

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

NO. 2009-CA-00980

TIMBER LAKE FOODS, INC.

APPELLANT

V.

STEPHANIE ESTESS

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
CAUSE NO. CV-08-177**

BRIEF OF APPELLANT

Berkley N. Huskison, MSF [REDACTED]
Mitchell, McNutt & Sams, P.A.
215 5th Street North
Post Office Box 1366
Columbus, MS 39703-1366
(662) 328-2316

ATTORNEY FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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 of recusal.

1. Timber Lake Foods, Inc. – Appellant
2. Joe Estess – Owner of Timber Lake Foods, Inc.
3. Stephanie Estess – Appellee
4. Berkley N. Huskison – Attorney for Appellant
5. John A. Ferrell – Attorney for Appellee
6. Hon. Paul S. Funderburk – Trial Court Judge

Berkley N. Huskison

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
REQUEST FOR ORAL ARGUMENT	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT.....	8
CONCLUSION.....	16
CERTIFICATE OF SERVICE	17
CERTIFICATE OF FILING.....	18

TABLE OF AUTHORITIES

Cases

<u>Cascade Exchange, Inc. v. Reed</u> , 565 P.2d 1095 (Ore. 1977)	11, 14
<u>Century 21 Deep South Properties v. Keys</u> , 652 So.2d 707 (Miss. 1995)	11
<u>Empire Gas, Inc. of Kosciusko v. Bain</u> , 599 So.2d 971 (Miss. 1992)	9
<u>Herring Gas Co., Inc. v. Magee</u> , 813 F. Supp. 1239 (S.D. Miss. 1993)	8, 9, 13, 14
<u>Kennedy v. Metropolitan Life Ins. Co.</u> , 759 So.2d 362 (Miss. 2000)	8
<u>Killebrew v. City of Greenwood</u> , 988 F. Supp. 1014 (N.D. Miss. 1997)	8
<u>Redd Pest Control Co., Inc. v. Foster</u> , 761 So.2d 967 (Miss. App. 2000)	8, 9
<u>Redd Pest Control v. Heatherly</u> , 157 So.2d 133 (Miss. 1963)	14
<u>Taylor v. Cordis Corp.</u> , 634 F. Supp. 1242 (S.D. Miss. 1986)	8, 12, 13, 15
<u>Union National Life Ins. Co. v. Tillman</u> , 143 F.Supp.2d 638 (N.D. Miss. 2001)	8, 13
<u>Vector Transportation Co. v. Conner</u> , No. 01-1298 (Lee County Chancery Court, December 20, 2001)	9, 11, 16

REQUEST FOR ORAL ARGUMENT

Timber Lake requests oral argument in this case because of the apparent differing opinions of the Chancery Court of Lee County and the Circuit of Lee County on the reasonableness and enforceability of Timber Lake's non-compete agreement.

STATEMENT OF THE ISSUE

1. Whether the trial court erred in finding that Timber Lake's non-compete agreement with Stephanie Estess was unenforceable.

STATEMENT OF THE CASE

I. Factual and Procedural Background

A. Procedural History

On July 24, 2008, Timber Lake Foods, Inc. ("Timber Lake") filed suit in the Chancery Court of Lee County, Mississippi, against Stephanie Estess ("Ms. Estess") seeking to enforce a covenant not to compete. (Record 4-9 (hereinafter "R.")). Ms. Estess worked as a meat and poultry broker for Timber Lake and signed an employment agreement that included a non-compete agreement when she began work. Shortly after her employment ended at Timber Lake, she began working for a direct competitor of Timber Lake in violation of her non-compete agreement. Timber Lake filed a Motion for Preliminary Injunction on August 26, 2008. (R. 53-66). By Order entered on December 22, 2008, Chancellor Talmadge D. Littlejohn transferred the case to the Lee County Circuit Court. (R. 3). A hearing on Timber Lake's Motion for Preliminary Injunction was held before Circuit Court Judge Paul S. Funderburk on February 12, 2009. On April 21, 2009, Judge Funderburk entered an Order Denying Timber Lake's Motion for Preliminary Injunction. (R. 114-16; Record Excerpts Tab B). Timber Lake filed a Notice of Appeal from that order on May 21, 2009. (R. 117-18; Record Excerpts Tab D). After the Notice of Appeal was filed, on May 27, 2009, Judge Funderburk entered a Judgment of Dismissal of Claims in favor of Ms. Estess. (R. 121; Record Excerpts Tab C). Timber Lake filed an Amended Notice of Appeal on June 2, 2009. (R. 122; Record Excerpts Tab E). This matter is now ripe for a decision from the Mississippi Court of Appeals.

