California Bar Examination

Performance Test and Selected Answers

July 2021

The State Bar of California

OFFICE OF ADMISSIONS

PERFORMANCE TEST AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2021 California Bar Examination and two selected answers.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

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Performance Test

INSTRUCTIONS AND FILE

INDUSTRIAL SANDBLASTING, INC. v. MORGAN

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Sylvia Baca and Associates, P.C.
2343 Whitetail Road
Columbia City, Columbia

MEMORANDUM

TO: Applicant
FROM: Sylvia Baca
DATE: July 27, 2021
RE: Industrial Sandblasting, Inc. v. Samuel Morgan

The firm represents Samuel Morgan, who works as a sandblaster and bid manager for Columbia Coatings Corporation. Until about three months ago, Morgan worked for a competitor named Industrial Sandblasting, Inc. (Industrial). Morgan had a contract with Industrial that contained a covenant not to compete if Morgan ever left Industrial.

Industrial has sued Morgan for breach of contract. Industrial wants to enjoin him from doing any work at all at Columbia Coatings for one year. We agreed to a bench trial and held a hearing three weeks ago. I attach transcripts of the relevant portions of testimony at that hearing. I also attach the relevant provisions of the contract between Morgan and Industrial, dated February 15, 2016.

The judge has scheduled us for closing argument on whether the covenants are valid. Please prepare a draft of the oral argument that I might present, using the attached cases as authority.

Excerpt of Transcript from Hearing
Industrial Sandblasting, Inc. v. Samuel Morgan

Held on July 6, 2021

Testimony of Samuel Morgan

. . . . .

Att'y Baca: When did you start work at Industrial Sandblasting, Inc.?

Morgan: In February 2013.

Baca: What did you do for Industrial?

Morgan: I specialize in commercial sandblasting. For several years, I operated a crew and did estimates for my old employer, Industrial Sandblasting, Inc.

Baca: Describe what commercial sandblasting means.

Morgan: We take paint and rust off of buildings, industrial equipment, pipelines, that kind of thing. Then we recoat them with a more durable covering.

Baca: How much did Industrial pay you at the start?

Morgan: They offered me $35,000 per year and I was glad to get it.

Baca: Did you have experience?

Morgan: No. It was entry-level, with no contract. They offered on-the-job training.

Baca: What happened after you got hired?

Morgan: They started me off with the simplest equipment. I figured that out pretty quickly and eventually learned how to operate all of the equipment. I got so good that different foremen would ask for me for the harder jobs.

Baca: How did your responsibilities change after those first few years?

Morgan: About five years ago. The company decided that it would help their business if they could advertise that they had people with certain kinds of certifications. So they paid me while I obtained certifications from the Society for Protective Coatings (SPC), starting six years ago. The SPC has different levels of certification, all labelled QP. In the end, I got a QP1 for external structures, a QP2 for removing hazardous coatings, a QP6 for applying metalized coatings, and a QP8 for coating concrete with polymer.

Baca: How long did that take you?

Morgan: A few months for each certification. I would find a course that introduced me to how to handle the particular task, then worked with the company to make sure that it had the equipment and management to meet SPC standards. Then we'd apply. An auditor would come and spend a week or so making sure of our capacity, and then we'd get the certification.

Baca: How did it help Industrial's business?

Morgan: We started to get a lot of different kinds of jobs, and a lot of different regular customers, mostly because we could handle a bigger range of work.

Baca: What other responsibilities did you take on?

Morgan: One year, I took over from the foreman of that crew who got sick and couldn't continue. So the company asked me to take over. I got it done early and under estimate. Both the town and the company were very satisfied. Industrial kept me with that team and promoted me to team manager.

Baca: What happened after that?

Morgan: My work was always on time and on budget and my people were always happy. One day, someone I knew in the home office asked me to help him put together a bid, as well as an estimate. He wanted to figure out how to make lower bids, and he knew that I had figured out how to do it.

Baca: How did that work out?

Morgan: It worked out well. Eventually the boss, Roger Cole, called me in and said that they couldn't promote me to the office, because they needed me in the field. But Cole also said that they wanted to keep me, so he offered me a raise and a contract. I accepted. It was good money.

Baca: Is that the contract they say you've broken?

Morgan: Yes. We signed it around 5 years ago.

Baca: What happened after you signed?

Morgan: Pretty much the same as before, except I was paid more. I kept bouncing between doing jobs and helping with estimates. Eventually, it became a strain.

Baca: Why?

Morgan: After the contract, I never got another raise. And he kept pushing me to take on more jobs. That was fine for my team; they got overtime. But I was on salary, which stopped going up.

