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OPINION REVERSING JUDGMENT, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (FEBRUARY 24, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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C.H. ROBINSON WORLDWIDE, INC.,

Plaintiff-Appellant,

v.

TRAFFIC TECH, INC.;
JAMES ANTOBENEDETTO; SPENCER BUCKLEY;
WADE DOSSEY; BRIAN PEACOCK;
DARIO AGUINIGA,

Defendants-Appellees.

_____

No. 21-3259/21-3825

Appeal from United States District Court
for the District of Minnesota

Submitted: October 20, 2022
Filed: February 24, 2023

Before: LOKEN, GRUENDER, and GRASZ,
Circuit Judges.

GRASZ, Circuit Judge.

Employees at C.H. Robinson Worldwide, Inc. jumped ship to join Traffic Tech, Inc. C.H. Robinson

then sued five of those former employees and Traffic Tech, raising various state-law claims, including tortious interference with a contractual relationship. After the case was removed to federal court, the district court granted summary judgment in favor of the former employees and Traffic Tech. The district court also awarded attorney fees to the former employees and Traffic Tech. We affirm in part, reverse in part, vacate the attorney fees award, and remand.

I. Background

C.H. Robinson and Traffic Tech are both in the logistics business. C.H. Robinson is a Delaware corporation with its principal place of business in Minnesota. Traffic Tech is a Canadian corporation with its United States headquarters in Illinois.

Five of C.H. Robinson's employees left and began working for Traffic Tech: James Antobenedetto, Spencer Buckley, Wade Dossey, Dario Aguiniga, and Brian Peacock. C.H. Robinson believes all five of these former employees improperly solicited current C.H. Robinson employees and customers, as well as accessed or used its confidential or proprietary information—all for the benefit of Traffic Tech.

The current dispute focuses largely on two clauses in the former employees' employment contracts with C.H. Robinson. The first is the Confidentiality and Protection of Business Agreement, which states:

> For a period of two (2) years after the termination of my employment with [C.H. Robinson], however occasioned and for whatever reason, I will not: . . . Directly or indirectly, for the benefit of any Competing

> Business . . . solicit, engage, sell or render services to, or do business with any Business Partner or prospective Business Partner of [C.H. Robinson] with whom I worked or had regular contact, on whose account I worked, or with respect to which I had access to Confidential Information about such Business Partner at any time during the last two years of my employment with [C.H. Robinson]; or . . . Directly or indirectly cause or attempt to cause any Business Partner of [C.H. Robinson] with whom [C.H. Robinson] has done business or sought to do business within the last two (2) years of my employment to divert, terminate, limit or in any manner modify, decrease or fail to enter into any actual or potential business relationship with [C.H. Robinson].

All five former employees had agreed to this language.

The second clause is a choice-of-law provision. All of the former employees except Peacock agreed that Minnesota law "shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles." Peacock's contract, by comparison, states:

> With respect to claims or disputes arising in California, I agree that the law of the State of California shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles. With respect to all other claims or disputes, I agree that the law of the State of Minnesota shall govern as to the interpretation and

> enforceability of this Agreement without regard to conflicts of law principles.

Also relevant are the Bonus Incentive Agreements signed by Antobenedetto, Buckley, Dossey, and Aguiniga. In exchange for continuing their employment and agreeing to certain dispute resolution provisions, they became eligible for a bonus. The signed "[a]greement[s] supersede[d] all previous Incentive Bonus Agreements or similar agreements entered into" with C.H. Robinson. Antobenedetto, Buckley, Dossey, and Aguiniga also "reaffirm[ed] and agree[d] anew to abide by all [their] prior agreements with [C.H. Robinson] as a necessary condition of receiving the benefits under this Agreement."

C.H. Robinson originally filed this lawsuit in Minnesota state court before the case was removed to federal court on the basis of diversity jurisdiction. *See* 28 U.S.C. §§ 1332, 1441. C.H. Robinson asserted three claims: breach of contract against the former employees; tortious interference with a contractual relationship against the former employees and Traffic Tech; and tortious interference with prospective economic advantage against the former employees and Traffic Tech.

The former employees and Traffic Tech filed a motion for summary judgment. In support, they cited California's anti-waiver statute, which became effective on January 1, 2017, and states:

> (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

(b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

Cal. Lab. Code § 925(a)–(b). Of the five former employees, only Peacock began working for Traffic Tech and signed his employment contract after California's anti-waiver statute took effect.

The district court granted summary judgment in favor of the former employees and Traffic Tech. In doing so, the district court construed *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 871 F.2d 734 (8th Cir. 1989) (en banc), as providing a threshold test for determining "whether to enforce a choice of law provision over an anti-waiver statute. . . ." It then concluded California's anti-waiver statute applies, the contracts were amended by the Bonus Incentive Agreements, the contracts are voidable, and the former employees voided the contracts. Next, the district court held the breach of contract and tortious interference with a contractual relationship claims failed because the contracts were unenforceable under California law. The district court concluded the claim for tortious interference with prospective economic advantage lacked merit because C.H. Rob-

inson did not provide evidence of interference. In a separate order, the district court awarded $247,416 in attorney fees and costs to the former employees and Traffic Tech. C.H. Robinson timely appealed.

II. Analysis

C.H. Robinson argues the district court erred by granting summary judgment in favor of its former employees and Traffic Tech. "We review the district court's grant of summary judgment de novo, taking the facts in the light most favorable to the nonmoving party." *McElree v. City of Cedar Rapids*, 983 F.3d 1009, 1014 (8th Cir. 2020) (quoting *Oglesby v. Lesan*, 929 F.3d 526, 531–32 (8th Cir. 2019)). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. Choice of Law

The district court conducted a choice-of-law analysis and held California law applies. C.H. Robinson insists the district court applied the wrong choice-of-law test. We review a choice-of-law determination de novo. *Axline v. 3M Co.*, 8 F.4th 667, 672 (8th Cir. 2021).

"According to long-settled precedent, a federal court sitting in diversity borrows the forum State's choice-of-law rule." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1509 (2022) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The forum State in this diversity case is Minnesota. We therefore apply Minnesota's choice-of-law rules. *Allianz Ins. Co. of Can. v. Sanftleben*, 454 F.3d 853, 855 (8th Cir. 2006).

Minnesota is "committed to the rule" that parties can agree on the law that governs their contract. *Milliken & Co. v. Eagle Packaging Co.*, 295 N.W.2d 377, 380 n.1 (Minn. 1980) (quoting *Combined Ins. Co. of Am. v. Bode*, 77 N.W.2d 533, 536 (Minn. 1956)). Accordingly, "under Minnesota law a contractual choice-of-law provision will govern so long as the parties acted in good faith and without an intent to evade the law." *St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, 818 F.3d 785, 788 (8th Cir. 2016) (cleaned up) (quoting *Medtronic, Inc. v. Gibbons*, 684 F.2d 565, 568 (8th Cir. 1982)); *see also Placzek v. Mayo Clinic*, 18 F.4th 1010, 1016 (8th Cir. 2021) (applying Minnesota law "because of the employment agreement's choice-of-law provision"). Here, the choice-of-law provisions in the contracts of Antobenedetto, Buckley, Dossey, and Aguiniga provide Minnesota law governs. Further, the former employees and Traffic Tech do not raise arguments about good faith and intent to evade the law. Minnesota law therefore applies.

The former employees and Traffic Tech disagree, urging us to apply our en banc decision in *Modern Computer* the same way it was understood by the district court. We do not agree with the district court's characterization of *Modern Computer* as establishing a threshold test for determining whether to enforce a choice-of-law provision over another State's anti-waiver statute. *See Mod. Comput.*, 871 F.2d at 738–39. Instead, *Modern Computer* merely applied Nebraska's choice-of-law rules because Nebraska was the forum State. *See Mod. Comput. Sys., Inc. v. Mod. Banking Sys., Inc.*, 858 F.2d 1339, 1341–42 (8th Cir. 1988) (outlining the relevant procedural history before the case was considered en banc). Thus, our en banc deci-

sion in *Modern Computer* did not change our approach of first examining the forum State's rules before deciding whether to enforce a choice-of-law provision. Here, Minnesota is the forum State, so we apply Minnesota's choice-of-law rules. *See Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.").

Peacock signed an employment contract that warrants a different analysis. Peacock and C.H. Robinson agreed as follows:

> With respect to claims or disputes arising in California, I agree that the law of the State of California shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles. With respect to all other claims or disputes, I agree that the law of the State of Minnesota shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles.

C.H. Robinson argues the claims or disputes involving Peacock arose in Minnesota. Peacock does not analyze the contractual language on appeal.

The parties' arguments on appeal raise more questions than answers. To understand why, we briefly discuss choice-of-law principles. Broadly, choice of law asks "which jurisdiction's law should apply in a given case." *Choice of Law*, Black's Law Dictionary (11th ed. 2019). Relatedly, there is a conflict of laws

when there is "[a] difference between the laws of different states . . . in a case in which a transaction or occurrence central to the case has a connection to two or more jurisdictions." *Conflict of Laws*, Black's Law Dictionary (11th ed. 2019). Resolving disputes about what law applies often includes a fact-intensive analysis of a variety of factors. *See, e.g.*, *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 831–34 (Minn. 1979). It is no wonder why we have long cautioned against courts "entangling" themselves "in messy issues of conflict of laws" unless "there actually is a difference between the relevant laws of the different states."[1] *Phillips v. Marist Soc. of Wash. Province*, 80 F.3d 274, 276 (8th Cir. 1996) (quoting *Barron v. Ford Motor Co. of Can.*, 965 F.2d 195, 197 (7th Cir. 1992)); *see also Nodak Mut. Ins. Co. v. Am. Fam. Mut. Ins. Co.*, 604 N.W.2d 91, 93–94 (Minn. 2000) ("Before a choice-of-law analysis can be applied, a court must determine that a conflict exists between the laws of two forums." (footnote omitted)).

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[1] The parties appear to agree there is an outcome-determinative conflict between Minnesota and California law. "Minnesota law disfavors noncompete agreements," but "the courts will enforce them under certain circumstances." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001) (citing *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982)). For example, "restrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests," such as "the company's goodwill, trade secrets, and confidential information." *Id.* at 456. California law, by contrast, prohibits "restraining a party from engaging in a profession or business unless necessary to protect trade secrets." *Id.* (citing Cal. Bus. & Prof. Code § 16600); *see also Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290–93 (Cal. 2008).

To avoid some of these issues, parties to a contract regularly agree to a choice-of-law provision that selects the applicable law before any controversy arises. *See generally* Restatement (Second) of Conflict of Laws § 187 (1971). Peacock's contract includes a choice-of-law provision of sorts. The contract first asks whether the "claims or disputes aris[e] in California. . . ." If the answer is yes, California law applies. If the answer is no, Minnesota law applies. Unlike a normal choice-of-law provision that selects the law at the outset, this provision asks a threshold question about where the particular claims or disputes arose.[2]

The district court held C.H. Robinson's claims arose in California. But its conclusion was premised on the assumption that California law—and, by extension, California Labor Code § 925—applies. This assumption was an error because Minnesota law governs four of the former employees' contracts and, as we explain, the issue of whether California law governs Peacock's contract is undecided. On appeal, the parties do not clearly articulate their positions on whether Minnesota or California law applies to determine what the parties intended by the phrase "claims or disputes arising in California." Given the questions left unanswered by the district court and the parties, we remand for the district court to consider in the first instance whether C.H. Robinson's claims or disputes against Peacock arose in California under the language in Peacock's employment contract.

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[2] This purported choice-of-law clause resembles dépeçage—*i.e.*, the conflict of laws doctrine applying the law of different states to resolve different issues in the same case. *See generally Ewing v. St. Louis-Clayton Orthopedic Grp., Inc.*, 790 F.2d 682, 686–87 (8th Cir. 1986); *Dépeçage*, Black's Law Dictionary (11th ed. 2019).

In sum, we hold that Minnesota law applies to the interpretation and enforceability of Antobenedetto, Buckley, Dossey, and Aguiniga's employment contracts. We remand for the district court to consider whether C.H. Robinson's claims or disputes against Peacock arose in California or elsewhere under Peacock's employment contract. We further remand for the district court to substantively analyze whether all or part of the former employees' contracts are unenforceable and, if not, whether the claims for breach of contract and tortious interference with a contractual relationship survive summary judgment.

B. Tortious Interference with Prospective Economic Advantage

Unlike the other two claims, C.H. Robinson's claim for tortious interference with prospective economic advantage is not contingent upon whether the contracts are enforceable. Rather, this claim is based upon C.H. Robinson's long-standing relationships with its customers. The district court dismissed the claim because C.H. Robinson did not provide evidence that its former employees and Traffic Tech interfered with C.H. Robinson's existing relationships. On appeal, C.H. Robinson argues the district court erred by ignoring that the contracts were voidable rather than void.

A district court's interpretation of state law while sitting in diversity is reviewed de novo. *Sports v. Top Rank, Inc.*, 954 F.3d 1142, 1146 (8th Cir. 2020). A claim for tortious interference with prospective economic advantage under Minnesota law has five elements:

1) The existence of a reasonable expectation of economic advantage;

2) Defendant's knowledge of that expectation of economic advantage;

3) That defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;

4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and

5) That plaintiff sustained damages.

Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 219 (Minn. 2014).

