IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

02-1356
CRIMINAL

UNITED STATES OF AMERICA,

Appellee,

v.

GREG ALLEN JOHNSON

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
HONORABLE HAROLD D. VIETOR, JUDGE

BRIEF OF APPELLEE

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellant, Greg Allen Johnson (hereinafter "Johnson")

appeals his conviction on one count of conspiracy to distribute methamphetamine, claiming that the district court erred in denying Johnson's motion for judgment of acquittal on the question of whether the government's evidence showed multiple conspiracies and in instructing the jury of the applicable law concerning single versus multiple conspiracies. The United States responds that the verdict was supported by sufficient evidence and the jury was properly instructed.

The United States suggests that the briefs and record adequately present the facts and legal arguments, and that oral argument would not significantly aid this Court in reaching a decision. If the Court grants oral argument, fifteen minutes per side would be adequate for a full discussion of the issues.

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2. *United States v. Lopez-Arce*, 267 F.3d 775 (8th Cir. 2001)
3. *United States v. Pullman*, 187 F.3d 816, 821 (8th Cir. 1999)

II. The trial court properly instructed the jury on the applicable law regarding single versus multiple conspiracies and did not err in refusing Johnson's requested instruction.

1. *United States v. Adipietro*, 983 F.2d 1468 (8th Cir. 1993)
2. *United States v. Hall*, 171 F.3d 1133 (8th Cir. 1999)
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STATEMENT OF THE CASE

On June 13, 2001, a federal grand jury in the Southern District of Iowa returned an indictment charging Johnson and two co-conspirators (Craig Allen Heller and Trisha Amanda Barck) with conspiracy to distribute methamphetamine from September 1999 to September 2000. (R. 1).[1] On July 25, 2001, a superseding indictment was returned charging the same defendants with conspiracy from on or about July 1997 and continuing to on or about September 2000. (R.27). Trial commenced against Johnson on November 5, 2001, and Johnson was convicted of one count of conspiracy to distribute methamphetamine. (R.86). Both co-conspirators pled guilty prior to trial (R. 59 and 65). Sentencing was held on January 25, 2002. (R. 98 and 99). Johnson was sentenced to 210 months of imprisonment followed by five years supervised release. (R. 99). Notice of Appeal was timely filed on January 25, 2002. (R. 100).

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[1]In this brief, "R" refers to the district court clerk's record, followed by the docket number of the referenced document. "1TTT" refers to the first volume of the trial transcript, and "2TT" refers to the second volume of the trial transcript; in each case, the transcript citations are followed by the page number. "Br." refers to defendant-appellant's appeal brief, followed by the page number.

STATEMENT OF FACTS

In the early 1990's, Johnson and Craig Heller met through mutual friends, Steve and Mary Basinger (Mary Basinger a/k/a Mary Van Hafton). (1TT 151). At this time, Johnson was supplying drugs to Heller. (1TT 151).

Kelly Carmichael was Johnson's girlfriend for nine or ten years preceding the summer of 2000. (1TT 33-34). They resided together at her address at 4416 N.E. 27th. (1TT 34). She identified her telephone number on Exhibit 1 (1TT 44-45) which was seized at one of the Ayala search warrant locations. (1TT 174-175.) Both she and Johnson were users of methamphetamine. (1TT 52). Carmichael met Mark Ayala in 1997 or 1998. (ITT 34). In the summer of 1998, Johnson began purchasing from Ayala. (ITT 35, 93-94). Carmichael accompanied Johnson to Ayala's residence for the purpose of purchasing methamphetamine. (1TT 35-36). Carmichael testified that Johnson purchased a pound from Ayala on one or two occasions. (1TT 35-37, 39-40, 55-56). On two occasions, Carmichael saw Johnson get goose-egg size quantities of methamphetamine from Ayala. (1TT 55-56). Carmichael testified that Johnson distributed meth to her (1TT 48) and that she distributed to him (1TT 48). Carmichael further testified that Johnson continued to get methamphetamine after Ayala's arrest, but she did not know the identity of Johnson's source after Ayala's arrest. (1TT 40-41).

Carmichael testified that she knew Terry Hendrix (hereafter Hendrix) (1TT 43) and that she met him through Johnson. (1TT 43). Carmichael met Hendrix at Carmichael's house in Norwoodville. (1TT 43-44). Carmichael knew where Hendrix lived, and at one point she bought a TV from Hendrix. (1TT 44). Carmichael testified that she did not know Hendrix to use or be involved with methamphetamine and had never bought from Hendrix. (1TT 44).

Nicholas Griffith testified that in 1995[2], when Griffith was 14, Ayala began to purchase and distribute methamphetamine. (1TT 83-84). Griffith further testified that in December 1997, Johnson was purchasing methamphetamine from Ayala. (1TT 59, 63-64). Johnson purchased more than he could use. (1TT 65). Ayala was arrested in August 1998. (1TT 86). After Ayala's arrest, Griffith collected money from Johnson and got Johnson to assist in securing the bail bond for Ayala. (1TT 66-67).

Eric Rasmussen testified that Johnson purchased from Ayala in 1998. (1TT 93-96). Rasmussen was present when Johnson purchased methamphetamine from Ayala. (1TT 95). Rasmussen collected money from Johnson for payment of methamphetamine purchased from Ayala. (1TT 93-94).

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[2]The transcripts says 1985, however this would appear to be an error. Griffith would appear to have been 14 in 1995.

After Ayala's arrest, Johnson continued to purchase and distribute methamphetamine. (1TT 40-41,110, 168).

In 1997, Mary Van Hafton sold methamphetamine to Juanita Kopp. (1TT 163-164). In 1997, Van Hafton introduced Johnson as her source to Kopp. (1TT 164). Kopp observed Johnson deliver methamphetamine to Van Hafton. (1TT 164). Starting sometime in 1997, Kopp purchased methamphetamine from Johnson for approximately six months . (1TT 165). This six month time period appears to have included part of 1997 and the early months of 1998 (1TT 165), which was part of the time period Johnson was getting methamphetamine from Ayala. (1TT 35-37, 39-40, 55-56, 59, 63-64, 93-96). In February, 1998, Kopp met Heller. (1TT 165). Heller became Kopp's boyfriend. (1TT 165). In March 1998, Kopp saw Johnson at Heller's house where Johnson had green-colored methamphetamine which he stated was in commemoration of St. Patrick's Day. (1TT 166-67). Johnson sold Heller some of this methamphetamine and Kopp received some of it. (1TT 166-67). Kopp had met Johnson's girlfriend Kelly Carmichael. (1TT 164-65). Kopp reached Johnson through Van Hafton or by calling Johnson's pager or cell phone number which Van Hafton had given her or by calling Johnson's girlfriend, Carmichael. (1TT 165). These transactions

occurred "every week." (1TT 165). Kopp stated Johnson was supplying Heller with methamphetamine. (1TT 166).

Kopp testified that Johnson would come to Heller's house and that they would go in the bedroom to do the deal. (1TT 167). Heller was not getting enough methamphetamine from Johnson at a time. (1TT 167). Because of this, Johnson introduced Heller to Terry Hendrix and Heller began to deal directly with Hendrix. (1TT 167). Kopp knew Nadine Woods. (1TT 167). Kopp and Woods worked together at Adventureland Inn. (1TT 167). Kopp observed Woods, Hendrix, and Johnson visit Heller's house. (1TT 167-68). After Hendrix was arrested, Heller got methamphetamine again from Johnson. (1TT 168).

In approximately early 1998, Woods worked with Kopp at the Adventureland Inn. (1TT 127-128). Woods knew Kopp as "Anita." (1TT 128). She bought methamphetamine from Juanita ("Anita") Kopp. (1TT 127-28). Woods got methamphetamine from Heller and then from Hendrix once she was introduced to him. (1TT 128-29). A week or two later after the introduction to Hendrix, Woods moved in with him and began obtaining methamphetamine from Hendrix. (1TT 129). Woods met Johnson at Heller's house. (1TT 129). Woods and Hendrix had come to Heller's house and Kopp was also there. (1TT 129). The purpose of their visit was for Hendrix to collect money from Heller. (1TT

130). While they were there, Johnson showed up. (1TT 130). Hendrix asked Johnson where the money was that Johnson owed to him. (1TT 130). Hendrix told Woods that Johnson has owed him money for a while and that "he just wrote him off." (1TT 130-31).

In September 1999, Hendrix began distributing methamphetamine. (1TT 106). Hendrix began selling to Johnson shortly thereafter. (1TT 108-109). According to Hendrix, Johnson was already involved in drugs at that time. (1TT 109). Johnson introduced Heller to Hendrix. (1TT 109-110, 167). Heller began purchasing from Hendrix. (1TT. 166-167). Heller eventually cut out Johnson as the middle man. (1TT 154). After the arrest of Hendrix, Johnson later began purchasing from Heller and Heller from Johnson. (1TT 154-155).

Dan Davis is a detective with the Polk County Sheriff's Office. (ITT 137). Davis testified that there were multiple suppliers involved, but one continuous "actor". (ITT 146). He also indicated that the case involved the "continuous activity" of Johnson during the time period. (1TT 144-146).

SUMMARY OF ARGUMENT

Johnson's Motion for Judgment of Acquittal on the question of whether the government's evidence showed multiple conspiracies was properly denied by the

trial court. The government provided sufficient evidence at trial to support the jury's verdict of finding Johnson guilty of the conspiracy charged in the indictment.

Further, the trial court properly instructed the jury on the applicable law regarding single versus multiple conspiracies using an approved instruction found in the *Eighth Circuit Manual of Model Criminal Jury Instructions §5.06G, Notes on Use*, and Johnson's rights were not substantially affected by the trial court not utilizing his requested instruction.

ARGUMENT

I. Sufficient evidence supports the trial court's denial of Johnson's Motion for Judgment of Acquittal on the question of whether the government's evidence showed multiple conspiracies.

A. Standard of Review

Whether the government has proven one conspiracy or multiple conspiracies is a fact question for the jury to decide and is reviewed for clear error. *United States v. Contreras,* 283 F.3d 914, 916 (8th Cir. 2002) (citations omitted); *United States v. Morales*, 113 F.3d 116, 118 (8th Cir. 1997) (citation omitted); *United States v. Pullman*, 187 F.3d 816, 821 (8th Cir. 1999) (citation omitted); *United States v. Hester*, 140 F.3d 753, 760 (8th Cir. 1998) (citation omitted). In considering this issue, "the court reviews the evidence in the light most favorable to the jury's verdict." *Contreras* , 283 F.3d at 916 (citation omitted). "'If the

evidence supports a single conspiracy, failure to give a multiple conspiracy instruction is not reversible error.'" *Id.,* (*quoting United States v. Roach*, 164 F.3d 403, 412 (8th Cir. 1999)), (*citing United States v. Cabbell*, 35 F.3d 1255, 1262 (8th Cir. 1994)).

B. Argument

Johnson argues on appeal that there were two separate conspiracies. (Br. 12-13). The jury in this case found that Johnson was guilty of the conspiracy as charged in Count 1 of the indictment. The record supports the jury's finding. In determining if the evidence supports the finding of the single conspiracy, this Court has stated that it will "look to the totality of the circumstances to determine whether a single conspiracy or multiple conspiracies existed and give the verdict the benefit of all reasonable inferences that can be drawn from the evidence." *Pullman,* 187 F.3d at 821, (*citing United States v. McCarthy*, 97 F.3d 1562, 1570 (8th Cir. 1996)). *See also, United States v. Rounsavall*, 115 F.3d 561, 564 (8th Cir. 1997) (citation omitted).

In order to prove that the defendant was a member of the conspiracy, the government was required to prove: "(1) that there was a conspiracy, i.e. an agreement to manufacture or to distribute, (2) that the defendant knew of the conspiracy, and (3) that the defendant intentionally joined the conspiracy." *United*

States v. Hester, 140 F.3d 753, 760 (8th Cir. 1998)(citation omitted); *See also United States v. Romero*, 150 F.3d 821, 824 (8th Cir. 1998)(citation omitted).

"'A single conspiracy may exist even if the participants and their activities change over time, and even if many participants are unaware of, or uninvolved in, some of the transactions.'" *Contreras*, 283 F.3d at 916, (*quoting United States v. Cabbell*, 35 F.3d 1255, 1262 (8th Cir. 1994)) . "'[T]o prove a single conspiracy it is not necessary to show that all the conspirators were involved in each transaction or that all the conspirators even knew each other.'" *Pullman*, 187 F.3d at 821 (*quoting United states v. Rosnow*, 977 F.2d 399, 405 (8th Cir. 1992).

"If the jury could have found one overall agreement that existed among the conspirators, even if many of them were not involved in all of the transactions, a single conspiracy is not precluded." *Cabbell*, 35 F.3d at 1262, (*citing United States v. Lee*, 782 F.2d 133, 134-35 (8th Cir. 1986). "'One conspiracy may exist despite the involvement of multiple groups and the performance of separate acts.'" *Romero*, 150 F.3d at 825, (*quoting United States v. Riebold*, 135 F.3d 1226, 1230 (8th Cir. 1998)(internal quotations omitted). "Dealers who at times compete with one another may be members of the same conspiracy." *United States v. Roach,* 164 F.3d 403, 412 (8th Cir. 1999); *see also*, *United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993) and *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir.

1991). "'A single conspiracy may be found when the defendants share a common overall goal...'" *Pullman*, 187 F.3d at 821, (*citing United States v. McCarthy*, 97 F.3d 1562, 1571 (8th Cir. 1996) *quoting United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995)). "'Once a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement.'" *Pullman* at 820, (*citing United States v. Smith*, 49 F.3d 362, 365 (8th Cir. 1995) *quoting United States v. Ivy*, 915 F.2d 380, 384 (8th Cir. 1990)).

In this case, Johnson shared with Ayala, Hendrix, Heller and numerous others the common goal of conspiring to possess with intent to distribute quantities of methamphetamine. Indeed, even Johnson himself acknowledges in his brief that the "two conspiracies had Mr. Johnson in common." (Br. 13). The evidence demonstrated that Johnson, and several co-conspirators all resided in the Des Moines, Iowa, area. (1TT 34, 35, 44). Numerous witnesses testified that Johnson was purchasing and selling methamphetamine (1TT 35-36, 58-77, 87-90, 151-158, 165-166); that Johnson instructed Hendrix on how to weigh and price the drugs (1TT 124-125); and individuals brought customers to Johnson for the purpose of purchasing methamphetamine. (1TT 164-165).

The evidence demonstrates that individuals involved in this conspiracy worked together to achieve this common goal. During the course of the conspiracy, they often lived with one or more members of the conspiracy. (1TT 33-34, 128-129). They shared drug supplies. (1TT 48, 151). They were seen together exchanging large amounts of cash. (1TT 65-67, 94). Johnson assisted in bailing out of jail a co-conspirator. (1TT 66-67).

These are just a few examples of the interplay of the individuals involved in this conspiracy. Johnson's name figures prominently throughout the entire conspiracy. As discussed in the Statement of Facts, Johnson had customers who appear to have purchased methamphetamine from the Ayala and the Hendrix/Heller groups via Johnson. In addition, Heller testified that he met Johnson approximately ten years ago and that he and Johnson dealt methamphetamine to each other starting at that time. (1TT 151-52). These transactions continued until the time Heller was arrested on a gun charge in 1995. (1TT 151-52). However, Heller started to obtained methamphetamine from Johnson once again in June or July of 1998, approximately five months after he got out of jail. (1TT 152-53). As noted previously, Ayala was arrested in August 1998. (1TT 86).

"A multiple conspiracy instruction is not required because there are a number of sources and independent dealers if there was a shared objective to 'sell

large quantities of drugs'." *Roach*, 164 F.3d at 412, (*quoting Cabbell*, 35 F.3d at 1262). In any event, in this case, a multiple conspiracy instruction was given in Jury Instruction No. 13. *Eighth Circuit Manual of Model Criminal Jury Instructions, § 5.06G , Notes on Use (2000).*

In *United States v. Lopez-Arce*, 267 F.3d 775, 781 (8th Cir. 2001), the defendant argued that the government did not prove the single conspiracy contained in the indictment, but proved numerous conspiracies with the end result being a variance that had a substantial affect on his rights.

This Court not only disagreed with defendant's argument, but found "it difficult to see how the defendant was prejudiced given that he was the sole defendant on trial and was arguably implicated in any other conspiracy the evidence could prove." *Id.* at 781. This Court further held that "[t]he essence of the crime of conspiracy is the 'agreement to commit an unlawful act'" *Id.* (*quoting Iannelli v. United States*, 420 U.S. 770, 777 (1975)). "The agreement need not be shown to have been explicit." *Id.* It can "be inferred from the facts and circumstances of the case." *Id.* (*citing Iannelli* at 777).

Johnson argues in his brief that the evidence demonstrated at least two conspiracies. (Br. 12-13). Johnson further argues that he was prejudiced as a result of testimony about a second and separate conspiracy. (Br. 10, 14-15).

Here, as in *Lopez-Arce*, it is difficult to see how Johnson was prejudiced given that he was the sole defendant on trial and was arguably implicated in any other conspiracy the evidence could prove.

The issue is whether the evidence demonstrated that Johnson joined a conspiracy with other individuals that shared as its common goal of distributing methamphetamine during the time period charged in Count 1 of the indictment. The jury was not wrong when it concluded that Johnson was involved in a single conspiracy. Johnson conspired to sell methamphetamine and enjoyed mutual dependence and assistance. The fact that Johnson obtained drugs from different sources did not mean there was more than one conspiracy. Johnson's goal was to distribute methamphetamine and his means was to conspire with other individuals to obtain that goal. This common goal may be as simple as the criminal objective of selling large quantities of drugs. *See, e.g.*, *United States v. Rounsavall*, 115 F.3d 561, 564 (8th Cir. 1997) (citation omitted).

Johnson offers no specific evidence identifying or defining the two or more distinct conspiracies. Instead, he makes general arguments that the government presented evidence of two or more conspiracies. (Br. 12-13). He claims there were no common people to the conspiracy of distribution other than Johnson and that Johnson did not control or was not the "hub" of any conspiracy, but was

simply a part of each agreement. (Br. 13). This is similar to the argument made in *Pullman*. *Pullman*, 187 F.3d at 821.

The evidence showed that Johnson purchased and/or supplied drugs to co-conspirators, while at other times individuals competed for the same business. (1TT 123-24).

Sufficient evidence through testimony was presented that showed Johnson conspired to distribute methamphetamine from 1997 until September 2000. However, Johnson's claim that these acts constituted separate conspiracies cannot aid him because he was a participant in each conspiracy, which forecloses his claim of any prejudicial variance. *Pullman*, 187 F.3d at 822 ("... any claim that Pullman's acts constituted separate conspiracies is of no aid to him because he participated in each conspiracy, which forecloses a claim of prejudicial variance.") (*citing United States v. Zimmerman*, 832 F.2d 454, 457 n.2 (8th Cir. 1987)).

"A variance between the indictment and the proof justifies the reversal of a defendant's conviction 'only when a 'spillover' of evidence from one conspiracy to another has prejudiced [the] defendant's substantial rights.'" *United States v. Hall*, 171 F.3d 1133, 1150 (8th Cir. 1999), (*quoting, United States v. Morales*, 113 F.3d 116, 119 (8th Cir. 1997)). That clearly is not the situation here and the testimony of juveniles that Johnson complains of (Br. 14-15) is simply, as is often

the case, the effective testimony of others involved in a drug distribution conspiracy.

Based upon the evidence presented, the jury properly concluded that a conspiracy existed as charged in Count 1 of the indictment and that Johnson participated in that conspiracy.

II. The trial court properly instructed the jury on the applicable law regarding single versus multiple conspiracies and did not err in refusing Johnson's requested instruction.

A. Standard of Review

"Whether there was sufficient evidence to sustain a multiple conspiracy instruction is a question of law and is reviewed de novo." *Contreras*, 283 F.3d at 916 (citation omitted). This Court reviews the trial court's jury instruction formulation for an abuse of discretion. *United States v. Parker*, 32 F.3d 395, 400 (8th Cir. 1994) (citation omitted).

B. Argument

Johnson argues the district court's instruction was not adequate, the Court erred in not presenting Johnson's requested jury instruction and thus prejudiced his substantial rights. (Br. 14-18).

First, it is important to note that "'[i]f the evidence supports a single conspiracy, failure to give a multiple conspiracy instruction is not reversible error.'" *United States v. Contreras*, 283 F.3d 914, 916 (8th Cir. 2002) (*quoting United States v. Roach*, 164 F.3d 403, 412 (8th Cir. 1999), *citing United States v. Cabbell*, 35 F.3d 1255, 1262 (8th Cir. 1994)). "The trial court is required to instruct the jury on multiple conspiracies only if evidence exists to support such a finding." *United States v. Grajales-Montoya*, 117 F.3d 356, 362 (8th Cir. 1997) (citations omitted). "A multiple conspiracy instruction is not required just because there are a number of sources and independent dealers if there was a shared objective to 'sell large quantities of drugs.'" *Roach*, 164 F.3d at 412 (*quoting Cabbell*, 35 F.3d at 1262).

The government presented evidence that Johnson conspired to distribute methamphetamine using a number of sources and independent dealers. The object of the conspiracy was to sell drugs. The activities and individuals changed over time, and many of the participants were unaware of, or uninvolved in some of the transactions, however, the conspiracy did exist. *Roach*, 164 F.3d at 412 ("A single

conspiracy may exist even if the participants and their activities change over time, and even if many participants are unaware of, or involved in, some of the transactions") (citations omitted). "A single overall conspiracy can be made up of a number of separate transactions and of a number of groups involved in separate crimes or acts." *Id.* The Eighth Circuit held in *Roach* that the trial court did not error by refusing to give a multiple conspiracy instruction. *Roach* at 412.

Even if multiple conspiracies existed, as Johnson contends, the instruction given did not affect Johnson's substantial rights resulting in a miscarriage of justice.

United States v. Hall, 171 F.3d 1133 (8th Cir. 1999), is analogous to the present case. In *Hall*, three defendants were convicted of conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it. *Id.* at 1138. One defendant argued that the evidence showed more than a single conspiracy and that the trial court committed error by failing to give the jury an instruction on multiple conspiracies. *Id.* at 1149. Hall argued that the jury could have convicted him because of a conspiracy in which he was a participant, but that he was not the one charged in the indictment. *Id.* Hall requested a jury instruction "stating that if the government had failed to prove that a defendant 'was a member of the conspiracy which is charged', then the jury had to acquit that defendant 'even though he may have been a member of some other conspiracy'". *Id.* The

Eighth Circuit found that trial court's instruction "fairly and accurately contained the applicable law ... and covered the essence" of Mr. Hall's suggested instruction. *Id.* at 1150 (*quoting United States v. Cain*, 128 F.3d 1249, 1252 (8th Cir. 1997)). The trial court had instructed the jury that a conviction for conspiracy required "both a finding that 'the defendant ... joined in the conspiracy' 'as charged in [the relevant count]of the indictment' and a finding that the elements with respect to that conspiracy were proved 'as to that defendant.'" *Id.* at 1150-1151 (emphasis added).