Baca: At that point, what did you know about Columbia Coatings?

Morgan: Columbia Coatings started up about three years ago, but they were very aggressive about bidding, and often took jobs away from us – not always, but enough to notice. They never got one of my customers. Eventually, I got a call from them.

Baca: What did they say?

Morgan: They were up front. They said that they wanted to get more business, and they knew that I was valuable to Cole and Industrial. They asked whether I would come to work with them instead. I told them my problem with Cole, and they said no problem. They said that they would pay me $20,000 more,

give me an office position, and let me work in the field as much or as little as I wanted.

Baca: When did this conversation occur?

Morgan: About three months ago. I thought it over, then let them know that I would accept. I gave Cole two weeks' notice and left.

Baca: How did Cole take it?

Morgan: He was angry. He asked where I was going, and he got angrier. He made all kinds of threats and cursed me out. He said I'd regret making this decision and that I'd never work in the industry again.

Baca: Just a few more questions. When you worked for Industrial, you said you worked only in Columbia City. Is that right?

Morgan: I did one job in Sidalia, in the northeast part of the state. I did one job in Crescent, a suburb about 20 miles from Columbia City. Otherwise, all the work was in Columbia City, in the northwest corner of the state.

Baca: Where does Columbia Coatings want you to work?

Morgan: I have jobs in the south and southeast. And my office work deals with work all over the state.

Baca: How long will it take Industrial to replace you?

Morgan: They hired another foreman the week before I left. They already had someone doing the bidding – the man in the home office who asked me to help with bids and estimates. He knew pretty much what I knew.

Baca: What would happen if the court applies the non-compete clause to you?

Morgan: I won't have any work at all, after years of experience in the field.

Baca: No further questions.

Att'y Rice: Cross-examination, Your Honor?

Judge Yan: Go ahead.

Rice: You learned everything you knew about sandblasting at Industrial. Isn't that right, Mr. Morgan?

Morgan: Yes.

Rice: They invested a lot in getting you trained and qualified, didn't they?

Morgan: No. They didn't.

Rice: They paid you to get trained, didn't they?

Morgan: No. I paid for the QP certifications myself; all they did was let me do some of the coursework during work hours. It didn't cost much, but Cole sure didn't pay out for it.

Rice: Without you, Industrial won't be able to use those certificates, will it?

Morgan: Wrong again. By now, other foremen have gotten certified. Industrial won't miss me.

Rice: Columbia Coatings doesn't have any of these certifications?

Morgan: They do not. But they have foremen who do.

Rice: You learned how to estimate job costs at Industrial, didn't you?

Morgan: Yes, I did.

Rice: And now you want to use that to harm Industrial, isn't that right?

Morgan: I just want a job that pays me what I'm worth.

Rice: No further questions.

Excerpt of Transcript from Hearing
Industrial Sandblasting Inc. v. Samuel Morgan

Held on July 6, 2021

Testimony of Roger Cole

. . . . .

Att'y Rice: What impact will Mr. Morgan's working at Columbia Coatings have on your business?

Cole: A big impact. Morgan was a key employee, especially when it came to pricing out jobs. He's bringing them expertise that we trained him to have. We can already see the effect it's having.

Rice: What do you mean?

Cole: We have lost several bids to Columbia Coatings already – bids we wouldn't have lost if Morgan weren't there.

Rice: You say that you trained him to have his current expertise. What do you mean?

Cole: We paid him for the days that he attended the QP certification courses. We gave him the work that let him figure out how to price jobs. We provided him with the support and equipment to work his projects. He got all of that while working for us.

Rice: What do you want this court to do?

Cole: Enforce the contract, keep him from working in the industry for one year, anywhere in Columbia.

Rice: Is that all?

Cole: At a minimum, the court should keep him out of Columbia City, at least for long enough for us to train someone the way we trained him.

Rice: You would accept that change?

Cole: Yes. He agreed to what's in the contract, so he ought to accept less.

Rice: No further questions.

Baca: No cross-examination, Your Honor.

Employment Contract

The parties to this contract are Industrial Sandblasting, Inc. (“Employer”) and Samuel Morgan (“Employee”).

. . . . .

11. For a period of one (1) year after the termination of Employee’s employment for any reason, Employee will not own, operate, or work at any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia.

. . . . .

