

1990

# Kasco Services Corporation v. Larry D. Benson, Connie A. Benson dba Tri-B-Supply : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

900260

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KASCO SERVICES CORPORATION,	:	RESPONDENT'S BRIEF
Plaintiff-Appellant,	:	
vs.	:	
LARRY D. BENSON,	:	Case No. 900260
CONNIE A. BENSON	:	Priority No. 11
dba TRI-B-SUPPLY,	:	
Defendants-Appellee.	:	

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On Interlocutory Appeal from the  
Third Judicial District Court of Salt Lake County  
Honorable David S. Young, District Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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### LIST OF ALL PARTIES

The following are all the parties to these proceedings:

1. Plaintiff-Appellant:
  - a. Kasco Services Corporation
2. Defendant-Appellees:
  - a. Larry D. Benson, dba Tri-B Supply
  - b. Connie Benson, dba Tri-B Supply
3. Robert Benson

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## STATEMENT OF ISSUES AND STANDARD OF REVIEW

- I. Was the covenant not to compete contained in the contract between Keene Corp. and Larry Benson valid and binding?

This is a question of law, and therefore this Court should address this issue de novo; *Scharf v. BMG Corp.*, 700 P.2d 1068 (Utah 1985).

- II. Did the District Court abuse its discretion by refusing to modify its original preliminary injunction against Larry Benson to extend an additional six months?

"[T]he granting or refusing of injunction rests to some extent within the sound discretion of the trial court, and its judgment . . . will not be disturbed on appeal unless it can be said the court abused its discretion, or that the judgment rendered is clearly against the weight of the evidence."

*Systems Concept Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). Modification of an order of injunction should not be made unless "the circumstances, whether of law or facts, obtaining at the time of issuance have changed, or new ones have since arisen." *Systems Federation No. 91 v. Wright*, 364 U.S. 642 (1961).

- III. Did the District Court Abuse its Discretion by Refusing to Enjoin Connie Benson and Robert Benson (Who Were Not Parties to Larry Benson's Employment Agreement With Kasco) From Competing with Kasco?

The standard of review for the refusal of injunctive relief identified for issue II above also applies to issue III.

- IV. Can Kasco Be Afforded Injunctive Relief Even Though The Period of Non-Competition Covered By The Agreement Between Larry Benson and Keene Has Lapsed?

This is a new issue not raised by Kasco at the District Court Level or in their Petition for Interlocutory Appeal.

- V. Did the District Court abuse its discretion by refusing leave to amend Kasco's Verified Complaint to add Robert Benson as a defendant and to add claims against Larry and Connie Benson over a year after the Verified Complaint was first filed?

A trial court's refusal of leave to amend pleadings is reviewed for abuse of discretion *Kelly v. Utah Power & Light, 746 P.2d 1199, 1150 (Utah App. 1987)*.

## DETERMINATIVE CONSTITUTIONAL OR STATUTORY

### PROVISIONS OR RULES

Rule 5(a) Utah Rules of Appellate Procedure:

Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

### STATEMENT OF THE CASE

#### 1. Nature of the Case

This is an interlocutory appeal from the district court's refusal to modify its preliminary injunction against Larry Benson, its refusal for the second time to enjoin Connie Benson, its refusal to enjoin Robert Benson and its refusal to allow Kasco to amend its Complaint, over a year after the Verified Complaint was filed, to add new parties and new causes of action.

#### 2. Course of Proceedings and Trial Court Disposition

On March 17, 1989, Kasco filed a Verified Complaint against Larry Benson, his wife Connie Benson, and Tri-B Supply seeking injunctive relief and damages. On the same

date, the district court entered a temporary restraining order against the defendants. On March 21, 1989, following a hearing, the district court granted a preliminary injunction solely against Larry Benson. The district court signed an order of preliminary injunction on April 10, 1989. Subsequently, Kasco filed the following motions (1) Motion for Preliminary Injunction Against Connie Benson and Order to Show Cause Why Connie Benson Should Not Be Held In Contempt Of Court, dated April 17, 1989; (2) Motion for Leave to Amend Complaint, dated August 24, 1989; (3) Motion for Preliminary Injunction against Robert Benson, dated January 5, 1990; and (4) Motion for Modification of the Court's April 7, 1989, Order of Preliminary Injunction, dated January 17, 1990. The district court denied Kasco's motions after a hearing.

Kasco filed a Petition for Permission to Appeal Interlocutory Order on May 29, 1990. This Court granted Kasco's petition on July 17, 1990. On June 20, 1990 Kasco filed a Motion for Injunction Pending Disposition of Petition Under Rule 5 and Pending Appeal. On August 14, 1990 this Court granted Kasco's motion.

#### STATEMENT OF ADDITIONAL FACTS

In addition to the facts set forth in Kasco's Petition, the following facts are necessary for consideration of this Petition for Interlocutory Appeal:

1. Prior to 1977, Larry Benson worked for Grandma's Cookies. Larry Benson traveled to various grocery stores and developed relationships with the store managers. Many of the stores he visited for Grandma's Cookies were the same as those he serviced as an employee of Keene. (Larry Benson Deposition, Page 272-274).<sup>1</sup>

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<sup>1</sup> A copy of the cited pages is included as Exhibit A.

2. Larry Benson was hired by Keene Corporation in 1977 and continued to work for them until they were merged into Kasco Services Corporation ("Kasco") in 1983. (Kasco's Petition for Permission to Appeal Interlocutory Order, Page 2, Paragraph 2, hereafter "Petition").

3. Larry Benson signed a non-competition agreement with Keene in 1982, approximately five years after he began working for Keene. (Petition, Page 4, Paragraph 3).

4. The only position Larry Benson ever held with Keene or Kasco was salesman.

5. In 1987, Connie Benson and Larry Benson received a Tax Identification Number for Tri-B-Supply Company. Tri-B-Supply Company originally sold ceramics only. (Connie Benson Deposition, Page 80).<sup>2</sup>

6. In January, 1989, Connie Benson became concerned about obtaining a business license because of the increased traffic coming to her home. Larry Benson, whose employment with Kasco, was experiencing some difficulty, believed it prudent to include the sale of butcher supplies as part of the newly acquired Tri-B-Supply business license. At that point, no decision had been made as to Larry Benson leaving Kasco's employment or setting up any kind of competing business. (Larry Benson Affidavit, Paragraph 2).<sup>3</sup> (R. 822, para. 2).

7. Approximately one week before Larry Benson gave notice of his intent to exercise his option to resign and terminate the employment contract, Larry Benson became so dissatisfied with his employment at Kasco that he believed that he had no alternative but

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<sup>2</sup> A copy of the cited pages is included as Exhibit B.

<sup>3</sup> A copy of Larry Benson's Affidavit is included as Exhibit C.

to voice his intent to leave the business. He believes that was the first time he indicated to any customers that he was leaving Kasco. He stated nothing about starting a competing business, only that he was leaving Kasco's employment. (R. 823, para, 3, 4).

8. During the time when he voiced his intent to leave Kasco's employment, Larry Benson's hope was that Kasco would contact him and work something out so that he could stay. Therefore, he was careful not to do or say anything which would alienate the customers which he hoped would remain with him at Kasco after something was worked out between Kasco and himself for his continued employment. (R. 823, para. 3).

9. When Kasco would not even return Larry Benson's calls and made no attempt to work with him with regard to his employment concerns, Larry Benson tendered his resignation, dated February 15, 1989, effective March 1, 1989. (R. 823, para. 3, 5).

10. On March 10, 1989, prior to the Restraining Order, Connie Benson sent a letter to potential customers, who she found in the telephone book and through store rosters, informing them that Tri-B-Supply was beginning a butcher supply business. (Connie Benson Affidavit, Paragraph 4).<sup>4</sup> (R. 819, para. 4).

11. The March 10, 1989 letter referred to in Paragraph 9 of Kasco's Statement of Facts as set forth in its Petition for Permission to Appeal Interlocutory Order was sent to all potential customers of Tri-B-Supply Company and not merely those formerly serviced by Kasco. (Connie Benson Deposition, Pages 42-43).

12. Kasco asserts that after this letter, Kasco customers requested Kasco remove its equipment. Connie Benson specifically disputes that this occurred and personally contacted those companies which Plaintiff asserts requested equipment to be removed and

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<sup>4</sup> A copy of Connie Benson's Affidavit is included as Exhibit D.

found that persons making those requests were not authorized to make statements in behalf of the companies. The various meat cutters in stores would not be able to operate if the equipment were removed and therefore would not be in a position to ask for equipment to be removed prior to having substituted equipment placed in their stores. The substitute equipment was not placed in the stores by Tri-B-Supply or Connie Benson. (Petition, Paragraph 9, Page 7) (R. 819, para. 5).

13. On March 18, 1989, a Temporary Restraining Order was filed against Connie and Larry Benson. (R. 85-95).

14. On March 21, 1989, Preliminary Injunction was entered against Larry Benson only. The Court's Order enjoined him from competing with Kasco for 18 months from the time it determined the agreement was terminated, August of 1988. Pursuant to the Court's ruling, non-competition provision would terminate in March of 1990 instead of September of 1990 as claimed by Kasco.<sup>5</sup> (R. 973).

15. The Preliminary Injunction was signed on April 10, 1989. (R. 141).

16. The Court found that it had no jurisdiction to enter a restraining order on Connie Benson. (March 21, 1989 Transcript of Judge's Ruling Page 9). (R. 973, p. 9).

17. After the Restraining Order was entered, all orders for butcher supplies were made by Connie Benson. At all times, invoices for orders made by Tri-B-Supply were paid for by Connie Benson, with checks written by her. (R. 818, para. 3).

18. At the time the Preliminary Injunction was issued, Larry Benson's interest in Tri-B-Supply was terminated. Since that date, Larry Benson has had no input in the

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<sup>5</sup> A copy of the March 21, 1989 Transcript of Judge's Ruling is included as Exhibit E.

butcher supply business nor does he share in the profits, to the extent any exist, of Tri-B-Supply. (R. 819, para. 7).

19. After the Preliminary Injunction, only Connie Benson was authorized by the bank to sign checks. (R. 818, para. 3).

20. Since the Preliminary Injunction of March 21, 1989, Larry Benson has done nothing to be involved with Tri-B-Supply butcher supply business although he has been actively involved in marketing ceramics. (R. 823-824, para. 9, 10).

21. In order to get established in the business, Connie Benson was required to be trained. She traveled with Robert Benson to Denver, to Huwa Sales and Service where they were trained by Dan Huwa. Connie Benson personally paid for the training. (R. 819-820, para. 8).

22. Connie Benson received information on pricing by discussing the matter with suppliers to determine what her mark-up should be as well as from Dan Huwa. (Deposition of Connie Benson P. 34). (R. 820, para. 7).

23. In order to prevent any confusion that Larry Benson might still be in the business, Connie Benson caused to be sent out to all potential customers, a letter stating that Larry Benson had been restrained and that he would not be involved in Tri-B-Supply's business and that she and Robert Benson would be operating Tri-B-Supply.<sup>6</sup> (R. 820), para. 9).

24. Connie Benson also had Anna Benson answer the telephone for the business so that Larry Benson would not even have to be involved in answering the telephone. Although Larry was present in the building to continue the ceramics supply business, Larry

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<sup>6</sup> A copy of the letter is attached as Exhibit F.

had no responsibility to answer the telephone and he only did this when Anna Benson or Connie Benson were not available to do so, such as times when they were out to get the mail. On the occasions that Larry answered the telephone he would merely take messages for Connie and Robert to return. (R. 823-824, para. 9, 10).

25. In the hearing of March 21, 1989, Judge Young indicated the following acts would be a violation of his order of injunction against Larry Benson.

1. Larry Benson communicating or sharing any information that he would have received as an employee of Keene or Kasco with Connie Benson. (R. 973, p. 7).

2. Any "assistance, communication, contact, conversation, whatever else it may be, with Mrs. Benson . . ." not in harmony with the spirit of the covenant not to compete. (R. 973, p. 8).

26. On April 5, 1990, the Honorable Judge David S. Young, ruling on Kasco's Motions found that Larry Benson had abided by the terms of the Preliminary Injunction. The court found that Larry did not assist or aid Connie or Robert in their operation of Tri-B Supply. (April 5, 1990 Transcript of Judge's Ruling, Page 3).<sup>7</sup> (R. 971, p. 3).

27. On May 1, 1989, Larry Benson underwent surgery to remove the L-5 disk from his back because of severe nerve damage and disk degeneration. From that date until the present, he has been totally disabled. The doctors have indicated to him that he is in need of another operation but they have chosen not to operate to remove scar tissue because it is too close to the nerve and an operation may render him paralyzed. (R. 824, para. 12).

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<sup>7</sup> A copy of the April 5, 1990 Transcript of Judge's Ruling is attached hereto as Exhibit G.



28. At this point, Larry Benson is not even able to participate in therapy and has been receiving periodic epidural injections of steroids and cortisone. From that time to the present, Larry Benson has been totally unable to work. (R. 824, para. 12).

29. Robert Benson lives in his own household and began working at Tri-B-Supply to help Connie Benson after Larry was restrained. He has had no communication with Larry regarding the butcher supply business or Tri-B-Supply. All the information he has obtained has been from on the job training or from training received through Huwa Sales and Service. Robert Benson is an employee of Tri-B-Supply and has no ownership interest whatsoever in the company. (Robert Benson Affidavit, Paragraph 2-12).<sup>8</sup> (R. 422-423, para. 2-12).

#### SUMMARY OF THE ARGUMENT

Kasco's appeal of the orders granting preliminary injunctive relief against Larry Benson and denying the same against Connie Benson are untimely and should therefore be dismissed.

Those motions and the motions seeking to enjoin Robert Benson and to amend Kasco's Complaint should be denied in that the restrictive covenant which is the basis for all of Kasco's claims is invalid in that it was not supported by consideration and Larry Benson's services were neither special, unique, or extraordinary.

Kasco's motions seeking injunctive relief should also be denied because Kasco is not suffering an irreparable harm and the equities clearly demonstrate the harm suffered by the defendants, if such relief were granted, would be far greater than that suffered by Kasco, if it is not.

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<sup>8</sup> A copy of Robert Benson's Affidavit is attached as Exhibit H.

Finally, the motion to amend the Complaint should be denied in that allowing Kasco to amend will result in severe prejudice to the Defendants, and Robert Benson is not properly a party in this suit.

## ARGUMENT

### Overview

The district court did not make any findings of facts or conclusions of law in denying the motions being appealed here. The standard of review for an interlocutory order where findings of fact are not made is set forth in *Mower v. McCarthy*, 122 Utah 1, 245 P.2d 224 (1952).

