IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-11858-C
No. 10-10346-C

D.C. Docket No. 07-00791-CV-TCB-1

NEWS AMERICA MARKETING
IN-STORE, LLC,

Plaintiff-Appellee/Cross-Appellant,

versus

ROBERT T. EMMEL

Defendant-Appellant/Cross-Appellee,

Appeal from the United States District Court
for the Northern District of Georgia

BRIEF OF APPELLANT/ CROSS-APPELLEE ROBERT T. EMMEL

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NEWS AMERICA MARKETING v. ROBERT T. EMMEL

No. 09-11858-C
No. 10-10346-C

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following have an interest in the outcome of this case:

1) Abrams, Lee – counsel for plaintiff-appellee/cross-appellant

2) Batten, Timothy – United States District Judge

3) Beery, Dawn – counsel for intervenor (terminated)

4) Burr & Forman, LLP – counsel for intervenor (terminated)

5) Canody, Renee – counsel for plaintiff-appellee/cross-appellant

6) Constantine Cannon, LLP – counsel for plaintiff-appellee/cross-appellant

7) Cooper, David – counsel for intervenor (terminated)

8) Coughlin, Kerin – counsel for plaintiff-appellee/cross-appellant

9) Dekarske, Jennifer – Attorney General of Minnesota (terminated intervenor)

10) Doyle, Sara – counsel for plaintiff-appellee/cross-appellant

11) Emmel, Robert – defendant-appellant/cross-appellee

12) Floorgraphics, Inc. – intervenor (terminated)

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT
(continued)

13) Ford & Harrison – counsel for plaintiff-appellee/cross-appellant

14) Garber Law Firm, P.C. – counsel for defendant-appellant/cross-appellee

15) Garber, Alan – counsel for defendant-appellant/cross-appellee

16) Garber, Marc – counsel for defendant-appellant/cross-appellee

17) Green-Kelly, Diane – counsel for plaintiff-appellee/cross-appellant

18) Harley, Gregory – counsel for intervenor (terminated)

19) Hilder & Associates, P.C. – counsel for defendant-appellant/cross-appellee

20) Hilder, Philip – counsel for defendant-appellant/cross-appellee

21) Holland & Knight – counsel for plaintiff-appellee/cross-appellant

22) Housen, Susan – counsel for plaintiff-appellee/cross-appellant

23) Insignia Systems, Inc. – intervenor (terminated)

24) Kelley Drye & Warren – counsel for intervenor (terminated)

25) Kitchens Kelley Gaynes – counsel for intervenor (terminated)

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT
(continued)

26) Loring, Julie – counsel for plaintiff-appellee/cross-appellant

27) Mahoney, Stacey – counsel for plaintiff-appellee/cross-appellant

28) Mayer Brown Rowe & Maw – counsel for plaintiff-appellee/cross-appellant

29) Mehrman, Leanne – counsel for plaintiff-appellee/cross-appellant

30) News America Marketing In-Store, LLC – plaintiff-appellee/cross-appellant

31) News Corporation – parent company of plaintiff-appellee/cross-appellant

32) Reed Smith LLP – counsel for plaintiff-appellee/cross-appellant

33) Schroeder, James – counsel for plaintiff-appellee/cross-appellant

34) Smith-Lott, Kelli – counsel for plaintiff-appellee/cross-appellant

35) Solotorovsky, Julian – counsel for intervenor (terminated)

36) Southwick, James – counsel for intervenor (terminated)

37) State of Minnesota – intervenor (terminated)

38) Susman Godfrey – counsel for intervenor (terminated)

STATEMENT REGARDING ORAL ARGUMENT

Appellant's counsel requests oral argument. Oral argument will aid the Court because this appeal presents the important question of whether a corporation can use a confidentiality agreement to restrain the disclosure of information about its possible criminal activities to federal and state officials.

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STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellant-defendant appeals a permanent injunction and final civil judgment issued by the United States District Court for the Northern District of Georgia, Atlanta Division. Docs. 281, 302.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT WRONGLY CONCLUDED THAT THE DEFENDANT BREACHED HIS POST-EMPLOYMENT CONFIDENTIALITY AGREEMENT WITH THE PLAINTIFF.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A PERMANENT INJUNCTION AGAINST THE DEFENDANT.

III. THE PERMANENT INJUNCTION VIOLATES THE DEFENDANT'S FIRST AMENDMENT RIGHTS.

STATEMENT OF THE CASE

This appeal arises out of defendant Robert Emmel's voluntary disclosures about the possible illegal activities of his former employer—plaintiff News America Marketing—to the SEC, the New York Attorney General, two U.S. Senators, and two Senate committees. The district court resolved the case on cross-motions for summary judgment, granting News's claim that one of Emmel's disclosures breached a confidentiality/non-disparagement agreement but dismissing its remaining claims. The district court permanently enjoined Emmel from communicating with anyone at any time about anything involving News's confidential information, without exception. And Emmel was ordered to return all confidential materials he kept after News fired him, which he promptly did (and does not challenge on appeal).

The district court also ordered a jury trial to decide if News was entitled to any nominal damages or any attorney's fees and costs under OCGA § 13-6-11. By then News had paid its lawyers more than $1.5 million. So Emmel, facing the potential of a huge verdict with no means to post an appeal bond, declared bankruptcy. He received a complete discharge in January 2010. And News initiated no proceedings in the bankruptcy court to determine the dischargeability of any of its claims.

Now on appeal, Emmel argues that his voluntary disclosure to federal officials of confidential information revealing possible criminal conduct did not, as a matter of public policy, breach his non-disclosure/ non-disparagement agreement with News. Nor can such a disclosure constitute a breach when it happens *before* the agreement takes effect. And such disclosures cannot support the issuance of an injunction, as they cause no cognizable injury as a matter of law; in fact, even the district court found no irreparable injury. Finally, an injunction, like the one here, so broadly worded that any future disclosure of such information is in all circumstances barred and subject to punishment for contempt—and thus under the complete control of a federal judge—disserves the public interest and violates the First Amendment.

A. Course of Proceedings Below

On April 10, 2007, News filed this action against Emmel, a former account director, for injunctive and monetary relief based on claims for breach of contract, breach of fiduciary duty, conversion, and statutory trade-secret and computer-based violations. Doc. 1 – Pg 12-18 & ¶ 12. News's original complaint alleged that, after his firing, Emmel secretly retained sensitive hard-copy and electronically stored documents reflecting News's strategy toward its competition and customers. Doc. 1

– Pg 1-2 & ¶¶ 34-38. News's complaint also alleged that Emmel either would or did unlawfully disclose these materials to its competitors—including three litigation opponents called Floorgraphics Inc., Insignia Systems, and Valassis[1]—because, according to News, Emmel's alleged duty of confidentiality trumped subpoenas and all other legal process. Doc. 1 ¶¶ 2, 33, 35, 48, 69. Along with its complaint, News filed a motion for a temporary restraining order and preliminary injunction to bar Emmel from disclosing any confidential News materials to anyone for any reason. Doc. 2; Doc. 40 – Pg 1-4.

Also on April 10, 2007, News competitor and litigation opponent, Floorgraphics Inc., filed a subpoena-enforcement action in the Northern District of Georgia pursuant to Fed. R. Civ. P. 45(c). Doc. 40 – Pg 2-3; Doc. 78. Floorgraphics sought to enforce a subpoena *duces tecum* previously issued to Emmel in Floorgraphics' action against News in the District of New Jersey (the "New Jersey Action"). Doc. 40 – Pg 2; Doc. 80-2. The subpoena, which also required Emmel's testimony, was

[1] Prior to April 10, 2007, these particular competitors had filed federal civil actions against News charging some combination of Sherman Act antitrust violations, Lanham Act unfair-competition violations, and other federal- and state-law claims. Doc. 1 ¶ 33; Docs. 3, 29-4, 33; Doc. 40 – Pg 3; *Valassis Communications, Inc. v. News Am. Inc.*, Case No. 2:06-cv-10240 (E.D. Mich.).

returnable on March 27, 2007, in Atlanta at his non-party deposition. Doc. 40 – Pg 2; Doc. 80-2. When News objected to Emmel's production at his deposition, Emmel gave all the materials to the court reporter to hold pending a court ruling. Doc. 40 – Pg 2, 4-5, 8. News responded with its own Rule 45 actions (i) to compel certain testimony from Emmel pursuant to News's own subpoena in the New Jersey Action, and (ii) to quash the *duces tecum* portion of Floorgraphics' March 27, 2007 subpoena to Emmel. Docs. 46, 80.

