

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of	)	
	)	
<b>POWERCOMM BROADBAND LLC,</b>	)	Case No. TA-2018-0300
<b>d/b/a NewDawn Fiber,</b> for Certificate of	)	
Service Authority to	)	
Provide Basic Local Telecommunications	)	
Services and Registration to Provide	)	
Interconnected Voice over Internet	)	
Protocol Telecommunications Service in	)	
Missouri	)	

**SECOND AMENDED APPLICATION**

COMES NOW POWERCOMM BROADBAND, LLC, d/b/a NEWDAWN FIBER, ("Company") pursuant to §§392.550 and 392.611.4, RSMo, and for its Application to the Missouri Public Service Commission ("Commission") states as follows:

1. The Applicant's legal name is Powercomm Broadband, LLC, and it does business under the d/b/a of "NewDawn Fiber." Applicant is a Missouri limited liability company and duly registered to do business in Missouri, and its d/b/a is duly registered with the State of Missouri. A copy of Applicant's Certificate of Good Standing from the Missouri Secretary of State's Office is attached as **Exhibit A** and a copy of its Registration of Fictitious Name is attached hereto as **Exhibit A-1**. Applicant's mailing address, electronic mail address and telephone number are:

Powercomm Broadband, LLC  
529 St. Joseph Ave.,  
Excelsior Springs, MO, 64024  
Telephone: 816-205-4450

Email: [kennis@welcometofast.com](mailto:kennis@welcometofast.com)

2. The Company seeks Certificate of Service Authority to offer and provide Basic Local Exchange Telecommunications Services and registration to offer and provide Interconnected Voice over Internet Protocol service. Applicant is seeking statewide authority.
3. Attached as **Exhibit B** is an affidavit signed by an officer or general partner of the Applicant making the statements required by §392.611.4 and §392.550, RSMo, and confirming that the Applicant's service meets the criteria for Basic Local Exchange Telecommunications Services and interconnected Voice over Internet Protocol service as defined by §386.020, RSMo.
4. The Company will pay/comply with all tariffs required by law.

WHEREFORE, POWERCOMM BROADBAND LLC, d/b/a "NewDawn Fiber," respectfully requests that the Commission issue an order granting it a Certificate of Service Authority to offer and provide Basic Local Telecommunications Services in the State of Missouri and granting it a registration to offer and provide Interconnected Voice over Internet Protocol service in the exchanges listed in the Affidavit.

Respectfully submitted,



Linda S. Dickens  
Missouri Bar #31331  
Dickens Law LLC  
10975 Grandview Dr.

Suite 190  
Overland Park, KS 66210  
(913) 486-9908  
Fax: (913)-562-1165  
Linda@DickensLawKC.com

COUNSEL FOR POWERCOMM  
BROADBAND LLC  
d/b/a "NEWDAWN FIBER"

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been served electronically on the PSC Staff Counsel's office (at staffcounsel@psc.mo.gov) and on the Office of the Public Counsel (at opcservice@ded.mo.gov) on this 13th day of June, 2018, to each of the political subdivisions listed above.

# STATE OF MISSOURI



**John R. Ashcroft**  
**Secretary of State**

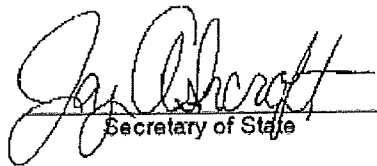
CORPORATION DIVISION  
CERTIFICATE OF GOOD STANDING

I, JOHN R. ASHCROFT, Secretary of State of the STATE OF MISSOURI, do hereby certify that the records in my office and in my care and custody reveal that

*PowerComm Broadband, LLC*  
*LC1394285*

was created under the laws of this State on the 16th day of April, 2014, and is active, having fully complied with all requirements of this office.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the GREAT SEAL of the State of Missouri. Done at the City of Jefferson, this 17th day of May, 2018.

  
Secretary of State



Certification Number: CERT-05172018-0109

**EXHIBIT**

tabbles

*A*



## State of Missouri

Jason Kander, Secretary of State

Corporations Division  
PO Box 778 / 600 W. Main St., Rm. 322  
Jefferson City, MO 65102

**X001232473**  
**Date Filed: 11/6/2015**  
**Expiration Date: 11/6/2020**  
**Jason Kander**  
**Missouri Secretary of State**

### Registration of Fictitious Name

(Submit with filing fee of \$7.00)  
(Must be typed or printed)

This information is for the use of the public and gives no protection to the name being registered. There is no provision in this Chapter to keep another person or business entity from adopting and using the same name. The fictitious name registration expires 5 years from the filing date. (Chapter 417, RSMo)

Please check one box:

☒ New Registration ☐ Renewal ☐ Amendment ☐ Correction  
Charter number Charter number Charter number

The undersigned is doing business under the following name and at the following address:

Business name to be registered: NewDawn Fiber

Business Address: 529 St. Joseph Avenue. PO Box 178  
(PO Box may only be used in addition to a physical street address)

City, State and Zip Code: Excelsior Springs, MO 64024

#### Owner Information:

If a business entity is an owner, indicate business name and percentage owned. If all parties are jointly and severally liable, percentage of ownership need not be listed. Please attach a separate page for more than three owners. The parties having an interest in the business, and the percentage they own are:

Name of Owners, Individual or Business Entity	Charter # Required If Business Entity	Street and Number	City and State Excelsior Springs, MO	Zip Code	If Listed, Percentage of Ownership Must Equal 100%
PowerComm Broadband, LLC	LC1394285	15585 Lovers Ln	MO	64024	100.00

All owners must affirm by signing below

In Affirmation thereof, the facts stated above are true and correct:

(The undersigned understands that false statements made in this filing are subject to the penalties of a false declaration under Section 575.060 RSMo)

PowerComm Broadband, LLC - Bryon Jeffers	POWERCOMM BROADBAND, LLC - BRYON JEFFERS	11/06/2015
Owner's Signature or Authorized Signature of Business Entity	Printed Name	Date

Name and address to return filed document:

Name: Calan McConkey

Address: Email: calan.mcconkey@gmail.com

City, State, and Zip Code: \_\_\_\_\_

EXHIBIT

A-1

## AFFIDAVIT

I, KENNIS MANN, a natural person, do hereby swear and affirm that I am an officer or general partner of POWERCOMM BROADBAND, LLC ("the Company"), and that the following are true and correct to the best of my knowledge and belief.

(1) Applicant's basic information:

Powercomm Broadband LLC, d/b/a NewDawn Fiber  
529 St. Joseph Ave.  
Excelsior Springs, MO 64024  
Telephone: 816-205-4550  
Email: [kennis@welcometofast.com](mailto:kennis@welcometofast.com)

(2) Area where Applicant proposes to offer telecommunications services:  
Missouri Statewide.