Reviewing a case of this kind where issues of fact are involved and there are no findings of fact, we do not review the facts but assume that the trier of the facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it.

*Id.* at 245 P.2d 226. See also *Mohave Uranium Co. v. Mesa Petroleum Co.*, 451 P.2d 587, 591 n. 7 (Utah 1969).

The facts in this case clearly support the findings of the trial court and therefore the Plaintiff's Interlocutory Appeal should be denied.

#### I. KASCO'S PETITION IS UNTIMELY AND SHOULD THEREFORE BE DENIED.

Kasco would have this Court believe that it is appealing the Trial Court's Order of May 9, 1990 denying Kasco's Motion for Modification of the April 7, 1989 Order Preliminary Injunction and Kasco's Motion For Preliminary Injunction Against Connie Benson and Order to Show Cause Why Connie Benson Should Not Be Held in Contempt of Court. In reality, Kasco is asking this Court to reverse the Order of the Trial Court of

March 21, 1989. It was on March 21, 1989 that the Trial Court ruled the Non-Competition Agreement was to be valid from August of 1988 for eighteen months for purposes of the Preliminary Injunction and that Connie Benson should not be enjoined. (R. 973). Kasco failed to appeal the Trial Court's Order, instead it filed its subsequent barrage of motions.

Rule 5(a) of the Utah Rules of Appellate Procedure requires a party to appeal an interlocutory order "within 20 days after the entry of the order of the trial court . . ." Kasco did not appeal the April 10, 1989 order within 20 days instead it brought subsequent motions to the trial court containing the same arguments as previously heard and rejected.

To allow Kasco to have its motions for injunctive relief heard by this court is to make the time restriction contained in Rule 5 moot and allow an interlocutory order to be appealed indefinitely by simply bringing the identical motion at a later date.

Kasco's appeal of the order denying the injunctive relief as against Tri-B Supply and Connie Benson and granting injunctive relief against Larry Benson is not timely and should therefore be dismissed.

## II. THE TRIAL COURT'S DECISION TO DENY KASCO'S MOTIONS WAS CORRECT.

### A. Kasco's Motion to Modify the Preliminary Injunction Against Larry Benson was Properly Denied by the Trial Court.

Ordinarily the issuing of an injunction is not appealable.

Injunction, being an extraordinary remedy, should not be lightly granted, and it is well settled that: the granting or refusing of injunction rests to some extent within the sound discretion of the trial court, and its judgment. . . will not be disturbed on appeal unless it can be said the court abused its discretion or that the judgment entered is clearly against the weight of the evidence.

*Systems Concept Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983).

1. A Court should not modify an injunction absent a change in circumstances or fact.

The conditions under which a court should modify an injunction were addressed by the U.S. Supreme Court in *Systems Federation No. 91 v. Wright*, 364 U.S. 642. In *Systems Federation*, the court was faced with a motion to modify an injunction entered by a trial court which forbade discrimination against non-union employees by the Louisville and Nashville Railroads. The statute upon which the injunction was originally entered was modified by an act of Congress.

In the court's opinion, Justice Harlan stated the proposition that a court will not modify injunctive relief on the basis of a reconsideration of matters which have already been adjudicated. The Court stated that "[f]irmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the [opposing party] nor the court should be subjected to the unnecessary burden or re-establishing what has once been decided." *Id.* at 647.

Justice Harlan did, however, indicate that modification of the injunction would be appropriate in two situations; a change in the law or a change in the facts. *Id.*<sup>9</sup> He said that "sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or facts, obtaining at the time of its issuance have changed, or new ones have since arisen." *Id.* (emphasis added).

Because Kasco's appeal attempts to modify the Preliminary Injunction based on a re-adjudication of when the starting period of the injunction should commence, and is not

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<sup>9</sup> (A footnote does suggest that other equitable grounds may exist for changing an order).

based on new facts or law, or changed facts or law, Kasco's Motion must be denied.

2. An extension of the preliminary injunction was properly denied, where the underlying covenant not to compete was invalid for a lack of sufficient consideration.

One of the requirements necessary, in order for a restrictive employment contract to be valid is that "the covenant be supported by consideration." *Systems Concepts, Inc. v. Dixon*, 669 P.2d 421, 426-427 (Utah 1983); *Allen v. Rose Park Pharmacy*, 120 Utah 608, 237 P.2d 823 (1951). In its Ruling of March 21, 1989, the Trial Court appeared to find that the covenant was supported by consideration. However, in its Hearing of April 5, 1990 the issue of consideration was again raised by Benson. The sole purported consideration for the restrictive covenant was Mr. Benson's employment. Mr. Benson was already employed, indeed he had already been performing the same job for the company for five years prior to his signing of the agreement. There was no promise of future or continued employment, nor was Mr. Benson reemployed.

It is true that a promise of continuing employment can be sufficient consideration for a restrictive covenant if it is made upon the start of an employee's employment or soon thereafter. *Systems Concepts, Inc.*, at 426. However, the agreement signed in this case was not signed until some five years after employment had begun and no promise of continuing or future employment was made.

The general rule regarding consideration in restrictive employment contracts is explained in *Perthou v. Stewart*, 243 F.Supp 655 (D. Ore. 1965). In *Perthou*, the court held that where the defendants had signed the non-compete agreement a substantial time after commencing their employment, and the employer's obligation under the covenants amounted to nothing more than to employ the defendants, no consideration passed at the

time of signing. The court found no consideration existed even though the signed documents indicated that there was consideration for the agreement.

The current case is similar to *Perthou*, the purported consideration is set forth in the agreement "in consideration for Keene employing sales representative..." (Plaintiff's Exhibit B). However, Keene had already employed Larry Benson. No new consideration passed at the time the agreement was signed. The employer's obligations were not changed at the time of signing the agreement. The covenant was not supported by new consideration, and was therefore invalid. See *Mail-Well Envelope Co. v. Saley*, 497 P.2d 364, 366 (Ore. 1972).

In refusing to extend the Preliminary Injunction against Larry Benson, the Trial Court may have correctly found that no new consideration existed.

3. The Trial Court was correct in refusing to extend the Preliminary Injunction where the covenant not to compete sought to enjoin an activity that was neither special, unique or extraordinary.

In *Systems Concept, Inc.*, the court succinctly stated:

This Court has held that to justify enforcement of a restrictive employment covenant by injunctive relief, the employer must show not only good will, but the services rendered by the employee were special, unique or extraordinary.

*Systems Concept Inc.* at 426; *Robbins v. Finlay*, 645 P.2d 623, 627-28 (Utah 1982).

The services rendered by Larry Benson were neither special, unique or extraordinary. Larry Benson was a salesman. His job involved visiting customers and selling them butcher products. There is nothing special, unique or extraordinary about the job. In fact, by the time Larry Benson had been working for Keene for six months he was outselling his boss, and by the end of the next year he was the top salesman for the entire company. While Larry Benson may possess special abilities as a salesman, there is nothing special, unique or extraordinary about the job that he was doing. The salesman's job description in this

case is closer to the non-specialized salesman in *Robbins v. Finlay* rather than the specialized salesman in *Systems Concept Inc. v. Dixon*.

In *Robbins v. Finlay*, the defendant Finlay was a hearing aid salesman working for Bel-Tone in an area running from east to west across the State of Utah with a northern boundary line running through Farmington, Utah and the southern boundary line running through Point of the Mountain in southern Salt Lake County. The Court found:

The record shows that Finlay's job required little training and is not unlike the job of many other salesmen. The company's investment in his training was small... Furthermore, there is no showing that his service was special, unique, or extraordinary, even if their value to his employer was high.

*Robbins* at 628.

This type of employment was distinguished by the Court in *Systems Concepts, Inc. v. Dixon*. In *Systems Concepts, Inc.*, the employee was found to have rendered services which were special, unique, or extraordinary. *Systems Concepts, Inc.* at 426. Specifically the court found,

Defendant's special and unique service included management of sales activities and customers referral on a national level, extensive personal promotions in advertising media, products development and design consultation, development of sales methods and general promotion of products.

*Supra* n.11. (emphasis added)

Larry Benson was a salesman. His job was similar to many other salesmen. He received very little or no sales training from Keene or Kasco. (Larry Benson Deposition Page 59-60). The investment of Kasco and Keene in Larry Benson was small. His services did not include management responsibility, product development, design consultation or development of company wide sales methods. Neither Keene nor Kasco made extensive personal promotions of Larry Benson through the advertising media. Injunctive relief in

this case was not proper against Larry Benson at all. Therefore, the Trial Court was correct in ruling the injunction should not have been extended an additional six months.

It is of no moment that defendant may have been especially proficient in his work. General knowledge or expertise acquired through employment is a common calling and a common calling cannot be appropriated as a trade secret. The efficiency and skills which an employee develops through his work belong to him and not to his former employee.

*Robbins* at 628.

4. Kasco has also failed to show that it will be irreparably harmed if the injunction is not extended.

In *Systems Concept, Inc.*, the court held:

The second ground for injunctive relief [irreparable harm] is generally considered the most important. If the moving party is unable to show that the commission or continuance of some act during the litigation would produce great or irreparable injury, the motion for injunction will usually be denied, notwithstanding the showing of probable right or entitlement to recover at law.

*Systems Concepts Inc. v. Dixon*, 669 P.2d 421, 427 (Utah 1983).

Plaintiff Kasco's suit is brought claiming potential harm and damage to their good will. In the Hearing of April 5, 1990 Judge Young found:

There seems to me to be little reason why Kasco could not be covering all those customers even on a more rapid schedule than they did before. As I understand, these are rural people, principally, in small towns, where there is not going to be a whole lot of butcher shops in small towns for butcher supplies and all that Kasco has to do is continue or to begin to create the good will that you claim is so inherent in Larry Benson who has not even been able to call on these people for eighteen months.

(R. 971, para. 8, 9).

The Court found no irreparable injury to the Plaintiff from a failure to grant its preliminary injunctions, therefore the Trial Court's ruling was correct, and Kasco's motions should not be granted.



Even if Kasco was able to establish an injury, it would not be an "irreparable injury." An "[i]rreparable injury' justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.' *Systems Concepts* at 427-428.

Any damages here would be easily calculable as the net sales from the activities of the injuring parties. If Larry Benson breached his covenant, appropriate damages would be the net sales Larry Benson received from former Kasco customers. If Connie Benson or Tri-B Supply were the injuring party the net sales they received from Kasco customers would be appropriate damages. Where the damages are so easily calculable there is no irreparable injury. See *Merrill, Lynch, Pierce, Fenner & Smith v. de Liniere*, 572 F. Supp. 246, 249 (N.D. Ga. 1983).

5. If the covenant not to compete was sufficient to sustain a preliminary injunction, the injunction was correctly calculated by the Court in its Hearing of March 21, 1989.

Kasco had actual notice in August of 1988 that Larry Benson did not intend to be bound by the non-compete agreement. Affidavit of Larry Benson In Opposition to Plaintiff's Motion for Modification.<sup>10</sup> (R. 917).

"Actual Notice" has been defined as knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts.

*See Colorado Interstate Gas Co. v. Dufield*, 681 P.2d 25, 28 (Kansas App. 1984).

Actual notice is also said to be of two kinds, express and implied. Applicable to the instant

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<sup>10</sup> A copy of the Affidavit of Larry Benson in Opposition to Plaintiff's Motion for Modification is set forth in Exhibit I.

case is express notice which includes direct information. *NLRB v. Vapor Recovery Systems Co.*, 311 F.2d 782, 786 (9th Cir 1962).

In August of 1988, Larry Benson was asked for the first time, by Kasco to sign an employment contract with them. The contract contained a non-compete agreement. Kasco told Benson that if he did not sign the agreement he would be terminated. (R. 917). Benson then told Kasco that "he did not wish to retain any restrictive covenants in his employment..." (R. 973) (R. 917). Benson also told Kasco that he deemed the contract void. These express statements to Kasco gave them actual notice at that time that Mr. Benson would not be bound by the non-compete clause in the agreement he had signed with Keene. Kasco, at that time, had the right to terminate Mr. Benson and insist on compliance with the provision. By allowing Benson to continue employment in light of a known breach, with knowledge that he would not honor the non-compete provision of the contract, Kasco has waived any rights that it may have had at a later time to claim that it did not know that Mr. Benson did not wish to be bound by the non-compete provision of the agreement. Moreover, Kasco has waived any claim for lack of notice, where it sent a non-compete agreement as well as a policy provision requiring the non-compete agreement be signed to Larry Benson and he refused to sign the agreement.

Kasco waived its right to insist that the non-compete term was to start at the termination of Mr. Benson's employment when it continued to employ Mr. Benson after his statement that he would not be bound by the non-compete provision. Any default in the performance of a contract may be waived by the injured party. *See Zoeller v. Snyder*, 297 P.2d 40, 41-42 (Cal. App. 1956). Additionally, any act by the "injured" party indicating an intent to continue with the agreement will operate as a conclusive election to waive the breach. *Sitlington v. Fulton*, 281 F.2d 552, 555 (10th Cir. 1960). Such acts include the

"injured" party receiving money in the continued performance of the contract. In other words, where a contracting party, with knowledge of a breach by the other party receives money in the performance of the contract, he will have waived the breach. *See Einot Inc. v. Einot Sales Co.*, 49 N.W. 2d 625, 627 (Nebraska 1951).

Kasco was on actual notice that Benson intended not to be bound by a material portion of the agreement through his express statement as well as his refusal to sign the non-compete agreement. Because Kasco did nothing upon actual notice of the breach, i.e. Mr. Benson's refusal to be bound to the non-compete agreement and his refusal to sign the new non-compete agreement, Kasco waived its right to rely on the non-compete agreement. Kasco continued to employ Mr. Benson, continued to pay him his commissions and continued to have him service his route while Kasco received payments for goods and services provided through orders derived through the efforts of Mr. Benson. Larry Benson operated to his detriment in relying on the absence of the non-compete agreement, after expressly stating that he would not be bound by the former agreement and would not sign Kasco's new agreement. Kasco should not now be allowed to claim that the non-compete provisions should have gone into effect on the date of Mr. Benson's termination when it waived its rights under the non-compete of the agreement by continuing to perform other remaining portions of the agreement after Mr. Benson's breach. In the March 21, 1989 Hearing, Judge Young specifically found the notice received by Kasco in August of 1988 was sufficient.

The Preliminary Injunction will be granted to expire eighteen months from August, 1988 because I believe that at the time the company was on notice that Mr. Benson did not wish to retain any restrictive covenants in his employment, thereafter, the company would be willing to either - - require to terminate him or deal otherwise with him. At that point the restrictive covenant would be terminated as to its application of Mr. Benson except for eighteen months thereafter.

