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*In the*  
**Court of Appeal**  
*of the*  
**State of California**  
SECOND APPELLATE DISTRICT  
DIVISION TWO

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**B229509**

FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE,  
FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY  
and FARMERS NEW WORLD LIFE INSURANCE,

*Plaintiffs-Respondents,*

v.

KETTELIE ST. FLEUR,

*Defendant-Appellant.*

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APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY  
HON. DAVID S. MILTON · NO. EC054050

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**BRIEF OF APPELLANT**

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**Court of Appeal**  
*of the*  
**State of California**

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Court of Appeal Case No.: B229509

Case Name: FARMERS INSURANCE EXCHANGE ET AL. v. ST. FLEUR

There are no interested entities or parties to list in this Certificate per California Rules of Court,

Interested entities or parties are listed below:

<b>Name of Interested Entity or Person</b>	<b>Nature of Interest</b>
1. Farmers Insurance Exchange	Plaintiff
2. Truck Insurance Exchange	Plaintiff
3. Fire Insurance Exchange	Plaintiff
4. Mid-Century Insurance Company	Plaintiff
5. Farmers New World Life Insurance Company	Plaintiff
6. Farmers Insurance Group	Owner/Manager
7. Zurich Financial	Owner
8.	
9.	
10.	

  
\_\_\_\_\_  
Signature of Attorney/Party Submitting Form

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## **I. INTRODUCTION**

Defendant and Appellant KETTELIE ST. FLEUR (ST.FLEUR), appeals from a preliminary injunction (INJUNCTION) ordered by the trial court in favor of Plaintiffs FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY and FARMERS NEW WORLD LIFE INSURANCE COMPANY (collectively "FARMERS") on November 8, 2010 (Appen. 200 to 201.).

The INJUNCTION was issued on the basis of a Complaint, which, on its face, is not subject to injunctive relief.

The INJUNCTION enforces a contractual nonsolicitation covenant in the Agent Appointment Agreement (AAA) between ST.FLEUR and FARMERS, which covenant is *presumptively* void. (*Business and Professions Code §16600.*) The INJUNCTION not only restrains "solicitation", it restrains, *indefinitely*, ST.FLEUR from "contacting or communicating" with friends, neighbors, cousins, uncles, aunts, congregants of her church and acquaintances all of whom she happens to know without any information or assistance from FARMERS, and who, through her, became FARMERS insurance policyholders, and even to send them Christmas cards, simply because FARMERS contends, without evidence, that they are "trade secrets" of FARMERS.

FARMERS is a very large group of insurance companies, well known and highly advertised as selling automobile and homeowners insurance to individual consumers not only in California but nationally. Although it has many competitors, based upon television advertising and common knowledge, its obvious competitors are Allstate, State Farm and Progressive, along with numerous insurance brokerages that advertise.

FARMERS' customers obviously have the free will to change insurance brokers or insurance companies at their pleasure, and neither

an insurance company nor an insurance broker has any right or power to restraint the customer from changing.

In California, every driver or owner of an automobile is required to have insurance. (*Vehicle Code § 16021(b).*) The identities of such persons are a matter of public record and available for any insurance company or broker to solicit. All homeowners will likely carry fire insurance, and homeowners records are also available to any insurance broker and insurance company for solicitation purposes.

Although automobile and homeowners insurance are essentially fungible commodities, and although every insurance customer has the unrestricted freedom to chose insurance companies and insurance brokers at will, and although every insurance broker has the right to compete for business in accordance with their insurance licenses, and although FARMERS offered no evidence that ST.FLEUR'S "customer list" met the criteria of "Trade Secret" under the Uniform Trade Secrets Act (UTSA) (*Civ. Code §§ 3426 et seq.*), the trial court abused its discretion by ordering an INJUNCTION not covered by the pleadings that not only restrained ST.FLEUR from conducting her business, but also prevented her from contacting or communicating with her cousins, or her neighbors, or even going to church, lest she be subject to a contempt proceeding.

As a practical matter, the INJUNCTION has put ST.FLEUR not only in a prison cell but in solitary confinement indefinitely, to be visited only by "parents, siblings or in-laws".

## **II. FACTS**

ST.FLEUR now is, and at all times relevant hereto, has been a licensed California "fire and casualty broker-agent" (*Insurance Code § 1625*) and a "life licensee" (*Ins. Code § 1626.*)

FARMERS is a large and well-known provider of automobile and homeowners insurance to consumers.

