reasonable non-competition provision:

> For a period of one (1) year after termination of Employee's employment with the Company, whether voluntarily or involuntarily terminated by either party with or without cause or notice, the Employee hereby agrees not to render services, directly or indirectly, whether as principal or agent, officer, director, employee, advisor, consultant, shareholder, or otherwise, alone or in association with any other person or entity, to or for any Competitor of the Company within a 150 mile radius of the (a) the location of any office of the Company and (b) from any place where the business of the Company is being conducted, whether or not the Company established an office in such a location.

(Exb. P-2, at 1-2, § 2).

Banks began work at BCI on March 19, 2001. *(Tr. at 438).* A few months later, on November 27, 2001, BCI promoted Banks to Vice-President of Emerging Technologies. *(Tr. at 443).* Banks served as an officer of BCI until he left BCI to work for Venture in February of 2006. *(Tr. at 453).*

During Banks' time at BCI, he was primarily responsible for the installation and support of local and wide area network Cisco equipment. *(Tr. at 437).* To enable Banks to perform these duties and others, BCI incurred substantial training costs and expenses. *(Tr. at 90-96).* While employed at BCI, he also came in contact with confidential and proprietary information and trade secrets of BCI in order to enable him to perform his job duties. *(Exb. P-2).* During the course of this litigation, it was discovered that after Banks left BCI, he took with him several pieces of BCI property including a BCI Employment Handbook, BCI's customer work orders, and a BCI backup computer disk. *(Tr. at 87, 220-226, 343, 348-349).*

In January 2005, Banks, unbeknownst to BCI, placed his resume on Monster.com. *(Tr. at 238).* Venture Technologies, his current employer, contacted him in November of 2005 about employment. *(Id.)* In response to employment inquiries from Venture, Banks' told them that he signed a non-competition agreement with BCI, and that he was not able to work for Venture because he had a noncompete agreement. *(Tr. at 239-241).* Venture backed off and did not pursue employment for over two months. On January 26, 2006, Venture approached Banks again. *(Tr. at 240-241).* On February 7, 2006, Venture formally extended Banks a job offer. *(Tr. at 242; Exb. P-11).*

Banks notified BCI of his resignation on February 15, 2006. *(Tr. at 80, 246; Exb. P-4).* Tony Bailey ("Bailey"), Chief Executive Officer of BCI, asked Banks where he was going to work. *(Tr. at 321-322).* Banks would not tell them. *(Id.)* Bailey soon discovered that Banks left BCI to work for Venture. BCI and Venture are direct competitors. *(Tr. 197, 227, 228, 241, 342, 350, 355, 445, 484).* They both specialize in providing network and communication systems integration and consulting. *(Id.)* Banks' employment by Venture was in direct violation of the non-competition agreement. Moreover, Banks' disclosure of confidential information belonging to BCI as well as his retention of BCI property after the termination of his employment are further proof of his breaches of the BPA.

IV. ARGUMENT

A. Standard of Review.

A motion for judgment notwithstanding the verdict made under the procedural vehicle of *Miss. R. Civ. P.* 50 (b), requires the trial court to test the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994).

In *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006), the Mississippi Supreme Court set forth the standard of review for the grant or denial of a J.N.O.V. as follows:

> [T]his Court will consider the evidence in the light most favorable to the appellee [nonmovant], giving that party the benefit of all favorable inference [sic] that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant [movant] that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. The above standards of review, however, are predicated on the fact that the trial judge applied the correct law.

In order to rule on a motion for J.N.O.V., the trial court is required to consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that reasonably may be drawn therefrom. *Corley v. Evans*, 835 So. 2d 30, 36 (Miss. 2003) (quoting *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989)). "A motion for J.N.O.V. is a challenge to the legal sufficiency of the evidence, and this Court will affirm the denial of a J.N.O.V. if there is substantial evidence to support the verdict." *United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956 at 964 (Miss. 2008)* (citing *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, 948 (Miss. 2008)); *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 961 (Miss.1999)(citing *Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373, 376 (Miss.1997)). "Substantial evidence" has been defined as "information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." *Martin*, 998 So. 2d at 964 (citing *Adcock*, 981 So. 2d at 948-49); see also *Smith v. Averill*, 722 So. 2d 606, 613 (Miss. 1998) (citing *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324, 326 (Miss. 1988)).