On April 12, 2007, the district court held a brief hearing on News' TRO application. Doc. 7. Prior to the hearing, Floorgraphics moved to intervene in this action to argue for access to Emmel's evidence. Doc. 3; Doc. 40 – Pg 4. After the hearing, the district court entered an agreed preliminary injunction barring Emmel from producing or disclosing to anyone any confidential News documents or materials and requiring that his counsel hold all the News materials Emmel kept after his termination until the outcome of this action. Doc. 40 – Pg 5, 8. The district court also granted Floorgraphics motion to intervene, consolidated the related Rule 45 actions into this case, and ordered the court reporter to retain custody of the materials Emmel produced at his

March 27, 2007 deposition in the New Jersey Action. Doc. 40 – Pg 7-8, 10-11; Docs. 77, 80.

On April 13, 2007, News filed its first amended complaint. Doc. 8. News added a new claim that Emmel breached his duty of good faith and fair dealing. Doc. 8 – Pg 8-9.

On May 2, 2007, another News competitor and litigation opponent called Insignia Systems Inc.—which had filed a federal antitrust/unfair competition action against News in the District of Minnesota—also filed a motion to intervene. Doc. 33; Doc. 29-4. Insignia had subpoenaed Emmel on April 25, 2007, to produce documents and give a non-party deposition in its Minnesota action; News opposed with a Rule 45 action to quash.[2] Docs. 33-2, 81. On June 8, 2007, the district court allowed Insignia to intervene over News's objection. Docs. 39, 77. The following month, on July16, 2007, Insignia was voluntarily dismissed. Doc. 121. Several months later, Floorgraphics was also voluntarily dismissed from this case. Doc. 184.

On November 29, 2007, News filed its second amended complaint adding several new claims. Doc. 69-2; Doc 151 at 2. In addition to

[2] The state of Minnesota, a co-plaintiff of Insignia, also subpoenaed Emmel to produce documents and testify in the Minnesota action. Doc. 29-2.

claims for breach of contract, breach of good faith and fair dealing, and violation of the Georgia Trade Secrets Act, News added claims that Emmel committed common-law conversion and fraud, was bound to return News's materials by promissory estoppel, violated his fiduciary duties, and was liable for News's attorney's fees and costs for acting willfully, with malice, and in bad faith under OCGA § 13-6-11.[3] Doc. 69-2 – Pg 16-27. Emmel denied any liability. Doc. 157.

On July 7, 2008, both parties filed motions pursuant to Fed. R. Civ. P. 56. News limited its summary-judgment motion to its claims of conversion, breach of contract, and promissory estoppel. Doc. 281 – Pg 5. Emmel moved for summary judgment on all of News's claims. *Id.*

On March 13, 2009, the district court granted News partial summary judgment only on its claim that Emmel breached a post-employment confidentiality/non-disparagement agreement. Doc. 281. But the district court granted Emmel complete summary judgment on all of News's other claims. Doc. 281. The district court also (i) entered a permanent injunctive relief barring Emmel from disclosing or producing any confidential News information to anyone under any

[3] News dropped its claims under the Georgia Computer Systems Protection Act and the federal Computer Fraud and Abuse Act.

circumstance and requiring Emmel to return all the News materials he kept after his termination,[4] and (ii) ordered a trial on nominal damages and attorney's fees and costs under OCGA § 13-6-11. Doc. 281 – Pg 29-32. A trial was set for July 20, 2009. Doc. 286 – Pg 2. News's litigation expenses, including attorney's fees, totaled more than $1.5 million at that point. Doc. 290 – Pg 9.

On April 13, 2010, the district court, without explanation, denied Emmel's motion to strike News's claim under OCGA § 13-6-11 and for a protective order based on News's failure to designate any experts on attorney's fees during discovery, which had closed 13 months earlier.

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[4] The permanent injunction reads:

> Accordingly, the Court hereby (1) PERMANENTLY ENJOINS AND RESTRAINS Emmel, his agents, servants, employees, attorneys, and any other persons who are acting in concert with them, from discussing, sharing, revealing, disclosing, or making available to any third party or entity any "Confidential Information" of NAMIS, including the information and documents contained on the three compact discs copied from the hard drive of the computer that Emmel used during his employment with NAMIS; and (2) ORDERS Emmel to return to NAMIS, within five days of the entry of this Order, the three compact disks and any copies thereof and all tangible things that contain NAMIS's confidential information that Emmel retained following his termination.

Doc. 281 – Pg 30. In a footnote, the court defined the phrase "Confidential Information" to have the same meaning as in the parties' 12/21/06 agreement. *Id.* n. 7.

Docs. 229, 283; Doc. 286 – Pg 2. Instead, the court ordered expert discovery to proceed well out of time. *Id.*

The district court also granted News's oral motion, again with no explanation, to depose the then-U.S. Senate Judiciary Committee's investigative counsel Nicholas Podsiadly. Doc. 286 – Pg 1. News knew during discovery all about Podsiadly's role on behalf of the Senate Finance Committee in receiving information from Emmel. Doc. 250-2: Emmel Depo – Pl. Exs 33, 36 & Def. Ex. 4; Doc. 250-2: Emmel Depo – Pg 145, 148. But News now recognized that no evidence supported one of the district court's key factual finding in its order granting partial summary judgment to News on its breach-of-contract claim. Doc. 283-1 – Pg 2, 11-12; Doc. 283-3 – Pg 2 ¶ 2; Doc. 292 – Pg 2. The U.S. Senate invoked Article I's Speech & Debate Clause to bar any deposition of Mr. Podsiadly, however. Doc. 292 – Pg 1.

On April 13, 2009, Emmel timely filed his notice of appeal from the permanent injunction and summary-judgment order pursuant to 28 U.S.C. § 1292(a); and Emmel later moved the district court to stay all further proceedings until the conclusion of his appeal. Docs. 284, 290-292. News in turn moved this Court to stay Emmel's appeal of the

permanent injunction until the trial set for more than three months hence was finished. Doc. 298.

On April 22, 2009, Emmel filed for bankruptcy rather than risk the potential of a large verdict before the district court with no means to maintain the status quo on appeal. Doc. 294. Both this Court and the district court stayed all further proceedings pending the termination of Emmel's bankruptcy or the automatic stay. Docs. 296, 298. The bankruptcy court fully discharged Emmel on January 5, 2010; News filed no adversary proceedings to determine the dischargeability of any of its claims.[5] Doc. 300; *See* Dkt Sheet – Case No. 2:09-bk-21646-REB (Bank. N.D. Ga.).

After Emmel's discharge, no trial on damages or attorney's fees was needed. So, on the district court's order, the clerk entered a final judgment on January 20, 2010, incorporating the permanent injunction based on the partial summary judgment for News on its breach-of-contract claim and dismissing all other claims. Docs. 301, 302. Emmel

[5] News's only adversary proceeding was for a declaratory judgment that the permanent injunction had not been discharged. Doc. 1 – Case No. 09-ap-2136-REB (Bank. N.D. Ga.). The bankruptcy court, on Emmel's motion, dismissed News's adversary action for lack of Article III subject-matter jurisdiction on March 22, 2010. Adv. Pro. Docs. 6, 14.

promptly amended his notice of appeal to include the final judgment. Doc. 303. News timely cross-appealed. Doc. 304.