On or about February 9, 1999, ST.FLEUR entered into a "Reserve Agent Appointment Agreement" (RAAA) (Appen. 47-48.), wherein (Paragraph B), ST.FLEUR was hired as a trainee under the "Reserve Agent Training Program" (Paragraph G) to sell insurance as an independent contractor (Paragraph F). Said RAAA contains a nonsolicitation covenant (Paragraph D).

Thereafter, on or about August 30, 1999, ST.FLEUR and FARMERS entered into a "Horizontal Marketing Agent Relationship Agreement" (HMA) (Appen. 50 to 53.), and the AAA at issue here, which superseded the RAAA.

The AAA unambiguously refers to employing ST.FLEUR as an independent contractor (Paragraph J) for the purpose of selling insurance products underwritten and issued by FARMERS in District 91. The HMA, by its terms, was clearly intended by FARMERS as a way to use the FARMERS agency sales force to sell *non-insurance products and services* sponsored by FARMERS, which were specifically to be identified in Exhibits to the HMA. No Exhibits were attached to the HMA at the time of execution and apparently none were attached thereafter, and the Complaint here appears to be limited only to ST.FLEUR'S status as an insurance agent of FARMERS under the AAA.

The AAA is based upon a customary contract between an employer and a salesperson wherein the employer hires the salesperson to sell the employer's good or services and service the customer in consideration of which the employer agrees to pay the salesperson "commission" compensation calculated as a percentage of the sales price for each sale. (AAA, Paragraph A.1.)

The AAA also offers the agent two forms of bonuses: "Contract Value" and an "Underwriting Contract Value Bonus" (AAA, Paragraph G), which appear to be rewards offered to agents upon termination of the agency for the production of a volume of profitable insurance policies over a long period of time. According to Paragraph G, the "Underwriting Contract Value Bonus" is evidenced by certificates and is "fully vested", and may not be reduced. "Contract Value" is based upon recent performance and is payable unconditionally unless the agent is terminated for "embezzlement."

Paragraph C of the agreement is a termination provision. Thereunder, either party can terminate the agreement at will, upon 90 days written notice. If, however, either party breaches the contract, it could be terminated by the other upon 30 days written notice. Finally, there are five specific grounds for immediate termination.

Upon termination by either party, the AAA imposes for three post-termination duties on the terminated agent, as set forth in Paragraphs H and I. Under Paragraph H, for payment of the sums due in Paragraph G, at the *option* of FARMERS, the agent must assign the agent's rented or leased office and telephone number to FARMERS.

The second sentence of Paragraph H is the covenant that is the subject of this Appeal, whereby, the agent, in consideration of the payment of "Contract Value", *specifically* agrees not to solicit FARMERS' insurance business, not only from the customers that the agent brought to FARMERS, but also from any other FARMERS' policyholders in the "agencies of this district", but the AAA does not define "this district" whether geographically or otherwise (does District 91 include the entire state of California?), nor does the AAA set forth how the terminated FARMERS agent is supposed to know the identity of the policyholders of any other FARMERS' agent in the district. In support of

the INJUNCTION, FARMERS submitted the declaration of Rodney E. Chamberlain (Chamberlain), “assistant vice president of eBusiness/AIMS” of FARMERS Group Inc. (Appen. 114 to 117.) At Paragraph 9 of that declaration, the witness states that under the FARMERS computer system, FARMERS agents have no access to information about any policyholder other than those customers of that specific agent.

Therefore, even if the nonsolicitation covenant here was valid as a matter of law, it could not be enforceable because there is no way that a terminated FARMERS agent could comply if such agent wanted to remain in business as an insurance broker/agent in California, without knowing the boundaries of “this district” nor the identities of all FARMERS’ policyholders. Thus Paragraph H is actually a blanket noncompetition covenant that appears to prevent ST.FLEUR from selling insurance in California for one year after termination.

On August 27, 2010, FARMERS gave a 90 day written notice of termination *for cause*. (Declaration of Jack White, appen. 35 - 60, at p. 60.)

That notice started a process as set forth in Paragraph D of the AAA requiring a hearing before a “Termination Review Board”, if requested. Such termination procedure apparently was intended by FARMERS to comply with the “Doctrine of Fair Procedure” which has two requirements: “(1) The decision making process must be substantially rational; and (2) The decision making must be procedurally fair”.

