

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION**

**UNIVERSAL PROTECTION SERVICE, LP, §
A California Limited Partnership §**

Plaintiff, §

v. § 2:16-cv-00097

**MARK THORNBURG, an individual, §
MIKE WEATHERL, an individual, and §
AGTAC SERVICES, LLC, a Nebraska §
Limited Liability Company §**

Defendants. §

**BRIEF IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER AND IMMEDIATE EX PARTE HEARING**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT1

FACTUAL BACKGROUND.....3

I. Universal Protection Is a Leader in the Security Industry and Greatly Values Its Customer Relationships and Confidential Information.3

II. Universal Protection’s Acquisition of ABM’s Security Business.4

III. Universal Protection Utilizes Several Measures to Keep Its Customer Information Secret and Confidential.....4

IV. Defendants Have Engaged in a Malicious Scheme Resulting in the Loss of Universal Protection’s JBS-Cactus Account.5

ARGUMENT8

I. The Applicable Legal Standard Warrants Issuance of a TRO.....8

II. There Is a Substantial Likelihood That Universal Protection Will Succeed on the Merits.....9

A. Universal Protection Will Succeed on the Merits of Its Claim for Breach of Contract Against Thornburg.9

1. Thornburg Entered into a Binding Contract with Universal Protection Containing Valid and Enforceable Restrictive Covenants.9

B. Universal Protection Will Succeed on the Merits of Its Claim for Misappropriation of Trade Secrets Against All Defendants.....13

1. Standard for Trade Secret Protection in Texas.13

2. Universal Protection’s Confidential Customer Information Regarding the JBS-Cactus Site is Entitled to Protection as a Trade Secret.....15

III. Universal Protection Has Established a Substantial Threat of Immediate and Irreparable Harm For Which It Has No Adequate Remedy at Law.20

IV. Threatened Injury to Plaintiff Outweighs Damage to Defendants.....22

V. Temporary Injunctive Relief Will Not Disserve the Public Interest.....23

CONCLUSION.....24

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Alliantgroup, LP v. Feingold</i>	
803 F. Supp. 2d 610 (S.D. Tex. 2011)	15
<i>Am Castle & Co. v. Byrne</i>	
123 F. Supp. 3d 909, 916 (S.D. Tex. 2015)	14
<i>Amerispec, Inc. v Metro Inspection Serv., Inc.</i>	
No. 3:01-cv-946, 2001 WL 770999 (N.D. Tex. July 3, 2001).....	21
<i>Avera v. Clark Moulding</i>	
791 S.W.2d 144 (Tex. Ct. App. 1990)	13
<i>In re Bass</i>	
113 S.W.3d 735 (Tex. 2003).....	14, 16, 17, 18
<i>Brink’s Inc. v. Patrick</i>	
No. 3:14-cv-775, 2014 WL 2931824 (N.D. Tex. June 27, 2014).....	23
<i>Cambridge Strategies, LLC v. Cook</i>	
No. 3:10-cv-2167, 2010 WL 5139843 (N.D. Tex. Dec. 17, 2010).....	18
<i>Canal Auth. v. Callaway</i>	
489 F.2d 567 (5th Cir. 1974) (en banc)	8
<i>Chacon v. Granata</i>	
515 F.2d 922 (5th Cir.), cert. denied, 423 U.S. 930, 96 S. Ct. 279 (1975).....	20
<i>Clark v. Princhard</i>	
812 F.2d 991 (5th Cir. 1987)	8
<i>Crouch v. Swing Mach. Co.</i>	
468 S.W.2d 604 (Tex. Ct. App. 1971).....	15
<i>Evans Consoles, Inc. v. Hoffman Video Sys., Inc.</i>	
No. 3:01-cv-1333, 2001 WL 36238982 (N.D. Tex. Dec. 6, 2001).....	19, 22
<i>Flake v. EGL Eagle Global Logistics LP</i>	
No. 14-01-1069-CV, 2002 WL 31008136 (Tex. Ct. App. Sept. 5, 2002)	15, 18
<i>FMC Corp. v. Varco Int’l, Inc.</i>	
677 F.2d 500 (5th Cir. 1982)	21
<i>Fox v. Tropical Warehouses, Inc.</i>	
121 S.W.3d 853 (Tex. Ct. App. 2003)	14
<i>Gen. Univ. Sys., Inc. v. Lee</i>	
379 F.3d 131 (5th Cir. 2004)	14
<i>Gonzales v. Raich</i>	
545 U.S. 1 (2005).....	20
<i>Halliburton Energy Servs., Inc. v. Axis Techs., LLC</i>	
444 S.W.3d 251 (Tex. Ct. App. 2014)	13
<i>Heil Trailer Int’l Co. v. Kula</i>	
542 F. App’x 329 (5th Cir. 2013)	17
<i>Hyde Corp. v. Huffines</i>	
314 S.W.2d 763 (Tex. 1958).....	22
<i>Merrill Lynch, Pierce, Fenner & Smith v. Wright</i>	
No. 3:93-cv-1101, 1993 WL 13036199 (N.D. Tex. July 2, 1993).....	19

<i>Metallurgical Indus. Inc. v. Fourtek, Inc.</i> 790 F.2d 1195 (5th Cir. 1986)	18, 23
<i>Miller v. Talley Dunn Gallery, LLC</i> No. 05-15-444-CV, 2016 WL 836775 (Tex. Ct. App. Mar. 3, 2016).....	14, 15, 18
<i>Miss. Power & Light Co. v. United Gas Pipeline</i> 760 F.2d 618 (5th Cir. 1985)	8
<i>Molex, Inc. v. Nolen</i> 759 F.2d 474 (5th Cir. 1985)	18
<i>Picker Int’l, Inc. v. Blanton</i> 756 F. Supp. 971 (N.D. Tex. 1990)	21, 22, 23
<i>Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.</i> 374 S.W.3d 488 (Tex. Ct. App. 2012)	18
<i>Rimkus Consulting Group, Inc. v. Cammarata</i> 688 F. Supp. 2d 598 (S.D. Tex. 2010)	17, 18
<i>Sirius Computer Solutions, Inc. v. Sparks</i> No. 5:15-cv-698, 2015 WL 5821840 (W.D. Tex. Oct. 5, 2015).....	23
<i>Taco Cabana Int’l, Inc. v. Two Pesos, Inc.</i> 932 F.2d 1113 (5th Cir. 1991)	17
<i>Transparent Translations, Inc. v. Leslie</i> 594 F. Supp. 2d 742 (S.D. Tex. 2009)	20
<i>Waste Mgmt. of Tex., Inc. v. Abbott</i> 406 S.W.3d 626 (Tex. Ct. App. 2013)	14
<i>Weed Eater, Inc. v. Dowling</i> 562 S.W.2d 898 (Tex. Ct. App. 1978)	21
<i>Wellogix, Inc. v. Accenture, LLP</i> 716 F.3d 867 (5th Cir. 2013)	13
<i>Williams v. Compressor Eng’g Corp.</i> 704 S.W.2d 469 (Tex. Ct. App. 1986)	21
<i>Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP</i> 422 S.W.3d 821 (Tex. Ct. App. 2014)	9
<i>Zoecon Indus. v. Am. Stockman Tag Co.</i> 713 F.2d 1174 (5th Cir. 1983)	13
<u>Statutes</u>	
Economic Espionage Act of 1996, 18 U.S.C. §§ 1831, <i>et seq.</i>	19
18 U.S.C. § 1836(b)(1)	19
18 U.S.C. § 1836(b)(3)(A)(i)	19
18 U.S.C. § 1836(b)(3)(A)(ii)	19
18 U.S.C. § 1839(3)	19
Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376.....	1, 19, 20
Uniform Trade Secrets Act, Tex. Civ. Prac. & Rem. Code §§ 134A.001, <i>et seq.</i>	<i>passim</i>
<u>Other Authorities</u>	
Federal Rule of Civil Procedure 65	8