Here, as in *Hall*, Johnson contends that his rights were substantially prejudiced because the jury heard evidence that defendant may have participated in a separate conspiracy that was not the conspiracy charged in the indictment. Johnson also presented a proposed jury instruction regarding single versus multiple conspiracies. (Br. 16-17) (Johnson's Supplemental Proposed Jury Instruction, Number 12A). The trial court considered Johnson's instruction before adopting and presenting to the jury *Eighth Circuit Manual of Model Criminal Jury Instructions §5.06G, Notes on Use(2000)*, concerning single versus multiple conspiracies, utilizing the shorter version as discussed in the committee notes (appearing in the Notes on Use of the Model Instruction). Thus, the district court,

in instruction 13,[3] instructed the jury on Johnson's claim that there may have been multiple conspiracies utilizing the Eighth Circuit's model instruction. *Id*. As Johnson admits in his own brief (Br. 18), the instruction given was approved by the Eighth Circuit in *United States v. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993) and the committee has thus noted. *Eighth Circuit Manual of Model Criminal Jury Instructions §5.06G, Notes on Use (2000)*. The trial court fairly and accurately instructed the jury as to the applicable law and covered the essence of Johnson's instruction.

The trial court did not abuse its discretion in denying Johnson's proffered instruction.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Johnson's conviction and sentence be affirmed.

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[3]If the United States has failed to prove beyond a reasonable doubt the existence of the conspiracy charged in Count 1 of the indictment, then you must find the defendant not guilty, even though you may find that some other conspiracy existed or might have existed. Likewise, if the United States has failed to prove beyond a reasonable doubt that the defendant was a member of the conspiracy charged in Count 1 of the indictment, then you must find the defendant not guilty even though he may have been a member of some other conspiracy. But proof that defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict if the government has also proved to you beyond a reasonable doubt that he was a member of the conspiracy charged in Count 1 of the indictment. (Jury Instruction Number 13).

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CERTIFICATE OF COMPLIANCE, WORD PROCESSING PROGRAM AND VIRUS SCAN

I, the undersigned, hereby certify on the 2nd day of May 2002, that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief was typed using WordPerfect 9.0 software. A document information was run on the entire brief on this date and it reported: word count = 5257; line count = 612. The brief was typed using Times New Roman font, 14 pt.

In accordance with Eighth Circuit Local Rule 28A(c), I further certify that two diskettes labeled United States v. Greg Allen Johnson, Case no. 02-1356, were scanned for viruses by using the Inoculan for Windows NT scan software program. The Inoculan for Windows NT scan program reported no viruses were found on either diskette. One of these diskettes is being sent to the United States Court of Appeals for the Eighth Circuit, the other is being sent to J. Keith Rigg, counsel for the Appellant.

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CERTIFICATE OF SERVICE

I hereby certify that I did on this 2nd day of May 2002, mail two true and correct copies of the foregoing BRIEF OF APPELLEE by placing it in the U. S. mail, postage prepaid and addressed to the following:

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IN THE UNITED STATES COURT OF APPEALS
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06-2905
CRIMINAL

UNITED STATES OF AMERICA,

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v.

JAMES GRIFFIN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
HONORABLE ROBERT W. PRATT, CHIEF JUDGE

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

James Donald Griffin, Defendant-Appellant, appeals the judgment of the district court. Griffin entered a plea of guilty to one count of Receiving Child Pornography in violation of Title 18, United States Code, Section 2252(a)(2), and one count of Possessing Child Pornography in violation of Title 18, United States Code, Section 2252(a)(4)(B). The issues are as follows: 1) Whether Griffin should receive a five-level enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B) (now found at § 2G2.2(b)(3)(B)), and 2) Whether "[d]istribution other than distribution described" in U.S.S.G. § 2G2.2(b)(2)(A) through (D) did occur.

The United States does not believe that oral argument is necessary and respectfully suggests that the briefs and record adequately present the facts and legal arguments. If the Court grants oral argument, the United States requests permission to participate and believes that ten minutes per side would be sufficient for a full discussion of the issues.

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United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996)

United States v. Gunderson, 345 F.3d 471 (7th Cir. 2003)

United States v. Lyckman, 235 F.3d 234 (5th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001)

United States v. Oldham, 177 Fed. Appx. 842 (10th Cir. 2006)

STATEMENT OF THE CASE[1]

On June 14, 2005, the Defendant-Appellant, James Griffin was indicted by the federal grand jury for the Southern District of Iowa on one count of Receiving Child Pornography in violation of Title 18, United States Code, Section 2252(a)(2), and one count of Possessing Child Pornography in violation of Title 18, United States Code, Section 2252(a)(4)(B). (R. 2, 3). On November 18, 2005, Griffin pled guilty to both counts of the indictment before the Honorable Thomas J. Shields, Chief Magistrate Judge. (R. 46). There was no plea agreement between the government and Griffin. (R. 46). Griffin was sentenced on July 7, 2006, by the District Court, Honorable Robert W. Pratt, Chief Judge. (R. 64, 67). The issue presented at the sentencing hearing was: whether Griffin should receive a five-level enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B) (now found at § 2G2.2(b)(3)(B)). (ST. 3; R. 61, 62, 64). The district court applied the five-level distribution enhancement in accordance with the 2003 edition of the U.S.

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[1] In this brief,"PSR" refers to the Presentence Investigation Report, the report citations are followed by paragraph numbers; "ST." refers to the transcript of the sentencing hearing followed by a page number; "Appellant's Sentencing Exhibit" refers to exhibits submitted by the Defendant-Appellant during the sentencing hear on July 7, 2006, the exhibit citations are followed by a page number; "R." refers to the district court clerk's record, followed by the docket number of the referenced document; "Br." refers to the Defendant-Appellant's opening brief followed by a page number.

Sentencing Guidelines. (ST. 3-4; 48-49). Griffin received a downward departure from the sentencing guidelines. (ST. 49; R. 64, 67). His guideline range was 87 to 108 months; he received a sentence of 78 months. (ST. 49; R. 64, 67). Thereafter, Griffin filed a timely notice of appeal on July 14, 2006. (R. 70).

STATEMENT OF THE FACTS

The Denmark National Commissioner of Police executed a search warrant at the residence of Niesl Bo Jalsig in Denmark. (ST. 6; PSR ¶ 7). The Denmark Police performed a forensic analysis on Jalsig's computer using the program KaZAlyser and found that a partial file numbered 1061125803605562 7.dat on his computer contained child pornography, and that the IP address 12.217.134.123 was a source for the download of this file. (PSR ¶ 7). The IP address that was retrieved was then traced to Griffin who resides in Davenport, Iowa. (ST. 6-7; PSR ¶ 7). The KaZAlyser program is a program used to aid in the investigation process. (Appellant's Sentencing Exhibit 2, p. 2; R. 63, 65, 66). One of the most important functions of the KaZAlyser tool is to identify the source of a downloaded file. (Appellant's Sentencing Exhibit 2, p. 3; R. 63, 65, 66). KaZAlyser can retrieve the IP address and other identifying information from partially downloaded files. (Appellant's Sentencing Exhibit 2, p. 3; R.63, 65, 66).

A search warrant was executed on Griffin's residence on May 12, 2004. (PSR ¶ 8). Among the items seized were Griffin's computer and several CD-ROMs containing approximately 67 video clips of child pornography. (ST. 7, 27; PSR ¶¶ 8, 9). At the time of the execution of the search warrant, Griffin was interviewed and admitted being the primary user of the seized computer. (PSR ¶ 8). Griffin also

admitted that he had downloaded child pornography using the file-sharing site, KaZaA. (ST. 7; PSR ¶ 8). Griffin stated he understood KaZaA was a file-sharing site, and while he was able to download files from this site; others were able to upload files from his computer. (ST. 7; PSR ¶ 8). On a second, separate occasion, Griffin was interviewed and admitted to the pre-sentence investigator that he had downloaded both adult and child pornography using KaZaA, and that KaZaA let users exchange videos. (PSR ¶ 17).

Griffin was indicted on June 14, 2005, in the Southern District of Iowa for Receiving Child Pornography, a violation of 18 U.S.C. § 2252(a)(2) and Possession of Child Pornography, a violation of 18 U.S.C. § 2252(a)(4)(B). (R. 2, 3). Griffin pled guilty to the above violations without a plea agreement. (R. 46). Griffin was sentenced on July 7, 2006. (R. 64, 67; ST. 1). Griffin received a downward departure from the sentencing guidelines. (ST. 49; R. 67). Griffin's guideline range was 87 to 108 months; he received 78 months. (ST. 49; R. 67). Griffin objected to the five-level sentencing enhancement for distribution under U.S.S.G. § 2G2.2(b)(2)(B), given to him by the district court. (ST. 3).

The District Court, Honorable Robert W. Pratt, Chief Judge, heard testimony provided by the government regarding the means of distribution used by Griffin. (ST. 4-10, 13-14, 26-27). The government called Kevin Lang, an agent employed

with the Immigration and Customs Enforcement in its Public Safety Unit, which encompasses, among other things, child sex predators. (ST. 5). Agent Lang's employment duties include computer forensics and computer analysis. (ST. 5). Agent Lang testified to the operation of the file-sharing program, KaZaA. (ST. 5-34). He explained that "KaZaA is a peer-to-peer file-sharing program" that allows users to exchange files directly over the internet. (ST. 7).

By participating in file-sharing over KaZaA, a user establishes a shared folder on his or her respective computer that receives downloaded files and maintains those files, along with files added by the user, for upload by other users. (ST. 8, 9). These files are then registered with a "SuperNode," a stronger computer that databases the files available for upload, but does not store these files. (ST. 13). Agent Lang stated that a user is able to actively control the shared file, by adding other materials, and blocking other users from accessing files contained in the folder. (ST. 9, 10). He also acknowledged that a user would know if someone was uploading from their shared folder. (ST. 9). Agent Lang explained that a user would be aware of others uploading from his or her computer, due to a split screen showing files being downloaded by the user, as well as all files being uploaded from the user's computer by others. (ST.9). Lang pointed out that one feature of KaZaA is that in order to gain access to certain files, or better quality files, users must be

willing to share their files with others. (ST. 20). Lang testified that Griffin had "at least the one default shared folder" and that this folder "was available for sharing." (ST. 8). Lang testified to the contents of Griffin's shared folder having "over 20-some videos" with various titles. (ST.8). Some of these were indicative of child pornography. (ST. 8).

Agent Lang testified that when downloading from KaZaA, a file can be retrieved from multiple sources at the same time. (ST. 14). Griffin notes this process of "swarming downloads" in his brief. (Br. 3). Griffin goes on to point out that "[i]f the file is downloaded from multiple locations the manual claims there will be an entry for each remote person for whom the file is being downloaded and the last IP address of this user." (Br. 4). Griffin acknowledges that "[t]he manual notes that when the remote IP is reported this may be one of a number of sources." (Br. 4). Lang stated that in order for Jalsig to have downloaded the file in question and for it to be traceable to Griffin, it would have to have been on Griffin's computer at one time and available for upload from his shared folder. (ST. 16, 27). Lang explained that an IP address could be obtained because the file was only partially downloaded to Jalsig's computer, and that once a file has been completely downloaded the IP addresses are no longer recorded. (ST. 31). During the cross-examination of the witness the Court stated:

[D]istribution for the receipt or expectation of receipt of a thing of value, but not for pecuniary gain, means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. A thing of value means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the thing of value is the child pornography material received in exchange for other pornographic material bartered in consideration for the material received.

Now my understanding of peer-to-peer file sharing is that he, Mr. Griffin, obtained child pornography in exchange for others being able to obtain his child pornography in a shared file.

(ST. 29).

The Government acknowledges that there was some confusion about the reported date of the download of the partial file in question including a mistake in the report as to the day. (ST. 13, 14). However, Agent Lang testified that Griffin's computer appeared to be a source for at least part of the child pornography file uploaded to Jalsig's computer in Denmark, and that the computers had to have communicated given the presence of Griffin's IP address on Jalsig's computer. (ST. 11, 16, 27, 33).

The court took into account Griffin's use of KaZaA, and found that Griffin was distributing child pornography, within the definition of § 2G2.2(b)(2)(B) and applied the five-level sentencing enhancement. (ST. 48-49; R. 67). The district court found that according to *Imgrund*, "[y]ou only need an expectation, [of exchange] not an actual exchange" to qualify for the sentencing enhancement.

(R. 39) (quoting *United States v. Imgrund,* 208 F.3d 1070, 1072 (8th Cir. 2000)). The Court stated, "It seems to me the images on KaZaA that he made available via file sharing, doesn't that meet the definition of distribution?" (ST. 39). The Court further stated that, "[t]his wasn't a web site, this was a file-sharing program that he had with KaZaA that somebody in . . . Denmark got his IP address. That's the record, isn't it?" (ST. 40). The district court concluded sentencing through its discussion of the applicability of the five-level sentencing enhancement to Griffin:

> The Court finds the factual record, including the testimony here today, supports the finding of a distribution enhancement . . . . The Court's understanding, and the Court's reading of the presentence report, as well as the record here today, indicates that peer-to-peer file sharing, to quote the report, "is used in data communications to describe communications between two equals in a network without involving a central computer server. The KaZaA network is built upon several million users which are connected through the internet."
>
> She goes on to describe one who makes their files available, makes - - in return for that, gets the files of other, quote, users.
>
> The testimony of Mr. Lang was also helpful in explaining to me how Mr. Griffin accessed computer files of child pornography and distributed them by making them available by the KaZaA network.

(ST. 48-49).

SUMMARY OF THE ARGUMENT

The United States argues that Griffin properly received a five-level distribution enhancement, that being an enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B). (Nov. 5, 2003 edition).

Griffin's use of peer-to-peer file-sharing qualifies him for a five-level sentencing enhancement because this act meets the definition of distribution for non-pecuniary gain. Griffin's use of KaZaA to obtain and distribute child pornography raises his conduct beyond mere distribution. The nature of KaZaA and Griffin's understanding of the functions of this file-sharing program shows that Griffin understood that a trade, barter, or an exchange could be requested and would occur when he downloaded child pornography through KaZaA.

The United States contends that the argument applicable to Issue One, distribution for non-pecuniary gain, applies with equal force on the question of whether "[d]istribution other than distribution described" in U.S.S.G. § 2G2.2(b)(2)(A) through (D) did occur.

ARGUMENT

I. The district court properly found that Griffin should receive a five-level enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B). (Nov. 5, 2003 edition).

A. Standard of Review

"'The correct application of the guidelines is a question of law subject to *de novo* review,' while a 'factual determination of the sentencing court is reviewed under a clearly erroneous standard.'" *United States v. Tirado*, 313 F.3d 437, 440 (8th Cir. 2003) (quoting *United States v. Collins*, 104 F.3d 143, 144 (8th Cir. 1997)). In order for a court to determine reasonableness, it must review the district court's sentencing determination for abuse of discretion. *See United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. Haack*, 403 F.3d 997, 1002-1004 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 276 (2005). "We review the district court's factual findings for clear error and its interpretation and application of the guidelines *de novo*." *United States v. Vasquez-Garcia*, 449 F.3d 870, 872 (8th Cir. 2006).

"An abuse of discretion, on the other hand, can occur in three principle ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given

significant weight; and when all proper factors, and no improper ones, are considered, but the court in weighing those factors, commits a clear error of judgment." *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). "When a district court exercises its discretion based on an erroneous view of the law, it necessarily abuses its discretion." *United States v. Peterson*, 276 F.3d 432, 436 (8th Cir. 2002) (citing *United States v. Hasan,* 245 F.3d 682, 684 (8th Cir. 2001) (en banc)).

B. Argument

1. Distribution Enhancement for Non-Pecuniary Gain

Griffin was charged with Receiving Child Pornography under 18 U.S.C. § 2252(a)(2) and Possession of Child Pornography under 18 U.S.C. § 2252(a)(4)(B). Griffin contests any enhancements under the U.S. Sentencing Guidelines pertaining to the distribution of child pornography. However, the government's position is that Griffin's conduct warrants a distribution enhancement, that being an enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B) as found by the district court at the time of sentencing. U.S.S.G. § 2G2.2(b)(2)(B) (now codified § 2G2.2(b)(3)(B)) contains the relevant distribution enhancement: "If the offense involved . . . (B) Distribution for the receipt, or

expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels." The Application Notes for Section 2G2.2 provide guidance as to the meaning of these terms. "'Distribution' means any act, including production, transportation, and *possession with intent to distribute*, related to the transfer of material involving the sexual exploitation of a minor." U.S.S.G. § 2G2.2 Application Note 1 (Nov. 5, 2003 edition)(emphasis added).

> "Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

§ 2G2.2 Application Note 1 (Nov. 5, 2003 edition).

It is worth noting that the latest edition of the Guidelines has made an addition to Application Note 1. "Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant." § 2G2.2 Application Note 1 (Nov. 1, 2005 edition). Griffin argues that the use of peer-to-peer file-sharing does not qualify him for a five-level sentencing enhancement because this act does not meet the definition of distribution for non-pecuniary gain.

(Br. 11-15). Griffin cites *United States v. Imgrund*, 208 F.3d 1070 (8th Cir. 2000) and *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), *cert. denied*, 529 U.S. 1029 (2000) in support. That reliance is misplaced. Both of these cases will be addressed later in this brief.

Using the amended guidelines from 2000, the Second Circuit found that the dissemination of child pornography with the expectation of receiving even an intangible thing of value would trigger the five-level enhancement under § 2G2.2(b)(2)(B) (now codified as § 2G2.2(b)(3)(B)). *United States v. Maneri*, 353 F.3d 165, 168-69 (2d Cir. 2003). Section 2G2.2(b) has been amended several times since 2000. Currently, "distribution . . . not for pecuniary gain" is defined as follows:

> [A]ny transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

§ 2G2.2(b)(3)(B) Application Note 1 (Nov. 1, 2005 edition).

This language mirrors the language in the 2003 edition of the guidelines, applying to Griffin. He was engaged in transactions or exchanges for "things of value," i.e., pornographic images of children.

The Eighth Circuit in *Horn* held that "'distribution' includes, but is not limited to, transactions for pecuniary gain. . . . If Congress had intended § 2G2.2(b)(2) to apply only to distribution for pecuniary gain, it could easily have said so directly. The purpose of the enhancement for distribution, we believe, is to increase the sentence of those defendants who did not merely receive child pornography but also disseminated it." *Horn*, 187 F.3d at 791(citations omitted).

Griffin attempts to distinguish *Horn*. (Br. 11). In *Horn*, the defendant answered an advertisement posted by law enforcement that contained code words that would appeal to "traffickers of child pornography." *Horn*, 187 F.3d at 785. The defendant expressed to the agent an interest to meet and exchange "video tapes 'on all subjects from the tame to the taboo.'" *Id.* ("taboo" referring to child pornography). He began the process of trading by sending the officer two videotapes containing no discernable child pornography. *Id.* The officer then offered to send the defendant child pornography on two separate occasions, and on the last occasion the defendant reminded the officer "that he was still waiting for tapes in exchange for the two that he had sent" that officer. *Id.* Like the defendant in *Horn*, Griffin was engaged in the trade of child pornography. He downloaded child pornography from KaZaA and maintained a shared folder from which others could access and upload files. (ST. 7-8, PSR ¶ 8). Griffin apparently claims that

he was unaware of the fact that trade was occurring on his computer (Br. 12-13), but his own statements speak to the contrary. He indicated to law enforcement agents during the execution of the search warrant that he understood that KaZaA was a file-sharing site and that others were able to upload files from his computer. (ST.7, PSR ¶ 8). Of course, these exchanges clearly appear to have taken place as evidenced by the child pornography on the Jalsig computer which ultimately led back to Griffin, the considerable child pornography found in his possession during execution of the search warrant, as well as the items which had existed in his shared folder.

The Seventh Circuit addressed this issue in *United States v. Brown*, 333 F.3d 850 (7th Cir. 2003), *cert. denied*, 540 U.S. 1163 (2004). In *Brown*, the defendant engaged in a series of on-line conversations with an individual he believed to be a fifteen-year-old girl, but who was in reality a New York State Police Officer. *Id.* at 851. He sent the officer images of minors engaged in sexual activity and these transmissions resulted in his arrest. *Id.* at 851-52. Defendant's attorney admitted at sentencing that Brown had been trading pornographic images of children, but not for commercial purposes. *Id.* at 852. The defendant received a five-level sentencing enhancement for distribution under § 2G2.2(b)(2) of the 1998 Guidelines. *Id.* at 852-53. The defendant objected to the five-level sentencing enhancement because

he claimed that he had not exchanged pornographic images for any commercial purpose, but had only been "trading" these images. *Id.* at 853. The *Brown* Court, quoting its precedent in *Black*, stated that the "description of 'distribution' in Application Note 1 refers to 'pecuniary gain' but also recognized that 'pecuniary gain is a broad concept itself, and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration.'" *Id.* at 853 (quoting *United States v. Black*, 116 F.3d 198, 203 (7th Cir. 1997)). The *Brown* Court further held that, "[t]his broad interpretation–that 'distribution' requires an expectation of something valuable in return–is an entirely reasonable interpretation of § 2G2.2(b)(2)." *Brown*, 333 F.3d at 853. It stated that, "[t]o decide otherwise, and limit its application to cases involving an exchange of money, would miss a great deal of economic activity that takes place through trades, barter, and other transactions." *Id.* at 853-854.

In *United States v. Kimbrough*, the Fifth Circuit held that the defendant's action of posting child pornography on a bulletin board system, a system which was "designed to distribute and receive files," constituted distribution for the purposes of the five-level enhancement even if there was no evidence that the defendant had engaged in any actual commercial distribution of child pornography. *United States v. Kimbrough*, 69 F.3d 723, 734-735 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157

(1996). Griffin admitted that he understood KaZaA was a file-sharing system, that he used it to download child pornography and that others could upload images from his computer. (ST. 7; PSR ¶¶ 8, 17).