*(Cumbre Inc. v. State Compensation Insurance Fund (2010) 189 Cal App 4<sup>th</sup> 1381, 1388.)*

ST.FLEUR promptly requested such hearing (Declaration of Christopher S. Maile (Maile), Appen. 66 - 113, at p. 72.)

FARMERS did not comply with its contractual requirement (AAA, Paragraph D) which led to the dispute between counsel as set forth

in the Maile declaration, which led to FARMERS immediate *retroactive* termination of ST.FLEUR by letter dated October 6, 2010, effective October 1, 2010 (Maile declaration, Appen. p. 106.) Thus, there is a substantial issue here of whether the AAA was terminated, and, if so, the effective date of termination.

FARMERS contends that termination was effective on October 1, 2010 by reason of the retroactive notice of termination dated October 8, 2010. ST.FLEUR contends that the AAA was never terminated under its own terms because FARMERS did not afford the termination review board hearing within the time specified in the AAA, and that the AAA does not provide for *retroactive* termination. Alternatively, ST.FLEUR contends that the earliest date of termination could be October 27, 2010 by reason of ST.FLEUR'S counsel's letter to FARMERS' counsel of September 27, 2010 (Maile declaration, Appen. 66 -112, at p. 89-90.), which constituted a 30 day notice of termination for breach of contract under Paragraph C of the AAA.

### **III. THE INJUNCTION**

FARMERS filed the Complaint here and sought an *ex parte* Temporary Restraining Order and Writ of Possession on October 14, 2010. The Complaint (Appen. 1 to 11.) alleges three causes of action for damages (conversion, breach of fiduciary duty and breach of contract), and one for an injunction. In support of temporary restraint and preliminary injunctive relief, FARMERS offered six declarations. Of those, four are relevant here: the declaration of White, the declaration of FARMERS' attorney Maile, the declaration of Chamberlain, and the declaration of James Mulligan, the Farmers' "District Manager"(Milligan). The court issued the Temporary Restraining Order (Appen. 137.), and scheduled a date for hearing on the motion for

preliminary injunction on November 1, 2010. That hearing was held and continued thereafter to November 8, 2010. No evidence was offered that ST.FLEUR had not either substantially or fully complied with the Temporary Restraining Order re the Conversion and Writ of Possession.

At the hearings, the Court ignored the dispute concerning termination of the agency contract and its effective date, but *concluded* that the contract no longer existed and that October 1, 2010 was the termination date of the contract (R.T. A29 to A30.)

By declaration (Appen. 42, Paragraph 25.), White testified that *all "goodwill" belongs to FARMERS* and that "each FARMERS' agent cultivates FARMERS' goodwill "on a personal level, and becomes most times the only face of FARMERS to the policyholders". Mr. White testified about FARMERS agents generally in his experience as a FARMERS' DMM. His declaration (and testimony) is devoid of any knowledge of ST.FLEUR personally or her business.

ST.FLEUR testified, by way of declaration (Appen. 159 to 160.), that : "During that time [1999], to the current date, I have procured insurance policies on behalf of the Farmers Group of Companies, from family, friends, neighbors and other people with whom I have been associated, and those I have solicited. I do not recall placing insurance for anyone that FARMERS has referred to me, and I do not so now". That is undisputed.

Although ST.FLEUR appeals from the entire INJUNCTION, this Appeal focuses on Paragraphs (e) and (f) thereof which restrain as follows:

"(e) Contacting or communicating with current policyholders of FARMERS in St.Fleur's agent code number as of October 1, 2010, . . . , except: (1) as to Defendant's parents, siblings or in-laws;

or (2) where the FARMERS' policyholder initiated contact with defendant for securing defendant's services as his/her/its insurance agent; or

“(f) soliciting, accepting, or servicing the insurance business of any FARMERS policyholder in her district for the 12 month period between October 1, 2010 to October 1, 2011, except: (1) except as to defendant's parents, siblings or in-laws; or (2) where the FARMERS' policyholder initiated contact with the defendant for securing defendant's services as his/her/its insurance agent.”