To raise a genuine issue of material fact in response to a motion for summary judgment, a nonmovant "must substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor." *Segal v. Metro. Council*, 29 F.4th 399, 403 (8th Cir. 2022) (quoting *Argenyi v. Creighton Univ.*, 703 F.3d 441, 446 (8th Cir. 2013)). C.H. Robinson's sole argument on appeal for this claim does not address the lack of evidence—the basis of the district court's decision. Accordingly, we cannot conclude the district court erred by dismissing the claim. *Cf. Sherr v. HealthEast Care Sys.*, 999 F.3d 589, 601–02 (8th Cir. 2021). We thus affirm the district court's dismissal of the claim for tortious interference with prospective economic advantage.

C. Attorney Fees and Costs

The district court awarded the former employees and Traffic Tech attorney fees under California Civil Code § 1717(a). C.H. Robinson argues this award was improper because, among other reasons, California law does not apply. "We review legal issues relating to fee awards de novo, the awards themselves for abuse of discretion." *Cody v. Hillard*, 304 F.3d 767, 772 (8th Cir. 2002). Attorney fees are premature in light of the issues that will remain following remand. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1068 (8th Cir. 2015); *Martinez v. City of St. Louis*, 539 F.3d 857, 862 (8th Cir. 2008). Indeed, the former employees and Traffic Tech argue that whichever state's law governs the contracts also governs the fees provision. We thus vacate the order awarding attorney fees and costs.

III. Conclusion

We affirm the district court's dismissal of C.H. Robinson's claim for tortious interference with prospective economic advantage, reverse the judgment in all other respects, vacate the district court's order awarding attorney fees and costs, and remand for further proceedings consistent with this opinion.

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEYS FEES, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (DECEMBER 7, 2021)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

C.H. ROBINSON WORLDWIDE, INC.,

Plaintiff,

v.

TRAFFIC TECH, INC.,
JAMES ANTOBENEDETTO, SPENCER BUCKLEY,
WADE DOSSEY, BRIAN PEACOCK, AND
DARIO AGUINIGA,

Defendants.

Civil No. 19-902 (MJD/DTS)

Before: Michael J. DAVIS,
United States District Court Judge.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motion for Attorney's Fees and Costs (Doc. No. 174) and Motion to File Reply Brief (Doc. No. 193).

I. Background

Plaintiff C.H. Robinson Worldwide, Inc. ("CHR") brought this action against Defendants seeking to enforce certain restrictive covenants contained in the Confidentiality and Protection of Business Agreements ("CHB Agreements") signed by the individual defendants as a condition of employment. Originally, CHR had asserted six causes of action: Count I, Breach of Contract; Count II, Tortious Interference with Contractual Relationships; Count III, Tortious Interference with Prospective Economic Advantage; Count IV, Breach of Duty of Confidentiality; Count V, Inducing, Aiding and Abetting Breaches; and Count IV, Conspiracy. (Doc. No. 1.) In an Order dated May 14, 2020, the Court granted Defendants' motion to dismiss in part and allowed CHR to file an amended complaint. Thereafter, CHR filed an Amended Complaint that asserted the same claims but dropped claims against two individual defendant. (Doc. No. 81.)

On September 17, 2020, Defendants moved to dismiss Counts IV through VI, and the motion was granted. (Doc. No. 110.) CHR then filed a Second Amended Complaint ("SAC") that asserted three causes of action: Count I, Breach of Contract; Count II, Tortious Interference with Contractual Relationships; Count III, Tortious Interference with Prospective Economic Advantage. (Doc. No. 115.)

In March 2021, Defendants moved for summary judgment as to the remaining claims, and by Order dated September 22, 2021, this Court granted Defendants' motion in its entirety.

With respect to the breach of contract claim, the Court found that the restrictive covenants were

governed by California law, and that under California law, the restrictive covenants were not enforceable.

With respect to the tortious interference claims, the Court found that to the extent these claims addressed contractual relationships with customers, Defendants were entitled to summary judgment as CHR failed to demonstrate it had any exclusive contracts with any of its customers and failed to identify any customer or carrier contracts that were interfered with by Defendants.

Finally, the Court found that Defendants were entitled to summary judgment on the claim that Defendants tortiously interfered with the restrictive covenants set forth in the CPB Agreements as the restrictive covenants were not enforceable.

Defendants now seek attorney's fees and costs under California law. For the reasons that follow, the Court will grant Defendants' motion.

II. Discussion

A. Which State Law Governs Defendants' Motion

The CPB Agreements provide that in the event CHR seeks injunctive relief to enforce the restrictive covenants contained therein, "[CHR] shall further be entitled to recover all attorneys' fees reasonably incurred in establishing such violation of this Agreement . . . " (Doc. No. 115 Exs. 1-3, 25, § VII.)

Defendants argue that California law applies to their motion for attorney's fees and costs, and that California has enacted legislation to address unilateral attorney's fee provisions, such as the provision in the

CPB Agreements. California's Reciprocal Attorney's Fee Statute provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ. Code § 1717(a).

Section 1717 applies even when a party defeats a contract claim by showing the contract was unenforceable, "if the opposing party would have been entitled to attorney fees had it prevailed." *Brown Bark III, L.P. v. Haver*, 219 Cal App. 4th 8709, 819 (Cal. Ct. App. 2013).

Defendants argue that Section 1717 applies here because it is clear from the contract language in the CPB Agreement, that CHR would be entitled to fees had it prevailed on its claims. As the individual defendants were the prevailing parties on the breach of contract claims, they are entitled to reasonable attorney's fees and costs under California law.

It is CHR's position that Minnesota law governs the motion for attorney's fees and costs. CHR argues that whether a party is entitled to attorney's fees is a procedural issue and that a Court sitting in diversity must apply the law of the forum to procedural questions. Therefore, Minnesota law must be applied to determine whether Defendants are entitled to attor-

ney's fees and costs. CHR further asserts that even if the Court finds that awarding attorney's fees is a substantive issue, a choice of law analysis will demonstrate that Minnesota law should govern this issue. In support of its argument, CHR cites to the decision in *Bannister v. Bemis Co., Inc.*, 07-1662 (RHK /AJB), 2008 WL 2002087 (D. Minn. May 6, 2008). That case is distinguishable, however, because the contract at issue in that case did not include an attorney's fee provision. *Id.* at 1.

The Court finds that California law applies to the issue of attorney's fees and costs. As to CHR's arguments, the Court notes that it has already conducted a choice of law analysis with regard to the CPB Agreements and found that California law governs those contracts. As one of the provisions of the CPB Agreements concerns the recovery of attorney's fees, the issue is substantive and controlled by California law. *See BP Group, Inc. v. Capital Wings Airlines, Inc.*, 09-dv-2040 (JRT/JSM), 2011 WL 4396938, at *1 (D. Minn. Sep. 21, 2011) (because the parties agreed the contract was governed by Florida law and the contract contained an attorney's fees provision, the court found the question of whether a party could recover attorney's fees under the contract was a substantive matter controlled by Florida law).

Finally, CHR argues that even if California law applies, California courts have repeatedly held that when a contract provision is adjudicated to be illegal, no party can enforce its terms, even an attorney's fee provision. As to this argument, the Court notes that it did not find the contracts to be illegal. Rather, the Court found those covenants to be void and unenforceable, which is not a barrier to the recovery of

attorney's fees under Section 1717. *See Brown Bark III*, 219 Cal App. 4th at 819.

B. Whether Fees Should Be Apportioned

Defendants further assert they are entitled to fees incurred in defending all claims asserted by CHR in this action, because Section 1717 is to be construed liberally and the right to contractual attorney's fees extends to all causes of action that are inextricably intertwined with the breach of contract claim. *See Turner v. Schultz*, 175 Cal. App. 4th 974, 979 (Cal. Ct. App. 2009); *Rivera v. Wachovia Bank*,_09-cv-433 JM (AJB), 2009 WL 3423743, at * 2 (S.D. Cal. Oct. 23, 2009) ("Moreover, the right to attorney's fees extends to all causes of action that are 'inextricably intertwined' with the contract action.") Thus, where causes of action are "based directly on the contract, require predicate acts based on breach of contract, or relate to the formation of the contract," they are inextricably intertwined with the contract. *Id.*

Defendants argue, and this Court agrees, that all of the claims asserted by CHR's are inextricably intertwined with the CPB Agreements and the non-restrictive covenants contained therein. Accordingly, the Court will not apportion the fee request based on the individual counts.

For every count originally included in the Complaint, except the conspiracy claim, CHR expressly refers to the employment agreements at issue. (*See e.g.* Complaint, Count I, Breach of Contract at ¶ 144 (breach of the CPB Agreements); Count II, Tortious Interference with Contractual Relationship at ¶¶ 151-53 (referencing employee contracts); Count III, Tortious Interference with Prospective Economic Advantage

at ¶ 162 (alleging Defendants interfered with current and former CHR employees' employment contracts); Count IV, Breach of Duty of Confidentiality at ¶ 169 (referencing contractual employment agreements concerning confidentiality); Count V, Inducing, Aiding and Abetting Breaches at ¶¶ 179-80 (inducing, aiding and abetting breaches of employment contracts)).)[1] Although CHR did not reference the restrictive covenants in the complaint in its allegations supporting the conspiracy claim in Count VI, CHR described its conspiracy claim in later pleadings as follows: "it is now abundantly clear the role each Individual Defendant played, and the confidential information used to 'usurp' C.H. Robinson's clients, in violation of their agreements, for their and Traffic Tech's benefit." (Doc. No. 98 (CHR Opposition to Motion to Dismiss at 20).)

The SAC similarly bases all claims on the restrictive covenants in the CPB Agreements. (*See*, *e.g.*, SAC, Count II, Tortious Interference with Contractual Relationships at ¶¶ 142-44 (alleging Defendants tortiously interfered with CHR contracts with its employees); Count III, Tortious Interference with Prospective Economic Advantage at ¶ 153 (alleging Defendants tortiously induced current and former CHR employees to breach their contractual duties owed CHR in order for Defendants to usurp CHR's business relationships and reasonable expectation of economic advantage with its customers).)

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[1] The allegations in the Amended Complaint are substantially the same as in the Complaint, minus allegations against the defendants that were dismissed.

Finally, Defendants argue that the Court should not apportion fees between Traffic Tech and the individual defendants because all claims involved issues common to all causes of action – chiefly the enforceability of the CPB Agreements.[2] *See Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 86 (Cal. 1979) (finding that attorney's fees need not be apportioned when incurred for representation on issue common to both a cause of action in which are proper and one in which they are not); *Hill v. Affirmed Hous. Group*, 226 Cal. App. 4th 1192, 1197 (Cal. Ct. App. 2014) (finding allocation of fees in representing multiple parties is not required when claims are inextricably intertwined such that it is not possible to differentiate between compensable and non-compensable time).

Because it is clear that the tortious interference claims asserted against all defendants are inextricably intertwined, the Court finds that no allocation of fees between Traffic Tech and the individual defendants is required.

C. Whether the Fees Requested Are Reasonable.

"The amount of the fee [] must be determined on the facts of each case." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation

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[2] Defendants are not seeking to recover for time billed for work related to the defense of Dadkhah and Maassen, who were dismissed from this case by Order dated September 11, 2020 (Abbate Dattilo Decl. at ¶ 8). In addition, Defendants are not seeking to recover for time billed solely to Traffic Tech's justification defense. (*Id.* at ¶ 9.)

multiplied by a reasonable hourly rate." *Id.* at 433. The party seeking fees bears the burden of producing evidence to support the rates charges. *Id.* "[W]hen fixing hourly rates, courts may draw on their own experience and knowledge of prevailing market rates." *Warnock v. Archer*, 397 F.3d 1024, 1027 (8th Cir. 2005) (citations omitted).

As to the amount of fees requested, Defendants have submitted the declaration of Pamela Abbate Dattilo setting forth defense counsels' experience, hourly rates and the hours expended litigating the claims brought by CHR. (*See* Abbate Dattilo Decl., Ex. A.) Abbate Dattilo attests she is a Shareholder at Fredrikson & Byron P.A. and has twelve years of experience litigating non-compete disputes. (*Id.* ¶¶ 1, 5.) She attests she spent 214 hours on the case and that her hourly rate is $425. (*Id.* ¶ 5.) She further attests that Lukas Boehning spent 365.8 hours on the case, and that his hourly rate is $305 (2020) and $335 (2021). (*Id.* ¶ 4.) Other timekeepers on this case billed lesser hours, ranging from 92 hours to 1.3 hours, and charged hourly rates ranging from $335 to $130. (*Id.*)

Abbate Dattilo further attests that based on her experience and understanding of hourly rates charged in the Twin Cities, the rates charged by Defendant's legal team are consistent with rates charged by other firms for similar services provided by lawyers with similar skill and experience. (*Id.* ¶ 17.) CHR does not challenge the rates charged by defense counsel.

Based on its experience and knowledge of the prevailing rates in this market, the Court finds that the hourly rates charged, from $425 to $130 are reasonable. *See e.g., Price v. Midland Funding LLC*, 18-

cv-509 (SRN/SER), 2018 WL 5259291, at *4 (D. Minn. Oct. 22, 2018) (noting $425 was a reasonable rate to charge in consumer law cases); *Harris v. Chipotle Mexican Grill, Inc.*, No. 13-cv-1719 (SRN/SER), 2018 WL 617972, at *8 (D. Minn. Jan. 29, 2018) (approving hourly rates ranging from $575 per hour to 300 per hour).

