T. Thomas Singer
Amanda G. Hunter
Axilon Law Group, PLLC
115 N. Broadway, Ste. 310
P.O. Box 987
Billings, MT 59103-0987
Telephone: (406) 294-9466
Facsimile: (406) 294-9468
tsinger@axilonlaw.com
ahunter@axilonlaw.com

Attorneys for Amici Applicants Opposed to Enforcing Employee Non-Competes Because of the Burdens on the Public

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0521

JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C.,

Plaintiff and Appellee,

vs.

TERRY ALBORN, PAUL UITHOVEN, CHRISTINA RIEKENBERG, JOE BATESON, AND SHERM VELTKAMP,

Defendants and Appellants.

OPPOSED MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

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1. Statement of Interest.

Until 1985, Montana law governing employee non-competes was "settled" and simple: "The employee, having left his employment, is free to make use of his experience, so long as he does not violate his employer's confidence." *First Am.*

Ins. Agency v. Gould, 203 Mont. 217, 223, 661 P.2d 451, 454 (1983). In 1985, the Court unsettled the law. Without mentioning its 1983 decision, and despite the clear language of § 28-2-703, MCA, the Court announced that a non-compete in an employment contract is enforceable so long as it is "reasonable." *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 397, 708 P.2d 577, 580 (1985). And even though the Court said its test for reasonableness "requires a balancing of the competing interests of the public as well as the employer and employee," the Court provided no guidelines for weighing the interests of the public.

Since *Dobbins* was decided, the burdens imposed on the public by non-competes have become better understood. Over the last 35 years, social science scholars have been able to quantify many of the adverse impacts on the public that come from enforcing non-competes. And while this Court has never mentioned that research, it certainly seems less willing to strictly enforce employee non-competes now than it was in the last century. Since 2000, this Court has decided five cases involving employee non-competes. In the first case, the Court refused to enjoin a violation of a contract that prohibited MSU's coach from appearing on any competing radio station, but it left the door open to enforcement through other legal remedies. *Reier Broadcasting Co., Inc. v. Kramer*, 2003 MT 165, 316 Mont. 301, 72 P.3d 944. Then, in two subsequent cases, the Court held the non-competes

void and unenforceable specifically because they were "absolute prohibitions on trade." *Montana Mountain Products v. Curl*, 2005 MT 102, 327 Mont. 7, 112 P.3d 979; *Access Organics, Inc. v. Hernandez*, 2008 MT 4, 341 Mont. 73, 175 P.3d 899. Nine years ago, the Court held an accounting firm had "no legitimate business interest" in enforcing a restraint that was not an absolute prohibition against an employee it had terminated. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2011 MT 290, 362 Mont. 496, 265 P.3d 646. But in the most recent case, this Court said the same non-compete that was not enforceable against Wrigg might be enforceable against the Appellants in this case. The Court instructed the trial court to "balance the nature of Former Shareholders' relationships with their clients with the protectable interest in Junkermier's client base." *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 48, 384 Mont. 464, 480, 380 P.3d 747, 760.

In all of these cases, the Court reiterated that non-competes are strongly disfavored, but in none of the cases did it address the burden non-competes place on "the public" – whether that term refers to the local economy as a whole or to groups that might be affected, such as clients and customers, competing businesses, co-workers, vendors and suppliers, job seekers, or others.

In hopes of making the Court aware of the public impact of its decisions, a group of individuals and entities that have been burdened by employee non-

competes ask for the opportunity to share their own knowledge and experiences, and to explain some of the relevant research, by filing an *amici curiae* brief pursuant to Mont. R. App. P. 12(7). The group includes:

- These clients of the Appellants:
    - William Dabney
    - Lynn Turner
    - Art Castings of Montana, Inc.
    - GLM, LLC
    - Don Cape
    - Cape Family Limited Partnership LP
    - Cape-France, Inc.
    - Cape-France Enterprises
    - CapVan Development, Inc.
    - Home Leasing, Inc.
    - JWT Restaurant Group, LLC
    - Spirited Holdings, Inc.
    - East Main Investments, LLC
    - 6161 Jackrabbit, LLC
    - Blackmore Development Partners, LLC
    - Bozeman Lodging Investors, LLC
    - JWT Hospitality Group, LLC
    - VC Development, LLC
    - 7th Avenue Hospitality, LLC
    - 7th Avenue Hospitality Lender, LLC
    - Blackmore Bend Subdivision Owners Association Inc.
    - Leah Cape, LLC
    - Marketplace Building at Blackmore Bend Condo Owners Association, Inc.
    - Catron Crossing Owners Association Inc.
    - DonJo Subdivision Owners Association Inc.