Said INJUNCTION enforces a nonsolicitation covenant in Paragraph H in the AAA between ST.FLEUR as an independent contractor insurance agent and FARMERS as follows, with emphasis added:

“H. The Agent agrees to transfer and assign all of the Agent's interest under this Agreement and Agency (including at the request of the Companies, any interest in the telephone numbers and lease or rented office location) to the Companies at the time of payment or tender of payment to the Agent pursuant to Paragraph G of this Agreement. *The Agent agrees to accept tender of Contract Value and further agrees for a period of one year following the date of payment or tender of payment the Agent will neither directly or indirectly solicit, accept or service the insurance business of any policyholder of record in the Agencies of this district as of the date of payment or tender of payment.*”

Such nonsolicitation covenant is *presumptively invalid* and therefore unenforceable. (*Business and Professions Code § 16600.*)

Therefore, FARMERS had the burden of producing evidence to show that the nonsolicitation covenant was subject to one of the three statutory exceptions to the statutory prohibition. (*Business and Professions Code §§ 16601, 16602, 16602.5.*)

Because ST.FLEUR was and is a sole proprietorship, the only relevant statutory exception to the prohibition of *Business and Professions Code section 16600* would be that FARMERS purchased the “goodwill” of ST.FLEUR’S business, but the AAA is silent about “goodwill”, and mentions only that the Contract Value (as defined and calculated in Paragraph G therein) was being paid for the nonsolicitation covenant, and FARMERS not only offered no evidence to the contrary, but offered evidence that the agent has no goodwill. (White Declaration, Append. 35-60 at p. 42.)

The trial court, however, enforced the nonsolicitation covenant using a nonstatutory “trade secret exception” to *Business and Professions Code section 16600*, an exception that had been rejected by two appellate courts, including the Second District (R.T.A35-37; B6-B12.), although there was no evidence offered of trade secrets as to customer information, even in the form of a customer list.

Here, the issue of misappropriation of trade secrets was not before the Court. Paragraph I of the AAA refers only to “confidential property”. There is no cause of action nor allegations in the Complaint of misappropriation of “trade secrets” under the UTSA nor allegations of unfair competition under *Business and Professions Code sections 17200 et seq.*, and thus FARMERS was not *statutorily* entitled to an injunction pursuant to *Business and Professions Code section 17203* or *Civil Code section 3426.2*.

#### IV. ISSUES

ST.FLEUR assumes that FARMERS will not contend that the single purpose of Contract Value as set forth in Paragraph G of the AAA was the nonsolicitation covenant in Paragraph H thereof. If FARMERS does contend so, then the entire contract is void. (*Civ. Code § 1598.*) Otherwise, arguably, Paragraph H, in its entirety, can be severed from the balance of the AAA. (*Civil Code §1599; Marathon Entertainment Inc. v. Blasi (2008) 42 Cal 4<sup>th</sup> 974, 996.*)

The remaining issues are as follows:

1. Whether the Court abused its discretion by granting the INJUNCTION based upon three causes of action, one of which was capable only of a writ of possession (Claim and Delivery) and two of which, breach of fiduciary duty and breach of contract, were not subject to injunctive relief as a matter of fact and law.
2. Whether the Court abused its discretion by enjoining “contacting and communicating” with people indefinitely or at all.
3. Whether the Court abused its discretion by enforcing a void nonsolicitation covenant.
4. Whether the Court abused its discretion by imposing an illegal “trade secret exception” to *Business and Professions Code section 16600*.
5. Whether the Court abused its discretion by concluding that FARMERS had trade secrets that were subject to protection.

**V. STANDARD OF REVIEW:**  
**“MIXED QUESTIONS OF FACTS AND LAW”**

The standard of review applicable here for the Court of Appeal was articulated by the Supreme Court in Ghirardo v. Antonioli (1994) 8 Cal 4<sup>th</sup> 791, 800 - 801.

The trial court must first establish the “basic, primary or historical facts”. The trial court must then select the applicable law, and must then apply the facts as found to the law.

Factual determination of the trial court will be given deference; questions of law will be reviewed *de novo*.

Here, the first step is to determine whether FARMERS presented by way of Complaint and declarations admissible evidence to justify injunctive relief at all.

If such evidence was offered, the next inquiry is whether there is applicable law to entitle FARMERS to any relief whether by injunction or damages. In that inquiry, whether a contract is illegal or unenforceable is a question of law for a court (Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal App 3<sup>rd</sup> 832,838.), as is interpretation of written contracts. (Parsons v. Bristol Development Co. (1965) 62 Cal 2<sup>nd</sup> 865.)

The third inquiry is whether the evidence offered support the legal conclusions made by the trial court. If the trial court’s conclusions of law, based upon the admissible evidence, are erroneous, then there would be an “abuse of discretion” and a “miscarriage of justice”, and the order of INJUNCTION must be reversed. (Blank v. Kirwan (1985) 39 Cal 3<sup>rd</sup> 311, 331.)