B. Statement of the Facts

1. Emmel Receives Confidential Materials while Employed at News

News employed Emmel as an account director from February 1999 to November 30, 2006, in the Atlanta, Georgia area.[6] Doc. 281 – Pg 1. News provides in-store advertising and promotional services to consumer packaged goods companies such as Kraft, Nabisco, Procter & Gamble and Coca-Cola. Doc. 281 – Pg 1-2. As an account director, Emmel sold News's services to retail chains and maintained relationships with those retailers; renewed contracts; contracted new

[6] The factual allegations in News' complaints, including the documents attached to and incorporated into the complaint pursuant to Fed. R. Civ. P. 10(c), constitute admissions by a party-opponent under Fed. R. Evid. 801(d)(2)(A) admissible at trial and on summary judgment. *Hunt v. Liberty Lobby*, 720 F.2d 631, 649 n. 29 (11th Cir. 1983) (allegations in a plaintiff's complaint constitute judicial admissions binding on the plaintiff at trial) ; *Gen'l GMC Trucks, Inc. v. Mercury Freight Lines, Inc.*, 704 F.2d 1237, 1239 (11th Cir. 1983) (the principles governing the admissibility of evidence for purposes of summary judgment are the same as at trial); *Hill v. F.T.C.*, 124 F.2d 104, 106 (5th Cir. 1941) ("facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them").

business with new retail customers; participated in internal News conference calls; and implemented News' sales initiatives. *Id*.

In his job, Emmel also received a wide array of confidential and proprietary information concerning News's strategic and tactical marketing and business plans against its competition—such as Floorgraphics, Insignia, and Valassis—as well as materials reflecting News's revenue practices with customers. Doc. 281 – Pg 2; Doc. 69-2 ¶ 14; Doc. 251 – Ex. J-2 ¶¶ 4, 23. Emmel received this information orally, in the form of documents, and through electronic media—and he maintained much of it on his News-issued laptop computer. Doc. 281 – Pg 2; Doc. 69-2 ¶¶ 14-16; Doc. 251 – Ex. J-2 ¶ 4.

2. Emmel Reveals News's Fraudulent and Anti-Competitive Activities to the Government

By late 2005, Emmel was convinced that News was engaged in widespread illegal activity against its customers, competitors, and shareholders; he also saw that News management intended to do nothing about it. Doc. 250-2: Emmel Depo – Pg 157-58. Emmel had complained repeatedly to News Vice President Patrick Kroc, who oversaw Emmel's areas of responsibility, and also to his immediate

supervisor; but News did nothing to fix these problems, instead doing business as usual. *Id.*; Doc. 250-1 ¶ 1.

So starting in late January 2006 and continuing until December 20, 2006, Emmel—using the pseudonym "Courter Zanger"—disclosed News's illegal activities to the SEC, the New York Attorney General's Office, the offices of U.S. Senators Paul Sarbanes and Charles Grassley, and the U.S. Senate Finance and Judiciary Committees.[7] Doc. 281 – Pg 4; Doc. 250-2: Emmel Depo – Pl. Exs. 3, 33-36 & Def. Exs. 2, 4; Doc. 250-2: Emmel Depo – Pg 14, 210-11.

Specifically, Emmel gave the government—in personal meetings, phone conversations, via Federal Express, and through the mails—substantial oral and documentary evidence of News's extensive billing and revenue-sharing fraud against its customers; its predatory and anti-competitive schemes against competitors Floorgraphics, Insignia, and Valassis; and News's fraudulent inflation of its reported earnings unbeknownst to its shareholders. Doc. 281 – Pg 4; Doc. 250-2: Emmel Depo – Pg 14, 184-85, 189, 192, 195-96, 199, 210-11, 217-20, 224-25;

[7] The district court found that Emmel had no contractual or common-law duty of confidentiality to News during his employment, which ended on November 30, 2006. Doc. 281 – Pg 12-15.

Doc. 250-2: Emmel Depo – Pl. Exs. 3, 33-36 & Def. Exs. 2, 4; Doc. 251 – Ex. J-2 ¶ 23.

3. News Instructs Emmel to Send a Copy of His Laptop's Hardrive to Its Chicago Counsel in Connection with Floorgraphics' New Jersey Lawsuit

In early October 2006, Floorgraphics' action against News in New Jersey federal court was still pending. Doc. 69-2 ¶¶ 12, 62; Doc. 69-5: Ex. E – Pg 29:11-:17; Doc. 251 – Ex. J-2 ¶ 25. In connection with the New Jersey Action, News instructed Emmel to duplicate all the files on his hard-drive and send them to News's Chicago law firm of Mayer Brown; Emmel complied by sending them to Mayer Brown partner Lee Abrams in Chicago. Doc. 251 – Ex. J-2 ¶ 25; Doc. 69-5: Ex. E – Pg 29:11-30:11, 153:20-154:18; Doc. 249-4: Def. Ex. C (UPS Receipt). News reimbursed Emmel for the costs of hiring a third-party vendor to do the re-imaging onto a portable hard-drive and for the cost to ship the materials to Mayer Brown. Doc. 69-5: Ex. E – Pg 154:8-:15. The vendor also gave Emmel three DVDs that purported to be a duplicate of his hard-drive files as a back-up in the event the file transfer to the portable hard-drive was unsuccessful. Doc. 69-5: Ex. E – Pg 154:15-:18; Doc. 251 – Ex. J-2 ¶ 26.

Emmel kept the three extra DVDs, though he did not and could not access their contents. Doc. 69-5: Ex. E – Pg 155:1-:8, 156:2-:8; Doc. 251 – Ex. J-2 ¶ 27. Emmel knew about the ongoing federal civil actions against News filed by Floorgraphics, Insignia, and Valassis. *Id*. And he knew of previous instances in which News had withheld documents from discovery in other lawsuits. Doc. 251 – Ex. J-2 ¶ 29. So Emmel wanted to preserve the evidence on the DVDs for production in those cases and for government regulators and officials.[8] Doc. 69-5: Ex. E – Pg 155:1-:8, 156:2-:8; Doc. 250-2: Emmel Depo – Pg 185; Doc. 250-3: Emmel Depo – Pg 50-51; Doc. 251 – Ex. J-2 ¶ 28.

In fact, Floorgraphics intervened in this action to enforce its subpoena precisely because News had not produced in the New Jersey Action relevant materials on the hard-drive Emmel sent the previous October to News's Chicago counsel. Docs. 3, 45.

Yet when Emmel kept the DVDs in October 2006, he could had no idea that in six weeks News would fire him. Doc. 69-5: Ex. E – Pg 156:2-:8; Doc. 251 – Ex. J-2 ¶ 29. Nor could Emmel have known that

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[8] The district court ignored this evidence. Doc. 281 – Pg 21 ("The situation might be different if Emmel had proffered evidence that he had a legitimate concern that NAMIS might destroy or conceal the relevant information had he not taken action to preserve and disclose the documents. However, Emmel has adduced no such evidence[.]")

News would—as in the past—not produce scores of relevant documents electronically stored on the hard-drive he sent to News's lawyers. Docs. 3, 45. But with past as prologue, Emmel kept the DVDs.

4. News Terminates Emmel

On November 30, 2006, News terminated Emmel. Doc. 281 – Pg 4. Emmel immediately returned his company-issued computer and shipped some other materials to News via UPS. Doc. 251 – Ex. J-2 ¶ 30; Doc. 69-2 ¶ 61; Doc. 69-2: Ex. E – Pg 157:1-:13.

But Emmel did not return the three extra DVDs that mirrored his laptop and a variety of other documents he received during his employment. Doc. 281 – Pg 5; Doc. 69-5: Ex. E – Pg 155:10-:15, 156:9-157:25; Doc. 251 – Ex. J-2 ¶ 31. Emmel believed those items contained evidence of News's illegal activities against customers, competitors, and shareholders that would aid the government officials with whom he had already communicated and to whom he had disclosed other evidence of News's illegal activities; so Emmel retained the DVDs and documents to erase any chance they would be unavailable of suppressed by News. Doc. 69-2 ¶ 100; Doc. 69-5: Ex. E – Pg 155:10-:15, 156:9-157:25; Doc. 250-2: Emmel Depo – Pg 172; Doc. 250-3: Emmel Depo – Pg 50; Doc. 251 – Ex. J-2 ¶ 31.