(3) That the Applicant is legally, financially, and technically qualified to provide the requested authorization to provide the indicated telecommunications services, subject to the following explanation of the company's current financial circumstances:

In October, 2016, the Applicant was financially qualified to run its business, and successfully doing so, when a frivolous lawsuit was filed against it. (See Exhibit A, Petition filed in *Reflective Group LLC v. Powercomm Broadband, LLC, et al*, Case No. 16CV06205, Johnson County, Kansas District Court.) On Jan. 18, 2018, summary judgment was granted in Applicant's favor on all facts and all counts, effectively confirming the frivolous nature of the suit. (See Exhibit B, Order Granting Summary Judgment). Meanwhile, in violation of governing laws and



practices, Applicant's commercial lender (Almena State Bank) learned of the frivolous lawsuit and, on or about April 7, 2017, accelerated Applicant's commercial loans and thereafter foreclosed on them. (See Exhibit C, Petition on Promissory Note to Foreclose Mortgage, *Almena State Bank et al v. Powercomm Broadband LLC, et al*, Case No. 17CV04201, Johnson County, Kansas District Court.) Applicant filed counter-claims against its lender, alleging, *in part*, that it had no right to take punitive actions on the loans (a) without making a good faith inquiry into whether there was merit to the frivolous lawsuit and whether Powercomm could financially weather out the lawsuit (which it did), (b) without giving Powercomm a reasonable opportunity to work through the frivolous litigation, and (c) when Powercomm *had never even missed a payment (on the loans)*. (See Exhibit D, Defendants' Answer, Affirmative Defenses and Counterclaims.) Trial in the case is set to begin on Jan. 14, 2019. (See Exhibit E, Case Management Order.)

The bank's foreclosure actions substantially harmed the reputation (and more) of Applicant, causing it to lose revenue and revenue opportunities that would have furthered its march toward cash-flow-positive on operations, and causing it to spend legal fees on its defense and counterclaims. To avoid any interruptions in its services for subscribers, starting in July, 2018 and continuing through the present,

"owners"<sup>1</sup> made personal loans to Applicant so that it could continue furnishing services to its subscribers.

The foreclosure action and counterclaims against the lender are set for trial in Johnson County, Kansas on Jan. 14, 2019. (See Exhibit E, Case Management Order.) Until then, Applicant's owners plan to continue making personal loans to Applicant, and/or to file for Reorganization under Chapter 11 of the U.S. Bankruptcy Code, so that Applicant can continue its operations until cash flow has recovered from the lender's improper actions.

(4) Applicant is ready, willing, able, and will comply with all applicable state and federal laws and regulations imposed upon providers of the indicated telecommunications services; Applicant further states that it never intended to operate without proper licensure; that when the company was set to begin operations, the undersigned delegated to a responsible Consultant (Jeremy Gee) owner and managing member of KrombleTech, LLC, which later was purchased and became PhoneHost, LLC, who were under a master services agreement with PowerComm Broadband, LLC the task of obtaining the proper license, the undersigned believed the task had been completed, that upon recently learning that the license had not in fact been obtained, the undersigned (and the company) took immediate steps to bring it into compliance with the laws, and the undersigned and applicant sincerely regret and apologize for operating without proper licensure.

(5) Applicant will comply with applicable assessment requirements. These assessments include but are not necessarily limited to:

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<sup>1</sup> Kennis Mann is the *majority owner* and *manager* of the parent company of Applicant, Powercomm Holdings, LLC, and it is appointed the *manager* for Applicant.



- (a) Relay Missouri assessment requirements identified in 4 CSR 240-28.050(3);
- (b) Missouri universal service fund assessment requirements identified in 4 CSR 240.28.050(2);
- (c) Missouri Public Service Commission assessment requirements identified in 4 CSR 240-28.050(1);
- (d) Local enhanced 911; and
- (e) Any applicable license tax;
- (6) Applicant will comply with applicable reporting requirements identified in 4 CSR 240-28.040 including maintaining an updated list of company contacts in the Missouri Commission's Electronic Filing and Information System;
- (7) The Applicant has established a process for handling inquiries from customers concerning billing issues, service issues, and other consumer-related complaints; and
- (8) The Applicant's service meets the criteria as defined within § 386.020 for the indicated services sought for certification.

This concludes my affidavit.



TARA HOTZEL  
My Commission Expires  
November 23, 2018  
Clay County  
Commission #14831815

Kennis Mann  
Signature

Kennis Mann  
Printed Name

C.E.C.  
Title

State of Missouri  
County of Clay  
Subscribed and sworn before me this 6 day of June, 2018  
Tara Hotzel  
Notary Public

Notary Seal:



TARA HOTZEL  
My Commission Expires  
November 23, 2018  
Clay County  
Commission #14831616

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

REFLECTIVE GROUP, LLC

Plaintiff,

v.

KENNIS MANN d/b/a NEWDAWN FIBER

SERVE AT:

13713 Fontana Lane

Overland Park, KS 66207

BRYON JEFFERS

SERVE AT:

15585 Lovers Lane

Excelsior Springs, MO 64024

BODIE COOPER

SERVE AT:

529 Saint Joseph Ave.

Excelsior Springs, MO 64024

and

POWERCOMM BROADBAND, LLC

SERVE AT:

529 Saint Joseph Ave.

Excelsior Springs, MO 64024

Defendants.

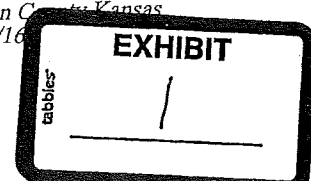
Case No.:

Division:

**VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER**  
**AND FOR DAMAGES**

COMES NOW Plaintiff Reflective Group, LLC, by and through its counsel, and pursuant to K.S.A. 60-901, *et seq.*, hereby petitions the Court for an ex parte restraining order against Defendants Kennis Mann d/b/a NewDawn Fiber, Bryon Jeffers, Bodie Cooper, and PowerComm Broadband, LLC, and for other damages, and in support thereof, states as follows:

Clerk of the District Court, Johnson County, Kansas  
10/21/16



### **PARTIES**

1. Plaintiff Reflective Group, LLC (“Reflective Group”) is a Kansas Limited Liability Company duly registered in the State of Kansas.

2. Defendant Kennis Mann d/b/a NewDawn Fiber (“Mann”) is a Kansas resident who may be served with process at 13713 Fontana Lane, Overland Park, Johnson County, Kansas 66207.

3. Defendant Bryon Jeffers (“Jeffers”) is a Missouri resident who may be served with process at 15585 Lovers Lane, Excelsior Springs, Clay County, Missouri 64024.

4. Defendant Bodie Cooper (“Cooper”) is a Missouri resident who may be served with process at 529 Saint Joseph Avenue, Excelsior Springs, Clay County, Missouri 64024.

5. Defendant PowerComm Broadband, LLC (“PowerComm”) is a Missouri Limited Liability Company duly registered in the State of Missouri.

### **JURISDICTION AND VENUE**

6. Jurisdiction and venue are proper in this Court pursuant to the laws of Kansas because Plaintiff and at least one of the Defendants to this litigation are Kansas entities and/or residents, the contract/agreement in dispute was entered into in the State of Kansas, and Defendant Mann is a resident of Johnson County, Kansas.

### **FACTS COMMON TO ALL COUNTS**

7. Reflective Group and Mann formed an entity called Dawn Fiber, LLC (“Dawn Fiber”) on May 2, 2013.

8. Dawn Fiber was organized for the object and purpose of offering broadband internet services to operate in cities within the states of Kansas and Missouri, including but not

limited to, Baldwin City, Lawrence, Ottawa, and Gardner, Kansas, and Marshall, Peculiar and Excelsior Springs, Missouri.

9. Following the rise of disputes between Reflective Group and Mann concerning the management and operation of Dawn Fiber's business, Reflective Group and Mann mutually agreed to dissolve and liquidate Dawn Fiber.

10. The dissolution and liquidation of Dawn Fiber occurred on April 28, 2014, under and in accordance with Dawn Fiber's Operating Agreement, K.S.A. 17-76,116, and a written Settlement Agreement and Mutual Release ("Settlement Agreement") entered into between Reflective Group and Mann.

11. Mann executed the Settlement Agreement on April 29, 2014, and agreed to be bound by its terms and conditions, having acknowledged receipt of good and valuable consideration for the Settlement Agreement.