In *United States v. Gunderson*, the Seventh Circuit rejected the defendant's claim that he did not qualify for a distribution enhancement because his "computer automatically swapped files with other computers, and because he never received money from the people accessing his illegal images." *United States v. Gunderson*, 345 F.3d 471, 472 (7th Cir. 2003). The defendant traded files with individuals after they had met his requirement of uploading images to his computer. *Id.* at 473. The court held that "these types of swaps, barters, and in-kind transactions are covered under § 2G2.2(b)(2)." *Id.* at 473 (citing *Black*, 116 F.3d at 202-203). The court stated that "Gunderson received valuable consideration from each of the persons who downloaded his illegal images because they could access his files only after they uploaded images to his hard drive." *Gunderson*, 345 F.3d at 473. The court held, "the fact that his computer traded files automatically is irrelevant: Gunderson is the person who programmed his computer to trade files in this manner." *Id.*

The Fifth Circuit has held that the "[defendant's] 'trading' of pornographic images falls within the ambit of 'distribution.'" *United States v. Lyckman*, 235 F.3d 234, 240 (5th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001). The court went further

to state that, "even those courts that have defined 'distribution' to require 'pecuniary gain' have recognized that 'pecuniary gain' is itself an elastic concept and does not exclude the possibility of swaps, barter, and in kind transactions." *Id.* at 240-41 (citing *United States v. Laney*, 189 F.3d 954, 959-961 (9th Cir. 1999); *Black*, 116 F.3d at 202-203).

2. *Imgrund's* Purely Gratuitous Dissemination

There had previously been a split in the circuits "as to whether purely gratuitous dissemination of child pornography qualifies as 'distribution.'" *United States v. Simmonds*, 262 F.3d 468, 471 (5th Cir. 2001). The Eighth Circuit had concluded that "purely gratuitous dissemination . . . will not trigger the § 2G2.2(b) [now expanded and codified as § 2G2.2(b)(3)(A)-(F)] enhancement for distribution." *United States v. Imgrund*, 208 F.3d 1070, 1072 (8th Cir. 2000). However, Griffin's reliance and emphasis on *Imgrund* is misplaced. In *Imgrund*, the defendant sent an undercover agent unsolicited images of child pornography over the internet. *Id.* at 1071. The Eighth Circuit remanded for reconsideration, noting that:

> The court should apply the § 2G2.2(b) enhancement only if the court is persuaded that the government has met its burden of demonstrating [Defendant's] expectation of receiving pornographic images in exchange for the images he sent the agent. If, on the other hand, the court finds that [Defendant's] dissemination of the images was

> achieved without [Defendant's] understanding that a trade, barter or exchange of images was to be accomplished between himself and the agent, then the court should conclude that the five-level sentencing enhancement is inappropriate for the facts of this case.

Id. at 1072-73. Thus, if Griffin had gratuitously disseminated the images, the Eighth Circuit would not have applied the enhancement under the *Imgrund* standard. As noted earlier, Griffin was well aware of the exchange mechanism of KaZaA and used it to obtain and distribute child pornography. In addition, since the Eighth Circuit's ruling in *Imgrund*, the Guidelines have been amended and courts have further considered the issue.

Section 2G2.2(b) has been amended to expand and clarify "distribution" by outlining five new subdivisions of distribution, with one of these subdivisions covering "distribution other than distribution [already] described . . . ." § 2G2.2(b)(2)(E) (now codified as § 2G2.2(b)(3)(F)). Thus, § 2G2.2(b)(2)(E), now seems to address the issue of gratuitous dissemination. The Guidelines call for various enhancements for distribution for pecuniary gain, non-pecuniary gain, and distribution to minors. § 2G2.2(b)(2)(A)-(E) (Nov. 5, 2003 edition) (now expanded and codified as § 2G2.2(b)(3)(A)-(F)).

The Tenth Circuit has recently addressed the issue of expectation in the context of supposedly "gratuitous" transfers in an unpublished opinion, *United*

States v. Oldham, No. 05-1406, 2006 WL 1174508 (10th Cir. May 4, 2006) (unpublished), 177 Fed. Appx. 842 (10th Cir. 2006) (opinion attached). The defendant was the owner/moderator of at least two Yahoo! Group internet websites or forums dedicated to the exchange of child pornography. *Id.* at **1/*844. The defendant indicated that he had a rule that anyone who wished to join his Yahoo! Group needed to post child pornography, and that he had uploaded pornographic images of children to "stimulate" members of his group to reciprocate. *Id.* The defendant objected to a five-level sentencing enhancement for distribution, stating that this enhancement required that he have an "agreement with someone else to exchange child pornography . . . that the defendant must have an expectation of a direct quid pro quo." *Id.* at **3/*846. The Court disagreed with the defendant's interpretation, and quoting the Second Circuit, held that distribution, "may apply notwithstanding the absence of a *quid pro quo* agreement between the distributor and the recipient of child pornography." *Id.* at **4/*846 (citing *Maneri*, 353 F.3d at 170). The Court further noted that, "the provision is implicated if the distributor expects--rather than just hopes--to receive a thing of value." *Id.* at **4/*846 (citing *Maneri*, 353 F.3d at 168). The Court held that, "the enhancement applies 'when a defendant distributes child pornography in anticipation of, or while reasonably believing in the possibility of, the receipt of a thing of value.'" *Id.* at **4.*846-47

(citing *Maneri*, 353 F.3d at 169)). The Court held that the defendant's actions constituted distribution because the defendant had "an 'expectation' that he will receive child pornography in exchange for his distribution of child pornography, even in the absence of a specific agreement with another person, if he anticipates or reasonably believes that the recipients of his distribution will reciprocate." *Id.* at **4/*847. Griffin received child pornography from KaZaA, a site he admittedly understood to be a file-sharing site. (ST. 7; PSR ¶¶ 8, 17). By installing the KaZaA software, a user creates a shared file; such a file did exist on Griffin's computer. (ST. 8, 9). See *United States v. Sewell,* 457 F.3d 841, 842 (8th Cir. 2006) for a good description of the operation of KaZaA. Agent Lang pointed out that in order for a user to receive access to certain files, or better quality files, he would have to make files available for upload by other users. (ST. 20). It seems clear that Griffin did so (ST. 8-9), and that, as noted, he understood the process. Griffin also told agents that he understood that people he did not know could upload child pornography from his computer. (ST.7; PSR ¶ 8). Given this, the government finds it hard to believe that Griffin did not understand that a trade, barter, or at least an exchange would occur when he downloaded child pornography through KaZaA.

3. Griffin's Sentence Was Reasonable

The standard of review for reasonableness was recently spelled out in this Court's *Gatewood* decision, as follows:

> When the district court has correctly determined the guidelines sentencing range, ... we review the resulting sentence for reasonableness. This standard is akin to our traditional review for abuse of discretion. Because the Guidelines are fashioned taking the other § 3553(a) factors into account and are the product of years of careful study, the guidelines sentencing range, though advisory, is presumed reasonable. See *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). When the district court has varied from the guidelines range based upon its analysis of the other § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005); *see Haack*, 403 F.3d at 1004. [*United States v. Haack*, 403 F.3d 997 (8th Cir. 2005)] A "range of reasonableness" is within the court's discretion. *United States v. Saenz*, 428 F.3d 1159, 1165 (8th Cir. 2005).

United States v. Gatewood, 438 F.3d 894, 896 (8th Cir. 2006).

The United States contends that the district court gave appropriate weight to the factors in 18 U.S.C. § 3553(a) in fashioning the ultimate sentence for Griffin and that the resulting sentence meets the standard articulated in *Gatewood* regarding reasonableness. Therefore, remand is unnecessary.

4. Whether "Distribution other than distribution described" in U.S.S.G. § 2G2.2(b)(2)(A) through (D) did occur

The government respectfully submits that the argument presented for Issue One applies with equal force on the question of whether "Distribution other than distribution described" in U.S.S.G. § 2G2.2(b)(2)(A) through (D) did occur.

CONCLUSION

For the reasons stated above, the government asks that this Court affirm the district court's application of the five-level enhancement for "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" pursuant to U.S.S.G. § 2G2.2(b)(2)(B).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,527 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE AND VIRUS SCAN

I hereby certify that I did on this 6th day of October 2006, mail two true and correct copies of the foregoing BRIEF OF APPELLEE by placing it in the U. S. mail, postage prepaid and addressed to the following:

John O. Moeller
601 Brady Street, #303
Davenport, IA 52803-5251

I further certify that two diskettes labeled United States v. James Griffin, Appellate No. 06-2905, were scanned for viruses by using the Trend Micro OfficeScan Client for Windows scan software program, which reported no viruses were found on either diskette. One of these diskettes is being sent to the United States Court of Appeals for the Eighth Circuit, and the other is being sent to the counsel listed above.

Susan Koranda
Legal Assistant, U. S. Attorney's Office

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 3:08-cr-3
	)	
v.	)	
	)	**GOVERNMENT'S RESISTANCE**
PAUL WARREN WELLS,	)	**TO DEFENDANT'S MOTION TO**
	)	**SUPPRESS.**
Defendant.	)	
	)	

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby resists defendant's Motion to Suppress filed on May 6, 2008 for the following reasons:

1. Under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), defendant has failed to make a substantial preliminary showing sufficient to warrant an hearing.

2. In order to be entitled to a *Franks* hearing, defendant must make a substantial preliminary showing that a false statement was knowingly and intentionally made, or with reckless disregard for the truth, and that the affidavit's remaining content was insufficient to establish probable cause. *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995)(citations omitted). For omitted facts, defendant must show that the facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and that the affidavit supplemented with the omitted information could not support probable cause. *Id*.(citations omitted). There must be allegations accompanied by some offer of proof. *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir.

1987)(citation omitted). The substantial preliminary showing threshold is not lightly met. *United States v. Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995)(citation omitted).

3. "Search warrant '[a]pplications and affidavits should be read with common sense and not in a grudging, hyper-technical fashion.'" *United States v. Goodson*, 165 F.3d 610, 613 (8th Cir. 1999)(quoting *Walden v. Carmack*, 156 F.3d 861, 870 (8th Cir. 1998)).

4. Defendant has failed to make the requisite substantial preliminary showing and offer of proof.

5. In addition, the government contends that the evidence in question was legitimately obtained pursuant to a valid consent to search. Officers may clearly search subject to a voluntary consent. *United States v. Almendares*, 397 F.3d 653, 660-61 (8th Cir. 2005). Here, there is no allegation or indication that the consent was anything other than voluntary.

6. Closely related to the above is the inevitable discovery exception. The Eighth Circuit has stated that "[t]o succeed under the inevitable-discovery exception to the exclusionary rule, the government must prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." United States v. Connor, 127 F.3d 663, 667-68 (8th Cir. 1997)(citing *United States v. Wilson*, 36 F.3d 1298, 1304 (5th Cir. 1994)). Here, officers were legitimately investigating a possible drug trafficking angle to this home invasion. As part of that investigation, they were legitimately searching the computer for drug-related material. This led to the inevitable discovery of child pornography

7. Depending upon the outcome of defendant's *Franks* claim, the Government would note that it would reserve the right to make a *Leon* good faith exception argument pursuant to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677(1984) and it's progeny.

8. For the above reasons, defendant is not entitled to a Franks hearing, nor is he entitled to an evidentiary hearing on the Motion to Suppress.

9. The Government will file a brief along with this Resistance.

WHEREFORE, the United States respectfully requests that this Court deny defendant's Motion to Suppress. The Government would further request that, if the Court determines that the defendant is entitled to a full Franks hearing or suppression hearing, the Government be given adequate notice and opportunity to secure the appearance of the requisite witnesses.

Respectfully submitted,

Matthew G. Whitaker
United States Attorney

By: /s/ Joel W. Barrows

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Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon all counsel of record and *pro se* parties by electronic service by filing this document with the Clerk of Court using the ECF system on May 20, 2008, which will send notification to the following:

David R. Treimer
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/s/ Joel W. Barrows
Joel W. Barrows
United States Attorney's Office
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. PAUL WARREN WELLS, Defendant.	))))))))))	Criminal No. 3:08-cr-3 **BRIEF IN SUPPORT OF GOVERNMENT'S RESISTANCE TO DEFENDANT'S MOTION TO SUPPRESS**

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby submits this Brief in Support of Government's Resistance to Defendant's Motion to Suppress for the following reasons:

INTRODUCTION

On May 6, 2008, the defendant filed a document entitled Motion to Suppress, which appears to request a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), to determine if evidence seized pursuant to a search warrant should be suppressed. This was supplemented by a brief and offer of proof filed on May 13, 2008, which clarified this request. The allegations in defendant's Motion to Suppress fail to make a substantial preliminary showing sufficient to warrant a hearing under *Franks*. In addition, the government contends that the evidence in question was legitimately obtained pursuant to a valid consent to search and that the inevitable discovery doctrine applies.

ARGUMENT

In order to be entitled to a *Franks* hearing, defendant must make a substantial preliminary showing that a false statement was knowingly and intentionally made, or with reckless disregard for the truth, and that the affidavit's remaining content was insufficient to establish probable cause. *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995)(citations omitted). For omitted facts, defendant must show that the facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and that the affidavit supplemented with the omitted information could not support probable cause. *Id*.(citations omitted). There must be allegations accompanied by some offer of proof. *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir. 1987)(citation omitted). The substantial preliminary showing threshold is not lightly met. *United States v. Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995)(citation omitted). "If the defendant presents no proof that the affiant lied or recklessly disregarded the truth, the court is not required to conduct a hearing." *United States v. Gleich*, 397 F.3d 608, 613 (8th Cir. 2005)(citing *United States v. Mathison*, 157 F.3d 541, 548 (8th Cir. 1998).

"Search warrant '[a]pplications and affidavits should be read with common sense and not in a grudging, hyper-technical fashion.'" *United States v. Goodson*, 165 F.3d 610, 613 (8th Cir. 1999)(quoting *Walden v. Carmack*, 156 F.3d 861, 870 (8th Cir. 1998)). In *Goodson*, the Eighth Circuit found that defendant was not entitled to a *Franks* hearing where the challenge was essentially to probable cause, and there was not a substantial preliminary showing that the affiant included a false or reckless statement or omission, and that the false or reckless statement or omission was necessary to the probable cause determination. *Goodson,* 165 F.3d at 613.

In *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986), the Eighth Circuit explained that some courts have stated "that recklessness may be inferred from the fact of omission of information from the affidavit." The Court went on to note that "[s]uch an inference, however, is warranted only when the material omitted would have been 'clearly critical' to the finding of probable cause." *Id*.(quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980).

The Eighth Circuit in *United States v. Lueth* emphasized that in regards to the second element of the *Franks* omitted information analysis, "suppression is warranted *only* if the affidavit as supplemented by the omitted material *could not* have supported the existence of probable cause." *Lueth*, 807 F.2d 719, 726 (8th Cir. 1986)(citing Reivich, 793 F.2d at 962). "Our touchstone is 'probability,' and not 'certainty,' and one hundred percent reliability on the part of [an informant] was not crucial to the issuance of the warrant." *Lueth*, 807 F.2d at 727 (citing *Reivich*, 793 F.2d at 963). In *Reivich*, the Eighth Circuit cautioned against finding this second element met after concluding only that the information *might* have affected the probable cause determination. *Reivich*, 793 F.2d at 962-963. In order to find the second element, a district court must find that the supplemented warrant *could not* have supported the existence of probable cause. *Id*. at 962.

In this case defendant's allegations primarily concern the conduct of Officer Denger. It is important to note that Officer Denger was not the affiant on the search warrant in question, it was Officer Tubbs. The entirety of Attachment A to the search warrant, the affidavit, reads as follows:

> The suspect in this case is Paul Warren Wells M/W 02-07-67. He is a registered sex offender. He was convicted for having sex with a

> girl under age of 16. While officer were serving a consent to search on the suspect's address they saw child pornography on the computer's display. The computer monitor was sitting on the (sic) a table.

There has been no showing by the defendant that this statement is false or that it omits facts that could alter a probable cause determination. Indeed, it appears that this statement is correct. The defendant's motion and supporting documents question how the initial discovery of child pornography occurred. Subsequent investigation has shown that some aspects of Officer Denger's *report* dealing with how this discovery occurred are inaccurate and that, at the time, his fellow officers, including Officer Tubbs, may have been operating on the basis of those inaccuracies. However, this is immaterial. Officer Denger would testify that he viewed child pornography on the computer while searching said computer for evidence related to drug trafficking This search for drug trafficking-related material was done pursuant to a valid consent to search. Officer Denger would further testify that he was not searching for child pornography. Hence, the relevant language, "While officer were serving a consent to search on the suspect's address they saw child pornography on the computer's display. The computer monitor was sitting on the (sic) a table" is accurate.

Officers initially responded to the Wells' residence to investigate a home invasion/burglary. They formed the collective opinion that the home invasion could be drug related. Because of this, a consent to search was obtained. There appears to be no dispute that the defendant's wife signed a valid consent to search. The defendant, in fact, notes this consent in paragraph 3 of his motion to suppress. The precise language of what was authorized under that consent to search is important. In relevant part, it authorizes officers to search for "Illegal Drugs, Drug Paraphernalia, Pipes, Scales, Bagies (sic), Large Amounts of Cash, Logs, Notebooks,

Ledgers, Records Related to drug sales/trafficking."

It scarcely warrants mentioning, but officers may clearly search subject to a voluntary consent. *United States v. Almendares*, 397 F.3d 653, 660-61 (8th Cir. 2005). There is no allegation that the consent t search in this case was anything other than voluntary. Obviously, the scope of the search may not exceed the consent given. *United States v. Tirado*, 313 F.3d 437, 440 (8th Cir. 2002). There is no indication that this occurred. Officer Denger would testify that he searched the computer because, based on his training and experience, drug dealers often take pictures of themselves and their accomplices with drugs, drug paraphernalia and cash. He would also testify that he searched the computer for ledgers and records related to drug trafficking. These searches would clearly seem to be covered by the express terms of the consent to search. There is no indication that the computer was declared off-limits defendant's wife or that it password protected. There is no indication that there was an objection to the search of the computer when it occurred.

Closely related to the above is the inevitable discovery exception. The Eighth Circuit has stated that "[t]o succeed under the inevitable-discovery exception to the exclusionary rule, the government must prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." United States v. Connor, 127 F.3d 663, 667-68 (8th Cir. 1997)(citing *United States v. Wilson*, 36 F.3d 1298, 1304 (5th Cir. 1994)). Here, officers were legitimately investigating a possible drug trafficking angle to this home invasion. As part of that investigation, they were legitimately searching the computer

for drug-related material. This led to the inevitable discovery of child pornography.

Depending upon the outcome of defendant's *Franks* claim, the Government would note that it would reserve the right to make a *Leon* good faith exception argument pursuant to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677(1984) and it's progeny.

CONCLUSION

For the above reasons, defendant is not entitled to a *Franks* hearing, nor is he entitled to an evidentiary hearing on the Motion to Suppress. The United States respectfully requests that this Court deny defendant's Motion to Suppress.

Respectfully submitted,

Matthew G. Whitaker
United States Attorney

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Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon all counsel of record and *pro se* parties by electronic service by filing this document with the Clerk of Court using the ECF system on May 20, 2008, which will send notification to the following:

David R. Treimer
601 Brady Street, Suite 211
Davenport, IA 52803-5251

/s/ Joel W. Barrows
Joel W. Barrows
United States Attorney's Office
Southern District of Iowa

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. **LARRY DEAN BELL**, Defendant.	Criminal No. FECR360749
STATE OF IOWA, Plaintiff, vs. **KENDRICK E. SAMPSON**, Defendant.	Criminal No. FECR360740 **RULING ON DEFENDANTS' MOTION TO SUPPRESS**

On August 26, 2014, Defendants' Motion to Suppress came before the Court for hearing. The State of Iowa was represented by Assistant County Attorney Will R. Ripley. Defendant Larry Dean Bell was present and represented by Attorney Brenda Drew-Peeples. Defendant Kendrick E. Sampson was present and represented by Attorney Russell A. Dircks. After reviewing counsels' filings, listening to the testimony of the witnesses, and considering the applicable law, the Court enters the following ruling on Defendants' Motion to Suppress.

FINDINGS OF FACT

The Court finds the following facts:

Davenport Police Officer Matthew Lovelady, the State's first witness, has been with the Davenport Police Department for four years. He is currently assigned to the N.E.T.S. unit, which focuses on servicing high-crime areas. His shift is 6:00 P.M. to 2:00 A.M.

On April 4, 2014, Officer Lovelady was on duty with his partner, Matthew Bowman. The two officers were parked in a black, unmarked squad car in the area of Second and Myrtle streets, which Officer Lovelady described as a high-crime area involving narcotics activity, prostitution, stabbings, and shootings. He described the unmarked squad car as the same model as marked squad cars. The squad car was a N.E.T.S. unit vehicle with a spotlight and an interior light bar.

At approximately 8:45 P.M., the officers were backed into a parking space across the street from ATC liquor store looking straight ahead at the ATC parking lot. The only vehicle in the lot at that time was a white pickup truck with a driver as the sole occupant. A conversion van then entered the lot. The van stopped, did a three-point turn, and backed in next to the pickup so that the drivers' windows were aligned across from each other. According to Officer Lovelady, the van could have exited the lot from its position, but the pickup would have had to back up in order to exit.

Officers Lovelady and Bowman continued their surveillance of the two vehicles. Officer Lovelady testified that based on his training and experience, the situation was indicative of a hand-to-hand narcotics transaction. He testified that the passenger in the van went to the rear interior of the van on several occasions and used a flashlight or lighter to look around. He said this occurred approximately three times. He also witnessed the driver light up an object three times. He could not tell what it was the driver was lighting. He further stated that he did not see a hand-to-hand transaction. He would not have been able to see such a transaction because the van partially blocked his view of the pickup. He and Officer Bowman observed all of this over the course of 15 to 20 minutes. Eventually, the van moved 15 to 20 yards forward and re-parked. A few minutes later, the pickup backed up and left the lot. At approximately the same time, the

passenger in the van exited the van and went into the liquor store. Officer Lovelady testified that at that point, the two officers decided to move on the suspicious van. He again testified that all of the van's activity was indicative of a narcotics transaction.

The passenger was in the liquor store for approximately five minutes. Once the passenger came out of the liquor store and re-entered the van, Officers Lovelady and Bowman pulled in behind the van. According to Officer Lovelady, two other N.E.T.S. units arrived around the van at approximately the same time. He did not recall if the light bars in the unmarked squad cars were turned on. One officer used a spotlight. Officer Lovelady testified that he exited his squad car and approached the passenger side of the van with two other officers. All officers were in fully identifiable police uniforms. He saw the passenger of the van turn to his left and make a furtive movement toward the center console near the area behind the passenger seat. The officers requested that the occupants of the van exit the vehicle. Defendant Kendrick Sampson was identified as the passenger. Defendant Larry Bell was identified as the driver.

