STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0318

Atronix, Inc.

v.

Kenneth Morris

Scott Electronics, Inc.

RULE 7 MANDATORY APPEAL FROM ROCKINGHAM COUNTY SUPERIOR COURT

JOINT BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

This is an action where the distinction between a corporate merger and an asset sale matters considerably. It is generally accepted that a corporate merger does not impair the enforcement of an employee non-compete agreement entered into before the merger. *Netscout Systems, Inc. v. Hohenstein*, 2017 Mass. Super. LEXIS 25, *6, 34 Mass L. Rep. 153 (Mass. Super. Feb. 22, 2017); *OfficeMax Inc. v. County Qwick Print, Inc.*, 709 F. Supp. 2d 100, 111 (D. Me. 2010). Less settled, however, is whether an employee non-compete agreement is enforceable when unilaterally assigned by an employer in an asset sale. *Compare Hess v. Gebhard & Co.*, 570 Pa. 148, 808 A.2d 912, 918-19 (Pa. 2002) and *A. Fink & Sons, Inc. v. Goldberg*, 101 N.J. Eq. 644, 139 A. 408 (1927). Massachusetts does not view such assignments favorably, and Massachusetts is the law that governs the 1997 non-compete agreement between Defendant Kenneth Morris and Atronix Sales, Incorporated. *See, e.g., Securitas Security Services USA, Inc. v. Jenkins*, 2003 Mass. Super. LEXIS 200, 16 Mass. L. Rep. 486 (Mass. Super. Ct. July 18, 2003); App. 59.

It was striking, therefore, when Plaintiff commenced this action in November 2016 without any mention of the July 2014 asset purchase agreement ("APA") in its Complaint or Motion for Preliminary Injunction, or that the rights it claimed derived solely from the APA. In fact, not only did Plaintiff omit reference to the APA in its initial filings, but it claimed to be a Massachusetts corporation "formed in 1980" that "merged" with Atronix Sales, Incorporated in 2011 to become "Atronix, Inc." In other words, Plaintiff represented itself to be the original Atronix, Inc. from Massachusetts, as if the July 2014 asset sale had never occurred. Again, this was a remarkable assertion considering the disfavor toward assignments under Massachusetts law.

It was two months later, in January 2017, and only after Defendants moved to dismiss for lack of standing, that Plaintiff finally admitted its true identity as a Delaware corporation, formed in 2014, that had changed its name from "Cable Assembly Acquisition Corp." to "Atronix, Inc." following consummation of the APA. Plaintiff also produced a heavily redacted copy of the APA and acknowledged that its sole basis for standing was the APA.

The superior court (Wageling, J.) granted Defendants' motions to dismiss by Order dated March 10, 2017. (Appellant Add. at 1-10.) The superior court never reached the question of whether Massachusetts law bars an employer's assignment of an employee non-compete agreement in an asset sale absent express consent of the employee. Instead, it held that Plaintiff lacked standing to sue Defendants because the APA did not assign the Morris non-compete agreement in the first place. (*Id.* at 9.) Plaintiff filed a motion for reconsideration in which it raised novel arguments purportedly overlooked by the superior court, but which found no support under Massachusetts law. (App. at 510-20.) The superior court denied the motion by Order dated May 11, 2017. (Appellant Add. at 11-20.) This appeal followed.

STATEMENT OF FACTS

Defendant Kenneth Morris ("Morris") earned a high school diploma and attended a year-and-a-half of college before joining, at age 19, a manufacturer in Billerica, Massachusetts that would eventually become Atronix, Inc. (Add. at 1, ¶¶ 1-4.)[1] Morris started the job in 1982 and remained an employee of the company for the next 32 years. (Add. at 1, 7, ¶¶ 3, 12-14.) Along the way, Morris received promotions and pay raises and started a family. (Add. at 1-2, ¶¶ 5-10). He also moved from the factory floor into the sales department. (Add. at 2, ¶ 6.)

In 1997, Morris was handed a document by his employer titled "Atronix Sales, Incorporated Non-Compete and Non-Solicitation Agreement." (Add. at 2, ¶ 10.) Morris was instructed to sign the agreement or find another job. (*Id.*) By this time, Morris was 34 years old, married, and supporting three young children. (*Id.*) Morris signed the agreement. (*Id.*)

The agreement prohibited Morris from competing against Atronix Sales, Incorporated in the business of manufacturing cable assemblies and wire harnesses anywhere in the world for a period of three (3) years following his termination as an employee. (App. at 58-59.) As recited in the agreement, Morris consented to the restriction "in consideration of the employment or continued employment of the Employee, and in further consideration of the payment by the Company to the Employee the sum of $15.00 per week…" (App. at 58.) The agreement contained no provision granting Atronix Sales, Incorporated a right to assign the agreement. (App. at 58-59.)

In 2011, the Massachusetts corporations Atronix Sales, Incorporated and Atronix, Incorporated merged to become "Atronix, Inc." (App. at 48, ¶ 3; App. at 133-134.)

[1] Morris submitted affidavits to the superior court in support of his opposition to Plaintiff's Motion for Preliminary Injunction. The affidavits were not included in the Appendix, but have been appended to Appellees' Joint Brief as an addendum. Supreme Court Rule 17.

In May 2014, Morris learned Atronix, Inc. was going to be sold to a private equity firm called Wafra Partners LLC, and a management firm, Meridian Associates, would operate the business going forward. (Add. at 3, ¶ 12.) Morris was introduced to the new managers from Meridian Associates, including James Laird ("Laird"). (*Id.*)

In July 2014, Atronix, Inc. and its stockholders entered into an Asset Purchase Agreement ("APA") with Consolidated Cable Assembly Holdings, Inc. ("CCAH") and Cable Assembly Acquisition Corp. ("CAAC") whereby Atronix, Inc. sold and assigned certain assets to CAAC, including the name "Atronix, Inc." (App. at 179-180.) CAAC is a Delaware corporation formed in June 2014 that changed its name to "Atronix, Inc." following consummation of the APA. (App. at 180.) This is the entity now before the Court as Plaintiff. The original Massachusetts Atronix, Inc., in turn, changed its name to PSJL Corporation. (App. at 180, ¶ 8.) PSJL Corporation remains an active Massachusetts corporation. (Add. at 14-15.)

Morris joined Plaintiff as an employee following the asset sale. (App. 181, ¶ 18.) He was not asked to consent to the assignment of his 1997 non-compete agreement with Atronix Sales, Incorporated, nor did he sign a new non-compete agreement with Plaintiff. (Add. at 3, ¶ 13; *see* App. at 18, ¶ 18.)

Within months of the asset sale, Plaintiff moved all manufacturing operations to a facility in Nogales, Mexico and closed the Billerica facility that had employed 50 to 60 workers. (Add. at 3, ¶ 14.) Morris was moved to an office in Woburn, Massachusetts, stripped of essential duties such as preparing customer quotes, and given a new commission structure that would result in lower pay. (Add. at 3-6.)

Plaintiff's changes to the company did not go well. The new quoting system, which Plaintiff also moved to Mexico, was slow and the quotes were often wrong. (Add. at 3, ¶ 15.)

Customers became upset and sent their business to competitors, further decreasing Morris' incentive compensation. (Add. at 4, ¶ 16; *see also* Add. at 4-6.)

Morris resigned from Plaintiff effective September 30, 2016, and joined Scott Electronics, Inc. ("Scott Electronics") as its General Manager in October 2016. (Add. at 7, ¶ 32; Add. at 9, ¶ 48.) Scott Electronics is a family-owned cable assembly manufacturer that has been in business for more than 30 years. (*See* App. at 1.) It employs more than 100 workers at its Salem, New Hampshire facility, which also serves as its headquarters. (*See* App. at 54.)

Plaintiff filed a Complaint against Morris and Scott Electronics in the Rockingham County Superior Court dated November 9, 2016, and alleged claims for breach of contract, tortious interference with contract, and violation of RSA 358-A. (App. at 1-14.) Plaintiff also filed a Motion for Preliminary Injunction dated November 28, 2016. (App. at 15-47.) Plaintiff supported the motion with an affidavit of James Laird. (App. at 48-124.) According to Laird, Plaintiff was "founded in 1980" and was the "surviving company" that resulted when "Atronix Sales, Inc. ("ASI") and Atronix, Inc. merged" in June 2011. (App. at 48.) Nowhere in the Complaint, Motion for Preliminary Injunction, or Laird affidavit did Plaintiff disclose the July 2014 asset sale. (App. at 1 to 124.)

Plaintiff would later admit it was a Delaware corporation formed in June 2014 that purchased the name "Atronix, Inc." along with certain other assets under the APA. (App. at 179.) These facts were disclosed in a second affidavit of James Laird filed in January 2017 after Defendants raised the question of Plaintiff's true identity in their motions to dismiss. (App. at 179-187.)

The second Laird affidavit also attached a heavily redacted copy of the APA. (App. at 193-479.) Plaintiff made the redactions on its own and without consulting Defendants or the

superior court. Plaintiff explained that the redactions were necessary to protect information that it deemed confidential and immaterial to the issues before the superior court. (App. at 154 n.1.)