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**BRIEF IN SUPPORT OF PLAINTIFF’S EMERGENCY MOTION FOR
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TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW PLAINTIFF UNIVERSAL PROTECTION SERVICE, LP (“Plaintiff” or “Universal Protection”) and files this Brief in Support of Plaintiff’s Emergency Motion for Temporary Restraining Order and Immediate Ex Parte Hearing against Defendants Mark Thornburg (“Thornburg”), Mike Weatherl (“Weatherl”), and AgTac Services, LLC (“AgTac,” and collectively, “Defendants”) respectfully requesting the Court to immediately enjoin Defendants from violating their respective contractual obligations and from continuing to engage in certain acts in violation of Universal Protection’s rights pursuant to Texas’s Uniform Trade Secrets Act (“TUTSA”), Tex. Civ. Prac. & Rem. Code § 134A.001, *et seq.*, the Defend Trade Secrets Act of 2016 (“DTSA”), Pub. L. No. 114-153, 130 Stat. 376, and the common law.

PRELIMINARY STATEMENT

1. Following a clear playbook and anticompetitive course of conduct, Defendants Weatherl and AgTac have used existing Universal Protection employees, like Defendant Thornburg, to breach their duty of loyalty and to steal customers and employees by secreting misappropriated trade secrets and confidential information. Indeed, Weatherl and AgTac, a direct

competitor of Universal Protection in the security services industry, has engaged in the same conduct in Nebraska, thus necessitating a Complaint and Motion for a Temporary Restraining Order and a resulting Order in the U.S. District Court for the District of Nebraska. *See Universal Protection Service LP v. AgTac Security, LLC, et al.*, No. 4:16-cv-03039 (D. Neb. filed Mar. 21, 2016). App. 35-82. Weatherl and AgTac have now extended their tentacles into the Northern District of Texas by poaching Defendant Thornburg, who is Universal Protection's Director of Security for an important customer site, JBS USA facility in Dumas, Texas (also known as "JBS-Cactus"). Correspondingly, AgTac has unlawfully poached the customer account for JBS-Cactus, as well as dozens of employees from this account.

2. Thornburg is not innocent in this scheme. Unbeknownst to Universal Protection until very recently, despite working as the Director of Security at the JBS-Cactus facility, Thornburg simultaneously served (and continues to serve) as owner, manager, registered agent, and employee of AgTac. Such actions clearly violate his contractual, statutory and common law obligations to Universal Protection. Incredibly, while actively employed by Universal Protection and in collusion with Weatherl, Thornburg was a central player in AgTac's poaching of JBS-Cactus from Universal Protection. Thornburg was intimately involved in the creation of the revised pricing, budget, operational and employee structure proposal that Universal Protection submitted to JBS-Cactus in April 2016, and he subsequently funneled that confidential information to Weatherl for the benefit of AgTac. Just last week, JBS informed Universal Protection that it lost the JBS-Cactus account because it was "significantly underbid" by AgTac.

3. Thornburg has similar proprietary and confidential information for various other Universal Protection customers in West Texas, including Cargill, Inc. and Tyson Foods. Therefore, Universal Protection seeks the injunctive relief set forth herein to protect its business from further irreparable harm as a result of Defendants' unlawful conduct. Given Defendants' brazen and continued tortious acts in the face of valid contractual agreements and Texas's prohibition on the actual and threatened misappropriation of trade secrets, a Temporary Restraining Order is both warranted and necessary to prevent further irreparable harm.

FACTUAL BACKGROUND

I. UNIVERSAL PROTECTION IS A LEADER IN THE SECURITY INDUSTRY AND GREATLY VALUES ITS CUSTOMER RELATIONSHIPS AND CONFIDENTIAL INFORMATION.

4. Universal Protection is a security services company, which means that it provides security solutions and supplies security guards to a wide array of end-customer businesses and sites. App. 83. (Richmond Aff. ¶ 3). It serves customers across Texas, the Great Plains and throughout the country. App. 84. (Richmond Aff. ¶ 4). Over the years, Universal Protection has developed a business plan for security solutions that is the primary key to its growth and success. App. 84. (Richmond Aff. ¶ 8). Universal Protection and several of the entities it has acquired have invested a great deal of time and money in the development of this specialized platform of training, service, and crafting solutions to customer needs and related marketing and referrals. *Id.* As a result, Universal Protection has developed a reputation for high performance, reliability, and customer satisfaction. *Id.* Every customer has different security needs according to its business, user demographic, and requests of the owners and operators. App. 84. (Richmond Aff. ¶ 9). Even among similar businesses, the best security approach will differ based on the personalities of its patrons and preferences of the owners or operators. *Id.*

5. Universal Protection assesses the needs of its customers and designs individually-crafted security platforms suited to each customer. *Id.* Various levels of managers and site supervisors for Universal Protection are well-versed in this methodology and utilize it to craft security proposals for new and existing customers. *Id.* Because each customer and property is unique, it can take years to cultivate the proper relationship in order to fully understand the needs and particularities of customers and properties in order to create the best custom-designed security solutions possible. App. 85. (Richmond Aff. ¶¶ 10-11). Thus, longstanding and integrated customer relationships and related goodwill provide Universal Protection (and its acquired entities like ABM) with a fair competitive advantage in the industry. App. 85. (Richmond Aff. ¶¶ 10-12).