12. Both Reflective Group and Mann, by and through their respective counsel, cooperated in the drafting and preparation of the Settlement Agreement, and both Reflective Group and Mann agreed the Settlement Agreement shall not be construed against or in favor of any party.

13. The Settlement Agreement provides that it shall be construed and interpreted in accordance with the laws of the State of Kansas.

14. Both Reflective Group and Mann represented and warranted that the Settlement Agreement constitutes the legal, valid and binding obligation of the Releasing Parties, which included Reflective Group and Mann.

15. Among the terms and conditions contained within the Settlement Agreement, Mann agreed to provide Reflective Group with a full and general release of all claims Mann may have had against Plaintiff Reflective Group with regard to Dawn Fiber or its dissolution.

16. The Settlement Agreement also contained the following prohibitory provision:

**14. The Dawn Fiber Name**

Neither Mann, his spouse or children, nor any affiliate of Mann, nor Reflective Group or its Members will use the word Dawn in any entity or affiliation, except for (i) an entity that has a not-for-profit purpose and is so designated for Federal Income Tax purposes; or (ii) an entity that is not engaged in the business of providing telecommunication goods or services or providing goods or services to entities that are engaged in the business of providing telecommunication goods or services.

(Hereinafter referred to as the “Dawn Prohibition Clause”).

17. On or about November 6, 2015, Mann, by and through Jeffers, Cooper, and/or PowerComm, began operating a for-profit business in Excelsior Springs, Missouri, under the Missouri registered business name “NewDawn Fiber”.

18. Defendant Mann’s creation and operation of NewDawn Fiber, by and through Jeffers, Cooper, and/or PowerComm, was in direct violation and breach of the Dawn Prohibition Clause contained in the Settlement Agreement.

19. Reflective Group notified Mann, by and through a “cease and desist” letter dated September 15, 2016, that Mann’s creation and operation of NewDawn Fiber was in direct violation and breach of the Dawn Prohibition Clause contained in the Settlement Agreement, and requested that Mann cease and desist all operations of NewDawn Fiber, but to date, Mann has failed and refused to comply with Reflective Group’s request, and continues to violate and breach the Dawn Prohibition Clause contained in the Settlement Agreement.

20. As result of Mann’s creation and operation of the business NewDawn Fiber, by and through Jeffers, Cooper, and/or PowerComm, in direct violation and breach of the Dawn Prohibition Clause contained in the Settlement Agreement, Reflective Group has suffered, and will continue to suffer, damages and injury.

**COUNT I: REQUEST FOR TEMPORARY RESTRAINING ORDER, OR IN THE  
ALTERNATIVE OR ADDITIONALLY, TEMPORARY AND PERMANENT  
INJUNCTION**

21. Plaintiff Reflective Group incorporates by reference paragraphs 1 through 20 as though fully set forth herein.

22. As a result of Mann's current, and anticipated future, violation and breach of the "Dawn Prohibition Clause" contained within the Settlement Agreement entered into with Reflective Group, Reflective Group is entitled to injunctive relief in the form of a temporary restraining order prohibiting Mann, Jeffers, Cooper, and PowerComm, from continuing to operate the business NewDawn Fiber, and use the name "Dawn" in any for-profit entity or affiliation engaged in the business of providing telecommunication goods or services or providing goods or services to entities that are engaged in the business of providing telecommunication goods or services, pursuant to the express terms and conditions contained in the Dawn Prohibition Clause contained in the Settlement Agreement.

23. Immediate and irreparable injury, loss and/or damage will result to Reflective Group if a temporary restraining order, as set forth above, is not granted in this matter.

24. There is a substantial likelihood that Reflective Group will prevail on the merits of this matter.

25. The injury sustained by Reflective Group, and which Reflective Group will continue to sustain without issuance of a restraining order against Mann, Jeffers, Cooper, and PowerComm, outweighs any potential damage that may occur to Mann, Jeffers, Cooper, and PowerComm by issuance of the restraining order.

26. The requested restraining order is not adverse to the public interest.

27. Reflective Group requests that notice and bond be waived in this matter.

28. Alternatively, or additionally, Reflective Group requests this Court grant a temporary injunction, as well as a permanent injunction, against Mann, Jeffers, Cooper, and PowerComm prohibiting each of them from continuing to operate the business NewDawn Fiber, and use the name "Dawn" in any for-profit entity or affiliation engaged in the business of providing telecommunication goods or services or providing goods or services to entities that are engaged in the business of providing telecommunication goods or services, pursuant to the express terms and conditions contained in the Dawn Prohibition Clause contained in the Settlement Agreement, after reasonable notice and opportunity to be heard.

WHEREFORE, Plaintiff Reflective Group, LLC respectfully requests the following relief:

- (1) That the Court enter a temporary restraining order or, in the alternative or additionally, a preliminary injunction, as well as a permanent injunction, against Defendants Kennis Mann d/b/a NewDawn Fiber, Bryon Jeffers, Bodie Cooper, and PowerComm Broadband, LLC, and each of them, preventing each of them from continuing to operate the business NewDawn Fiber, and use the name "Dawn" in any for-profit entity or affiliation engaged in the business of providing telecommunication goods or services or providing goods or services to entities that are engaged in the business of providing telecommunication goods or services;
- (2) That the Court award Plaintiff Reflective Group the costs of this action and attorney fees;
- (3) That the Court award such other relief as it finds just and equitable.

#### **COUNT II: BREACH OF CONTRACT**

29. Plaintiff Reflective Group incorporates by reference paragraphs 1 through 28 as though fully set forth herein.



30. On April 29, 2014, Reflective Group and Mann entered into a contract entitled “Settlement Agreement and Mutual Release”.

31. The parties contracted and agreed to be bound by the terms and conditions of the Settlement Agreement.

32. The Settlement Agreement between Reflective Group and Mann was supported by offer, acceptance and consideration.

33. The Settlement Agreement between Reflective Group and Mann contained definite and certain terms.

34. Mann breached the Settlement Agreement by his creation and operation of the business NewDawn Fiber, by and through Jeffers, Cooper, and/or PowerComm, and by his use of the name “Dawn” in a for-profit entity or affiliation engaged in the business of providing telecommunication goods or services or providing goods or services to entities that are engaged in the business of providing telecommunication goods or services.

35. As a direct and proximate cause of Mann’s breach, Reflective Group has suffered damages, and will continue to suffer damages into the future.

WHEREFORE, Plaintiff Reflective Group, LLC respectfully requests the following relief:

- (1) That the Court award Plaintiff Reflective Group any and all reasonable damages available and warranted under the circumstances against Defendants Kennis Mann d/b/a NewDawn Fiber, Bryon Jeffers, Bodie Cooper, and PowerComm Broadband, LLC, and each of them; and
- (2) That the Court award such other relief as it finds just and equitable.

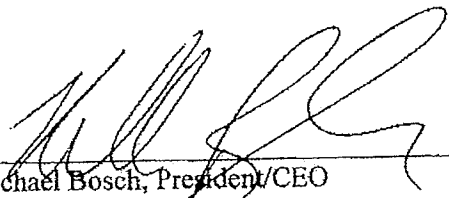
/s/Brian T. Goldstein

Brian T. Goldstein    KS Bar #19077  
Cummings, McClorey, Davis, Acho & Associates, P.C.  
9140 Ward Parkway, Suite 225  
Kansas City, Missouri 64114  
(816) 842-1880  
(816) 221-0353 (fax)  
[bgoldstein@cnda-law.com](mailto:bgoldstein@cnda-law.com)  
ATTORNEY FOR PLAINTIFF

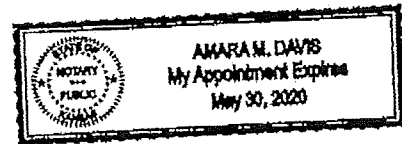
VERIFICATION

STATE OF KANSAS           )  
                                  Douglas       )  
COUNTY OF ~~JOHNSON~~       )

The undersigned, upon penalty of perjury, swears that the above and foregoing is true.