**VI. STATEMENT OF APPEALABILITY**

An order granting or refusing to grant or dissolve an injunction is made appealable by Code of Civil Procedure § 904.1(a)(6).

## **VII. LEGAL ARGUMENT**

### **A. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE INJUNCTION.**

At the hearing, there was no evidence offered by FARMERS to show that ST.FLEUR had not complied either precisely or substantially with the Temporary Restraining Order. By its terms the Temporary Restraining Order required ST.FLEUR to turn over to FARMERS her rented office and telephone numbers, but compliance with that order necessarily requires the action of third persons who are not parties to the litigation: the telephone company and the landlord. However, she did comply within her power.

Those issues are now moot.

As of November 1, 2010, two causes of action of the Complaint were viable: breach of fiduciary duty and breach of contract.

#### **1. Injunctive Relief Is Not Available Unless The Contract Is One That Would Be Subject To Specific Enforcement. (*Code of Civil Procedure § 526(b)(5)*).**

The AAA is not subject to specific enforcement.

#### **2. Once FARMERS Terminated The ST.FLEUR Agency Relationship, ST.FLEUR Had No Fiduciary Duties To FARMERS. Thus, FARMERS Could Not Seek Injunctive Relief For Breach Of Fiduciary Duty After The Agency Was Terminated. *FARMERS' Only Claim Would Be For Damages.***

Essentially, reviewing the allegations of the third cause of action for breach of fiduciary duty, FARMERS is alleging that upon FARMERS'

immediate termination of the agency contract, the terminated agent owes FARMERS a fiduciary obligation to effectively go out of business for one year. Such concept is preposterous on its face and unsustainable as a matter of law.

The Complaint sought the immediate possession of ST.FLEUR'S interest in real property, her rented office. The contention is that she had a fiduciary obligation to voluntarily assign the office to FARMERS along with the telephone number. The Temporary Restraining Order granted that request. Thus, the trial court decided that the *option* regarding the office and telephone number was specifically enforceable as a matter of law.

However, that sentence in Paragraph H gives FARMERS an *option* without separate consideration nor mutuality of obligation. (*Kowal v. Day* (1971) 20 Cal App 3<sup>rd</sup> 720, 724, citing *Lawrence Block Co. v. Palston* (1954) 123 Cal App 2<sup>nd</sup> 300.). If FARMERS failed to exercise the option, ST.FLEUR could not compel FARMERS to assume the office and its obligations. Further, the option applies only to *rented or leased* offices, and not to an office in real property that the agent owns. If the agent owns his office real property, upon termination of the AAA, the agent would still be entitled to the compensation set forth in the AAA, Paragraph G. The "Underwriting Contract Value Bonus" is "fully vested", and the terminated agent could not compel FARMERS to buy the real property.

Therefore, there are no causes of action alleged in the Complaint that would warrant injunctive relief. There are no causes of action alleged for relief under *Business and Professions Code sections 17070 et seq., 17200 et seq., or sections 17500 et seq., or Civil Code sections 3426 et seq.*(UTSA).

Therefore, the trial court should have denied the motion for INJUNCTION for lack of statutory grounds, and the INJUNCTION itself

should be vacated on those grounds.

Effectively, the trial court, *sua sponte*, effected a *de facto* amended the Complaint on behalf of FARMERS to justify the INJUNCTION based upon the statutory authorization of *Civil Code section 3426.2* and *Business and Professions Code section 17203*. The entire INJUNCTION was erroneous based upon the allegations of the Complaint, and the failure of evidence.

**B. THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRAINING “SOLICITATION” AND “CONTACTING AND COMMUNICATING” IN INJUNCTION, PARAGRAPHS E AND F.**

INJUNCTION, Paragraph (e), on its face, violates ST. FLEUR’S freedom of speech and association under the United States Constitution, Amendment I, and the California Constitution, Article I, Section 2(a).

On its face, Paragraph (e) enjoins ST.FLEUR from “contacting and communicating” with anybody other than ST.FLEUR’S parents, siblings or in-laws *indefinitely* if she happened to bring them to FARMERS as policyholders, under the threat of a contempt citation, which could include a fine or imprisonment.