SUMMARY OF THE ARGUMENT

The superior court correctly determined that the APA did not assign the Morris non-compete agreement to Plaintiff. When considered in its entirety, the APA evidences an intention for Plaintiff to enter a new employment relationship with Morris after the asset sale. The APA expressly describes the new employment relationship it would form with Morris and omits reference to an assignment of employment contracts generally or the Morris non-compete agreement specifically. Plaintiff's proposed interpretation of the APA, by comparison, ignores basic rules of contract interpretation and relies on stray references and general clauses as proof of an assignment.

Plaintiff also advances numerous theories for why the Morris non-compete agreement was assigned to it irrespective of the language of the APA. None of the theories find support in Massachusetts law, which is the law that governs the Morris non-compete agreement. Rather, Massachusetts decisional law strongly suggests the Morris non-compete agreement is not assignable absent the express consent of Morris.

The superior court's order dismissing Plaintiff's claims for lack of standing should be affirmed.

ARGUMENT

I. THE APA DID NOT ASSIGN THE MORRIS NON-COMPETE AGREEMENT TO PLAINTIFF

The order dismissing Plaintiff's claims should be affirmed because the superior court correctly determined that the APA did not assign the Morris non-compete agreement to Plaintiff. As the superior court observed, the APA makes no reference to employee contracts generally or to the Morris non-compete agreement specifically. Appellant Add. at 8. Instead, Section 5.06 of the APA provides that Plaintiff would "offer employment to each of the then-current employees of the Company upon the same terms and conditions as immediately prior to the Closing . . ." App. at 243, § 5.06. Thus, the APA contemplated Plaintiff entering a wholly new employment relationship with Morris, untethered from past employment contracts. Without evidence that Plaintiff and Morris entered a non-compete agreement in connection with their new employment relationship, the superior court reasoned, Plaintiff could not preclude Morris from continuing employment at Scott Electronics. Appellant Add. at 9.

In reaching its decision, the superior court cited the analysis in *Hedgeye Risk Mgmt., LLC v. Heldman*, 196 F. Supp. 3d 40 (D.D.C. 2016), which involved a surprisingly similar set of facts. Appellant Add. at 8-9. In *Heldman*, the plaintiff employer, Hedgeye, claimed it was entitled to enforce a non-compete covenant contained in an employment agreement assigned to it under an asset purchase agreement with the defendant's former employer, PRG. 196 F. Supp. 3d at 45. The court granted summary judgment to the defendant, finding the asset purchase agreement did not, in fact, convey the employment agreement. *Id.* at 52. The court observed that the description and schedule of assets in the purchase agreement made no reference to employment contracts or even to employees. *Id.* at 49. Instead, PRG employees were addressed under sections of the asset purchase agreement entirely separate from the asset transfers. *Id.* at

50. The schedule that identified PRG's employees, for example, was appended to the section describing PRG's "representations and warranties." *Id.* In turn, the section titled "Employees and Employee Benefits" provided that Hedgeye would offer employment to PRG's employees. *Id.* The court observed that this provision in particular was "squarely at odds with Hedgeye's contention that PRG's existing employment contracts conveyed to Hedgeye as 'assets' of PRG." *Id.* The court also found compelling the fact that the purchase agreement included a provision expressly addressing non-competition, yet the defendant was not identified in it. *Id.* at 50-51. Rather, the non-competition obligations extended only to PRG and its founder. *Id.*

The APA in this case is analogous to the asset purchase agreement in *Heldman*. Not only does the APA omit any reference to employment contracts in the list of assets transferred under Article II, but it segregates discussion of employee matters to other sections of the agreement. The schedule that identifies the employees of Atronix, Inc. is appended to a section under Article III for "Representations and Warranties" of Atronix, Inc. and its shareholders. App. at 437-39; App. at 235, § 3.24. The section that discusses Plaintiff offering employment to the employees of Atronix, Inc. appears under Article V titled "Additional Agreements." App. at 243, § 5.06. The APA even includes a non-competition agreement at Article V, but Morris is not named in it. App. at 242, § 5.04. Rather, the non-competition obligations extend only to Atronix, Inc. and its shareholders. *Id.* As in *Heldman*, therefore, the language and organization of the APA rebuts any claim that it conveyed the Morris non-compete agreement to Plaintiff as an "asset" of Atronix, Inc.

For its part, Plaintiff offers a thin textual argument for why the Morris non-compete agreement was assigned under the APA. It relies on residual language appearing at Section 2.02 (xii) assigning "all other contracts ... [and] agreements..." as well as Section 2.02 (i), which

generally assigns "the Business as a going concern." (App. at 211, §§ 2.02(i) and 2.02(xii).) Plaintiff's reliance on these references, however, ignores basic rules of contract construction. It ignores the necessity for a contract to be considered in its entirety and interpreted so that all provisions are given effect. RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981); *Paisner v. Renaud*, 102 N.H. 27 (1959). It ignores the preference to give greater weight to specific terms and exact terms over general language. RESTATEMENT (SECOND) OF CONTRACTS § 203(c); *Sage Software, Inc. v. CA, Inc.*, No. 4912, 2010 Del. Ch. LEXIS 242, *31 (Del. Ch. Dec. 14, 2010).

The superior court's interpretation, on the other hand, is consistent with these principles. It considered the APA as a whole and gave effect to those provisions specifically addressing employees of Atronix, Inc. and the new employment relationship contemplated between Plaintiff and Morris. (Appellant Add. at 7-9.) It gave greater weight to the specific language of Section 5.06 and less weight to general language at Sections 2.02(i) and 2.02(xii). *Id.*

Accordingly, the superior court correctly interpreted the APA, and its decision dismissing Plaintiff's claims for lack of standing should be affirmed.

II. PLAINTIFF'S THEORIES OF ASSIGNMENT FIND NO SUPPORT IN MASSACHUSETTS LAW

The question of whether an employer may unilaterally assign an employee non-compete agreement to an asset purchaser implicates important questions of public policy. *Heldman*, 196 F.Supp. 3d at 48. Several state courts of highest resort have concluded such agreements are unassignable absent express employee consent because the agreements are "personal in nature." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 87 P.3d 1054, 1058 (Nev. 2004); *Hess v. Gebhard & Co.*, 570 Pa. 148, 808 A.2d 912, 921 (Pa. 2002); *Sisco v. Empiregas, Inc. of Belle Mina*, 286 Ala. 72, 237 So. 2d 463 (Ala. 1970). As the *Heldman* court observed, there are good reasons for the rule.

> For one, as a general matter, covenants not to compete should be construed narrowly because they impose a restraint on an employee's right to earn a livelihood. And even if a covenant not to compete is, in itself, enforceable against an employee, the fact that the employee may have confidence in the character and personality of one employer does not mean that he would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking. These policy concerns are heightened, moreover, where (as here) the transfer is achieved through a sale of assets, rather than through a merger.

Heldman, 196 F.Supp. 3d at 48-49 (internal quotations and citations omitted).

The Massachusetts Supreme Judicial Court has not yet addressed whether an employer may assign an employee non-compete agreement in an asset sale absent express employee consent. Nevertheless, it has long been settled that a contract for employment in Massachusetts is not assignable absent employee consent, and a Massachusetts appellate court has suggested employee consent is a necessary element for a valid assignment of a non-compete agreement. *New England Cabinet Works v. Morris*, 226 Mass 246, 115 N.E. 315 (Mass. 1917); *see Middlesex Neurological Associates, Inc. v. Cohen*, 3 Mass. App. Ct. 126,128, 324 N.E.2d 911 (Mass. App. Ct. 1975) ("No contention is made that the defendant, who, under the agreement, was employed for a one-year period only and was salaried, did not consent to the assignment.").

Several Massachusetts superior courts, moreover, have concluded that employee non-compete agreements are not assignable in the absence of employee consent. *Next Generation Vending v. Bruno*, 2008 Mass. Super. LEXIS 348, *9-10 (Mass. Super. Ct. May 20, 2008) (dismissing employer's claim against employee because "under Massachusetts law, a non-compete agreement is unassignable absent an express agreement permitting assignment"); *Chiswick, Inc. v. Constas*, 2004 Mass. Super. LEXIS 272, *5 (Mass. Super. Ct. June 17, 2004) (declining preliminary injunction request of employer); *Securitas Sec. Servs. USA, Inc. v. Jenkins*, 2003 Mass. Super. LEXIS 200, 16 Mass. L. Rep. 486 (Mass. Super. Ct. 2003) (declining preliminary injunction request of employer).

Despite the unfavorable landscape of Massachusetts law, Plaintiff advances several theories for why the Morris non-compete agreement should be deemed assigned irrespective of the language of the APA. For example, Plaintiff characterizes as "well-established" the rule that when a business is sold as a going concern, employee restrictive covenants are assigned automatically as part of the goodwill and other assets necessary for the continued operation of the seller's business. (Appellant Brief at 10.) The two cases Plaintiff principally cites for this theory, however, do not fit with Massachusetts law. *Beta Lasermike, Inc. v. Swinchatt*, No. 18059, 2000 Ohio App. LEXIS 887 (Ohio App. Ct. March 10, 2000); *Hexacomb Corp. v. GTW Enterprises, Inc.*, 875 F. Supp. 457 (E.D. Ill. 1996).

