

74545-0

74545-0

No. 74545-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PUGET SOUND SECURITY PATROL, INC.,

Petitioner,

vs.

KATHRYN BATES,

Respondent.

PETITIONER'S OPENING BRIEF

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUN 22 2016

ROCKE LAW GROUP, PLLC
Aaron V. Roche, WSBA No. 31525
Peter Montine, WSBA No. 49815
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 652-8670

Attorneys for Petitioner Puget Sound
Security Patrol, Inc.

2015 JUN 22 PM 4:02
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
PUGET SOUND
SECURITY PATROL, INC.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 3

IV. STATEMENT OF THE CASE..... 4

 A. Ms. Bates’s Background in Human Resources 4

 B. Mr. and Ms. Bates’s Relationship 4

 C. Mr. Bates’s Employment with Puget Sound Security..... 5

 D. Mr. Bates’s Employment with US Security 6

 E. Puget Sound Security’s Civil Action Against Mr. and
 Ms. Bates..... 8

 F. Ms. Bates’s Motion for Summary Judgment 8

 1. Puget Sound Security’s Opposition 9

 2. Ms. Bates’s Motion to Strike 10

 3. Puget Sound Security’s Other Materials 10

 4. Trial Court’s Order Granting Summary Judgment..... 12

 5. Trial Court’s Order Striking Evidence 12

 G. Subsequent Procedural Posture 14

V. ARGUMENT 14

 A. Puget Sound Security’s claims should have survived
 summary judgment..... 14

 1. Conspiracy Claim 15

 2. Constructive Trust/Unjust Enrichment Claim 20

 B. The trial court erred in striking evidence offered by Puget
 Sound Security. 22

 1. The trial court should have considered lesser sanctions.
 24

 2. Puget Sound Security’s delays were not deliberate..... 24

 3. Ms. Bates would not have been prejudiced. 24

VI. CONCLUSION..... 25

APPENDIX A 27

APPENDIX B 33

APPENDIX C 39

APPENDIX D	45
APPENDIX E	48

TABLE OF AUTHORITIES

Cases

<i>Ashely v. Lance,</i> 75 Wn.2d 471 (1969)	21
<i>Burnet v. Spokane Ambulance,</i> 131 Wn.2d 484 (1997)	24
<i>Caruso v. Local Union No. 690 of Int’l Bhd. Of Teamsters,</i> 100 Wn.2d 343 (1983)	22
<i>Dillon v. Seattle Deposition Reporters, LLC,</i> 179 Wn. App. 41 (2014)	14, 15
<i>Keck v. Collins,</i> 184 Wn.2d 358 (2015)	24, 25, 26, 27
<i>Le Maine v. Seals,</i> 47 Wn.2d 259, (1955)	20, 21
<i>Lewis v. Bell,</i> 45 Wn. App. 192 (1986)	22
<i>Merager v. Turnbull,</i> 2 Wn.2d 711 (1940)	20
<i>Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.,</i> 114 Wn. App. 151 (2002)	16
<i>Sterling Business Forms, Inc. v. Thorpe,</i> 82 Wn. App. 446 (1996)	16, 17, 18, 19
<i>Young v. Young,</i> 164 Wn.2d 477 (2008)	23

Rules

CR 7	13
CR 56	14

I. INTRODUCTION

This case arose from a dispute over a noncompete agreement between William Bates and Puget Sound Security Patrol, Inc., his former employer. Mr. Bates signed an employment contract when he started working for Puget Sound Security. Mr. Bates's wife, Kathryn Bates,¹ used her background as a Human Resources professional to assist Mr. Bates in negotiating his employment agreement, including the noncompete clause.

After working for Puget Sound Security for about a year, Mr. Bates left to work for one of its competitors, US Security Associates, Inc. When Mr. Bates left for US Security, Ms. Bates encouraged him to seek indemnification for violation of his noncompete agreement. When Mr. Bates signed his contract with US Security, Ms. Bates was there to sign as a witness. Ms. Bates allowed Mr. Bates to set up an email address through her company, which he used to correspond with US Security.

Mr. Bates profited from violating his noncompete agreement with Puget Sound Security, and Ms. Bates benefited from those profits. Ms. Bates had either actual or constructive knowledge of this based on her involvement in Mr. Bates's transition and the violations of his noncompete agreement.

¹ Kathryn Bates, wife of Mr. Bates, has asked to be called "Ms. Bates."

Puget Sound Security brought suit against Mr. Bates for violating his noncompete agreement. Puget Sound Security added US Security and Ms. Bates as defendants, later dismissing its claims against US Security. Mr. Bates filed for bankruptcy on the eve of trial and the claims against him were resolved by the bankruptcy court in an adversarial proceeding.

The bankruptcy court found that Mr. Bates violated his noncompete agreement and he remains liable for that non-dischargeable debt. Judgment was entered against Mr. Bates, although the Bates's house and all assets are in the name of Ms. Bates. The judgment remains 100 percent unsatisfied.

The trial court dismissed Puget Sound Security's claims of conspiracy and constructive trust against Ms. Bates on summary judgment. In doing so, the trial court held that Puget Sound Security had failed to establish any genuine issues of material fact. The trial court reached this conclusion despite Puget Sound Security's evidence that Ms. Bates had knowledge of and benefited from Mr. Bates's violations.

The trial court struck much of Puget Sound Security's opposing materials for being untimely, despite the materials being mostly timely, prepared immediately after a notice of unavailability, and filed well before Ms. Bates's reply brief. The trial court also failed to take into account Washington's history of holding nonparties liable for assisting parties who violate their noncompete agreements.

Puget Sound Security asks this Court to reverse the trial court's order striking certain evidence it presented in opposition to Ms. Bates's motion for summary judgment. Puget Sound Security then asks the Court to use that evidence to reverse the trial court's grant of summary judgment as to the claims against Ms. Bates and remand the case to proceed to trial.

II. ASSIGNMENTS OF ERROR

The trial court erred in excluding evidence that was relevant and important to Puget Sound Security's opposition to Ms. Bates's motion for summary judgment. The trial court also erred in granting summary judgment in favor of Ms. Bates and dismissing her in her individual capacity from this action.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether a trial court should consider supplemental briefing and declarations when they help the trial court understand the factual and legal context of the case, they preserve the right to a jury trial, and opposition materials were due immediately following a noticed period of unavailability.
- B. Whether the trial court incorrectly found that, considering all evidence in the light most favorable to Puget Sound Security, there was no genuine issue of material fact regarding Ms. Bates's involvement in a conspiracy with Mr. Bates.

C. Whether the court incorrectly found that Puget Sound Security's pleadings did not put Ms. Bates on notice of its implied claim of unjust enrichment.

D. Whether the court incorrectly dismissed Puget Sound Security's claims against Ms. Bates and dismissed her from this action.

IV. STATEMENT OF THE CASE

A. Ms. Bates's Background in Human Resources

Ms. Bates has over 20 years of experience as a human resources professional and has reviewed and edited noncompete agreements for sales positions at other companies. (CP 599–601.) She is certified as a global human resources manager and a senior human resources manager. (CP 598.) According to Ms. Bates, these certifications mean that she has significant knowledge and practical experience in her fields. (CP 599.) In this role, Ms. Bates had previously reviewed and edited noncompete agreements for sales positions. (CP 600–01.) She has also consulted with lawyers about the changes made to those noncompete agreements. (CP 601.)

B. Mr. and Ms. Bates's Relationship

Prior to their marriage, Mr. and Ms. Bates entered into a premarital agreement and opened a joint bank account. (CP 609–10.) Mr. Bates's

paychecks were deposited into this account and Ms. Bates would withdraw Mr. Bates's contribution to the monthly expenses from the account. (CP 610.)