(R. 973, p. 7).

Kasco's appeal as to the Motion for Extension of Preliminary Injunction against Larry Benson should therefore be denied.

6. The district court could modify the covenant if required to do so by equity.

Covenants against competition are not favored by courts because of the public policy against restraint of trade and hardships resulting from interference with a person's means of livelihood. *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App. 1982).

The proceeding to determine whether a restrictive covenant is reasonable "is in equity, and the court may reduce the duration of the restrictive covenant to that which it considers reasonable under the circumstances. *Bob Pagan Ford* at 178; *Fullerton Lumber Co. v. Torborg*, 70 N.W. 2d 585 (Wis. 1955).

Examples of factors which may weigh into the court's decision are "whether the interests which the covenant was designed to protect are still outstanding." *Bob Pagan Ford* at 178; "hardships which would be imposed upon the employee by enforcement of the restrictions," *Merrill Lynch, Pierce, Fenner & Smith v. de Liniere*, 572 F. Supp., 246, 249 (N.D. Ga. 1983) and; the public's interest in its "ability to choose the professional services it prefers." *Id.*

In the present case all of these factors weigh against the granting of injunctive relief. The court specifically found Kasco has had sufficient time to protect its goodwill. If an injunction is granted against Connie Benson and Tri-B Supply they will be prevented from serving the customers for whom they have worked for the past two years. It would leave them with no client base in a business that thrives on sales to regular clients. If an

injunction were to issue, damage to Connie Benson and Tri-B Supply while they waited ultimately to prevail would be catastrophic as a result of the loss of most of their income. The affect of the loss of income pending the outcome of this dispute would, by reason of the differing financial strength of the parties bear far more heavily on Connie Benson and Tri-B Supply than on Kasco. As shown in part 4 above, any damages to which Kasco is entitled are readily calculable: Finally, many of Tri-B Supply's customers would be forced to pay higher prices for inferior goods and services if Tri-B is precluded from serving them.

When weighing the relative effects, the gross disparity, in relative harms requires, in equity that Kasco's motions for injunctive relief be denied.

B. The Trial Court properly denied Kasco's Motions for Preliminary Injunctions against Connie and Robert Benson.

1. The covenant not to compete is not enforceable as to Connie and Robert Benson.

Generally a restrictive covenant should not be directly enforceable against Connie and Robert Benson because they were not a party to the employment agreement. *County of Clark v. Bonanza No. 1*, 615 P.2d 939 (Nev. 1980) (" . . . none is liable upon a contract except those who are parties to it."); *Mitten v. Weston*, 615 P.2d 60 (Colo. App. 1980) (" . . . a contract can be enforced only against a party to that contract."); *see also, Commercial Fixtures and Furnishings, Inc. v. Adams*, 564 P.2d 773 (Utah 1977). Moreover, the restrictive covenant is not enforceable against Connie or Robert Benson because there was no consideration to support its enforcement against them. *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028 (Utah 1985) ("For a promise to be legally enforceable, it must be supported by consideration.").

Kasco sought to have the Trial Court issue a preliminary injunction against Connie and Robert Benson prohibiting them from doing business. However, the plaintiff's Verified Complaint fails to allege any wrongdoing on the part of Connie or Robert Benson. A review of the Plaintiff's Complaint shows that the entire gist of the Plaintiff's allegations therein go against the Defendant, Larry Benson. The only allegation against Connie Benson is that "to the extent" Connie Benson has used Larry Benson's contacts and special knowledge, then she has engaged in unfair competition. No allegations are made as to Robert Benson.

The allegation against Connie Benson is clearly insufficient to support a preliminary injunction. First, Connie Benson may be held liable, if at all, only if her actions are so interconnected with Larry Benson that she is deemed an extension of Larry Benson violating the restrictive covenant. In *Madison v. La Sene*, 268 P.2d 1006 (Wash. 1954), Andrew La Sene sold his upholstery business and agreed not to compete for five years. The sales contract also gave Madison exclusive right to use the name "La Sene's Custom Upholstery". After Madison moved the business to a new location, La Sene and his son, Ray, opened up "R. A. La Sene's Upholstery" at the old address. The trial court enjoined both father and son from operating an upholstery business in violation of the restrictive covenant. On appeal, the Washington Supreme Court held that since the son was not a party to the covenant not to compete, he "couldn't be denied the right to make a legitimate effort to carry on an upholstery business". *Madison* at 1009. The only restriction placed on the son was that he couldn't carry on the upholstery business in association with or with the direct or indirect assistance of his father.

Consequently, since Connie's actions were found by the Court not to be an extension of Larry's actions or in furtherance of Larry's breach of his covenant not to

compete, Kasco has failed to meet its burden of proof and Kasco is not entitled to a preliminary injunction.

2. Plaintiff's cited cases are distinguishable.

Kasco relies extensively on the case of *McCart v. H & R Block, Inc.*, 470 N.E.2d 756 (Ind. App. 1984) to support its proposition that Connie and Robert Benson should be enjoined. *McCart*, however, deals with a drastically different situation than the one at hand. *McCart* deals with a situation where the spouse who is subject to the covenant not to compete took an active role in running the day to day operations of the new business. For instance, in *McCart* the court held that the husband could be enjoined from aiding his wife, who was then actively competing against her former employer, in breaching her covenant not to compete.

Such is not the case here where Larry Benson takes no part in running the day-to-day operations of Tri B Supply and Kasco cited no authority to support its contention that Connie Benson or Robert Benson, who have no contractual relation at all with Kasco, should be forced to cease operating a business to which Larry Benson, husband and father, has no connection, simply because the Plaintiff doesn't want the competition. Kasco's assertion that the only reason that Connie and Robert Benson are able to get new accounts is because of their relationship to Larry Benson is without sufficient support in fact or evidence. As with any business which markets goods, sales are a combination of service, price, and inter-personal relationships. In the present situation, Kasco's problem is that (1) they cannot keep a salesman in the territory, and (2) they have priced themselves out of the market. While many customers may have warmed-up to Connie and Robert Benson because they are related to Larry Benson, the important determining factor in their decision

was price. (Deposition of Connie Benson, Page 139, 144, 150). Particularly telling is the deposition of Craig Smart.<sup>11</sup>

Q. At the time Robert and Connie Benson came and provided service to you in April of 1989, do you recall any conversations that you had with either of them?

A. I just recall that they mentioned that they were - - that they had the business now and they were coming, to see if they could have my business at that time and they tell me their prices which was considerably less than what I had been paying for the same service."

Q. So their prices were much better than Kasco's?

A. A-hum (affirmatively) and because of that reason I said, (well, sure, you know, we'll - - go with you." (Deposition of Craig Smart, Page 31, lines 10 through 21.) (emphasis added).

Judge Young was aware that, if the covenant not to compete was valid, the purpose of the covenant and Judge Young's Preliminary Injunction would be thwarted, if Connie Benson was aided in any way by Larry Benson in running the butcher supply business.

These activities, specifically proscribed by Judge Young, are the types of activities which led to the courts in Plaintiff's cited cases, enforcing non-compete agreements against third parties. These types of activities were not engaged in by Larry Benson with Connie Benson or Robert Benson.

Specifically, in the Judge's ruling of March 21, 1989, Judge Young ordered,

Its obvious to the court that unless Mr. Benson is enjoined from communicating or sharing any of the information he would have received as an employee of Keene and thereafter Kasco with Mrs. Benson that the effect of an injunction, preliminary injunction, would be neutralized, and thus Mr. Benson is enjoined from communicating any information in this relation to Mrs. Benson. . . .If it determined by the court that the objective of the parties is to attempt, by utilizing Mrs. Benson who has never called on anyone as an employee, to go around the court's order, then obviously Mr. Tateoka, I will not be happy about that. I don't believe that's my desire. She hasn't been

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<sup>11</sup> A copy of the relevant page is included as Exhibit J.



a previous employee so far as I have been able to see and if that is utilized as a ruse and a guise to avoid the responsibility of the contract, that is in disharmony with my ruling. The ruling is that the provisions of the agreement that apply to restrictions as to covenant not to compete in relation to the Keene, and thereafter Kasco contract, are enforceable and valid and that Mr. Benson is expected to make a good faith effort to comply with those and to see that his assistance, communication, contact, conversation, whatever else it may be, with Mrs. Benson maintains the spirit of the court's ruling.

(R. 973, p. 7, 8).

In his ruling of April 5, 1990, Judge Young found Larry Benson's contacts with Connie were in harmony with his previous order.

The best information that I have available to me now is that there has been an excellent effort by Mr. Benson to abide by the terms and conditions of the restrictive covenant, consistent with the court's ruling that he abide by those from August of 1988 until eighteen months thereafter, which I would assume would be about March of 1990.

(R. 971, p. 3).

All of the sales of Tri-B-Supply are the direct result of the efforts of Connie and Robert Benson (R. 60, R. 818, para. 2). They have nothing to do with Larry Benson. (R. 823-824, para. 9). Connie Benson and Robert Benson, contrary to the assertions of Kasco, received training from Huwa Sales in Denver, Colorado in order to make them more effective in their sales presentations (R. 820, para. 8). Connie Benson contacted all of Tri-B-Supply's customers, first by letter and then through personal follow-up contact Connie Benson Deposition, Page 144). The customers names were garnered from the telephone book (Connie Benson Deposition, Page 37). All these potential customers also received notice that Larry Benson was not going to be providing goods or services as he was no longer part of Tri-B-Supply Company (R. 820, para. 9, Exhibit F). When specifically questioned by customers, they were informed that Larry Benson could have nothing to do

with the company due to the Trial Court's Preliminary Injunction (Connie Benson Deposition, Page 150).

The facts are simple. We have here an effort by an enormous multi-state conglomerate, Kasco, to destroy a small local competitor with the aid of the courts. The simple truth of the matter is that Tri-B-Supply, Connie and Robert Benson, provide better service, better quality, and a better price than Kasco. It would be a grave injustice to restrain the individual efforts of Connie and Robert Benson in order to benefit Kasco. If a covenant not to compete is enforceable against third parties it is only enforceable against those who are acting in conjunction with a party to the covenant. The court found that is not the case here.

These findings of fact are consistent with the record. Therefore, Kasco's Petition for Permission to Appeal the Interlocutory Order Denying the Preliminary Injunction against either Connie or Robert Benson should be denied.

C. The Trial Court was correct in denying Kasco's Motion to Amend its original Verified Complaint.

One of the principal factors in allowing an amendment is whether the amendment is based on a bad faith motive *Christensen v. Utah Transit Authority*, 649 P.2d 42, 47 (Utah 1982); *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 194 (5th Cir. 1985); *Hurn v. Retirement Fund Trust Plumbing, etc.*, 648 F.2d 1252, 1254 (9th Cir. 1981). *See generally Childers v. Inc. School District No. 1 of Bryan County*, 676 F.2d 1338, 1343 (10th Cir. 1982).

In this case, Kasco is acting in bad faith by attempting to bring in a new defendant, Robert Benson, with whom it does not have privity of contract. More importantly, Robert Benson has no significant contact with Larry Benson that would require Robert to be

restrained. The causes of action and the remedies Kasco seeks are applicable to its past employee, Larry Benson, with whom Kasco had an employment contract. Kasco had no contract with Robert Benson. In this instance, Kasco's sole remedy should be limited to restrain its past employee and should not be expanded to include extended family not in privity of contract. If the alleged wrong occurred (revealing trade secrets), then the appropriate remedy is to assess damages for the revealing of trade secrets and to restrain the holder of the information. To restrain an innocent third party from working would be a restraint of trade and should not be allowed absent a strong showing of impropriety. Kasco has not effectively demonstrated a claim against Robert Benson and should not be allowed to amend their Complaint.

Robert Benson is an employee of Tri-B-Supply who works in sales and service (R. 422, para. 1). He has contributed no money to the enterprise (R. 423, para. 8). He was asked to participate in the business by Connie Benson, not Larry Benson. He was not involved in the actual decision to start the business (R. 423, para. 9). He received training and the know how to do his job from a firm in Denver; training in which Larry Benson was not involved (R. 423, para. 10, 11). This training was never discussed with Larry Benson (R. 423, para. 11). Robert has not participated in or made decisions regarding the choice of suppliers (R. 423, para. 7). Finally, Robert does not live with Connie or Larry Benson (R. 422, para. 2). Robert has not discussed with Larry Benson anything related to the performance of his job at Tri-B-Supply. Also, Robert has no contact either directly or tangibly with customer lists, catalogs, or other materials allegedly taken or received from Kasco (R. 423, para. 4).

Just because his father is Larry Benson, and Larry Benson is currently involved in controversy with the Plaintiff, does not mean that his son, Robert Benson, should also be

brought into the conflict.

Kasco is apparently attempting not to recover damages on claims for dissemination of proprietary information, which damages are easily calculated, instead it appears to be attempting to stop Tri-B-Supply, a small family run business just starting up, from competing with it. If this is the intent of Kasco, the Complaint should not be amended to allow the bringing in of a new party. The Rule should be construed to allow fair trade especially in this instance where the damages, if any, are not against Robert but are against Larry D. Benson.

Another principal factor to be examined in connection with the offer of an amendment is whether the amendment will be futile. If the amendment is futile, the Court is well justified in not allowing leave to amend. *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983).

In this case, the Plaintiff's amendment is futile and not likely to succeed on the merits. As has been shown previously, Kasco's claims against Connie and Robert Benson are without basis in fact or law and therefore unlikely to succeed. The Trial Court therefore correctly refused to allow Kasco to amend its Complaint over a year after the original Complaint had been answered by the Defendants.

#### D. Kasco Should Not Be Granted Prospective Injunctive Relief

Enforcement of restrictive covenants in employment contracts is a matter of equity. *Bob Pagan Ford* at 178. The agreement signed between Keene and Larry Benson provided for a covenant not to compete for a period of eighteen months after Larry terminated his employment with Keene. Larry Benson terminated his employment with Kasco, Keene's

successor to the agreement, on March 1, 1989. By its express terms therefore, the agreement terminated September 1, 1990.

The district court found the agreement between Keene and Larry Benson to be terminated in August of 1988. While the more correct result would have been to void the agreement entirely, the court held that the covenant would begin to run from that date. By the court's order therefore the covenant expired April 1, 1990.

As shown above the covenant itself is invalid and therefore no injunctive relief prospective or otherwise is called for in this case. However, if we were to assume the covenant was valid, under either the express terms as found in the agreement or the equitable terms as found by the court, the time period covered by the covenant has expired.