Officer Lovelady testified that Officer Antle, a K-9 officer, had arrived on the scene. Officer Antle informed Officer Lovelady that his dog had hit on the van. The officers conducted a search of the van finding a Crown Royal bag containing 33 baggies of suspected marijuana behind the front seat passenger area near the center console. The officers also found a glass pipe in the back of the van. Officer Lovelady also testified that officers located what he called a "Chor Boy", which he described as a wiry substance that is used in the pipe.

On cross-examination, Officer Lovelady confirmed that on the approach to the van he and Officer Bowman were in a N.E.T.S. vehicle. Another N.E.T.S. vehicle pulled up to the van at the same time Officer Lovelady exited his vehicle. A third N.E.T.S. vehicle arrived within seconds. Officer Antle was in the third vehicle. According to Officer Lovelady, he, Officer Fury,

and Officer Farley all drew their weapons. In his opinion, the driver and passenger were not free to drive off at this point. Subsequently, Mr. Bell was placed in a squad car. When Mr. Bell was in the squad car, he was not free to leave.

Officer Lovelady testified that he could tell Mr. Bell had been speaking to the individual in the pickup, but could not tell if anything passed between them. He acknowledged that he did not see Mr. Bell go back and forth in the van. He also acknowledged that the passenger could have been looking for something in the back of the van. He stated that the van was blocking his view of the pickup while the two vehicles were side by side, but that he could see the driver of the van turning and speaking to someone in the pickup. He could not see what Mr. Bell or the driver of the pickup were smoking. They could have been smoking cigarettes. He acknowledged that there was no evidence that it was anything other than cigarettes. He did not see Mr. Sampson ever hand anything to Mr. Bell. He testified that it was suspicious when the pickup drove off, but that he had not observed any illegal activity. When the van moved forward, it was closer to the liquor store.

Finally, Officer Lovelady testified that as he approached the van, Mr. Sampson was moving to his left. Officers Farley and Fury were ahead of him when they approached the van. Officer Lovelady focused on the rear of the van. He stated that he had his gun drawn when Mr. Sampson was asked to exit the vehicle. Mr. Sampson was then placed in a squad car.

Officer Seth Farley, the State's next witness, has been with the Davenport Police Department for over eight years. He is a corporal in the N.E.T.S. unit and his current assignment with the unit will be approximately one year in November. He also had a previous assignment with the N.E.T.S. unit for approximately two years.

On April 4, 2014, Officer Farley was riding with Officer Fury when they responded to

the ATC liquor store. This response led to the arrest of Mr. Bell and Mr. Sampson. During this response, Officer Fury was driving. The officers overheard a call for assistance based on the observation of possible narcotics activity in the parking lot of the liquor store.

When the officers first arrived, they parked their vehicle at an angle off of the rear passenger side of the van. They immediately shined a spotlight on the passenger area. All officers were wearing uniforms. Officer Farley testified that as soon as the spotlight was shined on the vehicle, he saw Mr. Sampson reach around to the back of his seat to the left. He testified that based on his training and experience, this indicated Mr. Sampson was hiding or concealing something, or grabbing a weapon. He testified that he then drew his weapon and pointed it at the front seat passenger.

Officer Farley testified that most people in Davenport know that their unmarked units are, in fact, squad cars. He testified that this was a high-crime area. He stated that when they moved to the passenger door, his weapon was pointed at Mr. Sampson. Officer Fury opened the passenger door. Both Mr. Bell and Mr. Sampson were told to exit the van.

On cross-examination, Officer Farley testified that when they approached the van with guns drawn, both Mr. Bell and Mr. Sampson were told to raise their hands. He testified that when their guns were drawn, Mr. Bell and Mr. Sampson were not free to leave. He also testified that the decision to approach the van was made before he and Officer Fury arrived.

Officer Danny Antle, the State's final witness, has been with the Davenport Police Department for seven years. Previous to this, he was with the Muscatine Police Department for six years. Officer Antle testified that he has been to two separate K-9 schools. His current K-9 partner is Yari. In total, he has spent six years with a K-9 partner, two of these while with the Muscatine Police Department. Yari has been his partner for four years. Officer Antle testified

that his N.E.T.S. unit vehicle includes an aluminum K-9 transport in the back seat.

Officer Antle also testified that he responded to the area because the officers on scene requested a K-9. In addition to Yari, Officer Grothus was also in the vehicle. When they arrived, he positioned his vehicle on the driver's side of the van. The officers present asked Officer Antle if Yari could do a sniff around the van. Officer Antle told them yes, but only if the driver and passenger were removed from the vehicle. It was Officer Antle's testimony that both Mr. Bell and Mr. Sampson were still in the vehicle when he arrived.

Once Mr. Bell and Mr. Sampson were removed from the vehicle, Yari began to perform his sniff of the vehicle. Officer Antle testified that the driver's side door was left open. Yari sniffed inside the door and then had a change of behavior. Yari then proceeded around the back of the van and eventually to the rear passenger bumper. He also had a change of behavior here. The passenger door was also left open. Yari sniffed there as well. Yari put his paws on the front floor board in the passenger area and then sat. According to Officer Antle, this meant that Yari was trying to get closer to the target odor. The sit is a final response indicating the presence of narcotics. He testified that Yari's changes of behavior indicated that he smelled narcotics. Yari was trained to smell marijuana. Officer Antle testified that based on his training and experience, Yari had smelled a narcotic odor. He also testified that after the final alert by Yari, he opened the side door of the van to allow Yari to perform an interior search. Yari indicated on a Crown Royal bag and sat. According to Officer Antle, this was a final response indicating a narcotic odor. Marijuana was found in the Crown Royal bag.

On cross-examination, Officer Antle testified the two other N.E.T.S. vehicles were there when he arrived. The officers had already approached the van. According to Officer Antle, Mr. Bell and Mr. Sampson were still in the van when he arrived. He could not recall if the individuals

in the van had their hands up. He did not pull his weapon. He did not recall who opened the doors to the van, but acknowledged that it could have been the other officers.

The Court finds the testimony of the officers was credible and, indeed, candid. The officers' belief that the behavior of the van and its occupants was suspicious and indicative of activity involving narcotics was both honest and, in fact, correct. However, the question remains whether the officers' observations were sufficient to support the reasonable suspicion necessary to perform a *Terry* stop on the defendants prior to the officers' seizure of the defendants and search of the defendants' vehicle.

CONCLUSIONS OF LAW

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…." U.S. Const. amend. IV. Similarly, Iowa's Constitution also protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches…." Iowa Const. art. I, § 8. "Searches and seizures conducted without a warrant are per se unreasonable unless they fall within one of the exceptions to the Fourth Amendment's warrant requirement." *State v. Bradford*, 620 N.W.2d 503, 506 (Iowa 2000). However, in order for the Fourth Amendment to apply, there must first be a seizure. *State v. Wilkes*, 756 N.W.2d 838, 842 (Iowa 2008).

"Whether a 'seizure' occurred is determined by the totality of the circumstances." *Id.* In *State v. Harlan*, the Iowa Supreme Court held that an officer's initial observations of an individual upon walking up to the individual's parked vehicle is not a seizure. 301 N.W.2d 717, 720 (Iowa 1981). "The officer, like any other citizen, had a right to look into the car." *Id.* at 720. However, a seizure may occur where the officers take hold of a suspect, the officers draw their

weapons, the officers use language or tone of voice indicating that compliance is required, the officers use sirens or lights, or the stop is performed with many officers present. *Id.* at 719-20.

Not all seizures violate the Fourth Amendment. An officer, upon a standard of "reasonable suspicion" of criminal activity, may stop, briefly detain, or frisk an individual for the purposes of investigation. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The more restrictive "probable cause" standard of the Fourth Amendment does not apply. *Id.* The officer must have "reasonable cause to believe a crime may have occurred or criminal activity is afoot." *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993). "Reasonableness of a stop is measured by whether the facts available to the officer at the moment of the stop would warrant a person of reasonable caution to believe the action taken was appropriate." *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). An investigatory stop "is constitutionally permissible only if the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot." *State v. Cooley*, 229 N.W.2d 755, 760 (Iowa 1975). "Circumstances evoking mere suspicion or curiosity will not suffice." *Id.* The test is whether "articulable objective facts were available to the officer to justify the stop." *State v. Stevens*, 394 N.W.2d 388, 391 (Iowa 1986). "While an unparticularized suspicion will not do, an officer may make an investigatory stop with 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" *State v. Richardson*, 501 N.W.2d 495, 496-97 (Iowa 1993).

Specifically, reasonable suspicion arises where an individual is present in an area of illegal activity and attempts to leave a scene undetected when officers arrive. *State v. Cline*, 617 N.W.2d 277, 283 (Iowa 2000) *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001). Reasonable suspicion justifying a protective search for weapons arises when the passenger of car fails to provide identification and makes furtive movements towards

the area under the front seat. *State v. Riley*, 501 N.W.2d 487, 490 (Iowa 1993) (court declined to decide whether furtive movements alone would justify the search).

Here, it is undisputed that the officers seized Mr. Bell and Mr. Sampson. The key issue in deciding whether that seizure was in violation of the defendants' constitutional rights is determining the point in time at which the seizure occurred. If the officers' seizure of the defendants occurred before Mr. Sampson made furtive movements, his furtive movements cannot be considering in determining whether the seizure was valid. On the other hand, if the officers' seizure of the defendants occurred after Mr. Sampson made furtive movements, his furtive movements can be considered in the Court's determination.

The Court finds that the officers' seizure of the defendants occurred before Mr. Sampson's furtive movements. Six officers in three separate vehicles surrounded the defendants' van, immediately shined a spotlight on the van, and immediately approached the van with their weapons drawn. The conduct of the officers indicated that the defendants were not free to leave. Mr. Sampson made furtive movements in response to the presence and actions of the officers. Thus, the officers' seizure of the defendants necessarily preceded Mr. Sampson's furtive movements.

The Court must now determine whether the defendants' conduct supported a reasonable suspicion by the officers that criminal activity was occurring. The defendants' conduct occurred in a high-crime area known for narcotics transactions. In addition, the van's orientation with the pickup, the driver's erratic parking and re-parking, and the passenger's curious movements inside the vehicle were indicative of a narcotics transaction. However, the officers never witnessed the individuals in the vehicles exchange money or objects, and never explicitly witnessed the presence of any illegal substances. Thus, the defendants' activity could have been

reasonably viewed as any number of things other than a narcotics transaction. The defendants could have simply been having a conversation with a friend, and searching the rear of the van for some unknown lost possession. The facts available to the officers at the moment of the stop would not warrant a person of reasonable caution to believe the action taken was appropriate. Accordingly, the Court finds the defendants' conduct before the seizure did not support a reasonable suspicion by the officers that criminal activity was occurring. Because the officers' initial seizure of the defendants was unlawful, the evidence obtained from the subsequent arrest of the defendants and search of the defendants' vehicle must be suppressed.

Because the Court has suppressed the evidence obtained from the search of the defendants' vehicle, the issue regarding whether the K-9 search was proper is rendered moot.

RULING

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Suppress is hereby GRANTED for the reasons stated herein.

The Clerk shall e-mail a copy of this Ruling to counsel of record.

Dated this ____ day of August, 2014.

_____

Joel W. Barrows
District Court Judge
Seventh Judicial District

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

CURRY'S TRANSPORTATION SERVICES, INC.,	)	
Plaintiff,	)	NO. LACV 021480
vs.	)	**RULING ON PLAINTIFF'S PETITION AT LAW**
MIKE DOTSON, ERIC RYNER, JUSTIN CRAIG SHAFER, AND RYNER TRANSPORTATION, INC.,	)	
Defendants.	)	

This matter came for a contested trial before the Court on July 22, 2013, and concluded on July 24, 2013. Plaintiff, Curry's Transportation Services, Inc., appeared through Jason Curry and was represented by Attorney Thomas E. Maxwell. Defendants Mike Dotson, Eric Ryner, Justin Craig Shafer, and Ryner Transporation, Inc., appeared personally and through their attorney, Jason J. O'Rourke. The Court has now considered the testimony presented, the exhibits admitted into evidence, and the contents of the court file. The Court being fully advised makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Court must decide the facts from the evidence. The Court considers the evidence using its observations, common sense and experience. The Court will try to reconcile any conflicts in the evidence, but if the Court cannot, the Court accepts the evidence it finds more believable.

In determining the facts, the Court may have to decide what testimony to believe. The Court may believe all, part, or none of a witness's testimony. In determining what testimony to believe, the Court considers the reasonableness and consistency of the testimony with other

evidence and, additionally, whether a witness has made inconsistent statements, as well as the witness's appearance, conduct, age, intelligence, memory, knowledge of the facts, interest in the trial, motive, candor, bias and prejudice. With these concepts in mind, the Court finds the following facts:

A. Witness Testimony

(1) Jason Curry

The following is a summary of the testimony from Jason Curry. Curry has been the vice-president of operations at Curry's Transportation since the company's inception. He is a 49 percent owner. His wife is a 51 percent owner, and the company president.

Curry's Transportation formed in 2001. By 2006 it had grown to approximately 35 employees and 30 trucks. Also, in 2006, Curry's acquired Nelson Trucking. In June of 2007 a tornado wiped out Curry's terminal. The company lost numerous files.

Curry's now has approximately 125 employees. About 90 of these are drivers. The company also works with independent owner/operators who lease their trucks to Curry's for Curry's use. There is a standard agreement for these independent operators. Of the owner/operators working with Curry's approximately 80 percent operate under Curry's authority and DOT number. About 20 percent operate under their own authority and DOT number.

Eric Ryner worked as an employee of Curry's on two separate occasions. He was reemployed for his second stint as a Curry's employee in 2006. He left Curry's direct employ in 2008. Ryner ceased employment with Curry's in 2008 when he became an owner/ operator. At that time he formed Ryner Transportation (RT). On August 8, 2012, Ryner ceased working with Curry's entirely.

Initially, Curry's provided freight to RT under Curry's authority. Eventually, Ryner obtained his own authority at the end of 2009. Jason Curry testified that he assisted Ryner on what he needed to do to get his own authority. Curry's was agreeable with owner/operators operating under Curry's authority or under their own authority. Curry's uses owner/operators to increase their fleet without additional investment.

RT hauled solely for Curry's. But on August 9, 2012, RT discontinued hauling for Curry's. By this time RT had five trucks that Jason Curry was aware of.

On the evening of August 8, 2012, Jason Curry called Eric Ryner several times. Ryner finally called him back. Ryner told Curry that he was going out on his own, would not be hauling for Curry's and would haul for someone else. Curry told Ryner that he was under contract with Curry's and not allowed to haul for someone else. Curry had no warning that Ryner would discontinue hauling in this fashion.

Early in 2012 the company's freight was not being distributed equally and needed to be evened out. Curry testified that he told Mike Dotson, Craig Shafer, and Todd Kirchner that the high-paying gravy jobs could not all go to RT. Dotson was operations manager at the time, a position right below Jason Curry himself. Shafer was dispatcher. This directive was followed for a short time. Later, Curry had another meeting with Dotson, Shafer, and Kirchner and told them that he was getting complaints from other haulers who saw RT getting the better jobs and routes. He again told them that they had to even out the freight.

One of Curry's customers was Winegard. Winegard used on-time shipping and had little warehouse space. Curry's took five to eight loads per day into Winegard's. There was a very profitable rate for this service because it was time sensitive. The Winegard business worked well

for picking up other loads as well.

At the time RT terminated hauling for Curry's, Dotson had quit a week before. Shafer quit the day after RT discontinued hauling for Curry's.

Dotson had been with Curry's for seven years. He was Jason Curry's right-hand man and had wide responsibility. Dotson knew Curry's rates and how they were formulated. He also handled customer relations. As to Winegard, Dotson was the main contact at Curry's. He handled the Winegard business.

Dotson was on an extended vacation in July of 2012. He had borrowed three weeks of vacation because he was out of vacation. Dotson left for vacation on June 28, 2012. He returned during the third week of July. On the morning that he returned he informed Jason Curry that he would be resigning. He gave two weeks' notice at that time. There was no indication prior to this that he would be leaving.

Dotson had a company phone and laptop. He returned them. When the phone was returned it had been wiped clean.

Before Dotson's last day there was no indication from him of any dissatisfied customers who would be leaving Curry's. Jason Curry also testified that there was no prior indication from Shafer that he would be terminating his employment. Likewise, there was no prior indication for Ryner that he would discontinue hauling for Curry's.

Operations manager was a very important position at Curry's. The operations manager had daily contact with the decision makers of Curry's customers. Jason Curry testified that he worked with Dotson on a daily basis to transition him into the operations manager role. He took Dotson on customer visits and introduced him to his (Curry's) contacts.

Shafer quit the day after Jason Curry talked to Eric Ryner about the fact that RT would discontinue hauling for Curry's. Shafer gave no advance notice.

Curry was shown Exhibit 1, an independent contractor operating agreement. Curry testified that Ryner had an independent contractor operating agreement with Curry's. The purpose of this agreement was to protect Curry's customer base and also because it was required by law. The agreement had terms regarding non-competition. Curry did admit that some of the terms changed when Ryner got his own authority. For example, Ryner got a higher rate of pay. Curry also admitted that with respect to paragraph 3 of the agreement he had crossed out the number 15 and written in 30, thus changing the time period in which compensation would be paid to the contractor. Curry testified that after signing this agreement, Ryner never asked for modification of the non-compete or to terminate the agreement. There was no discussion about the non-compete no longer being in force when RT began to operate under its own authority. Page 4, paragraph 13 of the agreement provides a method for termination. Curry testified that no notice was received from Ryner that the lease would be terminated.

When Curry learned that RT was hauling for Curry's customers, he communicated with Ryner about it. Curry identified Exhibit No. 2, a cease and desist letter. A return receipt is attached to Exhibit No. 2 showing that it was received on September 1, 2012.

Jason Curry was then shown Exhibit No. 3, which he identified as Dotson's employment agreement with Curry's. Dotson signed it in front of him. It contained all eight pages at the time Dotson signed it. The agreement had non-compete and non-solicitation provisions. Curry testified that these were important because of Dotson's knowledge of the customer base and rates.

When Curry learned that Dotson was working for RT, he sent him a cease and desist letter. Dotson identified Exhibit No. 5 as that cease and desist letter. A return receipt attached to the letter shows that it was received by Sherrie Dotson on September 8, 2012.

Curry met with Dotson before Dotson left the company. Dotson told him that he would be pursuing something working with the church. Dotson gave no indication that he would be working for RT. Dotson said he needed to spend more time with his family. Curry asked Dotson to sign an exit letter, Exhibit No. 4. According to Curry, Dotson showed no reservation about signing it. Dotson also brought up no issues regarding his employment contract. (The Court would note that Exhibit No. 4 contains the following language: "Additionally, I agree not to accept any employment where I will compete directly or indirectly for the next year, with Curry's Transportation Services, Inc. This agreement is per the previously signed confidentiality agreement all Curry managers sign as a condition of employment.")

As to Craig Shafer, Curry testified that he was an employee on two occasions. Shafer worked as a dispatcher. He had no non-compete the first time he worked at Curry's. He left after his first stint in 2008 or 2009. Shafer was reemployed in late 2010. At that time, Curry talked to him about the terms of his returning to employment. Curry offered to rehire Shafer on the grounds that he sign a non-compete. Curry was shown Exhibit No. 6, which he identified as the email sent to Shafer regarding his reemployment. (The Court would note that this actually appears to be a letter to Shafer that was signed by Jason Curry. There is also a signature line for Craig Shafer, but no signature. The last sentence of this email/letter states, "With this job and contract comes a level of confidentiality. Therefore you will be required to sign a confidentiality contract and a non-compete contract.") Curry testified that Shafer came to work shortly

thereafter. Curry acknowledged, however, that he could not find a non-compete for Shafer in Shafer's personnel records.

Curry found out that Shafer was working for RT the day after RT discontinued hauling for Curry's. When he did, Curry wrote a letter to Shafer, Exhibit No. 7. This is a cease and desist letter. The return receipt attached to it shows that it was received by Shafer on September 1, 2012.

After RT discontinued hauling for Curry's, there were some customers that Curry's no longer hauled freight for subsequent to the split. These included ACH Phone, a 50 percent reduction, Winegard, a 100 percent reduction, and Griffin Wheel, a 90 percent reduction. Per Jason Curry, no customer had ever reduced business with Curry's Transportation in this manner before the split with RT.

On August 9, 2012, Curry contacted Winegard to tell them that Dotson and Shafer had left the company. However, Winegard brought no business back to Curry's. Curry testified that this type of change of carrier was very unusual in the industry.

On cross-examination Curry testified that Shafer was employed by Nelson Trucking when Curry bought out Nelson. Curry was not aware of Shafer having an employment contract with Nelson's. Curry acknowledged that he did not ask Shafer to sign a non-compete until 2008. He did not ask him to sign one in 2006 or when he was first hired in 2002. Curry acknowledged that Shafer refused to sign the non-compete in 2008, but was allowed to keep working there with access to the same information that he had access to previously. Curry also acknowledged that the first time Shafer left the company he (Shafer) tried to solicit Curry's clients, but Curry did nothing about it.

Curry acknowledged that Shafer did not sign the letter identified as Exhibit No. 6. He also noted that when Shafer came back to work he was presented with a confidentiality agreement by either himself or Mike Dotson. He was shown his deposition in which he indicated that he (Curry) gave Shafer the agreement when they were alone in Curry's office. Curry acknowledged that Shafer did not sign the agreement in his office. Curry did not see Shafer sign it and has not seen a signed copy. He was not aware of anyone else who had seen a signed copy. Curry acknowledged that he cannot produce a signed copy. The confidentiality agreement should have been in Shafer's human resources file if he signed it, but it was not there. There was no evidence that it was removed from Shafer's file. Curry acknowledged that he was not aware of any evidence that Shafer ever took confidential information or used it to solicit Curry's clients.

As to Dotson, Curry was not aware of any evidence that Dotson used confidential information to solicit Curry's clients. He was also not aware of any evidence that Dotson had used rate information.

Curry acknowledged that page 2 of Exhibit 3, the confidentiality agreement signed by Dotson, contains a definition of what is not confidential information. Curry agreed that the identity of customers is not a secret. He acknowledged that customers are well-known in the shipping industry. Curry's has some customers that other companies haul for. No customers are a secret. Curry also acknowledged that the internet has broker boards. He admitted that these are sometimes used to fill loads. He acknowledged that there are a lot of competitors out there.

Curry acknowledged that employee drivers are not prohibited from disclosing the identity of customers, and neither are owner/operators under their agreements. They are free to disclose

this information.