C. Mr. Bates's Employment with Puget Sound Security

Puget Sound Security is a local small business that provides private security guards and alarm response to customers in Washington. (CP 783.) Puget Sound Security hired Mr. Bates as a Business Development Manager. *Id.* As part of his hiring process, Mr. Bates signed an employment agreement entitled "Employee Intellectual Property Agreement (Including Confidentiality, Invention Assignment, Nonraiding and Noncompetition)" (the "Agreement"). *Id.* This Agreement was an enforceable contract that included a confidentiality clause and a noncompetition clause. (CP 783–84.) This Agreement also stated: "If I [William Bates] breach this agreement, I will hold in trust for PSSP all income I receive as a result of the violation." (CP 122, 623.)

Ms. Bates used her HR background to help Mr. Bates negotiate his contract with Puget Sound Security. (CP 602–03.) Ms. Bates provided handwritten proposed revisions for the Agreement, including revisions to the noncompete clause. (CP 620–24.) *See* Appendix A.

D. Mr. Bates's Employment with US Security

Mr. Bates quit his job with Puget Sound Security on October 18, 2010. (CP 94.) Mr. Bates had already started working for US Security by the time he quit. (CP 785.) US Security is a competitor of Puget Sound Security, providing many of the same products and services in the same geographic area as Puget Sound Security. (CP 517, 613.) Mr. Bates was paid a higher base salary by US Security than he was paid by Puget Sound Security. (CP 589, 626.) When Mr. Bates signed his contract with US Security, Ms. Bates was a witness to his signature (Dkt. 30, Ex. 9.) *See* Appendix B.

When Mr. Bates worked as a Business Development Manager for Puget Sound Security, he had access to its client list, pricing information, and client contact information. (CP 93.) One of the clients Mr. Bates signed for Puget Sound Security was VersaCold. (CP 94.) Mr. Bates developed a professional relationship with VersaCold while he was working for Puget Sound Security. (CP 94.)

At US Security, Mr. Bates used his knowledge of Puget Sound Security's contract with VersaCold and its pricing structure to convince VersaCold to end its contract with Puget Sound Security and sign a new contract with US Security. (CP 95, 785.) This contract was worth approximately \$250,000 annually to Puget Sound Security. (CP 94.)

Mr. Bates's actions were an intentional violation of the Agreement.

(CP 786.)

When US Security was recruiting Mr. Bates, Ms. Bates advised him that, if he was going to work for US Security, he should get written confirmation from US Security that it would support him "if anything happens." (CP 604.) This topic came up several times before and after Mr. Bates began working for US Security. (CP 605.) Ms. Bates also acknowledged seeing an email from the US Security recruiter to Mr. Bates saying that US Security would support him if there was a concern that his US Security employment violated his noncompete agreement with Puget Sound Security. (CP 605.)

Mr. Bates later brought a lawsuit against Puget Sound Security and US Security in King County Superior Court, Cause No. 13-2-30651-4

SEA. In his statement of facts, Mr. Bates averred:

In early November, 2010, Bates left his position at PSSP and accepted a position with USSA. Prior to hiring Bates, USSA was informed by Bates that a non-compete agreement was entered into between Bates and PSSP, which was acknowledged by USSA. As a condition to Bates leaving PSSP and accepting an employment position with USSA, USSA promised Bates that Bates would be indemnified for all costs and fees for any legal action taken against Bates by PSSP as a result of the existing non-compete agreement. As a result of USSA's promise to indemnify Bates, Bates resigned his position at PSSP and began working for USSA.

See Appendix C. This establishes that Mr. Bates sought indemnification from US Security.

E. Puget Sound Security's Civil Action Against Mr. and Ms. Bates

When Puget Sound Security discovered that Mr. Bates had violated the Agreement, it commenced this litigation against him. (CP 1–15.) Puget Sound Security added Ms. Bates as a defendant to this litigation when it learned that she had assisted in and benefited from Mr. Bates's violations. (CP 514–24.) Puget Sound Security alleges Mr. and Ms. Bates conspired to violate Mr. Bates's Agreement and that a constructive trust should be made to hold the earnings he received by violating the Agreement. (CP 522.) This constructive trust would include amounts paid by Mr. Bates from these earnings to Ms. Bates for their household expenses. *Id.*

F. Ms. Bates's Motion for Summary Judgment

On August 1, 2013, Ms. Bates moved for summary judgment dismissal of Puget Sound Security's claims against her. (CP 528–42.) Ms. Bates claimed that there was no evidence that she had worked in concert with Mr. Bates and that Puget Sound Security had improperly pled its constructive trust claim. (CP 530–40.) The date for the summary judgment hearing was noted for August 30, 2013, which meant that Puget Sound Security's response was due on August 19, 2013. (CP 528.)

Previously, on March 27, 2013, lead counsel for Puget Sound Security had served a notice of unavailability to opposing counsel. *See* Appendix D. This notice indicated that counsel would be unavailable to respond to motions from August 13, 2013, through August 15, 2013. *Id.* Puget Sound Security gave Ms. Bates this information well before she filed her motion for summary judgment.

Then, on May 31, 2013, the trial court had entered an order continuing trial (Dkt. 284, pg. 3.) This order moved the trial date to September 16, 2013, and the deadline for hearing dispositive pretrial motions to September 3, 2013. *See id.* Accordingly, the hearing date for Ms. Bates's motion for summary judgment was the last Friday that the trial court could consider a dispositive motion. This also meant that Puget Sound Security's opposition materials would need to be prepared during the time it had notified Ms. Bates it would be unavailable.

1. Puget Sound Security's Opposition

In its opposition, Puget Sound Security presented evidence linking Ms. Bates to Mr. Bates's violation of the Agreement with Puget Sound Security. (CP 586–89.) Puget Sound Security argued that, considering all of the evidence in the light most favorable to it, disputed questions of material fact existed as to whether Ms. Bates had conspired with Mr. Bates in violating the Agreement. (CP 591.) Puget Sound Security also argued

that it had provided sufficient notice pleading and evidence with regard to its claim for unjust enrichment by pleading constructive trust. (CP 592.)

2. Ms. Bates's Motion to Strike

On August 22, 2013, Ms. Bates moved to strike evidence offered by Puget Sound Security in support of its opposition to her motion for summary judgment. (CP 664–70.) Ms. Bates asked the court to strike certain parts of Puget Sound Security's opposition demonstrating her involvement in Mr. Bates's violation of the Agreement. (CP 667–68.) The targeted materials included a description of Ms. Bates's actions at a fundraising event, Mr. Bates's use of an email account from Ms. Bates's company, and Mr. Bates's work with US Security. (CP 667.)

3. Puget Sound Security's Other Materials

After Ms. Bates filed her motion to strike, Puget Sound Security submitted additional materials to the court. First, on August 22, 2013, Puget Sound Security filed a supplemental brief providing additional opposition to Ms. Bates's motion. (CP 628–33.) This was four days before Ms. Bates submitted her reply materials and eight days before the hearing. The supplemental brief included some additional legal authority and one additional piece of evidence. *Id.* The evidence attached to the supplemental brief was an email from William Bates to the senior salesperson in his region for US Security. (CP 633.) Ms. Bates had already

seen and been questioned about this email during her deposition.

(CP 606.)

In this email, Mr. Bates contacted a representative from US Security to say that he had set up an email address through Ms. Bates's company. (CP 633.) Mr. Bates said: "Henry: If you need anything here is an email address I set up through my wife's company. Not much to be said, I hope you are doing well! WB2." *Id.*; *see* Appendix E.