B. The Trial Court Erred In Granting Defendant's Motion for Judgment Notwithstanding The Verdict.

The lower court erred in granting Banks' Motion for J.N.O.V. because Mississippi law does not require a showing of unfair competition for BCI to prove that Banks breached his noncompete agreement. The unfair competition element is simply not a prerequisite for enforcing a noncompete agreement in Mississippi. Moreover, the trial court did not instruct the jury on this element. Consequently, the lower court overruled the jury verdict, but this ruling is contrary to established Mississippi jurisprudence and the proof offered at trial. The simple fact remains that there are no Mississippi cases which require a showing of unfair competition to prove a violation of a noncompete agreement. Moreover, the record evidence confirmed that the BPA was an enforceable agreement between Banks and BCI, and also that Banks breached his BPA in several ways. These additional breaches further supported the jury's verdict.

1. Mississippi jurisprudence does not require a showing of unfair competition to enforce a noncompete agreement and the jury was not instructed on this element.

The lower court improperly granted Banks' Motion for J.N.O.V. on the issue of the breach of the BPA and the court's opinion on the record confirms that the basis for the ruling is just dead wrong:

> 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.

(R. at 1384-1386).

The trial court incorrectly mandated that BCI prove "unfair competition" as an element of its claims. Banks' Motion for J.N.O.V. cited cases in a footnote from foreign jurisdictions which require establishing unfair competition to prove breach of a noncompete agreement. However, Mississippi jurisprudence requires that a plaintiff establish enforceability of a non-compete agreement by showing "the reasonableness and specificity of its terms, primarily the duration of the restriction and its geographic scope." *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 975 (Miss. 1992); *Taylor*, 634 F. Supp. at 1247-1250. A court must also examine the covenant's effect on "the rights of the employer, the rights of the employee, and the rights of the public," and balance these respective interests. *Texas Rd. Boring Co. of La.-Miss. v. Parker*, 194 So. 2d 885, 888 (Miss. 1967). Under a long line of unchanging and decisive opinions, Mississippi courts have held that a covenant not to compete is enforceable if it is "necessary for the protection of the [employer's] business and goodwill." *Id.* at 886. Neither the trial judge nor Banks can cite any Mississippi authority that confirms a Mississippi plaintiff must prove unfair competition to prevail on a breach of a covenant not to compete claim. To hold BCI to this new and heightened standard is a misapplication of the law.

By imposing an unprecedented post-verdict standard, the trial court invaded the province of the jury. The court never instructed the jury on the "unfair competition" element. In fact, Banks did not submit a proposed jury instruction on this subject of unfair competition. For Banks to now argue that it is a required element, after the jury has spoken, is error.

On the issue of the breach on the non-competition agreement, the Jury Instructions read as follows:

> **Jury Instruction No. 12**
>
> The Court instructs the jury that the Business Protection Agreement 1) prohibited Al Banks from rendering service to any competitor of Business Communications Inc., located within a 150 mile radius of the location of any Business Communications, Inc. office for a period of one (1) year after termination of his employment with Business Communications, Inc., that served to protect a legitimate business interest as defined; 2) prohibited Al Banks from retaining written material, information, records, and documents or copies of same made by him or coming into his possession concerning the business or affairs of Business Communications, Inc.; and 3) required Al Banks to promptly return to Business Communications, Inc. all written material, information, records, and documents made by him or coming into his possession concerning the business or affairs of Business Communications, Inc., including without limitation Confidential Information, and any other property in his possession owned or leased by the Business Communications, Inc. If you find that Al Banks violated one or more of the above conditions of the Business Protection Agreement with Business Communications, Inc., you may find that he was in breach of his agreement with Business Communications, Inc. *(R. at 1148-1149).*
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> **Jury Instruction No. 13**
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> "Legitimate" business interests are protection from loss of customers and good will, disclosure of confidential and proprietary business information and mis-appropriation of "trade secrets" and training costs. *(R. at 1150).*
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> **Jury Instruction No. 14**
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> The Court instructs the jury that in determining the validity and enforceability of the covenant not to compete provision in the Business Protection Agreement between Business Communications, Inc., and Albert Banks, you consider the following factors: 1) The rights of Business Communications, Inc., in protecting its legitimate business interests including but not limited to its confidential and proprietary information and the investment in training its employees; 2) The rights of Albert Banks to not be subjected to undue hardship; and 3) The rights of the public to avoid the creation of a deficiency of service in the information technology industry, or that any one information technology company in the state has created or is in danger of creating a monopoly though its use of them. *(R. at 1151).*