  
\_\_\_\_\_  
Michael Bosch, President/CEO  
Reflective Group, LLC

  
\_\_\_\_\_  
NOTARY PUBLIC



My commission expires: May 30 2020\_\_\_\_\_

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL DEPARTMENT

REFLECTIVE GROUP, LLC and  
MIKE BOSCH

Plaintiffs,

v.

KENNIS MANN, *et al.*

Defendants.

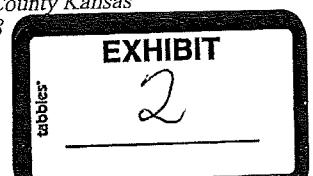
Case No. 16CV6205  
Chapter 60; Division 7

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Before the Court is defendants' consolidated motion for summary judgment. On October 24, 2016, plaintiff Reflective Group, LLC, filed its verified petition for a temporary restraining order and damages, naming Kennis Mann d/b/a New Dawn Fiber, Bryon Jeffers, Bodie Cooper, and Powercomm Broadband LLC as defendants (Doc. 1). Mann and Powercomm answered and counterclaimed against Reflective Group and added Mike Bosch, Casey Morford, and Joshua Strohm as third-party defendants (Doc. 19, amended Doc. 24). On May 4, 2017, the parties filed a notice of dismissal without prejudice of Mr. Cooper.

On May 19, 2017, plaintiff filed an amended petition for a temporary restraining order and damages, adding Zachary Mann, Joan Mann, and Kevin Shaw as parties (Doc. 65). Within a month, plaintiff dismissed Joan Mann and Kevin Shaw without prejudice (Docs. 68, 69). The remaining defendants filed a joint answer and reaffirmed Kennis Mann's counterclaims and third party claims (Doc. 70). Plaintiff moved for leave to file a second amended petition (Doc. 97, amended Doc. 98), which the Court denied.

On December 8, 2017, Mr. Jeffers filed a motion for summary judgment on Counts 1, 2, and 3 of plaintiff's first amended petition (Doc. 112). On the same day, Kennis Mann filed his



motion for summary judgment (Doc. 113), as did Powercomm (Doc. 114) and Zachary Mann (Doc. 116). On December 11, 2017, the defendants consolidated the individual motions into a single motion (Doc. 118).

Before these summary judgment motions were filed, counsel for Reflective Group and Mr. Bosch moved to withdraw (Doc. 111). The Court granted the motion. As a result, at the hearing on defendants' consolidated motion for summary judgment on January 9, 2018, Mr. Bosch appeared pro se. Reflective, being a corporate entity unable to appear pro se, did not appear. Defendants appeared through counsel. The Court took the matter under advisement. After considering the parties' briefs and oral arguments, the Court **GRANTS** defendants' motion for summary judgment.

#### **I. STATEMENT OF UNCONTROVERTED FACTS**

Defendants included 95 uncontroverted facts in its consolidated motion for summary judgment. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. *Byers v. Snyder*, 44 Kan. App. 2d 380, 384-85, 237 P.3d 1258 (2010). Plaintiff never filed a response brief or objected to the foundation of any of defendants' evidence, and the time to do so has elapsed. As such, the Court adopts the facts as presented by defendants, which were coupled with proper citations to the record. They are, as follows:

1. In 2013, Kennis Mann was an experienced telecommunications fiber designer working in the engineering field with over 30 years of experience in fiber construction and design in and around the State of Kansas.

2. In 2013, Reflective Group LLC (hereafter "Reflective") was a company engaged in software design and operating in Baldwin City, Kansas.

3. On May 1, 2013, Reflective and Mann together formed "Dawn Fiber LLC" (hereafter "Dawn Fiber") as a Kansas entity for the purpose of constructing fiber networks and offering high speed internet services in and around the Kansas towns of Baldwin City and Lawrence, Kansas.

4. Mann contributed \$100,000 in capital to Dawn Fiber and received a fifty percent ownership interest.

5. Reflective contributed \$100 in capital to Dawn Fiber and received a fifty percent ownership interest.

6. At all relevant times, the members of Reflective were Michael Bosch, Casey Morford and Joshua Strohm, and Bosch was its president.

7. Prior to forming Dawn Fiber with Reflective, Mann worked as a Fiber Design Engineer for BHC Roades Engineering Firm in Kansas City.

8. When he left BHC Roades' employ, it was with the agreement that he would later finish work he had done on a St. Louis, Missouri Trolley Line project as a consultant, billing \$100 per hour.

9. To perform this work, Mann formed an entity called "Dawn Fiber Designs, LLC" (hereafter "DFD LLC") in Kansas.

10. Because he no longer had liability coverage for his design work, he inquired into coverage with CEK Insurance, but did not ultimately purchase it.

11. In approximately September 2013, BHC Roades notified Mann that its client was ready for Mann to finish its work on the Trolley Line.

12. Outside of regular business hours, Mann spent a total of 4.5 hours to do the trolley project work, and billed BHC Roades for \$450 through DFD LLC; no other work was done through or for DFD LLC and this was its only billing.

13. The design work Mann performed for the St. Louis Trolley Line project was not for the purpose of “offering broadband internet service.”

14. BHC Roades is not in the business of “offering broadband internet service.”

15. Mann did not seek written consent from Reflective to do the St. Louis Trolley Line work.

16. During the entire time that Dawn Fiber was in existence, the members of Reflective Group, and Reflective Group itself, continued to perform its “software development” business at the same location as Dawn Fiber was operated.

17. Neither Reflective Group nor any of its members asked Kennis Mann for his permission or written consent for their work for Reflective to continue during the life of Dawn Fiber.

18. From May 1, 2013 through approximately March 3, 2014, Mann worked full time and completed the designs, cost estimates, construction plans, and more for a fiber network to operate in Baldwin City, plus obtained most of the licenses and rights-of-way needed for construction to begin.

19. Mann met with the Douglas County Surveyor in order to obtain a permit for Dawn Fiber to install fiber on county roads.

20. At the time, Mann was “out” of his Dawn Fiber business cards, so he gave a DFD LLC card to the surveyor because it had the same contact information for Mann as did his Dawn Fiber business card.

21. Kennis Mann had no conversations or dealings with Douglas County on behalf of Dawn Fiber Design except using that business card for his contact information during this first meeting with the Douglas County Surveyor on behalf of Dawn Fiber.

22. Subsequently, Douglas County issued the requested permit to Dawn Fiber.

23. Mann and Bosch also looked for an investor who could bring a million dollars or more to fund the upfront construction of whatever system they set out to build first.

24. In January 2013, the City of Lawrence granted Dawn Fiber a License Agreement under which Dawn Fiber could install fiber cable in the city's rights-of-way.

25. Dawn Fiber planned to use the Lawrence rights-of-way to install cable leading to Baldwin City for connecting the fiber network it planned to build there.

26. Meanwhile, in early Fall 2013, Mann and Bosch met with Rex Schick, owner of K & W Underground headquartered in Olathe, Kansas, as a potential investor.