Next, on August 27, 2013, Puget Sound Security filed a timely opposition to Ms. Bates's motion to strike (CP 684–99), which was supported by a declaration from D. James Davis (CP 700–48). Also on August 27, 2013, Puget Sound Security filed the declaration of Jeff Kirby, founder of Puget Sound Security. (CP 749–50.) This declaration discussed the behavior exhibited by Ms. Bates at an event where Mr. Kirby and George Schaeffer, CEO of Puget Sound Security, saw her. (CP 749.) Mr. and Ms. Bates sent a bottle of Champagne to Mr. Kirby and Mr. Schaeffer at a fundraising event in May of 2011. *Id.* Mr. Bates came over to Mr. Schaeffer and Mr. Kirby and told them that he was working for his wife and no longer working in the security industry. *Id.* Then the Bateses lifted their glasses to toast Mr. Kirby and Mr. Schaeffer. *Id.* Mr. Kirby concluded from Ms. Bates's actions to mean that she was complicit in

Mr. Bates's false statements that he was working for Ms. Bates and no longer in the security industry. (CP 749.)

4. Trial Court's Order Granting Summary Judgment

At the August 30 summary judgment hearing, the trial court first held that it would not consider Puget Sound Security's supplemental brief or the declaration of Jeff Kirby (RP Aug. 30, 2013, 9:4–21.) Then, after oral arguments the trial court granted Ms. Bates's motion for summary judgment. (CP 766–67.) The court dismissed the claims against Ms. Bates with prejudice and dismissed Ms. Bates from the action in her separate capacity. (CP 767.) The court specifically noted that the remedy of constructive trust and the claim against the Bates marital community were not dismissed. *Id.*

5. Trial Court's Order Striking Evidence

The trial court later entered a written order listing the materials stricken in its oral ruling on August 30, 2013. (CP 770–72.) The court struck three sections of Puget Sound Security's opposition brief. (CP 771.) The court also excluded as untimely Puget Sound Security's supplemental brief, the Declaration of Jeff Kirby Regarding Kathryn Bates' Conduct at Bandage Ball, the Declaration of George Schaeffer in Opposition to Defendant Bates' Motion for Continuance, and the Declaration of

D. James Davis in Support of Opposition to Motion to Strike. (CP 770–72.)

As the record before this Court demonstrates, however, this finding of untimeliness was not accurate. First, Puget Sound Security used the Declaration of George Schaeffer in Support of Motion for Summary Judgment, filed in April 2011, as support for its opposition to Ms. Bates’s motion for summary judgment. (CP 594.) This Schaeffer declaration was incorporated as an exhibit to the Declaration of Abigail Westbrook. (CP 594, 614–24).

Puget Sound Security filed its Supplemental Brief on August 22, 2013. (CP 628–33.) Although this was after Puget Sound Security’s opposition materials were due, it was still eight days before the summary judgment hearing and four days before Ms. Bates filed her reply brief.

The Declaration of D. James Davis filed in support of Puget Sound Security’s opposition to Ms. Bates’s motion to strike was timely filed on August 27, 2013, three days before the hearing date. (CP 700–01.) The Declaration of Jeff Kirby was also filed on August 27. (CP 749–50.) This declaration was timely filed in support of Puget Sound Security’s opposition to Ms. Bates’s motion to strike three days before the hearing, consistent with CR 7, and filed prior to the hearing date. *Id.*

G. Subsequent Procedural Posture

On the eve of trial, several weeks after the trial court granted Ms. Bates's motion for summary judgment, Mr. Bates filed a notice of bankruptcy case filing and automatic stay of proceedings. (CP 811–14.) Puget Sound Security subsequently initiated an adversarial proceeding against Mr. Bates in the bankruptcy court. (CP 822–23.) The bankruptcy court found that the Agreement was an enforceable contract and that Mr. Bates had intentionally breached the Agreement in numerous ways. (CP 786.) The bankruptcy court found the liability was non-dischargeable and entered judgment against Mr. Bates and in favor of Puget Sound Security. (CP 831–33.) Upon conclusion of the bankruptcy proceeding, the stay on this litigation was lifted. (CP 835.) With the stay lifted, Puget Sound Security filed its notice of appeal. (CP 843–53.)

V. ARGUMENT

A. Puget Sound Security's claims should have survived summary judgment.

Summary judgment will be granted if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56. The court reviews a grant of summary judgment *de novo*. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 58 (2014) (internal citations omitted). Summary judgment is only properly granted if the pleadings, affidavits, depositions,

and admissions on file demonstrate that there is no genuine issue of any material fact and that the moving party is entitled to summary judgment as a matter of law. *Id.* at 59.

All facts and all reasonable inferences from the evidence must be construed in favor of the nonmoving party. *Id.* With respect to Ms. Bates's motion for summary judgment, the trial court did not consider all of the evidence before it, much less construe it in the light most favorable to Puget Sound Security. If it had, it would not have granted summary judgment to Ms. Bates.

1. Conspiracy Claim

To establish a civil conspiracy, a plaintiff must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 160 (2002). Notwithstanding the clear and convincing evidentiary standard involved in civil conspiracy cases, the evidence at issue must be construed in the light most favorable to the nonmoving party. *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn. App. 446 (1996). The role of the jury is not denigrated because the burden of proof in a case is heightened. *Id.*

Weighing of the evidence, credibility determinations, and the drawing of legitimate inferences from the facts remain jury functions. *Id.*

In *Thorpe*, an analogous case, a corporation brought a conspiracy claim against several people who formed a competing business. *Id.* at 448. All but one of these people were former employees of the original corporation. *Id.* On summary judgment, the court dismissed the conspiracy claim against the one competitor employee who was not a former employee of the original corporation. *Id.* Sterling appealed and the court of appeals reversed. *Id.* at 447–48. While the court of appeals found that the formation of the competitor, in and of itself, was not unlawful, genuine issues remained as to whether the competitor was soliciting the original corporation’s clients and using its confidential information. *Id.* at 453. The court also found sufficient circumstantial evidence suggesting that the one non-former employee was aware of the alleged misconduct of the former employees. *Id.*

In the present case, Mr. and Ms. Bates agreed to accomplish an arguably lawful purpose through unlawful means. Like the employees in *Thorpe*, Ms. Bates conspired with Mr. Bates to solicit Puget Sound Security clients for US Security. Puget Sound Security presented sufficient evidence for its conspiracy claim to have survived summary judgment.

a. Mr. and Ms. Bates benefited from Mr. Bates's violation of the Agreement.

An action for civil conspiracy lies when there is an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means. *Thorpe*, 82 Wn. App. at 446. A finding that a conspiracy exists may be based on circumstantial evidence, although the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. *Id.*

Mr. and Ms. Bates's purpose was to increase their income. The way they accomplished this goal, however, was by violating Mr. Bates's Agreement. It has been established that Mr. Bates was in violation of the Agreement. Whether Ms. Bates knew that Mr. Bates was in violation is, at best, a genuine dispute of material fact. Several pieces of evidence suggest that Ms. Bates had knowledge of the terms of Mr. Bates's contracts with Puget Sound Security and US Security.

b. Genuine issues of material fact existed regarding Mr. and Ms. Bates's conspiracy.

To establish liability for conspiracy, it is sufficient if the proof shows concert of action or other facts and circumstances from which the natural inference arises that the unlawful overt act was committed in furtherance of a common design, intention, and purpose of the alleged conspirators. *Thorpe*, 82 Wn. App. at 453 (quoting *Lyle v. Haskins*, 24

Wn.2d 883, 899 (1946)). In other words, circumstantial evidence is competent to prove conspiracy. *Id.* Since direct evidence of a conspiracy is ordinarily in the possession and control of the alleged conspirators and is seldom attainable, a conspiracy is usually susceptible of no other proof than that of circumstantial evidence. *Id.* at 453–54.