II. UNIVERSAL PROTECTION'S ACQUISITION OF ABM'S SECURITY BUSINESS.

6. Due to Universal Protection's success, the company has grown strategically through the acquisition of other security businesses and related goodwill. App. 85. (Richmond Aff. ¶ 14) When Universal Protection acquires a company, much of the value of the purchase lies in the target company's trade secrets and goodwill—specifically, in the relationships held by the acquired company's employees and their intimate knowledge of the inner workings of various customers and properties. *Id.* To further these goals, on October 26, 2015, Universal Protection acquired the entire security business of ABM. App. 86. (Richmond Aff. ¶ 16). Per the Asset Purchase Agreement between Universal Protection and ABM (the "APA"), the "security business" included, among other things, ABM's security contracts and all of its employment and restrictive covenant agreements. *Id.* After the acquisition, Thornburg, who was then an ABM employee, continued to work on behalf of Universal Protection and became a full-time Universal Protection employee. App. 94-96. (Nagy Aff. ¶¶ 3-4).

7. Critically, Universal Protection purchased ABM's goodwill with its customers, along with the particularized knowledge, trade secrets, and confidential and proprietary information that ABM employees had acquired as a result of their employment with ABM. App. 86. (Richmond Aff. ¶ 17). Like Universal, ABM developed its customer base through sustained effort dedicated to strategically identifying particular customers, assessing their needs, and creating specialized and confidential security solutions for those customers. ABM's customer identities were not publicly known, nor was its methodology for identifying potential customers or its strategy in preparing and delivering bids for those customers. App. 94-95. (Barlev Aff. ¶¶ 1-4).

III. UNIVERSAL PROTECTION UTILIZES SEVERAL MEASURES TO KEEP ITS CUSTOMER INFORMATION SECRET AND CONFIDENTIAL.

8. Universal Protection maintains comprehensive information regarding each existing customer in its "WinTeam" database. App. 85. (Richmond Aff. ¶ 13). This database includes details of a customer's service contract with Universal Protection, including their pricing, assigned

guards, chosen services, and billing practices. *Id.* WinTeam also contains information regarding each individual guard's personal information, payroll information, benefits and wages, which may be unique pursuant to each customer site. *Id.* Universal Protection protects the confidential customer and employee information stored in WinTeam by limiting access to the system through password protection and only offering passwords and log-in credentials to senior level employees. App. 86 (Richmond Aff. ¶ 19). Thus, only a select coterie of high-level employees have passwords and log-in credentials that enable them complete access to all of the information within WinTeam. *Id.*

9. Additionally, Universal Protection requires all management, administrative and sales employees to sign confidentiality agreements in which they promise not to disclose to Universal Protection's competitors any trade secrets, including information about employees, customers, training and internal operating procedures. App. 86. (Richmond Aff. ¶ 20). Only employees of Universal Protection have access to the company's standard operating procedures and reports. *Id.* Universal Protection also takes additional steps to protect the confidentiality of its training programs, operational protocols, training and operational publications, and customer information. App. 87. (Richmond Aff. ¶ 21). For example, each laptop issued to an employee is password-protected and requires multiple log-ins to access the application and security software programs. *Id.* Similarly, all mobile devices that employees use to access company information, including iPhones, Androids and tablets, are required to be password-protected. App. 87. (Richmond Aff. ¶ 22). Universal Protection also employs an array of physical security measures. App. 87. (Richmond Aff. ¶ 23).

IV. DEFENDANTS HAVE ENGAGED IN A MALICIOUS SCHEME RESULTING IN THE LOSS OF UNIVERSAL PROTECTION'S JBS-CACTUS ACCOUNT.

10. Thornburg served as Director of Security for ABM, and later for Universal Protection, at JBS-Cactus, a beef processing facility in Dumas. App. 94. (Nagy Aff. ¶ 3). Universal Protection officially hired Thornburg as a full-time Universal Protection employee on or around January 22, 2016 following the acquisition of ABM. App. 95. (Nagy Aff. ¶ 4). In his

role as Director of Security at JBS-Cactus, Thornburg has been responsible for managing and maintaining the customer relationship, executing the security operational plan as agreed to between Universal Protection and JBS USA, scheduling and payroll for the security guards and, to an extent, their hiring and firing. App. 95. (Nagy Aff. ¶ 5).

11. The JBS-Cactus account is a remote site located about one hour north of Amarillo, Texas. App. 95. (Nagy Aff. ¶ 7). As a result of this relatively isolated location, Thornburg's interaction with the customer was critical. *Id.* Universal Protection leadership relied heavily not only on Thornburg's inside knowledge of JBS-Cactus, which he learned entirely through his employment with ABM and Universal Protection, but also on the interpersonal communication skills he developed with the customer contacts at JBS-Cactus, including the security guards who worked for him. *Id.* Because of his critical role, Thornburg's opinion concerning staffing and operations was highly valued. App. 95. (Nagy Aff. ¶ 8).

12. Thornburg had regular access to WinTeam, which included all customer contract information, wages, payroll, billing rates, and personal employee information. App. 95. (Nagy Aff. ¶ 9). Additionally, Thornburg had access to and knowledge of the competitive customer pricing methodologies and strategies employed by Universal Protection to propose competitive bids. *Id.* Thornburg had also worked with other ABM and Universal Protection customers in West Texas, including Cargill and Tyson Foods, and he had access to and knowledge of confidential customer information, pricing and contract details, wages and payroll data at various customer sites in West Texas. *Id.*

13. For these reasons, Thornburg signed an Employment and Non-Solicitation Agreement (the "Thornburg Agreement") when he was hired by Universal Protection. As consideration for the Thornburg Agreement, Universal Protection promised to provide and, in fact, did provide Thornburg with access to confidential information and specialized training. The Thornburg Agreement contains, among other things, conflict, non-interference, non-raiding, confidentiality and non-disclosure provisions. Thornburg also agreed to the reasonableness of the provisions contained in the Thornburg Agreement and acknowledged that any breach would result

in “irreparable damage and continuing injury” to Universal Protection, and that in such event, “Universal Protection shall be entitled to an injunction ... enjoining [him] from committing any violation of those covenants.” *See, generally*, App. 5-10.

14. Despite these reasonable covenants with Universal Protection, however, Thornburg engaged with AgTac as early as February 2016. App. 28. On the website for the Texas Department of Public Safety (“TDPS”), Thornburg is identified as an owner/partner/shareholder/officer for AgTac, and his AgTac “hire date” is listed as February 15, 2016. App. 28. Moreover, the TDPS website lists 26 AgTac employees in addition to Thornburg and Weatherl. App. 28-31. Out of these 26 employees, **23** are current or former employees of Universal Protection. App. 87. (Richmond Aff. ¶ 26).