27. Schick had immediate interest in Dawn Fiber because he had capital to invest and owned and operated a construction firm which was experienced in designing and constructing cable networks.

28. In early February, Schick committed by email to Bosch and Mann to partner with Dawn Fiber as an investor (and potentially more) in the Baldwin City and Lawrence markets.

29. On or about March, Bosch verbally attacked Mann, stating that he could no longer work with him. Bosch called his lawyers and ordered dissolution papers to be drafted for Dawn Fiber.

30. During March and April of 2014, Mann and Bosch were each represented by counsel, who negotiated the terms of a Settlement Agreement and the terms of Dissolution of



Dawn Fiber; Reflective was represented by Bob Levy and Kennis Mann was represented by Michael Foster.

31. On April 15, 2014, Robert Levy sent Michael Foster an email with an “attachment” that Mr. Levy had allegedly just discussed with Mike Bosch.

32. The attachment is a letter written by “Mike Bosch, CoFounder & CEO of Reflective Group,” to Kennis Mann, stating it was sent regarding, “Final offer to dissolve Dawn Fiber, LLC.”

33. Page 2 of the letter states: “Our review of . . . e-mails (sic) uncovered your attempts to divert corporate opportunities to the company formerly owned by you and to an LLC that you formed shortly after we formed Dawn Fiber. . . .”

34. Bosch’s letter has an Exhibit “B” attached, consisting of 7 pages of accusations by Bosch that Mann diverted business opportunities to Dawn Fiber Design (DFD LLC) to Bodie Cooper, through the Douglas County Surveyor, including a City of Lawrence “RFI”, the St. Louis trolley project, and more, that Mann did not exert the efforts Reflective thought he should as CEO, and that Mann failed to land an investor.

35. The parties eventually negotiated a Dissolution and Settlement Agreement and it was executed on or about April 29, 2014 (hereafter “Agreement”).

36. The Agreement states on page 1 that the parties to it are Reflective and Mann.

37. The Agreement states the following:

1. Mutual Release. . . . For . . . consideration . . . Mann . . . completely releases and forever discharges Reflective Group . . . from any and all past or present claims . . . [and] Reflective Group . . . releases and forever discharges Mann . . . from any and all past, present, or future claims . . . causes of action, rights, damages, costs, expenses and compensating of any nature whatsoever, whether based on tort, contract, strict liability or other theory of recovery . . . which Reflective Group now has or otherwise may be acquired . . . in any way growing out of or which are the subject of Dawn Fiber or the dissolution thereof . . . Reflective Group expressly waives and assumes the risk of any and all claims . . . of which Reflective Group does not know

or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise...

38. The Agreement states the following:

9. Entire Agreement... This Settlement Agreement contains the entire agreement between the Parties with regard to the matters set forth herein and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each.

39. The Agreement is signed by Kennis Mann and by Michael Bosch, listed as CEO of Reflective.

40. Section 2 of the Agreement obligated Reflective to pay Mann \$35,000 within 90 days of execution of the Agreement, guaranteed by Bosch, Morford and Strohm; Mann was not to pay Reflective or its members anything.

41. Section 5 of the Agreement includes the following mutual representations and warranties:

... The parties represent and agree that neither has failed to disclose to the other the existence of any liabilities, obligations or executory contracts to which either could or may be liable upon dissolution. The parties further represent and agree that no liabilities, obligations or executory contracts exist that could or may impose liability upon the members of Dawn Fiber upon its dissolution.

42. Section 5 of the Agreement, regarding tax return and regulatory filings, states that "... Reflective Group will be responsible for all tax return and regulatory filings required in connection with the dissolution..."

43. Section 6 of the Agreement includes the following non-disparagement clause: "Each party, including their members [and] affiliates ... agree to make no statements, whether oral, written or electronic, that would tend to disparage, criticize, or ridicule the other party."

44. Section 12 provides that it shall be governed by Kansas law.

45. Section 13 of the Agreement, titled “Severability,” provides the following: “In the event that any provision of the Agreement... becomes or is declared by a court... to be... unenforceable or void, this ... Agreement shall continue in full force and effect without said provision.”

46. Section 14 of the Agreement provides that none of Mann, his spouse, children, and affiliates, or Reflective and its members would use the word “Dawn” in any entity or affiliation that was engaged in providing telecommunications goods or services (hereafter the “Dawn prohibition”).

47. Section 15 of the Agreement provides that for two years, Mann would not provide telecommunication services within the Lawrence city limits (hereafter the “restrictive covenant”).

48. The Agreement makes no mention of “damages,” “irreparable harm,” or “injunctive relief.”

49. Reflective admits the existence and enforceability of the Agreement.

50. Reflective admits that both it and Mann cooperated in drafting and preparing the Agreement.

51. At the time Dawn Fiber was dissolved, it had never gotten out of the planning stage; therefore, there had never been any operations.

52. Bosch formed a Kansas new entity, RG Fiber, with Schick as the investor.

53. RG Fiber now has designed and built and today operates a high speed internet service in Baldwin City.

54. Kennis Mann formed the Missouri entity Powercomm Broadband to operate in Excelsior Springs, Missouri and it designed, built and today operates a high speed internet system there.

55. Both RG Giber and Powercomm use Facebook, Twitter, and other digital and/or social networking methods to market their services to the public.

56. On or about September 2, 2014, Mike Bosch sent a letter to the City of Lawrence on Dawn Fiber letterhead, requesting that the City “assign” the license it had granted to Dawn Fiber to RG Fiber.

57. The letter was signed by Mike Bosch as “Managing Partner” of Dawn Fiber.

58. During Dawn Fiber’s existence, it had responsibility for doing all bookkeeping, including complying with all tax requirements for Dawn Fiber.

59. On October 8, 2014, the Kansas Department of Revenue notified Kennis Mann that he was personally responsible for paying Dawn Fiber’s unpaid withholding taxes for the years 2013 and 2014, which Mann learned for the first time had never been paid by Reflective as required by the Operating Agreement.

60. Reflective did not disclose to Kennis Mann, prior to execution of the Agreement or at any time, that Dawn Fiber owed withholding taxes to the State of Kansas, nor that it had never done any tax compliance in Missouri for the Missouri entity.

61. Reflective did not pay the State of Kansas the withholding taxes Dawn Fiber owed for the years 2013 and 2014.

62. The Missouri Department of Revenue notified Kennis Mann that he was personally responsible for paying withholding taxes owed to the State of Missouri by Dawn Fiber LLC.

63. As of December 8, 2017, the Missouri Secretary of State’s office shows that Dawn Fiber LLC is still in existence.

64. After the Agreement was signed, RG Fiber’s Facebook page stated, at the top of the page under its name, the following:

**“RG Fiber  
formerly Dawn Fiber.**

**Why? Well, we had to kick out a partner  
and lost the name in the process.”**

65. Following the dissolution, Bosch seized control of Kennis Mann’s Dawn Fiber email address and caused all future incoming mail to be forwarded to himself.

66. Following the dissolution, Bosch used “www.dawnfiber.net” on his Twitter profile, representing that he was still with Dawn Fiber.

67. In November 2015, after seeing all of these breaches by Bosch and Reflective concerning use of the name Dawn Fiber, and the multitude of other breaches of Reflective’s obligations, and after paying his attorney to repeatedly demand that Bosch and Reflective stop, Mann concluded that under Kansas law, he was no longer bound by the restrictive covenant regarding use of Dawn Fiber’s name.

68. In November 2015, Kennis Mann, “alone”, made the decision to go ahead the use “NewDawn Fiber” as the d/b/a for Powercomm and no one attempted to influence or persuade him to do it.