Finally, Defendants assert the number of hours billed is reasonable, given the extensive work required in this case, including discovery and multiple motions to dismiss that resulted in the dismissal of two defendants and multiple claims, and its successful motion for summary judgment involving the remaining claims and defendants. CHR argues the Court should eliminate fees incurred in defending against the non-contract claims, fees incurred specific to Traffic Tech's defense, a 50% reduction for fees billed towards the first motion to dismiss, which was voluntarily withdrawn and contained arguments related to those individual defendants that were dismissed, fees incurred to oppose CHR's motion for voluntary dismissal, and fees incurred in bringing a second motion to dismiss that did not seek dismissal of any California-governed breach of contract claims.

As set forth above, apportionment of fees between claims and defendants is not required, as all claims are inextricably intertwined with the contract claims. Defendants have already agreed not to seek fees specific to Traffic Tech's justification defense or fees specific to the dismissed defendants. Any further reduction is not warranted.

Based on its review of Defendants' billing records, the Court finds that the time billed is reasonable based on the amount of discovery conducted in this case,

including multiple depositions and the production and review of thousands of documents. Further, this case involved multiple dispositive motions and responses to motions brought by CHR. Accordingly, the Court will grant Defendants' request for attorney's fees in the total amount of $225,762 (which includes $6,000 incurred in preparing the motion for attorney's fees and costs).

Defendants also request costs in the total amount of $21,654. (Abbate Dattilo Decl., Ex. B.) CHR has not opposed the requested costs, and the Court finds the costs incurred are reasonable.

IT IS HEREBY ORDERED that:

1. Defendants' Motion for Attorney's Fees and Costs (Doc. No. 174) is **GRANTED**. Attorney's fees and costs in the total amount of $247,416 are hereby awarded to Defendants.

2. Defendants' Motion to File Reply Brief (Doc. No. 193) is **GRANTED**.

Date: December 7, 2021

/s/ Michael J. Davis
United States District Court

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (SEPTEMBER 22, 2021)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

C.H. ROBINSON WORLDWIDE, INC.,

Plaintiff,

v.

TRAFFIC TECH, INC., JAMES ANTOBENEDETTO, SPENCER BUCKLEY, WADE DOSSEY, BRIAN PEACOCK, AND DARIO AGUINIGA,

Defendants.

Civil No. 19-902 (MJD/DTS)

Before: Michael J. DAVIS,
United States District Court Judge.

This matter is before the Court on Defendants' Motion for Summary Judgment. [Doc. No. 125]

I. Background

Plaintiff C.H. Robinson Worldwide, Inc. ("CHR"), a Delaware corporation with its principal place of business in Minnesota, is in the business of providing

third-party logistics, acting as a broker between companies that need to ship goods and other companies that provide transportation services. Defendant Traffic Tech, Inc. ("Traffic Tech"), a Canadian corporation headquartered in Chicago, Illinois, is also in the logistics industry acting as a freight broker. The individual defendants, all citizens of California, worked for CHR in California. After leaving CHR's employ, the individual defendants immediately began working for Traffic Tech in California.

CHR asserts that as a condition of employment with CHR, the individual defendants executed a Confidentiality and Protection of Business Agreement ("CPB Agreement") that contained customer non-solicit and business interfering clauses, but that the plain terms of these agreements allowed the individual defendants to work for Traffic Tech, in the same positions they held as CHR employees. With respect to defendants Antobenedetto, Buckley, Dossey and Aguiniga, who all began their employment prior to 2017, the customer non-solicit and business interfering clauses provided:

> Therefore, in consideration of the Company's entrusting me with Confidential Information and the opportunity to represent the company in dealings with Business Partners[1], in consideration of my employment by the

[1] "Business Partner" is defined in the CPB Agreement as "any Customer, Carrier, consultant, supplier, vendor, or any other person, company, organization, or entity that has conducted business with or potentially could conduct business with [CHR] in any of the Company Business."

Company, in consideration of the compensation, benefits and

opportunities available to me through such employment, and in consideration of the other benefits and covenants provided to me by this Agreement.

I hereby agree as follows:

* * *

C. For a period of two (2) years after the termination of my employment with the Company, however occasioned and for whatever reason, I will not:

1. Directly or indirectly, for the benefit of any Competing Business (including a business which I may own in whole or in part), solicit, engage, sell or render services to, or do business with any Business Partner or prospective Business Partner of the Company with whom I worked or had regular contact, on whose account I worked, or with respect to which I had access to Confidential Information about such Business Partner at any time during the last two years of my employment with the Company; or

   * * *

3. Directly or indirectly cause or attempt to cause any Business Partner of the Company with whom the Company has done business or sought to do business within the last two (2) years of my employment to divert, terminate, limit or in any manner modify decrease or fail to enter into any actual or

> potential business relationship with the Company.

(O'Malley Decl. ¶¶ 2-6; Exs. A-C, and E, Section IV.)

These CPB Agreements also contained the following choice-of-law provision:

> I agree that all of my obligations hereunder shall be binding upon my heirs, beneficiaries, and legal representatives and that the law of the State of Minnesota shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles. Employee and Company agree that any claim or dispute between them shall be adjudicated or arbitrated exclusively in the State of Minnesota, Hennepin County District Court, or the United States District Court for the District of Minnesota. Employee and Company hereby consent to the personal jurisdiction of these courts and waive any objection that such venue is inconvenient or improper.

(*Id.* Exs. A-C and E, Section X.)

The non-solicit language used in defendant Peacock's CPB Agreement, who began working for CHR in July 2017, was changed to restrict contact with CHR Business Partners by use of CHR's confidential information. (*Id.* Ex. D, Section IV "Use the Company's Confidential Information in order to directly or indirectly, for the benefit of any Competing Business (including a business which I may own in whole or in part), solicit, engage, sell or render services, to or do business with any Business Partner or prospective Business Partner of the Company . . . ").)

(*Id.* Ex. D.)

The choice-of-law provision in Peacock's CPB Agreement is also different:

> I agree that all of my obligations hereunder shall be binding upon my heirs, beneficiaries, and legal representatives. With respect to claims or disputes arising in California, I agree that the law of the State of California shall govern as to the interpretation and enforceability of the Agreement without regard to conflicts of law principles. With respect to all other claims or disputes, I agree that the law of the State of Minnesota shall govern as to the interpretation and enforceability of this Agreement without regard to conflicts of law principles. Employee and Company agree that any claim or dispute between them arising in California shall be adjudicated or arbitrated exclusively in the State of California, Superior Court of California – County of San Diego, or the United States District Court for the Southern District of California. Employee and Company agree that any other claim or dispute between them shall be adjudicated or arbitrated exclusively in the State of Minnesota, Hennepin County District Court, or the United State District Court for the District of Minnesota. Employee and Company hereby consent to the personal jurisdiction of these courts and waive any objection that such venue is inconvenient or improper.

(*Id.* Ex. D, Section X.)

A. James Antobenedetto

James Antobenedetto was interviewed for a position and received a job offer from CHR by email in 2015. (Doc. No. 127, Abbate-Dattilo Decl., Ex. 50 (Antobenedetto Dep. at 17).) The offer letter provides that "[a]s a condition of employment, you will be asked to sign an Employee Sales Agreement at C.H. Robinson. A copy of the agreement is available for your review at the following [link provided][2]." (*Id.* Ex. 6.) Antobenedetto did not click on the link provided. (*Id.* Ex. 50 at 18, 119.)

Antobenedetto was assigned to CHR's San Diego office. (*Id.* at 117.) During his first day of work, he was provided a copy of the CPB Agreement, along with a number of other documents. (*Id.* at 22.) When asked to sign the CPB Agreement, CHR did not alert him to the restrictive covenants contained therein or the Minnesota choice of law provision. (*Id.* at 116-17.) Antobenedetto claims the restrictive covenants were never discussed during his employment, and the only time he fully read the document was after this action was filed. (*Id.)* Antobenedetto signed the CPB Agreement on April 28, 2015 in San Diego, California. (*Id.* at 21-22; O'Malley Decl. Ex. A.)

Antobenedetto was originally hired as an account manager, which involved the servicing of current CHR customers. (Abbate-Dattilo Decl., Ex. 50 (Antobenedetto Dep. at 39-41).) In 2017, he became a sales executive, which required him to go after new business instead of maintaining current business. (*Id.* at 40-41.)

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[2] While the offer letters refers to an "Employee Sales Agreement" the link connected to the CPB Agreement.

B. Spencer Buckley

Spencer Buckley began working for CHR two months before receiving his college degree as an account manager. (*Id.* Ex. 51 (Buckley Dep. at 11-12).) Buckley had two in-person interviews, and received a call that he would be getting an offer letter. (*Id.* at 16-17.) On February 20, 2015, he received an email from CHR that provided a link to an offer letter. (*Id.* at 18; Ex. 12.) Buckley assumes he looked at the offer letter, but he is not certain. (*Id.* Ex. 51 (Buckley Dep. at 18).) Like the offer letter Antobenedetto received, Buckley's offer letter provided information as to his base salary, and the notification that as a condition of employment he would have to sign an Employee Sales Agreement, with a link to that agreement. (*Id.* Ex. 7.)

Buckley began work at CHR on March 5, 2015, in the Clairemont, California location. (*Id.* Ex. 51 (Buckley Dep. at 26).) He was given a copy of the CPB Agreement as part of all the paperwork for the position. (*Id.* at 26, 122.) He does not recall if he read the CPB Agreement thoroughly, but he did sign it. (*Id.* at 28-30; Buckley Decl. ¶ 4; O'Malley Decl. Ex. B.) At no point did anyone at CHR explain the terms of the CPB Agreement. (*Id.* Ex. 51 (Buckley Dep. at 122).)

While employed at CHR, Buckley worked on three different teams, with four different managers, but always worked out of California. (*Id.* at 44, 51-52.) His contact to Minnesota involved attending a week-long training session in April or May 2015. (*Id.* at 45.)

On July 20, 2018, Buckley was given a written warning for unacceptable performance and put on a performance improvement plan. (*Id.* Exs. 15 and 16.) He was terminated from CHR on August 2, 2018. (*Id.* Ex. 51 (Buckley Dep. at 59).)

C. Wade Dossey

Wade Dossey also began working at CHR in California right after college. (*Id.* Ex. 52 (Dossey Dep. at 11).) Following his interview, Dossey received a phone call informing him that he was to receive an offer. (*Id.* at 14.) He believes he accepted the job over the phone. (*Id.* at 14, 126-27.) He received an offer letter by email on March 25, 2016. (*Id.* at 15, Ex. 8.) The letter set forth the job title, compensation and the requirement that he complete an "onboarding program" in either Kansas City, MO or Minneapolis, MN. (*Id.* Ex. 8.) The letter also provided that as a condition of employment, he would have to sign an Employee Sales Agreement, with a link to that agreement. (*Id.)* Dossey is certain that he did not click on the link provided. (*Id.* Ex. 52 (Dossey Dep. at 19, 24).)

While attending the onboard program in Minnesota, two months after he accepted the position, Dossey asserts he first saw and was asked to sign the CPB Agreement. (*Id.* at 30-31.) Dossey said that he felt rushed to sign it and that he did not review the CPB Agreement before signing it. (*Id.* at 22, 30-31.) He further felt he could not negotiate the terms or review it further because he had already accepted the job and was in Minnesota for training. (*Id.* at 26.)

Dossey began as a trainee in the San Diego office. (*Id.* at 47.) His job duties for the first six months included answering the phone and helping out the

office. (*Id.* at 45.) After his training was completed, Dossey became a sales executive, managing current accounts and bringing in new business. (*Id.* at 47.)

D. Brian Peacock

Brian Peacock also joined CHR right after college graduation. (*Id.* Ex. 53 (Peacock Dep. at 13).) He participated in an interview and was notified by email that he was being offered a position as an associate sales executive in CHR's San Diego office. (*Id.* at 13-14.) The offer letter, dated April 25, 2017, provided salary and commission information, and provided that as a condition of employment, he would have to sign an Employee Sales Agreement, with a link to that agreement. (*Id.,* Ex. 9.) Peacock does not recall that he clicked the link prior to accepting the job. (*Id.* Ex. 53 (Peacock Dep. at 17, 153).)

He began employment with CHR in July 2017 and completed training in Minnesota. (*Id.* at 19-20, O'Malley Decl., Ex. D.) He testified that while waiting to check into his hotel, he and other new sales associates were given a number of documents to sign, one of which was the CPB Agreement. (*Id.* Ex. 53 (Peacock Dep. at 19).) At that time, he did not read the documents, as he was told to sign and then go check into the hotel. (*Id.* at 20.) Peacock signed the CPB Agreement on July 10, 2017, and the restrictive covenants contained therein were not discussed beforehand. (*Id.* at 27.) After training, he returned to San Diego and did not return to Minnesota. (*Id.* at 62.)

Peacock's duties included phone calls and emails to customers to make sales. (*Id.* at 38.) Peacock performed near the minimum requirements his first year,

and later resigned in August 2018 and took a few months to travel. (*Id.* at 54.)

E. Dario Aguiniga

Aguiniga began working for CHR in April 2007. He was hired as a Sales Transportation Representative in California. (*Id.* Ex. 10.) Throughout his employment, Aguiniga signed three different agreements; one in 2007, one in 2013 and one in 2014. (*Id.* Exs. 23, 24 and 25.) CHR is pursuing its claims against Aguiniga under the 2013 CPB Agreement. (Sec. Am. Comp. ("SAC") at ¶ 9; Abbate-Dattilo Decl. Ex. 49 (Vigeant Second Dep. at 46).) The 2013 CPB Agreement provides the same language as the CPB Agreements signed by the other defendants. (SAC Ex. 25.) Aguiniga does not remember how this CPB Agreement was presented to him. (Abbate-Dattilo Decl., Ex. 54 (Aguiniga Dep. at 24).) CHR claims the 2013 CPB Agreement was signed in connection with a promotion he received in 2014. (*Id.* Ex. 26.)