Clearly, the jury properly followed the instructions and found a breach of one of the terms in the BPA as outlined by Jury Instruction Number 12. Nevertheless, the trial court's ruling granting Banks'

Motion for J.N.O.V. created an essential prerequisite on BCI's claims of breach of BPA never before recognized by Mississippi jurisprudence. Ample proof existed that Banks committed multiple breaches of the BPA. To hold BCI to a heightened evidentiary standard, an unprecedented post jury verdict standard is clear error. For these reasons, this Court should reverse the J.N.O.V. and reinstate the jury verdict in BCI's favor.

2. Business Communication, Inc.'s Business Protection Agreement was a valid and enforceable agreement.

Mississippi courts have steadfastly held that an employer has an interest in the protection of its customer base, its goodwill, and its ability to succeed in a competitive marketplace. *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 976 (Miss. 1992). "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 and relationships with the employer's customers.'" *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (*quoting Redd Pest Control Co., Inc. v. Heatherly*, 248 Miss. 34, 157 So. 2d 133 (1963)).

Here, the proof at trial confirmed that BCI had several business interests the BPA served to protect. First, Banks had extraordinary access to BCI's confidential business operations:

- Banks was the Vice President of Emerging Technologies at BCI. *(Tr. at 76).*
- Banks was BCI's lead engineer and had access to all of the company's internal systems, including passwords, accounting information, and BCI's business practices. *(Tr. at 319, 341).*
- BCI depended on the customer and vendor relationships it formed to continue its business. *(Tr. at 318).*
- BCI had a legitimate business interest in protecting its customer lists. *(Tr. at 341).*

In addition to protection of confidential information, trade secrets and other proprietary information, Mississippi courts have also held that covenants not to compete are valid and enforceable if they protect an employer's investment in training and education of an employee. *Redd Pest Control Co., Inc. v. Foster,* 761 So. 2d 967, 973 (Miss. App. 2000); *Taylor v. Cordis Corp.*, 634 F.Supp. 1242, 1247-1250 (S.D.Miss.1986); *Texas Rd. Boring Co. of La.-Miss. v. Parker*, 194 So. 2d 885, 889 (Miss.1967); *Heatherly*, 157 So. 2d at 136.

In *Foster*, a pest control company filed contract actions against two former employees, based on breach of covenants not to compete, and sought injunctive relief and damages. The chancery court ruled in favor of the employee, and the employer appealed. The Court of Appeals 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. Likewise in *Taylor*, a pacemaker manufacturer had extensively trained the defendant sales representative to sell pacemakers to physicians. *Taylor*, 634 F.Supp. at 1243. The sales representative filed a declaratory judgment action requesting that the court rule that his contract of employment was void and unenforceable. *Id.* The employer counterclaimed for a preliminary injunction to enforce the covenant not to compete. *Id.* Judge Lee, interpreting Mississippi law, held that the salesman was not entitled to rescission of contract and the manufacturer was entitled to preliminary injunction to enforce the covenant. *Id.* Judge Lee focused on the training and education of the salesman:

> This court is of the opinion that Cordis sustained its burden of demonstrating the economic justification for its agreement with Taylor. In the pacemaker sales industry the customers, in most cases the physicians, rely primarily on the salesperson and have little or no contact with the company prior to purchasing a pacemaker.

> Throughout the period during which Taylor was in training, and later when he was establishing his and Cordis' credibility with the physicians, Cordis paid all his salary and expenses. Under similar circumstances, the Mississippi Supreme Court has stated that it is proper for the court to take into consideration the fact that [the employer] spent large sums of money over a period of time to establish the business and acquire the customers. *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So.2d 133, 136 (1963). See also *Texas Rd. Boring Co. of La.-Miss. v. Parker*, 194 So.2d 885, 889 (Miss.1967).