15. In early April 2016, JBS-Cactus requested that Universal Protection submit a proposed pricing structure and budget based on new security hours identified by the customer. App. 96. (Nagy Aff. ¶ 11). Thornburg was intimately involved in the creation of the revised pricing, budget, operational and employee structure, and he submitted the proposal to JBS-Cactus on Universal Protection’s behalf. App. 96. (Nagy Aff. ¶¶ 12-13). Indeed, nobody knew the site or the customer’s preferences better than Thornburg, and Universal Protection relied upon him in this regard. *Id.*

16. Last week, Universal Protection learned from JBS-Cactus that it had lost the account because it had been “significantly underbid” by AgTac. App. 96. (Nagy Aff. ¶ 14). Following this news, Universal Protection investigated and uncovered that Thornburg—while working as Universal Protection’s Director of Security to JBS-Cactus—contemporaneously served (and continues to serve) as owner, manager, registered agent, and employee of Weatherl’s company, AgTac, in direct violation of his contractual, statutory and common law obligations to Universal Protection. App. 96. (Nagy Aff. ¶15). Most egregiously, Thornburg conspired with Weatherl to poach JBS-Cactus from Universal Protection along with the security officers staffed at the site. Thornburg has similar proprietary and confidential information for various other

Universal Protection customers in West Texas, including Cargill and Tyson Foods. App. 96. (Nagy Aff. ¶ 10).

ARGUMENT

I. THE APPLICABLE LEGAL STANDARD WARRANTS ISSUANCE OF A TRO.

17. The issuance of a Temporary Restraining Order (“TRO”) is proper pursuant to Federal Rule of Civil Procedure 65. In determining whether to issue a TRO, the Fifth Circuit has set out the following four factors: (1) substantial likelihood of success on the merits; (2) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (3) that greater injury will result in denying the temporary restraining order than from its being granted; and (4) that a temporary restraining order will not disserve the public interest. *Clark v. Princhar*d, 812 F.2d 991, 993 (5th Cir. 1987); *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (en banc). The party seeking the TRO must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order can be granted. *See Miss. Power & Light Co. v. United Gas Pipeline*, 760 F.2d 618, 621 (5th Cir. 1985).

18. Here, Universal Protection satisfies all four factors necessary for issuance of a TRO. The clear evidence of wrongdoing by Defendants firmly establishes that Universal Protection will likely succeed on the merits of its claims for breach of contract and misappropriation of trade secrets.¹ As a result of Defendants’ breaches of their contractual promises, together with the actual and threatened misappropriation of trade secrets, Universal Protection will continue to suffer immediate and irreparable harm in the form of lost business, employees and goodwill if the Court does not grant a TRO. Surely, greater harm will result to Universal Protection in the same form of loss from the Court denying Universal Protection’s request than from its being granted, as evidenced by Universal Protection already losing one customer account and many employees due to Defendants’ nefarious conduct and risks losing additional business with each passing day. Finally, granting a TRO will not disserve the public

¹ While Universal Protection technically does not rely on the other Counts in the Complaint for prospective injunctive relief, these additional Counts most assuredly evince a steady pattern of unlawful conduct by Defendants.

interest as it is in the public interest to uphold valid agreements and prevent the misappropriation of trade secrets.

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT UNIVERSAL PROTECTION WILL SUCCEED ON THE MERITS.

A. Universal Protection Will Succeed on the Merits of Its Claim for Breach of Contract Against Thornburg.

19. The Affidavits submitted with Universal Protection's Complaint and the exhibits attached thereto make a strong *prima facie* showing that Thornburg has materially breached his contractual obligations. Without immediate injunctive relief, he will continue to do so.

20. "Under Texas law, the elements of a *prima facie* case of breach of contract are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to plaintiff resulting from the breach." *Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP*, 422 S.W.3d 821, 837 (Tex. Ct. App. 2014). Here, Universal Protection has demonstrated the existence of an enforceable contract, properly ancillary to an employment agreement and supported by valid consideration under Texas law. There is also ample evidence of Thornburg's breach and resultant damages to Universal Protection.

1. Thornburg Entered into a Binding Contract with Universal Protection Containing Valid and Enforceable Restrictive Covenants.

21. Because Universal Protection considered its pricing, billing, and customer information as confidential, it entered into the Thornburg Agreement to protect its trade secrets and confidential information, customer relationships and legitimate business interests. In exchange for valid consideration in the form of confidential information, Thornburg agreed to and signed the Thornburg Agreement. Yet, despite the binding nature of this agreement, Thornburg has materially breached, and continues to breach, it in several specific ways.

22. First, Thornburg breached the non-conflicts provision of the Thornburg Agreement, which provides:

Conflicts. During Employee's employment with the Company, Employee shall not: (a) engage in any outside business activity without written authorization from

the Company; (b) in any way compete with the Company; (c) solicit anyone to compete with or to prepare to compete with the Company; and/or (d) engage in any conduct intended to or reasonably expected to harm the interests of the Company or any affiliate.

Indeed, Thornburg breached all four subsections of the conflicts provision. In direct contravention of this provision, while Thornburg was working for Universal Protection as its Director of Security to JBS-Cactus, he was contemporaneously serving as owner, manager, registered agent, and employee of AgTac, which directly competes with Universal Protection. Thornburg was intimately involved in Universal Protection's creation of the operational and employee structure proposal to JBS-Cactus, and he submitted the proposal to JBS-Cactus on Universal Protection's behalf. Thornburg funneled this information to Weatherl, and last week, Universal Protection learned from JBS-Cactus that it had lost the account because it was "significantly underbid" by AgTac.

23. In funneling confidential information to Weatherl so that AgTac could "significantly underbid" Universal Protection, Thornburg also breached the confidentiality and non-disclosure provision of the Thornburg Agreement, which provides:

Confidential Information. Employees agrees and acknowledges that the Company has developed Confidential Information at great time and expense and further agrees that the Company has provided and/or will provide and will continue to provide Employee with access to Confidential Information and specialized training. Employee covenants and agrees that, except to the extent the use or disclosure of any Confidential Information is required to carry out Employee's assigned duties with the Company, during Employee's employment with the Company for five (5) years thereafter: (a) Employee shall keep strictly confidential and not disclose to any person not employed by the Company any Confidential Information; and (b) Employee shall not use for Employee or for any other person or entity any Confidential Information. However, this provision shall not preclude Employee from (i) the use or disclosure of information known generally to the public (other than information known generally to the public as a result of Employee's violation of this Section); or (ii) any disclosure required by law or court order so long as Employee provides the Company immediate written notice of any potential disclosure under this subsection and fully cooperates with the Company to lawfully prevent or limit such disclosure.

24. Thornburg agreed to the reasonableness of both the conflicts and confidentiality and non-disclosures provisions. He also acknowledged that his breaches of these provisions would

result in “irreparable damage and continuing injury” to Universal Protection; and in the event of such damage and injury, that Universal Protection “shall be entitled to an injunction from a court of competent jurisdiction enjoining [him] from committing any violation of these covenants.”