Aguiniga became the supervisor of CHR's San Diego Cross Border Branch. (*Id.* Ex. 27.) In this role, he had a team ranging from four to seven people related to carrier sales and that Aguiniga handled the personnel matters, such as setting up goals for the team, P & L's, and tracking his team. (*Id.* Ex. 54 (Aguiniga Dep. at 43-44).)

Because he did not meet the performance expectations of a supervisor, Aguiniga was put on a performance improvement plan on August 1, 2019. (*Id.* Ex. 28.) On April 26, 2020, he was informed that he was being furloughed. (*Id.* Ex. 54 (Aguiniga Dep. at 57); Ex. 29.) After one and one-half months, Aguiniga

started looking for a new position. (*Id.* Ex. 54 (Aguiniga Dep. at 59).)

F. Defendants Join Traffic Tech

Defendants Antobenedetto, Dossey, Buckley and Peacock accepted employment with Traffic Tech in late 2018. Antobenedetto, Dossey and Buckley were working for CHR when they were recruited by Traffic Tech on LinkedIn. (*Id.* Ex. 51 (Buckley Dep. at 62); Ex. 50 (Antobenedetto Dep. at 48); Ex. 52 (Dossey Dep. at 51-52).) Traffic Tech also reached out to Peacock on LinkedIn before and after he left CHR. (*Id.* Ex. 53 (Peacock Dep. at 55-56); O'Malley Decl., Ex. G at TT000160_0009-10).)

Aguiniga joined Traffic Tech in 2020 after he was furloughed from CHR. Antobenedetto reached out to Aguiniga to express his sympathies when he learned of Aguiniga's furlough. (*Id*. Ex. 35; Ex. 54 (Aguiniga Dep. at 61-62).) Aguiniga informed Antobenedetto that he was looking for work, and Antobenedetto let him know that Traffic Tech was beginning to hire in its La Jolla location. (*Id.)* Aguiniga was interviewed at Traffic Tech and was given an offer of employment. (*Id.* Ex. 54 (Aguiniga Dep. at 76).)

G. CHR Files Suit

CHR filed this action on February 25, 2019 in Minnesota state court. Defendants removed it to this Court on April 1, 2019. In the SAC, CHR has alleged three causes of action: Breach of Contract against the individual defendants; Tortious Interference with Contractual Relationship against all Defendants; Tortious Interference with Prospective Economic Advantage against all Defendants.

II. Standard for Summary Judgment

Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. *Celotex,* 477 U.S. at 323. "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." *Amini v. City of Minneapolis,* 643 F.3d 1068, 1074 (8th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 252 (1986)). The party opposing summary judgment may not rest upon mere allegations or denials but must set forth specific facts showing that there is a genuine issue for trial. *Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir. 1995).

III. Discussion

A. Breach of Contract Claims Against Individual Defendants

CHR alleges that the individual defendants each entered into agreements that contained certain restrictions and obligations and that the individual defendants breached their respective agreements by soliciting CHR employees to join Traffic Tech and by soliciting CHR customers.

The CPB Agreements signed by the individual defendants, except Brian Peacock, provide that "the law of the State of Minnesota shall govern as to the

interpretation and enforceability of this Agreement without regard to conflicts of law principles." (O'Malley Decl., Exs. A-C and E, Section X.) Despite this provision, Defendants argue that California law governs all claims against them because they are California residents, work primarily in California, and because California prohibits restrictive covenants in employment agreements.

With few exceptions not applicable here, California law provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. And Prof. Code § 16600. This provision includes customer non-solicitation agreements. *See Dowell v. Biosense Webster, Inc.,* 179 Cal. App. 4th 564, 575 (2009). To prevent employers from using choice of law provisions in employment contracts to avoid California law, California enacted an anti-waiver statute, effective January 1, 2017, that provides:

> An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

California Labor Code § 925.

With respect to Antobenedetto, Buckley, Dossey and Aguiniga, CHR argues that Minnesota law applies to the claims against them, as the Minnesota choice

of law provision in their CPB Agreements are valid, and as a result, Minnesota law governs the interpretation and enforceability of the CPB Agreement. With respect to Peacock, CHR argues that the claims arise outside of California, therefore Minnesota law governs the claims against Peacock as well.

1. Choice of Law

A federal court sitting in diversity applies the choice of law rules of the forum state. *Highwoods Props., Inc. v. Exec. Risk Indem., Inc.,* 407 F.3d 917, 920 (8th Cir. 2005). Minnesota's choice of law principles therefore control. Under Minnesota law, courts generally honor the parties' contractual choice of law provisions, so long as the parties are acting in good faith and without the intent to evade the law. *Menzies Aviation* (*USA), Inc. v. Wilcox,* 978 F. Supp.2d 983, 996 (D. Minn. 2013) (citing *Combined Ins. Co. of Am. v. Bode,* 247 Minn. 458, 77 N.W.2d 533, 536 (1956) and *Milliken & Co. v. Eagle Packaging Co.,* 295 N.W.2d 377, 380, n.1 (Minn. 1980)); *Hagstrom v. Am. Circuit Breaker Corp.,* 518 N.W.2d 46, 48 (Minn. Ct. App. 1994)). "However, parties do not have unchecked power to choose their own law, particularly where the State has 'expressed an intent to protect its citizens with its own laws by voiding . . . choice of law provisions . . . " *Hedding o/b/o Hedding Sales & Serv. v. Pneu Fast Co.,* 18-cv-1233, 2019 WL 79006 at *3 (D. Minn. Jan. 2, 2019) (quoting *Banbury v. Omnitrition Intern., Inc.,* 533 N.W.2d 876, 880 (Minn. Ct. App. 1995)). Accordingly, "the law of the state chosen by the parties will be applied unless to do so 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issues . . . '" *Id.*

To assist in determining whether to enforce a choice of law provision over an anti-waiver statute, the Eighth Circuit cited with approval a four factor test used by the Sixth Circuit in *Tele-Save Merchandising Co. v. Consumers Distributing Co.,* 814 F.2d 1120 (6th Cir. 1987). *Modern Computer Systems v. Modern Banking Systems, Inc.,* 871 F.2d 734, 738 (8th Cir. 1989) (en banc). These factors consider 1) whether the parties agreed in advice to the law to be applied in future disputes; 2) whether the contacts between the parties were fairly evenly divided between the state selected in the contract and the state that has enacted the anti-waiver statute; 3) the parties' relative levels of bargaining power; and 4) whether application of the law chosen in the contract is repugnant to the public policy of the state that has enacted the anti-waiver statute. *Id.*; *see also JRT, Inc. v. TCBY Systems, Inc.,* 52 F.3d 734, 739 (8th Cir. 1995) (noting that the Eighth Circuit adopted *Tele-Save* in *Modern Computer)*; *Banek Inc. v. Yogurt Ventures U.S.A.,* 6 F.3d 357, 360 (6th Cir. 1993) (noting the determination of the applicability of an anti-waiver statute is the first of three separate, sequential questions).

As to the first factor, there is no dispute that the parties entered into the CPB Agreement, and that such agreement contained a Minnesota choice of law provision.

As to the division of contacts between the parties, the Court looks to the parties' contacts between the two potential forum states. *Modern Computer,* 871 F.2d at 739. Minnesota is CHR's principal place of business and the state named in the choice of law provisions. Two of the individual defendants, Dossey

and Peacock, signed their respective CPB Agreements while attending training sessions in Minnesota, but the circumstances surrounding the execution of those documents demonstrate they were given little time to consider the terms of the agreements, let alone consider the impact of the choice of law provision. The remaining defendants signed their CPB Agreements in California, and California is the state where the individual defendants live and their place of performance under the CPB Agreements. Based on these facts, the Court finds the division of contacts weighs in favor of California.

The parties are also of unequal bargaining power. With the exception of Aguiniga, the individual defendants were entry-level employees when they signed their respective CPB Agreements as a condition of employment. In addition, the CPB Agreements signed by all individual defendants are essentially identical agreements. Aguiniga was asked to sign the CPB Agreement in connection with a job promotion in 2013, but the record demonstrates the agreement Aguiniga signed was the same as the others, and there was no negotiation involved in the signing of said agreement. A contract of adhesion – a take it or leave it form contract between parties of unequal bargaining power- would likely not be enforced under Minnesota law. *Menzies Aviation* (*USA), Inc. v. Wilcox,* 978 F. Supp. 2d 983, 997 (D. Minn. 2013) (citing *Cell v. Moore & Schley Sec. Corp.,* 449 N.W.2d 144, 147 (Minn. 1989). Accordingly, this factor weighs in favor of applying California law.

Finally, the Court considers whether California public policy overrides the choice of law provision. California law clearly evinces a public policy against

restrictive covenants in employment agreements. "Section 16600 expresses California's strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice." *Dowell,* 179 Cal. App. 4th at 575. California Labor Code § 925 was enacted as further protection of California citizens by eliminating an employer's ability to use a choice of law provision in order to designate a state with more favorable non-compete laws. Because Minnesota law also disfavors non-compete agreements, the Court finds that application of California state law is not repugnant to Minnesota's public policy concerning such agreements. *See Matson Logistics, LLC v. Smiens,* Civil No. 12-400, 2012 WL 2005607, at *3 (D. Minn. June 5, 2012) (noting that Minnesota law disfavors non-compete agreements).

Based on the above, the Court finds that application of California's anti-waiver statute would be appropriate under the facts presented.

2. Whether California Labor Code § 925 Applies to CHR's Claims

Next, the Court must determine whether the California anti-waiver statute applies to the claims asserted against the individual defendants.

California Labor Code § 925 provides:

(a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

(b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

(c) In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney's fees.

(d) For purposes of this section, adjudication includes litigation and arbitration.

(e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

(f) This section shall apply to a contract entered into, modified, or extended on or after January 1, 2017.

As the statutory language makes clear, § 925 applies to an employee who primarily resides and works in California; to controversies that arise in California; and to a contract entered into, modified or extended on or after January 1, 2017.

The individual defendants are citizens of California and worked exclusively in California while employed by CHR. Further, they are alleged to have breached the restrictive covenants in their respective CPB Agreements while working for Traffic Tech in California. Defendants argue it is thus clear that CHR's claims for breach of contract and tortious interference against the individual defendants arise in California.

"A claim arises in any district in which a substantial part of the acts, events, or omissions occurred that gave rise to the claim." *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 842 (9th Cir. 1986). For a claim based on breach of contract, the claim arises in the place of intended performance rather than the place of repudiation. *Id.*

Here, the individual defendants were hired in California and lived and worked in California during their entire employment with CHR. Accordingly, the Court finds that the claims asserted against the individual defendants arose in California. *Cf. Bromlow v. D & M Carriers LLC,* 438 F. Supp.3d 1021, 1030 (N.D. Cal. 2020) (finding § 925 does not apply when the employee did not live or work in California).

Next, the Court must determine whether the CPB Agreements were entered into or modified after January 1, 2017. As Peacock signed his CPB Agreement on July 10, 2017, there can be no dispute that requirement is met with respect to Peacock. (O'Malley Decl. Ex. D.) As to the other individual defendants, although they signed their respective CPB Agreements before January 1, 2017, Defendants argue such agreements were modified by their Bonus Incentive Agreements that CHR required them to sign after

January 1, 2017. The 2018 Bonus Incentive Agreements provided new elements into their employment contracts – salaries and bonuses – that were not part of the original agreements. (SAC, Exs. 10 (Antobenedetto), 14 (Buckley), 18 (Dossey) and 29 (Aguiniga).) Further, the CPB Agreements provide that compensation and benefits were the consideration for the restrictive covenants, but do not provide specific compensation and bonus terms. Instead, those details are included in the Bonus Incentive Agreements. (*See* Abbate-Dattilo Decl., Ex. 48 (First Vigeant Dep. 62-63).) As a result, Defendants argue the CPB Agreements are modified by the Bonus Incentive Agreements, which introduce the specifics of the employee's compensation and bonuses. *See Sokol & Associates, Inc. v. Techsonic Industries, Inc.,* 495 F.3d 605, 610 (8th Cir. 2007) ("A modification of a contract is a change in one or more respects, which introduces new elements into the details of the contract . . . but leaves the general purpose and effect undisturbed.")

In *Midwest Motor Supply Co. v. Superior Court of Contra Costa County,* 56 Cal. App. 5th 702, 709 (Cal. Ct. App. 2020), the court held that § 925 applies and a forum selection clause is voidable if it is contained in a contract that is modified on or after January 1, 2017. The court found that § 925's applicability was not limited to a modification of the forum selection clause specifically, but to a modification of the contract within which the forum selection clause is included. *Id.* Because the employment agreement was modified after January 1, 2017 to change the employee's compensation, the court held that § 925 allowed the employee to void the forum selection clause. *Id.*

Here, the CPB Agreements were similarly modified when the Bonus Incentive Agreement added new and different compensation and benefits. The CPB Agreements provide:

> As a condition of employment or continued employment, Employee agrees to be bound by and act in accordance with this Agreement. In consideration of the mutual obligation incurred and benefits obtained hereunder and other good and valuable consideration (including, without limitation, access to Company's confidential information, customers, carriers, and other business partners, opportunities for learning and experience, opportunities for increased compensation and other benefits, restricted stock opportunities, bonus opportunities and opportunities for advancement) which would not be available to Employee except in return for entering into this Agreement and the sufficiency of such valuable consideration Employee hereby acknowledges . . .