B. Statement of Facts

Timber Lake is a Mississippi corporation operating in Tupelo, Mississippi. The nature of Timber Lake's business is the brokerage of meat and/or poultry products (or the transportation thereof) to and between customers and suppliers. (Transcript (hereinafter "T.") 32-33, 74-75).

Timber Lake requires its sales representatives to execute non-compete agreements to protect its interest in the business. (T. 33, 36-37).

Ms. Estess (formerly Stephanie Neu) was hired as a Sales Representative of Timber Lake in January 2003. (T. 13-15). On January 13, 2003, Timber Lake entered into an Employment Agreement with Ms. Estess. (Id.). The Employment Agreement contained mutual covenants and assurances, and were entered into voluntarily and knowingly by all parties. Specifically, the Employment Agreement contained a covenant not to compete as follows:

* * *

NOW THEREFORE, in consideration of the mutual covenants hereinafter contained, Employer and Employee hereby agree as follows:

* * *

3. Covenant Not To Compete. Employee agrees that, except with written permission from Employer, he will not, during his employment by Employer and for a period of two (2) years after the end of his employment by Employer, perform any services regarding the brokerage of meat and/or poultry and products (or the transportation thereof), directly or indirectly, either as owner, partner, joint venturer, shareholder, employee, or consultant, for any person or business entity (or a subsidiary thereof) within a two hundred fifty (250) mile radius of Tupelo, Mississippi.

Employee acknowledges that such period is a reasonable period of time and that the geographical area set forth in the foregoing paragraph is reasonable. Employee represents and admits that in the event of termination of his employment, for any reason whatsoever, his experience and capabilities are such that the enforcement of a remedy by way of injunction will not prevent him from earning a livelihood.

* * *

(Ex. "P-1").

On April 4, 2008, Ms. Estess ended her employment with Timber Lake. (T. 22, 38-39).

The circumstances surrounding Ms. Estess' termination are not in dispute. Ms. Estess testified that she married Brian Estess, the son of the owner of Timber Lake on October 8, 2005. (T. 18).

In the months leading up to her termination, Brian Estess was preparing for a kidney transplant. (T. 23). The donor of the kidney was Ashley Perkins, a friend of Brian's, that worked for Vector Transportation, a truck brokerage business operating out of the same building as Timber Lake and also owned by Joe Estess. (T. 23, 38-39). Ms. Estess testified that, at some point prior to the kidney transplant, she began an affair with Mr. Perkins. (T. 23). The kidney transplant took place on Sunday, March 30. Brian Estess confronted Ms. Estess about the affair in the days after the transplant. (T. 24). Even with the obvious problems, Ms. Estess returned to work the week of March 31. (T. 24). Joe Estess testified about the tension at Timber Lake when Ms. Estess returned to work. (T. 38-39). There are 5-10 other sales representatives that work at Timber Lake and all were aware of Ms. Estess' affair. (T. 35, 38-39). Recognizing that there would be no way for Ms. Estess to continue working at Timber Lake under these circumstances, Joe Estess made the decision to dismiss Ms. Estess. (T. 38-39). He met with Ms. Estess on Friday, April 4, and told her of his decision and the reasons that it was necessary. (Id.). Brian and Stephanie have since completed a divorce.

A few days after her dismissal, Ms. Estess was contacted by Lawrence Wholesale, a direct competitor of Timber Lake. (T. 12, 27). Lawrence Wholesale would have not interest in her as an employee if she had not worked at Timber Lake. Ms. Estess was trained at Timber Lake. (T. 15-17, 34-35). She was introduced to customers and suppliers that had previously built relationships with Timber Lake. (T. 15-17, 34-35). As a sales representative, Ms. Estess had access to customer listings, including contact information and credit lines, supplier lists, sales reports by customer and supplier, including gross profit, sales volumes and margins. (T. 17-18, 35-37, 76). Ms. Estess also gained additional knowledge of Timber Lake as a member of

the Estess family. (T. 35). Ms. Estess began work at Lawrence Wholesale on or about April 24, 2008. (T. 11-12; See Ex. "P-5", Lawrence Wholesale Sales Reports). She worked as a sales representative for Lawrence Wholesale out of her home in Prentiss County, Mississippi, which is a violation of the aforementioned covenant not to compete. (T. 12).