25. Thornburg also breached the non-interference provision of the Thornburg Agreement, which provides:

Non-Interference. Employee covenants and agrees that, for a period of twelve (12) months following Employee’s last day of employment with the Company, Employee shall not, directly or indirectly: (a) solicit, encourage, cause or attempt to cause any Restricted Customer (as defined below) to purchase any services or products from any business other than the Company that are competitive with or a substitute for the services or products offered by the Company, (b) sell or provide any services or products to any Restricted Customer that are competitive with or a substitute for the Company’s services or products; (c) solicit, encourage, cause or attempt to cause any supplier of goods or services to the Company not to do business with or to reduce any part of its business with the Company; or (d) make any disparaging remarks about the Company or its business, services, affiliates, officers, managers, directors or management employees, whether in writing, verbally, or on any online forum.

“**Restricted Customer**” means: (a) any customer of the Company with whom Employee has contact or communications at any time during Employee’s last twelve (12) months as a Company employee; (b) any customer of the Company for whom Employee’s last twelve (12) months as a Company employee; and/or (c) any customer of the Company about whom Employee obtained any Confidential Information (as defined below) during Employee’s last twelve (12) months as a Company employee.

26. Thornburg served as ABM’s Director of Security, and later Universal Protection’s Director of Security to the JBS-Cactus account. He currently serves as owner, manager, registered agent, and employee of AgTac, a direct competitor of Universal Protection, and he continues to provide services to JBS-Cactus, which qualifies as a “restricted customer” as defined by the Thornburg Agreement, on behalf of AgTac. Indeed, the security services provided to JBS-Cactus by AgTac are a substitute for the services Universal Protection provided to JBS-Cactus until it was “significantly underbid” as a result of Defendants’ nefarious conduct. Thornburg is in clear breach of the non-interference provision of the Thornburg Agreement, which prohibits him from servicing

the JBS-Cactus account on behalf of AgTac, Universal Protection's direct competitor, in any way for 12 months.

27. Like the conflicts and confidentiality provisions, Thornburg agreed to the reasonableness of the non-interference provision and acknowledged that any breach would result in "irreparable damage and continuing injury" to Universal Protection and, in such event, that Universal Protection "shall be entitled to an injunction from a court of competent jurisdiction enjoining [him] from committing any violation of th[e] covenant[]."

28. Additionally, Thornburg has also breached the non-raiding provision of the Thornburg Agreement, which provides:

Non-Raiding. Employee covenants and agrees that for a period of twelve (12) months following Employee's last day of employment with the Company, Employee shall not, directly or indirectly: (a) hire or engage as an employee or as an independent contractor any person employed by the Company, (b) recruit, solicit or encourage any employee or independent contractors to leave his or her employment or engagement with the Company; and/or (c) hire or engage any person employed by the Company at any point during Employee's last six (6) months with the Company.

29. Universal Protection has experienced a recent exodus of 23 of its security guards to AgTac, and there is no indication that Thornburg will stop his solicitation. Given Thornburg's recent termination from Universal Protection, it is only natural to infer that he will continue actively soliciting other security guards to join him and Weatherl at AgTac. Thornburg is in clear breach of the non-raiding provision of the Thornburg Agreement, which prohibits him—for a period of 12 months following his termination—from hiring, soliciting or recruiting any Universal Protection employee, *and* from hiring or engaging any person employed by Universal Protection at any point during his last six months with Universal Protection. Yet, this is exactly what Thornburg has done and will continue to do, all in the service of Universal Protection's direct competitor, AgTac.

30. In sum, there can be no doubt as to the substantial likelihood of Universal Protection's success on the merits of its breach of contract claim against Thornburg. Thornburg clearly and unmistakably breached his agreement with Universal Protection.

B. Universal Protection Will Succeed on the Merits of Its Claim for Misappropriation of Trade Secrets Against All Defendants.

31. Texas's Uniform Trade Secrets Act expressly provides that "[a]ctual or threatened misappropriation may be enjoined." Tex. Civ. Prac. & Rem. Code § 134A.003(a). Texas courts have long recognized the appropriateness of granting injunctive relief against those who have misappropriated trade secrets. In the words of the Texas appellate court, "[t]he scope of the injunctive relief must, of necessity, be full and complete so that those who have acted wrongfully and have breached their fiduciary relationship, as well as those who willfully and knowingly aided them in doing so, will be effectively denied the benefits and profits flowing from the wrongdoing." *Halliburton Energy Servs., Inc. v. Axis Techs., LLC*, 444 S.W.3d 251, 257 (Tex. Ct. App. 2014) (internal quotations and citation omitted). Moreover, "[t]he purpose of an injunction is to remove the advantage created by the misappropriation." *Id.* Accordingly, "[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order." Tex. Civ. Prac. & Rem. Code § 134A.003(c).

1. Standard for Trade Secret Protection in Texas.

32. Universal Protection is likely to succeed on its claim against all Defendants for misappropriation of trade secrets in violation of Texas's Uniform Trade Secrets Act ("TUTSA"), Tex. Civ. Prac. & Rem. Code § 134A.001, *et seq.* Texas law requires that a trade secret be "secret," *i.e.*, that it be neither generally known by others in the same business nor readily ascertainable by an independent investigation. *See Zocon Indus. v. Am. Stockman Tag Co.*, 713 F.2d 1174, 1179 (5th Cir. 1983). As the Fifth Circuit has stated, "[t]rade secret misappropriation under Texas law is established by showing: (a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade

secret without authorization from the plaintiff.” *Wellogix, Inc. v. Accenture, LLP*, 716 F.3d 867, 874 (5th Cir. 2013); *see also Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex. Ct. App. 1990).

33. Under Texas law, “[w]hen deciding whether to grant a request for a temporary injunction, the trial court does not decide whether the information sought to be protected is a trade secret.” *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-444-CV, 2016 WL 836775, at *12 (Tex. Ct. App. Mar. 3, 2016). Rather, the court determines “whether the applicant has established the information is entitled to trade secret protection until a trial on the merits.” *Id.*; *see also Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex. Ct. App. 2003). In the course of this inquiry, the Texas Supreme Court has identified six factors a court should consider in determining whether information is entitled to trade secret protection:

(1) the extent to which the information is known outside the holder’s business; (2) the extent to which it is known by employees and others involved in the holder’s business; (3) the extent of the measures taken by the holder to guard the secrecy of the information; (4) the value of the information to the holder and its competitors; (5) the amount of effort or money expended by the holding in developing the information; and (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

See In re Bass, 113 S.W.3d 735, 739 (Tex. 2003).

34. Texas courts have repeatedly explained that “[t]he owner of the trade secret does not have to satisfy all six factors because trade secrets do not fit neatly into all factors every time.” *Am Castle & Co. v. Byrne*, 123 F. Supp. 3d 909, 916 (S.D. Tex. 2015); *see also Gen. Univ. Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004). Indeed, “[o]ther circumstances that are not included in the six factors may be relevant to the trade secret analysis.” *Waste Mgmt. of Tex., Inc. v. Abbott*, 406 S.W.3d 626, 631 (Tex. Ct. App. 2013) (citing *Bass*, 113 S.W.3d at 740). Therefore, courts “weigh the factors in the context of the surrounding circumstances to determine whether information qualifies as a trade secret.” *Id.* The definition of “trade secret” has also been codified in the TUTSA, which defines a trade secret as:

[I]nformation, including a formula, pattern compilation, program, device, method technique, process, financial data, or *list of actual or potential customers or suppliers*, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tex. Civ. Prac. & Rem. Code § 134A.002(6) (emphasis added). Universal Protection's confidential and proprietary business information meets the standard for a protectable trade secret under Texas law.