- These individuals who experienced the burdens of employee non-competes personally when an employer who had treated them unethically, unfairly, or illegally then sued or threatened to sue them to

enforce a covenant that would prevent them from earning a living in their chosen profession:

- Tom Jacques, whose employer failed to pay hundreds of thousands of dollars in commissions he had earned yet still insisted he honor a non-compete that would have barred him from using the expertise in chemical hazards he had developed over several decades while working for other employers;

- Ernie Olness, an accountant who paid a settlement in order to be released from a non-compete that was imposed by one of the larger accounting firms in Montana so he and his brother could open their own practice;

- Phil Hastings, an agronomist who left his job with a large agriculture supply company to open a competing business and then, after the employer threatened to enforce a non-compete that dictated venue in Missouri and application of Minnesota law, filed suit in Montana to invalidate the covenant; and

Assuming the Court grants this motion, additional amici may also join the brief to address the burdens restrictive covenants in employment contracts impose on workers, customers, competitors, suppliers, and other members of the public, and because of the negative effects such covenants have on the economy.

2. Why an *Amici* Brief Is Desirable.

Seven large accounting firms were allowed to file an amicus brief in support of JCCS's position when this case was appealed the first time. That brief is the only input this Court has ever received from "the public" concerning the burdens that covenants not to compete impose on anyone other than the parties in the case.

The burdens need to be considered because non-competes have become ubiquitous. *See* Petition for Rulemaking by Open Markets Institute, AFL-CIO, et al., before Federal Trade Commission, March 12, 2019, pp. 6-8 (https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf). American employers increasingly insist that their employees sign contracts of adhesion that restrict their right to change jobs to work for a competitor. Yet in states where employee non-competes are not enforceable, such as California and North Dakota, research shows that employers can protect their interests in less restrictive ways that do not reduce employees' opportunities, stall innovation, restrict worker mobility, make talent inaccessible, diminish individual advancement, displace families, increase wealth disparities, or cause other harms associated with employee non-competes. *See, generally*, *id*., pp. 39-45. This growing recognition that non-competes burden employees and the public without really benefitting employers has prompted the U.S. Congress and several state legislatures to consider restricting non-competes. *See, e.g.*, Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019-2020); Jane Flanagan and Terri Gerstein, *Welcome Developments on Limiting Non-Compete Agreements*, American Constitution Society (Nov. 7, 2019) https://www.acslaw.org/expertforum/new-developments-on-non-competes-new-state-laws-potential-ftc-rulemaking-and-a-bipartisan-senate-bill-that-gets-it-right-

for-workers-and-businesses/. And just this month, in response to a petition by 19 labor and public interest organizations and 46 advocates and scholars, the Federal Trade Commission conducted an all-day meeting to consider whether to prohibit employee restrictive covenants completely. *See* Fed. Trade Comm'n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (2020), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

The proposal before the FTC is hardly innovative. The Field Code that California adopted in 1872 prohibited employee non-competes, and the consistent enforcement of that prohibition gave the Silicon Valley a competitive advantage in technology development over Boston, despite its major universities with government-funded research, because Massachusetts enforced non-competes aggressively. Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete (August 1998), Stanford Law School, John M. Olin Program in Law and Economics, Working Paper No. 163, available at SSRN: https://ssrn.com/abstract=124508 or http://dx.doi.org/10.2139/ssrn.124508.

Of course, Montana adopted the Field Code in 1895, and the statute that invalidates restraints on trade is still codified as § 28-2-703, MCA. If that statute is read as California interprets the same language, will Montana enjoy greater

prosperity? Will Montana residents have better opportunities? Will Montana businesses be more successful? Will Montana consumers have more or better choices? This Court should be considering questions such as these.

3. Party Whose Position Amici Support.

The named amici support the position of the Appellants.

4. Opposing Party's Consent.

Undersigned counsel contacted Kirk Evenson, counsel for Appellees, on January 21, 2020, and was advised that Appellees do not consent to this motion.

5. Proposed Date for Filing Amici's Brief.

Counsel for the proposed amici ask the Court to set the deadline for filing their amici brief no less than three weeks after the motion is granted. A proposed order allowing *amici* participation is submitted concurrently.

DATED this 21th day of January, 2020.

/s/ T. Thomas Singer
T. Thomas Singer
Amanda G. Hunter
Axilon Law Group, PLLC
Attorneys for Applicants Moving for Leave to File Amicus Brief Addressing the Burdens Imposed on the Public by Covenants Not to Compete

CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed - Amicus - Leave to Participate to the following on 01-21-2020:

Bridget W. leFeber (Attorney)
One West Main
Bozeman MT 59715
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

Michael J. Lilly (Attorney)
One West Main St.
Bozeman MT 59715
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

Carey E. Matovich (Attorney)
2812 1st Ave N., Suite 225
P.O. Box 1098
Billings MT 59101
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

Kirk D. Evenson (Attorney)
Marra, Evenson & Bell, P.C.
P.O. Box 1525
Great Falls MT 59403
Representing: Junkermier, Clark, Campanella, Stevens, P.C.
Service Method: eService

Electronically signed by Samantha Schrock on behalf of T. Thomas Singer
Dated: 01-21-2020