As to pricing, Curry admitted that Curry's Transportation has no special formula to set price. He said overhead has something to do with it. Other factors that affect price are overhead, fuel, where the load is, where it's going, and whether it's tarped or not. Curry admitted that most of these things are constant. He also acknowledged that overhead varies from company to company. Curry acknowledged that his company built a new building in 2007. He was questioned about his deposition in which he admitted that a company like his with a new building may have higher overhead than a new startup. When pressed, Curry could not identify one factor in pricing that varies from one company to another other than overhead. He stated that the amount he will accept for a particular load will vary from day to day.

Curry acknowledged that there was no agreement with the company's employees to prevent them from disclosing rates or going to work for a competitor.

As to Exhibit 1, Curry stated that not all owner/operators have to sign this agreement if they are operating under their own authority. He acknowledged that there is no written non-compete or non-solicitation agreement with some owner/operators operating under their own authority. He identified several, to include Cook and Sons, P.J. Trucking, and Holstein. Curry acknowledged that all of them have access to Curry's rates. He admitted nothing prevents them from telling others what the company charges.

As to Eric Ryner, Curry testified that Ryner was employed by Curry's but that he bought his own truck and became an owner/operator. Curry testified that when Ryner became an owner/operator he entered into the agreement in Exhibit No. 1 so that RT could operate under Curry's authority and DOT number. Curry noted that if a driver has his own authority he has his

own DOT number. If not, he operates under Curry's DOT number.

Curry noted that any truck operating under Curry's authority should have its own written agreement. Curry acknowledged that he was not aware of any agreement for any of RT's trucks other than the one mentioned in Exhibit No. 1. He admitted that the contract only references one truck and that he did not have agreement for each individual Ryner truck.

In December 2009 Ryner quit hauling under Curry's authority and hauled under his own authority. When Ryner got his own authority he no longer operated under Curry's DOT number; he operated under his own. The relationship changed when Ryner got his own DOT number. It changed in various respects: The responsibility for fuel tax reporting changed; displaying Curry's placards was no longer required, just RT DOT numbers; DOT log books no longer had to be turned in to Curry's because this became Ryner's own responsibility; Curry stopped providing liability insurance; the rate paid to Ryner changed from 75 percent to 80 percent; and, the compensation to the contractor was changed so that it had to be paid in up to 30 days, as opposed to 15.

Curry testified that Exhibit No. 1 is the only written contract or lease which he ever had with Ryner. (The Court notes that this is incorrect as the defendants introduced Exhibit A, an independent contractor operating agreement signed between Ryner Transportation, Inc., and Curry's Transportation dated September 29, 2008.) Curry testified that no new written contract with Ryner was entered into after Ryner got its own authority.

Curry testified that all loads are booked by the dispatchers. Curry's dispatchers decided which loads to funnel to RT.

Curry was aware of no evidence that Ryner had access to Curry's customer list. He

acknowledged that none of the drivers in August of 2012 had non-compete agreements. This is still true today. He has had drivers leave and go to work for competitors. He has not sued any of them. Ryner did not have a non-compete or non-solicitation agreement when he was an employee. Curry acknowledged that he admitted during his deposition that owner/operators operate essentially the same as employee drivers. He has no customers that haul only with Curry's. He admitted that most customers do not bind themselves to one carrier, as it would prevent negotiating better rates.

Curry acknowledged that one of the company's employee drivers could quit today and go to work for a competitor, could buy their own truck and start their own business, could solicit all of Curry's customers, and could do just as much damage as any owner/operator. Curry acknowledged that an employee could leave and do anything he does not want Ryner to do.

Curry acknowledged that Eric Ryner had little access to confidential information, only rates charged and customer names. Nothing really prohibited Ryner from disclosing rates.

When asked if he was aware of any evidence that Ryner had used confidential information, Curry answered that he was not aware of any.

Curry acknowledged that his company and his competitors often worked together to haul loads for customers.

Curry acknowledged that Dotson could have gone to work for a competitor before he signed the non-compete agreement. Curry admits that he did nothing to prevent that at the time. Curry acknowledged that Dotson got no consideration for signing Exhibit No. 4.

Curry's Transportation now has 120 employees. Curry's has backhoe, septic and repair facilities, as well as a contract with Freightliner. Curry acknowledged that RT does not have any

of these operations, or a brokerage facility similar to the one that Curry's has. In 2012 Curry's Transportation had 19 million dollars in sales. This was higher than 2011, and 2011's figures were higher than those in 2010. Curry acknowledged that the company has added trucks, replaced older units, and added a couple of drivers since the defendants left its employ. He admitted that he has no knowledge of damage defendants have caused to his business. Curry acknowledged that the number of loads were comparable to what they were when the defendants left. Curry admitted that he wants to shut down RT.

On redirect Curry acknowledged that the company has no written contract with Holstein, P.J. Trucking, or Cook and Sons. There is only a verbal agreement with these carriers. Curry distinguished this by noting that RT had only hauled for Curry's. Curry testified that he entered into Exhibit 1 with RT to be compliant with federal law and so that Curry could protect its customers. He noted numerous provisions that remained in effect even after Ryner got its own authority. Curry testified that it was not the intent of that contract that it would terminate if Ryner got its own authority.

(2) Richard Pence

The following is a summary of the testimony of Richard Pence. Pence had been a driver with RT. He went to work with RT in March of 2012. Most of his loads emanated from Winegard in Burlington, Iowa. He was generally dispatched by either Kirchner, Shafer, or Dotson. He stopped working for RT on October 12, 2012.

In August of 2012 RT stopped getting all of its loads from Curry's. Eric Ryner told him they were breaking off from Curry's. There were meetings where discontinuing hauling for Curry's was discussed. According to Pence, this was before RT quit hauling for Curry's.

According to Pence, Shafer, Dotson, and Ryner were at a meeting in which Ryner laid out the plan by which Shafer and Dotson would come to work for RT, and RT would discontinue hauling for Curry's. There was a reference to a non-compete for one of them.

Pence stated that he saw Dotson at RT more than once before the discontinuance. Shafer and Dotson came to work for RTimmediately after Ryner discontinued hauling for Curry's. Pence asked Ryner why Shafer and Dotson were coming to work. According to Pence, Ryner said that Shafer and Dotson had a book of contacts this thick, indicating approximately three inches with his fingers. Ryner said we couldn't survive without this.

On cross-examination Pence indicated that he went to Curry's first about this case and met with them about five times. He did acknowledge that he never actually saw a book of contacts from Curry's.

On redirect Pence indicated that these contacts would have been valuable. He said that knowledge of rates was valuable because you could underbid the competitor.

(3) Justin Marland

The following is a summary of the testimony from Justin Marland. Marland testified that he was a driver at RT and that he started at RT in April or May of 2012. While there, he hauled drywall and Winegard freight. When RT hauled for Curry's, Dotson and Shafer dispatched him, as did Kirchner.

Before separating from Curry's Transportation, Eric Ryner told Marland that he was going out on his own and would be hauling Winegard freight. There was a meeting before the separation from Curry's occurred. Ryner, Dotson, and Shafer were there, along with numerous others. At the meeting Ryner said that they would be doing their own thing and would be

hauling Winegard freight. According to Marland, at that meeting they were told if anyone asked about Dotson, he was a shag driver, not a dispatcher, because Dotson had a non-compete agreement with Curry's.

On cross-examination it was established that Marland sought out Jason Curry to see how he could help with the lawsuit.

(4) Michael Dotson

The following is a summary of the testimony of Michael Dotson. Dotson currently works for RT. He is a dispatcher. He has worked there since August 8, 2012. Dotson has only been a dispatcher at RT. Before that he was Curry's operations manager for six years. Prior to working as an operations manager at Curry's he was a driver for Curry's. Before that he held numerous positions as a driver.

Dotson stated that he had numerous duties as operations manager. It was an important position. He assisted with efficiency, working with customers, obtaining new customers, working with brokerage as to loads, working with pricing, maintaining customers, as well as customer satisfaction and relations.

As to pricing, there were negotiations with customers. He developed pricing strategies along with Jason Curry, but said that pricing was industry knowledge. Dotson knew what Curry's typically charged and the variables Curry's would consider.

With respect to Winegard, Dotson testified that Winegard did not dictate to suppliers who they would use for shipping. He indicated that Winegard occupied approximately five percent of his time each day. Shafer was the main point of contact for Winegard at Curry's. Terry Wagner was the main point of contact at Winegard.

The loss of Winegard would have initially resulted in a decrease of revenue to Curry's. Dotson noted, however, that there was more freight out there than any carrier can haul. Winegard and all of its suppliers were third or fourth in terms of revenue to Curry's. A loss of all of them would have been a substantial loss of revenue.

Dispatch developed a customer list. Dotson admitted that this was an important asset. Having it would provide a time advantage to competitors. Cold calls to get new business worked only about 50 percent of the time.

Dotson remembered a project in the spring of 2012 to update the client or contact list. He went on vacation the first week of August 2012. The project was completed before he went on vacation. The updated list was stored on a flash drive in a locked cabinet. A hard copy was given to Kirchner who was the lead dispatcher. The list was also in the Prophecy dispatch software system. Dotson directed Kim Theobald to put the list on a flash drive, and she gave it back to him.

As operations manager he learned things from Jason Curry as to how to do the job, how to maximize profits, efficiency strategies, future customer needs, etc. He went on customer visits with Jason Curry.

Dotson testified that when he first became operations manager he already knew Curry's contacts from driving truck for Curry's. He was privy to more information as operations manager than he had been as a driver. Jason Curry made efforts to introduce him to contacts. He had more interaction with contacts as operations manager than Curry did himself.

Dotson testified that rates and pricing are an industry standard. There is no secret there. There is no way to protect this information. He did admit that if a competitor knew what Curry's

needed to charge to make a profit they could undercut Curry's. He acknowledged that he would not share contact information with competitors because it would give them an advantage.

As to the timing of his departure, Dotson acknowledged that there was a meeting at Perkins in April of 2012. He was invited by Shafer and Ryner. They talked about doing their own thing, but did not offer him a job. At the time, he did not have a sense that he had an opportunity to work for RT. At trial, Dotson stated that he notified Curry's about a problem with RT, though he was shown his deposition in which it said he did not recall whether he had done so.

After the April meeting, Dotson later talked to Ryner and Shafer about working for RT. Dotson stated that he felt like he wanted to leave Curry's about a year and a half before he did so. The decision to leave was made on July 4, 2012, while he was on vacation. He had talked to Ryner about leaving Curry's before this. Going to RT was arranged on July 4, 2012. Ryner offered him two possible positions, shag driver or dispatcher. Ultimately, he accepted the position of dispatcher. On July 4th, Ryner did tell him that he was going to stop hauling for Curry's Transportation.

Dotson communicated his decision to leave to Curry on July 29th or 30th. As to the vacation in 2012, Dotson asked for an advance on his vacation because he had not accrued enough time. Dotson indicated that he left on vacation on June 30th, but the decision to leave Curry's was made on July 4th. Dotson noted that he booked his vacation 11 months ahead of time.

After he made the decision to leave, Dotson talked to three customers. This was the day before he actually left Curry's. He called Terry Wagner at Winegard and told him that he was

leaving and that there would be a new contact at Curry's. He also told him that he was going to work at RT. Dotson said that he told Wagner he wasn't sure what his position would be. Dotson was impeached with his deposition in which he had answered that he did not recall what he told Wagner. Dotson also talked to Jerry Umthun, another customer of Curry's, as well as Sally Johnson at Batey. He did not tell Umthun he would be working for Ryner. He also did not tell Johnson that he would be working for Ryner. Dotson recalled that he had also called Bonnie Gipson at USG.

Dotson did not tell Jason Curry that he was making these calls. No one had told the customers that he was leaving, so he took it upon himself. He only told four customers because they were personal friends. Of the four, Winegard and Batey now do business with RT. Umthun brokers loads for RT.

He and Shafer were friends and rode to work together. They did talk about the situation with RT. Between the April lunch meeting at Perkins and July 4, 2012, Dotson did not know that Shafer was leaving Curry's for RT. Dotson was impeached with his deposition in which he indicated that he did not officially know that Shafer was leaving, but that he did know unofficially. At trial, to clarify, Dotson indicated that to him "unofficial" equals "uncertain".

Dotson testified that he did not tell Jason Curry about the April lunch meeting, about Shafer possibly leaving, or about RT potentially discontinuing business with Curry's. Dotson testified that he did not tell Curry because it was his (Dotson's) job to help people resolve issues and only take it to Jason Curry if he could not do so.

Dotson acknowledged that he had a confidentiality agreement. He was shown Exhibit No. 3 and admitted that it was the confidentiality agreement. Dotson said that the agreement he

received in 2008 was only five pages, not the eight pages as in Exhibit 3. He could not recall which five pages were present when he was presented with the agreement. Dotson was asked about the answers to interrogatories, specifically number 22, in which he indicated that the agreement he received was only three pages. At trial, Dotson stated that the agreement he signed was five pages, not eight. He testified that the agreement that he was presented contained no non-compete provisions. If it had, he would not have signed it. Dotson was directed to the non-competition provision in paragraph 9. (The Court also notes paragraph 10.) He was also directed to the non-solicitation provisions in paragraph 8. Dotson testified that he did not remember if this was in there. It was pointed out that the signatures on pages 1, 7, and 8 of the confidentiality agreement where on pages that indicated in the upper right-hand corner 1 of 8, 7 of 8, and 8 of 8, respectively. Dotson testified that this would have caused him concern if he had noticed it. He did not review the agreement carefully.

Dotson testified that before he left Curry's he asked for a copy of the confidentiality agreement. He asked Traci Hook for a copy, but did not get one. He wanted to look it over because he was considering a change of employment. He testified that he was not really concerned about the contents.

As to Exhibit No. 4, his resignation letter, Dotson testified that this was presented to him at a meeting. He briefly read the letter. Dotson admitted he often signs things without looking them over. He admitted that this may also have happened with the confidentiality agreement, Exhibit 3.

Dotson told Ryner that he had a confidentiality agreement. He did not recall when he informed Ryner of this. Dotson acknowledged that he did believe he was bound as to

confidential information. He also told Ryner that he felt pages were inserted into the confidentiality agreement. As to paragraphs 6 and 7 of Exhibit 3, dealing with avoiding conflict of opportunities, Dotson stated that he was not concerned that he might be violating these provisions.

Dotson testified that he got a copy of the confidentiality agreement right before he left Curry's. He gave a copy to Eric Ryner the day after he left Curry's. He acknowledged that the confidentiality agreement had eight pages at this point. Dotson stated that he did not discuss the confidentiality agreement with Ryner. Dotson stated that Ryner told him that his (Ryner's) contract with Curry's was invalid because he got his own authority and because the previous contract only referred to one truck.

Dotson started with RT on August 8, 2012. Dotson stated that RT had used Curry's exclusively to obtain loads before they stopped hauling for Curry's. Dotson also noted that during the first month after RT quit hauling for Curry's, RT was hauling for customers they had hauled for while working with Curry's. One example of this was Winegard.

Dotson acknowledged that at RT he had discussed customer development with Shafer. Shafer is the operations manager at RT. RT sought to get business from overlapping customers. Shafer did this. Dotson denied making contact with Curry's customers while at RT.

Dotson testified that he would have known of dissatisfied customers who might leave Curry's only if the dispatcher couldn't handle the problem and brought it to his attention. He could not recall any in the last two weeks of his employment at Curry's. He did state that since April 2012, there were unhappy customers, but none to the point he thought they would quit using Curry's. If there were such customers, and he couldn't handle it, he would tell Jason

Curry.

Dotson claimed that he could not recall being involved in discussions as to how RT would get revenue.

Dotson testified that while at Curry's he was involved with circulating confidentiality agreements to other Curry employees, but claimed that he did not look them over. He was not aware of RT targeting Curry's customers before he left Curry's.

Under cross-examination Dotson testified that he started in the trucking industry approximately 23 years ago. None of his previous employers asked for a confidentiality agreement. Dotson testified that before coming to Curry's he had already learned the logistics of trucking, pricing, where the better paying loads were, and customer relations. He also indicated that since he had purchased his own truck before, he knew the law associated with that. Before working at Curry's he learned about booking his own loads, for example, through the live load boards at truck stops. Dotson testified that he did not learn anything about booking loads or customer relations at Curry's that he did not already know.

Dotson testified that trucking companies operate very similarly with respect to booking freight and customer relations. He testified that it was common for drivers and dispatchers to move from one company to another.

Dotson stated that while employed as a driver at Curry's he had no confidentiality agreement and no written agreement regarding nondisclosure. As a driver he knew the addresses of shippers and their phone numbers, as well the type of freight and destinations. He did not know pricing, but could have asked the shipping department to obtain that information. He was not prohibited from disclosing information to other trucking companies.

Dotson testified that he dealt with customer complaints and finding loads before he ever went to work for Curry's.

Dotson stated that he became operations manager in 2006 and was operations manager until August 25, 2008. No one asked him to sign any non-compete or nondisclosure agreement during this time frame. He did not do anything new after August 25, 2008. Prior to that date there was nothing that prevented him from going to another trucking company. Pricing was the same before and after he signed Exhibit No. 3. Rates are generally industry standard. For example, there was a certain price range, but urgency, oversized loads, higher value loads, etc., could affect the price. Dotson noted that no customers have exclusive carriers. This includes Curry's customers. Rates, truck availability, safety score, and reliability affect which carriers get what business.

Dotson testified that nothing he learned about pricing at Curry's is used by him at RT. The operations are too dissimilar in terms of debt load, size of the company, etc. RT sets its price based on what it needs to take care of its business.

Dotson stated that he wanted to leave Curry's for approximately one and a half years before he did so. The reason for this is because the job was ten hours a day or more. He was on call 24 hours a day. The job took too much time from his family. Dotson testified that he devoted all of his working time to Curry's until he left. As to the timing of his vacation, Dotson noted that his wife is a teacher, that his kids are in school, and that they have a condominium time share. He has to book his vacations 11 months in advance. Dotson noted that Jason Curry approved his 2012 vacation in the summer of 2011.

Dotson testified that he never left one job without having another job lined up because he

needed the money to provide for his family, including four children.

During the period from April through August of 2012 he took no steps to hurt Curry's Transportation, nor did he solicit any of Curry's customers. He told four customers that he was leaving Curry's because they were friends. In fact, he had worked for two of them. Dotson pointed out that he only told one of the four that he was going to RT, and that was because that individual had asked him. He did not tell the other three because he did not think it appropriate until he actually left Curry's.

Dotson testified that on his final day Jason Curry said something to him along the lines of he would hate to see him (Dotson) lose his home. Curry then asked him to sign Exhibit No. 4. According to Dotson, Curry gave him no consideration for signing Exhibit No. 4.

As to updating the customer list, Dotson testified that Curry told him to use the Prophecy system more efficiently. To use the automated system properly customer information had to be updated so drivers could use the system correctly. Before that, much of this info had to go to drivers via phone which took up a lot of time. Dotson stated that he did not update this list so that he could take information with him when he left Curry's. The system was being updated by someone else before Dotson booked his vacation 11 months earlier. Dotson pointed out that RT does not even use this particular system. Dotson testified that he took no contact information with him when he left Curry's and that he has used no contact information at RT. Dotson stated that he took no USB drive or hard copy off of Curry's premises. He made no copy of the USB drive or hard copy and did not ask anyone else to do so.

Dotson testified that he did not play favorites at Curry's and did not direct "gravy" loads to RT. He did not treat RT any differently.

Dotson testified that there is an abundance of freight in Iowa with hundreds of loads available. There are numerous trucking companies large, medium, and small in this area. Dotson noted that other trucking companies hauled for Winegard, for example, Decker. He also pointed out that all Winegard suppliers have house trucks.

With respect to restoring the factory settings on his phone, Dotson noted that he had a Facebook account and received personal calls on that phone. He simply used restore factory settings so that no personal information would be left on the phone. Dotson noted that he is not a big tech guy. He also pointed out that all the information on the phone was on the Prophecy software.

Dotson testified that he did nothing to intentionally harm Curry's before or after leaving their employ. He stated that he has not recruited any of Curry's employees. He did nothing to compete with Curry's before his last day there. He makes significantly less money at RT. He also works significantly less hours at RT. While at RT he has referred loads to Curry's.

On redirect Dotson testified that as operations manager he got confidentiality agreements to some employees, not all. It was done on a case-by-case basis. He did not remember if the other confidential agreements contained non-compete clauses.

When asked if knowing the price RT could quote to undercut Curry's would be useful, Dotson answered, if that were the determining factor.

As to the four customers he talked to the day before he left, Dotson stated that he did give all four his home phone number.

Dotson noted that he and Jason Curry interviewed Chad Olson for a dispatch position with Curry's. Olson had a non-compete with Wabash at that time. On recross he was asked if

Curry's hired Olson despite this non-compete. He answered yes.

(5) Justin Craig Shafer

Shafer is the operations manager for RT. He also does dispatch. During his first four months at RT he performed only dispatch duties. There was another dispatcher, Mike Dotson. Before moving to RT, Shafer worked for Curry's Transportation. Shafer started in the Transportation Industry in 1982. He was with Nelson Trucking until 2006. He was the operations manager at Nelson Trucking. Curry's purchased Nelson Trucking in 2006.

From 2006 through October 29, 2008, Shafer worked at Curry's as dispatcher. He then worked for two other employers before returning for a second stint at Curry's. During this second stint there came a point when he became dissatisfied with his employment. Shafer initiated a meeting with Eric Ryner because he knew that both were dissatisfied at Curry's. They explored starting a trucking company.

On April 13, 2012, a breakfast meeting was held at Perkins Restaurant. Shafer initiated the meeting. Eric Ryner and Mike Dotson were there. Shafer invited Dotson because he knew that Dotson was dissatisfied with his employment at Curry's. He wanted to talk to Dotson about working with himself and Ryner. Shafer testified that he wasn't worried about Dotson reporting this meeting to Jason Curry. Shafer testified that at the meeting he did not recall specifically discussing the possibility of his working at RT. He recalled that they discussed various opportunities and obtaining clients in southeast Iowa. Shafer did testify that he had the impression he would have an opportunity with RT. Mostly they discussed whether Eric Ryner could line up the financing needed to grow his company. At the meeting Shafer encouraged the prospect of Dotson being employed by RT. He was not concerned about Dotson's employment

agreement. Per Shafer, Dotson was unsure about it.

Shafer testified that he knew Dotson had an employment agreement. Shafer was asked to sign one and refused to do so. He did recall a confidentiality provision, but not a non-compete provision in the proposed agreement. Shafer could not recall if Dotson's employment agreement was brought up at the meeting.