Courts in this state have not addressed the issue of whether prospective injunctive relief can be granted after the expiration of the period covered by a covenant. Kasco has cited to decisions from Florida, Virginia, and Wisconsin which appear to grant such relief, but decisions from Oregon, *Professional Business Services v. Gustafson*, 590 P.2d 729 (Ore 1979) and Washington *Alexander & Alexander Inc v. Wohlman*, 578 P.2d 530 (Wash. App. 1978) both rejected such relief.

In *Professional Business Services v. Gustafson*, Professional Business Services (PBS) was seeking to enforce a covenant requiring Gustafson not compete with PBS for three years. Gustafson left PBS' employ in November of 1975. Gustafson began immediate employment with a former customer of PBS. In June of 1976 PBS filed suit. The trial court dismissed and PBS appealed. The appeal was not argued until December 4, 1978, more than three years from the termination of Gustafson's employment. Gustafson had engaged in her employment, which plaintiff alleged was in violation on the non-competition covenant, during the entire period of time. In light of these facts the Court held:

Since the appeal was not granted until December 4, 1978, the three-year period during which defendant was bound not to compete under the agreement had expired by its own terms, and the suit for injunction is moot.

*Professional Business Services* at 730.

The eighteen-month period set forth in the Keene/Benson contract has likewise expired by its own terms, and is therefore moot.

In *Alexander & Alexander, Inc. v. Wohlman*, suit was brought to determine the validity of non-competition covenants entered into by employees of a local insurance brokerage firm. The covenant, in Wohlman's case, was to be effective for two years. On January 16 1976 Wohlman terminated his employment with Alexander & Alexander (A & A). Between January 12, and January 16, 1976 Wohlman personally contacted all of his clients and informed them of the formation of a new firm of which he would be a partner. A & A brought suit to enjoin Wohlman from competing in violation of the covenant. The trial court denied the motion holding the covenant to be invalid. A & A appealed and the appeal was heard on April 10, 1978 more than two years from the time Wohlman left his employ with A & A

The Washington court of appeals reversed the trial court on the issue of the validity of the covenant but refused to grant the injunctive relief, because the lapse of the delineated time would be "inappropriate and manifestly unfair . . ." *Alexander & Alexander* at 540.

While the Oregon court summarily dismissed the idea of prospective injunctive relief, the Washington Court like the courts cited by Kasco appears to view the matter as a weighing of the equities. See *Roanoke Engineering Sales Co. v. Rosenbaum* 280 S.E. 2d 882, 886 (Va. 1982).

The district court has already found that Kasco has had sufficient time to protect its good will. If this court were to determine that prospective injunctive relief is available in this state, applying it in this case would not be equitable, but only punitive. Where such is the only possible reason, courts weighing the equities have rejected injunctive relief. See *Premise Inc. v. Zappitelli*, 561 F. Supp. 271, 278 (N.D. Ohio 1983); *Merrill Lynch, Pierce Fenner & Smith Inc. v. de Liniere*, 572 F. Supp. 246 (N.D. Ga 1983); *Alexander & Alexander Inc. v. Wohlmer*, 578 P.2d 530 (Wash. App. 1978).

The equities in this case weigh against the granting of any injunctive relief. They clearly outweigh any claim for prospective injunctive relief. Kasco's Interlocutory Appeal should therefore be denied.

### **CONCLUSION**

Kasco would have this Court believe that this case hinges on two issues of law not before decided in the state of Utah; (1) Whether a covenant not to compete can be enforced against parties who are not in privity with either of the covenantors, and (2) Whether an employer should be entitled to prospective injunctive relief against a former employee where the time period for which the parties covenanted has already expired. While both of these issues are undoubtedly important, they are not important in this case.

Neither of these issues should be reached by this Court. Respondent has shown that Petitioner's appeal in this case is untimely and in gross violation of both the letter and spirit of Rule 5 of the Utah Rules of Appellate procedure. Furthermore, the underlying covenant in this case is invalid because it was not supported by adequate consideration, and it seeks to enjoin a common calling and not services which are neither unique or special.

Even were the covenant valid, and Kasco's appeal timely, this case is still not the appropriate case for the determination of these legal issues. Both of these issues require

that there be some form of active participation by a covenantor with a third party in order to have the third party subject to the non-competition covenant. The trial court specifically found that Connie Benson, Robert Benson and Tri-B Supply did not receive such assistance from Larry Benson. Thus, even were the covenants valid, and even were this Court to decide that third parties could be enjoined under a covenant not to compete and the prospective relief should be granted, such would not be appropriate in this case.

Kasco is attempting to use the invalid covenant, in this case, to eliminate the competition of a small local competitor. The Bensons should be afforded the right to work without being subjected to the harassment and crippling costs of multiple hearings, re-litigating previously denied and presently moot restraining orders and appeals of the same.

The trial court has determined that the Bensons have acted properly and in accordance with the injunctions issued by that court. This Court should not second guess the finder of fact where, as shown, the trial court has sufficient grounds to deny Kasco's spurious motions for injunction and amendment.

Kasco's appeal should therefore be denied and Bensons awarded their costs and attorney's fees acquired to defend this appeal.

DATED this 9<sup>th</sup> day of November, 1990.

McKAY, BURTON & THURMAN


By Shawn D. Turner  
Reid Tateoka  
Shawn D. Turner  
Attorneys for Defendants



CERTIFICATE OF SERVICE

This is to certify that on the 9<sup>th</sup> day of November, 1990, a true and correct copy of the foregoing Respondent's Brief was hand-delivered to the following:

Michael F. Richman  
David L. Arrington  
Casey K. McGarvey  
VAN COTT, BAGLEY, CORNWALL & McCARTHY  
50 South Main Street, Suite 1600  
Post Office Box 45340  
Salt Lake City, Utah 84145

A handwritten signature in black ink, appearing to read "Shaw D. Turner", is written over a horizontal line.

Tab A

# CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

\* \* \*

KASCO SERVICES CORPORATION,	)	
	)	
Plaintiff,	)	Civil No. 89-0901724
	)	Judge David S. Young
vs.	)	
	)	Deposition of:
LARRY D. BENSON and CONNIE	)	
A. BENSON, dba TRI-B-SUPPLY,	)	<u>LARRY D. BENSON</u>
	)	
Defendants.	)	
	)	
	)	

---

Deposition of LARRY D. BENSON, taken at the instance and request of the Plaintiff, at Vancott, Bagley, Cornwall & McCarthy, 50 South Main, Salt Lake City, Utah, on Wednesday, the 31st day of May, 1989, at the hour of 9:20 a.m., before VICKY MCDANIEL, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, Utah License No. 285.

\* \* \*

1 first year or two that you joined Keene?

2 A I never received any sales training with Keene,  
3 none.

4 Q Who were your supervisors when you joined?

5 A Don Lewis and Ed Mason and LeRoy Moser.

6 Q M-o-s-e-r?

7 A M-o-s-e-r.

8 Q Did you have any other supervisors between that  
9 time and after Keene became KASCO and the time you resigned?

10 A I had a lot of supervisors. They had people  
11 coming and going like flies.

12 Q Really? Do you remember who they were?

13 A Yeah.

14 Q Could you list them for me?

15 A Rob Rickertson, Bob Dutcher.

16 Q Could you slow down a little? How does Bob  
17 Rickertson spell his name?

18 A R-i-c-k-e-r-t-s-o-n.

19 MR. ARRINGTON: Could we go off the record a  
20 minute?

21 (Brief recess.)

22 Q (By Mr. Arrington) Let's get back on the record.  
23 Before our break you were identifying supervisors you had.  
24 You'd mentioned Don Lewis--is that Dan Lewis?

25 A Don, D-o-n.

1 employment that you'd be required to sign the agreement; is  
2 that correct?

3 A It certainly appeared that way, yes, at the time.

4 Q In paragraph 7 you say you signed the agreement  
5 under duress. What do you mean?

6 A I would say it's duress when you're told to do  
7 something you don't want to do and it's put to you in such a  
8 way that you feel like you're obligated to do it.

9 Q You signed this agreement but you didn't want to  
10 sign it?

11 A You're right, strictly because--forget it.

12 Q You could have not signed the agreement; is that  
13 correct?

14 A I could have not signed it.

15 Q Is that correct?

16 A Correct.

17 Q Did anyone threaten you with legal action or  
18 physical harm if you didn't sign the agreement?

19 A They had no cause for either.

20 Q I agree.

21 A I'm bigger than they are.

22 Q In paragraph 9 you say that "All of the contacts  
23 that I had with grocery stores were made prior to my  
24 becoming employed with Keene Corporation." Are you saying  
25 that there was not one single store that you hadn't

1 established a contact with before when you joined Keene?

2 A Oh, obviously there could have been stores that  
3 came into being after I was employed by--

4 Q At the time you were hired when you were handed a  
5 customer list?

6 A At the time I was hired I'd been involved one  
7 time or another.

8 Q As a cookie representative?

9 A There was a few meat plants that I hadn't been  
10 in.

11 Q So there were some contacts that you hadn't made?

12 A But there was a lot of those I'd been into with  
13 Fur Breeders--

14 MR. TATEOKA: Object to the extent that you're  
15 mischaracterizing paragraph 9. Statement says that all of  
16 the contacts he had with grocery stores were made prior to--  
17 all of his contacts.

18 Q Okay.

19 A That would be correct, all of the contacts I had  
20 with grocery stores.

21 Q So there would be some specialty meat stores or  
22 other businesses that dealt in the butcher supply area that  
23 you wouldn't have contacted as a cookie representative with  
24 Grandma's or Archway Cookies?

25 A Right.

1           Q       When you say contacts with grocery stores, what  
2 do you mean?

3           A       I mean I'd been in there for the purpose of  
4 selling or distributing product.

5           Q       Would you have contacts with the meat managers  
6 for all grocery stores prior to joining Keene?

7           A       The contacts that I would have had would have  
8 been either through the brokerage firm or, like I say, when  
9 we were letting them sample cookies.

10          Q       Would you have had contacts with all meat  
11 managers or those responsible for purchasing the butcher  
12 supplies and those grocery stores before joining Keene?

13          A       I was exposed to them when I was--

14          Q       That means you would have been in the store with  
15 them, or does that mean that you had contacts with them and  
16 were personally known to them?

17          A       A lot of them I met at the time I was making  
18 headquarter calls, and a lot of them I met in the stores,  
19 yes.

20          Q       Would you say all?

21          A       I wouldn't say all, I would say most of them. I  
22 knew who they were, they knew who I was.

23          Q       Since the inventory with Rich Wagner have you  
24 discovered any other KASCO documents or items?

25          A       Everything that I've discovered I returned to

1 Keene or to KASCO.

2 Q Have you returned items to Keene--or to KASCO,  
3 excuse me--that you discovered after the inventory with Rich  
4 Wagner?

5 A Mailed stuff to me I returned to them.

6 Q Did you discover any items after that inventory  
7 that weren't mailed to you?

8 A I found a few. I found--there was a knife or  
9 something that we found in the truck when we cleaned it out.

10 Q Do you still have that knife?

11 A No, I sent them a check for it.

12 Q In paragraph 13 you state you have not called  
13 upon or solicited or attempted to contact any of KASCO's  
14 customers regarding the purchase or rent of meat cutting  
15 products. Is that correct?

16 A At that time I hadn't, no.

17 Q And at that time it would have been March 20th,  
18 1989, is that correct?

19 A Yes.

20 Q Isn't it true that there were some contacts--  
21 well, when you say I have not called upon, what do you mean?  
22 Do you mean you talked face to face with someone?

23 A I mean I have not called upon them.

24 Q Does that mean a personal visit?

25 A That means I have not called them, I have not



Tab B

# CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

\* \* \*

KASCO SERVICES CORPORATION,	)	
	)	
Plaintiff,	)	Civil No. 89-0901724
	)	Judge David S. Young
vs.	)	
	)	Deposition of:
LARRY D. BENSON and CONNIE	)	
A. BENSON, dba TRI-B-SUPPLY,	)	<u>CONNIE A. BENSON</u>
	)	
Defendants.	)	
	)	
	)	

---

Deposition of CONNIE A. BENSON, taken at the instance and request of the Plaintiff, at VanCott, Bagley, Cornwall & McCarthy, 50 South Main Street, Salt Lake City, Utah, on Wednesday, the 3rd day of May, 1989, at the hour of 9:00 a.m., before VICKY MCDANIEL, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, Utah License No. 285.

\* \* \*



Associated Professional Reporters  
10 West Broadway / Suite 200 / Salt Lake City, Utah 84101

1 that you brought--and that you've already looked at and  
2 identified, as I believe, numbers, what, 25--was it 26?

3 MR. TATEOKA: 27 through 68.

4 Q --26 through 68. Those are complete as far as  
5 you know?

6 A As far as I can tell, yes.

7 Q What documents have you brought that reflect  
8 pricing of your products and services, the products and  
9 services of Tri-B-Supply?

10 A Do you want to ask that again, please?

11 Q What documents have you brought that reflect  
12 Tri-B-Supply's prices for the products and services that it  
13 is going to sell to its customers?

14 A She's got the books.

15 Q When you refer to the books, you mean those  
16 brochure-type books from the various suppliers that you  
17 brought with you today?

18 A Yes.

19 Q Those books have pricing information in them?

20 A Yes.

21 Q What about documents that reflect Tri-B-Supply's  
22 prices that it's going to charge its customers?

23 A Well, it's in there and it's on those things that  
24 you've got there.

25 Q So you've taken your prices from the--when I say

1 you, for the business, Tri-B-Supply, the butcher supply  
2 business--your prices have come from the brochures that  
3 you've received from the suppliers, correct?

4 A They have come from the suppliers--our prices, is  
5 that what you asked?

6 Q That's what I'm asking you, if--that's what  
7 appears to me that you have said. I've asked you what  
8 documents you have brought that reflect the prices that  
9 Tri-B-Supply charges to its customers, and you referred me  
10 to those pamphlets supplied to you by your suppliers.

11 A They supply the books, I put in my prices.

12 Q Do you rely on those books at all in setting your  
13 prices?

14 A Yes.

15 Q So we'll get those books and we'll look at them  
16 in detail and get that information. So you do rely on those  
17 books that have been given to you by your suppliers in  
18 setting Tri-B-Supply's prices?

19 A Yes.

20 Q What other documents do you have pertaining to  
21 the prices that Tri-B-Supply charges for its products and  
22 services that you've brought with you?

23 A I need you to ask that again, please.

24 Q So far we've identified those pamphlets or  
25 brochures from suppliers as documents that you rely on in

1 setting prices. Are there any other documents that you rely  
2 on or that otherwise reflect the prices that you charge your  
3 customers?

4 A No.

5 Q Okay.

6 MR. TATEOKA: Excuse me. Is your question are  
7 there other things that she uses to set her prices, or is  
8 your question are there other documents that evidence what  
9 price she asks?