_____	_____
Samuel Morgan, Employee	Michelle Abebe, President Industrial Sandblasting, Inc.
February 15, 2016 Date	February 15, 2016 Date

July 2021

California Bar Examination

Performance Test

LIBRARY

INDUSTRIAL SANDBLASTING, INC. v. MORGAN

LIBRARY

Strom v. Knox Broadcasting Corporation
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Strom v. Knox Broadcasting Corporation

Columbia Supreme Court (2014)

This appeal arises from a trial court decision upholding the non-compete provisions of an employment contract between George Strom and Knox Broadcasting Corporation. Strom left Knox Broadcasting Corporation to work for a competing broadcaster, WCAP-TV. WCAP-TV brought the action below to invalidate the non-compete provision and permit Strom to appear on air for WCAP-TV.

The trial court findings indicate that, from 2008 until 2013, George Strom was employed by Knox Broadcasting Corporation ("Knox") as a meteorologist and "television personality." That contract ended on September 1, 2013 and included the following contractual provision:

> Employee shall not, for a period of one hundred-eighty (180) days after the end of the Term of Employment, allow his/her voice or image to be broadcast 'on air' by any commercial television station whose broadcast transmission tower is located within a radius of thirty-five (35) miles from Company's offices in Columbia City, Columbia.

During Strom's employment with Knox, Knox spent in excess of a million dollars promoting Strom's name, voice, and image as an individual television personality and as part of Knox's Action News Team. Strom is one of the most recognized television personalities in the Columbia City area. Local television personalities are strongly identified in the minds of television viewers with the stations upon which they appear.

In April 2013, Strom entered into a five-year contractual agreement with WCAP–TV, a competitor of Knox, to work for WCAP as a meteorologist and "television personality" when his contract with Knox expired.

After learning of Strom's prospective departure, Knox instituted a "transition plan" to reduce the impact Strom's departure would have on the station's image. That plan depended on Strom not appearing on air for WCAP-TV for at least six months after leaving Knox. To permit Strom to appear on air for WCAP-TV during those six months would disrupt Knox's plans for a transition to a replacement for Strom.

Strom's contract with WCAP-TV does not require him to appear "on air" during the first six months of his employment. Under this contract, Strom would perform substantial duties and services to WCAP–TV for which he is being compensated. To permit Strom to appear on air, WCAP-TV would take advantage of the substantial investment Knox had put into developing Strom's public persona, in which Knox had a legitimate and protectable interest.

Finally, Strom will suffer no financial harm from staying off the air during the six months following his departure from Knox.

This case requires us to apply Columbia Stat. Ann. § 24-6-53(a), which states in relevant part:

> (a) Enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.

The statute applies to contracts between employers and employees and thus applies to the contract between Strom and Knox.

Under the statute, we should uphold such a covenant only when strictly limited in time, territorial effect, and scope of the prohibited activities. In doing so, we must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

The provision in this contract should be upheld. The time limit is appropriate, restraining Strom from appearing on air for six months, during which time he will

not appear on WCAP-TV in any case. It permits Strom to appear on air after a transition period tailored to allow Knox to develop an alternative broadcasting identity.

The geographical scope is appropriate, applying only to that broadcast area surrounding Columbia City. The provision restricts Strom's activity in the same media market as that in which his former employer operates.

The scope of the services covered is appropriate; the contract prohibits Strom from using an on-air personality in which Knox has a legitimate and protectable interest. Strom remains free to work for WCAP-TV as an off-air consultant.

Finally, enforcing the covenant in Strom's contract with Knox represents a fair balance of a distinct and substantial harm to Knox, when compared to a relatively minor and incidental harm to Strom.

We affirm.

Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.

Columbia Court of Appeal (2015)

Fawcett Railway Relief, Inc. ("Fawcett") appeals from a declaratory judgment that voided a noncompetition covenant with Peter Markham ("Markham"), a former employee, and his new employer, Columbia Rail Services, Inc. ("CRS").

Fawcett is in the business of providing emergency disaster remediation services for railroads and industries with rail siding and rail yards in the lower 48 states, Canada, and Mexico. Markham began work for Fawcett in 2006 in Illinois, and over the course of seven years provided services in parts of Tennessee and Kentucky before locating in Columbia and performing services entirely within this state.

On December 2, 2011, after the move to Columbia, Markham entered into a renewed employment agreement with Fawcett that contained a non-compete provision. The non-compete provision prohibited Markham from working for three years in all of Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee in any capacity.

On June 1, 2013, Markham left Fawcett and went to work for CRS, a direct competitor. Markham has worked for CRS only in Columbia. On April 7, 2014, CRS instituted this declaratory judgment action against Fawcett to have the covenant voided. The trial court agreed with CRS that the covenant involved was overly broad as to geographical scope, time period, and scope of services. It invalidated the covenant. Fawcett appealed.