69. On October 21, 2016, Reflective filed this suit, seeking temporary and permanent injunctions to bar Powercomm from using “Dawn” and damages allegedly suffered from its use. Reflective also named Powercomm employee Bryon Jeffers and Powercomm member Bodie Cooper as defendants.

70. On October 28, 2016, a hearing was held on Reflective’s request for a preliminary injunction.

71. At the end of the hearing, the Court denied Reflective's request for injunctive relief without prejudice, due to the lack of evidence that Reflective suffered any damages as a result of Powercomm using the name "NewDawn Fiber."

72. Reflective filed its First Amended Petition on May 18, 2017, adding multiple claims and additional defendants.

73. Bosch is currently the owner and only member of Reflective Group.

74. When asked what trade secret he believed Mann had taken from Reflective and/or Dawn Fiber, Bosch testified that it was the "business model" made of offering gigabit service, through a fiber network that is primarily buried (not aerial), within 30 minutes of a major metro area, using a "local" tech savvy member, and as a privately funded start-up.

75. When asked why he believed his business model was a trade secret, Bosch testified it was because no one else in the country had ever used it except himself and Mann.

76. During his deposition, Bosch admitted that Reflective's only loss caused by Powercomm's use of the name "NewDawn Fiber" was the legal fees expended on this lawsuit.

77. During his deposition, Bosch was asked what evidence Reflective had that the name Dawn Fiber had goodwill and brand recognition in Excelsior Springs, and he testified it arose from a meeting he and Kennis had with Bryon Jeffers in Excelsior Springs, their exploring the town as a potential market, and some discussions with city folks at the City Hall, but he couldn't remember any names.

78. When asked, Bosch testified that he didn't recall any printed material that he and Kennis gave out while at Excelsior Springs' City Hall, no advertising campaigns were ever run in Excelsior Springs by Dawn Fiber.

79. Bosch testified that “name recognition” for Dawn Fiber could have come from all the “pitches” he and Kennis had made to Angel Investor Groups, who may or may not have lived in the Excelsior Springs area.

80. Bosch agreed that nothing in the Settlement Agreement prevented Mann from operating the same business model that Dawn Fiber used.

81. On or about January 9, 2017, Counsel for Reflective served its Answers and Objections to Powercomm’s First Interrogatories.

82. When asked in an interrogatory to state each fact which supported its contention that it had been injured or will suffer irreparable harm by Powercomm’s use of the name “NewDawn Fiber” in Excelsior Springs, Reflective incorporated its response to Interrogatory Number 2.

83. Reflective’s Response to Interrogatory Number 2 stated that it objected to being asked a “contention interrogatory” at an early stage in the lawsuit but that notwithstanding the objection, would “[s]upplement its answer upon the completion of discovery or at the pretrial conference.”

84. On or about September 27, 2017, counsel for Reflective and counsel for Powercomm verbally agreed that they would each supplement all written discovery responses to each other “post haste” to facilitate remaining discovery so they could each meet the dispositive motion deadline.

85. Counsel for Powercomm served supplemental written discovery responses to counsel for Reflective.

86. In early October 2017, counsel for Powercomm and counsel for Reflective reaffirmed their agreement that they would both supplement all written discovery responses.

87. On October 27, 2017, Powercomm's counsel emailed Reflective's counsel stating, "I really need all [your] discovery responses supplemented."

88. In early December, when asked the whereabouts of Reflective's supplemental responses, Reflective's counsel verbally advised Powercomm's counsel that Reflective had no supplements to its discovery responses.

89. At no time did counsel for Powercomm receive any updated information or discovery responses from Reflective identifying any facts related to its alleged irreparable harm, injury or damages.

90. On December 5, 2017, Reflective's counsel informed defendants' counsel that the only damages Reflective claims is a share of Powercomm's profits, to be calculated by their expert, based on financial documents Powercomm produced.

91. Reflective today is not operating except for "trickle down" work that is being done for old clients.

92. Bosch is currently the owner and only member of Reflective Group.

93. Neither Bryon Jeffers nor Zachary Mann work for, are members of, or make any decisions for Powercomm today.

94. On or about December 7, 2017, Zachary Mann signed an Affidavit under oath declaring he did not persuade or attempt to persuade Kennis Mann to use the name "NewDawn Fiber" for Powercomm, he did not at any time participate in any group that had as its object to persuade Kennis Mann to use such name, or to cause harm to Reflective, or to breach the Settlement Agreement.

95. On or about December 8, 2017, Bryon Jeffers signed an affidavit under oath declaring he had no knowledge of the Dawn prohibition until he was served with process in this



lawsuit, he did not persuade or attempt to persuade Kennis Mann to use the name “NewDawn Fiber” for Powercomm, and he did not participate in any group that had as its object to persuade Kennis Mann to use such name, or to cause harm to Reflective, or to breach any contract.

## II. STANDARD OF REVIEW

Kansas’ standard on summary judgment is well-established.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

*Bank v. Parish*, 298 Kan. 755, 759, 317 P.3d 750 (2014) (quoting *O’Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012)).

An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000). If there is a disputed fact, however resolved, that could not affect the judgment, it does not present a genuine issue of material fact. *Id.*

## III. ANALYSIS

### 1. Does plaintiff have a claim for injunctive relief?

In Kansas, “[t]o obtain injunctive relief, the movant must show: (1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest.” *Board of County Com’rs of Reno County v. Asset Management and Marketing*

*LLC*, 28 Kan. App. 2d 501, 506, 18 P.3d 286 (2001). An injunction is “not appropriate if a remedy at law can furnish the injured party with the full relief to which he or she is entitled.” *Id.*

More specifically, this injunction seeks to bar defendants from using a name or mark, which fall under both the federal Lanham Act and Kansas common law unfair competition. “Section 43(a) of the Lanham Act creates a federal cause of action for infringement of unregistered marks. 15 U.S.C. § 1125(a)(1)(A) (1994).” *Scholfield Auto Plaza, LLC v. Carganza, Inc.*, 26 Kan. App. 2d 104, 105, 979 P.2d 144 (1999) (internal citations omitted). “The common-law tort of unfair competition allows a similar cause of action to prevent confusion between parties’ products.” *Id.* “To prevail under either theory, plaintiff must prove (1) it owns a valid, protectable servicemark and (2) defendant’s service is so similar to plaintiff’s it is likely to cause consumer confusion.” *Id.* “Unquestionably, the purpose of the Lanham Act is to ‘secure to the owner of the mark the goodwill of [a] business [use] and to protect the ability of consumers to distinguish among competing producers.’” *Id.* at 107 (internal citations omitted). To assess whether the use of a mark creates the likelihood of confusion, courts consider “(1) the degree of similarity between the marks; (2) the intent of the alleged infringer in adopting its mark; (3) the relation in use and the manner of marketing between the goods or services marketed by the competing parties; (4) the degree of care likely to be exercised by purchasers; (5) evidence of actual confusion; and (6) the strength or weakness of the marks.” *Id.* at 109.

Summary judgment on plaintiff’s injunctive relief count for several reasons. For one, two of the defendants, Zachary Mann and Bryon Jeffers, no longer work for, are members of, or participate in the operations of Powercomm today. Therefore, summary judgment should be granted in their favor because they are not associated with Powercomm. Second, summary judgment is appropriate for the remaining defendants (Kennis Mann and Powercomm) because

there is no evidence from which the Court could infer a probability of irreparable harm to Reflective. Additionally, as a matter of law, the Dawn prohibition is unenforceable against Mann due to the multiple material breaches of it by Bosch and Reflective and because they waived their right to enforce it. There is also no evidence that money damages will not suffice, even if the Dawn prohibition was enforceable, and there is no evidence of injury to Reflective.