5. After Learning that the Senate Finance Committee Had Referred His Information to the United States Department of Justice and the FTC, Emmel's Makes One Last Disclosure to the Government

In mid-December 2006, the Senate Finance Committee's investigative counsel, Nicholas Podsiadly, told Emmel that the Committee had referred his allegations and evidence of News's fraud and Sherman Act violations to U.S. Department of Justice and the Federal Trade Commission. Doc. 250-2: Emmel Depo – Pg 170. So Emmel compiled one last batch of internal News materials totaling about 55 pages for transmittal to the Senate Finance Committee to further the government's investigation into News's activities. Doc. 281 – Pg 18-19; Doc. 250-2: Emmel Depo – Def. Ex. 4; Doc. 250-2: Emmel Depo – Pg 145, 148-49.

On December 20, 2006, Emmel put these materials in an envelope with Mr. Podsiadly's name on it and dropped it in a mail box for delivery via regular mail. Doc. 281 – Pg 19; Doc. 250-2: Emmel Depo – Pg 148-49. But whether Emmel correctly addressed the envelope or affixed sufficient postage remains a mystery. Doc. 250-2: Emmel Depo – Pg 145, 148. Also unknown is whether Mr. Podsiadly or anyone else

actually received Emmel's December 20 package. Doc. 250-2: Emmel Depo – Pg 149; Doc. 283-1 – Pg 2, 11-12; Doc. 283-3 – Pg 2 ¶ 2.

6. News and Emmel Execute a Post-Employment Confidentiality Agreement

On December 21, 2006, News and Emmel signed a short post-employment agreement.[9] Doc. 69-2 ¶ 37; Doc. 69-5: Ex. D; Doc. 251 – Ex. J-2 ¶ 32. The agreement took effect that same day, as it contained no language stating that its effective date predated its date of execution. Doc. 69-5: Ex. D.

The agreement, governed by New York law (though Emmel still lived in Georgia), acknowledged Emmel may still possess confidential News materials but he had no obligation to return anything. Doc. 69-5: Ex. D ¶¶ 1, 3; Doc. 251 – Ex. J-2 ¶ 32. Emmel's principal duties under the agreement—with no temporal limitation—were not to disparage News or disclose the materials he possessed and the information he remembered:

> Emmel agrees that he will not disparage, denigrate or defame the Company . . . . Emmel further agrees that he will maintain in complete confidence, and not discuss, share, reveal, disclose or make available to any third party or entity any "Confidential Information" of the Company. . . .

[9] A copy of the confidentiality agreement is included as "Addendum A" at the end of this brief.

Addendum "A" – Doc. 69-5: Ex. D ¶ 1. After Emmel signed the agreement, he never again discussed, shared, revealed, exposed, or made available to any government official any confidential News information, either orally or through the transmittal of any documents. Doc. 69-5: Ex. D; Doc. 281 – Pg 18; Doc. 250-2: Emmel Depo – Pg 149.

7. News and Floorgraphics Subpoena Emmel in the New Jersey Action

On March 21, 2007, News and Floorgraphics each issued Rule 45 subpoenas to Emmel in connection with the New Jersey Action. Both subpoenas commanded that Emmel produce documents and testify on March 27, 2007, in Atlanta, Georgia. Doc. 80-2; Doc. 249-4: Def. Ex. D; Doc. 251 – Ex. J-2 ¶¶ 33, 34.

Prior to Emmel's deposition, News filed no motion to quash or for a protective order in response to the request for production in Floorgraphics' subpoena. Emmel attempted to comply with the production demands in both subpoenas, producing the three DVDs he received in October 2006 and several hard-copy documents received during his employment. Doc. 69-5: Ex. E – Pg 7:7-:21, 62:3-:7, 62:14-:20, 64:19-65:5, 108:21-110:12. But because News objected to Emmel's production on the grounds of possible attorney-client privilege, Emmel

conveyed his materials to the court reporter to hold pending a resolution of News's objection. Doc. 40 – Pg 2, 4-5, 8.

8. Emmel Never Voluntarily Disclosed Any Confidential News Information to Any News Competitor

At no time either during his employment, after his firing, or after the parties signed their 12/21/06 post-employment agreement did Emmel voluntarily disclose any confidential information to any competitors such as Floorgraphics, Insignia, or Valassis—either directly or through anyone's agents or attorneys. Doc. 251 – Ex. J-2 ¶ 37; Doc. 69-5: Ex. E – Pg 158:17-159:6; Doc. 249-4: Ex. F – Pg 107:20-109:20, 110:5-111:8; Doc. 249-4: Ex. G – Pg 119:25-121:8, 127:17-128:12; Doc. 249-4: Ex. H ¶¶ 5-7; Doc. 249-4: Ex. I ¶¶ 5-7.

Emmel's lone disclosures of confidential News information after the 12/21/06 agreement took effect were under compulsion of subpoena well after his employment ended. On March 27, 2007, he gave deposition testimony and produced documents in the New Jersey Action in compliance with the Rule 45 subpoenas served by Floorgraphics and News. Doc. 281 – Pg 18 n. 5. He gave additional deposition testimony in the New Jersey Action on January 10, 2008 and in Insignia Systems' Minnesota action against Newscase. Doc. 250-3.

C. Standard of Review

Grants of summary judgment are reviewed *de novo*, with all the evidence viewed in the light most favorable to the non-movant. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1326 (11th Cir. 1998). The mere existence of some alleged factual dispute, however, is insufficient to defeat a motion for summary judgment; the non-moving party must present evidence sufficient for a jury to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The standard of review for the grant of a permanent injunction is abuse of discretion. *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009). But the Court "reviews *de novo* all determinations of law made by the district court en route." *Id.* (quotation omitted). And all findings of fact upon which the decision to grant equitable relief was made are reviewed under the clearly erroneous standard. *Id*.

SUMMARY OF THE ARGUMENT

1. The district court wrongly concluded that Emmel breached his post-employment confidentiality/non-disparagement agreement several reasons. First, as a matter of public policy, a person's voluntary disclosures of his employer's possible criminal activity to government officials cannot breach a confidentiality agreement. In Georgia, like

everywhere else, it is every citizen's duty to report such activities, and that legal duty is imported into every confidentiality agreement. Contracts that would conceal evidence of possible wrongdoing are thus deemed unenforceable as against public policy. And no reason exists to exempt ex-employers from this rule.

2. The district court wrongly held that Emmel breached the parties' 12/21/06 confidentiality/non-disparagement agreement on the theory that his act of mailing a package to the Senate Finance Committee the day before the contract was signed was a prohibited disclosure or statement because the package was, presumably, received after the contract's execution. A Contract operates only prospectively from the date of execution absent explicit language giving it retrospective effect. Here, the parties' agreement became effective December 21, 2006, after it was signed. The agreement has no retroactivity provision. Based on the plain meaning of the contract's non-disclosure provision and its prospective effect from execution, Emmel's pre-contract mailing was no breach.

3. The district court clearly erred in finding that Emmel's pre-contract act of mailing a package to the Senate Finance Committee's counsel breached his 12/21/06 agreement because the Senate Finance

Committee supposedly received it post-execution. First, the record includes no evidence that the Senate Finance Committee or its counsel actually received Emmel's package. Second, no presumption of receipt can exist because the record includes no evidence that Emmel either correctly addressed or affixed proper postage to the package. With no evidence or inference of receipt, the district court's finding of a breach was clearly erroneous.