The parties agree that Markham was an employee under this statute regulating covenants not to compete, Columbia Stat. Ann. § 24-6-53(a), and thus that the statute applied to this contract.

Fawcett contends that the trial court erred in invalidating the restrictive covenants as to their geographic scope, the scope of the services prohibited, and the time period of the restriction. For the reasons that follow, we disagree.

Geographic Scope

This geographic scope far exceeds the area within which Markham worked for Fawcett. This Court will accept as prima facie valid a restriction that covers the territory where the employee worked and the employer does business. However, a restriction that extends that territory to areas in which the employee did not work is overly broad on its face, absent a strong justification other than the desire not to compete with the former employee.

This restrictive covenant prohibited Markham from providing competing services in Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee. The trial court's finding of fact noted that no east-west or north-south mainline railroad east of the Mississippi could operate without passing through this territory. Markham did not perform work in the entire eastern seaboard and in fact, performed work only in a limited area of some of the states listed in the restrictive covenant.

A restriction that covers a geographic area in which the employee never had contact with customers is overbroad and unreasonable. This covenant is unreasonably broad because it covers a region and areas of states where the plaintiff never worked.

Scope of Activity

The restrictive covenant in this case prevented Markham from performing work for any competitors of Fawcett both in the provision of emergency remediation services and "in any other capacity whatsoever."

Under our cases, a former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the

former employer. Our courts have approved as reasonable restrictions that specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer. Such a restriction protects the employer's interests from competition in that area of service.

By contrast, a restrictive covenant that prohibits work for a competitor “in any capacity” does not protect a legitimate interest of the employer and imposes a greater limitation on the employee than is necessary. In this case, the contract prohibits Markham from working for a competitor in any capacity, including activities that have nothing to do with the services that he performed for Fawcett. This provision is unreasonably broad.

Duration of Restriction

The restrictive covenants in this case restricted Markham from competitive activity for a period of three years after the termination of his employment with Fawcett.

Our cases do not state a specific time period past which a given time restriction is per se unreasonable. Instead, the cases require employers who seek to uphold a time restriction to demonstrate how the restriction is necessary to the protection of the employer during the employee’s transition to work for a competitor. An employer must prove specific facts and circumstances that support a finding of necessity. Absent such proof, our courts have invalidated time periods as short as one year or less.

The trial court in this case found that Fawcett offered no proof of the relationship between the time restriction and Fawcett’s need for protection from competition. Moreover, we note that in none of our cases have we or our sister courts approved restrictions of longer than two years. We see no error in the trial court’s conclusion that the three-year restriction in this case was unreasonable.

“Blue Pencilling”

Fawcett argues that the trial court erred in failing to “blue pencil” this covenant by modifying it to a more reasonable form, consistent with the situation and intentions of the parties. Fawcett argues that the court should have modified the provisions as follows: to restrict them to territories in which Markham had worked; to cover only the services that Markham had provided; and to be limited to the maximum time period approved by our prior cases (two years).

We disagree. The facts indicate that the covenants in this case bore no relationship to Fawcett’s need for protection from competitive practices after Markham left its employ. This covenant not to compete is invalid and should not be revised. In such a situation, a trial court does not err in refusing to “blue pencil” the contract.

For all of the foregoing reasons, we affirm.

PT: SELECTED ANSWER 1

Draft Closing Argument Re: Industrial Sandblasting, Inc. v. Samuel Morgan

May it please the court.

Over the course of this trial, you have heard testimony from my client, Mr. Samuel Morgan, about the hardship he would suffer if the court were to enforce the unreasonable restrictions that his former employer, Industrial Sandblasting, is attempting to place on his ability to earn a livelihood.

As this court is aware, Columbia Stat. Ann. Sec. 24-6-53(a) provides that restrictions in non-compete contracts may be enforced "so long as such restrictions are reasonable in time, geographic area and scope of prohibited activities."

Under the current authorities in the State of Columbia, the covenant that Industrial is attempting to enforce, which would prevent Mr. Morgan from competing with Industrial in providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia for a period of one year, is overly broad as to time, geographical area, and scope of activities. On top of that, Industrial's interests are nothing compared to the significant hardship enforcement of the covenant would have on Mr. Morgan.

<u>Geographic Scope</u>

The geographical scope in Mr. Morgan's contract, which applies to all of the State of Columbia, is overbroad and unreasonable because it includes areas where Mr. Morgan

did not perform work.