When asked by interrogatory to state facts supporting allegations of irreparable harm, Reflective said it would supplement its answer but it never did. Discovery closed in November and trial is set for Jan. 22, 2018. Defendants have no notice of any facts giving rise to, or even the nature of any alleged, irreparable harm. Likewise, the undisputed evidence is that there never will be any irreparable harm. Dawn Fiber never reached the operational stage nor conducted any marketing anywhere close to Excelsior Springs. The only acts which Reflective contends may have given rise to goodwill are Mann's and Bosch's one visit there to talk with Bryon Jeffers, some conversations at City Hall, and sales pitches made to "angel investors" in the event any of them happened to reside in Excelsior Springs. Moreover, Reflective itself does not use the name "Dawn," it does not compete with NewDawn Fiber, it isn't in the same industry as NewDawn Fiber, it is winding down its operations, and it has admitted that the only damages it has suffered as a result of Powercomm's use of the name NewDawn Fiber is the legal fees expended on this lawsuit.

These same facts illustrate why neither the Lanham Act nor common law unfair competition would warrant injunctive relief—this simply is not a situation of two companies in the same or related industries and same geographic market using similar names to create confusion amongst consumers. Defendants are entitled to summary judgment on plaintiff's claim seeking injunctive relief.

**2. Does plaintiff have a claim for tortious interference with contract?**

Reflective's Count 2 alleges that each of Kennis Mann, Zachary Mann, Bryon Jeffers and Powercomm tortiously interfered with the Settlement Agreement because they each knew or should have known of the Dawn prohibition, yet they created Powercomm or allowed it to be created and/or convinced Kennis Mann and Powercomm to use the name "NewDawn Fiber" in violation of the Dawn prohibition, and Powercomm is now using the name and causing damages to Reflective as a result.

"The elements essential to recover for tortious interference with a contract are: (1) the contract; (2) the wrongdoer's knowledge thereof; (3) wrongdoer's intentional procurement of the contract's breach; (4) the absence of justification; and (5) damages resulting therefrom." *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 394-95, 77 P.3d 130 (2003). "[T]ortious interference with a contract... [is] predicated on malicious conduct by the defendant." *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986).

The undisputed evidence is that Kennis Mann alone made the decision to use "NewDawn Fiber" as the marketing name for Powercomm in November 2015, and there is no evidence from which it may be reasonably inferred that anyone else persuaded or tried to persuade him to use it. This leads to the issue of whether Kennis Mann could have interfered with a contract to which he was a party, or whether Powercomm itself could interfere with Mann's contract. "A claim for tortious interference with a contractual relationship requires the existence of a valid and enforceable contract at the time of the interference between the plaintiff and a third party." *Macke Laundry Service Ltd. Partnership v. Mission Associates, Ltd.*, 19 Kan. App. 2d 553, 561, 873 P.2d 219 (1994) (citing PROSSER & KEETON, LAW OF TORTS § 129, p. 994 (5th ed. 1984); *Noller v. General Motors Corp.*, 244 Kan. 612, 619, 772 P.2d 271 (1989)).

In this case, the contract is between Reflective and Kennis Mann. Therefore, as to Mr. Mann, the element of a “third party contract” does not exist as a matter of law. Likewise, as to Powercomm, because Mann alone made the naming decision on behalf of Powercomm, “procurement” does not exist because he cannot procure a breach from himself.

Also lacking is the essential element of damages. Reflective admits that its only loss resulting from Powercomm’s use of the disputed name is the legal fees it has expended on this lawsuit. “It is a general rule that attorneys’ fees and expenses of litigation, other than court costs, are not recoverable as an item of compensatory damage, in the same or subsequent action, and are not chargeable as costs against the defeated party, in the absence of a clear and specific statute authorizing such recovery. *Hawkinson v. Bennett*, 265 Kan. 564, 574, 962 P.2d 445 (1998) (citing *Ablah v. Eymann*, 188 Kan. 665, 682, 365 P.2d 181 (1961)). Defendants are aware of no statute authorizing the recovery of legal fees for a “tortious interference with contract claim,” and none has been identified by Reflective.

Defendants are entitled to summary judgment on plaintiff’s tortious interference with contract claim.

### **3. Does plaintiff have a claim for civil conspiracy?**

The elements of civil conspiracy are: “(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one of more unlawful overt acts; and (5) damages as the proximate result thereof.’ *Diederich v. Yarnevich*, 40 Kan. App. 2d 801, 811, 196 P.3d 411 (2008). “Conspiracy is not actionable without commission of some wrong giving rise to a cause of action independent of the conspiracy.” *Id.* (citing *Stoldt v. City of Toronto*, 234 Kan. 957, 967, 678 P.2d 153 (1984). “With no evidence of an underlying tort the claim of civil conspiracy cannot survive.” *Id.* Summary judgment is appropriate where a claimant

fails to prove the underlying unlawful act. See, e.g. *Kincaid v. Dess*, 48 Kan. App. 2d 640, 655-56, 298 P.3d 358 (summary judgment affirmed where “the record does not contain evidence that there was ever an agreement or meeting of the minds between the Desses and Wolfe to defraud the Kincaids”).

In Count 3, Reflective alleges that Bryon Jeffers, Zachary Mann, Kennis Mann, and Powercomm participated in a conspiracy to tortiously breach the Agreement and cause harm to Reflective by causing or allowing Powercomm to be created and to use the name “NewDawn Fiber.” The undisputed facts are that Kennis Mann alone made the decision for Powercomm to use the name “NewDawn Fiber,” and no one tried to persuade him to do it. Therefore, as to Bryon Jeffers and Zachary Mann, there is no evidence from which to infer any of the required elements for Reflective’s conspiracy claim.

The question that remains is whether Kennis Mann and Powercomm can be held liable for conspiring with each other to use the name. Under Kansas law, an employee acting on behalf of its employer cannot conspire with the employer because the employee represents the employer. See *Ragsdale v. Amsted Rail Co.*, 2013 WL 6729788 (D. Kan. Dec. 19, 2013). In such a situation, “there can be no claim for civil conspiracy because there are no ‘two or more persons’ engaged in a conspiracy.” *Id.* (citing *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 424, 370 P.2d 390 (1962) (holding that employees acting in their capacities on behalf of a corporate defendant may not form a conspiracy with that corporation)); see also *Diederich*, 40 Kan. App. 2d at 811-12 (holding that if an individual acts on behalf of the corporation, rather than for his individual advantage, there is no claim for civil conspiracy). The undisputed facts show that Kennis Mann was acting in his capacity as the president of Powercomm. Therefore, as a matter of law, there

can be no claim for conspiracy against either him or Powercomm. Defendants are entitled to summary judgment on plaintiff's civil conspiracy claim.

**4. Does plaintiff have a claim for a breach of the settlement agreement?**

In Kansas, "the elements of a breach of contract claim are: (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." *Stebschulte v. Jennings*, 297 Kan. 2, 23, 298 P.3d 1083 (2013). A jury may not be allowed to speculate on damages. *Wolfe Electric Inc. v. Duckworth*, 293 Kan. 375, 392, 266 P.3d 516 (2011) (citing *Venable v. Import Volkswagen, Inc.*, 214 Kan. 43, 50, 519 P.2d 667 (1974) ("The jury should not be allowed to merely speculate in arriving at damage[s]. . . One who claims damages on account of a breach of contract must not only show the injury sustained, but must also show with reasonable certainty the amount of damage suffered as a result of the breach.")); *see also Inter-Americas Insurance Corp., Inc. v. Imaging Solutions, Co.* 39 Kan. App. 2d 875, 185 P.3d 963 (2008) (affirming the trial court's grant of summary judgment against the buyer of a document imaging system where material facts were undisputed as to the buyer's breach and the seller's damages).