Beta Lasermike, an unpublished Ohio decision, declares that a Massachusetts case from 1934 – *Adamowicz v. Iwanicki*, 286 Mass. 453, 456, 190 N.E. 711, 712 (Mass. 1934) – stands for the proposition that noncompete agreements are assignable under Massachusetts law. 2000 Ohio App. LEXIS 887, *10. *Adamowicz* concerned a restrictive covenant that was entered into in conjunction with the sale of a business where the business and assets were thereafter transferred to the plaintiff. *Adamowicz*, 190 N.E. at 711. Noncompetition covenants arising out of the sale of a business are enforced more liberally in Massachusetts than such covenants arising out of an employer-employee relationship. *See Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 28 (Mass. App. Ct. 1986). As one Massachusetts superior court observed, "there is nothing in [*Adamowicz*]...that is contrary to the proposition in *New England Cabinet Works* relating to the need for assent of the employee to an assignment of his employment agreement." *Securitas*, 2003 Mass. Super. LEXIS 200, *15.

In turn, the Illinois court in *Hexacomb* declared the asset purchase agreement in that case to be a "*de facto* merger" and, therefore, the employee confidentiality agreement transferred to

the plaintiff asset purchaser "as an incident of the business sold." 875 F. Supp. at 464. In Massachusetts, however, *de facto* merger is a judicial doctrine used to impose successor liability strictly for the protection of innocent corporate creditors. *Nat'l Gypsum Co. v. Cont'l Brands Corp.*, 985 F. Supp. 328, 33 (D. Mass. 1995). Like other theories of successor liability, it is not a doctrine that may be invoked by the successor for its own benefit. *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 887 N.E.2d 244, 254 (Mass. 2008); *see also McCarthy v. Azure*, 22 F.3d 351, 363 (1st Cir. 1994). Indeed, the superior court rejected *Hexacomb* because the Illinois court failed to explain its rationale for expanding the *de facto* merger doctrine beyond the protection of corporate creditors. Appellant Add. at 16. Thus, neither *Beta Lasermike* nor *Hexacomb* support the proposition that the Morris non-compete agreement was somehow assigned automatically to Plaintiff irrespective of the APA language. Appellant Add. at 17.

Plaintiff also identifies a number of other decisions from outside Massachusetts where an employee non-compete agreement was deemed to have been assigned under an asset purchase agreement. Some of the decisions applied a presumption of assent to assignment by the employee when the non-compete agreement was silent on the issue. *Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929-930 (6th Cir. 2000); *AutoMed Technologies, Inc. v. Eller*, 160 F. Supp. 2d 915, 923-24 (N.D. Ill. 2001). Others held that restrictive covenants may be severed from an employment agreement and assigned separately in connection with an asset sale. *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990); *Reynolds and Reynolds Co. v. Tart*, 955 F. Supp. 547 (W.D.N.C. 1997); *Norma Ellis Corp. v. Lippus*, 176 N.Y.S.2d 5, 6 (1955); *Northwest Mobile Servs., LLC v. Schryver Medical*, No. C06-5227-RBL, 2006 U.S. Dist. LEXIS 44095, *7 (W.D. Wash. June 28, 2006); *Chemetall GMBH v. Zr. Energy, Inc.*, No. 99-C-4334, 2000 U.S. Dist. LEXIS 17928, *10 (N.D. Ill. Dec. 6, 2000), *aff'd* 320 F.3d 714 (7th Cir.

2003). Still others made the public policy choice that restrictive covenants follow with the goodwill of the business sold. *J.H. Rendarde, Inc. v. Sims*, 711 A.2d 410 (N.J. Super. Ch. Div. 1998); *Menasha Packaging Co. v. Pratt Indus., Inc.*, No. 1-0075, 2017 U.S. Dist. LEXIS 22318 (D. N.J. Feb. 15, 2017); *Symphony Diagnostic Services No. 1 Inc. v. Greenbaum*, 828 F.3d 643 (8th Cir. 2016).

Plaintiff cites no decision, however, that suggests Massachusetts follows these presumptions or public policy choices. In fact, all available evidence is to the contrary. The Massachusetts superior court in *Securitas* expressly rejected the employer's invitation to adopt one of these choices as a basis for finding an assignment of the employee's non-compete agreement. *Securitas Sec. Servs. USA, Inc. v. Jenkins*, 2003 Mass. Super. LEXIS 200, *15-16 & n. 5. Instead, it followed decisional law that acknowledged the strong policy considerations underlying the conclusion that employee restrictive covenants are not assignable absent consent. *Id.* at *16 n. 5 (citing *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 351-52 (Pa.Sup.Ct. 1997); *Reynolds and Reynolds Co. v. Hardee*, 932 F. Supp. 149, 155 (E.D.Va. 1996), aff'd., 133 F.2d 916 (4th Cir. 1997); *Smith, Bell & Hauck, Inc. v. Cullins*, 123 Vt. 96, 101-02, 183 A.2d 528 (1962)).

Among such policy considerations is the fact that restrictive covenants impose a restraint on an employee's right to earn a living and should be construed narrowly, and that, absent an express assignment provision, courts should be hesitant to read one into the contract. *All-Pak*, 694 A.2d at 351. Moreover, the employer, as drafter of the employment contract, is already in the best position to include an assignment clause within the terms of the agreement. *Id.* Similarly, a successor employer is free to negotiate a new employment contract with the

employee or secure the employee's consent to have the prior employment agreement contract remain in effect. *Id.*

These considerations also dovetail with the "changed circumstances" doctrine that has developed in Massachusetts with respect to employee non-compete agreements. Several Massachusetts courts have refused to enforce employee non-compete agreements following corporate acquisitions because of the disparity in size between the target and acquiring companies. The rationale is that it is unfair to hold an employee to restrictive covenants he or she entered into with a small employer, only to have the small employer acquired by a much larger competitor. *Getman v. USI Holdings Corp.*, 2005 Mass. Super. LEXIS 407, *3-4, 19 Mass. L. Rep. 679 (Mass. Super. Ct. Sept. 1, 2005) ("[Getman] did not agree not to compete with a much larger insurance brokerage firm such as USI. Since the scope of the non-compete provision was materially changed when USI purchased Hastings-Tapley, this Court finds that it may not be enforced against Getman."); *see also Rent-A-PC, Inc. v. March*, No. 13-10978-GAO, 2013 U.S. Dist. LEXIS 74535, *7-8 (D. Mass. May 28, 2013).

Taken altogether, Massachusetts decisional law strongly suggests Massachusetts does not recognize any of the assignment theories offered by Plaintiff. For Plaintiff to prevail on this appeal, however, the Court must adopt one of Plaintiff's theories and thereby wade into an area of Massachusetts law laden with important public policy considerations that the highest court in Massachusetts has not yet addressed. Plaintiff offers no compelling reason for the Court to do this. Plaintiff could have filed its action in Massachusetts, where Morris resides, and let the Massachusetts courts address this important issue. Instead, it filed its action in New Hampshire and tried to avoid the issue by omitting all mention of the APA from its initial filings. Now with its claims dismissed, it asks this Court to "blaze new, previously unchartered state-law trails" for

Massachusetts. *Therrien v. Sullivan*, 2005 DNH 40, 2005 U.S. Dist. LEXIS 3935, *18 (D.N.H. March 14, 2005). The Court should decline the invitation.

III. PLAINTIFF WOULD STILL HAVE NO CLAIMS EVEN IF IT PROVED AN ASSIGNMENT

The irony of this dispute is that Plaintiff would still not be entitled to enjoin Morris from working for Scott Electronics even if it could prove an assignment of his non-compete agreement. Where restrictive covenants do not extend to assignees, a validly assigned non-compete agreement does not prevent an employee from competing against the assignee. *Netscout Systems, Inc. v. Hohenstein*, 2017 Mass. Super. LEXIS 27, *13-15, 34 Mass L. Rep. 148 (Mass. Super. Feb. 14, 2017); *L-3 Communications Corp. v. Reveal Imaging Technologies, Inc.*, 2004 Mass. Super. LEXIS 519, 18 Mass. L. Rep. 512 (Mass. Super. Dec. 2, 2004).