10 Q (By Mr. McGarvey) All documents whatsoever  
11 pertaining to your prices--how you set your prices, what  
12 your prices, are as requested in the subpoena.

13 A I get my price list and I do my markup and I  
14 write it down in my book.

15 Q You don't get your price list--excuse me. If I'm  
16 not mistaken, in Robert's deposition there were certain  
17 price lists that we've made exhibits to this deposition.

18 A Right.

19 MR. TATEOKA: Correct.

20 Q (By Mr. McGarvey) I'm not trying to confuse you,  
21 Connie. There are some documents that appear to be price  
22 lists of Tri-B-Supply, and I'm going to show these to you  
23 and ask you if these are some of the documents that you've  
24 prepared. I want just want to make sure that we have  
25 specifics responsive to the question.

1           A       We do.

2           Q       And so I've asked, what do you rely on in setting  
3 your prices, and so we have found out, as I understand--you  
4 can correct me if I'm wrong--you rely on those brochures or  
5 pamphlets that you receive from suppliers to a certain  
6 extent, and we'll get into that later. Is that correct?

7           A       Yes.

8           Q       Also, Deposition Exhibits 4 through 7, which I'll  
9 hand to you now, also appear to be information pertaining to  
10 Tri-B-Supply's prices; is that correct?

11          A       Yes.

12          Q       Any other documents whatsoever that you know of  
13 pertaining to prices that Tri-B-Supply sets and requires for  
14 its customers?

15          A       I wasn't listening, I'm sorry. Will you ask it  
16 again?

17          Q       Certainly. Are there any other documents besides  
18 those now that we've identified that pertain to the prices  
19 that Tri-B-Supply sets and has its customers pay?

20          A       Just these and them books.

21          Q       What documents have you brought that are  
22 responsive to the request for customer lists?

23          A       I have no customer list.

24          Q       What documents are there that you have brought--  
25 can I have those back, please?

1           A       You bet.

2           Q       --that reflects Tri-B-Supply's customers?

3           A       What do I have that reflects the customers that  
4 we go see?

5           Q       Yes.

6           A       The phone book and these right here, these store  
7 rosters, only I haven't used those much except for--

8           (Discussion off the record.)

9           Q       (By Mr. McGarvey) Back on the record. So if I  
10 understand you correctly, Tri-B-Supply's customers are  
11 obtained from store rosters and from the telephone book?

12          A       Yes.

13          Q       Any other source?

14          A       People that might call us and we'll go out and  
15 see what they need.

16          Q       Are there any documents that reflect who  
17 Tri-B-Supply's customers are to date?

18          A       I don't think I heard you correctly.

19          Q       Are there any documents what reflect who Tri-B's  
20 customers are to date?

21          A       The invoices are who our customers are.

22          Q       So that would be, then, Tri-B's Supply's invoices  
23 to its customers?

24          A       Yes.

25          Q       Each of Tri-B-Supply's customers can be found

1 within those documents?

2 A Yes.

3 Q Does Tri-B-Supply ever sell to customers without  
4 using an invoice?

5 A No.

6 Q Do you use the white pages or the yellow pages in  
7 the phone book in obtaining lists of customers?

8 A Well, the yellow pages. It's a bit faster.

9 Q So is your answer, then, that you use the yellow  
10 pages?

11 A Mostly.

12 Q But you use both, then?

13 A Yes.

14 Q What is a store roster?

15 A It's a piece of paper that a particular store  
16 headquarter sends out over--not send out, excuse me--that  
17 they have of all their particular stores. I, however, do  
18 not use the Smith's because I have been unable to see the  
19 manager. The one that's over Smith's, I have not seen him  
20 as to this day. And Albertson's went with another company,  
21 so I don't use them any more at all.

22 Q I'm not sure I understood what your answer was.  
23 You don't use who?

24 A I don't use the store rosters because the manager  
25 that's over the meat industry is--I haven't been in to see



1 him yet.

2 Q Now, you're talking about the manager over the  
3 meat industry over all of Smith's stores?

4 A All of Smith's, yes. And the man that is over  
5 all the Albertson's stores went to another business to do  
6 their business.

7 Q Are there only rosters for Smith's and  
8 Albertson's, then, that you know of?

9 A In this particular part, yes.

10 Q And you don't use either of those rosters  
11 anymore?

12 A Not at the present time.

13 Q Did you ever use the Albertson's roster?

14 A Yes.

15 Q How did you use it?

16 A Well, because I sent a letter to Craig Moss at  
17 the Albertson's division office.

18 Q And that's the extent of your use of the roster?

19 A Yup.

20 Q So in other words, you used the roster to get  
21 Craig Moss's name so you could send the letter to him?

22 A To call him to see if I could get his business--  
23 stores.

24 Q And is Craig Moss with Albertson's?

25 A Yes.

1 MR. TATEOKA: Excuse me.

2 (Witness consults with counsel off the record.)

3 MR. TATEOKA: Would you rephrase your question?

4 Q (By Mr. McGarvey) Did you not understand my last  
5 question? I just noticed that your counsel was talking with  
6 you, and so I kind of suspect that perhaps you didn't  
7 understand my last question. Is that true?

8 A Yes.

9 Q Would you like me to repeat it?

10 A Yes.

11 Q Are there any other stores, then, other than the  
12 ones indicated on your invoices that you sent the March 10th  
13 letter to that have not yet become your customers?

14 A Yes.

15 Q Do you remember the names of any of those stores?

16 A No, I don't.

17 Q Approximately how many were there?

18 A I do not know.

19 Q Was it more or less than ten?

20 A It would be more.

21 Q More or less than a hundred?

22 A I don't know.

23 Q It could be more than a hundred?

24 A It could be.

25 Q Could it be more than two hundred?

1           A       I have no idea.

2           Q       Could it be more than five hundred?

3           A       I wouldn't think so.

4           Q       Probably less than five hundred, then? Is that  
5 your recollection?

6           A       I would say that it was less than four or five  
7 hundred with these.

8           Q       Now, we're talking only about the stores that are  
9 not yet your customers.

10          A       There wouldn't have been.

11          Q       That are not indicated on the rosters?

12          A       There would not be more than three or four  
13 hundred, no.

14          Q       Who paid for the postage on these letters?

15          A       I did.

16          Q       Out of your personal bank account?

17          A       I think it was cash.

18          Q       Okay. Was it cash from the ceramics business?

19          A       I think it was.

20          Q       Who actually signed the letters, you or Larry?

21          A       Nobody signed--

22                   MR. TATEOKA: Objection.

23          Q       The letters went out unsigned?

24          A       Yes.

25          Q       They went out exactly as it appears on Deposition

1           A       Both nothing--what?

2           Q       You said, And we used it for both.

3           A       We would have used it if he--he was contemplating  
4 quitting then, okay?

5           Q       And going into the butcher supply business on his  
6 own?

7           A       No, just in case he wanted to start another  
8 business, okay?

9           Q       So what do you mean by both?

10          A       Well, we both just put our names down on that  
11 I.D. number, that tax I.D. number.

12          Q       Is that the same number you have today?

13          A       Yes.

14          Q       What was the name of your ceramics business back  
15 then?

16          A       Same as it is now: Tri-B-Supply.

17          Q       Did you file a dba or anything with the state?

18 Did you file any documents with the state--

19          A       No.

20          Q       --at that time?

21          A       As a name, you mean?

22          Q       Did you file any documents with the state at that  
23 time?

24          A       No.

25          Q       Larry participated with you, however, in your

1           A       In Syracuse, yes.

2           Q       Are there other Hamblin's Foodtowns in other  
3 towns?

4           A       I'm not aware of any.

5           Q       When you went into Hamblin's Foodtown and met  
6 with the meat manager, did that manager have a list of  
7 things that he needed at that time, or did you suggest  
8 certain items that they might purchase, or how did it come  
9 about that you actually sold these particular items?

10          A       He told me what he needed in order to run his  
11 meat shop.

12          Q       So you just asked him, here I am, what do you  
13 need, introducing yourself and asking him what he needed,  
14 and he told you?

15          A       I introduced myself and asked him if he would  
16 like to do business with us, and then he wanted--of course,  
17 they always want to know the price, and--

18          Q       How did you give him the price?

19          A       I told him what it would run for his 300  
20 equipment for his grinder, and then I'd tell him the price.  
21 And then I asked him how many, what he would need, and  
22 that's why you see what you see.

23          Q       Did you hand him a price list?

24          A       No. We don't hand individuals--individual stores  
25 price lists. The contract that--this would be a contract

1 Q Did you tell him that Larry was expected to again  
2 join with Tri-B-Supply after the restraining order ended?

3 A I think they assumed that.

4 Q It was your understanding that he realized that?

5 MR. TATEOKA: Objection. She doesn't know what  
6 his understanding is.

7 THE WITNESS: He got a letter, he read the  
8 letter, and then I showed up and--

9 Q (By Mr. McGarvey) Are you referring to the March  
10 10th letter?

11 A Yes, because he knew from that letter that we had  
12 started our own business and he was very happy about that,  
13 and--

14 Q Why do you believe he was happy that you started  
15 your own business?

16 A He stated so.

17 Q What were the circumstances that led up to him  
18 telling you that he was happy?

19 A Because he was tired of the high prices with  
20 Kasco.

21 Q You were discussing the prices of Kasco?

22 A We weren't discussing prices per se, we were--he  
23 was telling me how he felt that Kasco's prices were too  
24 high; and he saw mine and he says, This looks good, I'll  
25 stick with you.

1 some are still cold.

2 Q That introduction that you just gave, did you  
3 give basically that same introduction with respect to every  
4 store you approached?

5 A Yes, because we had to tell them that if they  
6 called the store that Larry was restrained and that he could  
7 not talk this business for one year.

8 Q Did this person at this store have a list of  
9 things that he wanted also, or did you suggest things for  
10 him to buy?

11 A Well, first of all, what some of them do, they  
12 pull out their last invoice from Kasco, because a lot of  
13 them, well, they either do that or they--they show us the  
14 plates and the knives that they've been using. And that's  
15 how we know what equipment they need. As to however many,  
16 then they tell us that and--

17 Q Then you'd give them a price?

18 A Well, the price comes first, you know. They want  
19 to know the price first.

20 Q Are any of these customers--or were any of these  
21 customers previously serviced by anyone other than Larry, to  
22 your knowledge?

23 A Before me?

24 Q Yes.

25 A I have no idea.

Tab C



Reid Tateoka (3193)  
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1200 Kennecott Building  
10 East South Temple Street  
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH

---

KASCO SERVICES CORPORATION,	:	
	:	AFFIDAVIT OF LARRY
Plaintiff,	:	BENSON
vs.		
LARRY D. BENSON,	:	
CONNIE A. BENSON	:	Civil No. 89-0901724
dba TRI-B-SUPPLY,	:	
	:	Judge David S. Young
Defendants.	:	

---

STATE OF UTAH                    )  
  :ss.  
COUNTY OF SALT LAKE        )

Larry Benson, being first duly sworn upon his oath deposes and states as follows:

1. I am a defendant in the above-entitled matter and as such have personal knowledge of all facts contained herein.

2. In January of 1989, Connie Benson became concerned about obtaining a business license because of increased traffic coming to her home. As I was experiencing some difficulty with my employment with Kasco Services Corporation ("Kasco"), I requested that Connie include butcher supplies as part of the newly acquired Tri-B-Supply business license in the event Tri-B-Supply decided to sell butcher supplies. At

that point, no decision for me to leave Kasco's employment or to set up any kind of individual business had been made

3. Approximately one week before I gave Kasco notice of my decision to resign from employment, I became extremely frustrated and dissatisfied with Kasco as an employer. This was due in large part to the fact that they would not return my telephone calls nor would they listen to my concerns for the business. I began voicing my desire to leave the business with the hope that Kasco would contact me so that we could work out my concerns and I would stay in the business. I was careful not to do or say anything which would alienate customers in the event that I remained at Kasco.

4. During this entire period, prior to my resignation, I was careful only to indicate to customers that I was leaving Kasco. I did not mention anything about starting my own business.

5. On February 15, 1989, I tendered my resignation effective March 1, 1989. After the effective date of my resignation in March of 1989, I made a few orders for butcher supplies.

6. In order to expand Tri-B-Supply in both ceramics and future butcher supplies, Connie and I obtained a \$30,000.00 line of credit from the bank using our jointly owned residence as security. We also used our jointly owned personal savings and our stock to provide capital for Tri-B-Supply.

7. After the effective date of my resignation on March 1, 1989, I made some small orders for butcher supplies.

8. After the Temporary Restraining Order was served on March 18, 1989, I made no purchases or orders for purchases of butcher supplies.

9. Since the Temporary Restraining Order was filed against me on March 18, 1989, I have done nothing to be involved with Tri-B-Supply butcher supply business. I

have acted as the court instructed "as Mr. Mom" and have only been involved in the marketing of ceramics.

10. I have not even been significantly involved in answering the telephone for the business. Connie obtained the services of Anna Benson to answer the telephone. Occasionally, when Connie and Anna were out, for example, to get the mail, I would answer the telephone and would receive a call asking for butcher supplies. I would always indicate that I was restrained and could not service them but that Connie or Robert would be back with them shortly. My ceramics business is in the same building as Connies and Kasco asserts that I tried to communicate to Connie by giving her dirty looks. I recall only once when I gave Connie a dirty look when she answered the telephone. That occasion was not intentional. We have not communicated through dirty looks.

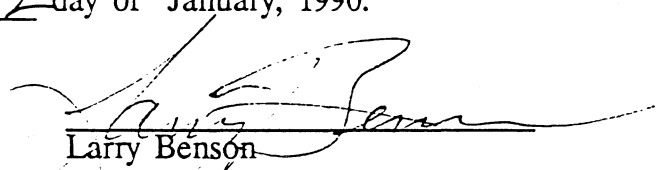
11. My intent was never to communicate any information regarding the butcher supply business to Connie, and in fact, I have never intentionally communicated any information regarding the business to her since the Restraining Order.

12. On May 1, 1989, I underwent surgery to remove the L-5 disk from my back because of severe nerve damage and degeneration to the disk. From that date until present, I have been totally disabled. I have been unable to work and have been collecting disability and unemployment compensation. The doctors have indicated to me that I am in need of another operation but they have chosen not to operate to remove the scar tissue because the scar tissue is located too close to the nerve and an operation may render me paralyzed. In fact, I am not even able to participate in therapy but I have been receiving periodical epidural injections of steroids and cortisone.