Taylor at 1248.

The record evidence contains testimony and other proof that the BPA was used to protect the BCI's training investment in Banks:

- The BPA was used to protect the investment made in training Banks to prohibit him from taking his knowledge to a competitor. *(Tr. at 50, 59, 74).*
- BCI incurred training costs within a year prior to Banks' terminating his employment. *(Tr. at 90-96).*
- The benefit of the training Banks received while at BCI inured to his own benefit, and that of his subsequent employer, Venture. *(Tr. at 301).*

Other jurisdictions have embraced the fact that training and education are protectable interests.[3] In fact, an overwhelming number of cases have held that territorial restrictions in

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[3]*Orkin Exterminating Co. v. Murrell*, 212 Ark. 449, 206 S.W.2d 185 (1947) (court enforced a noncompete in pest control business because the restraint imposed on the employee was reasonably necessary for the protection of his former employer's interests and court stressed the fact that the appellee had been given special training to enable him to carry on the appellant's work); *Davey Tree Expert Co. v. Ackelbein*, 233 Ky. 115, 25 S.W.2d 62 (1930), (Kentucky Supreme Court upheld as reasonable a restrictive covenant entered into by a tree surgeon covering a hundred-mile radius of each city in which the employer had a place of business and held that "an employee trained in the processes of this company, and acquainted with its methods, should not be allowed to use the processes and methods in conducting an independent business...."); *Chandler, G. & Williams v. Reynolds*, 250 Mass. 309, 145 N.E. 476 (1924). (Massachusetts court validated a restrictive covenant prohibiting an undertaker employee from engaging in the embalming business within the same city and vicinity of employer's business for ten years after the termination of the employment contract and confirmed that one of the purposes of a noncompete agreements is to prevent an employee from taking advantage of the knowledge thus gained by engaging in a competing business.); *Mel-Way, Inc. v. Wesley*, 290 So. 2d 454 (La. Ct. App. 2d Cir. 1974). (Louisiana appellate court upheld a restrictive covenant that prohibited a former employee from engaging in a competing employment agency business on the basis that the employer had expended considerable sums in training and in advertising the employee's connection with its firm.)

noncompetition provisions will be sustained if the employee gained training or education during the period of his employment. [4]

The proof at trial established that BCI has a legitimate business interest in protecting its customer list, vendor relationships, business practices and goodwill. Under similar circumstances, Mississippi courts have enforced covenants not to compete when former employees who, like Banks here, have peculiar knowledge of and relationships with the employer's customers and vendors. *See Herring Gas* at 1245. Consequently, the record evidence, when viewed most favorably towards BCI, clearly supports the jury's finding that the BPA was an enforceable agreement.

3. The Business Protection Agreement's terms were reasonable.

The terms of the BPA are reasonable and enforceable. The enforceability of a non-compete agreement "is largely predicated upon the reasonableness and specificity of its terms, primarily the duration of the restriction and its geographic scope." *Empiregas*, 599 So. 2d at 975; *Taylor*, 634 F. Supp. at 1247-1250. A court must also examine the covenant's effect on "the rights of the employer,