The *Fawcett* court set out the relevant standards for determining whether a geographical restriction is enforceable or not. A restriction is prima facie valid if it covers the territory where the employee worked and the employer has business (*Fawcett*). However, if the restriction extends the non-compete territory to areas where the employee does not work, that restriction is overly broad on its face, absent a strong justification other than simply the desire for the employee not to compete with the former employer (*Fawcett*). Here, Industrial has not provided a justification for enforcing a non-compete that covers all of the State of Columbia when the vast majority of Mr. Morgan's work for Industrial was in Columbia City, in the northwest corner of the state. Industrials' sole purpose for the state-wide restriction is to prevent Mr. Morgan from working for competitors like Columbia Coatings.

This instant case bears may parallels to *Fawcett*. In *Fawcett*, the court found that the geographical scope of the non-compete, which extended to all of Florida, Columbia, Illinois, Ohio, Georgia, and Tennessee, far exceeded the area within which Markham, the employee, worked for his former employer, which area was only Columbia. This was too restricted in *Fawcett* because the court found that in the case of the railroad business, no east-west or north-south mainly railroad east of the Mississippi could operate without passing through that territory, and because Markham did not perform work in the entire eastern seaboard and only performed work in a limited area of some of the specified states, the restriction was unreasonably broad. The *Fawcett* court also found that a restriction is overbroad and unreasonable if it covers areas where the

employee never had contact with customers.

Similarly, in Mr. Morgan's case, aside from Columbia City, he only did one job in Sidalia, in the northeast part of the state, and one job in a suburb just 20 miles outside of Columbia City. There is no reason for Industrial to prevent Mr. Morgan from doing field work in the south and southeast parts of the state for Columbia Coatings, which are places where Mr. Morgan has never interacted with Industrial's customers.

Mr. Morgan's situation can be distinguished from that of *Storm*, where the restrictive covenant was limited to a radius of 35 miles from the offices of the former employer, a news station. That may have been reasonable in the case of a news station because 35 miles encompassed the media market of the former employer (*Storm*), but here, there is no justification for why restrictions in the commercial sandblasting industry should apply to the entire state.

The geographical scope that Industrial is seeking to enforce is overly broad.

Scope of Activity

The scope of activities in Mr. Morgan's non-compete is also too broad. Here, the restriction applies to "providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia."

The *Fawcett* court articulated the standard for reasonable restrictions on scope of activities, which is that a former employer may restrict an employee from performing identical services for a competitor. Restrictions are reasonable if they "specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer" (*Fawcett*). However, a restriction that

prevents an employee from working for a competitor "in any capacity whatsoever", as was the case in *Fawcett*, is unreasonable as it does not protect a legitimate interest of the former employer and is more limiting than necessary.

Just as the *Fawcett* court found that a restrictive covenant preventing a former employee from conducting activities that had nothing to do with services he performed for his former employer is too broad, so too is the case here. Industrial is seeking to prevent Mr. Morgan not only from conducting field work, but also from doing estimates and doing an office job. This is unreasonable especially considering that Mr. Morgan was turned down for an office job.

The instant case can be distinguished from *Storm*, which found that the restriction on Storm's ability to appear "on air" for the period of the non-compete would not lead to financial harm for Storm because his contract with his new employer did not require him to appear "on air" during the first six months anyway. In *Storm*, the employee could still be compensated for performing other substantial duties and services to his new employer, but here, Mr. Morgan would not be able to do any of the duties for which Columbia Coatings has hired him to do.

This instant case can further be distinguished from *Storm* because Industrial does not have as significant or legitimate of an interest to be protected here. Whereas in *Storm*, the former employer spent more than a million dollars and five years to develop the television personality of one particular individual, here, Industrial did no more than pay Mr. Morgan for days off so that he could attend certification courses that he paid for himself, and that only took months to complete. Not only that, but Mr. Morgan's services

for Industrial are no means as unique as those of an on-air television personality. We can certainly appreciate that Mr. Morgan was a hardworking and effective worker, but Mr. Morgan was not the only employee capable of doing his job. As Mr. Morgan testified, other foremen have gotten the certifications that Mr. Morgan paid for himself, and there is someone else who is capable of doing bidding work.

Industrial's claim that it invested a lot into getting Mr. Morgan trained and qualified is simply not convincing. Not only did Industrial not pay for Mr. Morgan's certifications, but Mr. Morgan has already passed on what he learned from Industrial in terms of how to price bids to other employees at Industrial. Industrial already has all the capabilities they need to transition Mr. Morgan's responsibilities to others, and in fact, they already have before Mr. Morgan even left.