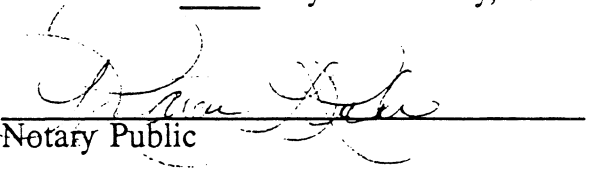
13. Robert Benson lives in his own household and was never involved with me in Tri-B-Supply nor have I in any way communicated with him in regard to the business. any information that he may have, he has learned independent from me.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 12 day of January, 1990.

  
Larry Benson

Subscribed and acknowledged before me this 12<sup>th</sup> day of January, 1990.

  
Notary Public

My commission expires:

Residing at:

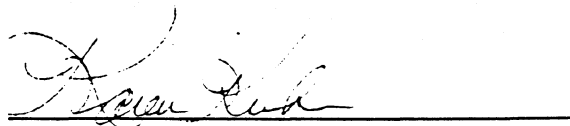
July 30, 1991

Salt Lake City, Ut

#### MAILING CERTIFICATE

This is to certify that on the 12<sup>th</sup> day of January, 1990, a true and correct copy of the foregoing Affidavit of Defendant Larry Benson was mailed first class, postage prepaid to the following:

Michael F. Richman  
David L. Arrington  
Casey K. McGarvey  
VAN COTT, BAGLEY, CORNWALL & McCARTHY  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, Utah 84145



Tab D

Reid Tateoka (3193)  
McKAY, BURTON & THURMAN  
Attorneys for Defendant  
1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH

---

KASCO SERVICES CORPORATION,	:	
	:	AFFIDAVIT OF CONNIE
Plaintiff,	:	BENSON
vs.		
LARRY D. BENSON,	:	
CONNIE A. BENSON	:	Civil No. 89-0901724
dba TRI-B-SUPPLY,	:	
	:	Judge David S. Young
Defendants.	:	

---

STATE OF UTAH                    )  
  :ss.  
COUNTY OF SALT LAKE        )

Connie Benson, being first duly sworn upon his oath deposes and states as follows:

1. I am a defendant in the above-entitled matter and as such have personal knowledge of all facts contained herein.

2. After Larry Benson had been restrained on March 22, 1989, I had no conversations with him regarding any phase of the butcher supply portion of the business of Tri-B-Supply. I have not talked to him regarding pricing, purchases, supplies, routes or in any other way.

3. All purchases for Tri-B-Supply have been paid for by me with checks written by me personally, drawn upon my Tri-B-Supply bank account, (in which Larry had no check writing privileges after the Preliminary Injunction) on my funds.

4. On March 10, 1989, prior to the Restraining Order, I sent a letter to potential customers, who I found in the telephone book, informing them that Tri-B-Supply was beginning a butcher supply business.

5. Kasco Services Corporation ("Kasco") asserts that its customers requested that Kasco remove their equipment after I sent my March 10th letter. This is not true. I talked to the people who Kasco named in their salesman's affidavit. Anyone who made such a request was making idle threats which were never carried out. Those who were requesting equipment to be removed were not authorized to make those statements in behalf of their company. The various meat departments would not be able to operate if equipment were removed and these people were not in a position to ask for equipment to be removed prior to having substituted equipment placed in the stores. I did not supply any of the stores any equipment and Tri-B-Supply did not supply equipment to those stores that Plaintiff asserts have previously asked that their equipment to be removed because of Tri-B-Supply beginning a business. Sales were not lost by Kasco as previously asserted in their salesman's affidavits.

6. On March 18, 1989, a Temporary Restraining Order was filed against me and my husband Larry. On the Hearing on March 21, 1989, Preliminary Injunction was issued against Larry only. The Court indicated that I was not restrained.

7. I personally re-registered Tri-B-Supply under my own name with Robert Benson as sales and service representative. Any affiliation that Larry Benson had with the business was terminated at the time of the Preliminary Injunction. Larry has no interest in the business nor is he allowed to have any input into the butcher supply business. He has not shared in the profits of Tri-B-Supply.

8. In order to conduct my business, not knowing anything about the butcher supply business, I went to a friend of mine, Dan Huwa, to ask him for help in training

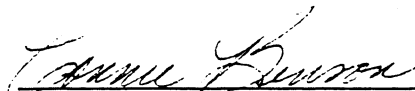
me and my son, Robert Benson, to run the business. We spent time with Dan Huwa being trained on how to repair parts and how to set up our business. I paid for the training primarily from my Master Card and from my joint bank account. I also had discussions with Huwa and with various distributors on proper pricing for products and as a result of the training by Huwa and my discussions with the different distributors I was able to set up pricing for product.

9. In order to prevent any confusion in the business that Larry Benson might still be in the business, I sent out a letter to all potential known customers stating that Larry Benson had been restrained and would not be involved in the Tri-B-Supply business and that Robert and I would operating the business.


10. In order to insure that Larry would not be involved in the business, I obtained the services of Anna Benson to answer telephones so that Larry would not even be involved in any contact with butcher supply customers.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 15 day of January, 1990.

  
\_\_\_\_\_  
Connie Benson

Subscribed and acknowledged before me this 15<sup>th</sup> day of January, 1990.

  
\_\_\_\_\_  
Notary Public

My commission expires:

July 30, 1991

Residing at:

East Lake City, UT



MAILING CERTIFICATE

This is to certify that on the 12<sup>th</sup> day of January, 1990, a true and correct copy of the foregoing Affidavit of Defendant Connie Benson was mailed first class, postage prepaid to the following:

Michael F. Richman  
David L. Arrington  
Casey K. McGarvey  
VAN COTT, BAGLEY, CORNWALL & McCARTHY  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, Utah 84145



---

kk\rt\bensonc.aff

Tab E

1           IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
2                   IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
3

4                                   \* \* \*

*Copy*

5  
6 KASCO SERVICES CORPORATION, )

7                   PLAINTIFF,           )

CIVIL NO. C-89-1724

8                   -VS-                   )

JUDGE'S RULING

9 LARRY D. BENSON & CONNIE           )  
10 A. BENSON, ET AL,                   )

11                   DEFENDANTS.           )

12  
13                                   \* \* \*

14  
15                   BE IT REMEMBERED THAT ON TUESDAY, THE 21ST DAY  
16 OF MARCH, 1989, COMMENCING AT THE HOUR OF 3:30 O'CLOCK  
17 P.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE  
18 COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT  
19 LAKE COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE  
20 HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL  
21 DISTRICT COURT, STATE OF UTAH.  
22

23                                   \* \* \*

24  
25                                   EXHIBIT L

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A P P E A R A N C E S

FOR THE PLAINTIFF:      MICHAEL F. RICHMAN &  
DAVID L. ARRINGTON  
VAN COTT, BAGLEY, CORNWALL &  
MC CARTHY  
50 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84101

FOR THE DEFENDANTS:    REID TATEOKA  
MC KAY, BURTON & THURMAN  
10 EAST SOUTH TEMPLE  
KENNECOTT BUILDING #1200  
SALT LAKE CITY, UTAH 84133

\* \* \*

I N D E X

MR. RICHMAN'S REPLY	PAGE 3
JUDGE'S RULING	PAGE 5

\* \* \*

1                                    P R O C E E D I N G S

2            MR. RICHMAN: YOUR HONOR, BEFORE THE COURT RULES, TWO  
3 CASES CAME UP DURING THE ARGUMENT. ONE REFERENCED BY THE  
4 COURT, THE MUNA CASE, AND THE OTHER, FINLAY CASE, REFERENCED  
5 BY OPPOSING COUNSEL. MAY I HAVE JUST ONE MOMENT TO COMMENT  
6 ON THOSE?

7            JUDGE YOUNG: YOU MAY.

8            MR. RICHMAN: OKAY. YOUR HONOR, I SUGGEST THE MUNA  
9 CASE, IN THIS PARTICULAR INSTANCE, HAS NO APPLICATION  
10 WHATSOEVER. AND THE REASON IS THAT IN THE MUNA CASE WE  
11 WERE NOT TALKING ABOUT A RESTRICTIVE COVENANT THAT WAS SOUGHT  
12 TO BE ENFORCED OR, AT LEAST, WITH RESPECT TO THE MUNA CASE  
13 THE COURT FOUND THAT A '68 RESTRICTIVE COVENANT WAS LATER  
14 REPLACED BY A CONTRACT SIGNED IN 1978 BY DR. MUNA THAT DID  
15 NOT CONTAIN THE RESTRICTIVE COVENANT. SO WE WERE NOT TALKING  
16 ABOUT A RESTRICTIVE COVENANT IN THAT PARTICULAR CASE. WHAT  
17 THEY WERE TALKING ABOUT IS THEY WERE TALKING ABOUT A TRADE  
18 SECRET WITH RESPECT TO THE PROCESS THAT DETECTS HERPES AND  
19 THIS OTHER STUFF. SO THEY WERE GOING UNDER THE COMMON LAW  
20 TRADE SECRET NOT A RESTRICTIVE COVENANT. AND WITH RESPECT  
21 TO THE COMMON LAW TRADE SECRET THEY FOUND DR. MUNA, IN 1966,  
22 HAD PUBLISHED AN ARTICLE AS TO HOW IN THE WORLD YOU MAKE  
23 THIS PARTICULAR TEST.

24                            AND LASTLY, ON PAGE 700, WITH REFERENCE TO THE  
25 CUSTOMER LISTS, THE COURT'S CITING A NEW YORK CASE OF

1 SILFEN, INC. V. CREAM IN THE SECOND COLUMN. "IN THE ABSENCE  
2 OF AN EXPRESS AGREEMENT TO THAT EFFECT BETWEEN THE PARTIES,  
3 OR A DEMONSTRATION THAT A CUSTOMER LIST HAS THE SEVERAL  
4 ATTRIBUTES OF A TRADE SECRET."

5 IN THIS CASE WE DO HAVE AN AGREEMENT BY THE  
6 PARTIES THAT IS A TRADE SECRET. UNDER THE RESTRICTIVE  
7 COVENANT WE HAVE THAT AGREEMENT SO THE MUNA CASE, IN ALL  
8 DUE RESPECT TO THE COURT, AND I'M NOT SURE THE COURT WAS  
9 SAYING IT WAS APPLICABLE--

10 JUDGE YOUNG: I DO DISAGREE WITH YOUR FEELING THAT  
11 IT IS INAPPLICABLE. I THINK IT IS APPLICABLE BUT I  
12 UNDERSTAND YOUR ARGUMENT.

13 MR. RICHMAN: OKAY. ALSO WITH RESPECT TO THE ROBBINS  
14 V. FINLAY CASE WHICH WE HAD NOT READ, THE DEFENDANT IN THAT  
15 CASE WAS ONE OF SEVERAL SALESMEN THAT SAT INSIDE A HEARING  
16 CLINIC WHERE A LOT OF PEOPLE CAME. HE WAS NOT THE TRAVELING  
17 SALESMAN TYPE THAT MR. BENSON IS. BUT THE MOST APPLICABLE  
18 PORTION OF THIS CASE APPEARS ON PAGE 627 AT THE LAST  
19 PARAGRAPH ON THE PAGE WHICH I BELIEVE WE UNDERLINED FOR  
20 THE COURT. THAT SAYS, "THIS CASE IS DISTINGUISHABLE FROM  
21 ALLEN V. ROSE PARK," WHICH IS IN OUR FAVOR, "WHERE THE  
22 COVENANT NOT TO COMPETE WAS ENFORCED BECAUSE ALL OF THE  
23 GOODWILL OF THE EMPLOYER WAS ASSOCIATED WITH, AND CREATED  
24 BY, THE EMPLOYEE," WHICH IS THE SITUATION WE HAVE HERE.  
25 ALL OF THE GOODWILL IS CREATED BY--

1 JUDGE YOUNG: I HAVE READ THE ALLEN CASE RECENTLY.

2 MR. RICHMAN: OKAY. ALSO, CONTINUING ON THAT PARAGRAPH  
3 THE COURT SAID, "NOR IS THERE ANY INDICATION THAT HIS  
4 COMPETITION (EXCEPT FOR THE USE OF CUSTOMER LEADS) HAD ANY  
5 GREATER EFFECT ON PLAINTIFF'S GOODWILL, OR OTHER LEGALLY  
6 PROTECTABLE INTEREST, THAN THE COMPETITION OF ANY OTHER  
7 SALESMAN EMPLOYED BY A COMPETITOR."

8 WELL, WE KNOW THAT'S NOT TRUE IN THIS PARTICULAR  
9 CASE. WE KNOW IT ALREADY FROM THE AFFIDAVITS WHICH REFLECT  
10 THAT MR. MOSS IS ABOUT TO GIVE 70 STORES TO MR. BENSON.  
11 MR. BENSON HAS AN UNBELIEVABLE COMPETITIVE ADVANTAGE OVER  
12 US THAT IS NOT ATTENDANT TO SOME OTHER COMPETITOR IN THE  
13 INDUSTRY. AND BASED ON THAT WE BELIEVE THAT IT WOULD BE  
14 PROPER TO--

15 JUDGE YOUNG: THANK YOU, MR. RICHMAN.

16 MR. TATEOKA, DO YOU WISH TO ADDRESS ANY OF THE  
17 CASES?

18 MR. TATEOKA: NO, YOUR HONOR, WE WILL REST.

19 JUDGE YOUNG: ALL RIGHT. THE COURT HAS REVIEWED THE  
20 CASES, MICROBIOLOGICAL RESEARCH CORP. V. MUNA, AND IN  
21 REFERENCE TO YOUR COMMENTS, MR. RICHMAN, I DO DISAGREE IN  
22 RELATION TO THE APPLICATION OF THE ISSUE OF THE CUSTOMER  
23 LISTS, CUSTOMER INFORMATION THAT I BELIEVE THAT MR. BENSON  
24 DID HAVE PRIOR TO THE EMPLOYMENT WITH KASCO AND KEEN THERE  
25 BEFORE. HOWEVER, I DO BELIEVE THAT THE SYSTEMS CONCEPT CASE,

1 HAVING REVIEWED THAT AGAIN, APPLIES DIRECTLY TO THIS CASE.  
2 AND I'D LIKE TO JUST COMMENT ON A COUPLE OF THINGS IN  
3 RELATION TO THAT.

4 THE COURT THEREIN STATED, JUSTICE HOWE STATED,  
5 THAT INJUNCTION IS AN EXTRAORDINARY REMEDY AND SHOULD NOT  
6 BE LIGHTLY GRANTED AND STATED FURTHER THAT IT IS WELL-SETTLED  
7 THAT THE GRANTING OR REFUSING OF INJUNCTION RESTS TO SOME  
8 EXTENT WITHIN THE SOUND DISCRETION OF THE TRIAL COURT,  
9 THEREFORE, EQUITABLE PRINCIPLES SEEM TO BE APPROPRIATE TO  
10 RELY ON IN RELATION TO THE GRANTING OF AN INJUNCTION.