4. The district court abused its discretion in issuing the permanent injunction for several reasons. First, Emmel did not breach his December 21, 2006 agreement, so News did not succeed on the merits. Second, Emmel's disclosures to federal and state law-enforcement and government officials, which the district court cited and derided as proof of his "propensity to disclose," did not and could not irreparably injure News because they were made pursuant to a public duty of disclosure. Worse, the district court did not find that News suffered any actual injury; only that News needed to be protected from the possibility of *future* injury. Third, the injunction disserves the public interest because it overrides Emmel's public duty by prohibiting him from making any voluntary or involuntary future disclosures in all circumstances, including to grand juries, federal agents, prosecutors,

victims, and elected officials. Fourth, the district court's order does not discuss the public-interest factor in support of the injunction. Ordinarily in this circumstance, the injunction should be vacated. But since all the evidence relevant to the public-interest factor are undisputed and confirm weigh entirely in Emmel's favor, this Court should reverse the district court's order granting injunctive relief.

5. The district court's permanent injunction violates Emmel's First Amendment rights. As worded, the injunction imposes a prior restraint on Emmel. All his communications to anyone, including the government, relating to confidential News information now require the advance approval of a federal judge backed by the threat of contempt. No legitimate government interest is served here given the injunction's overbreadth. Because the continued concealment of wrongdoing is no kin to maintaining the confidentiality of a legitimate trade secret, the injunction violates Emmel's First Amendment rights.

ARGUMENT AND AUTHORITY

I. THE DISTRICT COURT WRONGLY CONCLUDED THAT THE DEFENDANT BREACHED HIS POST-EMPLOYMENT CONFIDENTIALITY AGREEMENT WITH THE PLAINTIFF

A. Georgia Public Policy Immunized Emmels' December 20, 2006 Disclosure

The district court held that Emmel's last disclosure of confidential News materials to the Senate Finance Committee—after the committee had referred his information to the Justice Department and FTC—breached a confidentiality/non-disparagement agreement that took effect the next day. The district court's ruling squarely contradicts centuries of public policy, including in Georgia, which imposes on individuals a public duty to disclose possible crimes to the government and thereby sets such disclosures beyond the reach of a contractual promise of confidentiality and non-disparagement.[10] The judgment below against Emmel should be reversed. Judgment for Emmel should be rendered.

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[10] Under Georgia's conflict-of-laws rules, a contract's choice of law will not be honored if the chosen law contravenes Georgia public policy or the interests of its citizens. *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977); *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 247 (5th Cir. 1974). Here, the district court sat in diversity and was bound by Georgia's conflict rules. *Id.* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)).

1.

The long history of the public-policy principle ignored below was discussed at length in *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366 (Fed. Cir. 2001). The court observed:

> . . . the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the *highest order* and is indisputably "well defined and dominant" *in the jurisprudence of contract law*.

Id. at 1375 (quoting *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766 (1983)) (emphasis added). The court then traced the policy's origin:

> The citizen's duty to raise the 'hue and cry' and report felonies to the authorities was an established tenet of Anglo Saxon law *at least as early as the 13th century*.

Id. (quoting *Roberts v. United States,* 445 U.S. 552, 557 (1980)) (emphasis added); *accord* 4 W. Blackstone, *Commentaries on the Laws of England* 120-21 (1768).

In *Lachman v. Sperry-Sun Well Surveying Co.,* 457 F.2d 850 (10th Cir. 1972), the court spoke to the conflict employees would face if subject to court-sanctioned punishment for voluntarily disclosing evidence of possible criminality not just to the government, but to the victim as well. The Tenth Circuit, citing the same policy principle as *Fomby-Denson*, held that the defendant did not violate his non-

disclosure agreement when he told what he knew of the plaintiff's activities to the victim:

> It is public policy in Oklahoma *and everywhere* to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced by appellant would serve to frustrate this policy. . . .

Id. at 853-54 (emphasis added).

The Tenth Circuit then turned to an individual's conundrum when forced to choose between disclosure and the potential of court-sanctioned punishment for breaching a confidentiality agreement:

> By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.

Id. at 854 (emphasis added).

As *Lachman* explains, public policy is frustrated at the most basic level when a court punishes voluntary disclosures of wrongdoing to law enforcement or other government officials in favor of enforcing a private nondisclosure agreement. *Accord Ventura v. The Cincinnati Enquirer*, 396 F.3d 784, 791 (6th Cir. 2005) ("This court confirms that public policy

precludes the plaintiff from enforcing any promise . . . to conceal the plaintiff's criminal activity.").

2.

This Court, in *E.A. Renfroe & Co. v. Moran*, 249 Fed.Appx. 88 (11th Cir. 2007), approved the same public-policy principle adopted in *Fomby-Denson* and *Lachman*. That is, a confidentiality agreement cannot be used to prohibit or punish disclosures of possible wrongdoing to governmental authorities or third-party victims.

In *E.A. Renfroe*, two sisters copied 15,000 pages of documents they believed proved their employer's insurance fraud of Hurricane Katrina victims. On the advice of an attorney, the sisters shared the documents and their suspicions with the Mississippi Attorney General's office and the Federal Bureau of Investigation. The sisters also went on the ABC News show "20/20" to discuss what the perceived fraud.

The plaintiff sued the sisters for monetary and injunctive relief, alleging that they had violated the non-disclosure provisions in their employment contracts and the Alabama Trade Secrets Act. The district court issued a preliminary injunction commanding the return of the documents pending trial and barring any future disclosures, except "to, and their use by, law enforcement officials." Id. at 90 (emphasis added.)

On appeal, the sisters argued that "the public policy concern of ferreting out corporate wrongdoing justifies their breach of the contractual duty under the confidentiality provision and counsels against enforcement of it." *Id*. This Court agreed. *Id.* But the plaintiff did *not* base its lawsuit in any way on the sisters' disclosures to any government officials; so the Court affirmed the injunction, explaining:

> *But that concern [the defendant's public-policy argument] is one that is adequately covered by disclosure of the alleged wrongdoing to state and federal law enforcement agencies*. As Renfroe put it in its brief, "Renfroe makes no complaint about the Rigsbys's participation in any investigation by a governmental law enforcement agency. . . ." As we explained earlier, the preliminary injunction, which is all that we have before us, permits disclosure to and use by law enforcement agencies.

Id. (emphasis added).

3.

Georgia law imposes a public duty on its citizens to disclose possible illegality and disfavors the use of confidentiality agreements to conceal evidence of possible wrongdoing. "It is public policy to encourage citizens to bring to justice those who are *apparently* guilty. Citizens have a duty to report crimes." *Monroe v. Sigler*, 353 S.E.2d 23, 25-26 (Ga. 1987) (emphasis added); *accord Camp v. Eichelkraut*, 539

S.E.2d 588, 597-98 (Ga.App. 2000) (citizens have a duty to report criminal and other unlawful activity) (citations omitted).

Contracts containing confidentiality and non-disparagement clauses governed by Georgia law implicitly incorporate a citizen's duty to report criminal or other unlawful activity. *See id.*; *Unami v. Roshan*, 659 S.E.2d 724, 727 (Ga.App. 2008) (citing *Lachman v. Sperry-Sun Well Surveying Co.,* 457 F.2d 850 (10th Cir. 1972)); *Camp*, 539 S.E.2d at 598; *Barger v. Garden Way, Inc.*, 499 S.E.2d 737, 740-41 (Ga.App. 1998). A public-policy limitation on all confidentiality and non-disparagement clauses thus exists whereby "[a] bargain to refrain from disclosing to a third person, to whom a duty of disclosure exists, information of value or interest to him is illegal." *Unami*, 659 S.E.2d at 727 (quoting 7 *Williston on Contracts* § 16:14 (4th ed.) (brackets in original). Any agreement that prohibits such disclosures thus is unenforceable. *Id.* at 727 n. 2 (citing OCGA § 13-8-2(a) ("A contract which is against the policy of the law cannot be enforced.").

Georgia courts have consistently held promises of confidentiality and non-disparagement to be subservient to the public's greater interest in the detection and disclosure of possible crimes and other wrongdoing. *See id.*; *Camp*, 539 S.E.2d at 597-98; *Barger*, 499 S.E.2d at 740-41. But

no Georgia case directly addresses the facts here. Yet the principle expressed in *Unami* that agreements to refrain from disclosing information of interest to persons to whom a duty is owed, coupled with the cases holding that every citizen in Georgia owes a public duty to report apparently illegal activity, make clear that a confidentiality agreement will not be enforced to prohibit or punish disclosures of possible illegality to the government. *See Providence Constr. Co. v. Bauer*, 494 S.E.2d 527, 530 (Ga.App. 1997) (holding a non-disparagement clause in a deed unenforceable as against public policy because it effectively prohibited the homeowner from petitioning the government in opposition to the developer's activities).