In *Netscout*, the plaintiff employer sought to enforce an employee non-compete agreement assigned to it in connection with an asset purchase. *Netscout*, 2017 Mass. Super. LEXIS 27, *3-7. The superior court granted the plaintiff's injunction request, but only to the extent the employee was competing against his former employer, i.e., the company that assigned the non-compete agreement. *Id.* at *12-13. It did not bar the employee from competing against the plaintiff. *Id.* "An assignee of contract rights must stand in the shoes of the assignor and has no greater rights than the assignor." *Id.* at *13 (*quoting Unisys Fin. Corp. v. Allan R. Hackel Org., Inc.*, 42 Mass.App.Ct. 275, 281, 676 N.E.2d 486 (1997)). Because the non-compete agreement only contemplated restricting competition against the former employer, the superior court reasoned, the former employer had no contractual right to bar the employee from working for a company that, instead, competed with the plaintiff. *Id.* at *13-14. As a result, the plaintiff

– which stood in the shoes of the former employer – was in no better position to enforce the non-compete agreement to stop the employee from competing against it. *Id.*[2]

The Massachusetts superior court in *L3 Communications* reached a similar conclusion. 2004 Mass. Super. LEXIS 519, *29-30. The plaintiff employer claimed it was entitled to enforce an employee non-compete agreement assigned to it in connection with the acquisition of another company. *See id.* at *2-17. According to the terms of the agreement, however, it only applied to the "Company" or "an affiliate of the Company." *Id.* at 29-30. The superior court construed these terms to refer to the former employer, which continued to exist after the acquisition. *Id.* Plaintiff, on the other hand, was merely an assignee and qualified as neither the "Company" nor "an affiliate of the Company." *Id.* As such, plaintiff could not enforce the non-compete agreement against the defendant employees. *Id.*

The analysis in *Netscout* and L-*3 Communications* fits this case too. While the non-compete agreement barred Morris from competing against PSJL Corporation or its subsidiaries, it did not bar him from competing against others.[3] For its part, Plaintiff is not PSJL Corporation – which continues to exist as a separate, active Massachusetts corporation – nor is Plaintiff a subsidiary of PSJL Corporation. Therefore, even if Plaintiff could prove it was assigned the Morris non-compete agreement, it would be unable to enforce the agreement to prevent Morris

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[2] The *Netscout* court found the non-compete was assigned to the plaintiff because the agreement contained an express provision entitling the employer to assign it without the employee's consent. *Id.* at *11-12. The *Netscout* court later reconsidered its decision and granted a preliminary injunction in favor of the plaintiff after plaintiff introduced new evidence demonstrating that it acquired the non-compete agreement through a merger, not through an asset assignment. *See Netscout Systems, Inc. v. Hohenstein*, 2017 Mass. Super. LEXIS 25, 34 Mass. L. Rep. 153 (Mass. Super. Feb. 22, 2017).

[3] The Morris non-compete agreement prohibited Morris from competing against the "Company" and "its subsidiaries," which in 1997 was Atronix Sales, Incorporated. Following a 2011 merger with Atronix, Incorporated and a 2014 name change, the "Company" is now called PSJL Corporation.

from competing against it. Plaintiff' only right as an assignee would be to prevent Morris from competing against PSJL Corporation, but Plaintiff never alleged facts of any such competition.

When followed to its logical conclusion, this line of analysis also means Plaintiff's claims for equitable relief are moot. Morris' employment with PSJL Corporation ended in July 2014 when he became an employee of Plaintiff. Therefore, whatever restrictions governed Morris under the non-compete agreement ended in July 2017, three years after he ceased employment with PSJL Corporation. *See Netscout*, 2017 Mass. Super. LEXIS 27, *13-14.

CONCLUSION

For the foregoing reasons, the Court should affirm the superior court's order dismissing Plaintiff's claims.

REQUEST FOR ORAL ARGUMENT

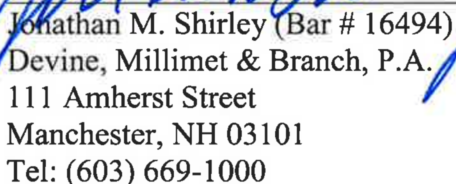
Defendants request oral argument. Attorney Jonathan Shirley will argue for Defendant Scott Electronics, Inc. and Attorney Brian Leahey will argue for Defendant Kenneth Morris.

Respectfully submitted,

SCOTT ELECTRONICS, INC.

By its attorneys,

Dated: January 5, 2018



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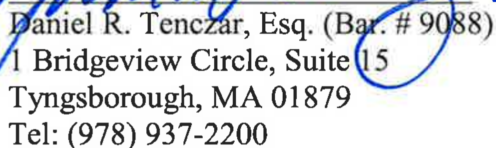
KENNETH MORRIS

By his attorneys,

Dated: January 5, 2018



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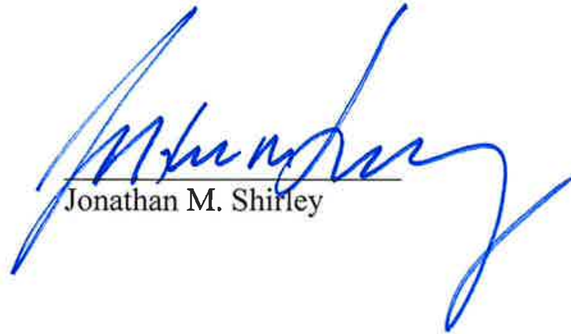
CERTIFICATE OF SERVICE

I hereby certify that on this date two copies of Appellees' Joint Brief was sent by first class U.S. Mail to all counsel of record.



Jonathan M. Shirley

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STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Docket No. 218-2016-cv-1197

Atronix, Inc.

v.

Kenneth Morris

and

Scott Electronics, Inc.

AFFIDAVIT OF KENNETH MORRIS

I, Kenneth Morris, hereby declare and state as follows:

1. I reside in Tewksbury, Middlesex County, Massachusetts.

2. I graduated from Reading Memorial High School. After graduation, I attended college for approximately a year and a half. In college, I studied engineering.

3. In February 1982, I started working at PCA on the Woburn/Winchester, MA line which later became Atronix in Billerica. I do not know the exact legal name that PCA/Atronix had during this time. I was hired as an assembler when I was 19 years old.

4. Atronix is a contract manufacturing business involving cable, harness and electro-mechanical assembly. Generally speaking, harnessing involves bundling cables in a product and electro-mechanical assembly is taking sheet metal and building items for virtually all industries: medical, industrial, telecommunications, electronics, instrumentation, laboratory and science. Virtually any item with a cable or power cord is part of the Atronix contract manufacturing business. Atronix provides assembly for cables, harnesses, value added products, fulfillment kitting, mechanical, box build, panel build and ITAR (military). Clients are manufacturers who outsource certain production items to Atronix to be manufactured. The client provides Atronix with a design, formula or specifications. Atronix will provide a quote based on labor and materials. Once selected, Atronix will produce and ship the item on behalf of the client. Generally speaking, client jobs are on a contract to contract basis though the contracts may vary between blanket contracts and fixed contracts.

5. During the 1980s, I received merit raises and promotions at Atronix. Around 1985, I was promoted to Production Supervisor. Around December 1987, I was promoted to Process Engineer and Warehouse Manager.

6. Around February 1989, I transferred to Inside Sales for Atronix because of the sales commission plan where it gave me a great opportunity to make more money based on my skills, knowledge and ability regarding contract manufacturing. My salary was reduced from $615.00 a week to approximately $400.00 a week due to the sales commission plan.

7. As a salesperson, I would interact with customers and potential customers. The customer would describe the project and provide me with the specific information. I would provide them with a quote/resale price for the job. To get the quote, Atronix management would provide me with the pricing for labor and I would call third party vendors for pricing on the materials, I would then apply a margin for profit.

8. The sales commission plan that I agreed to was based on the difference between the resale price against the costs of labor and material where I got the cost for the materials. For example, if an item was sold by the manufacturer for $10.00 and the cost of material and labor was $6.00, it would result in a gross profit of $4.00. My commission was based off of the gross profit on a percentage basis. This commission formula would be used for all monthly shipments and be provided as part of a monthly report that calculated the amount of the commissions due. The sales commission agreement did not include any overhead costs.

9. Upon becoming an inside salesperson, based on my knowledge and skills, I was able to provide customers with excellent service responding to their needs timely and in a cost effective manner. I used my abilities and resourcefulness to get the job done for the client. I was very good at my job and it showed in my sales numbers.

10. In January 1997, I was presented with a document entitled, "Atronix Sales, Incorporated Non-Compete and Non-Solicitation Agreement" ("January 1997 Agreement". Then Atronix owner, Peter Schofield told me I had to sign the document. He said if I didn't sign the document, I would be fired. At this time, I was 34 years and had worked for Atronix for 15 years. This was the only profession and job, I knew. I didn't have a college education. More importantly, I had a wife and three children, ages 4 and under, to support. I had no choice but to sign the document which I did on January 21, 1997. This document was not a standard Atronix document. It was the first time I had seen such a document despite having worked at Atronix for 15 years including the last 8 years in sales. It was not explained to me. Nor do I recall having time to review it. I was told to sign it or else. I signed it.

11. At the time I signed the January 1997 Agreement, my sales commission plan had remained essentially unchanged as described in paragraph 8. My base salary also remained essentially unchanged. The quote system never changed. At no time, were the quotes prepared by someone other than myself. While Atronix would give me an hourly rate; I would determine the number of hours needed for the labor portion of the quote. This quote was based on the needs of the client. At no time did my sales commission plan include overhead or similar charge backs against my commission. Each month, I would get a detailed report on my gross margins and commissions calculations. My commissions are based on that report.