The abuse of discretion is clearly illustrated in the colloquy between the trial court and ST.FLEUR’S counsel as follows:

MR. FREDGANT: “ Your Honor, the supplemental brief of, we submitted additional authority including the Galante Case. And -- and, again, discussed the -- the Aetna Case that we talked about last Monday here in court. And, of course, we continue to assert the Edwards Case applies to here and that there should not be any prohibition non--nonsolicitation.

“But one thing that Farmers is contending, based on the - -the briefs and their arguments that Ms.St.Fleur has so little right here that she must

be ordered to turn over her Christmas card list. And, and, apparently, the reach of Farmers' control here extends to Ms. St.Fleur's memory, is actually argued in the Supplemental Briefs submitted by Farmers, your Honor, which is on its face preposterous."

THE COURT: "Well any information that was developed by her on behalf of the Company belongs to the Company, and it's -- if it's confidential, it's trade secret. Whether or not, she also--she calls it a Christmas card list, doesn't change that.

"Whether or not it's reduced to writing, doesn't change that." (R.T. b5 to 6.)

The court's overreach here is remarkable and is unprecedented.

*"Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business. [Citations] West was entitled to accept business from Aetna's former customers and such acceptance, by itself, did not constitute solicitation. "Aetna Building Maintenance Co. v. West (1952) 39 Cal 2<sup>nd</sup> 198, 204.) (Emphasis added)*

INJUNCTION, Paragraph (e), went far beyond the definition of "Solicitation" articulated by the Supreme Court in *Aetna, supra*, 39 Cal 2<sup>nd</sup> at 203. It included "contacting and soliciting" in any way, including the sending of benign Christmas cards. The trial court imposed total isolation. For an indefinite period, ST.FLEUR would be in a judicially

imposed prison cell. That restraint is not only preposterous, it is outrageous and unprecedented.

The irrationality of the INJUNCTION is illustrated by the express provision that ST.FLEUR can place insurance for the FARMERS' policyholder where the FARMERS' policyholder "initiated contact".

ST.FLEUR'S conundrum here is illustrated by the declaration of Mulligan. (Appen. 187 to 188.) There, at Paragraph 4, Mulligan states that on October 18 and 19, 2010, he "sent a letter to all Farmers' policyholders, including ST.FLEUR . . . , who were previously serviced by ST.FLEUR prior to the termination of her agency. This letter stated to these policyholders, *inter alia*, that: (1) Their current agent was no longer with the organization; and (2) their policies would be immediately transferred to a new agent who would continue to provide outstanding service. This letter further provided the name and contact number of the new agent. Thus, all former FARMERS' policyholders who were serviced by ST.FLEUR have already been notified of the termination of her agency, including ST.FLEUR herself".

The trial court had actual knowledge that FARMERS had initiated "contact or communication" with policyholders, ten days after the notice of retroactive immediate termination was sent to ST.FLEUR, and, reasonably, many, if not all, would have contacted her about the letter. They would have initiated the contact, in response to the Mulligan letter.

Therefore, the INJUNCTION, Paragraph (e), imposes upon ST.FLEUR the burden of rebutting a presumption or inference that she violated the restraint of Paragraph (e), and imposes upon her family, friends and neighbors the burden of testifying, either in a contempt proceeding or in a trial, to rebut a reasonable consequence of the Mulligan notification.

**C. ANY RESTRAINT AGAINST SOLICITATION BASED UPON PARAGRAPH H OF THE AAA IS INVALID AND UNENFORCEABLE. (*Business and Professions Code § 16600; Edwards v. Arthur Anderson LLP (2008) 44 Cal 4<sup>th</sup> 937.*)**

The INJUNCTION, Paragraphs (e) and (f), enforced the nonsolicitation covenant of the AAA, Paragraph H. That covenant is, on its face, illegal and therefore unenforceable. (*Business and Professions Code § 16600; Edwards supra.*) FARMERS then had the burden of producing evidence to rebut the presumption of illegality by offering facts that the covenant was excepted, i.e., that the covenant was given in consideration of the purchase by FARMERS of “goodwill” of the FARMERS’ agency. (*Business and Professions Code § 16601.*)

FARMERS offered in rebuttal the contract itself, which offers no help because it is silent about “goodwill”. However, FARMERS also offered the declaration of White which, essentially states, at Paragraphs 23 to 25 thereof (Appen. 41 to 42.), that the agent has no goodwill; all goodwill belongs to FARMERS.