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[4]*See, e.g., Freudenthal v. Espey*, 5 Colo. 488, 102 P. 280 (1909); *Davey Tree Expert Co. v. Ackelbein*, 233 Ky. 115, 25 S.W.2d 62 (1930); *John Lucas & Co. v. Evans*, 141 Kan. 57, 40 P.2d 359 (1935); *Orkin Exterminating Co. v. Murrell*, 212 Ark. 449, 206 S.W.2d 185 (1947); *Jewel Paint & Varnish Co. v. Walters*, 339 Ill. App. 335, 89 N.E.2d 835 (1950); *Chandler, G. & Williams v. Reynold*, 250 Mass. 309, 145 N.E. 476 (1924); *Eastman Kodak Co. v. Powers Film Products*, 189 App. Div. 556, 179 N.Y.S. 325 (1919); *Scadron's Sons v. Susskind*, 132 Misc. 406, 229 N.Y.S. 209 (1928); *Davey Tree Expert Co. v. Back*, 137 Misc. 702, 244 N.Y.S. 239 (1930); *Briggs v. Glover*, 167 Misc. 306, 3 N.Y.S.2d 979 (1938); *Basic Food Sales Corp. v. Moyer*, 55 F. Supp .449 (1944, DC Pa); *Standard Dairies v. McMonagle*, 139 Pa. Super. 267, 11 A.2d 535 (1940); *Light Corrugated Box Co. v. Dubison*, 26 Pa. D. & C. 169 (1936); *Crosby v. McGlauflin*, 94 Pittsb. Leg. J. 213 (1945); *Niedland v. Kulka*, 64 Pa. D. & C. 418 (1948); *Diamond Furnishing Co. v. Krant*, 52 Lack. Jur. 233 (1951); *Keystone Sign Co. v. Trainor*, 67 York Leg. Rec. 189 (1954); *Pankas v. Bell*, 413 Pa. 494, 198 A.2d 312 (1964); *Dyar Sales & Machinery Co. v. Bleiler*, 106 Vt. 425, 175 A 27 (1934); *Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876 (1951); *National School Studios v. Superior School Photo Service*, 40 Wash.2d 263, 242 P.2d 756 (1952); *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So. 2d 232 (Fla. Dist. Ct. App. 3d Dist. 1960); *Edwards v. Howe Richardson Scale Co.*, 237 Ga. 818, 229 S.E.2d 651 (1976).

the rights of the employee, and the rights of the public, and balance these respective interests. *Texas Rd. Boring*, 194 So. 2d at 888.

In *Donahoe v. Tatum*, 242 Miss. 253, 261, 134 So. 2d 442,444-45 (1961), the employee went to work as an employment counselor at an employment agency. *Id.* Three years later she resigned from the job and entered the employ of a competing agency in violation of a covenant proscribing competition with the employer for a period of five years after termination. *Id.* A lawsuit was filed against the employee for injunctive relief, and the trial court entered a decree enjoining her from breaching the covenant. *Id.* This Court affirmed the chancellor's decision to enforce the non-compete agreement, prohibiting Ms. Donahoe from working as an employment counselor for five years in Hinds County. *Id.*

The primary considerations as to reasonableness are "the restriction with respect to the nature of the employment, the duration of the period of restraint, and the scope and extent of the restriction, territorially." *Donahoe,* 242 Miss. at 259, 134 So. 2d at 444. Regarding the first consideration, the *Donahoe* court looked to whether the employee's employment was of a nature to inform him of the company's business methods, confidential information and trade secrets, and whether enforcing the agreement would cause undue hardship that is to "earn a living ... during the period of the covenant." *Id.* Enforcing the BPA will not cause undue hardship. Banks demonstrated that he is a successful computer engineer and will be able to earn a living regardless of whether the BPA is enforced. Banks even interviewed for jobs with noncompetitors outside the geographic range set forth in the BPA. *(Tr. 237)* Banks solicited Cisco Systems in Washington, D.C. for a job. *(Tr. 237).* Banks did not introduce any evidence of his inability to find suitable work outside the protected geographic area

for the time period set forth in the BPA. Therefore, it is uncontroverted that he is ready, willing and able to accept employment outside the geographic restrictions contained with the BPA.

Here, it cannot be disputed that Banks had access to BCI's business methods and confidential information. In fact, Banks' trial testimony confirmed he expressly agreed to this much in signing the BPA which provides:

> Employee recognizes that the Company engages in the business of network communication systems integration and consulting, and that such business requires confidentiality in connection with many of its methods and operating procedures, including without limitation names and addresses of the Company's customer, sources of buying, training methods, and techniques of organization. During the course of his/her employment, Employee may become knowledgeable of the Company's confidential information. In addition, Employee may develop on behalf of the Company a personal acquaintance with the Company's present customers, suppliers, and/or other business-related contact which acquaintance may constitute the Company's only contact with such individuals or entities. As a result, Employee will occupy a position of trust and confidence with the respect to the Company's affairs and products.

(Exb. P-2 at 1).