12. In April or May of 2014, I was introduced to Mr. Mehdi Ali, Sr., Mr. Mehdi Ali, Jr. and James Laird. They informed me that they had bought Atronix and were taking over. It is my understanding that ICA Holdings, a division of Wafra Partners LLC, purchased Atronix in or about July 2014 and that Meridian Associates managed or oversaw ICA Holdings. Messrs. Ali, Sr., Ali, Jr., and Laird worked for Meridian Associates and/or ICA Holdings. I believe other entities like Abacus Finance Group, Northstar Mezzanine were also involved in the purchase of Atronix.

13. I had forgotten about the January 1997 Agreement until a co-worker mentioned it when Atronix was sold. We didn't know if the contracts were still valid as we were worried about our futures at the company. At no time did I consent, authorize or otherwise agree to the assignment of the 1997 Agreement from Atronix to the Wafra Group, ICA Holdings or Meridian Associates (collectively "ICA Holdings"), or any other entity.

14. After ICA Holdings bought Atronix, it started a process of making changes that affected my ability to earn a living. Within months of purchasing the business, ICA Holdings ordered the sales group to transfer all production from our Billerica, MA facility to the Nogales facility in Mexico. Over the next eighteen or so months, the Billerica facility, which had been the primary business office for Atronix since I joined was shut down. The Billerica facility was approximately 35,000 to 40,000 square feet and employed fifty (50) to sixty (60) persons. Approximately three (3) employees were transferred to another ICA Holding company in Exeter, NH and the approximately five (5) person sales group, of which I was a member, was moved to Woburn, MA. The corporate office that had been located in Billerica was relocated to Tucson, Arizona.

15. Starting around January 2016, ICA Holdings/Atronix started to remove me from the quote process which is the basis for my sales. I was told to provide all client information and give it to the Mexico facility. That facility would then prepare a quote based on labor and materials and give it to me to relay to the client. Over the next few months, I was providing fewer and fewer quotes to prospective clients as the Mexico facility was doing most of that work. By June 2016, I had been completely removed from the quote process. Taking me out of the equation resulted in me losing out on sales and ICA Holdings/Atronix losing out on business. In the contract manufacturing business, clients are looking for a timely quote that is responsive to what they requested and is at a good price. Once the quote process went to Mexico, there were problems. Instead of getting the quote back to a client in a week or two, it was taking three weeks or longer. Worse, when ICA Holdings/Atronix responded to a quote; it was neither efficient nor effective. For reasons that were not explained to me, these quotes were higher than the quotes I had been giving for over twenty five (25) years. I don't know why these quotes were higher. Compounding that was the fact that these quotes were regularly incomplete or wrong in that the quote failed to accurately reflect the work that had been requested by the prospective client. In these instances, there had to be a requote. Requotes further delay the process. Clients and prospective clients were upset with these changes. They did not like the new costs, additional delays and inaccurate quotes. Removing me from the quote process detrimentally affected my ability to do my job and make sales. I saw very little in new business sales in 2016.

16. Due to the new quote system along with other changes in how ICA Holdings/Atronix conducted business after the business was sold, I began to hear complaints and concerns from clients about ICA Holdings/Atronix. At least one client decided not to do business with ICA Holdings/Atronix. That client sent an email explaining why they were leaving. I was cc'd on that email. I do not possess a copy of that email. Losing that client cost me thousands of dollars in commissions.

17. Also in early 2016, I noticed I was not receiving all of my commissions. The change was immediately noticeable after Jeff Lang, one of the owners of the original Atronix, stopped providing me with the commissions spreadsheets as he had done for years. In communications with Jim Laird of ICA Holdings/Meridian Associate, Mr. Laird denied that the commission calculations had been changed. For example, in a March 1, 2016 email from jlaird@meridianassociates.biz; he stated "The commission formula (which has not been changed) and the calculation for January is attached." Mr. Laird's email was sent in response to my repeated questions on my commissions. I continued to see problems with the numbers and my commissions, which were consistently lower than they should have been. A copy of the March 1, 2016 email is attached as Exhibit A. Each month, I would raise questions about my commissions as they were my livelihood.

18. Given the issues ICA Holdings/Atronix had created with respect to removing me from the quote process system and manipulating my sales commission, I was worried about my future and thought my long term future no longer involved the job that I had for my entire adult life.

19. After the Billerica facility closed, on or about May 16, 2016, I spoke with Mr. Lang about the enforceability of the 1997 Agreement. In that conversation, Mr. Lang stated that on the two year anniversary of the sale of Atronix to ICA Holdings that the old Atronix would no longer exist. He said when they sold Atronix, they only sold the assets and none of the non-compete contracts were transferrable to ICA Holdings/Atronix. I asked Mr. Lang to confirm this to me in writing. He said he was leaving for Arizona but would get back to me. Based on my conversation with him, I thought the non-compete agreement ended on July 1st. A copy of this email (Plaintiff's Exhibit G) is attached as my Exhibit B.

20. On May 23, 2016, Mr. Lang texted me stating he had asked his attorney about the survivability of the old Atronix non-compete agreement and am waiting for his answer. Later, Mr. Lang stated that under the terms of the Atronix purchase agreement, the previous owners, Mr. Lang and Mr. Schofield were precluded from offering any kind of employment advice to employees of the new Atronix but noted "that with regard to individual questions concerning your employment with the new Atronix that you should consult with your own Attorney."

21. In a May 24, 2016 email, Steve Switalski, the Corporate Controller for "Atronix, an ICAD Holdings Company," claimed they "had problems earlier this month with this report, as the sum of the gross margins from these reports did not equal the actual gross margins for the company. We have since fixed the report." Controller Switalski stated I would "see that after correcting the report the amount of commissions due....is essentially the same as what was paid." This was another attempt by ICA Holdings/Atronix to alter my sales commission formula where it claimed there were

issues due to unexplained "problems." I continued to notice I was shortchanged in my commission formula. I continued to raise my objections to this change which ICA Holdings/Atronix continued to deny occurred. This May 24th email on my revised commission was sent after I again raised questions about my commissions and how they were lower than they should be. A copy of Controller Switalski's email is attached as Exhibit C.

22. In a June 16, 2016 email chain, I again raised these issues with ICA Holdings personnel. At 1:57PM, Controller Switalski provided me with the May 2016 gross margin and commission calculation. That calculation was again lower than what it should be. Controller Switalski stated they "are making a special payroll run" for me as there was another problem with my wages. At 2:56PM, I responded to this email and CC'd Messrs. Ali Sr., Ali, Jr. and Mr. Laird where I sought "clarification on the way the commissions are being calculated" as it was "very clear to me that something has changed in terms of how cost is being calculated as it relates to my commission which is severely impacting my earnings. The commission structure as it relates to determining the GP that I agreed to when I was hired into sales has always been the raw cost of Materials + raw cost of labor divided by resale times my commission % chart." In the May commission chart, the costs were "15.3% higher than the rolled up cost reported in Visibility [the computer program that runs the business and creates the spreadsheets and commission reports]. (Every single line item) This is obvious as the GP percentages are in many cases in the teens and below. I never would have quoted jobs or waste my time or anyone else's on work at such low margins. If this 15% is to cover overhead expenses or any other expense than that was NEVER the deal." I continued, "Last month I questioned this and all I got was a new report that changed the costs to meet what I was paid. I have never been informed or have agreed to any changes in my commissions. If this is the case please reply in writing that you have changed my commission structure and how." In response to that email, later on June 16th at 3:22PM, Mr. Laird wrote: "Steve: Do not answer yet. Jim." The June 16, 2016 email chain is attached as Exhibit D.

23. After this email, Mr. Laird spoke to me about my commission. During our discussion, he finally admitted that my commission plan had changed as of January 2016. He told me that I would be paid the difference between the old calculation and the new calculation from January through May 2016 where I would get the sales commissions I always had received. From June through December 2016, I would be paid 50% of the difference between the old and new commission plan and starting on January 1, 2017, my commission would be based solely on the new updated method. On Friday, June 17th at 2:15PM, Mr. Laird sent me an email regarding these changes. A copy of the June 17, 2016 email is attached as Exhibit E.

24. I did not have any say in this matter. Mr. Laird told me the commissions were changing and that was that. I did not agree to these changes as they would detrimentally affect my ability to earn a living. I did not agree to the new interim commission plan from June through December 2016 and the new permanent plan of January 2017.

25. On July 19, 2016, Controller Switalski sent me an email regarding the June 2016 commissions. In an email chain dated July 21, 2016, I again raised questions about the numbers and costs and specifically used one client as an example. I explained that "All of

the line items listed below are from my report that the reported gross profit of 2% to -14%. Again, I would never sell products for this margin and they have never been shipped before at these margins. I saw that one part where the Visibility increased the part from 9,696.49 to $13,149.61, an increase of 27%. I have no idea how or why this dramatic increase in cost was made." In reviewing the information in the spreadsheet, "I have taken the time to review each material line to see what we paid for the materials for this assembly [which] rolls up to less than the cost" listed in the spreadsheet of approximately $9450.00. I asked, "Could you please provide and (sic) explanation of where the costs are coming from on this report." Due to the contents of these emails that discussing pricing given the Plaintiff's allegations, I have not included them with my affidavit. If the court requires these emails, I will be happy to provide them.