After the meeting Shafer did have further conversations with Ryner about the possibility of working for RT. He characterized these as daily conversations. Shafer was not concerned about RT getting revenue. He said there is a lot of freight in this area. Shafer testified that he frequently asked Ryner about financing. Shafer rode to work with Dotson each day, a 30-minute ride each way. Shafer testified that he was sure the two of them talked about RT during the rides to work. Shafer testified that during these rides he continuously pushed Dotson to go to work for RT. (The Court would note that this is inconsistent with Dotson's testimony.)

Shafer went to work for RT on August 13, 2012. Dotson was there at the time. Shafer was working dispatch. Dotson was doing some other things, such as organizing. Dotson did dispatch some trucks.

Shafer was asked if before August 13, 2012, there were any discussions with Winegard about the possibility of RT hauling their freight. He answered no.

Shafer did let Dotson know that he had received an offer from RT. He knew that Dotson got an offer from RT. He was not sure of the time at which Dotson received his offer, but noted it had to be close to when he got his offer.

Shafer testified that on the Monday after he quit Curry's Transportation he had a conversation with Terry Wagner at Winegard. According to Shafer, Wagner planned to split the

company's loads between RT and Curry's Transportation. According to Shafer, Curry never responded to Winegard, so Winegard went with RT. Per Shafer, they just received an email from Winegard saying that Winegard wanted RT to haul their freight. Shafer indicated that this was before he left to go to Ryner's. Shafer testified that he believes everyone saw this email. He also indicated that Dotson may have been the one who initially received the email. (The Court notes the seeming inconsistency in Shafer's comments regarding when he talked to Terry Wagner and the time at which the email was received from Winegard.)

On cross-examination Shafer testified that he did not have a non-compete or confidentiality agreement with Nelson's. Shafer noted that he went to work for Curry's as a dispatcher in 2006. Jason Curry did not ask him to sign any such agreements in 2006, 2007, or up to August 2008. Shafer testified that his duties did not change after he refused to sign the non-compete/ confidentiality agreement. He still worked as a dispatcher. The issue wasn't brought up again. He still had access to the same information.

Curry's did not prevent him from leaving after his first stint with the company to go to another trucking company. There was no lawsuit. Per Shafer, Jason Curry did scream at him and said something about him (Shafer) going to jail.

Shafer testified that it is common for a variety of trucking companies to haul for a particular customer. There is nothing confidential about customers' names. They are easy to find. As to pricing, Shafer testified that there is nothing secret about it. Some companies have different costs, but the rates of companies are easy to obtain. He testified that shippers may say that a particular company can haul for this and ask if the company they are presently negotiating with can beat that price. Shafer also testified that shippers will sometimes simply set the price.

Shafer returned to Curry's Transportation in 2010. Dotson recruited him back. At the time, he met with Jason Curry. According to Shafer, Curry offered him the job, including a particular rate of pay and three weeks' vacation. Shafer accepted a few days later. As far as he could recall, Curry did not mention a non-compete or confidentiality agreement at the meeting.

Shafer was shown Exhibit No. 6, which he indicated was emailed to him after the job was offered. This letter/email references confidentiality and no-compete agreements. Shafer noted that he did not sign these and that Curry nonetheless let him work for the company, never asking him about it again. Shafer also pointed out that the email refers to two weeks of vacation despite the fact that three weeks had been offered at the meeting.

According to Shafer, Kirchner was the outbound dispatcher at Curry's, while he was the inbound dispatcher. This meant that he had to find loads for the trucks to bring back so that they would not have to return empty. Shafer indicated that he found return loads by calling around. He also used internet boards which were available to anyone. Shafer indicated that he dispatched loads for Curry's the same way he did elsewhere, and the same way everybody does it.

Shafer testified that he did not funnel gravy loads to RT. He used who he needed to to keep the customers happy. Shafer testified that if the customers wanted RT he would usually do that to keep them happy, not to benefit RT. According to Shafer, Terry Wagner at Winegard wanted RT trucks in order to get the job done. Shafer indicated that he was referencing the time period when RT still hauled for Curry's.

Shafer testified that he did nothing to damage Curry's Transportation before or after he left their employment. He testified that RT has not used Curry's strategies or business plan. Shafer testified that those would not even be helpful for RT. Shafer testified that he has not

solicited away Curry's employees. He stated that he developed no unique knowledge by way of working at Curry's. He had this knowledge beforehand. Shafer testified that he did nothing to compete with Curry's before leaving. He did not contact Curry's employees before leaving.

On redirect Shafer acknowledged that he knew what Curry's had to charge to make a profit. He stated that he did not know Curry's profit or loss margin.

(6) Kimberly Theobald

Theobald testified that she has worked for Curry's for the last two years. She works for Curry's as an outbound dispatcher. She also worked in brokerage where she secured loads from companies such as New Core Steel and sold those loads to carriers. Theobald additionally indicated that she had worked in the hopper and reefer division. It was at that time that Mike Dotson was her direct supervisor.

Theobald worked on updating the customer master list, which she characterized as a massive project. She stated that no one had started it before her. Dotson first asked her to start this project in February of 2012, and then pushed her to get started on it in May of 2012. The project entailed taking 2,600 customer files and updating their contact names, emails, phone numbers, fax numbers, and directions to their facilities. Theobald testified that Dotson wanted a digital copy for his laptop and a hard copy to keep offsite as a backup.

According to Theobald, Dotson asked for updates about every two weeks. He gave her a deadline for completion before he left for vacation.

Per Theobald, the information was entered into the company's Prophecy system and exported onto a spreadsheet. She gave Dotson a hard copy and a thumb drive containing the information. Theobald testified that she put the information on a thumb drive with the help of

Scott Richardson. Theobald testified that Dotson put the hard copy in a briefcase. All of this was done before Dotson left for vacation.

Theobald testified that it would have been a tremendous amount of legwork to compile all of this data on 2,600 customers from scratch. She indicated that simply updating it took approximately seven weeks.

Theobald testified that while she was in brokerage she used an internet truck stop rate feature which gave industry-wide standards for certain freight lanes. She testified that a competitor would have an advantage if it knew Curry's rates.

On cross-examination Theobald acknowledged that Curry's discloses rates to customers and potential customers. She acknowledged that the company does not require them to keep the rates confidential. She admitted that customers disclose rates to other shippers and asks those other shippers if they can beat them.

As to updating the Prophecy system, Theobald acknowledged that Dotson told her Jason Curry told him to update Prophecy. The fact that it was being updated was not a secret. Dotson never told her to keep it secret. Others in the office knew she was working on it. Theobald also did not dispute Dotson's testimony that he asked another employee to start this project in late 2011.

Theobald admitted that the Prophecy system improves the efficiency of the office, and that Curry's has gained a benefit from this update. She testified that asking her to update the files was no shock or surprise to her.

Theobald acknowledged that she does not know what Dotson did with the hard copy. She just saw him put it in a briefcase. She knows of nothing to indicate that Dotson used this

information at RT. She also acknowledged that she does not know what Dotson did with the thumb drive.

(7) Traci Hook

Hook testified that she has worked at Curry's for the last seven years. She handles billing for freight.

Hook testified that Dotson had a conversation with her about the confidentiality agreement. He wanted to see what was in it. Dotson asked for a copy of her confidentiality agreement because he wanted to know what he had signed. He then asked her to ask Human Resources for a blank copy.

According to Hook, in June of 2012 Dotson asked her if she knew how to print a list with all of the customer contact information. She testified that she did not know how to do it and referred Dotson to Scott Richardson. Dotson also wanted to know if she knew how to print out a customer rate schedule. Per Hook, Dotson also asked her for the matrix and web site she used to calculate Curry's fuel surcharge rate. Hook testified that she did not share this information with competitors. She also indicated that the matrix belonged solely to Curry's.

According to Hook, when Dotson came back from vacation he told her that he had put in his two weeks' notice. Dotson told her that he had no immediate plans and was going to do God's work. Dotson told her that he knew he had a confidentiality agreement, but that transportation was what he'd known, so that was where he would have to go find employment.

Hook testified that Curry's rates are not shared with competitors.

On cross-examination Hook acknowledged that Curry's bills to its customers show their rates. Nothing prevents the customers from telling other shippers Curry's rates. She also

acknowledged that the fuel surcharge is in the bill. Hook acknowledged that customers would have to compare rates and fuel surcharges with those of other carriers. She also acknowledged that Dotson told her that he asked for the matrix because of a complaint from New Process Steel, indicating that he wanted to use it to explain the surcharge to them.

(8) Cary Scott Richardson

Richardson testified that he is a dispatcher at Curry's and has worked there for the last five years. He has been employed in the industry for approximately 20 years. He has prior experience as a dispatcher, operations manager, in sales, etc.

Richardson testified that he remembers updating the database. Mike Dotson and Kim were involved. He was not aware of anyone else being involved. Per Richardson, Dotson said he wanted to take a copy of the database on vacation in case any problems came up that he needed to be in the middle of.

Richardson worked with Winegard and their suppliers. From April 2012 through August 2012, Richardson had no impression that Winegard or any of its suppliers were dissatisfied with Curry's services. Winegard stopped working with Curry's abruptly. The same was true for Winegard's suppliers. Richardson testified that while employed at Curry's he had never seen a customer change that quickly.

On cross-examination Richardson acknowledged a long history in the trucking industry, listing six companies that he had worked for. Richardson indicated that he had dispatched for companies, worked as an operations manager, terminal manager, and driver. He acknowledged that no other employers had ever required a non-compete as far as he could recall. As to updating the customer database and Prophecy system, Richardson acknowledged that the

company still uses Prophecy. In his opinion, he did not find the system to be particularly beneficial.

(9) Eric Ryner

Ryner testified that he is the president of RT. RT is an S corporation and he holds all of the shares. The company has 19 employees and 12 drivers. There are two dispatchers, Shafer and Dotson. There are two mechanics.

Ryner testified that he has been in trucking since 1999. He never worked as a dispatcher or operations manager. RT was formed in September of 2008. Ryner testified that he worked at Curry's as a company driver from 2002 through 2003, for a period of approximately six to eight months. Ryner worked at Curry's on two occasions. His second stint started in June of 2006. At that time, he came back to Curry's as a company driver. Then in September of 2008 he got his own truck and became an owner/operator. At that point he formed RT. RT owned the truck.

Ryner testified that he spoke to Jason Curry about forming RT. He planned to lease the truck to Curry's for all of its loads. Ryner worked with the dispatcher at Curry's to get loads. When he formed RT he became an employee of the company and ceased being an employee of Curry's.

Ryner testified that trucking is a heavily regulated industry. In 2008 RT had to use Curry's authority to haul, and this went on for a year until approximately September of 2009. In September of 2009 RT got its own authority. Still, when RT got its own authority it only planned to haul for Curry's Transportation. The authority acquired by RT in September 2009 was contract authority. (RT applied for common carrier authority in 2013.)

RT hauled for Curry's until August 6th of 2012. It was exclusive with Curry's until that

time. Ryner testified that around late summer of 2012 he thought about discontinuing hauling for Curry's. Ryner indicated that he had thought about it starting in April. There were some discussions with Shafer and Dotson, the first of those occurring in April of 2012.

Discontinuing with Curry's was a big change. As to potential sources of revenue for the new company, Ryner testified that there are a number of ways to get freight. These would include online sources, contacting people, and posting trucks online. Ryner testified that in April of 2012 this was how RT thought it would replace revenue from Curry's.

Ryner was asked if RT planned to haul for Curry's customers. His answer was if it happened. Ryner testified that Curry's does not own the customers, they're just customers.

Ryner acknowledged that he had a meeting with Dotson and Shafer in April of 2012. He said they did not discuss a strategy for RT to discontinue hauling for Curry's. Shafer called the meeting. Per Ryner, Shafer did not say on the phone why he wanted to meet. Ryner was questioned about his answer to a similar question at deposition in which he indicated that Shafer wanted to talk about his being unhappy at Curry's and whether Ryner wanted to go out on his own. At trial, Ryner then said he was not sure if this was said on the phone or in person. Ryner testified that at the April meeting he had the impression Shafer wanted to discuss a strategy for discontinuing with Curry's. According to Ryner, Shafer did not say why Dotson would be at the meeting or talk about Dotson's dissatisfaction with Curry's. Ryner stated that at the April meeting Shafer said if Ryner needed help going out on his own he (Shafer) would help him out.

After the April meeting, Ryner crunched numbers to see if he could go out on his own, or if he even wanted to do so. When asked how he planned to pay for it, Ryner testified that he had some money and would obtain a bank loan. Ryner testified that he did not talk to a bank until

mid-June. He applied for a loan at Farmers Merchant and obtained one. Shafer asked about this and Ryner shared that he had talked to a bank.

After the April meeting Ryner did update Dotson. He testified that he told Dotson he was seeking financial assistance. He also believed he told Dotson that he was seeking to purchase four trucks. Ryner testified that he did not know if Shafer and Dotson were discussing this. He was then shown his deposition in which his response was that he knew Shafer was sharing information with Dotson. At trial, Ryner then reiterated that he had no recollection as to whether the two had shared information.

Ryner decided that he personally would no longer haul for Curry's in April of 2012. He was dissatisfied with his treatment, the pay, and the attitude. However, he did not have RT quit hauling for Curry's at that point because he had to keep income rolling in for the company, his drivers' families, and for his own family.

RT quit hauling for Curry's after a conversation that Ryner had with Jason Curry on August 6, 2012. Ryner testified that he had intended to haul for Curry's for a week or so longer, but not after the call.

Ryner testified that his loan was approved on July 15, 2012. At that point he bought four trucks and twelve trailers. Prior to the purchase, RT had five trucks and no trailers. Ryner started purchasing the trucks and trailers on July 17, 2012. He shared this information with Shafer and Dotson.

Ryner indicated that he was going to get freight from brokers, load boards, and by calling customers. He felt this would generate enough revenue to cover overhead and the loan. According to Ryner, this is how RT started to obtain customers. He admitted that some of the

customers were companies RT had hauled for while hauling for Curry's.

Ryner testified that Dotson started working at RT around August 3, 2012. He was shown his deposition in which he indicated that Dotson was hired on August 13, 2012. At trial, Ryner said that Dotson hit the payroll on August 13th, but was in RT's office before that. Ryner also testified that he offered Dotson a job sometime in July, contingent on his obtaining financing.

At the time he offered Dotson a job, Ryner did not ask Dotson if he had an employment contract with Curry's. Ryner testified that he became aware of the employment contract in late July or early August. Dotson told him that he had signed some papers and wanted some legal advice on it. Ryner saw the agreement and read some of it. He testified that we sought legal advice. Ryner stated that the agreement did not cause him concern, but that he got legal advice because Dotson requested it. Ryner acknowledged that he told someone that Dotson had a confidentiality agreement and said if anyone asked they should say that he (Dotson) was a shag driver or janitor. Ryner said this was at a drivers' meeting and was said in jest.

Ryner testified that he directed Dotson and Shafer to contact potential customers and tell them that RT was available to haul loads. Ryner was asked whether he knew if some of these customers were customers RT had hauled for while with Curry's. He answered, if that is who they chose to call.

Ryner testified that RT hauled two Winegard loads on August 13th. RT hauled four Winegard loads on August 14th. According to Ryner, the loads from Winegard have subsequently remained at that level. Ryner stated that this includes Winegard's suppliers. Those suppliers include Charter Steel, Alliant Steel, Pro Net, Lockpoint Tube, Phoenix Tube, and Metal Processing. Other companies RT hauled for after August 13, 2012, and that it had carried while

contracted with Curry's, included Progress Rail, ACH Phone, and Atlas. ACH contacted RT in September of 2012.

Shafer started at RT on August 8, 2012. He was offered a job at the same time as Dotson, around July. The offer was contingent on obtaining financing.

RT called companies to let them know that it was available. This included Winegard and its suppliers. RT did take out ads in the Burlington Hawkeye, including during the time frame of August 2012. There was no other advertising. Ryner acknowledged that the ad probably referred to looking for drivers. It was more focused toward obtaining employees.

Ryner was shown Exhibit No. 1, the independent contractor operating agreement. He admitted that he signed page 5 of the agreement. He admitted that the agreement was between him and Curry's to operate under Curry's authority. Ryner then said that he thought he was signing the agreement on behalf of RT, not himself. The truck named in the agreement was the only truck RT owned at that time. That truck is still in service. Since August 13, 2012, the truck has been used to haul for Winegard and its suppliers, as well as other customers that RT hauled for while working with Curry's.

In discussing paragraph number 2 of Exhibit 1, Ryner testified that the terms changed on December 30, 2009, when RT got its own authority and DOT number. Ryner testified that the figure in paragraph 2A went from 75 percent to 80 percent. Paragraph 2B was supposed to remain the same, but didn't always. Paragraph 2C remained the same. As to paragraph 3 regarding the timing of payment, Ryner testified that the handwriting where the number 30 had been written in and 15 crossed out was not his. Ryner testified that the terms in paragraph 3 changed sometime in 2012. According to Ryner, Curry told him he had to go out further for the

time frame on these payments. Ryner testified that he agreed to 30 days. Ryner stated that he agreed to this change in terms in February or early March of 2012.

Ryner testified that he believed this contract no longer applied after RT got its own authority. He stated that he did not get legal advice on this issue. Ryner was asked if he thought the contract was void after RT got its own authority, that is, did RT have any agreement with Curry's. Ryner answered no. Ryner testified that Jason Curry told him that RT would then be on an 80 percent payment. Ryner figured the payments would continue as they were, 15 days. He thought this because of how it had been done before. Ryner testified that he did not know when Curry crossed out the 15 and wrote in 30.

The testimony then turned to paragraph 6 of the agreement. Ryner testified as to several ways paragraph 6 changed after RT got its own authority. As to paragraph 6A, Ryner noted that when he got his own authority he put his own plate on the truck, and Curry's plate was returned. As to paragraph 6B, Ryner testified that that all changed. He also testified that paragraph 6C changed.

Ryner testified that RT gave notice to Curry's that it would terminate operating under the agreement. According to Ryner, there was an accident in 2009. At that point Jason Curry asked RT to get its own authority to relieve Curry's of liability. Ryner acknowledged that there was no written notice to Curry's from RT indicating that RT was terminating the agreement. Ryner stated that he did not think this was necessary because Jason Curry was pushing for it.

On cross-examination Ryner testified that when first hired as an employee driver at Curry's he had access to customers' names, but not pricing information. He could have garnered access to the pricing information. During that employment Jason Curry did not require him to

sign a non-compete or confidentiality agreement.

When he returned to Curry's in 2006 Ryner had the same duties as when he had been a company driver earlier. From 2006 through September of 2008 he was not asked to sign a non-compete or confidentiality agreement. During this period he hauled for steel companies, Winegard, All Steel, U.S. Gypsum, etc. He had access to customers' names and pricing. Ryner testified that confirmation sheets included the pricing information. Ryner testified that from August of 2006 through September of 2008 nothing prohibited him from disclosing pricing information.

Ryner was shown Exhibit A, an independent contractor operating agreement that was presented to him by Curry on September 29, 2008. He signed page 5 of this agreement. (The Court would note that the date of the independent contractor operating agreement in Exhibit 1 is December 29, 2008.) Ryner testified that this first operating agreement was signed after his status changed to owner/operator. This initial agreement applied until December 29, 2008. The initial agreement had no non-compete restrictions in it. It also had no confidentiality provisions. During the three months under this agreement he had access to the same information and performed the same duties as before September 29, 2008. Exhibit 1 and Exhibit A identify the same truck.

Ryner testified that Janet Bennett, who he described as Curry's human resources person, asked him to sign Exhibit 1 after he had already signed Exhibit A. Ryner testified that Curry never talked to him about it. According to Ryner, Bennett said that some people had a problem with the way the agreement was worded regarding the 21-day pay period. According to Ryner, she did not mention any other changes, or that it added non-compete language. He relied on her

word. She was the human resources person. Ryner testified that he had no different access to information or different customers after the December 29, 2008, agreement, than he had under Exhibit 1 or as an employee driver. Ryner testified that Curry did not help him obtain his own DOT number. RT used Joy Fitzgerald for this. Ryner testified that once he got his own authority there was no reason for him to operate under Exhibit 1. After he got his own authority he never leased additional trucks to Curry's. Curry's did not do fuel tax reporting after RT got its own authority. After RT got its own authority, they did not run any trucks with Curry's placard or DOT number. After RT got its own authority Curry's no longer deducted fuel tax or provided insurance. In addition, before RT got its own authority, its log books went to Curry's. Afterwards they did not because it was not required.

On August 8, 2012, Ryner and Jason Curry had a conversation. According to Ryner, this was the first time they had talked since April, when Ryner quit personally hauling for Curry's. During this August conversation Ryner told Curry that he was moving on. According to Ryner, Curry cut him off and said this was the last load he would ever haul for Curry's. According to Ryner, RT did not abandon any of Curry's loads after this phone call.

Ryner testified that RT did not solicit customers of Curry's before it stopped hauling for Curry's.

Ryner admitted that he did make the comment about Dotson and Shafer having a book of business. He claims there was no talk about an actual book. According to Ryner, the reference was to a book of knowledge in their heads. According to Ryner, neither brought such a document to RT. RT has never used any such document. He has never seen any such document. Ryner testified that his company has used no information of Curry's since RT quit hauling for

Curry's. He did not personally solicit any freight of Curry's before RT stopped hauling for Curry's. Ryner testified that RT is not using any confidential information. Information he had access to when hauling for Curry's was not confidential because it was widely available. To him, his knowledge regarding how trucking companies obtain loads is nothing unique.

On redirect Ryner testified that he would not know the minimum price Curry needed to charge to make a profit. He further testified that he does not know it now. This information would not have been on the confirmation sheet he referred to.

When Exhibit 1 was presented to him, he did not read it word for word. Ryner testified that this was because of what Janet Bennett told him. He did read Exhibit A before he signed it.

Ryner was questioned about the provision at the top of page 5 on Exhibit 1 (a termination clause). Ryner testified that he did not seek to terminate the agreement per this provision. He said it was never brought up.

On recross Ryner testified that what Curry charges has no relevance to him.

(10) Todd Kirchner

Kirchner testified that he works for Curry's. He has been operations manager for not quite a year. Before that he was a dispatcher for four and a half years. Dotson was his supervisor when he worked as a dispatcher. Kirchner handled outbound dispatch. According to him, Curry's had three dispatchers and Dotson helped from time to time. All worked together, desk to desk, in a row. They worked as a team.

According to Kirchner, the most demanding customer was Winegard and its suppliers. That was because Winegard had limited storage and used on-time delivery to make sure that their production line could continue to run. Kirchner testified that Curry's handled five loads per day

for Winegard and its suppliers, sometimes as many as eight loads a day. They charged more for the Winegard loads.