There are several pieces of circumstantial evidence supporting a conspiracy between Mr. and Ms. Bates against Puget Sound Security:

- When Mr. Bates was negotiating his employment with Puget Sound Security, Ms. Bates used her human resources expertise to help him craft a unique agreement;
- Ms. Bates knew Mr. Bates would be violating the Agreement by working for US Security and advised him to seek legal protection;
- When Mr. Bates signed his employment agreement with US Security, Ms. Bates signed as a witness;
- When Mr. and Ms. Bates saw Mr. Kirby and Mr. Schaeffer at the fundraising event, Mr. Bates went over and lied about working for his wife and leaving the security industry. Afterwards, Mr. and Ms. Bates raised their glasses, implicating Ms. Bates in her husband's false statements;
- Ms. Bates allowed Mr. Bates to use an email address from her company to contact US Security; and

- Ms. Bates benefited from Mr. Bates's increased contributions to community expenses and bills, which he made with wages earned in violation of the Agreement.

A reasonable jury considering this evidence could conclude that Mr. and Ms. Bates were parties to a conspiracy. Here, as in *Thorpe*, the question of whether a conspiracy existed is a question of fact for the trier of fact.

c. Washington courts are sensitive to conspiracies to violate noncompete agreements.

The Washington Supreme Court has long held that nonparties to noncompete agreements who conspire with parties to violate the agreements can be held liable for conspiracy. In *Merager v. Turnbull*, 2 Wn.2d 711 (1940), a son was held liable for working with his father to open a business that violated the father's noncompete agreement. The court held the son liable even though he was not a party to the noncompete agreement. *Id.* at 724–26. In *Le Maine v. Seals*, 47 Wn.2d 259, (1955), the court held that a former partner's new partnership could be enjoined from using trademarked materials in violation of the former partner's restrictive covenant. *Id.* at 274.

The Washington Supreme Court has also held that efforts to work around a noncompete agreement will be considered a conspiracy. In *Ashely v. Lance*, 75 Wn.2d 471 (1969), the court held four doctors liable

for conspiring to breach their restrictive covenant by leaving their fifth partner and starting a new partnership. Even though the covenant stated that any partners who left could not compete with the remaining “partnership,” the court held that the sole remaining partner could be considered himself a partnership. *Id.* at 476–77.

These cases demonstrate that Washington courts treat conspiracies to violate noncompete agreement differently from traditional conspiracy claims. If courts did not prevent nonparties from assisting parties in violating their noncompete agreements, this would substantially limit the important protections provided by noncompete agreements. Therefore, consistent with this precedent, this Court should reverse the trial court so that Ms. Bates may be held responsible for her efforts to assist Mr. Bates in violating his noncompete agreement with Puget Sound Security.

2. Constructive Trust/Unjust Enrichment Claim

a. Ms. Bates was on notice of a claim of unjust enrichment.

Under Washington’s liberal rules of procedure, pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted. *Lewis v. Bell*, 45 Wn. App. 192, 197 (1986). Inexpert pleadings have been allowed. *Id.* The purpose of pleadings is to facilitate a proper decision on the merits, and not to erect formal and burdensome impediments to the litigation process. *Caruso v.*

Local Union No. 690 of Int'l Bhd. Of Teamsters, 100 Wn.2d 343, 349 (1983) (internal citations omitted).

Puget Sound Security's "claim" of constructive trust should be construed as a claim of unjust enrichment, for which the remedy sought is a constructive trust. Although Puget Sound Security's claim did not actually use the term "unjust enrichment," the entirety of the factual averments regarding Ms. Bates relate to her unjust receipt of funds at Puget Sound Security's expense and support a claim of unjust enrichment. (CP 519, 522–23.) While this may not be expert pleading, it is not so lacking as to be considered insufficient. Ms. Bates was on notice that Puget Sound Security claimed that she had unjustly benefited to its detriment. Whether Puget Sound Security specifically used the words "unjust enrichment" should not preclude it from relief.

b. The court erred in dismissing Puget Sound Security's implied unjust enrichment claim.

If this Court finds that Puget Sound Security pled a claim of unjust enrichment against Ms. Bates, albeit inexpertly, it should also find that this claim should not have been dismissed on summary judgment. The elements of unjust enrichment are (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.

Young v. Young, 164 Wn.2d 477, 484–85 (2008). Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of justice require it. *Id.* at 484.

Ms. Bates benefited from Mr. Bates’s ill-gotten gains in the form of his increased contributions to their expenses. Mr. Bates made these increased contributions by stealing clients and contracts from Puget Sound Security, in violation of the Agreement. Ms. Bates knew or should have known that Mr. Bates was making these increased contributions by violating the Agreement. Justice demands that these funds be returned to Puget Sound Security.

B. The trial court erred in striking evidence offered by Puget Sound Security.

Trial courts must consider the factors from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997), before excluding untimely disclosed evidence. *Keck v. Collins*, 184 Wn.2d 358, 368 (2015) (citing *Burnet*). Although courts typically use the *Burnet* analysis when severe sanctions are imposed for discovery violations, the court in *Keck* held that this same analysis should be used when the trial court excludes untimely evidence submitted in response to a summary judgment motion. *Id.* at 369.

Before imposing the severe sanction of exclusion of evidence, the court must consider the three *Burnet* factors: (1) whether a lesser sanction

would probably suffice, (2) whether the violation was willful or deliberate, and (3) whether the violation substantially prejudiced the opposing party. *Id.* at 368–69. The court’s overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. *Id.* at 369 (quoting *Burnet*, 131 Wn.2d at 498). The purpose of summary judgment is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exist*. *Id.* (quoting *Preston v. Duncan*, 55 Wn.2d 678, 683 (1960)).

The trial court excluded Puget Sound Security’s supplemental brief, the declaration of Jeff Kirby, the declaration of George Schaeffer, and the declaration of D. James Davis, as well as the exhibits attached to those declarations. (CP 771–72.) As stated above, however, the only materials that were arguably untimely were the supplemental briefing and the Kirby declaration. These materials, even if untimely, were materials already on the record or already known to Ms. Bates.

There is nothing, either in the trial court’s order or in the transcript of the hearing, showing that the court considered the propriety of lesser sanctions or Puget Sound Security’s willfulness, and it only discussed prejudice with regard to the declaration that was not excluded. (CP 770–

72; RP Aug. 30, 2013, 8:4–21.) Had the trial court gone through the *Burnet* factors, it still should not have excluded this evidence.

1. The trial court should have considered lesser sanctions.

The first *Burnet* factor a trial court must consider is whether a lesser sanction would probably suffice. *Keck*, 184 Wn.2d at 369. The trial court could have imposed some sort of monetary penalty on Puget Sound Security or some other lesser sanction. This would have penalized Puget Sound Security for its late materials while still allowing it to present factual materials relevant to the motion for summary judgment. The court did not consider lesser sanctions and this factor was not met.

2. Puget Sound Security’s delays were not deliberate.

The second *Burnet* factor is whether the violation was willful or deliberate. *Keck*, 184 Wn.2d at 369. Counsel for Puget Sound Security explained that the delay in its submissions were not deliberate. Although counsel for Puget Sound Security could have coordinated its timing better, this should not be interpreted as a deliberate violation of the requirements of the civil rules. Furthermore, most of the materials deemed “untimely” were in fact submitted on time.

3. Ms. Bates would not have been prejudiced.

The third *Burnet* factor is whether the violation would have substantially prejudiced the opposing party. *Keck*, 184 Wn.2d at 369. The

only material that was arguably untimely was Mr. Kirby's declaration, which only concerned the actions of the Bateses, and the attachment to the supplemental brief, which had already been used in Ms. Bates's deposition. Ms. Bates cannot argue that she would be unfairly prejudiced by having these or any other relevant facts presented before the court.