26. In his 3:35PM July 21st reply, Controller Switalski claimed Dennis Rondeau explained to him that the price differential involved problems with the parts as it involved sub-assemblies where "the timing of when those sub-assemblies are issued to production can affect the monthly cost." He claimed that the cost in June drove a large material variance for the month and that the cost would even out over two months – May and June. Again, this email chain has not been provided.

27. In my reply email of July 21st, I stated I spoke with Dennis and what Controller Switalski wrote was "not true." I explained the higher cost in May where I fought against it after I discovered that a 12.5% increase was being applied to the costs of the quote formula that reduced my commissions "without formal advisement or my agreement." I said, "I am quite sure that Dennis has explained how [Visibility] works...and that is why I continue to come back with these [commission pay] issues." I questioned the costs of these items as I did not understand them. I was only paid monies owed to me in May after previously raising this issue. There was "no way this job has 2% profit in it from June." I asked if I should speak with the Medhi's as I realize Controller Switalski was only doing what he was told to do. This email chain has not been provided.

28. In his reply, Controller Switalski changed his explanation for the discrepancy in payment. The problem was not the timing of sub-assembly costs as he stated earlier that day. Now he claimed: "I think the part of the equation you are missing is the overhead portion. The cost in [Visibility] does not fully take OH into account. Since commissions are calculated based on gross margin, the report I sent to you does include overhead." This email chain has not been provided.

29. I was very upset to see that ICA Holdings/Atronix continued to play games and unilaterally manipulate my sales commission plan where they were violating the terms and conditions of my employment regarding my sales commission plan. They kept changing reasons as to why my commission numbers were always short after Mr. Lang stopped doing the calculations. ICA Holdings/Atronix were doing everything they could to interfere with my ability to make sales and earn commissions as I had done for decades at Atronix. But for their actions, I would not have decided to leave the only job I had in my adult life. I left specifically because of what ICA Holdings/Atronix were doing and how it adversely affecting my ability to do my job where they breached the terms and conditions of employment that were agreed between the original Atronix and me.

30. I do not dispute the numbers that the Plaintiff claims in its pleadings regarding my total compensation for years 2013-2016. However, those numbers reflect my abilities as a good salesman under the terms and conditions of my old sales commission formula. It only includes three months of the interim commission and no sales under the January 2017 commission formula. Under the interim and future commission plans, I expected to lose commissions and actually make no money on some future sales. For example, under the June-December 2016 intermediate plan, I now lost money on sales under this intermediate 50% plan. For one of the larger customers, out of 21 sales, I lost money on 11 sales. On another 7 sales, the gross profit was 4% or less. Only 3 sales were above 4%. The loss to me exceeded negative 11% or higher on 7 of the 21 sales. Overall, I lost sales commissions on $11,931.98 in gross profits from July, August and September from this one customer. Under the January 2017 formula, I expect to lose money and have negative commissions on all but 3 of those 21 sales. In May 2016, the last month under my original agreed to sales formula, all 6 of my sales to that same client made money where the gross profit was 14.57% for 5 sales and 5.94% for the other. I have a chart regarding this information based on my understanding of what the cost numbers were when I was involved in the process. I have not produced this document based on the Plaintiff's allegations. If the court wishes, I can produce this document.

31. Since ICA Holdings/Atronix was actively trying to cut my pay through its various and changing reasons where it was also cutting off my ability to bring in new business by removing me from the quote process where clients were getting upset with the delays and inaccurate quotes, I knew my future wages at Atronix would only go down from June 2016 onward and would be even worse come January 2017. ICA Holdings/Atronix was doing whatever it could to undermine my ability to do my job utilizing the sales commission formula that was agreed by me and the original Atronix.

32. On Friday, September 16, 2016, I gave ICA Holdings/Atronix two (2) weeks' notice of my resignation which was effective on Friday, September 30, 2016.

33. On Tuesday, September 20, 2016, I received an email from Mr. Ali, Sr. of Meridian Associates. His email referenced the 1997 Agreement. His email also cited portions of an employee handbook regarding Non-Disclosure/Non-Compete, "112 – Non-Disclosure/Non-Compete" that I was unfamiliar with and hadn't previously seen. His email included two attachments: the 1997 Agreement and a photocopy of a January 1990 acknowledgment regarding me having received of a copy of the Atronix Personnel Manual Revisions dated January 23, 1990. A copy of this email is attached as Exhibit F.

34. I don't remember if I actually saw the revisions or if I was just told to sign it and signed it. However, I do not ever recall seeing any employee handbooks during my years of employment. I hadn't seen that policy before.

35. In a conversation with Mr. Ali, Sr. regarding his September 20th email, I told him that on the advice of counsel that I did not think the January 1997 Agreement was valid or enforceable.

36. On Thursday, September 22, 2016, I sent Mr. Ali, Sr. of ICA Holdings Corp. a request for a copy of my personnel records.

37. With respect to customer lists and contact information, I am not sure how, or if, ICA Holdings/Atronix kept this information, be it confidential or not confidential. I know I was responsible for keeping all such information regarding my customers. No one ever told me this information was confidential or gave instructions about protecting it.

38. On Friday, September 23rd, Mr. Ali, Sr. sent me an email asking that I provide him with a list of my customers and their contact information. I complied with his request and provided him with all of the information. I assume the reason he asked for this information is because ICA Holdings/Atronix did not keep or otherwise have such information regarding the customers I serviced.

39. Upon information and belief, after I provided this information to Mr. Ali, Sr., ICA Holdings/Atronix sent a letter to these same customers and provided them with the name of their new inside salesperson at ICA Holdings/Atronix. The letter also stated that I was leaving Atronix.

40. On Monday, September 26, 2016, Ivy Dang emailed me a copy of my personnel records. She also sent me a copy of a document entitled, Atronix Personal Policy Handbook. It states it is the "Employee Handbook" for "Atronix, Incorporated" and includes an "Issue Date: February 20, 1998" and "Revision Date: September 20, 2014". According to this "Employee Handbook" document Policy 122 "Non-Disclosure/Non-Compete" had an "Effective Date" of "02/13/1997" and a "Revision Date" of "09/05/2008". According to Policy 40, "THIS MANUAL REPLACES ALL OTHER PREVIOUS HANDBOOKS OR MANUALS FOR ATRONIX AS OF SEPTEMBER 5, 2008." This document appears to be Plaintiff's Exhibit D.

41. From 1997 through September 26, 2016, I do not recall seeing any employee handbook or being given any acknowledgement forms regarding any such handbook.

42. Prior to Ms. Dang's email of September 26, 2016, I had never seen this "Employee Handbook" document. I was unaware of its policies or the contents of that document. My personnel records do not contain any acknowledgement from 1998, 2008 or 2014, all dates referenced in that handbook or any other date. My personnel file only has the 1990 handbook acknowledgment.

43. Before leaving ICA Holdings/Atronix, I only told a few clients with whom I had developed personal relationships with that I was leaving. I did not otherwise communicate, make any announcement to or give any clients I served any notice that I was leaving. I did not communicate, make any announcement or give any clients that I served any information regarding my new job, address or contact information though my telephone number remained the same as it was my personal cellphone.

44. During my last week at ICA Holdings/Atronix, I was told to take my replacement, Roger White, out to meet as my clients I served as possible to introduce him to them and explain how he would be taking over their accounts. I followed that instruction. After giving my two weeks' notice, I complied with every work request that ICA Holdings/Atronix made including providing all of the contact information on my clients and introducing my replacement to several clients that I served.

45. Since leaving ICA Holdings/Atronix and starting at Scott Electronics, Inc. ("Scott Electronics") to avoid any issue, I have not solicited, contacted or reached out to any of the clients I formerly serviced. Rather, some of my former clients have contacted me. These individuals stated they wanted to do business with me and not ICA Holdings/Atronix. They cited problems they have had with ICA Holdings/Atronix over the past 6-12 months. When these individuals called, I would refer them to Scott Electronics sales staff. I did not have any other contact with these persons.

46. Upon information and belief, in mid-October of 2016, ICA Holdings/Atronix sent out emails to my former clients stating I was bound to a non-compete and non-solicitation agreement which barred me from approaching them or engaging in the wire harness and electromechanical assembly business for three years. The email referred the clients to contact Roger White (the individual I showed around and introduced to clients the week of September 26th) stating he would address any concerns or questions the clients had.

47. After leaving ICA Holdings/Atronix, the only information I retained were the sales commission records showing the monies that were owed to me and telephone numbers I had on my personal cellphone. Other than these documents and my personnel records, I do not have any ICA Holdings/Atronix records.

48. On or about October 6, 2016, I was offered a position as General Manager for Scott Electronics. At ICA Holdings/Atronix, my job was focused on sales where I was paid on a commission where my base salary was minimal. At Scott Electronics as their General Manager, I would make a base salary of $120,000.00 that could be increased incrementally based on new business. Copies of my offer letter and job description are attached as Exhibit G. The job is primarily an oversight position where I manage the overall manufacturing effort where I oversee Operations, Manufacturing, Sales and Marketing, safety, environmental, plant management and supervision, material and production department, manufacturing engineering department, facilities and equipment maintenance. I took a pay cut because I was sick of how ICA Holdings/Atronix treated me and would rather make less money and work for an honest employer.