Kirchner testified that some loads were better paying. They were asked to distribute those loads equally. According to Kirchner, Jason Curry told he, Shafer, and Dotson this in early 2012. This policy was not always followed when he was a dispatcher. Kirchner testified that toward the end of Dotson's tenure with the company there was favoritism. Kirchner testified that Dotson asked that we get RT's trucks to Chicago so they could get back for Winegard loads.

Kirchner testified that he dispatched loads for RT. He was not aware the RT got loads from any source other than Curry's.

According to Kirchner, Shafer stopped working for Curry's in early August of 2012. Within a matter of days RT stopped hauling for Curry's.

Dotson stopped working for Curry's in early August of 2012. At that point, Kirchner became operations manager.

Winegard's switch to RT was abrupt. Kirchner testified that he had never seen a customer leave this abruptly before.

Kirchner testified that the operations manager has the most contact with the decision-makers of Curry's customers. The operations manager is involved with pricing. The operations manager sets rates and knows the rate Curry's has to get to maintain a profit.

Kirchner testified that Curry's has a contact list in its Prophecy dispatch system. Not all of that contact information is shared with Curry's drivers. The information shared is only the general phone number for shipping and receiving and not the contact names. Kirchner noted that these contact names are also not shared with the owner/operators who contract with Curry's.

When RT quit hauling for Curry's it had a detrimental impact on Curry's business, in that it took trucks out of the mix. Kirchner also testified that Shafer's and Dotson's departures had a detrimental impact on the business.

Kirchner was asked if a list of contacts from its competitors would give Curry's an advantage. He answered yes, that a list of contacts would give you an advantage over making cold calls. Kirchner testified that a list of competitors' rates would also give you an advantage. Kirchner did state that he did not dispatch for Winegard loads while working as a dispatcher.

On cross-examination Kirchner acknowledged that he had been a driver for previous companies. None of them required a non-compete. He admitted that he was not the point man or dispatcher for Winegard. Kirchner acknowledged that Winegard would not have communicated with him regarding certain trucks carrying its loads.

Kirchner testified that on a typical day Curry's would haul approximately 30 loads. He then clarified to note that all 90 trucks were in service unless down for repairs.

Kirchner testified that he did try to regain the Winegard business and did not know why he was unable to do so.

CONCLUSIONS OF LAW AND RULING

Curry's petition raises claims of breach of contract, conspiracy, and intentional interference with business relationships against the defendants Dotson, Ryner, Shafer, and RT.

A) CURRY'S COVENANTS NOT TO COMPETE AGAINST SHAFER, RYNER, AND DOTSON ARE NOT ENFORCEABLE.

"Nondisclosure-confidentiality agreements enjoy more favorable treatment in the law than do noncompete agreements. (. . .) This is because noncompete agreements are viewed as restraints

of trade which limit an employee's freedom of movement among employment opportunities, while nondisclosure agreements seek to restrict disclosure of information, not employment opportunities." *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999) (internal citations omitted); *See also, Uptown Food Store, Inc. v. Ginsberg*, 123 N.W.2d 59, 62-63 (Iowa 1963) ("In Sickles v. Lauman, 185 Iowa 37, 45, 169 N.W. 670, 673, 4 A.L.R. 1073, a case dealing with the assignment of the covenantee's interest in a covenant not to compete, we said:

> In discussion courts sometimes indulge in the loose generality that the law does not favor contracts in restraint of trade, and therefore an agreement by which a party undertakes not to enter a specific business in a specified city or town will be strictly construed. What the law does disfavor are contracts which unreasonably restrict the individual in his liberty of occupation and employment. But there is no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement of this character, and such a contract is entitled to the same reasonable construction and the same effective enforcement that are accorded to business obligations in general.");

Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) ("Courts are naturally reluctant to remake contracts, *see Ehlers*, 188 N.W.2d at 376 (Becker, J. dissenting) and agreements in restraint of trade are generally disfavored. *Id.* ('We start with the basic tenets that restraints on competition and trade are disfavored in the law. Exceptions are made under narrowly prescribed limitations.')"). "Restrictive covenants of employment are strictly construed against one seeking injunctive relief. They are in partial restraint of trade and are approved with some reluctance. Under certain circumstances they are recognized and enforced by injunctive proceedings." *Cogley Clinic v. Martini*, 112 N.W.2d 678, 681 (Iowa 1962).

> The general rule in Iowa is that we will enforce a noncompetitive provision in an employment contract if the covenant is reasonably necessary for the protection of the employer's business and is not unreasonably restrictive of the employee's

> rights nor prejudicial to the public interest. *Ehlers*, 188 N.W.2d at 369. Our rule is analogous to the Restatement rule which provides that a noncompetitive agreement is unreasonably in restraint of trade if '(a) the restraint is greater than is needed to protect the promisee's legitimate interest or (b) the promisee's need is outweighed by the hardship to promisor and the likely injury to the public.' Restatement (Second) of Contracts § 188(1).

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); *See also, Tasco, Inc., v. Winkel*, 281 N.W.2d 280, 281 (Iowa 1979) ("We have recognized the validity of such a covenant 'if it is reasonably necessary for the protection of the employer's business and is not reasonably restrictive of employee's rights nor prejudicial to the public interest.'" (quoting *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 369 (Iowa 1971)); *Lamp*, 379 N.W.2d at 910 ("In deciding whether to enforce a restrictive covenant, the court will apply a three-pronged test: (1) Is the restriction reasonably necessary for the protection of the employer's business; (2) is it unreasonably restrictive of the employee's rights; and (3) is it prejudicial to the public interest?" (further citations omitted)).

"Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain." *Dental East, P.C. v. Westercamp*, 423 N.W.2d 553, 555 (Iowa Ct. App. 1988) (quoting *Ma & Pa, Inc. v. Kelly*, 342 N.W.3d 500, 502 (Iowa 1984)). "A restrictive covenant is strictly construed against the party seeking injunctive relief." *Board of Regents v. Warren*, No. 08-0017, 2008 WL 5003750, at *1, *3 (Iowa Ct. App. Nov. 26, 2008)(unpublished opinion)(further citation omitted). "The employer has the initial burden to show that enforcement of the covenant is reasonably necessary to protect its business." *Id.* at *4)(further citation omitted). While, "[t]he burden of proof that a contract is contrary to public policy is upon him who asserts it." *Cogley Clinic*, 112 N.W.2d at 682.

1) **There Was No Non-Compete or Confidentiality Agreement Between Curry's and Shafer**

Absent an enforceable non-compete agreement, Shafer would certainly be permitted to compete with Curry's. *Lemmon v. Hendrickson*, 559 N.W.2d 278, 280-281 (Iowa 1997) ("We note the Second Restatement of Agency which sets forth the expectations of an agent after termination of employment, as it relates to competition and solicitation of former customers: Unless it is otherwise agreed, after the termination of the agency, the agent: (a) has no duty not to compete with the principal… (Restatement (Second) of Agency § 396 (1958)."); *see also Kenyon & Landon, Inc. v. Business Letter, Inc.*, No.01-1386, 2002 WL 31309700, at *1, *4-5 (Iowa Ct. App. Oct. 16, 2002)(unpublished opinion) (affirming the trial court's jury instruction that "[u]nless it is otherwise agreed, an employee has no duty not to compete with his former employer.").

"In a breach-of-contract claim, the complaining party must prove: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach." *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). Curry's simply cannot prove the physical existence of a non-compete agreement entered into with Shafer. A signed non-compete or confidentiality agreement for Shafer are not in Curry's human resources files. Curry acknowledged that that he did not see Shafer such an agreement, nor has he seen a signed copy. Shafer testified that he was asked to sing an employment agreement when he returned to work for Curry's in 2010, but that he refused to sign one. Curry also sent a

letter/email to Shafer that references confidentiality and no-compete agreements. Shafer did not sign this letter/email. Nonetheless, Curry allowed Shafer to work for the company, and never asked Shafer about the agreements again. Because Curry's cannot establish the existence of a non-compete agreement, it most assuredly cannot sue Shafer for a breach of such an agreement.

2) **Ryner's Non-Compete Agreement With Curry's Was Not In Effect When Ryner Stopped Hauling For Curry's Because The Agreement Expired In December 2011**

In September 2008, Ryner formed RT and began hauling for Curry's under an Independent Contractor Operating Agreement (Exhibit A). The September 29, 2008, agreement did not include confidentiality or non-compete clauses. On December 29, 2008, Ryner entered into a subsequent Independent Contractor Operating Agreement with Curry's which included non-compete clauses (Exhibit 1). The agreements were required by law. Under both agreements, Ryner was working under Curry's authority and using Curry's Department of Transportation ("DOT") numbers.

In late 2009, Ryner began to haul under his own authority. There were no subsequent written agreements between Curry's and Ryner. At trial, Curry acknowledged that he was not aware of any agreement for any of RT's trucks other than the September 29, 2008 and December 29, 2008 Independent Contractor Operating Agreement. Additionally, he admitted that the contracts only reference one truck and that he did not have an agreement for each individual Ryner truck.

"Abandonment of a contract is the relinquishment, renunciation or surrender of a right." *In re Marriage of Christensen*, 543 N.W.2d 915, 918 (Iowa Ct. App. 1995)(citation omitted). "Whether or not an abandonment occurred depends upon the party's intent to abandon and acts

evidencing such an intent." *Id.* "The act of abandonment must be unequivocal and decisive." *Id.* "Abandonment of a valid contract may be accomplished by express agreement of the parties, or the parties, by conduct inconsistent with the continued existence of the original contract, may estop themselves from asserting any right thereunder." *Iowa Glass Depot, Inc.*, 338 N.W.2d at 380 (citation omitted). If there is no express agreement to abandon the contract, a court will "examine both the acts of the parties and the contract itself to determine whether the parties unequivocally and decisively relinquished their rights under the covenant." *Id.*

Here, the December 29, 2008 agreement does not contain an express agreement to abandon the contract. Therefore, a court will examine the parties' acts and the contract itself. From trial testimony, it is evident that once Ryner began hauling under his own authority and with his own DOT number, the relationship between Curry's and Ryner changed in various respects. Among the changes, the responsibility for fuel tax reporting changed; displaying Curry's placards was no longer required, just RT DOT numbers; DOT log books no longer had to be turned in to Curry's as this became Ryner's own responsibility; Curry's stopped providing liability insurance; the rate paid to Ryner changed from 75 percent to 80 percent; and, the compensation to the contractor was changed so that it had to be paid in up to 30 days, as opposed to 15. All significant changes. It is certainly reasonable to infer that these changes amounted to unequivocal and decisive relinquishments of the parties' rights under the September or December 2008 agreements.

Additionally, the December 2008 agreement was altered by hand so that the compensation from Curry's to Ryner was to be paid within 30 days, as opposed to 15 days. Under the DOT Federal Motor Carrier Safety Administration's regulations, Curry's was required

to pay Ryner within 15 days if the two parties were governed by a leasing operating agreement. 49 C.F.R. § 376.12(f). The change from 15 days to 30 days is further objective proof that the parties were not bound by the December 2008 agreement. Once Ryner began to haul under his own authority, the substantial changes in the relationship between Curry's and Ryner and the pay period alteration in the agreement show that the parties unequivocally and decisively abandoned the December 2008 agreement. Therefore, even if the covenant not to compete was reasonable and valid, the covenant expired on December 29, 2011, which is well before Ryner's alleged breaches in this matter. Paragraph 12(A) of Exhibit 1 notes, in part: "During the term of this agreement and for a period of two (2) years from the time of the termination of this agreement, Contractor shall not, directly or indirectly solicit or do business of a transportation nature with any of Carrier's customers who are serviced by Contractor as a result of this agreement as a result of this agreement unless otherwise agreed to in writing."

3) **Dotson Does Have Non-Compete And Confidentiality Clauses With Curry's**

Unlike Shafer and Ryner, it appears that Dotson was under non-compete and confidentiality clauses when he quit his operations manager position with Curry's in 2012. He became Curry's operation's manager in 2006. He signed an agreement with non-compete and confidentiality clauses on August 25, 2008. (Exhibit 3). Before that date, no one asked him to sign any non-compete or nondisclosure agreement during that time frame. While Dotson testified at trial that he was not aware of all of the pages in the agreement, the agreement itself shows that it contains 8 pages, and Dotson's signature is on page 8. The agreement itself shows Page 1 of 8, Page 2 of 8, etc., in the upper right-hand corner.

From 2006 to August 25, 2008, Dotson worked for Curry's without the restrictive

covenants. He performed the functions of an operations manager the same before and after he signed the August 25, 2008 agreement. Additionally, Curry's pricing and rates were the same before and after he signed the agreement. Dotson testified that he does not use anything that he learned about pricing from Curry's at his current position with RT. Regardless, as discussed below, Dotson's non-compete agreement is not enforceable.

4) **A Non-Compete Agreement Is Not Reasonably Necessary To Protect Curry's Business**

"In deciding whether to enforce a restrictive covenant, the court will apply a three-pronged test: (1) Is the restriction reasonably necessary for the protection of the employer's business; (2) is it unreasonably restrictive of the employee's rights; and (3) is it prejudicial to the public interest?"). *Lamp*, 379 N.W.2d at 910. "The employer has the initial burden to show that enforcement of the covenant is reasonably necessary to protect its business." *Dental East, P.C.*, 423 N.W.2d at 555. The Iowa Supreme Court has stated that

> reasonableness of the restraint and the validity of the covenant seldom depend exclusively on a single fact. Rather, all the facts must be considered and weighed carefully, and each case must be determined in its entire circumstances. Only then can a reasonable balance be struck between the interests of the employer and the employee. (. . .) Proximity to customers is only one aspect. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer's business, and the nature of the occupation which is restrained, must be considered along with matters of basic fairness.

Iowa Glass Depot, Inc., 338 N.W.2d at 382.

In *Iowa Glass Depot v. Jindrich*, the Iowa Supreme Court did not enforce a non-compete agreement. *Id* at 385. Among the several factors that the court considered was whether the employee was given a designated area in which he routinely serviced his employer's customers. *Id.* at 383. The court compared that case with other route cases and determined that although the

employee had contact with the employer's customers, the employer's business "did not lend itself to the type of close personal relationship with the customers that a normal route salesman ordinarily would develop." *Id.*

Here, Curry's bears the burden of showing that the enforcement of the restrictive covenants is necessary to protect its business. During trial, various witnesses stated that a variety of trucking companies haul for a particular customer. Customer names and rate prices are easy to obtain in the industry. In general, the deciding factors for customers are whether the price and service are adequate, not close personal relationships. In fact, Curry himself testified that he does not have customers that haul only with Curry's. He admitted that most customers do not bind themselves to one carrier, as it would prevent negotiating better rates. Therefore, the trucking industry does not possess the type of close personal relationships between customers and trucking businesses that a non-compete clause is meant to protect.

Additionally, Curry's treatment of different employees and agents shows that a non-compete clause is not necessary to protect its business. Curry's utilizes employee drivers, owner/operators who work under Curry's authority, and owner/operators who work under their own authority. Curry testified at trial that the employee drivers and owner/operators are not prohibited from disclosing the identity of customers. Additionally, there are no agreements between Curry's and its employees to prevent them from disclosing rates or going to work for a competitor. If a non-compete agreement was reasonably necessary to protect Curry's business, the company policy would reflect that necessity by requiring all employees to enter into a non-compete agreement with Curry's.

Similarly, Curry testified that not all owner/operators have to sign a non-compete

agreement if they are operating under their own authority. Namely, Curry's does not have written non-compete or non-solicitation agreements with Cook and Sons, P.J. Trucking, and Holstein. Additionally, Curry stated that all of these companies have access to Curry's rates and that nothing prevents them from telling others what Curry's charges its customers. Curry created a situation in which only certain owner/operators, like Ryner, were required to sign non-compete agreements. If a non-compete agreement was reasonably necessary to protect Curry's business, Curry's would require that all owner/operators be bound by such an agreement.

Also, the fact that most other trucking companies do not require their employees to sign restrictive covenants supports the proposition that such agreements are not reasonably necessary to protect Curry's business. At trial, Dotson testified that he was associated with the trucking industry for approximately 23 years and that none of his previous employers asked for a confidentiality agreement. Likewise, Cory Richardson testified that he has worked in the trucking industry for approximately 20 years, during which he worked for approximately 6 companies. No other employers had ever required Richardson to sign a non-compete agreement. Todd Kirchner also testified that he had worked for previous trucking employers who did not require him to sign a non-compete agreement.

(a) ***Customer contacts***

Iowa courts have not encountered a controversy where an employer trucking company has attempted to enforce a non-compete agreement against a driver or a dispatcher, as in the present case. However, the Missouri Court of Appeals has addressed such a case. In *Brown v. Rollet Bros. Trucking Company*, a plaintiff dispatcher signed a non-compete, confidentiality, and non-solicitation agreement with his former employers, one or more trucking companies who are

affiliated with each other, in which he agreed not to compete for 3 years after the end of his employment. *Brown v. Rollet Bros. Trucking Co.*, 291 S.W.3d 766, 771 (Mo. Ct. App. 2009). After resigning from the defendant companies, he began working as a dispatcher for another freight brokerage company which terminated his employment after an attorney for one of the defendant companies sent a letter to his new employer claiming that the plaintiff was violating his non-compete agreement. *Id.* The plaintiff brought a declaratory judgment action asking the court to declare that the non-compete and confidentiality agreement was unenforceable against him. *Id.*

The plaintiff was a dispatcher for the defendants.' *Id.* "When customers would call with a load to haul, they would often offer to pay a certain amount per ton for the haul. If the offered rate was the same or higher than the established rate on the defendant's rate sheet, plaintiff could accept it." *Id.* at 775. The court noted that the "[p]laintiff also testified that he was not aware of any customer or prospective customer who was willing to pay a higher rate to give business to defendants simply because plaintiff was the dispatcher setting up the haul." *Id.* The court also noted that "whoever answered the phone took the call, and customers never asked to speak to a particular dispatcher." *Id.* "No customers followed [the plaintiff] when he left defendants' employ." *Id.*

Under Missouri law, "non-compete restrictions are enforceable only to protect certain narrowly-defined and well-recognized interests, specifically, customer contacts and trade secrets." *Id.* at 773. The defendant trucking companies argued that the non-compete agreement "is enforceable to protect their customer contacts and goodwill because plaintiff had substantial contacts while employed by defendants. 'Customer contacts' is defined as the influence an

employee acquires over his or her employer's customers through personal contact." *Id.* at 774. "The quality, frequency, and duration of an employee's exposure to an employer's customers are crucial in determining the covenant's reasonableness." *Id.* (quoting *Healthcare Services of the Ozarks v. Copeland*, 198 S.W.3d 604, 611 (Mo. 2006). The court rejected the defendant companies' argument by stating that "[a]n employer must show that the employee had contacts of the kind enabling him to influence customers. (. . .) In other words, the opportunity for influencing customers must exist." *Id.* at 775. The court reasoned that the opportunity for influencing customers does not exist in the trucking "industry generally, and in defendants' business specifically, [because] the customer's decision to ship with a specific broker was wholly based on rates and was unconnected to the identity of the dispatcher who relayed the rates to the customer and set up the haul." *Id.* The court found that "defendants' brokerage business did not become associated in a customer's mind with plaintiff and plaintiff did not possess the degree of influence over any customers that would justify enforcement of the Agreement under a 'customer contacts' theory." *Id.* at 776.

Here, the facts are a bit different than in *Brown*, but the underlying rationale of that case supports the finding that Ryner, Dotson, and Shafer did not have an opportunity to influence customers. Unlike in *Brown*, Curry's assigned certain dispatchers and employees to certain customers. For example, Curry testified that Dotson was the main contact for Winegard at Curry's, while Dotson testified that Shafer was the main contact for that customer at Curry's. Additionally, unlike in *Brown*, some customers wanted specific drivers or owner/operators to haul their merchandise. Specifically, Shafer testified that Winegard wanted RT trucks to haul their loads because Winegard wanted to get the job done.

However, here, as in *Brown*, customers used more than one company to haul their freight. Additionally, the customers here often set the price that they were willing to pay for their freight to be hauled, and the trucking company had the option to accept the price or not. Lastly, this Court considers the Missouri Court of Appeals' rationale that the trucking industry is not the type of industry where the opportunity for influencing customers exists.

(b) ***Pricing information and customer lists***

Iowa courts have stated that "[i]n considering whether a restrictive covenant is reasonably necessary to protect an employer's business, we also look to whether the employee has obtained confidential knowledge and the nature of the business and the occupation." *Board of Regents*, No. 08-0017, 2008 WL 5003750, at *4. In *Titan International, Inc. v. Bridgestone Firestone North America Tire, LLC*, the United States District Court for the Southern District of Iowa considered whether the plaintiff's pricing, pricing strategies, and customer lists were trade secrets that were misappropriated by the defendants. *Titan Int'l, Inc. v. Bridgestone Firestone N. Am. Tire, LLC.*, 752 F.Supp.2d 1032 (S.D. Iowa 2010). In this diversity action, the court applied Iowa common and statutory law to grant the defendant's motion for summary judgment and dismissed the case. *Id.* at 1051.

"The elements of a claim of misappropriation of trade secret under the Iowa Uniform Trade Secrets Act and Iowa common law are practically indistinguishable." *Id.* at 1039. "There are three recognized prerequisites for relief based on the appropriation of a trade secret: (1) existence of a trade secret, (2) acquisition of the secret as a result of a confidential relationship, and (3) unauthorized use of the secret." *Lemmon v. Hendrickson*, 559 N.W.2d 278, 279 (Iowa 1997). The *Titan International* court held that the plaintiff "failed to demonstrate that its pricing

information constitutes a trade secret as that concept is recognized in the law." *Titan Int'l Inc.*, 752 F.Supp.2d at 1042. The court found that the plaintiff's "pricing and pricing strategy 'could properly be acquired' by others[;]" the "pricing and pricing strategies were known outside" the plaintiff's company; that "customer pricing information ultimately belonged to the customer and can be divulged by the customer to anyone if the customer is willing to provide that information[;]" and that the plaintiff's pricing strategy was not a static process. *Id.* at 1040-41. Specifically as to the plaintiff's pricing strategy being a non-static process, the court explained that the plaintiff "indicated that the pricing strategies vary depending on the customer's needs." *Id.* at 1041. Additionally, the court found that the plaintiff's customer lists did not constitute a trade secret "because that information was readily ascertainable in the marketplace[.]" *Id.* at 1044.