2. Universal Protection's Confidential Customer Information Regarding the JBS-Cactus Site is Entitled to Protection as a Trade Secret.

35. It is well-established in Texas that “[i]tems such as customer lists, pricing information, customer information, customer preferences, and buyer contacts may be trade secrets if they meet the criteria for such.” *Byrne*, 123 F. Supp. 3d at 916 (citing *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 928 (Tex. Ct. App. 2008)). Significantly, “[a] company’s confidential pricing and rate information may qualify as a trade secret.” *Abbott*, 406 S.W.3d at 631; *see also Flake v. EGL Eagle Global Logistics LP*, No. 14-01-1069-CV, 2002 WL 31008136, at *3 (Tex. Ct. App. Sept. 5, 2002) (“Confidential information and trade secrets include compilations of information that have a substantial element of secrecy and provide the employer with an opportunity for advantage over competitors.”). Thus, “[a]n employee has a duty to not use trade secret information acquired during the employment relationship in a manner adverse to the employer.” *Miller*, 2016 WL 836775, at *13. This obligation survives the termination of the employment. *Id.* Moreover, “even if information is readily available in the industry, it will be protected if the competitor obtained it working for the former employer.” *Alliantgroup, LP v. Feingold*, 803 F. Supp. 2d 610, 626 (S.D. Tex. 2011); *see also Crouch v. Swing Mach. Co.*, 468 S.W.2d 604, 607 (Tex. Ct. App. 1971) (“An ex-employee will not be permitted to make use of a secret list of customers, nor of any other confidential information obtained about the customers by virtue of his former employment.”).

36. As Universal Protection's Director of Security at JBS-Cactus, Thornburg had unrestricted access to the exact type of valuable, highly confidential information to which Texas courts have consistently granted trade secret protection. Critically, Thornburg functioned as the primary liaison between Universal Protection and JBS at the Cactus site, and his intimate knowledge of JBS's customer preferences and unique needs for this site made him an invaluable resource to Universal Protection. For example, in early April 2016, Thornburg was intimately involved in Universal Protection's creation of the operational and employee structure proposal that JBS-Cactus had requested based on new security hours identified by the customer. Thornburg submitted the proposal to JBS-Cactus on Universal Protection's behalf. Defendants would not have had access to the JBS-Cactus information but-for Thornburg, and with that, but-for Thornburg's employment with Universal Protection.

37. Indeed, applying the six *Bass* factors, Universal Protection is clearly entitled to a finding that the confidential customer information at issue is entitled to protection as a trade secret pending a trial on the merits. First, all of Universal Protection's secret information regarding the JBS-Cactus site, including, but not limited to, customer solutions, preferences, pricing information, employee information, and wage and payroll data, is considered confidential and thus is not readily ascertainable by third parties. Second, this information is not widely disseminated throughout the company, but rather is restricted to Thornburg and a small coterie of Universal Protection employees responsible for servicing this account. Third, Universal Protection maintains this customer information in the highly confidential WinTeam database that is only accessible by select employees, including Thornburg. Fourth, this confidential information is extremely valuable to Universal Protection and its competitors, because it provides top secret data and insight into JBS's customer preferences that ABM and Universal Protection gradually acquired over time. Indeed, but-for AgTac's access to this information through Thornburg, it would have been impossible for AgTac to know Universal Protection's structural design of customer solutions and employee staffing plans in order for it to tailor its pitch to JBS so as to "significantly underbid" Universal Protection for the JBS-Cactus account. Fifth, ABM and Universal Protection expended

significant time and effort in developing the confidential pricing and employee information. Sixth, it would be impossible for a competitor to either acquire or reverse-engineer Universal Protection's secret customer information about JBS-Cactus using publicly available sources. *Cf. Byrne*, 123 F. Supp. 3d at 916 ("If the names and addresses of customers and vendors on a party's customer list are readily ascertainable, however, it is not protectable as a trade secret."). For these same reasons, the confidential customer information at issue qualifies as a trade secret under TUTSA because it "derives independent economic value, actual or potential, from not being generally known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use," and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *See* Tex. Civ. Prac. & Rem. Code § 134A.002(6).

38. As the Texas Supreme Court stated in *Bass*, "the party claiming a trade secret should not be required to satisfy all six factors because trade secrets do not fit neatly into each factor every time." *See* 113 S.W.3d at 740; *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 333-34 (5th Cir. 2013) (vacating district court's order denying motion for preliminary injunction where lower court improperly applied the *Bass* factors conjunctively). This is one of those unique cases, however, where Plaintiff does, in fact, satisfy all six *Bass* factors. Indeed, under similar circumstances, Texas courts have held that the plaintiff was entitled to a finding that confidential information, such as customer preferences, pricing data, organizational structure and employee information constituted trade secrets under the *Bass* factors.

39. For example, in *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 668-69 (S.D. Tex. 2010), the court held that plaintiff's "pricing information, which [plaintiff] safeguards and which would give a competitor an advantage, is entitled to trade secret protection." In doing so, the court rejected the defendants' argument that the pricing information was not a trade secret because plaintiff shared that information with prospective or actual customers. *See id.* at 668 ("Disclosure does not destroy the protection given to a trade secret if, when it is disclosed, the owner of that secret, obligated the party receiving it not to disclose or use it."); *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123-24 (5th Cir. 1991) (holding that plaintiff's

disclosure to contractors of the architectural plans for its restaurants did not extinguish the confidential nature of those plans); *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (holding that trade secrets remained confidential when they were disclosed only to businesses with whom the plaintiff dealt with the expectation of profit). As in *Rimkus*, the confidential customer solutions, preferences, employee information, and wage and payroll data accessible to Thornburg in the scope of his employment with Universal Protection unquestionably provides AgTac with a competitive advantage.