4.

Whether a contract clause is unenforceable on public-policy grounds is a question of law. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998). Here, Emmel's last disclosure can only be an actionable breach by turning Georgia and federal public policy on their heads.

Animating the district court's decision was the view that Emmel, in essence, contractually waived his public duty to disclose confidential News information, including trade secrets, insofar as it revealed

possible criminal activity. But that view has two problems. First, "[d]isclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees." *McGrane v. The Reader's Digest Ass'n, Inc.*, 822 F. Supp. 1044, 1051 (S.D.N.Y. 1993).

> Any arrangement or agreement, formal or informal, designed to preclude a former employee from reporting wrongdoing by a former employer to proper authorities would be unenforceable by virtue of 18 U.S.C. §§ 3, 4[.]

Id.

Second, no individual can contractually waive a public duty under Georgia law. *See Porubiansky v. Emory Univ.*, 275 S.E.2d 163, 165 (Ga. App. 1980) ("Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement[.]") (quotation omitted). Cases like *Fomby-Denson*, *Lachman*, and *E.A. Renfroe* confirm as much.

But the district court—instead of applying Georgia's policy that "encourage[s] citizens to bring to justice those who are apparently guilty"—punished Emmel and protected News from any further disclosures about its possible wrongdoing. *Monroe*, 353 S.E.2d at 25-26. The district court did so by construing the 12/21/06 agreement to

impose on Emmel a duty to *conceal* evidence of possible illegal activity. *See McGrane*, 822 F. Supp. at 1051.

Such a construction not only contradicts Georgia's clearly articulated public-policy interest. It also is contrary to the public policy of the United States expressed in 18 U.S.C. §§ 3 and 4, which criminalize being an accessory after the fact and concealing evidence of a felony, and the obstruction-of-justice statute at 18 U.S.C. § 1512. *Id.* at 1051-52. Emmel's last disclosure to the government appears to be exactly the kind of communication this Court viewed as immunized from a breach-of-contract claim in *E.A. Renfroe*, 249 Fed.Appx. at 90.

The district court's decision to make Emmel's public-duty disclosure a breach of the parties' agreement was plainly wrong. Public policy precludes a finding of any actionable breach. Summary judgment should have been entered for Emmel on News's breach-of-contract claim. This Court should reverse and render judgment for Emmel.

B. Emmel's Last Mailing to the Senate Finance Committee the Day Before the Parties' Agreement Took Effect Could Not Constitute a Breach

The district court ruled that Emmel breached the parties' 12/21/06 confidentiality agreement on the novel theory that his act of mailing a package to the Senate Finance Committee on December 20, 2006—the

day before the contract took effect—constituted a prohibited disclosure or disparagement because the package was presumably received after the contract's execution and he took no steps to stop its delivery. Doc. 281 – Pg 20. This reasoning disregards the basic rule that a contract operates only prospectively from execution absent language of retroactive effect. No such language is in this agreement. Given the plain meaning of the contract's confidentiality and non-disparagement provisions, and its prospective effect, Emmel's pre-contract mailing was no breach.

1.

Under both Georgia and New York law, contracts apply prospectively upon signing; only "where the contract expressly states that its terms are to take effect at an earlier date" can it apply to activities that occurred prior to signing. *Am. Cyanamid Co. v. Ring*, 286 S.E.2d 1, 3 (Ga. 1982); *Colello v. Colello*, 780 N.Y.S.2d 450, 453 (N.Y.App.Div. 2004) ("It is fundamental that where parties to an agreement expressly provide that a written contract be entered into 'as of' an earlier date than that on which it was executed, the agreement is effective retroactively 'as of' the earlier date and the parties are bound

thereby . . . .") (quoting *Matthews v. Jeremiah Burns, Inc.*, 129 N.Y.S.2d 841, 847 (1954)).

Here, the 12/21/06 agreement was signed and became effective on December 21, 2006. Doc. 69-2 ¶ 37; Addendum "A" – Doc. 69-5: Ex. D; Doc. 251 – Ex. J-2 ¶ 32. And because it contains no language "expressly stat[ing] that its terms are to take effect at an earlier date[,]" the agreement could apply only prospectively. *Am. Cyanamid Co.*, 286 S.E.2d at 3; *accord Colello*, 80 N.Y.S.2d at 453.

2.

The question then is whether the agreement's non-disclosure and non-disparagement provisions—upon taking effect on December 21—can be understood in ordinary English to apply retrospectively to Emmel's action on December 20. The answer is clearly "no."

The relevant portion of the agreement is unambiguous:

> Emmel agrees that he will not *disparage, denigrate or defame* the Company . . . . Emmel further agrees . . . that he will . . . not *discuss, share, reveal, disclose or make available* to any third party or entity any "Confidential Information" of the Company. . . .

Doc. 69-5: Ex. D ¶ 1 (emphasis added). The district court, using an *ipse dixit* analysis, interpreted this clause to take effect before the agreement's execution and continue into the future. Doc. 281 – Pg 19-

20. But that construction flies in the face of basic rules of English grammar and common English usage. And, as a result, the district court impermissibly rewrote an unambiguous agreement.

> A court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case.

Terwilliger v. Terwilliger, 206 F.3d 240, 245 (2d Cir. 2000) (applying New York law); *accord Piggly Wiggly S. Inc. v. Heard*, 405 S.E.2d 478, 480 (Ga. 1991) (courts may not rewrite contracts under Georgia law).

Each of the italicized words in ¶ 1 is a verb couched in the future tense because they are in a series preceded by the underscored verb "will." *See* M. Shertzer, *The Elements of Grammar* 29 (1986) ("*Future: Shall and Will* – . . . *"Will* [is] used for the second and third persons to show to indicate [ ] simple futurity, willingness, and expectation."). Basic rules of grammar provide that the future and "present tense should ***not*** be used to express an action begun in the past and still continuing; the correct tense is the ***present perfect***." *Id.* ¶ 15 (bold and italics in original).

So for the district court's construction of ¶ 1 to be correct, the parties' agreement would have had to employ the "present perfect"

tense. To capture Emmel's pre-contract conduct, the confidentiality and non-disparagement provisions would have had to start with: "Emmel agrees he *has not* [begun/undertaken/started] . . . ." But the verb tense of the phrase on which the district court relied did nothing of the sort.

Moreover, because the contract-law principle of prospective effect controls here, the district court's reading is a striking departure from ordinary English usage, certainly from the listener's point of view in terms of syntax and plain meaning. *See Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890 (2009) (analyzing statutory text based on how the listener would understand its terms "[i]n ordinary English"). Both the confidentiality and non-disparagement clauses tell the listener that, starting on December 21, 2006, Robert Emmel "will not" not do any act to discredit News; nor will he do any act to expose, to make known, to free from secrecy any confidential News information. *See Black's Law Dictionary* 417, 422 (5th ed. 1979); *Webster's Third New International Dictionary* 645 (1986) (defining "disclosure" as "the act or an instance of opening up to view, knowledge, or comprehension").

Emmel did no such acts *after* the agreement's execution. His lone "act . . . of opening up to view" News's information—*i.e.*, releasing it—to the Senate Finance Committee happened on December 20 before he was

under any contractual obligations not to disparage News or reveal confidential information. *Id*.; *accord United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1185 (10th Cir. 2008) ("the term 'disclosure' is defined as the release of information or knowledge into the open"). That his package may have arrived after December 21 is wholly consistent with this construction. The agreement prohibits only future acts upon execution, not future consequences from past acts prior to execution.