In the present case, Curry was unable to point to any evidence where the defendants used confidential information to solicit Curry's customers at trial. Curry acknowledged that that Dotson's Confidentiality Agreement spells out what confidential information means. "'Confidential information' means all data and information relating to the business and management of the Employer, including proprietary and trade secret technology and accounting records to which access is obtained by the Employee, including Work Product, Production Processes, Other Proprietary Data, Business Operations, Computer Software, Computer Technology, Marketing and Development Operations, and Customers…" Exhibit 3. Furthermore, the Agreement spells out what "Customers" means, namely, the "names of customers and their representatives, contracts and their contents and parties, customer services, data provided by customers and the type, quantity and specifications of products and services

purchased, leased, licensed or received by clients of the Employer." *Id.*

As in *Titan International*, the identity of Curry's customers was readily ascertainable in the marketplace. Several witnesses at trial testified that customer names were not confidential information. Additionally, Kimberly Theobald testified that the Prophecy project that Dotson was involved with entailed updating customer contact names, emails, phone numbers, fax numbers, and directions to their facilities. While Dotson's Confidentiality Agreement states that some of this information is confidential, this information is readily ascertainable in the marketplace for anyone who has access to the internet. Therefore, enforcement of the non-compete agreement is not reasonable because Curry's customer's identities are not confidential.

Additionally, like in *Titan International* and in *Brown*, the rates that Curry's charges its customers are not confidential. Curry testified that Curry's does not have a special formula to set its price. In fact, Dotson, and others, testified that rates are generally standard across the trucking industry. Several owner/operators who operate under their own authority, including Cook and Sons, P.J. Trucking, and Holstein, have access to Curry's rates. Curry's pricing strategy is not static because Curry testified that the amount that he will accept from a customer for a particular load will vary from day to day. Theobald testified that while she was in brokerage she used an internet truck stop rate feature which gave her the industry-wide standards. The enforcement of the non-compete agreement is simply not reasonably necessary to protect Curry's business.

In *Titan International,* the court also analyzed the extent to which the plaintiff attempted to protect its pricing information from disclosure. *Titan Int'l, Inc.* 752 F.Supp.2d at 1042. In that case, the plaintiffs argued that their measures were reasonable, and included "(1) requiring all employees to abide by the employee handbook and the provisions therein to keep company

information confidential, (2) using password protections, (3) marking 'confidential' on certain documents, and (4) keeping certain information, such as pricing for particular accounts, secret and only allowing specific employees access to that information." *Id.* The court found that the plaintiff's measures were "general corporate security measures and not specifically designed to protect pricing." *Id.*

Here, the record supports a finding that Curry's enacted less stringent security measures than in *Titan International*. Apart from asking some employees to sign a confidentiality agreement, Curry's did not protect its pricing information in any other way. In fact, Curry's did not require Ryner to sign such an agreement during his employment at Curry's prior to December 29, 2008. Curry also acknowledged that employee drivers are not prohibited from disclosing the identity of customers, and neither are owner/operators under their agreements. Furthermore, Curry allowed Shafer to work without a non-compete agreement after Shafer refused to sign one, and Shafer had access to the same information before and after refusing to sign such an agreement.

Because Curry's cannot prove that a non-compete agreement is reasonably necessary to protect its business, the Court does not need to determine whether the non-compete agreement is unreasonably restrictive of the employee's rights and whether it is prejudicial to the public interest.

B) AGENCY LAW ALLOWS DOTSON, SHAFER, AND RYNER TO TAKE WITH AND USE GENERAL KNOWLEDGE THEY HAVE OBTAINED THROUGH THEIR PAST EMPLOYMENT AND EXPERIENCES IN THE TRUCKING INDUSTRY

Previously, the Iowa Court of Appeals has sanctioned a district court's jury instruction allowing the jury to find that an employee is allowed to take certain knowledge with him once he leaves his former employer. *Kenyon & Landon, Inc.*, No. 01-1386, 2002 WL 31309700, at *4. The relevant portion of the jury instruction stated:

> An employee is entitled to take with him his aptitude, skill, dexterity, manual and mental ability and such other general knowledge obtained in the course of employment. Unless it is otherwise agreed, an employee has no duty not to compete with his former employer. The employee is entitled to use general information concerning the method of business of his former employer and *the names of customers retained in his memory, if not acquired in violation of his duty as an agent.*

Id. (emphasis in original). Additionally, the United States District Court for the Northern District of Iowa has stated that there is a "general agreement of the courts that, absent a contractual limitation, once an employment relationship comes to an end, the employee is at liberty to solicit his former employer's customers and employees, subject to certain restrictions concerning the misuse of his former employer's trade secrets and confidential information." *Central States Industrial Supply, Inc. v. McCullough*, 279 F.Supp.2d 1005, 1044 (N.D. Iowa 2003). Lastly, the Iowa Supreme Court has stated that

> Although an employer has an interest in protecting his business from an employee's use of personal influence or peculiar knowledge gained in employment, the employer has no right to unnecessarily interfere with the employee following any trade or calling for which he is fitted and from which he may earn his livelihood. An employee cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instruction while in the employment.

Iowa Glass Depot, Inc., 338 N.W.2d at 383.

Here, Curry's has not presented evidence that Dotson, Shafer, and Ryner learned anything other than general knowledge of the trucking industry while they were employed with Curry's.

Additionally, each defendant has been in the trucking industry for many years. For example, Dotson testified that he had been in the trucking industry for approximately 23 years. In fact, he testified that before coming to Curry's he had already learned the logistics of trucking, pricing, where the better paying loads were, and customer relations. Therefore, Dotson, Shafer, and Ryner were allowed to use general knowledge and experience that they had learned in the trucking industry during their employment with RT.

C) DOTSON, SHAFER, AND RYNER DID NOT ENGAGE IN UNLAWFUL BEHAVIOR AND THEREFORE CURRY'S CONSPIRACY CLAIMS FAIL AS A MATTER OF LAW

"Under Iowa law, '[a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful.'" *Wright v. Brooke Group, Ltd.*, 652 N.W.159, 171 (Iowa 2002) (quoting *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977)). "Civil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy [that] give rise to the action." *Id.* at 172 (quoting *Basic Chems., Inc.* 251 N.W. 2d at 233). "Thus, conspiracy is merely an avenue for imposing vicarious liability on a party for the wrong conduct of another with whom the party has acted in concert." *Id.* "Thus, the wrongful conduct taken by a co-conspirator must itself be actionable." *Id.* "[I]f the acts alleged to constitute the underlying wrong provide no cause of action, then neither is there a cause of action for the conspiracy itself." 16 Am.Jur.2d *Conspiracy* § 50, at 275-76 (1998). "The burden of proof is on the plaintiff to prove misconduct; suspicion is not enough." *Bump v. Stewart, Wimer & Bump, P.C.*, 336 N.W.2d 731, 737 (Iowa 1983).

(a) *Curry's assertion that Ryner and RT received gravy loads*

During trial, Curry it was established that high-paying haul jobs and routes were called gravy jobs/loads. Curry testified that in early 2012, the company's freight was not being distributed equally and that he told Dotson, Shafer, and Kirchner that the gravy jobs could not all go to RT. He testified that this directive was followed for a short time, but that he received other complaints that RT was getting the better jobs and routes. However, Curry's did not provide any tangible or objective evidence to prove this assertion at trial. On the other hand, Shafer and Dotson testified that they did not funnel or direct higher paying jobs to RT. Shafer testified that if the customers wanted RT he would usually do that to keep them happy, not to benefit RT. In fact, he stated that Terry Wagner of Winegard, one of Curry's customers, wanted RT trucks to do Winegard's hauls while RT still hauled for Curry's in order to get the job done. The record supports a finding that Ryner, Shafer, and Dotson did not engage in tortious or unlawful activity in regards to the so-called "gravy" loads.

(b) ***The Prophecy system***

Dotson testified that Curry directed him to use the Prophecy system more efficiently for the benefit of Curry's. Theobald also testified that the Prophecy system improves the efficiently of the office, and that Curry's has gained a benefit from the update of that system. Curry's has not presented any objective evidence that Dotson committed any unlawful or tortious act involved with this update.

(c) ***The fuel surcharge issue***

According to Traci Hook, in June of 2012 Dotson asked her if she knew how to print a list with all of the customer contact information. She testified that she did not know how to do it

and referred Dotson to Scott Richardson. Dotson also wanted to know if she knew how to print out a customer rate schedule. Per Hook, Dotson also asked her for the matrix and web site she used to calculate Curry's fuel surcharge rate. Hook testified that she did not share this information with competitors. She also indicated that the matrix belonged solely to Curry's. However, there was no evidence to suggest that this information was used in any unlawful or tortious way.

(d) ***Dotson's phone***

Curry testified that Dotson returned the company phone and laptop when he quit. However, he testified that the phone was wiped clean when it was returned. Dotson testified that he merely reset the factory setting on his phone because he had a Facebook account and received personal calls on that phone. He simply used restore factory settings so that no personal information would be left on the phone. Dotson noted that he is not a big tech guy. He also pointed out that all the information on the phone was on the Prophecy software. This act was not tortious or illegal, particularly since the record does not reflect that Curry's had a company policy that prohibited an employee from restoring his phone to the factory setting.

(e) ***Ryner, Dotson, and Shafer's conduct before leaving Curry's employment***

The Iowa Supreme Court has stated that

> An insightful analysis of whether mere preparation to form a competing business organization is actionable as a breach of fiduciary obligation is found in *Cudahy Co. v. American Laboratories, Inc.*, 313 F.Supp. 1339, 1346 (D.Neb.1970), and *Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327, 49 Cal.Rptr. 825, 411 P.2d 921, 936 (Cal. 1966). Both cases conclude that such conduct is not actionable unless it is shown that something in the preparation to compete produced a discreet harm to the former business beyond the eventual competition that results from the preparation. We accept that conclusion as a reasonable approach to the problem.

Midwest Janitorial Supply Corp. v. Greenwood, 629 N.W.2d 371, 376 (Iowa 2001).

Here, there were several meetings between Shafer, Ryner, and Dotson while they were all employed or associated with Curry's, including a meeting at Perkins Restaurant in April 13, 2012. However, Curry testified that he is unaware of any evidence that Ryner used any confidential information from Curry's. According to Jason Curry, Curry's Transportation now has 120 employees. Curry's has backhoe, septic and repair facilities, as well as a contract with Freightliner. Curry acknowledged that RT does not have any of these operations, or a brokerage facility similar to the one that Curry's has. In 2012 Curry's Transportation had 19 million dollars in sales. This was higher than 2011, and 2011's figures were higher than those in 2010. Curry acknowledged that the company has added trucks, replaced older units, and added a couple of drivers since the defendants left its employ. He admitted that he has no knowledge of damage defendants have caused to his business. Curry acknowledged that the number of loads were comparable to what they were when the defendants left. Curry admitted that he wants to shut down RT. Since Curry's is unable to show a discreet harm to Curry's from Dotson, Ryner, or Shafer's conduct before leaving Curry's, their conduct was neither unlawful or tortious.

D) CURRY'S INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS CLAIMS FAIL AS A MATTER OF LAW

Iowa law recognizes two separate claims for intentional interference with business relationships: intentional interference with contract and intentional interference with prospective business advantage. *Nesler v. Fisher and Co., Inc.*, 452 N.W.2d 191, 198-99 (Iowa 1990).

1) Intentional Interference With Contract

"Intentional interference with a contract requires proof that (1) plaintiff had a contract with a third party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted." *Burke v. Hawkeye Nat. Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991).

Here, Curry's has failed to prove that it has a contract with any of Curry's customer. In its Post-Trial Brief, Curry's alleges that Dotson intentionally interfered with Curry's contract with RT. Curry's Post-Trial Brief at 12. However, Curry's has not presented any contract apart from the December 29, 2008 agreement between Curry's and RT's one truck. Also, Curry's alleges that RT intentionally interfered with Curry's contract with Dotson. *Id.* at 18. The court sees little evidence of that, and no evidence of damage to Curry's even if the allegation were true. Curry testified that he does not have any customers that haul only with Curry's. Moreover, Curry acknowledged that his company and his competitors often worked together to haul loads for customers. Curry's did not introduce any evidence at trial that Dotson, Ryner, or Shafer intentionally and improperly interfered with Curry's contract with a third party, nor that the interference caused the third party not to perform, or made performance more burdensome or expensive. Therefore, Curry's has not proved its claim of intentional interference with contract against Ryner, Dotson, or Shafer.

2) **Intentional Interference With Prospective Business Advantage**

The Iowa Supreme Court has stated that in order to prove intentional interference with prospective business advantage,

> The tort requires [the] plaintiff to prove the following by a preponderance of the evidence: 1. The plaintiff had a prospective contractual relationship with a third person. 2. The defendant knew of the prospective relationship. 3. The defendant intentionally and improperly interfered with the relationship in one or more particulars. 4. The interference caused either the third party not to enter into or to continue the relationship or that the interference prevented the plaintiff from entering into or continuing the relationship. 5. The amount of damages.

Tredrea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 283 (Iowa 1998) (quoting *Willey v. Riley*, 541 N.W.2d 521, 526-27 (Iowa 1995)). "Proof of intentional interference with a *prospective* contract or business relationship essentially calls for the evidence on the same elements [as intentional interference with contract] relative to *future* business." *Burke*, 474 N.W.2d at 114. "The primary distinction between the two causes of action is the nature and degree of proof required on the element of motive. In a claim of intentional interference with a prospective business advantage, plaintiff must prove that the defendant intended to financially injure or destroy the plaintiff." *Id.* "In cases of interference with existing contracts, proof of such purpose is not essential." *Id.* Additionally, "[i]f a defendant acts for two or more purposes, his improper purpose must predominate in order to create liability" in an intentional interference with prospective business advantage claim. *Tredrea*, 584 N.W.2d at 283 (quoting *Willey*, 541 N.W.2d 526-27).

Here, Curry's failed to prove by a preponderance of the evidence that Ryner, Dotson, or Shafer intentionally or improperly interfered with Curry's relationship with a third party. While the record holds some evidence that Dotson spoke with several of Curry's customers about Dotson leaving Curry's, this evidence does not amount to an intention to financially injure or destroy Curry's.

Additionally, Curry's failed to show that any alleged intentional or improper interference

by Ryner, Dotson, or Shafer's caused either a third party not to enter into or to continue the relationship with Curry or that the interference prevented Curry from entering into or continuing the relationship. While Curry testified that several trucking companies have either stopped or reduced their hauling with Curry's, Curry's has not shown that this is due to any intentional or improper interference on the part of Ryner, Dotson, or Shafer. Curry's has not met its burden in regards to the third, fourth elements of the tort of intentional interference with prospective business advantage. In addition, Curry's most assuredly has not shown that the defendants "intended to financially injure or destroy the plaintiff." In fact, nothing of the sort was demonstrated. Therefore, Curry's intentional interference with business relationships claims fail as a matter of law.

Given the above, there is no need for the court to consider plaintiff's request for injunctive relief.

RULING

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition is DENIED in its entirety.

IT IS FURTHER ORDERED that court costs are assessed against Plaintiff.

The Clerk shall E-mail a copy of this Ruling to counsel of record.

Dated this 27th day of August, 2013.

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Joel W. Barrows
District Court Judge

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

MATTHEW D. HARGRAVE, Plaintiff, vs. **GRAIN PROCESSING CORPORATION** and **KENT CORPORATION**, Defendants.	Case No. LACV022218 **RULING ON DEFENDANT GRAIN PROCESSING CORPORATION'S MOTION FOR SUMMARY JUDGEMENT**

On June 11, 2014, Defendant Grain Processing Corporation's Motion for Summary Judgment came before the Court for oral argument. Plaintiff Matthew D. Hargrave was represented by attorney J. Richard Johnson. Defendant Grain Processing Corporation ("GPC") was represented by attorney Eric M. Knoernschild. After reviewing counsels' briefs, hearing the parties' arguments, and considering the applicable law, the Court enters the following ruling on Defendant's Motion for Summary Judgment:

FACTUAL AND PROCEDURAL BACKGROUND

Team Staffing Solutions, Inc. ("TSI") is a temporary employment agency that supplies contract workers for GPC. GPC is TSI's only customer. As a condition of an individual's employment with TSI, TSI requires each prospective employee to complete an "Application for Employment – Understanding and Agreement as to Application Terms and Conditions" ("Application"). On July 6, 2011, Mr. Hargrave completed and signed an Application with TSI which contained the following provisions:

> **Definitions:** *Employer*: Team Staffing Solutions, Inc. *Employee*: The individual who signs this Application for Employment and Agreement. *Company*: Team Staffing Solutions, Inc. *Customer*: Team Staffing's Customer with whom employee may be assigned to provide temporary services.

…

> **Legal Remedies:** I acknowledge and agree that even though my work related activities may be under the control and direction of the Customer, my sole legal remedies in the event of a work related injury will be the Company's worker's compensation insurance and will not include any claim for damage against that Customer.

Pursuant to the terms of the Application, Mr. Hargrave began employment with TSI.

As part of his employment with TSI, Mr. Hargrave worked at a site owned by GPC where, on December 3, 2011, Mr. Hargrave sustained injuries. Mr. Hargrave subsequently applied for and received payment through TSI's workers' compensation insurance. On November 22, 2013, Mr. Hargrave filed suit against GPC claiming negligence, strict liability, premises liability, and vicarious liability. On April 23, 2014, GPC filed the pending Motion for Summary Judgment, claiming the "Legal Remedies" provision of the Application prevents Mr. Hargrave from pursuing his claims against GPC. Mr. Hargrave resists GPC's motion, claiming that the "Legal Remedies" provision is unclear, ambiguous, and unenforceable.

CONCLUSIONS OF LAW

I. Standard of Review

Summary judgment is appropriate only when the entire record, including pleadings, discovery, and affidavits on file, establishes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The burden of showing the nonexistence of a fact question rests with the moving party. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). A fact is "material" only when its determination might affect the outcome of the suit. *Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992).

In assessing whether summary judgment is warranted, the evidence is considered in a light most favorable to the party opposing the matter. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). The nonmoving party is entitled to every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question. *Id.*; *see also Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989). An inference is legitimate if it is "rational, reasonable, and otherwise permissible, under the governing substantive law." *McIlravy*, 653 N.W.2d at 318 (citations omitted).On the other hand, an inference is not legitimate if it is "based upon speculation or conjecture." *Id.* With these standards in mind, the Court turns to the consideration of Defendant's Motion for Summary Judgment.

II. Waiver

A waiver is a contract and, as such, is construed and interpreted according to the principles of contract law in order to determine its meaning and legal effect. *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). "When construing contracts, courts are guided by the cardinal principle that the parties' intent controls, and, except in cases of ambiguity, that intent is determined by what the contract itself says." *Id.* at 56. An ambiguity exists where there is a genuine uncertainty as to which of two reasonable constructions is correct. *Berryhill v. Hatt*, 428 N.W.2d 647, 654 (Iowa 1988). An ambiguity does not exist merely because the parties disagree on the meaning of a word or phrase. *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981). "Contract provisions will not be held to relieve a party of liability for its own negligence unless the intention to do so is clearly expressed." *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 878 (Iowa 2009) (finding such an intention was not expressed where the language at issue referred only to "accidents" generally, which the court defined as "unpreventable random occurrences").

Mr. Hargrave contends that the terms used by TSI in the "Legal Remedies" provision of the Application are not clear and unequivocal enough to put him, as a casual reader, on notice that he was waiving all claims relating to GPC's potential negligence. In support, he states that the terms "legal remedies," "claim," and "damage" are not defined. He further states that there is no specific indication in the "Legal Remedies" provision that he was waiving potential negligence claims as "claim" appears in the singular and does not refer to "all claims" or "negligence claims."

It is true that Iowa courts do not uphold contractual provisions releasing future claims where release of such claims would not be apparent to a casual reader. *Baker v. Stewarts' Inc.*, 433 N.W.2d 706, 709 (Iowa 1988). However, the Court disagrees with Mr. Hargrave's assertions. It is clear from the language of the "Legal Remedies" provision that Mr. Hargrave agreed to waive all legal remedies arising from a work-related injury except for those claims available through TSI's worker's compensation insurance coverage. Though the terms of the provision are not defined, the terms are in common use and are not presented in a way that creates ambiguity in their meaning. Mr. Hargrave has presented no evidence that he did not understand the terms or ask for clarification of any terms upon signing the Application, and has not presented a reasonable alternative construction that would allow him to bring his present claims.

The facts in this case closely mirror those of *Kelly v. Riser, Inc.* No. 11-1898, 824 N.W.2d 562 (Iowa Ct. App. Oct. 31, 2012) (unpublished). In *Kelly*, the Iowa Court of Appeals upheld a waiver of claims against third party customers of a temporary employment agency. *Id.* at *3. Like the present case, the plaintiff in *Kelly* was employed by a temporary employment agency and injured on the job at a site owned by the agency's customer. *Id.* at *1. In addition, the

release in *Kelly* did not include specific language referring to negligence claims. *Id.* at *3. The court held that the release was "not akin to the broad exculpating releases discussed in *Sweeney*" because the language unambiguously stated that if the plaintiff was injured on the job, he was required to look to the agency's "workers' compensation as the sole source of recovery." *Id.* The court recognized that the release did not bar recovery; it only directed it to a specific mode. *Id.*

In comparing the present case to *Kelly*, the Court finds it impossible to interpret the "Legal Remedies" provision in a way that allows Mr. Hargrave to bring claims against GPC that result from his work-related injuries. The provision states that Mr. Hargrave's legal remedies "will not include *any* claim for damage against Customer." Like *Kelly*, this release is specifically limited to all claims arising from a "work related injury" and necessarily includes any negligence claims against TSI's customers resulting from such an injury. Further, like *Kelly*, this provision did not bar Mr. Hargrave's recovery, but rather directed it to TSI's workers' compensation insurance, of which Mr. Hargrave has already taken advantage.

Finally, Mr. Hargrave contends that the assertion of a lien by TSI's insurance carrier against any recovery by Mr. Hargrave is evidence that the insurance carrier does not believe that Mr. Hargrave's claim is waived. However, the opinion of TSI's insurance company has no bearing on the legal propriety of Mr. Hargrave's present claims against GPC.

III. Waiver as an Affirmative Defense

Mr. Hargrave argues that GPC's defense of waiver was not specifically pled, but rather asserted for the first time in GPC's Motion for Summary Judgment. In an earlier order consented to by the parties the Court allowed GPC to amend its pleadings to include the defense of waiver. Therefore, GPC's motion for summary judgment will not be denied based on this issue.

RULING

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant Grain Processing Corporation's Motion for Summary Judgment is GRANTED for the reasons stated herein. The Clerk shall e-mail a copy of this Ruling to counsel of record.

Costs for this motion, if any, are assessed against Plaintiff.

Dated: June 24, 2014.

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Joel W. Barrows
District Court Judge
Seventh Judicial District