40. Similarly, in *Miller*, the court held that the steps plaintiff took to protect access to its confidential customer information warranted the conclusion that plaintiff was entitled to trade secret protection pending a trial on the merits. *Miller*, 2016 WL 836775, at *12 (noting that plaintiff tightly controlled access to customer information and finding that unauthorized disclosure to third parties would place plaintiff “at a competitive disadvantage”). Accordingly, the court affirmed the issuance of the temporary injunction issued by the trial court. *See id.* at *14. Numerous other Texas courts have held that information similar to the confidential information possessed by Thornburg (and Defendants) constitutes protectable trade secrets, and courts have consistently granted injunctive relief in cases to prevent the disclosure or use of trade secrets and confidential information. *See, e.g., Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 499 (Tex. Ct. App. 2012) (holding that company’s customer lists, pricing information, customer information and marketing strategies have all been recognized as trade secrets); *Abbott*, 406 S.W.3d at 635-37 (weighing *Bass* factors and holding that plaintiff’s confidential pricing and volume information constituted a trade secret); *Flake*, 2002 WL 31008136, at *3-4 (affirming injunction where defendant admitted the information he received from his employer was confidential customer lists and pricing information); *Molex, Inc. v. Nolen*, 759 F.2d 474, 476-78 (5th Cir. 1985) (affirming permanent injunction against former employee where he acquired trade secrets that led to poaching of former employer’s customer); *Cambridge Strategies, LLC v. Cook*, No. 3:10-cv-2167, 2010 WL 5139843, at *7 (N.D. Tex. Dec. 17, 2010) (preliminarily enjoining defendant from disclosing, using, or misappropriating any trade secrets

from plaintiff, including customer lists and any other proprietary information acquired in the course of defendant's employment with plaintiff); *Evans Consoles, Inc. v. Hoffman Video Sys., Inc.*, No. 3:01-cv-1333, 2001 WL 36238982, at *8-9 (N.D. Tex. Dec. 6, 2001) (granting preliminary injunction against former employer arising out of breach of confidentiality agreement where "it might be difficult to avoid the disclosure or use of [plaintiff's] confidential information"); *Merrill Lynch, Pierce, Fenner & Smith v. Wright*, No. 3:93-cv-1101, 1993 WL 13036199, at *4-5 (N.D. Tex. July 2, 1993) (holding that plaintiff was likely to succeed on merits of trade secrets claim to prevent defendants from soliciting customers and granting preliminary injunction). In sum, Plaintiff is likely to succeed on the merits of its claim that the confidential customer solutions, preferences, pricing information, employee information, and wage and payroll data disclosed to AgTac constitute protectable trade secrets under Texas law.

41. For the same reasons that Plaintiff is likely to succeed on the merits of its trade secrets claim under Texas law, Plaintiff is also likely to succeed on its trade secrets claim pursuant to the newly enacted Defend Trade Secrets Act of 2016 ("DTSA"), Pub. L. No. 114-153, 130 Stat. 376, which was passed into law on May 11, 2016.² See White House Office of Commc'ns, *Remarks by the President at Signing of S. 1890 – Defend Trade Secrets Act of 2016*, 2016 WL 2731986 (May 11, 2016). The DTSA provides a private right of action for parties to remedy trade secret misappropriation, and the statute defines "trade secret" more expansively than does TUTSA:

[T]he term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

² The DTSA amended chapter 90 of Title 18 of the U.S. Code (the Economic Espionage Act of 1996) to provide federal jurisdiction for the theft and misappropriation of trade secrets. See 18 U.S.C. §§ 1831, *et seq.* (as amended).

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

See 130 Stat. at 380 (amending definition of “trade secret” under 18 U.S.C. § 1839(3)).

42. Like TUTSA, the DTSA empowers courts to grant an injunction “to prevent any actual or threatened misappropriation” of any trade secret that is “related to a product or service used in, or intended for use in, interstate or foreign commerce.” *See* 130 Stat. 376 at 376, 379-380 (to be codified at 18 U.S.C. § 1836(b)(1), (b)(3)(A)(i)). Moreover, “if determined appropriate by the court,” the court may “requir[e] affirmative actions to be taken to protect the trade secret.” *Id.* at 380 (to be codified at 18 U.S.C. § 1836(b)(3)(A)(ii)).

43. Without question, the confidential information regarding the JBS-Cactus account to which Thornburg had unlimited access qualifies as trade secrets under the DTSA. Moreover, Universal Protection’s confidential security services protocols affect customers that do business throughout the United States, and therefore such security services are clearly used and *intended* for use in interstate commerce. Indeed, the JBS-Cactus site previously serviced by Universal Protection is a beef processing plant whose operations result in the transportation of millions of pounds of goods in interstate commerce each year. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”) (citing *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)). In short, Plaintiff has a substantial likelihood of success on the merits of its trade secrets claims under Texas’s Uniform Trade Secrets Act and the federal Defend Trade Secrets Act.

III. UNIVERSAL PROTECTION HAS ESTABLISHED A SUBSTANTIAL THREAT OF IMMEDIATE AND IRREPARABLE HARM FOR WHICH IT HAS NO ADEQUATE REMEDY AT LAW.

44. An injunction is appropriate if, as here, the anticipated injury is imminent and irreparable. *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir.), *cert. denied*, 423 U.S. 930, 96 S. Ct. 279 (1975). Indeed, the “use of an employer’s confidential information and the possible loss of customers is sufficient to establish irreparable harm.” *Transparent Translations, Inc. v. Leslie*,

594 F. Supp. 2d 742, 757 (S.D. Tex. 2009). Further, where the defendant will be unable to prevent knowledge of plaintiff's trade secrets "from infiltrating his work . . . Texas has recognized the need for injunctive relief." *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 504 (5th Cir. 1982). "[I]t is not the number of trade secrets taken that determines whether the threat of irreparable harm exists. The fact that a single trade secret may be disclosed is enough." *Id.* at 503. An injunction "is usually the only way use of the [trade] secret by the former employee can be prevented." *Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 472 (Tex. Ct. App. 1986). "[W]here the uncontradicted evidence shows that a former employee is working for a direct competitor, no finding of irreparable injury is necessary to support a permanent injunction to protect trade secrets." *Id.* at 470.

45. It is uncontroverted that Thornburg presently serves as owner, manager, registered agent and employee of AgTac, a direct competitor of Universal Protection. As a matter of law, because Thornburg works for a direct competitor, there is a substantial threat of irreparable injury to Universal Protection if the temporary restraining order is not issued. *Picker Int'l, Inc. v. Blanton*, 756 F. Supp. 971, 983 (N.D. Tex. 1990); *see also Weed Eater, Inc. v. Dowling*, 562 S.W.2d 898 (Tex. Ct. App. 1978) (holding that injunctive relief was proper to enforce confidentiality agreement because, even assuming the best of good faith on the part of former employee, he could hardly prevent his knowledge of his former employer's trade secrets from showing up in his nearly identical position). Moreover, Defendants have already used Universal Protection's trade secrets to "significantly underbid" Universal Protection and to unfairly compete for security contracts held by Universal Protection in this District by relying on other confidential and trade secret information. Already, Defendants successfully pilfered Universal Protection's JBS-Cactus account, and there is no reason to believe they will stop there. Harm resulting from these actions is not easily remedied or quantified. Furthermore, the parties themselves recognized the serious harm that the breach of the respective restrictive covenants could cause because the parties expressly agreed that such breaches would cause irreparable damage and Universal Protection is entitled to an injunction. *Amerispec, Inc. v Metro Inspection Serv., Inc.*, No. 3:01-

cv-946, 2001 WL 770999, at *6 (N.D. Tex. July 3, 2001). Accordingly, Universal Protection has demonstrated a substantial threat of immediate and irreparable harm.