11 IT SEEMS TO ME THAT THE REQUIREMENTS OF ALLEN  
12 V. ROSE PARK PHARMACY, THEY BEING NUMBER ONE, THAT THE  
13 COVENANT MUST BE SUPPORTED BY CONSIDERATION. THAT  
14 REQUIREMENT IS MET.

15 NUMBER TWO, THAT NO BAD FAITH BE SHOWN IN THE  
16 NEGOTIATIONS OF THE CONTRACT. I BELIEVE, LIKEWISE, EVEN  
17 THOUGH SOME DID NOT WISH TO SIGN THE CONTRACT UNDER THE  
18 CIRCUMSTANCES OF ITS PRESENTATION, THAT REQUIREMENT ALSO  
19 WAS MET.

20 NUMBER THREE, THE COVENANT BE NECESSARY TO PROTECT  
21 THE GOODWILL OF THE BUSINESS AND, NUMBER FOUR, THAT IT BE  
22 REASONABLE IN ITS RESTRICTIONS IN TERMS OF TIME AND AREA.  
23 I BELIEVE EACH OF THOSE REQUIREMENTS IS MET IN THIS CONTRACT  
24 AND THUS THE PRELIMINARY INJUNCTION WILL BE GRANTED.  
25 HOWEVER, THE PRELIMINARY INJUNCTION--THIS CASE NEEDS TO BE



1 EXPEDITIOUSLY HANDLED AND I SUSPECT IT WILL BE. THE  
2 PRELIMINARY INJUNCTION WILL BE GRANTED TO EXPIRE 18 MONTHS  
3 FROM AUGUST, 1988 BECAUSE I BELIEVE AT THAT TIME THE COMPANY  
4 WAS ON NOTICE THAT MR. BENSON DID NOT WISH TO RETAIN ANY  
5 RESTRICTIVE COVENANTS IN HIS EMPLOYMENT, THEREAFTER, THE  
6 COMPANY WOULD BE WILLING TO EITHER--REQUIRED TO TERMINATE  
7 HIM OR DEAL OTHERWISE WITH HIM. AT THAT POINT THE  
8 RESTRICTIVE COVENANT WOULD BE TERMINATED AS TO ITS  
9 APPLICATION TO MR. BENSON EXCEPT FOR 18 MONTHS THEREAFTER.

10 NOW, I THINK MR. TATEOKA'S ORIGINAL POSITION  
11 IN RELATION TO MRS. BENSON IS WELL-TAKEN. AND YOU  
12 FUNDAMENTALLY HAVE NO RIGHT TO ENFORCE ANYTHING AS TO MRS.  
13 BENSON IN RELATION TO THIS AGREEMENT, HOWEVER, IT'S OBVIOUS  
14 TO THE COURT THAT UNLESS MR. BENSON IS ENJOINED FROM  
15 COMMUNICATING OR SHARING ANY OF THE INFORMATION THAT HE  
16 WOULD HAVE RECEIVED AS AN EMPLOYEE OF KEEN AND THEREAFTER  
17 KASCO WITH MRS. BENSON THAT THE AFFECT OF AN INJUNCTION,  
18 PRELIMINARY INJUNCTION, WOULD BE NEUTRALIZED, AND THUS,  
19 MR. BENSON IS ENJOINED FROM COMMUNICATING ANY INFORMATION  
20 IN THIS RELATION TO MRS. BENSON.

21 MR. RICHMAN: I WOULD ASSUME, YOUR HONOR, THAT  
22 THIS ORDER WOULD ALSO BE APPLICABLE TO TRI-B SUPPLY OF WHICH  
23 MR. BENSON IS AN OWNER.

24 JUDGE YOUNG: THE ORDER WOULD APPLY TO TRI-B SUPPLY.

25 MR. TATEOKA: YOUR HONOR, COULD YOU CLARIFY FOR ME WHAT

1 MR. BENSON IS NOT ALLOWED TO DO? WHEN YOU SAY HE IS NOT  
2 ALLOWED TO COMMUNICATE WITH MRS. BENSON THAT'S KIND OF BROAD.  
3 AND I SUSPECT THAT WHAT YOU'RE SAYING IS HE'S NOT ALLOWED  
4 TO COMMUNICATE CUSTOMER LISTS, HE'S NOT ALLOWED TO  
5 COMMUNICATE SUPPLIES, BUT I SUSPECT AS TO TRAINING METHODS,  
6 HOW TO APPROACH CUSTOMERS, WHAT THE BENEFITS ONE SAW AS  
7 OPPOSED TO THE OTHER, I SUSPECT THAT'S COMMON KNOWLEDGE I  
8 SUPPOSE HE CAN COMMUNICATE.

9 JUDGE YOUNG: IF IT DETERMINED BY THE COURT THAT THE  
10 OBJECTIVE OF THE PARTIES IS TO ATTEMPT, BY UTILIZING MRS.  
11 BENSON WHO HAS NEVER CALLED ON ANYONE, AS AN EMPLOYEE, TO  
12 GO AROUND THE COURT'S ORDER, THEN OBVIOUSLY, MR. TATEOKA,  
13 I WILL NOT BE HAPPY ABOUT THAT. I DON'T BELIEVE THAT THAT'S  
14 MY DESIRE. SHE HASN'T BEEN A PREVIOUS EMPLOYEE SO FAR AS  
15 I'VE BEEN ABLE TO SEE AND IF THAT IS UTILIZED AS A RUSE  
16 AND A GUISE TO AVOID THE RESPONSIBILITY OF THE CONTRACT  
17 THAT IS IN DISHARMONY WITH MY RULING. THE RULING IS THAT  
18 THE PROVISIONS OF THE AGREEMENT THAT APPLY TO RESTRICTIONS  
19 AS TO THE COVENANT NOT TO COMPETE IN RELATION TO THE KEEN,  
20 AND THEREAFTER KASCO CONTRACT, ARE ENFORCEABLE AND VALID  
21 AND THAT MR. BENSON IS EXPECTED TO MAKE A GOOD FAITH EFFORT  
22 TO COMPLY WITH THOSE AND TO SEE THAT HIS ASSISTANCE,  
23 COMMUNICATION, CONTACT, CONVERSATION, WHATEVER ELSE IT MAY  
24 BE, WITH MRS. BENSON, MAINTAINS THE SPIRIT OF THE COURT'S  
25 RULING. ALL RIGHT?

1 MR. RICHMAN, WOULD YOU PREPARE AN ORDER?

2 MR. RICHMAN: YES, YOUR HONOR. I WOULD ASSUME THAT  
3 THIS COURT'S ORDER IS NOT PRECLUDING US FROM SEEKING A  
4 PERMANENT INJUNCTION AGAINST MRS. BENSON AT A LATER TIME,  
5 JUST A DENIAL AT THIS TIME.

6 JUDGE YOUNG: WELL, I DON'T SEE THAT I HAVE ANY BASIS  
7 FOR HAVING JURISDICTION OVER HER IN RELATION TO A CONTRACT  
8 AT ALL.

9 MR. RICHMAN: WELL, ONLY TO THE EXTENT, YOUR HONOR,  
10 THAT WE DON'T KNOW WHAT THE NATURE OF TRI-B SUPPLY IS.  
11 IT APPEARS TO BE A PARTNERSHIP IN THAT IT'S MR. AND MRS.  
12 BENSON OPERATING UNDER THE NAME OF TRI-B SUPPLY FOR PROFIT,  
13 AND THAT WOULD NORMALLY, IF TWO PEOPLE ARE OPERATING FOR  
14 PROFIT IT WOULD NORMALLY BE A PARTNERSHIP. I ASSUME THE  
15 COURT'S ORDER MEANS THAT MRS. BENSON CAN GO OUT AND SOLICIT  
16 ALL SHE WANTS SO LONG AS SHE DOESN'T USE THE INFORMATION  
17 FROM MR. BENSON BUT SHE IS GOING TO HAVE TO DO THE WORK  
18 HERSELF, MR. BENSON CAN'T BE OUT THERE DOING THAT WORK.

19 JUDGE YOUNG: THAT IS RIGHT. MR. BENSON IS MR. MOM.

20 MR. RICHMAN: THANK YOU, YOUR HONOR. WE'LL PREPARE  
21 THE ORDER.

22 YOUR, WITH RESPECT TO A BOND, I KNOW THE COURT  
23 HASN'T SAID ANYTHING BUT WE ARE GOING TO HAVE TO PUT UP A  
24 BOND ON THIS.

25 JUDGE YOUNG: ALL RIGHT. A COST BOND IN RELATION TO

1 COVERAGE OF WHAT COSTS? I WOULD APPRECIATE IT IF COUNSEL  
2 FOR EITHER SIDE COULD GIVE ME AN ESTIMATE.

3 MR. RICHMAN: YOUR HONOR, I THINK IT'S MORE THAN COSTS.  
4 I WOULD THINK, SINCE, PERHAPS, WE ARE EFFECTIVELY PUTTING  
5 MR. BENSON OUT OF BUSINESS THAT WE SHOULD BE PUTTING UP A  
6 BOND OF SOME SUBSTANTIAL AMOUNT. AND I WOULD SUGGEST \$50,000  
7 IS A SUFFICIENT BOND INASMUCH AS HE WAS MAKING 65,000 A  
8 YEAR, SIX MONTHS HAS ALREADY BEEN KNOCKED OFF.

9 JUDGE YOUNG: AND WE HAVE 18 MONTHS.

10 MR. RICHMAN: YES.

11 MR. TATEOKA: I WOULD SUSPECT WE'RE TALKING ABOUT A  
12 YEAR'S WORTH OF HIS SALARY WOULD BE APPROPRIATE.

13 JUDGE YOUNG: BOND IN THE AMOUNT OF \$50,000.

14 MR. TATEOKA: YOUR HONOR, WITH REGARD TO TRI-B I GUESS  
15 I HAVE A CONCERN IF MRS. BENSON IS GOING TO GO OUT AND BE  
16 THE BREADWINNER FROM NOW ON AND GO OUT AND DO THE SALES.  
17 WE'D LIKE TO BE ABLE TO DO THAT UNDER THE NAME TRI-B. I  
18 MEAN, SHE'S OPERATED THAT BUSINESS. AND I SUSPECT THAT  
19 AS LONG AS HE'S RESTRAINED THAT TAKES CARE OF THEIR CONCERN  
20 AND SHE STILL OUGHT TO BE ABLE TO OPERATE UNDER TRI-B.

21 JUDGE YOUNG: UNDER THE PRESENT STRUCTURE OF THAT  
22 ORGANIZATION THE INJUNCTION APPLIES. ALL I CAN DEAL WITH  
23 IS WHAT I HAVE AT PRESENT. IS THAT CLEAR?

24 MR. TATEOKA: WELL, I THINK--I THOUGHT THE INJUNCTION  
25 WAS AS AGAINST TRI-B AND MR. BENSON.

1 JUDGE YOUNG: IT IS. PRESENT STRUCTURE OF TRI-B  
2 INDICATES MR. BENSON IS AN OWNER IN TRI-B. COURT'S IN  
3 RECESS.

4 (WHEREUPON, THE JUDGE'S RULING WAS CONCLUDED).  
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I, EILEEN M. AMBROSE, HEREBY CERTIFY THAT I AM A CERTIFIED SHORTHAND REPORTER OF THE STATE OF UTAH; THAT AS SUCH CERTIFIED SHORTHAND REPORTER, I ATTENDED THE HEARING OF THE ABOVE-MENTIONED MATTER AT THAT TIME AND PLACE SET OUT HEREIN; THAT THEREAT I TOOK DOWN IN SHORTHAND THE TESTIMONY GIVEN AND THE PROCEEDINGS HAD THEREIN; AND THAT THEREAFTER I TRANSCRIBED MY SAID SHORTHAND NOTES INTO TYPEWRITING, AND THAT THE FOREGOING TRANSCRIPTION IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE SAME.

MY COMMISSION EXPIRES:  
JANUARY 14TH, 1992.

Tab F

Dear Friend,

This is to inform you that Larry Benson has a Restraining Order against him and cannot service in the area for the period of 1 year.

However I would like to inform you that I am operating with my son Robert L. Benson, who is very capable of handling your service needs to operate our new business.

Robert has been trained by Huwa Sales & Service in Denver, Colo. and is recently being trained by Atlanta Saw Co. in Georgia, to do your service of Grinder Plates & Knives and Saw Blades and the repair of Grinders, Saws, Slicers, and Tenderizers.

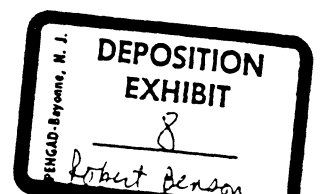
He is presently being trained to handle service and repair of Patty Machines and Heat Seal Stations -excluding Scales.

We solicit your business and will be contacting you about our very exciting service program.

Thank you very much.

Sincerely,

Connie A. Benson  
Robert L. Benson





Tab G

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

*Copy*

KASCO SERVICES CORP.,	)	
PLAINTIFF,	)	CIVIL NO. C-89-0901724
-VS-	)	<u>JUDGE'S RULING</u>
LARRY BENSON,	)	
DEFENDANT.	)	

\* \* \*

BE IT REMEMBERED THAT ON THURSDAY, THE 5TH DAY  
OF APRIL, 1990, COMMENCING AT THE HOUR OF 9:55 O'CLOCK  
A.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE  
COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT  
LAKE COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE  
HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL  
DISTRICT COURT, STATE OF UTAH.

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A P P E A R A N C E S

FOR THE PLAINTIFF:      DAVID L. ARRINGTON,  
MICHAEL F. RICHMON  
VAN COTT, BAGLEY, CORNWALL &  
MC CARTHY  
50 SOUTH MAIN STREET  
SUITE #1600  
P.O. BOX 45340  
SALT LAKE CITY, UTAH    84145

FOR THE DEFENDANT:      REID TATEOKA  
MC KAY, BURTON & THURMAN  
1200 KENNECOTT BUILDING  
10 EAST SOUTH TEMPLE  
SALT LAKE CITY, UTAH    84133

\* \* \*

I N D E X

JUDGE'S RULING

PAGE 3

\* \* \*

P R O C E E D I N G S

JUDGE YOUNG: ALL RIGHT. LET ME INDICATE TO YOU, MR. ARRINGTON, THAT I APPRECIATE YOUR ARGUMENT; I APPRECIATE THE ARGUMENT OF MR. TATEOKA.