With regards to geographic scope and time restraints, the BPA is reasonable. The BPA does not prohibit competition in all territories-- only in the areas where BCI has an office. Banks admitted at trial that he could work in other cities where BCI had no offices. *(Tr. at 48.)*

The one-year duration of the BPA is reasonable. Mississippi courts have repeatedly validated agreements with similar and even longer durations.[5]

In determining reasonableness, the court must also decide whether enforcement of the covenant will harm the public by creating a monopoly. *Foster*, 761 So. 2d at 973. The computer business is competitive and diverse. Although BCI is a large and prestigious company, there was ample testimony from witnesses at trial that there are many other companies that provide services in this area. *(Tr. 48, 71, 331-332, 374-375).* Therefore, the evidence confirmed that enforcing the terms of the BPA will not create a monopoly.

4. The proof at trial supported a finding that Banks breached the Business Protection Agreement.

Even assuming the lower court was correct in finding that BCI failed to prove a breach of the noncompete portion of the BPA, the record contains substantial evidence that Banks materially breached other portions of the BPA.

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[5] *Texas Rd. Boring Co. Of La.-Miss. v. Parker*, 194 So. 2d 885 (Miss. 1967) (non-compete for manager of contractor; two year duration within 100 miles of city where employee worked); *Redd Pest Control Co., Inc. v. Heatherly*, 248 Miss. 34, 157 So. 2d 133 (1963) (non-compete for exterminator; two year duration within 50 miles of Tupelo); *Bagwell v. H.B. Wellborn & Co.*, 247 Miss 564,156 So. 2d 739 (1963) (non-compete for insurance adjuster; two year duration within 70 miles of Meridian); *Frierson v. Sheppard Build. Supply Co., Inc.*, 247 Miss. 157, 154 So. 2d 151 (1963) (non-compete for building supply company manager; two year duration within 50 miles of Jackson); *Donahoe v. Tatum*, 242 Miss. 253, 134 So. 2d 442 (1961) (non-compete for employment counselor; duration of five years within Hinds County); *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363 (1937) (non-compete for two doctors; five year duration within 5 miles of Greenville); *Redd Pest Control Co., Inc. v. Foster*, 761 So. 2d 967 (Miss.App. 2000) (non-compete for exterminator; two year duration within former territory); *Union Nat 'l Life Ins. Co. v. Tillman*, 143 F. Supp. 2d 638 (N.D. Miss. 2000) (non-compete for insurance salesman; one year duration within two counties); *Taylor v. Cordis Corp.*, 643 F. Supp. 1242 (S.D. Miss. 1986) (non-solicitation agreement for pacemaker salesman; duration of one year for former employer's customers).

a. Banks breached the covenant not to disclose.

Banks breached the terms of his employment contract by disclosing confidential information to third parties including Venture. The nondisclosure provisions of the BPA state:

> 3. Covenant Not to Disclose.
>
> (a) For the purpose of this Agreement, "Confidential Information" means information and trade secrets disclosed to Employee or known by Employee as a consequence of, or through, Employee's employment with the Company, including information conceived, originated, discovered, or developed in whole or part by Employee, not generally known in the relevant trade or industry, ***about the Company's business, but not limited to information relating to business methods or practices***, training and training programs, and the documentation thereof.
>
> * * *
>
> (b) The Employee acknowledges that all Confidential Information is and shall at all times remain the property of the Company....
>
> * * *

(Exb. P-2 at 2).

While working at BCI, and in the process of seeking other employment, Banks shared his BPA with BellSouth and Venture, two of BCI's biggest competitors. *(Tr. 197, 227, 228, 241, 342, 350, 355, 445, 484).* Banks even negotiated an agreement in which Venture would employ Banks, and would defend and indemnify him up to $10,000.00 if BCI attempted to enforce the terms of the BPA. *(Tr. 207, P-9).* The indemnification agreement between Banks and Venture was reduced to writing. *Id.* Accordingly, the proof at trial confirmed that Banks breached a material term in his employment agreement by disclosing the BPA which was BCI's confidential information.

b. Banks removed confidential BCI property after he terminated his employment with BCI.