(SAC Exs. 1-4, Section I.)

The Bonus Incentive Agreements were incorporated into the CPB Agreement and provided, above the signature line,:

> I understand and acknowledge that this Agreement and the benefits made available to me under this Agreement is part of the compensation and consideration available to me in return for the dispute resolution provision it contains and also the other various agreements I previously have entered

> into with Company, which agreements may include but are not limited to, Sales-Employee Agreement, Management-Employee Agreement, Confidentiality and Noncompetition Agreement, and Data Security Agreement. I reaffirm and agree anew to abide by all my prior agreements with Company as a necessary condition of receiving the benefits under this Agreement.

(SAC, Exs. 10, 14, 18 and 29.)

The Court finds that the Bonus Incentive Agreement modified the individual defendants' compensation, and therefore modified the CPB Agreement. The Bonus Incentive Agreement is the only agreement that sets forth the terms of the individual defendants' compensation, and compensation is specifically identified as consideration for the restrictive covenants set forth in the CPB Agreements. Each subsequent year, CHR changed the individual defendants' compensation through the Bonus Incentive Agreements, which also required that the individual defendants affirm and agree anew to the terms of their restrictive covenants in the Agreement. (*See e.g.,* SAC Ex. 10.)

Because the CPB Agreements were modified after January 1, 2017 when Antobenedetto, Buckley, Dossey and Aguiniga signed their 2018 Bonus Incentive Agreements, the Court finds that § 925 applies to the choice of law provisions in the CPB Agreements, making them voidable. The individual defendants

have elected to void those provisions, therefore the Court will apply California law to the CHR's claims[3].

3. Whether Contracts are Enforceable Under California Law

Next, the Court must determine whether the restrictive covenants contained in the CPB Agreements are enforceable under California law. As noted previously, California law provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600. Non-solicitation clauses, as well as non-compete clauses, have been found to "restrain employees from practicing their chosen profession" and are therefore void under § 16600 *ab initio* and unenforceable. *See e.g. Dowell,* 179 Cal. App. 4th at 575.

The non-solicitation clauses in the CPB Agreements provide that for two years after termination of their employment with CHR, the individual defendants would not "directly or indirectly . . . solicit, engage, sell or render services to, or do business with any Business Partner or prospective Business Partner of the Company with whom I worked or had regular contact, on whose account I worked, or with respect

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[3] The Court further rejects CHR's argument that the individual defendants waived the right to void the CPB Agreements because they waited too long to assert the right. Waiver requires the "voluntary and intentional relinquishment or abandonment" of a particular right. *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 304 (Minn. 1990). The record in this case clearly shows the individual defendants did not relinquish or abandon their right to void the CPB Agreements under § 925. *See* Doc. Nos. 6, 30, 50, and 118.

to which I had access to Confidential Information . . . ' The definition of "Business Partner" includes more than just CHR customers, it also includes carriers, consultants, contractors, suppliers, vendors or any other person, company, organization or entity that has conducted business with CHR. Another non-solicitation provision provides that the individual defendants, within two years of terminating their employment with CHR, could not "[d]irectly or indirectly cause or attempt to cause any Business Partner of the Company with whom the Company has done business or sought to do business within the last two (2) years of my employment to divert, terminate, limit or in any manner modify decrease or fail to enter into any actual or potential business relationship with the Company." This provision is not limited to "Business Partners" the individual defendants had contact with or about who they had confidential information.

The Court finds that these non-solicitation clauses are very broad. The clauses are not limited to the protection of confidential information and together operate to restrict the individual defendants from contacting any CHR customer, vendor, partner or carrier. As such, the non-solicitation clauses unreasonably restrict the individual defendants' ability to engage in their lawful profession. Accordingly, the Court finds the non-solicitation clauses are unenforceable under California law[4].

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[4] The Court further notes that even under Minnesota law, the Court would find the non-solicitation agreements at issue are overbroad, and unenforceable. *See Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965) (finding that restrictions which are broader than necessary to protect the employer's legitimate interests are generally held invalid).

4. Application of California Law Does Not Violate Due Process

Finally, CHR argues that § 925 violates the Due Process Clause. "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 562 (1996) (finding "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003) (finding $145 million punitive damages award under Utah law violated Due Process as award was based in part on out-of-state conduct that was lawful where it occurred).

The Commerce Clause "has long been understood to have a 'negative' aspect that denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Oregon,* 511 U.S. 93, 98 (1994). "[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce. *Id.* at 99 (cleaned up). Discriminate "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" such as higher surcharges for out-of-state waste haulers than for in-state waste haulers. *Id.* at 99.

The Court finds that § 925 regulates evenhandedly. If CHR hires employees in California, it is subject to the laws of California just like every other employer

that employs individuals in California. *See Yoder v. Western Express, Inc.,* 181 F. Supp.3d 704 (C.D. Cal. 2015) (finding application of California's wage and hour laws would not violate dormant Commerce Clause); *Waguespack v. Medtronic, Inc.,* 185 F.Supp.3d 916, 927 (M.D. La. 2016) (finding Louisiana law that prohibits forum selection and choice of law clauses in employment contracts, unless the clauses are expressly, knowingly and voluntarily entered into and ratified after the occurrence of injury, did not violate dormant Commerce Clause because any burden on Defendant was incidental and because Louisiana law effectuated a legitimate local interest).

Because Section 925 does not discriminate between out-of-state employers and in-state employer, it must be upheld unless the burden imposed on commerce is clearly excessive in relation to the local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). This requires the Court to balance California's public interest against any incidental burdens on interstate commerce. *Id.*

The only burden identified by CHR is that it interferes with its management of its workforce, yet CHR fails to demonstrate how that interest outweighs California's public interest in the protection of employee rights. Further, § 925 does not interfere with CHR's ability to manage its workforce – it is free to hire employees of its choice, open offices of its choice and make sales and profits in California. The only restriction concerns how post-employment activities are governed for employees that live and work in California, and the Court finds this is not a burden on interstate commerce that outweighs California's strong, legitimate interest in regulating the employ-

ment of its citizens. *See Application Group, Inc. v. Hunter Group,* 61 Cal. App. 4th 881, 900 (Cal. Ct. App. 1998) (finding no reason why California employee's interests should not be deemed paramount to the competitive business interests of out-of-state as well as in-state employers).

B. Tortious Interference Claims

Count II asserts that Defendants tortiously interfered with CHR's contractual relationship with its customers, and its employees. Count III asserts that Defendants have tortiously interfered with CHR's long-standing and continuing business relationship with its customers which created a reasonable expectation that CHR would continue to do business with them for CHR's economic advantage.

> A claim of tortious interference with contract has the following elements:
>
> (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. The burden of proving sufficient justification for interference is upon the defendant.

Furlev Sales and Assocs., Inc. v. N. Am. Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982).

With respect to the claim that Defendants interfered with CHR's contracts with customers, CHR corporate representative Blake Nowak was asked during his 30(b)(6) deposition if CHR has exclusive contracts with any of its customers, to which he responded in the negative. (Abbate-Datillo Decl., Ex. 58 (Nowak Dep. at 147).) Alondra Alejo, another CHR

corporate designee, testified that carriers are also free to do business with other companies. (*Id.,* Ex. 57 (Alejo Dep. at 71).) In opposition to Defendants' motion for summary judgment, CHR did not address whether or not it had customer or carrier contracts that were interfered with by Defendants. CHR has thus not demonstrated that Defendants caused any breach of a customer or carrier contract. *See Superior Edge, Inc. v. Monsanto Co.,* 964 F. Supp.2d 1017, 1043 (D. Minn. 2013). Accordingly, Defendants are entitled to summary judgment on the claim that they tortiously interfered with CHR customer or carrier contracts.

As to the claim that Defendants tortiously interfered with the restrictive covenants within the CPB Agreements at issue, the Court finds those claims fail as well because those restrictive covenants are unenforceable. Because the restrictive covenants are unenforceable and otherwise do not prevent Traffic Tech from hiring employees from CHR, CHR has failed to demonstrate there are material fact issues as to whether Defendants acted intentionally or wrongfully in accepting employment at Traffic Tech and by soliciting CHR customers, or that Traffic Tech acted intentionally and wrongfully by recruiting CHR employees. *See Oak Park Dev. Co., Inc. v. Snyder Bros. of Minnesota, Inc.,* 499 N.W.2d 500, 506 (Minn. Ct. App. 1993) (interference must be intentional).

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment [Doc. No. 125] is GRANTED. This matter is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Michael J. Davis
United States District Court

Date: September 22, 2021

ORDER DENYING PETITION FOR REHEARING, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (APRIL 10, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

C.H. ROBINSON WORLDWIDE, INC.,

Appellant,

v.

TRAFFIC TECH, INC., ET AL.,

Appellees.

No. 21-3259/21-3825

Appeal from United States
District Court for the District of Minnesota
(0:19-cv-00902-MJD) (0:19-cv-00902-MJD)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton and Judge Kelly did not participate in the consideration or decision of this matter.

April 10, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

LAW JOURNAL PUBLICATION:
***NONCOMPETE AGREEMENTS IN THE U.S. LABOR FORCE*, E. STARR ET AL., EXCERPTS**

Noncompete Agreements in the U.S. Labor Force

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Recommended Citation

Starr, Evan P., J.J. Prescott, and Norman D. Bishara. "Noncompete Agreements in the U.S. Labor Force." *Journal of Law and Economics* 64, no. 1 (2021): 53-84.

[. . .]

3. The Use of Noncompetes

To identify employees bound by noncompetes, our survey instrument first defines a noncompete agreement (explicitly distinguishing a nondisclosure agreement, a common confusion) and asks respondents whether they have ever heard of such provisions (75.2% report yes). Our survey then asks those who indicate some familiarity with noncompetes whether they have ever agreed to one (25% overall, 42% of those who are aware of them), and, if they answer yes, whether they are currently bound by one. For our 11,505 respondents, the unweighted distribution of those with a noncompetes currently is 15.2% "yes," 55.1% "no," and 29.7% "maybe," where the "maybe" category includes those who have never heard of a noncompete (24.8%), do not know if they have one (2.2%), do not want to say (0.23%), and cannot remember (2.5%).[14]

A key challenge in calculating noncompete incidence is that many in the "maybe" category may actually be bound by a noncompete. In fact, of those in our data who report having ever entered into a noncompete agreement, 8.8% also acknowledge having unknowingly signed at least one such provision that they discovered only at some later date. We address

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[14] The unweighted distribution for whether an individual has entered into a noncompete at some point in the past in our full sample is 31.5% "yes," 41.5% "no," and 27% "maybe." Among individuals who answer "yes" or "no" (to the question whether they have ever entered into a noncompete), almost all report being confident in their answer—*i.e.*, either completely (74.2%) or fairly (23%) sure.

this uncertainty in two ways. First, we treat the "maybes" as their own category, which allows us to interpret the proportion of respondents answering "yes" as a lower bound on the incidence of noncompetes and the proportion of respondents answering either "yes" or "maybe" as an upper bound. Second, because the overall effect of a noncompete is averaged across those who are and who are not aware of their non-compete status, we use multiple imputation methods (King et al., 2001) to predict which respondents in the "maybe" category have a noncompete.[15]

Overall, our weighted estimates indicate that 38.1% of U.S. labor force participants have agreed to a noncompete at some point in their lives, and that 18.1%, or roughly 28 millions individuals,[16] currently work under one.[17] Table 3 shows the distribution of

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[15] We provide a more in-depth discussion in Section II.F of Prescott et al. (2016). To calculate our standard errors properly, we impute noncompete status among the "maybe" category 25 separate times. We then estimate our statistical models on each of the 25 different but complete datasets and follow by using Rubin's Rules to combine the resulting point estimates and correct the standard errors to reflect the variation in the imputed values (see Online Appendix F.5 for details). The benefits of multiple imputation methods are that they allow us to create an overall estimate of the use of noncompetes that accounts for the uncertainty surrounding the "maybe" group.

[16] The Bureau of Labor Statistics (BLS) puts the U.S. labor force at 156 million in July of 2014.

[17] The unweighted multiple imputation estimates signal that relatively few "maybes" are likely to have noncompetes in fact. We calculate that 19.9% of individuals (including 16% of the "maybe" respondents) are bound by noncompetes in 2014. These numbers are similar to two other estimates from smaller but more recent surveys: Krueger and Posner (2018), using a similar

temporal and geographic restrictions of noncompetes in the U.S.: most noncompetes have durations of 2 years or less, while the geographic scope is frequently the state or the entire country (or there is no geographic limitation), though about 20% of individuals with noncompetes are uncertain as to the precise terms. Table 4 provides means—overall and by noncompete status—of important variables in our sample. Table 5 and Figures 1 to 8 document variation in noncompete use by a range of employee and employer characteristics, with additional calculations presented in Online Appendix Figures OA1 to 0A5. The figures report the results of both our bounding approach and our multiple imputation strategy.[18] In Table 6, we also examine multinomial logit (Panel A) and linear probability models (Panel B) of employee noncompete status. We briefly describe variation in noncompete use by demographic characteristics before focusing our discussion on the empirical findings that are most relevant to the theoretical and policy debates over noncompetes.

Noncompete incidence differs widely across types of employees and employers. Table 5 shows that noncompetes are more than twice as common among employees of for-profit employers (19%) than they are among those working for private non-profits

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online survey methodology of 795 respondents in 2017, find a 15.5% incidence rate, while a 2017 survey in Utah of 2,000 employees reports an 18% incidence rate (Cicero, 2017).