IV. THREATENED INJURY TO PLAINTIFF OUTWEIGHS DAMAGE TO DEFENDANTS.

46. The third prong of the injunction test, whether the threatened injury to the plaintiff outweighs any potential damage to defendants caused by the status quo also weighs in Universal Protection's favor. "When balancing the threat of injury to the plaintiff if no [] injunction were to issue, versus the risk of injury to the defendant that would be caused by such an issuance, the proper result is to protect the plaintiff's legal right." *Picker*, 756 F. Supp. at 983. As stated by the Texas Supreme Court, "[W]hen ... a choice must be made between the possible punitive operation of the writ and the failure to provide adequate protection of a recognized legal right, the latter course seems indicated and the undoubted tendency of the law been to recognize and enforce higher standards of commercial morality in the business world." *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 773 (Tex. 1958).

47. The very competitive benefits rightfully belonging to Universal Protection are endangered if Defendants are permitted to continue their nefarious conduct, to have free use of Universal Protection's trade secrets, and to use such trade secrets to cause Universal Protection to lose customer goodwill and business. *Evans Consoles, Inc. v. Hoffman Video Sys., Inc.*, No. 3:01-cv-1333, 2001 WL 36238982, at *10 (N.D. Tex. Dec. 6, 2001). The risk of harm to Defendants is minimal, at most, because of the reasonableness of Universal Protection's injunctive request. After all, AgTac is still free to solicit and/or service other customers that are not currently being serviced by Universal Protection, and Thornburg is free to work for any company he wants so long as he does not poach Universal Protection's employees or customers. As a matter of law, the risk of irreparable injury to Universal Protection greatly outweighs any potential risk of injury to Defendants that would be caused by the issuance of a temporary restraining order.

V. TEMPORARY INJUNCTIVE RELIEF WILL NOT DISSERVE THE PUBLIC INTEREST.

48. Finally, the public interest will not be disserved by the issuance of a TRO enjoining Thornburg from continuing violations of his employment agreement and enjoining all Defendants from violating Texas' Uniform Trade Secrets Act and common law. "[I]t is in the public interest to uphold contracts and to enforce valid [] agreements." *Brink's Inc. v. Patrick*, No. 3:14-cv-775, 2014 WL 2931824, at *9 (N.D. Tex. June 27, 2014); *see also Sirius Computer Solutions, Inc. v. Sparks*, No. 5:15-cv-698, 2015 WL 5821840, at *20 (W.D. Tex. Oct. 5, 2015). Moreover, "[t]he public is served by protecting trade secrets." *Picker*, 756 F. Supp. at 983.

49. Unbeknownst to Universal Protection, and in breach of several provisions of his own agreement, while Thornburg served as Universal Protection's Director of Security to the JBS-Cactus account, he also worked on behalf of Universal Protection's competitor, AgTac. Universal Protection's proprietary information, including customer preferences, pricing information, employee wage and payroll data, and customer solutions information, was used against it to the benefit of AgTac so that AgTac could "significantly underbid" Universal Protection and steal the JBS-Cactus account, all while Thornburg was employed by Universal Protection. The public interest is best served by squelching this very unlawful conduct.

As the Fifth Circuit noted in *Metallurgical Industries Inc. v. Fourtek, Inc.*:
[t]hat the cost of devising the secret and the value of the secret provides are criteria in the legal formulation of a trade secret shows the equitable underpinnings of this area of the law. It seems only fair that one should be able to keep and enjoy the fruits of his labor. If a businessman has worked hard, has used his imagination, and has taken bold steps to gain an advantage over his competitors, he should be able to profit from his efforts. Because a commercial advantage can vanish once the competition learns of it, the law should protect the businessman's efforts to keep his achievements secret.

790 F.2d 1195, 1201 (5th Cir. 1986).

50. Simply put, rewarding Defendants for taking advantage of ABM's and Universal Protection's diligence and investments would not be in the public interest. If Defendants could blithely escape the consequences of their wrongful activities, legitimate businesses like Universal

Protection would be discouraged from investing time, training and resources in their employees in the future. This would cause Universal Protection's customers to needlessly suffer.

CONCLUSION

For the foregoing reasons, Universal Protection Service, LP respectfully respects the Court grant its motion for a Temporary Restraining Order and order the following:

A. All Defendants must, at all times henceforth, maintain the confidentiality of all Confidential Information, as defined in the Thornburg Agreement, and never disclose such Confidential Information to any third party for any reason whatsoever;

B. Thornburg shall not, directly or indirectly, solicit or attempt to solicit, on behalf of any person or entity, any Universal Protection customer, including those acquired from ABM, with whom he had contact or communications at any time during his last twelve (12) months of employment, any customer for whom he supervised Universal Protection's account or dealings at any time during his last twelve (12) months of employment, and/or any customer about whom he obtained any Confidential Information, for a period of twelve (12) months from issuance of this Court's Order;

C. Thornburg shall not, directly or indirectly, sell or provide any services or products that are competitive with or substitute for the services or products offered by Universal Protection to any Universal Protection customer, including those acquired from ABM, with whom he had contact or communications at any time during his last twelve (12) months of employment, any customer for whom he supervised Universal Protection's account or dealings at any time during his last twelve (12) months of employment, and/or any customer about whom he obtained any Confidential Information, for a period of twelve (12) months from issuance of this Court's Order;

D. Thornburg shall not, directly or indirectly, recruit, solicit or attempt to solicit, hire or engage, on behalf of any person or entity, any person currently employed by Universal Protection or employed at any point during Thornburg's last six (6) months of employment with Universal Protection for a period of twelve (12) months from issuance of this Court's Order;

E. Defendants shall not use, disclose or misappropriate any of Universal Protection's trade secrets pursuant to the Texas Uniform Trade Secrets Act and the Defend Trade Secrets Act;

F. AgTac shall not solicit, sell to, pitch or service any Universal Protection customer serviced by or about whom Thornburg had confidential information or trade secrets;

G. Thornburg must turn over for inspection and review all personal and business computers, laptops, external hard drives, flash drives, external devices and phones for forensic review by a computer forensic expert of Universal Protection's choosing; and

H. Award any additional relief this Court deems equitable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document and that a true and correct copy was served on the parties listed below through the electronic case filing system if the Notice of Electronic Filing indicated that the parties received it or otherwise by mailing a copy by Certified Mail, Return Receipt Requested, to the parties this 19th day of May, 2016.

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