Mr. Morgan should not be prevented from being paid what he is worth and being promoted to a position at a competitor that makes the best use of his skills and talent simply because his former employer refused to recognize his value.

Duration of Restriction

The one-year restriction on Mr. Morgan is arbitrary and unreasonable.

Although the Columbia courts have not found a bright-line rule for when a given time restriction is per se unreasonable, an employer must provide specific facts and circumstances to support a finding that the time period they are attempting to enforce is necessary to protect their interests during the transition period (*Fawcett*). Absent such proof, time periods as short as one year or even less have been invalidated in Columbia (*Fawcett*).

In *Storm*, a six-month restriction was found reasonable because the former employer was able to show that six-months was required in the detailed transition plan they put into place to replace Storm as an on-air personality. Further, that six-month restriction only incidentally burdened Storm because his new employment contract did not require him to appear on TV during the first six months anyway, so the six-month restriction was appropriately tailored (*Storm*).

But here, because of how broad the restrictions are, it would put Mr. Morgan out of work for an entire year. Industrial has also not been able to provide any evidence to support the one-year period. As we heard from Mr. Morgan, Industrial already has other employees doing work that Mr. Morgan did before he left, such as bid estimations, and the week after Mr. Morgan left, they hired another foreman. Even if this foreman needed to obtain certifications that Mr. Morgan had, we heard from Mr. Morgan that such certifications only take months, not an entire year.

The one-year restriction appears to be fully arbitrary, and Industrial has not provided any evidence that any time period, let alone one as long as one year, is necessary to protect their interests.

Balancing

Finally, the court should weigh the employer's interest against the impact on the employee (*Storm*).

In *Storm*, enforcing the non-compete was fair because there is a distinct and substantial harm to Knox, while the harm to Storm is relatively minor and incidental. Here, the situation is the exact opposite. The harm to Mr. Morgan would be distinct and

substantial because it would put him out of work for an entire year, while the harm to Industrial is relatively minor and incidental. While Industrial claims that they have lost several bids to Columbia Coatings already that they would not have lost had Mr. Morgan not transitioned to working for Columbia Coatings, that is simply not true. As Mr. Morgan testified, Columbia Coatings was taking jobs away from Industrial long before Mr. Morgan left.

Blue Penciling

The court should not reform the non-compete to be limited to only Columbia City and for a period long enough to train someone the way they trained Mr. Morgan, as Industrial has requested.

As the *Fawcett* court ruled, a court will not "blue pencil" a covenant to modify it to be reasonable, and therefore enforceable, if the covenants bear no relationship to the former employer's need for protection from competitive practices after the former employee's services are terminated.

Just as the *Fawcett* court found the covenant to be invalid and therefore should not be revised, similarly here, the geographical limitation to Columbia City bears no relationship to their need for protection from competitive practices because Mr. Morgan will not be working for Columbia Coatings in Columbia City aside from an office job, a position Industrial specifically declined to give Mr. Morgan while he was in their employ. It also appears that Industrial already has employees that have the same qualifications and trainings as Mr. Morgan.

The scope of the non-compete that Industrial is seeking to enforce, even if limited to

Columbia City and for a period of time long enough to train a replacement, bear no relationship to Industrial's need for protection, as they do not need protection from competition by Mr. Morgan in Columbia City. The non-compete should be invalidated and not blue penciled.

Conclusion

Industrial is seeking to place an undue burden on Mr. Morgan in restricting where he can work, what he can do, and for how long, not because they have any significant interest in enforcing the non-compete, but simply to be retaliatory and to make sure that Mr. Morgan, as Mr. Cole said, "never work in the industry again." And that is exactly what will happen if this restriction is enforced; Mr. Morgan will have no work at all, after years of experience in the field, making less than what he deserved. I respectfully request that this court finds the covenant overly broad and unenforceable in its entirety.

PT: SELECTED ANSWER 2

To: Sylvia Baca

From: Applicant

Date: July 27, 2021

Re: Industrial Sandblasting, Inc. v. Samuel Morgan

Oral Argument Draft

Good afternoon Your Honor and may it please the Court. Our client, Mr. Samuel Morgan, is a hard worker whose services were not appropriately valued by his former employer, Industrial. Because Mr. Morgan was consistently denied raises and promotional opportunities from his former employer, he accepted a new and substantially different position with Columbia Coatings. Industrial is seeking to enforce a non-compete agreement in Mr. Morgan's employment contract against him now, to preclude him from taking advantage of this valuable new employment opportunity.