[18] The size of the bars in the figures shows the size of the "maybe" category. The lower end of the bar represents the lower bound on the incidence of noncompetes, the upper end represents the upper bound on incidence, and the dark dot marks the multiple imputation estimate.

(9.8%). Men are slightly more likely than women to have entered into a noncompete at some point (39.7% vs. 36.3%) and to be currently bound by one (18.8% vs. 17.3%). Noncompetes are also a bit more frequent among the young (*see also* Figure 1) and in areas with greater product market competition (Figure 2). Lastly, while noncompetes are more routine among those with higher levels of education (Figure 3) and among those with greater annual earnings (Figure 4) or receiving a salary (Table 5), they are still prevalent among less-educated and lower-earning employees. For example, among those without a bachelor's degree, 34.7% of our respondents report having entered into a noncompete at some point in their lives, while 14.3% report currently working under one. Similarly, of those earning less than $40,000 per year, 13.3% are currently subject to a noncompete, with 33% reporting that they have acquiesced to one at some point. Table 6 confirms that these patterns hold in a multivariate framework. Importantly, these figures and Table 4 also demonstrate that a disproportionate share of the "maybe" category are low-earning with lower levels of education.[19]

Consistent with the traditional case for non-competes, the provisions are more frequent in certain high-skilled occupations and industries, though they are still common in most other occupations (Figure 5)

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[19] For example, among those who report having less than a bachelor's degree, nearly 45% indicate that they do not know whether they have agreed to noncompete in the past, compared to approximately 20% of respondents with at least a bachelor's degree.

and industries (Figure 6).[20] Per Figure 5, the occupations in which noncompetes are found most frequently are architecture and engineering (36%) and computer and mathematical vocations (35%). Farm, fishing, and forestry positions have the lowest incidence (6%).[21] With respect to industries, Figure 6 shows that noncompetes are most common in information (32%), mining and extraction (31%), and professional and scientific services (31%). Noncompetes are found least frequently in agriculture and hunting (9%) and the accommodation and food services industries (10%).[22] Relatedly, noncompete incidence

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[20] We use two methods to identify the use of noncompetes across occupations and industries: First, we calculate the proportion of respondents who agree to a noncompete within a given occupation or industry. Second, we ask individuals to project how common noncompetes are within their occupations and industries, and then we aggregate those estimates into a single occupation-or industry-specific number. The idea behind using "projected estimates" as a way of estimating noncompete incidence is that an employee's knowledge of their occupation and industry as a whole captures more information than the employee's personal situation alone. See Rothschild and Wolfers (2013) for an example of this method in a voting context.

[21] Two indicia of the quality of our survey data are that legal occupations have the second lowest incidence level (10%) and that employees in these occupations are most likely to know whether they are bound by a noncompete. These facts are reassuring because one would expect that lawyers and legal support staff would be among the most careful readers of contracts and because the practice of law is the only occupation in which noncompetes are unenforceable in all states (Starr et al., 2018).

[22] With respect to the joint occupation-industry incidence distribution, Figure 0A5 shows that the use of noncompetes is highest for technical occupations (computer, mathematical, engineering, architecture) in the manufacturing and informa-

is much higher among those who report possessing some type of trade secret or valuable information. Figure 7 breaks down noncompete incidence by type of "legitimate business interest."[23] Those who work with trade secrets are most likely to be bound by a noncompete (33-36%), while those who only work with clients or who have client-specific information are roughly half as likely to have a noncompete (15-16%).

Finally, we find very little difference in (unconditional) noncompete incidence between states that will and will not enforce these provisions (Figure 8). This is true even among single-location employers, where we find that the unconditional use of noncompetes in nonenforcing states is only slightly lower than in states that enforce noncompete agreements most zealously (14% vs. 16.5%). By comparison, multivariate results in Table 6 indicate that, comparing two observationally equivalent employees, noncompetes appear to be somewhat more common (4 to 5 percentage points) in the most vigorous enforcing states relative to nonenforcing states. The difference between the unconditional and conditional models suggests some role for geographic selection into the use of noncompetes based on employee and employer observables.

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tion industries. Note that in the figure we only analyze occupation-industry cells for which there are at least 20 individuals in the sample in order to ensure that the results are representative.

[23] We define legitimate business interests as trade secrets, relationships with clients, and client information, such as contacts or marketing databases.

To provide some aggregate understanding across all of these characteristics, our simple multivariate model predicts that a salaried employee with a college degree, earning $100,000 per year, with access to the employer's trade secrets, and in a private for-profit firm, has a 44% likelihood of being a party to a noncompete. As a point of comparison, an employee paid by the hour without a bachelor's degree, in a private for-profit firm, earning $50,000 per year, and without access to the employer's trade secrets, has a 13% chance of being bound by a noncompete.

4. Negotiation and the Contracting Process

Table 7 presents descriptive statistics regarding the noncompete contracting process, including the extent of negotiation over noncompetes, when employers initially present noncompetes to applicants or employees, and whether employees consult with others before assenting to such a provision. Panel A shows that 61% of individuals with a noncompete first learn they will be asked to agree not to compete before accepting their job offer while more than 30% first learn they will be asked to agree only after they have already accepted their offer (but not with a promotion or change in responsibilities). This late notice appears to matter to employees. In a follow-up question to those who received late notice, 26% report that if they had known about their employer's noncompete plans earlier, they would have reconsidered accepting their offer.

Table 7 also shows that only 10% of employees report attempting to negotiate over the terms of their noncompete or asking for additional compensation or benefits in exchange for agreeing to such an employ-

ment condition. However, we find that the timing of noncompete notice is correlated with whether an individual makes an effort to bargain: 11.6% report negotiating when given early notice by their potential employer compared to just 6% of those given notice only after they have accepted their offer.[24] When presented with a noncompete, most respondents report just reading and signing it (88%), with a nontrivial fraction not even reading it (6.7%). Consultation with friends, family, or a lawyer is relatively uncommon (17%), but obtaining advice is strongly associated with attempting to negotiate.[25]

[. . .]

[24] By contrast, 31% of those asked to agree to a noncompete before a promotion or raise report negotiating over their noncompete, suggesting such circumstances allow employees a more favorable bargaining position.

[25] In unreported results, we also find that negotiation is twice as likely for those with a bachelor's degree relative to those without (13% vs. 6.2%) and that men are more likely to report negotiating than women (13% vs. 4.5%). Also, negotiation appears to be uncorrelated with noncompete enforceability—even after controlling for a host of characteristics such as employer size and employee age, gender, industry, occupation, and education.

ANALYSIS OF SB 124,
SENATE ASSEMBLY COMMITTEE
ON JUDICIARY
(AUGUST 25, 2016)

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair SB 1241 (Wieckowski) ±
As Amended August 19, 2016

As Proposed to be Amended

SENATE VOTE: 25-13

SUBJECT: CONTRACTS

KEY ISSUE: IN ORDER TO PROTECT CALIFORNIA EMPLOYEES FROM BEING FORCED TO LEAVE THE STATE OR BEING SUBJECTED TO THE POTENTIALLY LESS-PROTECTIVE LAWS OF ANOTHER STATE OR COUNTRY DURING A LEGAL DISPUTE, SHOULD AN EMPLOYEE BE ALLOWED TO VOID A CHOICE-OF-VENUE OR CHOICE-OF-LAW PROVISION THAT WOULD REQUIRE THE EMPLOYEE TO ADJUDICATE A LEGAL CLAIM OUTSIDE OF CALIFORNIA OR DEPRIVE THAT CALIFORNIAN FROM THE PROTECTION OF CALIFORNIA LAW?

SYNOPSIS

According to the author, an increasing number of businesses and employers are imposing choice of venue and choice of law contractual provisions on Californians in order to evade California law. These contractual provisions allow businesses and employers to pick laws or venues of other states (and even other

countries) to govern a legal dispute in the event that one arises. Accordingly, Californians who are forced to agree to these contractual terms must travel to another state or country to litigate or arbitrate a legal claim. Given the expense and burdens of going to another forum, this ultimately means that a consumer or an employee is unlikely to vindicate his or her legal rights.

Originally, this bill allowed a California employee or consumer to void such one-sided provisions as described above. As proposed to be amended, this bill has been narrowed to apply only to California employees who primarily reside and work in California. Specifically, this bill prohibits an employer from requiring a California employee-as a condition of employment-to agree to a provision that would either: require the employee to adjudicate outside of California a claim arising in California, or deprive the employee of protection under California law. This bill exempts employees represented by legal counsel in negotiating specified employment terms or by a talent agency.

As this analysis was being prepared, this Committee was unable to confirm the support or opposition for this bill as proposed to be amended; accordingly, there is no support or opposition on file. However, in its prior version, this bill was supported by consumer advocates, employment lawyers, small businesses, and California arbitrators, and was opposed by various business interests, led by the Chamber of Commerce, who primarily contended that the bill was unnecessary because courts could invalidate unfair contractual provisions. The author believes that the bill as proposed to be amended will remove most, if not all, of the opposition to the bill.

SUMMARY: Allows an employee to void a contractual provision that requires the employee to adjudicate a legal claim outside of California, or require the employee to waive his or her protections under California law. Specifically, **this bill:**

1) Prohibits an employer from requiring an employee, who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

a) Require the employee to adjudicate outside of California a claim arising in California.

b) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

2) Provides that any contract that violates 1) is voidable by the employee. If rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

3) Allows a court to award an employee who is enforcing his or her rights under this act reasonable attorney's fees, in addition to other remedies available.

4) Provides that this act does not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

5) Provides that this act does not apply to a contract for which the employee was represented by a talent agency, as defined.

6) Defines adjudication under this act to include litigation and arbitration.

EXISTING LAW:

1) Provides that if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or the unconscionable clause. (Civil Code Section 1670.5.)

2) Holds that a mandatory forum selection clause is generally given effect unless enforcement would be unreasonable or unfair. (*Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 147.)

3) Holds that California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates California's public policy. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12.)

4) Holds that the party opposing the enforcement of a forum selection clause ordinarily bears the substantial burden of proving why it should not be enforced. (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1633.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Justice Brennan once said that, "courts are the central dispute-setting institutions of our society. They are bound to do equal justice under the law, to rich and poor alike." It comes as no surprise then that the phrase, "Equal Justice Under Law," is engraved above the entrance to our nation's

highest court. And so it seems, we put a great deal of faith in our courts-but would we expect any less? We anticipate our courts to apply the law in a fair, neutral, and open manner. We hold judges to high standards, and ask that they avoid even the appearance of impropriety. We count on our judiciary to advance the law, issue orders, and render written opinions. And yet, we acknowledge that our system isn't perfect and that despite their best efforts, courts sometimes get it wrong. Acknowledging the imperfection of our justice system is undoubtedly one reason why it has safeguards. We remember that decisions of courts are reviewed by appellate courts and indeed, reviewed by our elected branches. In order to facilitate the right to appeal, we provide a record of the proceedings, in criminal matters at least. And so, when our families, friends, and neighbors are injured, wronged, or have a dispute, we rely upon that faith that our courts—the institution we trust upon to promote fairness—will deliver equal justice under the law.

As this Committee is well-aware, arbitration is a form of alternative dispute resolution held outside of courts where a third-party (rather than a judge) makes a binding (and rarely appealable) award. Because most arbitration is created by entering into a contract (usually a contract that is adhesive or take-it-or-leave-it), the arbitration agreement will lay-out the procedures that will be followed during the arbitration hearing. For example, the terms of the arbitration agreement may stipulate that the award need not be written or justified (unlike in court), and that the entire process be kept in secret (rather than in public view). Arbitrators do not need to be lawyers, nor do they need to be trained in the law. Arbitrators

who issue favorable awards to a particular company can be repeatedly-hired by that same company to serve as the arbitration-neutral without ever notifying the public about that employment-history. It's easy to predict the calls if you can hire the umpire.

Last year, the *New York Times* issued a three-part series titled, "Beware the Fine Print" – a special report examining how arbitration clauses buried in contracts deprives Americans of their fundamental constitutional rights:

> Over the last 10 years, thousands of businesses across the country – from big corporations to storefront shops – have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients. The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court. (Silver-Greenberg & Corkery, *In Arbitration, a Privatization of the Justice System*, N.Y. Times (Nov. 1, 2015).)

In fact, some legal scholars have stated that, arbitration "amounts to the whole-scale privatization of the justice system." (*Ibid*.) In an effort to protect consumers and workers, this Legislature has worked on legislation aimed at leveling the playing field, a turf that has been used by corporate interests to evade public scrutiny, and even, avoid the law. This is because arbitrators do not need to be trained in the law, or even apply the law, or render a decision

consistent with the evidence presented to them. What evidence is presented may, in fact, be incomplete because parties in arbitration have no legal right to obtain evidence in support of their claims or defenses, or the claims or defenses of the other party, contrary to the longstanding discovery practice in public courts. Advocates continue to debate about the benefits and harms of mandatory-arbitration. Proponents of arbitration say that arbitration produces quicker results and reduces litigation costs. Opponents argue that arbitration harms consumers and workers because arbitration proceedings render unfair awards.