49. The reasons why I left ICA Holdings/Atronix all involve changes that were made after the original business was sold where the new owners unilaterally changed the terms and conditions of my employment by removing me from the quote process which greatly impacted my ability to bring in new business and by repeatedly changing my commission based salary. Whenever I questioned the changes in my pay; they would come up with different reasons not to pay me what I was owed. I never got a straight answer and no one every provided me with the specifics or documentation to support the various changes. During these discussions, I would repeatedly request to work under the same terms and conditions including my sales commission plan as I had done for decades. All of my attempts were rejected by Mr. Ali, Sr. and Mr. Laird.

50. In reviewing the twelve (12) items listed under "112 – Non-Disclosure/Non-Compete" section from Mr. Ali, Sr.'s September 20, 2016 email, most of those items either do not apply to ICA Holdings/Atronix or involves topics on which I do not have any information. The only compensation data I am aware of relates to my sales commission

plan which I had been cut off from since June 2016 and where I repeatedly questioned the quotes as I did not agree with the pricing I was being provided since early 2016. With respect to computer processes, programs and codes, I am aware that ICA Holdings/Atronix uses commercially sold ERP and MRP software. The only proprietary computer program I am aware of involves a process route sheet that was developed over twenty years ago. That program can be used to determine a quote for a client. However, I haven't used that program in many years. I did all of the calculations by myself as it was the quickest and easiest way to do it. As previously avowed, I gave ICA Holdings/Atronix a list of the names and contact information for my customers. I am not aware that ICA Holdings/Atronix kept records regarding customer history, requirements and preferences. I did not keep or maintain any such records. I did not have any information regarding Atronix's financial information or labor relations strategies. Other than clients' projects I was working on when I left, I do not know anything about other projects or proposals. I am not aware of any research and development strategies by ICA Holdings/Atronix. It only had a website and attended trade shows. Over the past few years, the number of trade shows ICA Holdings/Atronix attended had dwindled. I am unaware of any technological data or prototypes that ICA Holdings/Atronix may have.

51. On October 17, 2016, I received a letter by facsimile from Atronix's counsel that referenced an agreement, which I assumed was the January 1997 Agreement as the faxed communication had no attachment. The letter also stated that I would "inevitably use and disclose ICA Holdings/Atronix's trade secrets and proprietary information." See Plaintiff's Exhibit K.

52. Having spent over thirty four (34) years in the contractor manufacturing business, I am not aware of any trade secrets that ICA Holdings/Atronix or other similar contract manufacturing businesses would have other than internal costs and margins – two areas I argued with ICA Holdings/Atronix with after being cut out of those processes. At ICA Holdings/Atronix, we constructed the product to the client's specifications. Any trade secrets would belong to the client and not ICA Holdings/Atronix. Similarly, I am not aware of any ICA Holdings/Atronix proprietary information. I don't believe ICA Holdings/Atronix has any specialized or proprietary machine, products or software. The October 17th letter does not provide any specifics regarding any of Atronix's alleged concerns. The letter concluded by demanding that I had to confirm to ICA Holdings/Atronix that I had resigned from my employment with Scott Electronics immediately. As I need to work to earn a living and did not think the January 1997 Agreement was valid, I did not resign.

53. For the reasons set forth in this affidavit, I disagree with ICA Holdings/Atronix's claims that I was familiar with their pricing structures, labor and material costs and profit margins. It was because I didn't understand what ICA Holdings/Atronix was doing with respect to these issues that resulted in my many discussions and emails regarding my sales commissions. Since January 2016, I regularly disagreed with what they claimed their costs were. After I was removed from the quote process, I no longer understood ICA Holdings/Atronix's pricing as described in Exhibits A through E and paragraphs 15, 17, 21, 22, 23, 25, 26, 27, 28, 29, 30 and 31.

54. On October 19, 2016, through counsel I sent ICA Holdings/Atronix a letter stating the January 1997 Agreement was not enforceable. The letter also explained the reason why I left Atronix – the unilateral change to the terms and condition of my employment regarding my sales commission plan. Nevertheless, I offered to try and work out terms of an agreement that both sides could work with. See Plaintiff's Exhibit J. However, they demanded as a term and condition that both I and Scott Electronics agree not to do business with any current, former or prospective client for three years after I left. I could not agree on any term that bound Scott Electronics.

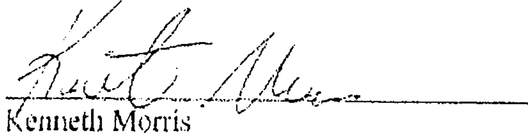
55. Over the past 34 years, I have developed a particular skill set and general knowledge acquired or improved during the course of my career. ICA Holdings/Atronix is simply trying to protect its ordinary business interests. ICA Holdings/Atronix seeks to prevent me from working anywhere in the world for three (3) years in the only industry I have ever worked in. Given my lack of formal education, my specialized skill set regarding cable, harness and electro-mechanical assembly and age, I would not be able to get a job in any other industry at a comparable salary. I cannot go three years of being unemployed.

56. In reading the motion for injunctive relief, I disagree with the Plaintiff's contention regarding the "wealth of confidential, highly sensitive information" as noted in this affidavit. How wires, harnesses and cables and other items in the contract manufacturing business are designed, engineered and assembled is fairly straightforward and common knowledge in the industry. The only confidential information regarding customer blueprints and specifications belong to the customer and not ICA Holdings/Atronix. The Plaintiff cannot assert rights that do not belong to it.

57. With respect to the Plaintiff's claim regarding the signing of the confidentiality agreement in 1997, I do not recall signing any such document. After speaking with employees regarding the January 1997 Agreement, I remembered signing the non-competition agreement but I did not and do not remember anything about the confidentiality agreement. Before I gave my two weeks' notice, neither Atronix nor ICA Holdings/Atronix ever discussed, mentioned or otherwise communicated to me about its confidential information. As averred earlier, I did not see the Atronix employee handbook until after I gave my notice to leave.

58. Until I read the Plaintiff's motion regarding the injunction, I was unaware that Mr. Laird was the Vice President of "Atronix." When I dealt with him or Mr. Ali, Sr., they were always of Meridian Associates as noted by their email addresses, which controlled and oversaw my employment. They managed the business from afar and where not involved in the day to day operations of my job.

IN WITNESS THEREOF, I have hereunto set my hand and seal on this 8th day of December 2016 and signed and sworn to as true under the pains and penalties of perjury.

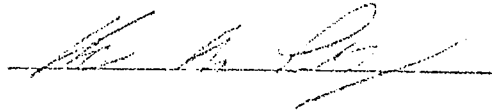


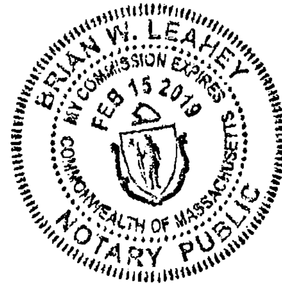
Kenneth Morris

Commonwealth of Massachusetts

Middlesex, ss.

On this 8th day of December 2016, before me, the undersigned Notary Public, personally appeared, Kenneth Morris, proved to me through satisfactory evidence of identification, which was a valid Massachusetts Drivers Identification card, to be the person whose name is signed on the proceeding or attached document and acknowledged to me that he signed this document voluntarily for its stated purpose.





AFFIDAVIT OF BRIAN W. LEAHEY

I, Brian W. Leahey, hereby declare and state as follows:

1. I am counsel for Mr. Kenneth Morris and am licensed to practice law in the Commonwealth of Massachusetts.

2. Attached as Exhibit H is a true and accurate copy of the Atronix Sales, Incorporated Non-Compete and Non-Solicitation Agreement between "Atronix Sales, Incorporated, a Massachusetts corporation, (herein referred to collectively with its subsidiaries as the "Company") and Kenneth Morris.

3. Attached as Exhibit I is a true and accurate copy of the Business Entity Summary for the PSJL Corporation from the Secretary of the Commonwealth's website as of December 8, 2016. The document states PSJL Corporation is a "Domestic Profit Corporation" that was incorporated on May 22, 1980. The company had two name changes. The company changed from "Atronix, Incorporated" to "PSJL corporation" on July 24, 2014. The company changed from "Atronix, Inc." to Atronix, Incorporated" on February 27, 1997. The Business Entity Summary also states that PSJL Corporation merged with "Atronix Sales, Inc." on June 30, 2011. The sole officers and directors are Peter K. Schofield and Jeffery S. Lang. Both Atronix Sales, Inc. and Atronix, Incorporated were incorporated as Massachusetts domestic corporations. A copy of the Articles of Merger Involving Domestic Entities filed on June 29, 2011 for the companies is attached as Exhibit J.

4. Attached as Exhibit K is a true and accurate copy of the Business Entity Summary for "Atronix, Inc." from the Secretary of the Commonwealth's website as of December 8, 2016. The document states Atronix, Inc. is a "Foreign Corporation" that was incorporated on June 10, 2014 under the laws of Delaware. It registered as a foreign business in Massachusetts on July 29, 2014.