I HAVE BEEN, FROM THE BEGINNING OF THIS CASE, VERY CONCERNED ABOUT THIS CONTRACT PROVISION THAT AROSE IN THE CONTRACT IN 1982. THE BEST INFORMATION THAT I HAVE AVAILABLE TO ME NOW IS THAT THERE HAS BEEN MADE AN EXCELLENT EFFORT BY MR. BENSON TO ABIDE BY THE TERMS AND CONDITIONS OF THE RESTRICTIVE COVENANT, CONSISTENT WITH THE COURT'S RULING THAT HE ABIDE BY THOSE FROM AUGUST OF 1988 UNTIL- 18 MONTHS THEREAFTER, WHICH I ASSUME WOULD BE ABOUT MARCH OF 1990.

BASED THEN UPON THE ARGUMENT THAT I'VE HEARD, THE RECORD THAT I'VE BEEN ABLE TO OBSERVE AND MY CONTINUING CONCERN THAT WE'RE NOT PLAYING ON AN EVEN PLAYING FIELD WITH PEOPLE WHO HAVE CONSISTENT POWER HERE, I WILL TELL YOU VERY CANDIDLY AND VERY FRANKLY THAT I HAVE SOME CONCERNS AS TO THE EXTENT AT WHICH KASCO HAS CONTINUED THIS LITIGATION. AND THOSE CONCERNS WOULD BE DEVELOPED THROUGH THE TRIAL IN RELATION TO THE DAMAGES AND I WILL RESERVE ANY DECISION IN RELATION TO THAT AND MUST RESERVE IT UNTIL AT SOME LATER TIME. BUT THERE SEEMS TO ME TO BE LITTLE REASON WHY KASCO COULD NOT ALSO BE COVERING ALL OF THOSE CUSTOMERS EVEN ON A MORE RAPID SCHEDULE THAN THEY DID BEFORE.

1 AS I UNDERSTAND, THESE ARE RURAL PEOPLE, PRINCIPALLY, AND  
2 SMALL TOWNS, WHERE THERE'S NOT GOING TO BE A WHOLE LOT OF  
3 BUTCHER SHOPS IN SMALL TOWNS FOR BUTCHER SUPPLIES AND ALL  
4 THAT KASCO HAS TO DO IS TO CONTINUE OR TO BEGIN TO CREATE  
5 THE GOOD WILL THAT YOU CLAIM IS SO INHERENT IN LARRY BENSON  
6 WHO HAS NOT EVEN BEEN ABLE TO CALL ON THESE PEOPLE FOR 18  
7 MONTHS.

8 BASED UPON THESE CONCERNS THAT I HAVE AS TO THE  
9 AGREEMENT, THE MOTION TO MODIFY THE PRELIMINARY INJUNCTION  
10 IS DENIED; THE MOTION TO AMEND THE COMPLAINT IS DENIED,  
11 AND THE MOTION FOR A PRELIMINARY INJUNCTION AS TO CONNIE  
12 AND ROBERT BENSON IS DENIED.

13 MR. TATEOKA, WILL YOU PREPARE THE ORDER?

14 MR. TATEOKA: YES, YOUR HONOR.

15 JUDGE YOUNG: ALL RIGHT. COURT'S IN RECESS.

16 (WHEREUPON, THE JUDGE'S RULING WAS CONCLUDED).  
17

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Tab I

Reid Tateoka (3193)  
McKAY, BURTON & THURMAN  
Attorneys for Defendants  
1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

---

KASCO SERVICES CORPORATION,	:	
Plaintiff,	:	AFFIDAVIT OF ROBERT BENSON
vs.	:	Civil No. 890901724
LARRY D. BENSON and	:	
CONNIE A. BENSON, dba	:	
TRI-B-SUPPLY,	:	
Defendants.	:	

---

STATE OF UTAH            )  
                                  : ss.  
COUNTY OF SALT LAKE )

Robert Benson, being first duly sworn upon his oath,  
deposes and states as follows:

1. I am the son of Larry D. Benson and Connie Benson  
and am an employee of Tri-B-Supply and as such have personal  
knowledge of all facts contained herein.

2. I have not lived with Larry and Connie Benson since  
Sept 19, 1981.

3. I have no employment agreement with Kasco nor have I  
ever been an employee or agent of Kasco.

4. I have had no contact with Kasco, have not seen Kasco's customer list nor any proprietary information of Kasco and I am not aware of any of its business policies or information.

5. As of April 28, 1989, I was an employee of Tri-B-Supply.

6. I am paid a bi-weekly salary from which Tri-B-Supply pays appropriate withholding tax and other obligations.

7. I have no input on business decisions or do I have a choice of who the suppliers should be.

8. I supplied no money or capital investment to the business.

9. I was not involved in any decision to start the business.

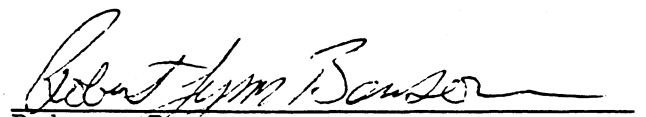
10. I received all of my training on how to service customers through Huwa Sales in Denver, Colorado.

11. I have never received training in any part of the business with Larry Benson.

12. I have had no discussions with Larry Benson with regard to the business from which Larry has been restrained.

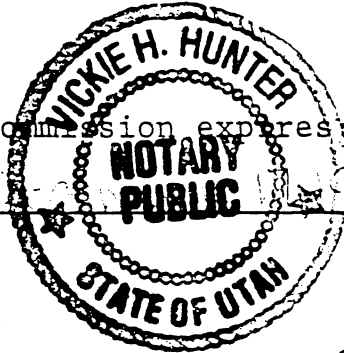
FURTHER AFFIANT SAITH NAUGHT

DATED this 22 day of September, 1989.

  
Robert Benson



Subscribed and acknowledged before me this 22nd day of September, 1989.



My commission expires

Vickie H. Hunter  
Notary Public

Residing at:

South Main Street, Salt Lake City, Utah

CERTIFICATE OF MAILING

This is to certify that on the 2nd day of October, 1989, a true and correct copy of the foregoing Affidavit was mailed first class, postage prepaid to the following:

Michael F. Richman  
David L. Arrington  
Casey K. McGarvey  
VAN COTT, BAGLEY, CORNWALL & McCARTHY  
50 South Main street  
Suite 1600  
Salt Lake City, Utah 84145

[Signature]

REID26

Tab J

Reid Tateoka (Bar No. 3193)  
McKAY, BURTON & THURMAN  
1200 Kennecott Building  
10 East South Temple  
Salt Lake City, UT 84133  
Telephone: (801) 521-4135

IN THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

KASCO SERVICES CORPORATION,	:	
Plaintiff,	:	AFFIDAVIT OF LARRY D.
	:	BENSON IN OPPOSITION
v.	:	TO PLAINTIFF'S MOTION
	:	FOR MODIFICATION
LARRY D. BENSON and CONNIE A.	:	
BENSON dba TRI-B-SUPPLY,	:	
Defendants.	:	Civil No. 89-0901724
	:	Honorable David S. Young

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

Larry D. Benson, being first duly sworn upon his oath, deposes and states as follows:

1. He is the defendant in the above-entitled matter and as such has personal knowledge of all facts contained herein.

2. I became employed by Keene Corporation in approximately January, 1977. Some time on or about August, 1978, I was given a portion of an employment contract by Keene. I was not given any additional compensation, or additional benefits for signing the portion of the employment contract with Keene.

3. I have never deemed the Keene employment contract as a valid contract as the copy of the portion of the agreement which I was given to sign is not the agreement plaintiff attaches to his memorandum as Exhibit "A".

4. At the time I was given the Keene agreement to sign, it did not contain all of the pages which plaintiff has attached to its memorandum as Exhibit "A".

5. I never executed an employment agreement with KASCO.

6. In August, 1988, Kasco presented me a copy of their employment agreement, including a non-compete clause.

7. Kasco indicated to me that I must agree to the non-compete agreement in the Kasco employment contract or that I would be terminated. I also received a policy letter confirming that I was required to sign Kasco's employment contract with its non-compete agreement as a condition of employment. A copy of said letter is attached hereto as Exhibit "A" and made a part hereof.

8. I told Kasco's representative, Jim Gingerich, that I would not sign the non-compete agreement. Mr. Gingerich told me that Kasco indicated to him that they would terminate everyone who would not sign the employment agreement containing the non-compete clause. I made it clear to Kasco that I would not continue employment under the non-compete agreement and that I deemed the non-compete agreement null and void from that point.

9. Following the Court's restraining order and preliminary injunction, I have not been involved in the business of Tri-B Supply in any way. I have not contacted any customers nor have I given any Tri-B customers or any potential customers any information with regard to butcher supply. On occasion, I have received a telephone call or two from potential customers or they have talked to me at church or at some other public place where I happened to be. In each instance, I indicated to them that I was restrained, that I could not talk to them regarding the butcher supply business for the period of the preliminary injunction order.

10. I have never told anyone that I would be coming back to work in the butcher supply business.

11. I cannot help what others think with regard to my running the business or my coming back. However, I can unequivocally state that I have said nothing intentionally to try to lead them to believe that I was running the business, which I am not. I have said nothing to lead Tri-B clients or potential Tri-B clients to believe that I am in any way connected with the business. I have had no conversations with Robert Benson or with Connie Benson in any way, nor have I communicated in any knowing way regarding the butcher supply business. Since the restraining order and preliminary injunction, I have done all which I am physically capable of

doing to insure that I keep the spirit and intent as well actual mandate of the preliminary injunction.

12. After termination with Kasco, I have never been out in the field nor actively soliciting without Kasco's permission. I was not involved in drafting or sending the letters that went out to potential customers. I have heard Connie Benson testify that she was the one who prepared and sent out any letters.

13. No Kasco information was ever given to Connie. As soon as I terminated my employment I gave all materials back to Kasco, including all customer lists, policy manuals and anything I had in my possession. I have never introduced Connie or Bob to any personnel at different stores' butcher shops. I have never indicated to Connie in any way who she was to send letters to. I have not provided Connie or Robert any information with regard to pricing or contacting customers.

14. Presently, I do not know anything about Connie's business, what her pricing is, who her customers are, except as Kasco has enlightened me through depositions and other information in this lawsuit.

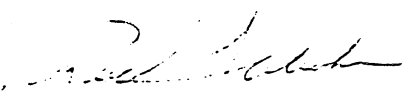
15. I was physically disabled as of May 1, 1989 when I underwent back surgery and have been physically unable to be involved in a butcher supply business such as Tri-B event if I would have wanted to.

DATED this 30 day of January, 1990.

  
Larry D. Benson

STATE OF UTAH                    )  
                                      :   ss.  
COUNTY OF SALT LAKE    )

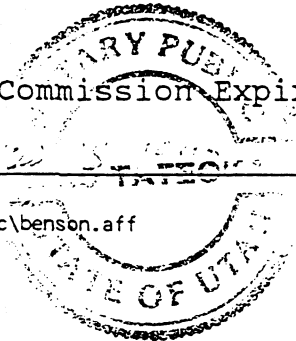
Subscribed and sworn to before me this 30<sup>th</sup> day of January, 1990.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

Residing at:

w\misc\benson.aff



<b>KASCO</b>  <b>Policy</b>	<b>SUBJECT</b> TERRITORY MANAGER EMPLOYMENT AGREEMENT		<b>NO.</b>	<b>PAGE</b> 1 OF 1
			<b>EFFECTIVE</b> Continuing;	<b>DISTRIBUTION</b> All
	<b>AFFECTS</b> Territory Managers		<b>REVISES</b>	<b>DATED</b>
			<b>FILE UNDER SECTION</b>	
<b>ISSUED BY</b> G. Bowers		<b>APPROVED BY</b> W. Sykes		

As a condition of employment with KASCO Corporation, each Territory Manager is required to enter into an agreement with the company concerning the conditions of employment. A copy of this agreement is attached.

This agreement and/or ones similar to it have been in effect for both Keene Cutting Services and Atlantic Service Company for many years and are hereby restated for the record. In addition to many other subjects, this agreement includes provisions which state:

- 1) Employment with KASCO Corporation is intended to be a full time job, and it requires the full time efforts of its employees. It does not, therefore, permit diversions into side no matter how little effort and time such diversions might require. The company has a large investment in each of its employees, and the employee's time in the field should be spent furthering the goals of the company to the exclusion of all others.
- 2) The company has provided the employee with access to certain confidential information concerning its customers, products, etc., and the employee is obligated to protect the confidentiality of this information.
- 3) During his employment with the company the employee is barred from becoming involved, directly or indirectly, in any activity which is in competition with the services and/or products provided by the company.
- 4) In the case of termination, either instigated by the company or the employee for a period of eighteen months immediately following termination of employment, the employee may not call upon, solicit or sell products to any KASCO customer for the purpose of competing against the KASCO products previously sold to KASCO customers in the employees territory.

EXHIBIT "A"



Tab K

# ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---oOo---

KASCO SERVICES CORPORATION,

Plaintiff,

vs

LARRY D. BENSON and CONNIE A. BENSON,  
DBA TRI-B-SUPPLY,

Defendants.

CIVIL NO. 89-0901724

DEPOSITION OF:

CRAIG M. SMART

---oOo---

Be it remembered that on the 30th day of June 1989 the deposition of Craig M. Smart, produced as a witness herein at the instance of the plaintiff, in the above-entitled action now pending, was taken before Sharon A. Merritt, a Certified Shorthand Reporter and Notary Public, in and for the State of Utah, at the offices of VanCott, Bagley, Cornwall & McCarthy, 2404 Washington Boulevard, Suite 900, Ogden, Utah.

That said deposition was taken pursuant to notice.

1 call would have been in April of '89, is that correct?

2 A. Yes, March or April. I wasn't sure if we were on a  
3 three-month or a four-month basis there.

4 Q. Then after Larry Benson provided the special  
5 service in February, the next contact you had from anybody was  
6 from Connie and Robert Benson the first of April of 1989?

7 A. Um.

8 Q. Is that right?

9 A. Yes, if that --

10 Q. And at the time Robert and Connie Benson came and  
11 provided service to you in April of 1989 do you recall any  
12 conversations that you had with either of them?

13 A. I just recall that they mentioned that they were --  
14 that they had the business now and they were coming, see if  
15 they could have my business at that time. And they tell me  
16 their prices, which was considerably less than what I had been  
17 paying for the same service.

18 Q. So their prices were much better than Kasco's?

19 A. Um-hum. (affirmatively) And because of that  
20 reason I said, "Well, sure, you know, we'll -- we'll go with  
21 you."

22 Q. As you testified earlier, that's one of the major  
23 factors you look at in determining who to go with?

24 A. Um-hum. (affirmatively)

25 Q. Is that correct?