Banks further breached the BPA by absconding with BCI property when his employment ended. The BPA states the following with respect to returning BCI property at the end of an employment term:

> 4. Business Material and Property Disclosures.
> All written material, information, records, and documents made by Employee or coming into Employee's possession concerning the business or affairs of the Company, including without limitation Confidential Information, ***shall be the sole property of the Company, and, upon termination of Employee's employment with the Company***, whether voluntary or involuntary terminated by either party with or without cause or notice, ***Employee shall promptly deliver the same to the Company and shall retain no copies.*** This includes, without limitations, customer and supplier information and lists. Employees shall also promptly return to the Company all other property in Employee's possession owned or leased by the Company upon termination of employment.

(Exb. P-2 at 2).

The record evidence confirms that Banks took BCI property with him. The items included books, a listing of overdue work orders, several Cisco documents, a BCI employee handbook, a backup computer file containing BCI information, and BCI files stored on his personal computer. *(Tr. at 87, 220-226, 343, 348-349).* Conveniently, Banks testified that he retained these documents inadvertently, even though he had plenty of time to discover and return them in the two weeks he worked for BCI after giving notice of his resignation. *(Tr. 348-349).* The retention of confidential company property is yet another example of Banks' flagrant disregard of BCI's rights under the BPA. Consequently, the jury was justified in finding that Banks breached the BPA. For these additional reasons, the trial court erred in granting Banks' Motion for J.N.O.V.

C. **The Evidence Introduced at Trial Supports the Jury's Finding That Banks Violated the Terms of the Training Cost Reimbursement Provision of the Employee Handbook Provision.**

1. **Banks was required to fulfill his obligations pursuant to the Business Communication, Inc.'s Employee Handbook and the jury found that he did not fulfill those obligations.**

The trial court erred when it held that there was no meeting of the minds between Banks and BCI with regards to the CRP. The evidence established that Banks' duties to comply with the provisions of his employee handbook arose as part of his obligations under his employment contract with BCI.

Banks claims he did not sign the CRP, nor did he sign the handbook in general, so therefore, he should not be bound by its terms. However, in *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086 at 1088 (Miss.1987), the Court held that a personnel manual "can create contractual obligations, even in the absence of a written agreement." Banks did not sign his handbook or the CRP, but he did execute a written employment contract, which gave rise to several duties on his part, along with those contained in his employee handbook. *(Exb. P-1).* The Mississippi Supreme Court has further held that "a written contract can be modified by a policy handbook which then becomes part of the contract, but only where the contract expressly provides that it will be performed in accordance with the policies, rules and regulations of the employer." *Robinson v. Bd. of Trustees of East Central Junior College*, 477 So. 2d 1352, 1353 (Miss. 1985).

Here, evidence was presented at trial through testimony from Banks, Derrick Lindsay, BCI's former Vice President, as well as documentary evidence of an offer letter from BCI which was extended to Banks which explicitly stated "This letter . . . is an offer of employment on the forgoing basic terms. Upon joining BCI, you may receive an employee handbook and a more detailed, formal

explanation of BCI's policies and guidelines." *(Exb. P-1).* In *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356 (Miss. 1992), the Mississippi Supreme Court held that because an employment manual was given to all employees, it became a part of the employment agreement. While the handbook did not create a right to employment, it did create an obligation on the part of the employer to follow its provisions in reprimanding, suspending or discharging an employee for infractions specifically covered therein. Likewise, the employee handbook here, and the CRP contained therein, all gave rise to obligations on the part of both Banks and BCI. Applying the courts rationale and adopting Banks' position means that his failure to sign the employee handbook would relieve both Banks and BCI from their obligation stated in the policies governing vacation, medical leave, cell phone use, harassment, employee honesty, and attendance. However, this is contrary to Mississippi law because, the employee handbook, whether signed or not, gives rise to obligations on the part of both parties. The jury found that Banks was obligated to reimburse BCI $9,000.00 in damages for breaching the CRP. The Court should reinstate the verdict.

2. The jury did not err when it found that Banks must fulfill his obligations under the Training Cost Reimbursement Provision of his Employment Handbook.