The trial court should have evaluated the *Burnet* factors before excluding materials submitted by Puget Sound Security. If it had gone through these factors, it would have determined that exclusion was not the proper sanction for Puget Sound Security's conduct, if any sanctions were in fact warranted.

VI. CONCLUSION

The trial court erred in granting Ms. Bates summary judgment and in rejecting so many pieces of relevant evidence. Considering all of the evidence in the light most favorable to Puget Sound Security, a reasonable jury could find in favor of Puget Sound Security on its conspiracy claim, rendering summary judgment improper. In addition, Puget Sound Security's "claim" of constructive trust sufficiently put Ms. Bates on notice of its claim for unjust enrichment.

The trial court failed to review the *Burnet* factors before excluding much of Puget Sound Security's evidence. Based on the *Burnet* factors, the evidence should not have been excluded.

The trial court erred in basing its decision on Ms. Bates's motion for summary judgment on largely procedural grounds and without considering all of the facts and inferences in the light most favorable to the nonmoving party. Puget Sound Security respectfully requests that the Court of Appeals reverse the grant of summary judgment in favor of Kathryn Bates and remand the case to proceed to trial.

DATED this 22 day of June, 2016.

Respectfully submitted,



Aaron V. Roche, WSBA No. 31525

Peter Montine, WSBA No. 49815

Roche Law Group, PLLC

101 Yesler Way, Suite 603

Seattle, WA 98104

(206) 652-8670

Attorneys for Petitioner Puget Sound
Security Patrol, Inc.

APPENDIX A

PUGET SOUND SECURITY PATROL INC.
Including HONORGUARD dba Pacific Security

EMPLOYEE INTELLECTUAL PROPERTY AGREEMENT
(Including Confidentiality, Invention Assignment, Nonraiding and Noncompetition)

I, the undersigned employee, agree as follows for the benefit of Puget Sound Security Patrol, Inc., its parents, subsidiaries and affiliates (collectively "PSSP"):

1. Confidentiality. I agree that information that is not generally known to the public to which I have been or will be exposed as a result of my being employed by PSSP is confidential information that belongs to PSSP. This includes information developed by me, alone or with others, or entrusted to PSSP by its customers or others. I will hold PSSP's confidential information in strict confidence, and not disclose or use it except as authorized by PSSP and for PSSP's benefit. If anyone tries to compel me to disclose any of PSSP's confidential information, by subpoena or otherwise, I will immediately notify PSSP so that PSSP may take any actions it deems necessary to protect its interests. My agreements to protect PSSP's confidential information apply both while I am employed by PSSP and after my employment by PSSP ends, regardless of the reason it ends.

PSSP's confidential information includes, without limitation, information relating to PSSP's trade secrets, research and development, product development plans, inventions, know-how, software (including source code and object code), procedures, manufacturing, engineering, purchasing, accounting, marketing, sales, customers, suppliers, financial status or employees.

I understand that this agreement does not limit my right to use my own general knowledge and experience, whether or not gained while employed by PSSP, or my right to use information that is or becomes generally known to the public through no fault of my own, but I have the burden in any dispute of showing that information is not PSSP's confidential information.

I understand it is PSSP's policy not to improperly obtain or use confidential, proprietary or trade secret information that belongs to third parties, including others who have employed or engaged me or who have entrusted confidential information to me. I will not use for PSSP's benefit or disclose to PSSP confidential, proprietary or trade secret information that belongs to others, unless I advise PSSP that the information belongs to a third party and both PSSP and the owners of the information consent to the disclosure and use.

2. Inventions, Copyrights and Patents. PSSP owns all Inventions and Works I make, conceive, develop, discover, reduce to practice or fix in a tangible medium of expression, alone or with others, either (a) during my employment by PSSP (including past employment, and whether or not during working hours), or (b) within one year after my employment ends if the Invention or Work results from any work I performed for PSSP or involves the use or assistance of PSSP's facilities, materials, personnel or confidential information. PSSP also owns all

Inventions and Works of mine that I bring to PSSP that are used in the course of PSSP's business or that are incorporated into any Inventions or Works that belong to PSSP.

I will promptly disclose to PSSP, will hold in trust for PSSP's sole benefit, will assign to PSSP and hereby do assign to PSSP all Inventions and Works described in the prior paragraph, including all copyrights (including renewal rights), patent rights and trade secret rights, vested and contingent. I will waive and hereby do waive any moral rights I have or may have in the Inventions and Works described in the prior paragraph. I agree that all Works I produce within the scope of my employment (which shall include all Works I produce related to PSSP's business, whether or not done during regular working hours) shall be considered "works made for hire" so that PSSP will be considered the author of the Works under the federal copyright laws. At PSSP's direction and expense I will execute all documents and take all actions necessary or convenient for PSSP to document, obtain, maintain or assign its rights to these Inventions and Works. PSSP shall have full control over all applications for patents or other legal protection of these Inventions and Works.

"Inventions" means discoveries, developments, concepts, ideas, improvements to existing technology, processes, procedures, machines, products, compositions of matter, formulas, algorithms, computer programs and techniques, and all other matters ordinarily intended by the word "invention," whether or not patentable or copyrightable. "Inventions" also includes all records and expressions of those matters. "Works" means original works of authorship, including interim work product, modifications and derivative works, and all similar matters, whether or not copyrightable.

I understand that this agreement does not apply to any Invention or Work of mine for which no equipment, supplies, facilities or trade secret information of PSSP was used and which was developed entirely on my own time, unless (a) the Invention or Work relates directly to PSSP's business or actual or demonstrably anticipated research or development, or (b) the Invention or Work results from any work I performed for PSSP.

3. PSSP Materials. I will safeguard and return to PSSP when my employment ends, or sooner if PSSP requests, all documents and property in my care, custody or control relating to my employment or PSSP's business, including without limitation any documents that contain PSSP's confidential information.

4. Nonraiding of Employees. So long as I am employed by PSSP and for twenty-four (24) months after my employment ends, regardless of the reason it ends, I will not directly or indirectly solicit any employee to leave his or her employment with PSSP. This includes that I will not (a) disclose to any third party the names, backgrounds or qualifications of any PSSP employees or otherwise identify them as potential candidates for employment; (b) personally or through any other person approach, recruit or otherwise solicit employees of PSSP to work for any other employer; or (c) participate in any pre-employment interviews with any person who was employed by PSSP while I was employed by PSSP.

5. No Disparagement or Interference. I will not disparage PSSP or its business or products and will not interfere with PSSP's relationships with its customers, employees, vendors,

bankers or others. This applies both while I am employed by PSSP and after my employment by PSSP ends, regardless of the reason it ends.

6. Other Employment While Employed By PSSP. While I am employed by PSSP I will not do work that competes with or relates to any of PSSP's products or activities without first obtaining PSSP's written permission. Any business opportunities related to PSSP's business that I learn of or obtain while employed by PSSP (whether or not during working hours) belong to PSSP, and I will pursue them only for PSSP's benefit.

7. Noncompetition After Employment by PSSP Ends. For ~~thirty-six (36)~~ ^{change to 6 months} months after my employment by PSSP ends, regardless of the reason it ends, I will not, directly or indirectly: (a) sell, market or propose to sell or market products or services that compete or will compete with PSSP's then existing or reasonably anticipated products or services ("Competing Products or Services") in any geographic area where PSSP's products or services are then marketed, (b) design or develop Competing Products or Services, or (c) work for or with, or provide services or information to, any person or entity that (i) sells, markets or proposes to sell or market Competing Products or Services in any geographic area where PSSP's products or services are then marketed or (ii) is designing or developing Competing Products or Services.
*change to 6 months
I will
at 12 mt
I will
49*

I understand that in cases where this noncompetition provision does not apply, I am still subject to all other obligations I have to PSSP, including my obligations related to PSSP's inventions, copyrights and confidential information.