A Return of the Lochner Era? In 1897, the State of New York enacted a labor law intended to protect its bakers: no employee may work in a bakery establishment for more than sixty hours in any one week. That law-which seems reasonable when considering today's standards-was infamously struck down by the Supreme Court in 1905. The Court held that the state law interfered with a person's freedom to contract, rejecting New York's argument that the law was intended to promote the public's welfare. (*Lochner v. New York* (1905) 198 U.S. 45, 52.) Some legal commentators have repudiated the *Lochner* decision as a relic, even a stain in American jurisprudence. Indeed, some scholars have stated that "[a]side from *Dred Scott* itself, *Lochner* . . . is now considered the most discredited decision in Supreme Court history." (Schwartz, *A History of the Supreme Court*, (1995).) While scholars continue to debate the *Lochner* decision, one thing seems clear: the *Lochner* era prioritized economic liberty over the state's interests in protecting the general welfare of its residents. Although one might expect that the principles behind

Lochner are long behind us, sometimes, *Lochner* rears its ugly head. Recently, businesses and employers have been requiring consumers and employees to agree to contractual provisions that seek to evade California law. For instance, a consumer might be required to sign a choice of venue provision, which would require the consumer to go to another state to resolve a legal dispute. In other contracts, an employee might be obligated to sign a choice of law provision, which would require the employee to accept the laws of another state to govern a legal dispute. In a *Lochner* era, one might argue that these provisions were unproblematic; after all, the employee 'voluntarily" agreed to the terms of these contracts- no matter how unfair or unreasonable. Indeed, it would seem that no matter how beneficial the social regulation, the view under *Lochner* is that consumers and employees who enter into contracts do so at their own peril. But we proudly know that California is no home of *Lochner*.

***The problem that this bill seeks to fix*:** According to author of the bill, an increasing number of businesses and employers are imposing contractual provisions on Californians in order to evade California law. These contractual provisions allow businesses and employers to pick laws or venues of another state (and even another country) that are favorable to the business interest to govern a legal dispute if one should arise. Accordingly, Californians who are forced to agree to these contractual terms must travel to other states or countries in order to litigate or arbitrate legal claims. Given the expense and burden of going to another forum, this ultimately

means that an employee is unlikely to vindicate his or her legal rights.

This bill has been narrowed and as proposed to be amended, applies its protections to California employees (rather than California consumers). This bill prohibits an employer from requiring an employee (who primarily resides and works in California)—as a condition of employment—to agree to a provision that would either require the employee to adjudicate a legal claim outside of California, or deprive the employee of the protections of California law. If an employee is subject to such a contractual provision during the course of employment, this bill would allow an employee to void the provision. If voided, the legal matter would be adjudicated in California under California law. This bill applies to contracts commencing after January 1, 2017, and allows a court to award reasonable attorney's fees to an employee who is enforcing his or her rights under this bill.

***Author's statement*:** In support of the bill, the author writes:

> Senate Bill 1241 focuses in on two of the worst kinds of clauses that can appear in an employment contract: (1) Choice of venue clauses that require a worker to go to an arbitration or to a court in an entirely different state, and; (2) Choice of law clauses that intentionally pick what state's law governs the arbitration – thus deciding what the rules are-to disadvantage the worker. A California employee should never be forced to travel to a different state to exercise her right to litigate or obligation to arbitrate a

> claim. If you're employing Californians who live in California, you should not be able to force all dispute resolution to take place in Florida or under the laws of Delaware. Just the cost of travel alone prevents California consumers who have been harmed by an illegal practice from seeking compensation. SB 1241 ensures that employees are able to arbitrate in California.

California has a history of protecting against potentially one-sided contractual arrangements. It should come as no surprise that California has previously enacted laws restricting the use of choice of law and forum selection clauses in contracts. (*See* AB 2781 (Leno, Ch. 797, Stats. 2006) child support collection choice of law agreements; AB 268 (Wayne, Ch. 624, Stats. 2001) sale of structured settlements received in tort claims choice of law and forum selection agreements; SB 586 (Sher, Ch. 194, Stats. 1997) Uniform Interstate Family Support Act choice of law; AB 1051 (Eastin, Ch. 582, Stats. 1991) construction subcontracts cannot be litigated or arbitrated outside this state).) Indeed, many California courts recognize this strong public policy. For instance, "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12.) This is because "[o]ur law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights

significantly impaired by their enforcement." (*Ibid.*) Accordingly, it appears that this bill is consistent with the Legislature's previous efforts in protecting Californians from potentially unfair and unreasonable contracts.

This bill is consistent with, but not duplicative of, existing law. Observers correctly note that California courts have the authority to refuse to enforce one-sided choice of venue and choice of law provisions. For example, a court may invalidate a provision if the inconvenience of the forum is so grave that it effectively deprives litigants of their day in court. (*The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 17.) Additionally, a court may refuse to enforce a choice of law if another state's laws fundamentally conflict with the public policy of California. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 916; *see Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 465.) While courts have the authority to strike down one-sided contracts, there is a strong presumption that forum selection clauses are valid and enforceable unless the contesting party meets the "heavy burden" of proving that enforcing the clause would be unreasonable under the circumstances of a case. (*Bancomer v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457.) In order words, a consumer or an employee seeking to invalidate an unfair forum selection clause must show that adjudicating in another state, or following the laws of another forum would be unreasonable. The burden seems unrealistic. The author reasonably argues that many employees do not have the means to invalidate one-sided contractual agreements, let alone travel to other forums to adjudicate

legal claims. Thus, it seems likely that without this bill, many one-sided clauses in employment contracts will remain in place. Accordingly, this bill does not appear to be duplicative of existing law.

Adjudication includes both litigation and arbitration. At issue is whether this bill somehow implicates the Federal Arbitration Act: it does not appear so. Since this bill applies to all contracts involving employees, this bill does not appear to violate the Federal Arbitration Act. Additionally, if an employee is subject to a choice of law or choice of venue provision that requires adjudication outside of California, or deprives the Californian of protection under California law during the course of employment, this bill allows the employee to void the provision and adjudicate the legal claim in California. This also means that if an employee would otherwise have been forced to travel outside of California to arbitrate a claim, the employee could void the provision, and the matter would be similarly arbitrated in California under the State's laws.

This bill does not apply to employees who are represented by counsel or a talent agency. Since this bill is aimed at protecting employees who may not have sufficient bargaining power throughout the employment relationship, this bill exempts employment contracts where an employee is individually represented by legal counsel in negotiating terms of an agreement that designate venue or the choice of law, or by a talent agency. These exemptions, intended to alleviate concerns raised by the business community, are consistent with the policy goal of this bill: Californians should be bound by potentially one-sided

terms only if the Californian knowingly and voluntarily agrees to such terms.

Similarly, this bill allows California employees the choice to adjudicate their claims outside of California. Although California law provides broad protections for California employees, there may be an instance where an employee wants to adjudicate a claim outside of California or to have another forum's laws govern the dispute. To that end, this bill allows an employee subject to such a contractual provision the option of voiding those outside-of-California clauses. By making these provisions voidable (rather than void), this bill ensures that employees are not coerced into signing away their rights under California law.

The bill does not appear to violate the Contract Clause Violation. Article I, Section 10 of the U.S. Constitution, known as the Contract Clause, provides that, "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." (U.S. Const., art. I, § 10.) But it is well-established that the Contract Clause does not prevent the government from regulating the terms of future contracts. Given that this bill only applies prospectively to contracts entered into after January 1, 2017, the Contract Clause is not implicated.

***Prior Vetoed Bills*:** The prohibitions of this bill limiting choice of law or choice of forum provisions in employment contracts is similar to a prior bill, AB 267 (Swanson, 2011), which was vetoed by Governor Brown.

In vetoing AB 267, Governor Brown stated:

> This measure would prohibit employment contracts that require California employees

to agree to the use of legal forums and laws of other states. Current law prohibits California employees from being subjected to laws or forums that substantially diminish their rights under our laws and I have not seen convincing evidence that these protections are insufficient to protect employees in California. Finally, I would note that imposing this burden could deter out of state companies from hiring Californians-something we can ill afford at this time of high unemployment.

REGISTERED SUPPORT / OPPOSITION:

Support (to the prior version of this bill)

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Dispute Resolution Council
California Employment Lawyers Association
California Teamsters Public Affairs Council
Consumer Attorneys of California
Consumer Federation of California
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
International Longshore and Warehouse Union
Professional and Technical Engineers, IFPTE Local 21, AFL-CIO
SAG-AFTRA, AFL-CIO
Small Business California
UNITE-HERE, AFL-CIO
Utility Workers Union of America, AFL-CIO

Opposition (to the prior version of this bill)

California Chamber of Commerce
American Insurance Association
California Bankers Association
California Farm Bureau Federation
California Manufacturers and Technology Association
Civil Justice Association of California
Dish Network
Feld Entertainment, Inc.
Motion Picture Association of America

Analysis Prepared by:
Eric Dang / JUD. / (916) 319-2334

79631472 v4

DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC FILED IN EIGHTH CIRCUIT (MARCH 10, 2023)

Appeal No. 21-3259, Appeal No. 21-3825

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

C.H. Robinson Worldwide, Inc.,
Plaintiff/Appellant

v.

Traffic Tech, Inc., James Antobenedetto, Spencer Buckley, Wade Dossey, Brian Peacock, Dario Aguiniga,
Defendants/Appellees

Appeal from the United States District Court for the District of Minnesota

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DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35(B)(1) STATEMENT

The panel opinion makes this Circuit the only one in the country to allow plaintiffs to export a single State's substantive law nationwide, through near-automatic enforcement of a contractual choice of law even when such a contractual provision is prohibited (and indeed actionable) under the law of the State where the relevant conduct occurred.

Specifically, in a dispute arising entirely in California, the panel held that Minnesota law governed plaintiff's claims that four entry-level employees who live and work exclusively in California had violated non-competition restrictive covenants—even though California law prohibits such covenants, and specifically prohibits contractual choices of law that circumvent this prohibition. This precedential holding will lead to a sea change in employment contracting practices, and it likely will transform the District of Minnesota into a litigation destination for large numbers of non-competition claims arising in other States. That raises serious practical concerns in its own right, and it also threatens important values of interstate order and comity. For these reasons, this case is of exceptional importance and warrants rehearing *en banc*.

The panel opinion also conflicts with a previous decision of this Court. In *Engineered Sales, Co. v. Endress + Hauser, Inc.*, 980 F.3d 597 (8th Cir. 2020), this Court held that the choice-of-law analysis in

cases like this one is governed by § 187(2)(b) of the Restatement (Second) of Conflict of Laws, and by the factors enumerated in *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 858 F.2d 1339, 1342 (8th Cir. 1988), which are tailored to address a choice of law involving an anti-waiver statute. The panel here took a different and conflicting path, holding that a contractual choice of law almost always applies. Rehearing is warranted to resolve this conflict.

BACKGROUND

Every State has extensive statutes and regulations governing employment relationships. These regulations provide employee protections, such as minimum wage requirements, timely payment of commissions, restrictions on workplace discrimination, wage transparency, meal breaks, sick leave, privacy, child labor, and a host of other topics. Through these regulations, States attempt to balance public policy interests in freedom of contract, healthy employment conditions, fair competition, and preventing serious abuses. This country's federalist system is designed to allow each State to strike this balance differently, depending on their local circumstances and the preferences of their people.

This case in particular involves restrictive covenants in employment contracts—provisions that purport to put restrictions on an employee's ability to compete with their former employer for a period of time after leaving the job. Because these provisions interfere with an individual's ability to earn a living, many states regulate them closely, but the precise nature of the regulations varies between States—depending on the particular State's public policy interests. Some States

prohibit restrictive covenants entirely; others permit them under certain conditions.

The dispute here arose in California: it involves California citizens who plaintiff C.H. Robinson hired to work in California, who did indeed work for C.H. Robinson in California, and who allegedly left C.H. Robinson to work for a competitor in California. For a century and a half, the State of California has prohibited restrictive covenants in employment contracts, as part of the State's "paramount" commitment to a "policy . . . of open competition." *Application Group, Inc. v. Hunter Group*, 61 Cal. App. 4th 881, 900 (1998); *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 291 (Cal. 2008). *See* Cal. Bus. and Prof. Code § 16600. In an effort to advance this strong public policy, California recently enacted a statute to prohibit employers of California citizens from circumventing this rule through venue and choice-of-law provisions: "An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would [d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." Cal. Labor Code § 925.

California is not alone in adopting this rule; at least four other States have similar non-competition and anti-waiver statutes. *See* Colo. Rev. Stat. Ann. § 82-113; La. Stat. Ann. § 23:92; Mass. Gen. Laws Ann. ch. 149, § 24L; Wash. Rev. Code Ann. § 49.62.050. Many other States have enacted similar anti-waiver protections for their substantive rules governing franchise and sales-representative relationships. *See, e.g., Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 607– 10 (4th Cir. 2004); *Cromeens,*

Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 391 (7th Cir. 2003); *Wright–Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132 (7th Cir. 1990); *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises*, 395 F.Supp.2d 891, 898 (D.S.D. 2005); *Cottman Transmission Sys., LLC v. Kershner*, 492 F. Supp. 2d 461, 469 (E.D. Pa. 2007); *EnQuip Techs. Group v. Tycon Technoglass*, 986 N.E.2d 469, 483 (Ohio Ct. App. 2012); *Q Holding Co. v. Repco, Inc.*, 5:17CV-445, 2017 WL 2787576, at *4 (N.D. Ohio June 28, 2017).

Despite this, and although C.H. Robinson employed each of the California defendants in California, it required them to annually reaffirm non-competition agreements (which are illegal under Section 16600 of the California Business and Professions Code) that contain Minnesota venue and choice-of-law provisions (which are illegal under California Labor Code Section 925). This is by design, as Minnesota takes a more employer-friendly view of restrictive covenants than California. After the defendants left C.H. Robinson for a different employer (Defendant Traffic Tech, also in California), C.H. Robinson sued them in Minnesota and pursued claims under Minnesota law, invoking the venue and choice-of-law clauses in the non-competition agreements.