Ms. Estess admitted that the only customers and suppliers that she has booked business with since she started at Lawrence Wholesale (excepting one customer) were customers and suppliers that she was introduced to and built relationships with while working at Timber Lake. (T. 88-89). Her testimony was further supported by sales records of both Lawrence Wholesale and Timber Lake. (See Exs. "P-5 – P-8"). Joe Estess testified about the profit losses that could be calculated when comparing Timber Lake's business records with the records provided by Lawrence Wholesale and estimated a \$60,000 loss in gross profits from the accounts that Ms. Estess worked before leaving Timber Lake. (T. 41). Ms. Estess' unique relationship with the Estess family and the knowledge and experience that she gained from that relationship and her employment at Timber Lake give her and Lawrence Wholesale an unfair advantage in this business.

SUMMARY OF THE ARGUMENT

Stephanie Estess was hired as a sales representative for Timber Lake in January 2003. At that time, she signed an employment agreement that contained a covenant not-to-compete. Ms. Estess spent the next five years learning and growing in the Timber Lake business. Timber Lake expends much time and effort in training their sales representatives. It provides sales representatives with access to customer and supplier lists and, most importantly, profit margins. Ms. Estess also gained more significant knowledge of the business because she married Brian Estess, the son of Timber Lake owner Joe Estess. After her employment ended at Timber Lake on April 4, 2008, Ms. Estess went to work for Lawrence Wholesale, a direct competitor of Timber Lake. She began work at Lawrence Wholesale on April 24, 2008. Ms. Estess has admitted that the only customers and suppliers that she did business with since she started at Lawrence Wholesale were customers and suppliers that she was introduced to and built the relationships with while working at Timber Lake. Her unique relationship with the Estess family and knowledge and experience that she gained from the relationship during her employment at Timber Lake gives her and Timber Lake competitors an unfair advantage in the meat brokerage business. This is the primary reason that Timber Lake uses non-compete agreements with its sales representatives. Several years before this decision by Circuit Judge Paul Funderburk, Lee County Chancery Court Judge Jacqueline Mask upheld an identical non-compete agreement in a similar case and the evidence presented here establishes the enforceability of the non-compete agreement. Timber Lake's non-compete agreement entered into and signed voluntarily by Ms. Estess is valid and enforceable and the decision of the Lee County Circuit Court should be reversed.

ARGUMENT

A party moving for a preliminary injunction must demonstrate the following elements: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threat and harm the injunction may do to the non-moving party; and (4) that granting a preliminary injunction will not disserve the public interest. Killebrew v. City of Greenwood, 988 F. Supp. 1014, 1015 (N.D. Miss. 1997); Taylor v. Cordis Corp., 634 F. Supp. 1242, 1247 (S.D. Miss. 1986). Timber Lake established the elements in this case and the decision of the Circuit Court should be reversed.

Employers use covenants not to compete to protect their company's various business interests, which include their time and expense in training essential employees, protection of confidential/proprietary information and protection of existing relationships with its customer base. Under Mississippi law, covenants not to compete will be enforced if the party seeking enforcement proves that the covenant is reasonable. Redd Pest Control Co., Inc. v. Foster, 761 So.2d 967, 972 (Miss. App. 2000). The validity and enforceability of a non-competition agreement are largely predicated upon the reasonableness and specificity of its terms, primarily, the duration of the restriction and its geographic scope. Kennedy v. Metropolitan Life Ins. Co., 759 So.2d 362, 364 (Miss. 2000). In determining reasonableness, the Mississippi Supreme Court has focused primarily on three major aspects: the rights of the employer, the rights of the employee, and the rights of the public. Union National Life Ins. Co. v. Tillman, 143 F.Supp.2d 638, 643 (N.D. Miss. 2001); Herring Gas Co., Inc. v. Magee, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993). Timber Lake's non-compete agreement is reasonable and enforceable and should be enforced here.

A. TIMBER LAKE IS LIKELY TO SUCCEED ON THE MERITS.

It is well established that Mississippi courts will enforce covenants not to compete, which are made a part of employment contracts, so long as those covenants are reasonable. Redd Pest Control Co., Inc. v. Foster, 761 So.2d 967, 972 (Miss. App. 2000); Herring Gas Co., Inc. v. Magee, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993), aff'd, 22 F.2d 603 (5th Cir. 1994). Fortunately for Timber Lake here, Lee County Chancellor Jacqueline Mask has previously upheld an identical non-compete agreement in favor of Vector Transportation, a truck brokerage business, under similar facts. Vector Transportation Co. v. Conner, No. 01-1298 (Lee County Chancery Court, December 20, 2001)(Opinion and Judgment at Record Excerpt at Tab F). Judge Mask's decision clearly supports the reasonableness of the non-competition agreement at issue in this case.