8. Disclosure of Other Work. ~~Before I undertake any work for myself or anyone else during my employment by PSSP or within thirty-six (36) months after my employment ends that will involve subject matter related to PSSP's activities, I will fully disclose the proposed work to PSSP.~~

9. Reasonableness of Terms. I acknowledge that the terms of this agreement are reasonably necessary to protect PSSP's legitimate business interests. I acknowledge that if my employment with PSSP ends my experience and capabilities are such that I can obtain employment that does not violate this agreement, and that an injunction to enforce this agreement will not prevent me from earning a reasonable livelihood. *K*

10. Future Consulting or Employment for PSSP. If my employment relationship with PSSP ends but PSSP employs me again or engages me as a consultant, then this agreement shall apply to my later employment(s) or engagement(s) unless they follow a period of a year or more during which I was neither employed nor engaged by PSSP. If this agreement becomes applicable to a consulting relationship, the references in this agreement to my employment by PSSP shall be treated, as appropriate, as referring to my consulting relationship with PSSP.

11. No Guarantee of Employment. I understand this agreement is not a guarantee of continued employment. My employment is terminable at any time by PSSP or me, with or without cause or prior notice, unless otherwise provided in a written employment agreement.

12. No Conflicting Agreements. I am not a party to any agreements, such as confidentiality or noncompetition agreements, that limit my ability to perform my duties for PSSP.

13. Miscellaneous. If I breach this agreement it will cause PSSP irreparable harm. If I breach or threaten to breach this agreement, PSSP will be entitled to injunctive or other equitable relief as well as money damages. If I breach this agreement, I will hold in trust for PSSP all income I receive as a result of the violation. I consent to PSSP notifying anyone to whom I may provide services of the existence and terms of this agreement. This agreement shall be governed by the internal laws of the state of Washington without giving effect to provisions thereof related to choice of laws or conflict of laws. Venue and jurisdiction of any lawsuit involving this agreement or my employment shall exist exclusively in state and federal courts in King County, Washington, unless injunctive relief is sought by PSSP and, in PSSP's judgment, may not be effective unless obtained in some other venue. If any part of this agreement is held to be unenforceable, it shall not affect any other part. If any part of this agreement is held to be unenforceable as written, it shall be enforced to the maximum extent allowed by applicable law. My obligations under this agreement supplement and do not limit other obligations I have to PSSP, including without limitation under the law of trade secrets. This agreement shall be enforceable regardless of any claim I may have against PSSP. This agreement shall survive the termination of my employment, however caused. The waiver of any breach of this agreement or failure to enforce any provision of this agreement shall not waive any later breach. This agreement is binding on me, my heirs, executors, personal representatives, successors and assigns, and benefits PSSP and its successors and assigns.

14. Introductions & Files I agree as part of my responsibilities without further compensation are to create or provide master file past and present history of every type on each client I solicit for PSSP. That if there are past employees associated with any of these clients I agree to introduce them to PSSP for an employment opportunity. I further offer that none of the known employees associated with any of these clients have been colluding to take the clients back from PSSP once they have been solicited to PSSP, by me. ~~I will provide all non-competitve agreements of these employees that I am aware of, at the consummation of my employment with PSSP.~~

asked I have reasons to contact such!

15. Wages & Payment: I agree to accept the above terms of employment with PSSP. My pay will be strictly on a commission basis at the rate of 1.5X the gross monthly billing revenues for each client that signs a PSSP contract for services when this is executed in person with a PSSP representative.

16. This offer is valid for 30 days of employment. And automatically terminates thereafter. The amounts paid to me in commissions do not represent an hourly wage. PSSP at its sole option may choose to extend this offer of employment beyond 30 days, but must do so in writing for the offer to be valid.

17. Should however, if for any reason the purposes of conversion from commissions to hourly wage become necessary, it is understood that my pay is minimum wage.

18. That my employment terminates within 72 hours automatically at anytime during this 30 day period in which I have not provided PSSP with a meeting and a signed PSSP contract with a client. ??

*non stated and
or atypical*

19. If for any reason I use/the services of others or incur expenses these will be born solely by me and I release PSSP And hold PSSP harmless from any and all types of related monetary or civil or criminal consequences.

20. PSSP as my employer will make standard payroll deductions from my commissions and pay all related payroll taxes federal state and local as required by law. I hereby testify under the penalty of perjury under the state of Washington that I am not violating any previous or existing employment agreements with others.

21. **OFF SETS:** Should for any reason/a client terminate services within ~~30~~⁷⁵ days of signing with PSSP this same amount paid of 1.5X monthly gross revenues will be refunded by me to PSSP immediately upon request.

22. That further I am testifying that I have the legal right to bring the customers I know or learn of to PSSP and without any connection to previous succusessorship or civil liability. Should at any time for any reason a government body or civil party bring claim of any type against PSSP for my actions related specifically with the clients which I solicit to PSSP, I will defend indemnify and hold harmless PSSP it's executives officers and associates. Attorney's fees will be paid by me or reimbursed immediately to PSSP by me for all of PSSP's costs and attorney fee's related to any such actions.

*with in 46
days to north
6 employees
with PSS
before
January 2
2010*

There are no other benefits or representations of employment not spelled out in writing within this agreement. My copy will become a valid offer of employment when accompanied by an authorized corporate PSSP officer's signature under mine below.

DATED this _____ day of _____, 2004.

EMPLOYEE: _____
Name:

Dated this _____ day of _____ 2004

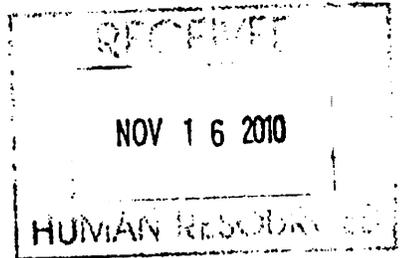
AUTHORIZED PSSP AGENT _____

TITLE _____

APPENDIX B

U. S. SECURITY ASSOCIATES, INC.

EMPLOYMENT AGREEMENT



This agreement, made this **October 26, 2010** by **William Bates** and **U. S. Security Associates, Inc.**, a Delaware corporation, with offices at 200 Mansell Court, Roswell, Georgia 30076, hereinafter referred to as "Employer", and, **William Bates**, hereinafter referred to as "Employee."

WITNESSETH

I

That the Employer hereby employs the Employee as its **Business Development Manager** located at Employer's office in or in the vicinity of **Oregon/Washington**, for a period of one year commencing on **October 18, 2010** and ending on **October 17, 2011**. On **October 18th** of 2011 and on the **18th of October** each year thereafter, the terms of employment and the provision of the contract shall be renewed for a period of one year unless the determination of either party to conclude this contract is made known to the other party by written notice given at least fourteen (14) days prior to the expiration of the term of employment or any renewal year thereof. Notwithstanding the above, either party may terminate this agreement at any time under the provision of Section VI hereof.

II

The Employee shall be responsible for implementing all Employer's policies and procedures. The Employee agrees to perform all duties assigned or delegated to his/her position and in such manner as the Employer may direct.

III

The Employee agrees to perform faithfully the duties assigned to him/her to the best of his/her ability, to devote his/her full and undivided time to the transaction of the Employer's business and to give to the Employer prompt, complete and accurate reports of and relating to his/her work in such form as the Employer may from time to time require. The Employee further agrees that during the term of this Agreement he/she will not directly or indirectly engage in or carry on any other competing or conflicting business for his/her benefit or the benefit of any other person, firm, or corporation.