The district court's interpretation of the parties' 12/21/06 agreement was plainly incorrect. Emmel's last act of disclosure via the mails on December 20, 2006 was neither retroactively covered by the agreement nor included as a matter of grammatical and definitional analysis.[11]

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[11] Oddly, the district court buttressed its legal conclusion by erroneously positing that Emmel offered no evidence to explain why he kept confidential News materials after his termination. Doc. 281 – Pg 20; *see supra*, at 15 n. 8. Not only did Emmel address that question in his declaration (as well as in his deposition). Doc. 251 – Ex. J-2 ¶¶ 28-29. But Emmel's *motive* for keeping News materials has no connection to the *legal* question of whether his December 20 mailing was a prohibited disclosure or disparagement within the meaning of the 12/21/06 agreement. The district court thus wrongly justified its interpretation of the parties' agreement with an erroneous factual scenario calculated to tip the equitable scales in News's favor—which is in improper method of contract analysis. *Terwilliger*, 206 F.3d at 245.

C. The District Court's Ruling that Emmel Breached the Parties' Agreement is Based on the Clearly Erroneous Finding that the Senate Finance Committee Received His Last Mailing

Crucial to the district court's ruling that Emmel breached the 12/21/06 agreement was the finding that the Senate Finance Committee in fact received his December 20 mailing at some point after the contract's execution. But the record contains no evidence of actual receipt or that Emmel correctly addressed and posted the package, which precludes any inference of receipt. The district court's finding that the Senate Committee received Emmel's his package was clearly erroneous, which made the findings of disclosure and disparagement equally erroneous.

To start, the record contains no evidence that either the Senate Finance Committee or addressee Nicholas Podsiadly, then the committee's investigative counsel, ever received Emmel's December 20 mailing. For that very reason, News wanted to depose Mr. Podsiadly—and the district court approved with no explanation—13 months after discovery closed and one month after winning partial summary judgment on its contract claim. No deposition was taken, however. The

district court, as it seems to have belatedly recognized, had no evidence in the record of actual receipt by the Senate Finance Committee.

The only basis then to find Emmel breached the parties' agreement is via the inference of presumed receipt. *Konst v. Florida East Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996). To secure that presumption, the proponent must prove "[i] the item was properly addressed, [ii] had sufficient postage, and [iii] was deposited in the mail." *Id*. Failure to prove all three means no presumption arises. *See id.* at 852 n. 2.

Here, News developed no evidence that proves the first two factors. In Emmel's deposition, News did not ask him the address to which he sent the package, whether he verified that address, or even if he correctly addressed it. Nor did News ask Emmel if he put sufficient postage on the package based on its weight. His deposition reads:

> Q. And the day before you signed this agreement, you sent written communication to Nick Podsiadly in the U.S. Senate; correct?
>
> A. That's correct.
>
> Q. How did you send it to him?
>
> A. Through the mail.
>
> Q. So you mailed it to him?

A. Yes.

* * *

Q. So back to my original question: You mailed it via regular mail --

A. Yes.

Q. -- on December 20th?

A. Yes.

Q. You're familiar with the length of time it takes for things to be mailed to arrive; correct?

A. I understand something in the mail, yes.

Q. You at least had some reason to believe that Mr. Podsiadly had not received the package you had mailed to him on December 21st; correct?

A. Yes. That's correct.

Doc. 250-2: Emmel Depo – Pg 145:7-:14 & 148:12-:25.

Obviously, News neither confirmed that Emmel correctly addressed the December 20 package nor put the proper postage on it. Its evidence provides only the barest suggestion that Emmel *might* have correctly addressed the package and *might* have put sufficient postage on it. *See Konst*, 71 F.3d at 851. That was not enough for News to meet its summary-judgment burden under the district court's breach-of-contract theory. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir. 1999) ("[T]he mere existence of a scintilla of evidence in support of

the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-movant.") (quotation, alterations omitted).

Based on the record evidence, no inference of receipt can be presumed. *Konst*, 71 F.3d at 851. And no actual receipt was proven. That makes the district court's key finding that the Senate Finance Committee received Emmel's package clearly erroneous. *See* Doc. 281 – Pg 18. And without proof of receipt, the district court's findings that Emmel breached the 12/21/06 agreement by disclosing News information and disparaging News are also clearly erroneous. The judgment should be reversed and rendered for Emmel.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A PERMANENT INJUNCTION AGAINST THE DEFENDANT

Applying the four factors governing permanent injunctive relief to the evidence shows the district court clearly abused its discretion in entering the injunction against Emmel. He committed no breach. News suffered no irreparable injury from Emmel's disclosures; nor did the district court find any such injury. The injunction disserves the public's interest by obstructing the flow of information to law enforcement, the courts, and News's victims. And the district court's

order fails to make findings that News proved all four factors. This Court should reverse.

A.

To warrant permanent injunctive relief, a plaintiff must prevail on the merits and demonstrate each of the following four factors:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

Injunctive relief does not follow mechanically from success on the merits. *Winter v. Natural Resource Defense Council*, 129 S.Ct. 365, 381 (2008). Rather, the district court's order must expressly find that each of the four factors is present. *See Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1352 (Fed. Cir. 2009) (the district court abuses its discretion when it fails to state its determination of each of the four factors).

B.

1.

For all the reasons discussed above in Point I, the district court wrongly granted partial summary judgment to News on its breach-of-

contract claim. *See supra*, at 25-42. Absent success on the merits, no injunction can issue as a matter of law. *KH Outdoor, LLC v. City of Trussville,* 458 F.3d 1261, 1268 (11th Cir. 2006) ("For a permanent injunction, . . . the movant must establish actual success on the merits, as opposed to a likelihood of success.").

2.

The district court made no finding that News in fact has suffered any irreparable injury because of Emmel's last governmental disclosure or any prior one; nor did the district court find any injury that money could not compensate. Doc. 281 – Pg 20. All the district court found was that "the interests of justice compel the issuance of an injunction to prohibit the harm to NAMIS that *could* flow from further such disclosures." *Id.* (emphasis added). The district court cited two preliminary-injunction cases. *Id*. The mere *possibility* of some future injury will not support permanent injunctive relief, however. *eBay Inc.*, 547 U.S. at 391.

The only injury that News was found to have suffered was a nominal one; and that finding arose as a matter of Georgia contract law because News failed to prove any *actual* injury. Doc. 281 – Pg 23. Moreover, News's nominal injury entitled it to a jury trial on damages.

Id. – Pg 33. So at best, News suffered only a compensable nominal injury. Injunctive relief is inappropriate in that circumstance. *eBay Inc.*, 547 U.S. at 391.

In any event, Emmel's last disclosure—like his prior ones—was made pursuant to a public duty under Georgia law. As discussed in Point I.A, disclosures of this kind are not even actionable. *See supra*, at 25-33. And if pubic-duty disclosures are not actionable, or at least strongly favored by public policy, they can cause no injury that would justify equity's protection. The record here thus precludes a finding that News has suffered any irreparable injury at Emmel's hands. That bars permanent injunctive relief of any kind against Emmel as a matter of law.

3.

The permanent injunction disserves the public interest. Given its unlimited breadth, the injunction imposes an absolute prior restraint on Emmel's compliance not only with his public duty to make voluntary disclosures about possible illegality to the authorities and victims. *See supra*, 25-33. The injunction also bars Emmel's compliance in all circumstances with grand jury and court-issued subpoenas. *Compare Young v. United States Dept' of Justice*, 882 F.2d 633, 640 (2d Cir. 1989)

(holding that compliance with a judicially-authorized subpoena immunizes the respondent from liability for any required disclosures, even disclosures of confidential information); *Barger*, 499 S.E.2d at 740-41 (compliance with a subpoena trumps a duty of confidentiality based on Georgia public policy). The injunction here plainly obstructs the unimpeded flow of the very kind of information that law enforcement and regulators, as well as victims, need to investigate and prosecute both criminal and civil matters.