Ms. Estess initially argued in the lower court that the agreement should not be enforced because Timber Lake's decision to dismiss her employment was in breach of her employment contract. Ms. Estess' made this argument even though the provisions of the employment agreement clearly establish that Ms. Estess was employed at-will and employment could be terminated by either party at any time. The specific section of the agreement reads as follows:

4. Term of Agreement. Employee's employment hereunder shall continue so long as he shall render services to Employer in a manner satisfactory to Employer in Employer's sole discretion, provided, however, that Employee's employment hereunder may be terminated by either party at any time by giving written or verbal notice to the other party.

(Ex. "P-1", Employment Agreement at ¶4). The terms of the employment agreement at issue establishes the at-will nature of Ms. Estess' employment with Timber Lake. The Mississippi Supreme Court has recognized that if an employer's termination of the employee is *arbitrary, capricious, or in bad faith*, the court may find the covenant unenforceable. Empire Gas, Inc. of Kosciusko v. Bain, 599 So.2d 971, 975 (Miss. 1992). In other words, in order for an employee to void an employment agreement, as Ms. Estess wants to do here, the employee must show that the

employer's termination was arbitrary, capricious or in bad faith. Ms. Estess has not made that showing in this case. More importantly, Timber Lake has provided a good faith reason for Ms. Estess' dismissal. Ms. Estess argued that she was a valuable sales person for Timber Lake and dismissing a valuable employee breaches the employment contract. Generating positive sales is not the only aspect of a sales person's job. Sales representatives at Timber Lake must work in an environment with five to ten other sales representatives and Joe Estess' testimony about the problems that Ms. Estess' extramarital affair with an employee of a truck brokerage business located in the same building provides the necessary support for her dismissal. It cannot be seriously argued that Ms. Estess' relationship with her husband's best friend, a friend that donated a kidney to her husband only days before her employment ended, does not provide good cause for dismissal. Ms. Estess cannot establish that her dismissal was arbitrary, capricious or in bad faith in this case and her argument that Timber Lake breached this agreement has no support in fact or law.

Ms. Estess also argued in the lower court that the 250 mile limitation of the covenant not to compete is ambiguous and not reasonable because a sales representative conducts business almost entirely by telephone and to limit the physical location of the employee would not be beneficial to Timber Lake under these circumstances. This argument does not establish unreasonableness. The non-compete agreement states in relevant part that the employee:

will not, during his employment by Employer and for a period of two (2) years after the end of his employment by Employer, perform any services regarding the brokerage of meat and/or poultry products (or the transportation thereof), directly or indirectly, either as owner, partner, joint venturer, shareholder, employee, or consultant, for any person or business entity (or a subsidiary thereof) within a two hundred fifty (250) mile radius of Tupelo, Mississippi.

There is nothing ambiguous or unreasonable about this language. Ms. Estess herself

acknowledged in her Employment Agreement that the time and geographic limitations were reasonable given the experience and knowledge she obtained in this business from Timber Lake. (Ex. "P-1", Employment Agreement at ¶ 3). Joe Estess testified that Timber Lake sought to limit only the physical location of the competing employee because Timber Lake believed that such a limitation would be reasonable and enforceable. (T. 57-59). Timber Lake simply does not want to train these employees, teach them the business and have them leave and compete with them in this limited area. Judge Mask specifically held that identical terms in the Vector Transportation non-compete agreement were clear and reasonable. (See Record Excerpts Tab F; Vector Transportation Co. v. Conner at p. 4).

The Mississippi Supreme Court has held that if the language of a contract is plain and unambiguous, it must be enforced as written. Century 21 Deep South Properties v. Keys, 652 So.2d 707, 716-17 (Miss. 1995). The covenant not to compete is plain and unambiguous and this court should enforce it as written. The Supreme Court of Oregon has enforced an identical non-compete agreement for a truck brokerage company against two former carrier-side dispatchers. Cascade Exchange, Inc. v. Reed, 565 P.2d 1095 (Ore. 1977). Cascade sought to enforce a covenant against two transportation side brokers that read as follows:

Upon the termination of this agreement Parker will refrain directly or indirectly from the carrying on a business similar to that involved under this agreement in the State of Oregon for period of two years from the date of termination.