Therefore, Paragraph H of the AAA is *presumptively* invalid, and FARMERS has presented no evidence to rebut that presumption. The Trial Court abused its discretion by enforcing the nonsolicitation covenant.

**D. THE COURT ABUSED ITS DISCRETION BY IMPOSING A NONSTATUTORY “TRADE SECRET EXCEPTION” TO BUSINESS AND PROFESSIONS CODE SECTION 16600.**

The Supreme Court in *Edwards, supra*, 44 Cal 4<sup>th</sup> 937, held that the prohibition of *Business and Professions Code section 16600* of noncompetition and nonsolicitation could contractual covenants are not subject to any exception for reasonableness or “narrow-restraint”.

However, the Supreme Court did not adjudicate a “common law trade secret exception” to *Business and Professions Code section 16600*.

*(Edwards, supra, 44 Cal 4<sup>th</sup> 93, at footnote 4.)*

That issue was decided by the Court of Appeal in the Fourth District of California in *The Retirement Group v. Galante* (2009) 176 Cal App 4<sup>th</sup> 1226 and at the Court of Appeal in the Second District in *Dowell v. Biosense Webster Inc.* (2009) 179 Cal App 4<sup>th</sup> 564.

After a thorough analysis, the Court of Appeal in *Galante* issued an “*evaluation*” as follows:

“We distill from the foregoing cases that section 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the new employee’s new business, but a court may enjoin *tortious conduct* (a violative of either the Uniform Trade Secrets Act (*Civ. Code, § 3426 et seq.*) and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate solicitation of such customers, or to otherwise unfairly compete with the former employer. Viewed in this like, therefore, the conduct is enjoinable *not* because it falls within a judicially-created “exception” to section 16600’s ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of any contractual undertaking.”  
*(Galante, supra, 176 Cal App 4<sup>th</sup> 1226 at 1238)*

Here, the Complaint alleges no causes of action under either the UTSA nor the Unfair Competition Law.

**E. NO RELEVANT INTEREST SUBJECT TO JUDICIAL PROTECTION WAS ALLEGED IN THE COMPLAINT AND THERE IS NO EVIDENCE OF ANY.**

The AAA, Paragraph I states as follows:

“The Agent acknowledges that all manuals, lists and records of any kind (including information pertaining to policyholders and expirations) are the confidential property of the Companies and agrees they shall not be

used or divulged in any way detrimental to the Companies and shall be returned to the Companies upon termination of the Agency.”

In its analysis, the trial court apparently made no distinction between “trade secrets” and “confidential property”; i.e., they were synonymous.

However, to be synonymous, such “confidential information” must meet the definition of “trade secret” in the UTSA (*Civil Code* § 3426. 1(d)) Otherwise, any company could claim and enforce as a trade secret all publically available information, as in a telephone book, and a telephone book itself. The trial court itself understood this problem, and therefore did not restrain ST.FLEUR from using policyholder information provided by the policy holder. That is consistent with *Hilb, Rogal & Hamilton Insurance Services of Orange County Inc. v. Robb*(1995) 33 Cal App 4<sup>th</sup> 1812), wherein it was held that information available from the policyholder cannot be a trade secret or proprietary to the former employer.

**F. FARMERS OFFERED NO EVIDENCE TO SUPPORT A CONCLUSION THAT IT “OWNED” A PROTECTABLE TRADE SECRET “CUSTOMER LIST” TO JUSTIFY AN INJUNCTION AGAINST SOLICITATION.**

ST.FLEUR agrees that a business’ customer list is valuable to that business. For personal service businesses such as doctors, lawyers, accountants and insurance broker, such lists represent historical business and opportunities for future business, as well as present business. However, those lists do not *necessarily* represent *legally-protectable* assets.

“With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is ‘readily ascertainable’ through public sources, such as business directories. [Citation] On the other hand, where the employer has expended time and effort identifying customers with *particular needs or characteristics*, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as *potential* customers. [Citations] As a general principle, the more difficult the information is to obtain, and more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret. [Citation] “(*Morlife Inc. v Perry* (1997) 56 Cal App. 4<sup>th</sup> 1514, 1521; *The Retirement Group v. Galante*, *supra*, 176 Cal App 4<sup>th</sup> at 1238.) (emphasis added)