The District Court granted summary judgment for Defendants, holding that the restrictive covenants are unenforceable under California law. The District Court applied choice-of-law factors from the Restatement (Second) of Conflict of Laws § 187(2)(b), as enunciated by this Court, *en banc*, in *Modern Computer Systems v. Modern Banking Systems, Inc.*, 871 F.2d

734, 738 (8th Cir. 1989),[1] to hold that the validity of the restrictive covenants here is governed by California law, rather than Minnesota law, giving due consideration to Section 925's anti-waiver provision.

C.H. Robinson appealed and argued exclusively that the District Court should instead have used the five-factor choice-of-law test from *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973). Defendants, on the other hand, defended the District Court's approach under the Restatement and Modern Computer. The panel, however, adopted a different test advocated by neither party. In a precedential opinion, 60 F.4th 1144, the panel held that Minnesota's choice-of-law rules require a court to uphold a contractual choice of law "so long as the parties acted in good faith and without an intent to evade the law"—no matter how close of a connection another State may have to the relevant employment relationship, and no matter how severely the choice-of-law provision contravenes that other State's fundamental public policies.

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[1] The factors are "1) whether the parties agreed in advice to the law to be applied in future disputes; 2) whether the contacts between the parties were fairly evenly divided between the state selected in the contract and the state that has enacted the anti-waiver statute; 3) the parties' relative levels of bargaining power; and 4) whether application of the law chosen in the contract is repugnant to the public policy of the state that has enacted the anti-waiver statute." *Modern Computer Systems*, 871 F.2d at 738.

ARGUMENT

I. The Panel's Opinion Will Upset the Balance of Federalism and Impact Employment Relations Across the Country.

The panel's holding will have a tremendous impact on States' rights, employee relations across the country, and the District of Minnesota's docket—as plaintiffs will flock to the District in order to export Minnesota's substantive law to their disputes nationwide. The impact will be felt far beyond this litigation, and the full Court should rehear the appeal to determine whether the outcome is acceptable.

The panel decision makes this Circuit an outlier nationwide. No other United States Court of Appeals has held that a State's choice-of-law analysis may wholly disregard another State's anti-waiver statute, like the panel did to Section 925 here. Indeed, every other Circuit that has considered the issue has at least considered the anti-waiver statute as part of its balancing of competing interests and factors. *See New England Surfaces v. E.I. du Pont de Nemours & Co.*, 546 F.3d 1, 10 (1st Cir. 2008), clarified on denial of reh'g, 546 F.3d 11 (1st Cir. 2008); *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 608 (4th Cir. 2004); *Lakeside Surfaces, Inc. v. Cambria Co., LLC*, 16 F.4th 209, 222 (6th Cir. 2021); *Wright-Moore Corp.*, 908 F.2d 128, 134 (7th Cir. 1990); *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 967 (9th Cir. 2022).

This state of affairs raises grave concerns regarding comity, federalism, and the appropriate level of respect one State should give to another State's statutes and public policy interests. *See Franchise*

Tax Bd. of California v. Hyatt, 538 U.S. 488, 4995 123 S. Ct. 16835 1690 (2003) (noting courts must apply "principles of comity with a healthy regard for [another state's] sovereign status"). Minnesota is home to numerous Fortune 500 companies—and it is a center for industries that frequently require non-competition agreements, such as agriculture, technology, and medical-device manufacturing. Until now these companies have, by and large, respected California's statutory prohibition on choosing the law of another State to govern restrictive covenants in California.[2] But under the panel opinion, that is no longer necessary: these companies may simply opt out of California law by including Minnesota venue and choice-of-law provisions—even for employees who live and work exclusively in the State of California.

Further, given that the panel disregarded Section 925—a fundamental public policy of California—the panel decision seemingly allows contract drafters to circumvent every anti-waiver statute in existence, including anti-waiver statutes enacted in Colorado,

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[2] The record demonstrates that reality. C.H. Robinson is suing four of the five Defendants in this case under contractual language that C.H. Robinson drafted before California enacted its anti-waiver statute (although C.H. Robinson modified these contracts annually, including after the statute was enacted). The fifth Defendant, Peacock, signed a contract that C.H. Robinson drafted *after* the statute was enacted. Peacock's contract shows that C.H. Robinson changed its choice-of-law provision so that *California* law governs disputes arising in California. Further, a privilege log produced during discovery reflects that C.H. Robinson adjusted its form non-competition provision in order to address the passage of Section 925. *See* Privilege Log, R. Doc. 140, at 2 (reflecting communications and revisions to C.H. Robinson's Non-Compete Agreements based on the passage of Section 925).

Louisiana, Massachusetts, and Washington to advance their public policy interests in promoting free competition within their borders. *See* Colo. Rev. Stat. Ann. § 82113; La. Stat. Ann. § 23:92; Mass. Gen. Laws Ann. ch. 149, § 24L; Wash. Rev. Code Ann. § 49.62.050. This panel's ruling also means that companies need not adhere to the numerous anti-waiver statutes that advance statutory protections for franchisees and sales representatives, so long as companies file suit in Minnesota and use a contractual choice of law provision. *See e.g., Volvo Constr. Equip. N. Am*, 386 F.3d at 607–10; *Cromeens, Holloman, Sibert*, 349 F.3d at 391; *Wright–Moore Corp.*, 908 F.2d at 132; *Pinnacle Pizza Co.*, 395 F.Supp.2d at 898; *Cottman Transmission Sys.*, 492 F. Supp. 2d at 469; *EnQuip Techs. Group*, 986 N.E.2d at 483; *Q Holding Co.*, 2017 WL 2787576 at *4.

This is an affront to the interstate order and risks major disruption to our federalist system. Long-standing choice-of-law principles require considering the contacts that other States have with the dispute, and the strength of those State's policies that the dispute implicates. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) ("[P]rotection of out-of-state parties' constitutional rights requires an inquiry into their claims' contacts with Minnesota and their individual state laws before concluding Minnesota law may apply.") If that analysis can be circumvented by designating Minnesota as the forum and selecting a more favorable choice of law in the contract, as the panel held, the outcome will not be hard to predict. Everyone drafting form employment agreements and non-competition agreements will have reason to insert a Minnesota venue and choice-of-law

provision—and then to bring all litigation in Minnesota, regardless of where the dispute arose, in order to export Minnesota's substantive law nationwide. Thus, no matter where in the United States an employee lives, works, or allegedly competes with his or her former employer, Minnesota law will govern the employment relationship as long as the former employer sues about it in Minnesota. It truly is that simple. *See St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, 818 F.3d 785, 788 (8th Cir. 2016) (employer may choose the law of the State where it is based).

If this anti-federalism outcome were not dangerous enough by itself, it will also turn the District of Minnesota into a litigation destination for non-compete plaintiffs. Indeed, the District of Minnesota regularly encountered this precise scenario prior to Section 925. *See e.g., St. Jude Med., S.C., Inc. v. Biosense Webster, Inc.*, CIV. 12621 ADM/AJB, 2012 WL 1576141, at *4 (D. Minn. May 4, 2012); *RocketPower, Inc. v. Strio Consulting, Inc.*, 19CV01928ECTBRT, 2019 WL 5566548, at *5 (D. Minn. Oct. 29, 2019); *Ingenix, Inc. v. Fessler*, CV 06-493(DSD/JJG), 2006 WL 8444005, at *3 (D. Minn. Feb. 24, 2006); *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 696 (D. Minn. 1986), aff'd, 828 F.2d 452 (8th Cir. 1987). Now that the Eighth Circuit has given the green light to this practice, employers can easily revert to prior agreements and avoid the law of another State simply by filing suit in the District of Minnesota. Such forum shopping ought to be discouraged. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 739 (8th Cir. 1995) (*quoting Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), aff'd, 449 U.S. 302 (1981)); *Lommen v. City of E.*

Grand Forks, 522 N.W.2d 148, 151 (Minn. Ct. App. 1994).

Finally, the panel's rule creates a serious risk of duplicative, wasteful, and potentially conflicting lawsuits. The panel approved the near-automatic application of Minnesota choice-of-law provisions to disputes arising in other States, without regard to the other States' anti-waiver statutes or policy interests. But many of those statutes—including California's Section 925—create a cause of action for an aggrieved party to sue in those States' own courts for an illegal attempt to circumvent that State's law. *See e.g., Sellers v. World Fin. Group, Inc.*, D078934, 2022 WL 2254998, at *2 (Cal. Ct. App. June 23, 2022) (noting plaintiff filed an action including a claim for "unlawful non-compete, non-solicitation, choice of law and forum selection provisions in employment agreements" pursuant to Cal. Bus. & Prof. Code Section 16600 and Cal. Lab. Code Section 925). This creates the inevitable and unwanted outcome of competing lawsuits, interstate conflict, and confusion among parties whose conduct will appear to be both legal and illegal at the same time.

The facts of this dispute are illustrative. Under the panel's ruling, Minnesota law presumably will apply to the Individual Defendants' non-competition agreements due to the choice-of-law provision. But at the same time, the Individual Defendants have a claim under California law against C.H. Robinson for requiring them to sign that very same choice-of-law provision. *See Healy v. Qognfy, Inc.*, 218CV06318O DWMRW, 2020 WL 136589, at *4 (C.D. Cal. Jan. 10, 2020) (finding plaintiff's claim under Cal. Bus. & Prof. Code, Section 16600 and Cal. Lab. Code, Section 925

survived motion to dismiss based, in part, on fact that defendant "filed a complaint" to enforce a non-compete provision in the District of New Jersey). Thus, determining the parties' rights in a dispute like this one may require litigating two lawsuits in different jurisdictions—and then potentially another round of litigation to decide which of the first round of cases is controlling. Whether that outcome is required or desired is a question that merits review by the full Court.

II. The Panel Decision Conflicts with this Court's Precedent.

The panel decision makes this Circuit an anomaly in the federal system, in a way that creates serious concerns for federalism, state sovereignty, and judicial administration in the District of Minnesota. To make matters worse, the panel decision also contravenes a recent precedential decision of this Court.

Just three years ago, in *Engineered Sales, Co. v. Endress + Hauser, Inc.*, this Court applied a Minnesota anti-waiver statute to void an Indiana choice-of-law provision in a sales representative agreement. 980 F.3d 597 (8th Cir. 2020). The panel's rule here would have required the Court in Engineered Sales to uphold the contractual choice of law absent a showing of bad faith or an intent to evade the law. But the *Engineered Sales* court did not apply that rule. Instead, it relied on the choice-of-law analysis from *Hedding ex rel. Hedding Sales & Serv. v. Pneu Fast Co.*, CV 181233 (JRT/SER), 2019 WL 79006, at *3 (D. Minn. Jan. 2, 2019), which applied the Restatement and *Modern Computer* factors, as the District Court did in this case.

The panel did not discuss this decision,[3] although it was featured in Defendants' briefing. Instead, the panel issued a sweeping choice-of-law rule, *but see Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (holding federal court cannot create or modify a State's choice-of-law rules)—one that no court has ever recognized. The panel's holding and outright rejection of the Modern Computer factors cannot be squared with the Court's prior reliance on Modern Computer in Engineered Sales—or the numerous decisions by Minnesota courts striking choice-of-law provisions in favor of anti-waiver statutes.[4] Therefore,

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[3] The panel justified its ruling based on *Combined Ins. Co. of Am. v. Bode*, 247 Minn. 458, 464, 77 N.W.2d 533, 536 (1956) and *Milliken & Co. v. Eagle Packaging Co., Inc.*, 295 N.W.2d 377, 380 (Minn. 1980), but neither case dealt with an anti-waiver statute. But *see Jepson v. Gen. Cas. Co. of Wisconsin*, 513 N.W.2d 467, 470 (Minn. 1994) (explaining courts applying Minnesota choice-of-law principles "need to wrestle with each situation anew").

[4] *See Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 880 (Minn. Ct. App. 1995) (declining to enforce choice-of-law clause due to Minnesota anti-waiver statute); *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. Ct. App. 1994) (citing *Modern Computer* and weighing competing interests); *White v. Catheter Robotics, Inc.*, A131401, 2014 WL 2921873, at *6 (Minn. Ct. App. June 30, 2014) ("[W]e acknowledged the Modern Computer *en banc* decision when deciding whether to enforce a choice-of-law provision. . . . "); *Delaria v. KFC Corp.*, No. CIV. 494116, 1995 WL 17079305, at *6 (D. Minn. Jan. 13, 1995) (striking Kentucky choice-of-law provision); *Healy v. Carlson Travel Network Assocs., Inc.*, 227 F. Supp. 2d 1080, 1087 (D. Minn. 2002) (striking Minnesota choice-of-law provision based on anti-waiver provision of Illinois statute); *Apex Tech. Sales, Inc. v. Leviton Mfg., Inc.*, No. CV 172019 SRN/HB, 2017 WL 2731312, at *5 (D. Minn. June 26, 2017) (anti-waiver statute "renders null and void the New York choice-of-law provision"); *Hedding o/b/o Hedding Sales & Serv. v. Pneu Fast Co.*, No. CV 181233 (JRT/SER), 2019 WL 79006, at *4 (D. Minn. Jan. 2, 2019) (striking

en banc review is "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this petition for rehearing *en banc*.

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Ohio choiceof-law clause); *HEK, LLC v. Akstrom Imports, Inc.*, No. 20-CV-1881 (NEB/LIB), 2021 WL 679585, at *6 (D. Minn. Feb. 22, 2021).