Per Columbia statute, a non-compete agreement in an employment contract is only enforceable if it is reasonable in (1) time, (2) geographic area, and (3) scope of permitted activities. Because the non-compete clause Industrial is seeking to enforce is unreasonable on all three fronts, we respectfully request this Court to invalidate the non-compete agreement as unenforceable.

The non-compete agreement is not reasonable in duration

As an initial matter, the non-compete agreement is patently unreasonable in duration. *Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.* [Columbia Ct. App. 2015] has established that there is no time that is per se unreasonable, though the court noted that Columbia appellate courts have never upheld an agreement beyond two years. Rather, the Fawcett court established that the burden is on the *employer* seeking to enforce a non-compete agreement to establish that the restriction is necessary to the protection of the employer during the employee's transition to working for a competitor. The Fawcett court was clear that the employer must present *specific* facts and circumstances to support a finding that the time period is necessary. Without these facts, even time periods of a year or less can be invalidated. *Fawcett*. *Strom v. Knox Broadcasting Corp* [Columbia 2014], for example, upheld a non-compete agreement of six months, since the six- month period was directly related to the duration of the former employer's transition plan. The plaintiff employer in Strom determined that six months was necessary to mitigate the public impact that Strom's loss would have on the network, and thus, the six- month period was upheld.

Here, however, Industrial has presented no concrete facts regarding why it is necessary to enjoin Mr. Morgan's work for Columbia Coatings for a full year. In fact, Industrial hired Mr. Morgan's replacement before he even left. Industrial hired another foreman the week before Mr. Morgan left, and the company already had another employee—a man that Mr. Morgan had worked alongside and helped to train—to do bidding work. [Testimony of Samuel Morgan.] Mr. Morgan indicated in his testimony that his replacement knew "pretty much what [he] knew." Therefore, the facts indicate that

Industrial has no concrete need to enjoin Mr. Morgan's work for a competitor for an entire year. Unlike in Strom, where a six month non-compete period was essential to the former employer's transition plan, the transition is already complete here.

Industrial may argue that the court should enforce the non-compete agreement for the time it takes to train an employee with identical QP certifications as Mr. Morgan. Mr. Morgan has four such certifications, each of which took several months to obtain. [Testimony of Samuel Morgan]. However, Mr. Morgan obtained those certifications with his own money, to further his own career. It is not essential to Industrial's interests in replacing Mr. Morgan's role as a sandblaster in the field to find and train a replacement with identical qualifications.

For the aforementioned reasons, the non-compete clause is clearly unreasonable in duration, since Industrial has not met its burden to establish why Mr. Morgan should be enjoined from work for a year—particularly since Industrial hired Mr. Morgan's replacement before he even left the company.

The non-compete agreement is not reasonable in geographic scope

Furthermore, the non-compete agreement here is also unreasonable in geographic scope. *Fawcett* has established that a non-compete agreement's scope is prima facie reasonable if it covers only the territory where the employee worked for the employer. However, it is facially *invalid* if the restriction extends to geographic regions in which the employee did not work, absent a strong justification from the employer other than the desire not to compete with the former employee.

Strom upheld a distinguishable non-compete agreement, which applied only to the

city in which the defendant worked for the network, since that city was the relevant media market in which Strom had provided all his services for his former employer. Here, however, Mr. Morgan has worked *almost exclusively* in Columbia City during his time with Industrial. He also worked on one job in Crescent, a suburb of Columbia City, and performed one job in the northeastern part of Columbia. His contract, however, enjoins him from any similar work in the *entire* state of Columbia [Contract]. Because the restriction here extends to large swaths of the state in which Mr. Morgan performed no work for Industrial, it is facially invalid here.

Moreover, Mr. Morgan anticipates doing most of his work for Columbia Coatings in the south and southeastern portions of Columbia state. Columbia City, on the other hand, is located in the northwestern portion of the state. Thus, enforcing the non-compete agreement through the entire state will preclude Mr. Morgan from working in a geographic market completely distinct from the one he worked for Industrial in.

Additionally, Industrial does not have the requisite compelling justification beyond preventing competition, as discussed in Fawcett, for enforcing the agreement throughout the entire state. In fact, Roger Cole testified that he was willing to accept an agreement that applied only to Columbia City [Testimony of Roger Cole], further suggesting that Industrial has no legitimate interest in enforcing the agreement throughout the entire state.

Therefore, the agreement is also unreasonable in its geographic scope, and should be invalidated on those grounds as well.