The court recognized that the business was conducted almost entirely by telephone, but found that the State of Oregon area limitation was reasonable in this business in view of the interstate character of Cascade's business. Cascade, 565 P.2d at 1098. The court recognized the unfair advantage that a former employee gains if allowed to gain experience and learn skills and techniques in the truck brokerage business only to leave shortly thereafter to work in a competing

business. Id. at 1097. The non-compete agreement between Timber Lake and Stephanie Estess is reasonable and clear and should be enforced.

B. TIMBER LAKE WILL BE IRREPARABLY HARMED.

Injury of the type that Timber Lake is experiencing and will continue to experience warrants protection. If the non-compete agreement is not enforced, Ms. Estess will continue to solicit business from customers and suppliers that she was introduced to and built relationships with at Timber Lake and she will continue to use her knowledge of profit margins at Timber Lake to gain an unfair advantage in conducting business with those customers and suppliers. The detrimental impact on Timber Lake is irreparable under Mississippi and federal law. The testimony from both Ms. Estess and Joe Estess established irreparable harm. Since leaving Timber Lake, the only meat brokering business that Ms. Estess has done (excepting business with Robinson & Harrison, another broker) has been with customers and suppliers that she was introduced to and built relationships with at Timber Lake. (T. 88-89). The hearing testimony showed the loss of business that Timber Lake was experiencing from customers and suppliers that are now booking more frequently with Lawrence Wholesale. (T. 41-42; Exs. "P-6 – P-8").

In addition, Timber Lake will be irreparably harmed by the potential loss of other sales persons that it spends much time and expense training. Joe Estess testified about the vital importance of sales persons to Timber Lake's business and the irreparable harm Timber Lake will suffer if this non-compete agreement is not enforced. (T. 33, 44). Sales Representatives are central to the operation of the business. Courts have consistently held that loss of training time and costs and the potential use of proprietary information establishes injury and harm to the employer. For example, in Taylor v. Cordis, 634 F. Supp. 1242, 1243-46 (S.D. Miss. 1986), the court held that the extensive training that the employer had given a pacemaker salesman, the time and expenses associated with the training and the special skills learned by the salesman were

important and protectable interests of the employer. Joe Estess and Stephanie Estess both testified about the training process. (T. 15-17, 34). Sales representatives are given access to all information about Timber Lake's business and generally require three months of training before becoming profitable. (T. 15-17, 34-37). In addition to the initial training of Ms. Estess that included introducing her to Timber Lake customers and suppliers, Ms. Estess was also exposed to the industry with Timber Lake paid for trips to Moo & Oink in Chicago on two occasions, a visit to a supplier in Minnesota, a trip to PECO Foods in Laurel, Mississippi, a trip to Pilgrims Pride in Texas and three separate trips to the National Poultry Convention in Atlanta. (T. 86-88). Injury of the type that Timber Lake is experiencing and will continue to experience (*i.e.*, use of confidential information, goodwill to Timber Lake's customers and suppliers, all of which Stephanie Estess obtained while in the employ of Timber Lake and at Timber Lake's expense), is clearly irreparable under Mississippi and federal law. Cordis Corp., 634 F. Supp. at 1250-51. Money damages for the loss of goodwill is difficult to prove, making this case one where the granting of equitable relief is proper. *Id.*; See, e.g., Tillman, 143 F.Supp.2d at 645 (irreparable harm exists even where the monetary amount is difficult to figure and incapable of calculation making injunctive relief the proper remedy).

The irreparable harm caused by the actions that Estess has undertaken was the reason a non-compete provision was included in Ms. Estess' Employment Agreement. Timber Lake has established irreparable harm.

C. THE BALANCE OF HARM FAVORS AN INJUNCTION.

A determination of the reasonableness of a covenant not to compete also entails a balancing of the interests of the employer, the employee, and the public. Herring Gas, 813 F. Supp. at 1245. The covenant is a business necessity to Timber Lake since Ms. Estess obtained valuable confidential information, including customer and supplier contacts and profit margins,