5. Attached as Exhibit L is a true and accurate copy of the Foreign Corporation Certificate of Registration filed with the Secretary of the Commonwealth on July 29, 2014 that states Atronix, Inc. was incorporated on June 10, 2014 in Delaware. Its corporate officers are Ryan Wierck, Harris Drantch and Peter Petrillo and with a business address of 345 Park Avenue, 41st Floor, New York, NY 10154.

6. Attached as Exhibit M is a true and accurate copy of a news item from July 2014 from the Wafra Partners website captioned "Wafra Partners Announces Acquisition of Atronix, Inc. and Cable Assembly, LLC." The article states Wafra and its partners "announce the acquisition of two companies, Atronix, Inc. and Cable Assembly, LLC, by an entity formed by the clients of Wafra, Meridian Associates, management of Atronix" and others. "Wafra and its co-investors are executing on a planned build-up in the wire harness, cable assembly and electromechanical industry." It states Atronix has facilities in Billerica, MA, Tucson, AZ and Nogales, Mexico. The article reads "Meridian Associates is a business advisory firm which helps companies maximize their growth, profitability and cash flow. Meridian has helped a wide variety of manufacturing, consumer products and service businesses reach their full potential."

7. Attached as Exhibit N is a true and accurate copy of the Articles of Amendment filed with the Secretary of the Commonwealth on July 24, 2014 where Atronix, Incorporated [the old Massachusetts corporation] changed its name of the corporation from "Atronix, Incorporated" to "PSJL Corporation" as of July 3, 2014.

8. Attached as Exhibit O is a true and accurate copy of a search of the Secretary of the Commonwealth's corporate records for James Laird or Jim Laird. This database has no record of Mr. Laird being listed as the Vice President or corporate officer for any iteration of Atronix. The only James Laird listed as a corporate officer in the Massachusetts database involves the Laird Woodworking Inc. company and Mr. James Frederick Laird.

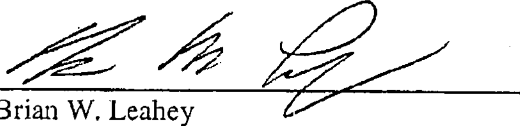
9. Attached as Exhibit P is a true, accurate and complete copy of all information contained on ICA Holdings' website (though some of the print materials overrun each other). It reads "ICA Holdings is one of the largest and most diverse manufacturers of specialty wire harnesses, cable assemblies and electromechanical assemblies in the U.S." It produces products for the following industries: Medical, Military & Aerospace, Heavy Construction, Energy Management, Laboratory Equipment, Generators and Compressors, Test & Measurement Equipment, School & Commercial Buses, SATCOM Systems, Scientific Instruments, Marine, Digital Printers, Communications, HVAC Equipment, LED Lighting, Specialty Vehicles, Point of Sale, Semiconductor, Electrical Equipment, Material Handling Equipment, Oil & Gas and Steam Turbines. According to ICA Holdings, the Exeter, NH facility is actually the "Velocity Manufacturing, Inc." ICA Holdings owns five separate wire harness and cable companies: Atronix, Incorporated; The Wire Shop, Inc., Midwest Harness & Cable Corp., Cable Assembly, LLC and Velocity Manufacturing, Inc..

10. While I was able to open and review the "Atronix" website, for whatever reason, I was unable to print anything regarding the website. On its website it states Atronix ICA, an integrated cable assembly holdings company.

11. Attached as Exhibit Q is a true, accurate and complete copy of all information contained on Meridian Associates' website. "Meridian Associates is engaged by private equity firms and other businesses to maximize the sustainable profitability of their companies." One of the areas where "Meridian has significant experience in dealing with" includes "Wire Harnesses and Cable Assemblies". The principals of Meridian Associates are Mehdi Ali, Jim Laird and Mehdi Ali, Jr. It reads "Mr. Laird has been a principal of the firm since 1996" and he has a Wall Street background in "buyouts, mergers, acquisitions and restructurings." In its "Cases Studies" section it reads: "Wire Harness & Cable Assembly Manufacturer. Situation: Buyout of leading manufacturers of wire harnesses and cable assemblies. The firm identified the wire harness and cable assembly industry as an attractive sector for building an industry leader through acquisitions. The firm partnered with a leading buyout fund with whom it had consummated a number of successful buyouts…. Results: Integrated Cable Assembly Holdings has become one of the largest and most diverse manufacturers of specialty wire harnesses, cable assembles and electromechanical assemblies in the U.S."

12. Over the past three years, the Massachusetts Legislature has debated some form of a law that would ban or restrict non-competition covenants in the employment context. Most recently in 2016 both the House and Senate passed versions of such a law though an agreement could not be reached in conference. The topics included limiting the timeframe of such agreements and payments during that timeframe. This issue is expected to come up again in future sessions.

IN WITNESS THEREOF, I have hereunto set my hand and seal on this 9th day of December 2016 and signed and sworn to as true under the pains and penalties of perjury.

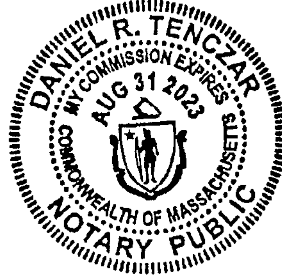


Brian W. Leahey

Commonwealth of Massachusetts

Middlesex, ss.

On this 9th day of December 2016, before me, the undersigned Notary Public, personally appeared, Brian W. Leahey, proved to me through satisfactory evidence of identification, which was a valid Massachusetts Drivers Identification card, to be the person whose name is signed on the proceeding or attached document and acknowledged to me that he signed this document voluntarily for its stated purpose.



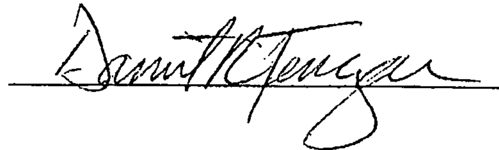
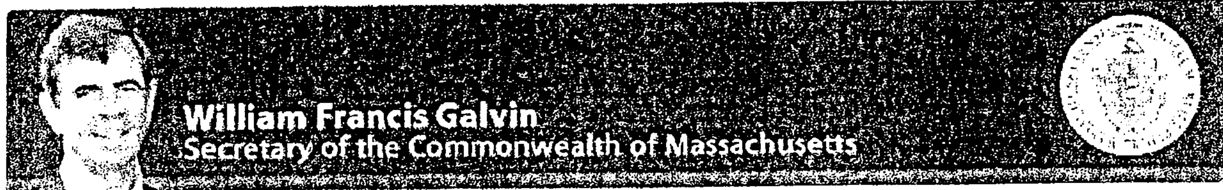


EXHIBIT I



Corporations Division

Business Entity Summary

ID Number: 042702310

Request certificate | New search

Summary for: PSJL CORPORATION

The exact name of the Domestic Profit Corporation: PSJL CORPORATION

The name was changed from: ATRONIX, INCORPORATED **on** 07-24-2014
The name was changed from: ATRONIX, INC. **on** 02-27-1997

Merged with ATRONIX SALES, INC. on 06-30-2011

Entity type: Domestic Profit Corporation

Identification Number: 042702310 **Old ID Number:** 000158219

Date of Organization in Massachusetts:
05-22-1980

Last date certain:

Current Fiscal Month/Day: 12/31 **Previous Fiscal Month/Day:** 08/31

The location of the Principal Office:

Address: 780 BOSTON RD.

City or town, State, Zip code, Country: BILLERICA, MA 01821 USA

The name and address of the Registered Agent:

Name: JEFFREY S. LANG

Address: 780 BOSTON ROAD

City or town, State, Zip code, Country: BILLERICA, MA 01821 USA

The Officers and Directors of the Corporation:

Title	Individual Name	Address
PRESIDENT	PETER K. SCHOFIELD	220 CANDLESTICK RD., N. ANDOVER, MA 01845 USA
TREASURER	JEFFREY S. LANG	6051 N PASEO ZALDIVAR TUCSON, AZ 85750 USA
SECRETARY	JEFFREY S. LANG	6051 N PASEO ZALDIVAR TUCSON, AZ 85750 USA
VICE PRESIDENT	JEFFREY S. LANG	6051 N PASEO ZALDIVAR TUCSON, AZ 85750 USA

DIRECTOR	JEFFREY S. LANG	6051 N PASEO ZALDIVAR TUCSON, AZ 85750 USA
DIRECTOR	PETER K. SCHOFIELD	220 CANDLESTICK RD., N. ANDOVER, MA 01845 USA

Business entity stock is publicly traded:

The total number of shares and the par value, if any, of each class of stock which this business entity is authorized to issue:

Class of Stock	Par value per share	Total Authorized		Total issued and outstanding
		No. of shares	Total par value	No. of shares
CNP	$ 0.00	1,500,000	$ 0.00	1,052,270

Consent	Confidential Data	Merger Allowed	Manufacturing

View filings for this business entity:

ALL FILINGS
Administrative Dissolution
Annual Report
Application For Revival
Articles of Amendment

View filings

Comments or notes associated with this business entity:

New search