The scope of activities covered by the agreement is also unreasonable

The non-compete agreement is unenforceable for a third and additional reason: the scope of activities Industrial is attempting to prohibit under the agreement is unreasonably broad. The Columbia Supreme Court in *Strom* upheld an agreement that only prohibited a television personality's "on air" appearances for six months, while he was still permitted to work as an off-air consultant for a competitor during that time. *Fawcett*, on the other hand, held that prohibiting work for a competitor in *any* capacity does not protect the legitimate interests of the employer, and is unreasonable in scope. The Court of Appeal in Fawcett strongly suggested that an employer can only restrict in a non-compete agreement services *identical to*, or at least very similar to, those performed by the former employee.

Here, Mr. Morgan's employment contract mandates that he not work—in *any* capacity—for a business providing sandblasting or similar industrial cleaning services. [Employment Contract]. Clearly, Mr. Morgan's contract is not simply limited to the services he performed for Industrial. At Industrial, for example, Mr. Morgan largely worked in the field—whereas at Columbia Coating, Mr. Morgan anticipates primarily working as office staff. [Testimony of Samuel Morgan]. Clearly, the non-compete agreement Industrial is seeking to enforce goes far beyond the scope of activities Mr. Morgan provided for his former employer and attempts to prohibit a materially different type of employment.

Furthermore, the *Strom* court suggested that relevant to this inquiry of scope is whether a defendant's former employer "substantially invested" resources into training

the employee, such that the former employer has a "legitimate and protectable interest" in enjoining a particular type of work for a narrow period of time. In *Strom*, for example, the court upheld enjoining on-air work specifically, because Strom's former employer had invested over a million dollars into cultivating his public and on-air persona. Here, however, there is no indication that Industrial has similarly substantially invested into the work that Mr. Morgan will be performing for Columbia Coatings. Mr. Morgan testified that he obtained most of his training—particularly his four QP qualifications—entirely at his own expense (though Industrial did permit him to complete some of the trainings on company time) [Testimony of Samuel Morgan]. Thus, Industrial has no valid need to enjoin Mr. Morgan's work for Columbia Coatings in order to protect their own investment, because Industrial invested very little in Mr. Morgan overall. Industrial refused to promote Mr. Morgan despite his outstanding performance at work, only gave him one raise, and did not provide financial assistance to Mr. Morgan as he sought to obtain trainings that would further Industrial's interests as a company.

In short, because Industrial has no protectable investment interest in Mr. Morgan's training, and because the scope of the agreement extends far beyond the limited field work Mr. Morgan provided for Industrial, it is unenforceable on these grounds as well.

Fairness also favors invalidation of the non-compete agreement

Moreover, the Columbia Supreme Court in *Strom* indicated that in considering the validity of a non-compete agreement, courts should consider whether the agreement strikes a "fair balance"—in other words, courts must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

Here, as discussed above, there is no indication that Industrial is seeking to protect a legitimate, investment-backed interest here. Industrial invested very little into Mr. Morgan and his career during his tenure at Industrial, and suffered very little harm by his departure, since they replaced him before he even left the company. Mr. Morgan, on the other hand, would suffer severe and irreparable injury if the non-compete agreement were enforced here. He would be barred from practicing his chosen profession for an entire year [Testimony of Samuel Morgan], which would pose significant financial difficulties and will have a substantial detriment on Mr. Morgan's overall quality of life. Thus, the balance of fairness here further weighs in favor of invalidating the compete agreement.

The court should not "blue-pencil" the agreement

This court should also not follow the suggestion of Roger Cole and his counsel during his testimony and modify the non-compete agreement to conform to a more limited duration, geographic scope, and scope of services. *Fawcett* has established that if the covenant bears absolutely *no* relationship to the employer's legitimate need to protect its own interests, it should be invalidated, and the court should not make an attempt to revise the agreement in an attempt to salvage it. Here, as discussed above, the non-compete agreement bears no rational relationship to protecting Industrial's legitimate interests. The covenant is overbroad in time, geographic scope, and in the scope of services it prohibits Mr. Morgan to engage in. Thus, reformation of the agreement would be inappropriate here, and the court should invalidate it in its entirety.

In short, the non-compete agreement between Mr. Morgan and Industrial is patently

unreasonable in scope. Its year-long duration has no reasonable relation to the needs of Industrial to shape an appropriate transition plan, it applies throughout the entire state when Mr. Morgan only worked in a small portion of Columbia for Industrial, and applies to *all* services for sandblasting companies, beyond those Mr. Morgan provided for Industrial. For the foregoing reasons, we respectfully request this Court invalidate the non-compete agreement in its entirety, and permit Mr. Morgan to pursue his promising career opportunity with Columbia Coating.