The trial court erred in setting aside the jury's finding that a meeting of the minds existed between the parties with respect to the CRP. Banks testified under oath that although he did not sign the acknowledgment, he was in possession of his BCI employee handbook which included the CRP at issue in the lawsuit. He had the CRP in his possession for an extended period of time and was able to review it. *(Tr. at 489-497).* He also testified that he had ample time to review and analyze its terms and provisions. *(Tr. at 490).* He clearly had notice of its provisions, whether he signed the CRP or not. *(Tr. at 458, 489-497).* More importantly, Banks testified that he kept the employee

handbook after the termination of his employment with BCI (contrary to his obligation in the BPA) and could therefore review it at his pleasure even after he left BCI's employ. *(Tr. 87, 221).* Banks received notice of the provision, and is subsequently bound by its terms pursuant to his employment contract. Like the handbook in *Bobbitt*, the BCI employee manual created obligations for both Banks and BCI. *Bobbitt*, 603 So. 2d 356 at 361. The jury heard evidence that Banks maintained the CRP at his fingertips for quite some time and found that he was bound by its terms. Clearly, the BCI employment agreement incorporated the BPA and the employee handbook and the handbook included the CRP.

Mississippi courts have enforced the terms of an employee handbook regardless of whether the provisions were countersigned by the employee or later changed by the employer. In *Nichols v. City of Jackson*, 848 F. Supp. 718, 724 (S. D. Miss. 1994), the federal district court interpreting Mississippi law held that an employee had a duty to follow provisions in an employee handbook that are reasonably believed to be current. *Nichols* involved the imposition of penalties and punishments for employment related infractions that were derived from a newer version of a handbook than the one that was in force at the time the employee began. The *Nichols* court held that because the employee was in possession of the new handbook, coupled with the glaring differences between the two manuals, he was on notice of his obligation to adhere to the more recent handbook provisions. *Id.* at 725.

Likewise, the Fifth Circuit Court of Appeals addressed the enforceability of an unsigned acknowledgment page in an employee handbook which served as a receipt and disclaimer about the handbook creating an employment contract. *Hawkins v. Toro Company*, 1995 U.S. Dist. LEXIS 21677 (N.D. Miss.), aff'd, 66 F.3d 321 (5th Cir. 1995). The employee in *Hawkins* claimed that

although he received a copy of the revised handbook, the provisions did not govern his employment because he did not sign the acknowledgment page. *Id.* at * 4. The *Hawkins* Court found that the employee's knowledge of the contents of the revised handbook bound him even though he did not sign the acknowledgment. *Id.* at * 12-13.

Similar to the employees in *Hawkins* and *Nichols*, Banks attempted to escape his obligations under the terms of the employee handbook because he did not sign an acknowledgment. The courts in those cases found that the fact that the employees had notice of the provisions and did not object created a meeting of the minds. The record evidence, when viewed in a light most favorable to BCI, indicates that Banks had notice of the CRP for a significant period of time and made no objection to the terms. The jury determined that there was a meeting of the minds to enforce the CRP. Consequently, since there was ample proof in the record that Banks was aware of the existence of the handbook and its provisions, including the terms contained in the new CRP, the trial court erred in granting the J.N.O.V.

V. CONCLUSION

The trial court committed reversible error. First, by misinterpreting the law, and requiring BCI to establish an element of proof not recognized under Mississippi jurisprudence. Moreover, the court did not instruct the jury on the "unfair competition" element, and therefore the trial court erred in reversing the jury's decision. However, even if the "unfair competition" element is a prerequisite, and BCI failed to meet its burden, there can be no dispute that there was ample proof in the record of Banks' other breaches of the BPA warranting and supporting the jury's decision. In addition, the trial court did not view the evidence at trial in the light most favorable to BCI with respect to the meeting of the minds on the CRP which was contained in BCI's employment handbook. A motion

for J.N.O.V. requires the trial court to test the legal sufficiency of the evidence supporting the verdict, rather than the weight of the evidence. Here, the evidence is overwhelmingly in favor of BCI and reasonable jurors could not have arrived at a contrary verdict. Consequently, this Court should reverse and render in BCI's favor.

Respectfully submitted this the 8th day of February 2010.

BUSINESS COMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I, one of the attorneys for Business Communications, Inc., do hereby certify that I have this date served a true copy of the above and foregoing via U. S. Mail on the following:

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SO CERTIFIED, this the 8th day of February, 2010.

Stephen J. Carmody