which would give Ms. Estess an unfair advantage when competing directly with Timber Lake. The Mississippi Supreme Court has specifically recognized the validity of an employer's desire to protect itself from competition by former employees who "have peculiar knowledge of and relationships with the employer's customers." Redd Pest Control v. Heatherly, 157 So.2d 133, 136 (Miss. 1963). Where the employee is the sole contact between the employer and customers, the reasonableness of the requirement of a covenant not to compete is established. Id. Ms. Estess acknowledged the importance of knowledge of the business and building relationships with customers and suppliers to success in this business. Ms. Estess also testified that she learned the meat brokering at Timber Lake and had no knowledge of the business prior to coming to Timber Lake. (T. 15-16). Before employment by Timber Lake, Ms. Estess had no experience in meat brokering and all skills and techniques in operating such a business were acquired through Timber Lake. (Id.). The court in Cascade determined that this was a very important factor in favor of the employer. Cascade, 565 P.2d at 1097. Not only are the training costs and confidential business information important to Timber Lake here, Timber Lake has shown a loss of business from customers that Ms. Estess is now contacting on behalf of a direct competitor.

As to the interests of Ms. Estess, she is free to accept employment with any non-competing business. In her Employment Agreement, Ms. Estess explicitly represented that "enforcement of a remedy by way of injunction will not prevent him from earning a livelihood." (T. 20-21; Ex. "P-1", Employment Agreement at ¶ 3). The primary interest of the departing employee is that of avoiding undue hardship and protecting their ability to make a living. Herring Gas, 813 F. Supp. at 1245. The court in Herring Gas found that a six-year, 50 mile radius covenant not to compete between a retailer of propane gas and one of its employees was enforceable. The enforcement of this covenant will not result in any undue hardship to Ms. Estess. Ms. Estess testified and her resume establishes that, prior to coming to Timber Lake, she

worked in several different jobs outside of the meat brokerage business. (See "P-2", Resume of Stephanie Estess). Enforcing a contractual agreement voluntarily entered into by Ms. Estess is not an undue hardship and does not prohibit her from gainful employment. Ms. Estess trained for several months and then, in the five years following, learned Timber Lake's business from the ground up. She now wants to take her training, experience and knowledge 30 miles down the road and compete directly against Timber Lake while performing the same job she had while working there. Other Timber Lake sales persons will have the same unfair opportunity if the non-compete agreement is not enforced. Ms. Estess' interests are outweighed by Timber Lake's interests in this case.

D. AN INJUNCTION WOULD NOT HARM THE PUBLIC INTEREST.

There will be no adverse effect on competition in the transportation services industry if Ms. Estess is required to abide by her promise not to compete with Timber Lake. Timber Lake has numerous competitors in the business, and there is no reason to believe that making Ms. Estess unavailable to work for those competitors or for herself in direct competition with Timber Lake for a period of 2 years and within a 250 mile radius of Tupelo, Mississippi, will curtail these other competitors' efforts to compete in this geographic location. See Cordis Corp., 643 F. Supp. at 1251 (court recognized that similar restriction in pacemaker sales industry was not restraint on competitors). To the contrary, as alluded to above, acquiescence to Ms. Estess' cavalier attitude toward compliance with the lawfully executed contract can only have unstabilizing effects between other businesses and their employees, as well as between competing meat brokering companies. The practice of using covenants not to compete in business is widespread and necessary. To allow Ms. Estess and potentially other Timber Lake sales persons to ignore a reasonable contract would inject uncertainty and unnecessary distrust

into the business environment – neither of which would serve the public interest.

CONCLUSION

Timber Lake's covenant not to compete is reasonable and enforceable under Mississippi law. The previous decision by Judge Mask in the Vector Transportation Co. v. Conner case establishes the reasonableness and enforceability of Timber Lake's non-compete agreement. The decision of the lower court should be reversed.

DATED: January 27, 2010.



BERKLEY N. HUSKISON

CERTIFICATE OF SERVICE

I, Berkley N. Huskison, attorney for the Appellant, do hereby certify that I have this day forwarded a true and correct copy of the above and foregoing Brief of Appellant, via United States mail, postage prepaid, to the following:

Honorable Paul S. Funderburk
Lee County Circuit Judge
Lee County Circuit Court
P. O. Drawer 1100
Tupelo, MS 38802
Trial Court Judge

John A. Ferrell, Esquire
Ferrell & Martin, P.A.
Post Office Box 146
Booneville, MS 38829
Attorney for Appellee

This the 27th day of January, 2010.


BERKLEY N. HUSKISON

CERTIFICATE OF FILING

I hereby certify that I have served via Federal Express delivery, the original and three copies of the Brief of Appellant on January 27, 2010, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, MS 39201-1082.


BERKLEY N. HUSKISON