And, as it stands now, a federal judge exercises complete control, backed by the power of contempt, over all of Emmel's communications of confidential News information regardless of context—and solely because Emmel discretely complained to the authorities about News's illegal activities. *See* Doc. 281 – Pg 4, 29 (relying exclusively on Emmel's communications to the SEC, N.Y. Attorney General's Office, two Senators and Senate Committees, the district court found that "Emmel has demonstrated a propensity to disclose NAMIS's confidential information"). Giving a judicial officer unbounded control over an individual's right to disclosure accurate information is contrary to the law of this Circuit. *See Bernard v. Gulf Oil Co.,* 619 F.2d 459, 468 (5th

Cir. 1980)[12]; *compare United States v. Kahn*, 244 Fed.Appx. 270, 273 (11th Cir. 2007) (an injunction that bars an individual from providing false information to the IRS serves the public interest).

The injunction against Emmel thus clearly disserves the public's interest, not only in Georgia but in the United States. *See Fomby-Denson*, 247 F.3d at 1375. The only person whose interests are served is News because the injunction has now suppressed and prevented the disclosure of damaging information about its illegal activities to the government and the victims—a weighing of interests that turned centuries of public policy upside down. *See id*. This injunction does not serve the public interest and should be reversed.

4.

Finally, the district court's order nowhere discusses either how News's nominal injury could not be compensated or the public-interest factor. Ordinarily, an injunction would have to be vacated in that situation. *See Ecolab, Inc.*, 569 F.3d at 1352. But since all the facts relevant to both of these factors are undisputed, this Court should

[12] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

render judgment for Emmel for the reasons just discussed and hold that no injunctive relief is justified as a matter of law.

III. THE PERMANENT INJUNCTION VIOLATES THE DEFENDANT'S FIRST AMENDMENT FREE-SPEECH AND PETITION-CLAUSE RIGHTS

The permanent injunction here is both an unlawful prior restraint on Emmel's speech and overbroad in violation of his First Amendment rights. The Court reviews this question *de novo*. *Kahn*, 244 Fed.Appx. at 273.

"Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated." *In re G. & A. Books, Inc.,* 770 F.2d 288, 296 (2d Cir. 1985). "The essence of prior restraint is that it places specific communications under the personal censorship of the judge." *Bernard,* 619 F.2d at 468.

Here, Emmel is prohibited in advance from disclosing to anyone at any time any confidential News information. And a federal judge is now the censor of all such disclosures, regardless of the situation. *Id.*; *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975) (A prior restraint is "a predetermined judicial prohibition restraining specified expression."). The injunction thus is a prior restraint because

Emmel is subject to contempt if he violates it based on the content of his speech; that makes the injunction presumptively invalid. *Org. for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

The only question then is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Kahn*, 244 Fed.Appx. at 273-74 (quoting *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994)). The answer is clearly "no."

The only government interest that might possibly be served is the preservation of News's confidential and trade-secret information. Generally, that is a legitimate interest if the evidence shows an ex-employee or competitor threatens to commercially exploit protected materials or actually do so. *See Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1412 (11th Cir. 1998).

But this is not what happened here. This case has nothing remotely to do with the either a governmental or private interest in maintaining some sort of competitive *status quo*. *Compare id.* (holding that injunctive relief may be appropriate "to the extent that the Gateway continues to make use of Camp Creek's confidential information to compete for guests.").

This case is only about Emmel reporting News's possible criminal activities to law enforcement, regulators, and elected federal officials. "Disclosures of wrongdoing do not constitute revelations of trade secrets . . . ." *McGrane*, 822 F. Supp. at 1051.

The problem then with the injunction is it is worded so broadly that it not only frustrates but completely obstructs the government's interests in the disclosure of illegal activities to the authorities and victims, as well as compliance with subpoenas, while News reaps the windfall of silencing an individual because he exercised his public duty of disclosure. *See E.A. Renfroe*, 249 Fed.Appx. at 90. *Accord Fomby-Denson*, 247 F.3d at 1375; *Lachman,* 457 F.2d at 854; *Unami*, 659 S.E.2d at 727; *Camp*, 539 S.E.2d at 597-98; *Barger*, 499 S.E.2d at 740-41. Nothing in the record justified entry of a permanent injunction that flatly prohibits all disclosures of this kind without the advance approval of the district court.

The permanent injunction against Emmel thus violates his First Amendment rights. And it should be promptly reversed.

CONCLUSION

Defendant- Appellant/Cross-Appellee Emmel respectfully requests that the Court reverse the district court's judgment and render a take-nothing judgment in his favor.

Respectfully submitted,

s/Marc N. Garber

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CERTIFICATE OF COMPLIANCE

Pursuant to 11th Cir. R. 28-1, counsel for Appellant hereby certifies that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,046 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii), and was prepared with a proportionally spaced typeface using Microsoft Word 2002 in CENTURY SCHOOLBOOK 14 PT.

s/Marc N. Garber

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the BRIEF OF APPELLANT/CROSS-APPELLEE was served by first-class mail with adequate postage attached on the following counsel on April 2, 2010, addressed to:

Leanne Mehrman
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271 17th Street NW, Ste 1900
Atlanta, GA 30363

s/Marc N. Garber

MARC N. GARBER

ADDENDUM "A"

12/21/06 Agreement

(Doc. 69-5: Ex. D)

21 (21E)

AGREEMENT made as of December 20, 2006 by and between Bob Emmel ("*Emmel*") and News America Marketing (the "*Company*" or "We"). As used herein, the phrase "the Company and/or related persons" means News America Marketing In-Store, LLC, News America Marketing FSI, LLC and each of their respective corporate affiliates, officers, and employees.

1. In consideration of the Company issuing to Emmel an executed original of the letter attached hereto at Appendix 1, Emmel agrees that he will not disparage, denigrate or defame the Company and/or related persons, or any of their respective business products, practices or services. Emmel further agrees that he will maintain in complete confidence, and not discuss, share, reveal, disclose or make available to any third party or entity any "Confidential Information" of the Company. For purposes of this Agreement, Confidential Information means all trade secrets and information on costs, pricing, and materials, supplier information, customer lists and customer information (including the identity of customer marketing personnel and customer marketing preference, practices or procedures), vendor lists and vendor information, employee lists and employee information, market share reports, customer contract terms and rates, right of first refusal reports, category scheduling, category management, layout management, contract management, account management, data processing programs and financial information, research, development, marketing plans, methods, techniques or processes, or combinations thereof, and/or compilations of information that was disclosed to or acquired by Emmel during or in the course of his employment that relates to the business of the Company and is not generally available to the public or generally known in the Company's industry.

2. Emmel acknowledge that in deciding to sign this Agreement you have not relied on any promises, statements, representations or commitments, whether spoken or in writing, made to him by any Company representative, except for what is expressly stated in this Agreement. This Agreement constitutes the entire understanding and agreement between Emmel and the Company, and replaces and cancels all previous agreements and commitments, whether spoken or written, in connection with the matters described.

3. This Agreement shall be governed by and enforced in accordance with the laws of the State of New York, without regard to its conflicts of law principles. No oral agreement, statement, promise, commitment or representation shall alter or terminate the provisions of this Agreement. This Agreement cannot be changed or modified except by written agreement signed by both Emmel and an authorized Company representative. If any term, provision or restriction contained in this Agreement, or any part thereof, is held by a court of competent jurisdiction or any foreign, federal, state, county or local government or any other governmental regulatory or administrative agency or authority or arbitration panel to be invalid, void, unenforceable or against public policy for any reason, the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect.

Bob Emmel

Signature of Bob Emmel

12/21/06

Date Signed by Bob Emmel

11:44 A.M.

News America Marketing

By: Rita Meyer

Dec. 21, 2006

Date Signed by News America Marketing

NEWS AMERICA MARKETING
1211 Avenue of the Americas, New York, NY 10036
212/782-8000 FAX 212/575-5845
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To Whom It May Concern.

Please accept this letter as establishing the fact Bob Emmel is hereby free of any non-competition restrictions he may have been under with his former employer, News America Marketing. While Mr. Emmel is free to accept employment with whomever he may choose, please also know that he is bound not to disclose to you any of News America Marketing's confidential information that he may possess.

Very truly yours,

Rita Meyer

Rita Meyer

Executive Vice President, Human Resources