IV

The Employee shall receive a yearly salary which shall be paid bi-weekly and reviewed in accordance with policy. It is understood and agreed that the normal deductions will be made from said salary.

V

In addition, Employee may receive vacations, benefits, and other forms of compensation as the Employer may deem appropriate and in accordance with Employer's policies.

VI

- A. Employer reserves the right to immediately discharge Employee if the services of the Employee become unsatisfactory to the Employer.
- B. Either the Employer or the Employee may terminate this contract without cause by giving fourteen days notice of termination (the "Notice Period") to the other party. Employer reserves the right to determine whether the Employee shall work during the Notice Period. If the Employer determines that the Employee shall not work all or any part of the Notice Period, then this contract shall terminate upon the date of the termination notice, and the employer shall continue to pay the employee's salary for two weeks from the date of the termination notice.
- C. If the Employer terminates the Employee without cause, the Employee shall receive a severance payment of two weeks severance. An employee who is entitled to receive a severance payment under this paragraph is not entitled to receive the pay described in paragraph VI.B.

VII

This contract shall inure to the benefit of and shall be binding upon the Employer, its successors and assigns. Should the Employer at any time be merged into or consolidated with another corporation, or should substantially all of the assets of the Employer be transferred to another corporation, the provisions of this contract shall be binding upon and inure to the benefit of the corporation resulting from such merger or consolidation or to which substantially all of the assets of the Employer shall be transferred. This provision shall apply in the event of any subsequent merger, consolidation or transfer, and such other corporation shall, for all purposes of this contract, be deemed the Employer. This agreement is not assignable by the Employee.

VIII

Employee acknowledges and agrees that during the course of his/her employment: Employee has been and/or will be provided with the benefit of access to Employer's customers and employees; Employer has and/or will place Employee in a position of trust and confidence with respect to Employer's customers and employees; that the goodwill customer relationships and contacts constitute substantial assets of Employer which have been acquired and/or developed at considerable expense to Employer; and Employee has and/or shall continue to receive direct financial remuneration as a result of the goodwill established by the Employer with such customers. As further consideration for the covenants contained herein, Employee shall receive certain benefits and severance pay as described in Paragraphs V and VI.

Employee agrees that the restrictions set forth below are necessary and reasonable for the protection of the goodwill, customer relationships, employee relationships and business of Employer and therefore covenants as follows:

Employee agrees that from the commencement of his/her employment until the termination of his/her employment and for a period of two (2) years following the termination of such employment (whatever the reasons for such termination may be and whether such termination is voluntary or involuntary) that the Employee will not:

- A. Directly or indirectly, alone or in any capacity, within the geographic area in which he/she actively works or worked for Employer or within the geographic area of Employee's responsibilities performed while in the employ of Employer, solicit, divert, accept or take away for any competing business any customer of Employer who was such at any time during the one (1) year immediately preceding the termination of Employee's employment.
- B. Directly or indirectly, alone or in any capacity, within the geographic area in which he/she works or worked for Employer or within the geographic area of Employee's responsibilities performed while in the employ of Employer, solicit, divert, hire or take away for any competing business any other employee of Employer who was such at any time during the one (1) year immediately preceding or following the termination of Employee's employment.
- C. Directly or indirectly, alone or in any capacity, within the geographic area in which he/she actively works or worked for Employer or within the geographic area of Employee's responsibilities performed while in the employ of Employer, solicit, divert, accept or take away for any competing business any prospective customer of

Employer whom the Employee actively solicited during the one (1) year immediately preceding the termination of Employee's employment.

The parties agree that if the scope or enforceability of the restrictive covenants set forth in this Article VIII is in any way disputed at any time, it is the intent of such parties that the court or other trier of fact shall modify and enforce the covenants to the full extent required to render the same enforceable.

IX

In the event that any judgment by a court holds any paragraph of Section VIII invalid and that judgment is ultimately reversed on final appeal from which no appeal is taken, the two-year period set forth in the first paragraph of Section VIII shall be extended for a period equal to the difference between two years and the period after termination during which Employee complied with the paragraph that was initially adjudged invalid, such extension period to commence on the day after such judgment of reversal.

X

Employee covenants and agrees, which covenant and agreement is of the essence of this agreement, that upon termination of his/her employment, whether voluntary or involuntary, he/she will promptly deliver to the Employer all property, customer lists, sales information, memoranda, documents containing trade secrets, information relating to Employer's business and other confidential information and all other property belonging to the Employer and any and all copies thereof, and that he/she will not, either during the term of his/her employment under this agreement or any time thereafter, (1) disclose to any person, firm, partnership, association or corporation, other than Employer, any trade secrets or other confidential information which was disclosed to him/her or came within his/her knowledge during the course of his/her employment, or (2) make or cause to be made any use of such trade secrets or confidential information.

XI

- A. Each section, paragraph and subparagraph contained in this agreement and each covenant and obligation of the Employee hereunder is separable and independent and in the event any section, paragraph, subparagraph, covenant or obligation is held invalid or unenforceable, it shall affect neither the validity or enforceability of any other section, paragraph, subparagraph, covenant or obligation contained in this agreement.

B. The covenants of Employee set forth in this agreement shall be construed as independent covenants and the existence of any claim, demand, action or cause of action of Employee against Employer, whether predicated upon this agreement or otherwise, shall not constitute a defense to the enforcement by the Employer of any of the covenants contained herein. Furthermore, the parties agree that any breach of this agreement by Employee may result in irreparable injury to the Employer, and therefore, in addition to all other remedies provided by law, Employee agrees and consents that the Employer shall be entitled to an injunction to prevent a breach or contemplated breach of any of the covenants of the Employee contained herein.

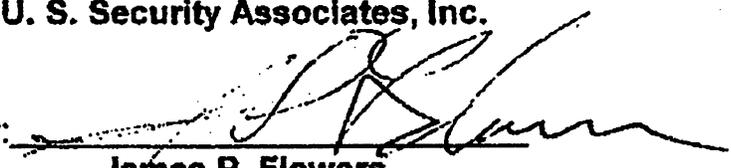
XII

This agreement supersedes and cancels all prior agreements between the parties and represents the entire agreement between the parties or between Employer and Employee. No modification of the terms of this agreement shall be effective unless such modification shall be in writing and shall be signed by both Employer and Employee.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first aforesaid.

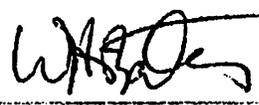
U. S. Security Associates, Inc.

By: _____


James P. Flowers
Director of Administration

The undersigned acknowledges that he/she has read and understands the provisions of the Agreement and agrees to be bound thereby.

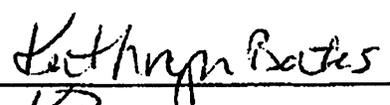
By: _____


William Bates

Date: _____

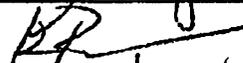
11/16/10

Witnessed By: _____



Date: _____

2/5/01 EDITION


11/18/10

APPENDIX C



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

WILLIAM BATES, an individual,

Plaintiff,

vs.

PUGET SOUND SECURITY &
PATROL, INC., a Washington
corporation, it's owner and officers and
George Schaeffer an individual, and
U.S. SECURITY ASSOCIATES, INC.,
a Delaware corporation, it's owners and
officers

Defendants.

NO. 13-2-30601-4 SEA

COMPLAINT FOR BREACH OF
CONTRACT, DEFAMATION,
INTENTIONAL INTERFERENCE OF A
BUSINESS OPPORTUNITY AND
CONSPIRACY

COME NOW the plaintiff, by and through William Bates, Pro Se of record, and
for his cause of action against the defendants, allege as follows:

I. PARTIES

1. Plaintiff. Plaintiff William Bates ("Bates") is an individual and is
now, at all times mentioned in this Complaint, a resident of King County, Washington

1 2. Defendant Puget Sound Security & Patrol, Inc. Defendant Puget
2 Sound Security & Patrol, Inc. ("PSSP") is a Washington corporation, with its principal
3 place of business in King County, Washington.