FARMERS itself recognized this issue in the HMA (Appen., 50 to 52 at p.51.), executed at the same time as the AAA, and provided that, with respect to products and services vended, by FARMERS through its

network of FARMERS' agents, the customer lists were not only "confidential" but were "trade secrets", but extended only to "all information obtained by Agent from current and prospective customers, applicants, etc, including, but not limited to names, addresses, telephone numbers, ages, social security number(s), credit history; application form(s), sales agreement(s) *and all other documents and materials provided to Agent by the Companies.*" (Emphasis added)

Here, no evidence was offered by FARMERS that it identified "customers with particular needs or characteristics" and provided those customers to ST.FLEUR. FARMERS is well known as a provider of automobile and homeowners insurance. With respect to automobile insurance, every driver or owner of an automobile in California is a potential customer. (*Vehicle Code § 16021(b)*). Vehicle registrations are a matter of public record, as are drivers license and voter registration records. All homeowner information is also a matter of public record. FARMERS competes with many insurance companies for such insurance business. FARMERS cannot rationally contend that it *owns* as an asset the continued patronage of any policyholder. FARMERS has the *right* to *compete* for policyholders whose identities are available everywhere from public records, but FARMERS does not have the right to claim ownership of any person.

**G. FARMERS REFERENCE TO STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. DEMPSTER (1959) 174 CAL APP 2<sup>nd</sup> 174, 418. (DEMPSTER) IS INAPPOSITE.**

Dempster is cited because the State Farm agents contract appears to be similar to the AAA here with respect to termination obligations. However, except for the issue of "termination benefits" (i.e., Contract

Value here), Dempster is no longer applicable for any reason. The issue of trade secrets has been clarified by the legislature by the enactment, in 1984, of the UTSA and *Business and Professions Code §§ 17200 et seq.* Further the issues of validity and enforceability of nonsolicitation and noncompetition covenants have been resolved in Edwards, The Retirement Group, and Dowell. The Complaint is devoid of any unfair competition or trade secret allegations.

Nothing was submitted by FARMERS to support any assertion, and no assertion was made, that ST.FLEUR'S policyholders had unique or peculiar insurance needs that could be satisfied only by the insurance products sold by FARMERS.

Thus, American Credit Indemnity Co. v. Sacks (2<sup>nd</sup> District, 1989) 213 Cal App. 3<sup>rd</sup> 622, controls.

There, the trial court denied a preliminary injunction and it was reversed. There, a cause of action was alleged under the UTSA. There, the insurance company provided evidence that it provided specialized insurance which is sold to a limited number of "manufacturers, wholesalers and certain service organizations" to insure "excessive bad debts".

The insurance company presented evidence that, of all the businesses in the United States with annual revenues of more than \$2,000,000.00, 6.5% actually insured their accounts receivable, and that American Credit insured more than half of those businesses. That was indeed a unique, peculiar and specialized market share.

Here, FARMERS competes with many insurance companies, including State Farm and Allstate, for insurance customers who, as a matter of public record, are required to carry automobile liability insurance and homeowners insurance. Without specific evidence of

the contrary, and none was provided, such insurance is not unique, peculiar or rare.

Therefore, FARMERS has not pled any cause of action nor alleged any facts which would justify a claim for unfair competition or misappropriation of trade secrets.

Therefore, the INJUNCTION was an abuse of discretion and must be vacated.

### VIII. CONCLUSION

This Court should first consider whether a party has any legally protectable interest in “confidential property” that does not, as a matter of evidence, rise to the status of “trade secret” under the UTSA. What is “confidential property”? Can parties enforce by INJUNCTION a contract that provides that information easily available on Google is proprietary to a party?

Specifically, as here, trial courts do not have the power to essentially amend a Complaint by “reformation” in order to grant relief that is not authorized, even under the color of equity.

Also, this Court should confirm that there is no presumption of wrongful conduct simply by the filing of a Complaint and that the good faith *belief* of a trial court in justice and equity does not excuse the mandate of statutes and the decisions of appellate courts.

This Court should also affirm what was held in *Edwards* that nonsolicitation and noncompetition covenants are presumptively void and will not be tolerated.

Finally, a message must be sent to FARMERS and other entities of their ilk that California courts will not tolerate unlawful conduct because it will be “moot” when it finally reaches appellate review.

Therefore, ST.FLEUR respectfully requests that the INJUNCTION be vacated either in its entirety or that Paragraphs (e) and (f) be vacated, and this Court declare that the nonsolicitation covenant set forth in Paragraph H of the AAA is void.

Dated: April 25, 2011      Respectfully submitted,

By: 

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