4 3. Defendant U.S. Security Associates, Inc. Defendant U.S. Security
5 Associates, Inc. ("USSA") is a Delaware corporation, with branch offices through the
6 United States, including in King County, Washington.

7
8 II. JURISDICTION AND VENUE

9 4. This court has jurisdiction and venue is properly laid with this court
10 because this action involves acts, breach of contract and other claims which occurred in
11 King County, Washington.

12 III. FACTS

13 5. Bates was employed as a Business Development Manager with PSSP from
14 September 1, 2009 until early November, 2010. PSSP is in the business of security and
15 patrol. Upon accepting his position with PSSP, Bates executed an employment
16 agreement, in which Bates promised to maintain the confidentiality of PSSP's trade
17 secrets and other confidential and proprietary information, and to refrain, for twenty-four
18 months, from competition with PSSP in the geographic area where PSSP's services were
19 marketed.
20

21
22 6. In early November, 2010, Bates left his position at PSSP and accepted a
23 position with USSA. Prior to hiring Bates, USSA was informed by Bates that a non-

1 compete agreement was entered into between Bates and PSSP, which was acknowledged
2 by USSA. As a condition to Bates leaving PSSP and accepting an employment position
3 with USSA, USSA promised Bates that Bates would be indemnified for all costs and fees
4 for any legal action taken against Bates by PSSP as a result of the existing non-compete
5 agreement. As a result of USSA's promise to indemnify Bates, Bates resigned his
6 position at PSSP and began working for USSA.
7

8 7. On or about August 11, 2011, PSSP filed a lawsuit against Bates and
9 USSA, under King County Cause No. 11-2-29147-2 SEA. The claims against Bates
10 included breach of contract, breach of fiduciary duty of loyalty and tortious interference
11 of with business and contractual relationships.
12

13 8. Despite repeated requests and demands for indemnification for Bates,
14 USSA denied Bates' requests for indemnification for the costs and fees associated with
15 the lawsuit. As a result, Bates has incurred fees exceeding \$75,000 and continue to
16 increase through the course of the lawsuit.
17

18 9. On or about February 1, 2013, PSSP and USSA settled their claims and
19 PSSP dismissed USSA from the lawsuit. It was discovered thereafter that PSSP and
20 USSA drafted and distributed a letter, accusing Bates of misconduct and libelous acts
21 which Bates has denied and has yet to be proved by any party. It was further discovered
22 that this letter, signed by L.J. Paul Lutz as representative of USSA, was distributed by the
23 defendants to all prospective employers of Bates, preventing him from gaining
24

1 employment in the security industry. The letter was intended to harm Bates financially
2 and prevent him from ever working in the close-knit security industry.

3 **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

4 **(Bates v. U.S. Security Associates)**

5 10. Bates incorporates herein by reference all preceding paragraphs.

6
7 11. Bates only agreed to quit PSSP and begin work with USSA if USSA
8 would indemnify him for all costs, expenses and damages brought against PSSP. USSA
9 expressly agreed that it would indemnify Bates in the event any action was taken against
10 Bates. Since this action was filed in August, 2011, Bates has incurred fees and costs
11 exceeding \$75,000.00, and despite demand for payment for these costs and fees, USSA
12 has denied or otherwise ignored such requests by Bates.

13 12. USSA has failed or refused to repay Bates his costs and fees, currently at
14 \$150,000.00, plus any future costs, fees and possible damages to PSSP, despite repeated
15 demands by Bates for payment. USSA breached its agreement in the total amount of
16 \$150,000.00 to date, plus prejudgment and post-judgment interest of 18% per annum, as
17 well as attorney's fees and costs incurred to collect all the amounts due.

18
19 13. Bates also claims in the alternative against USSA for Quasi Contract
20 and/or Implied Contract, Promissory Estoppel, and/or Unjust Enrichment to recover the
21 same amount as stated in the preceding paragraph.
22

1 Bates specifically reserves the right to amend this cross claim, to add additional
2 affirmative defenses, counterclaims or cross-claims, third-party claims, or to identify
3 additional responsible third party(ies) as additional facts are obtained through discovery.

4 WHEREFORE, Plaintiff William Bates respectfully pray that the Court grant the
5 following relief:

- 6 1. An award to Bates damages against PSSP and USSA in an amount to be
7 established at the time of trial;
- 8 2. An award to Bates of his reasonable attorneys' fees, costs, and expenses;
- 9 3. An award to Bates of his reasonable attorneys' fees, costs, and expenses
10 pursuant to RCW 4.84.185; and
- 11 4. Such other and further relief as the Court deems just and equitable.

12 DATED this 2nd day of August, 2013.

13
14
15
16 By: /s/ William H. Bates Jr.
17 14422 121st Place NE
18 Kirkland, WA 98034
425-533-5336

19
20 I certify under penalties of perjury under the laws of the State of Washington that
the foregoing is true.

21 DATED: August ____, 2013 at , WA.

22  8/23/13
23 WILLIAM BATES

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

7	PUGET SOUND SECURITY PATROL, INC.,)	Case No.: 11-2-29147-2 SEA
8	a Washington Corporation,)
9	Plaintiff,)
10	vs.)
11	WILLIAM BATES, an individual,)
12	KATHRYN BATES, his wife, and the marital)
	community composed thereof,)
	Defendants.)

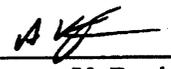
NOTICE OF UNAVAILABILITY

PLEASE TAKE NOTICE that the undersigned attorney of record for Puget Sound Security Patrol, Inc., will be out of the office and unavailable to respond to motions, depositions, or other actions during the following dates and requests that no motions, notices of hearing, deposition or other discovery be set or served such that they must respond or appear during this period:

From	Until	Returning
May 20, 2013	May 24, 2013	May 27, 2013
July 8, 2013	July 17, 2013	July 18, 2013
August 13, 2013	August 15, 2013	August 16, 2013
December 20, 2013	December 27, 2013	December 30, 2013

DATED this 21 day of March, 2013.

ROCKE | LAW GROUP, PLLC



 Aaron V. Rocke, WSBA #31525
 Attorney for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DECLARATION OF SERVICE

I caused a copy of the foregoing Notice of Unavailability to be served to the following in the manner indicated

Via U.S. Mail:

Robert Kaufman
Law Offices of Robert Kaufman, P.S.
2155 112th Avenue NE
Bellevue, WA 98004

Terence Wong
Newport Law Group, PC
12835 Newcastle Way, Suite 301
Newcastle, WA 98056

On today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

Signed this day in Seattle, Washington.

DATED this 21st day of March, 2013.



Jessica Williams, Legal Assistant

APPENDIX E

From: William Bates
To: hsturm@ussecurityassociates.com
Sent: 8/31/2011 9:45:11 AM
Subject: Email Contact

Henry:

If you need anything here is an email address I set up through my wife's company. Not much to be said, I hope you are doing well!

WB2

Ex 3

DECLARATION OF SERVICE

I caused a copy of the foregoing Petitioner's Opening Brief to be served to the following in the manner indicated:

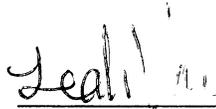
Via E-Mail:

Kathryn A. Bates
kathrynabates@hotmail.com

On today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

Signed and dated this 22 day of June, 2016, in Seattle,
Washington.



Leah VanHoeve, Legal Assistant



2016 JUN 22 PM 4: 02
CLERK OF SUPERIOR COURT
COUNTY OF KING
WASHINGTON