In Count 5, Reflective alleges that each of Kennis Mann and Zachary Mann were party to the Settlement Agreement and are now in breach of its Dawn prohibition clause due to Powercomm's use of the disputed name. First, Zachary Mann was not named as a party to the Agreement and did not sign it. As to Kennis Mann, it is undisputed that he was a party to the Agreement and that, if the Dawn prohibition clause is still enforceable, he is in breach of it. However, the Court need not reach the enforceability of the Dawn prohibition clause because there is no evidence that Reflective has been damaged as a result of Powercomm using the name

“NewDawn Fiber.” Once again, Reflective admits that the only damages it has suffered as a result of the name use were the legal fees expended on this lawsuit, and legal fees are not recoverable in a breach of contract claim.

Even if the Court was to reach the enforceability of the Dawn prohibition clause, the Court would find that Kennis Mann was discharged from being bound by the Dawn probation clause as a result of Bosch’s repeated public use, including but not limited to sending the City of Lawrence a letter on Dawn Fiber’s letterhead with Bosch signing it as “Managing Partner” of Dawn Fiber. The material facts are undisputed that Zachary Mann was not party to the Settlement Agreement, and Kennis Mann did not breach the Dawn prohibition because Bosch already had used the prohibited name to no effect. Defendants are entitled to summary judgment on plaintiff’s breach of the settlement agreement claim.

**5. Are defendants entitled to summary judgment on plaintiff’s remaining claims?**

Reflective’s remaining claims in this case are: Count 4, Breach of Operating Agreement; Count 6, Breach of Fiduciary Duties; Count 7, Fraud; Count 8, Fraudulent representation; Count 9, Fraudulent inducement to enter into a contract; and Count 10, Misappropriating trade secrets. This claims are all predicated on allegations that Kennis Mann partnered with Reflective in forming and operating Dawn Fiber for the sole purpose of learning its business model and trade secrets so he could later abandon it and form a new company using the stolen trade secrets. Additionally, plaintiff would have to show that Mr. Mann induced Reflective to form Dawn Fiber with him by misrepresenting his skills and capabilities, that he diverted business opportunities from Dawn Fiber to DFD LLC and others, that he promised to land an investor but never did, that he failed to perform his duties as CDEO, and that he failed to ever complete the fiber designs and construction plans needed for Dawn Fiber to attract an investor. These allegations are unsupported



by the uncontroverted facts and competent evidence in his case. Regardless, all six of plaintiff's remaining claims are released and discharged by the Settlement Agreement.

In its very first provision, the Settlement agreement provides:

"[Section] 1. Mutual Release. ... For the consideration set forth herein...Reflective Group...releases and forever discharges Mann...from any and all past, present, or future claims... whatsoever, whether based on tort, contract, strict liability or other theory of recovery...which Reflective Group now has or otherwise may be acquired on account of or in any way growing out of or which are the subject of Dawn Fiber or the dissolution thereof...Reflective Group expressly waives and assumes the risk of any and all claims...of which Reflective Group does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise..."

The Settlement Agreement also provides the following on page 4:

"9. Entire Agreement...." This Settlement Agreement contains the entire agreement between the Parties with regard to the matters set forth herein and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each.

In this case, the undisputed facts are that Kennis Mann and Reflective were each represented by counsel during the negotiating and executing of the Settlement Agreement, they each executed the Agreement, in which Reflective and Mann gave each other complete and full discharge and release from any and all claims related to all acts and occurrences which predated the Agreement. They both expressly assumed the risk that there were facts and or claims of which they had no knowledge at the time. Moreover, Reflective's claims in this lawsuit for injunctive relief, tortious interference with contract, conspiracy, and breach of the Settlement Agreement are all predicated upon the enforceability of that very Agreement; therefore, Reflective cannot now deny such.

The material undisputed facts are Reflective waived and forever released the claims it asserts as the basis for Counts 4, 6, 7, 8, 9, 10. "Summary judgment is. . . proper where the intent. . . is clearly expressed in the contract and the court finds no question presented." *Noller v. GMC*

*Truck and Coach Division, General Motors Corp.*, 244 Kan. 612, 617, 772 P.2d 271 (1989). Because the material facts are undisputed and the release clause of the Settlement Agreement is enforceable as a matter of law against Bosch, summary judgment should be entered in Mann's favor and against Reflective on each of Counts 4, 6, 7, 8, 9, and 10.

Even if Reflective did not waive and release the claims it asserts against defendants, the six remaining counts still fail. The only damages Reflective seeks on the remaining counts are a share of Powercomm's profits. Only the claims stated in Count 10 qualify for a recovery of a competitor's share of profits. Thus, even without referencing the Settlement Agreement, defendants would be entitled to summary judgment on Counts 4, 6, 7, 8, and 9.

Count 10 is labeled "misappropriation of trade secret," but the gravamen of the allegations appear to also include common law unfair competition and a Lanham Act violation for Powercomm's use of the name "NewDawn Fiber." Kansas has adopted the Uniform Trade Secret Act, which defines a trade secret as follows:

'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

K.S.A. ¶ 60-3321(4). The Act defines "misappropriation" as follows:

'Misappropriation' means: (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

K.S.A. ¶ 60-3321(2).

“Section 43(a) of the Lanham Act creates a federal cause of action for infringement of unregistered marks.” *Scholfield Auto Plaza, LLC v. Carganza, Inc.*, 26 Kan. App. 2d 104, 105, 979 P.2d 144 (1999) (citing 15 U.S.C. § 1125(a)(1)(A)). The relevant case law regarding the Lanham Act is discussed on page 15, *supra*.

In this case, Reflective admits that its only trade secret is its “business model”<sup>1</sup> and it also admits that Kennis Mann was free to repeat that business model after the dissolution of Dawn Fiber anywhere he chose, except for Lawrence, Kansas for two years following dissolution. As a matter of law, the nature of Dawn Fiber’s business model does not qualify as a trade secret, nor can it be said that Mann acquired knowledge of it by improper means (he was the President of the company) or that he is using that knowledge inappropriately. Additionally, there certainly is no evidence from which it may be inferred that Dawn Fiber’s business model was a “secret” or “never before used.”

Powercomm’s use of the name DawnFiber also does not qualify as a violation of the Lanham Act or common law unfair competition. Reflective’s business (software development) is different from Powercomm’s (internet provider), so there is no likelihood of confusion, there is no evidence of goodwill attached to the name, there is no evidence of confusion by any consumers as to the name, Dawn Fiber never marketed its name in the Excelsior Springs area,<sup>2</sup> and there is no

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<sup>1</sup> The characteristics of its business model, according to Bosch, are offering gigabit internet service, through private funding, through fiber which is primarily buried (not aerial), in a small town or rural area within 30 miles of a major metropolitan area, with a key member or employee who is “local.”

<sup>2</sup> One meeting with Bryon Jeffers to assess the viability of the market plus shaking a few hands in City Hall does not equate to marketing.

evidence that "purchasers" of internet services exert a great degree of care in selecting their providers where there is only one start-up in town.

As a matter of law, Reflective released and forever discharged Mann from any and all liability for the claims it asserts in Counts 4, 6, 7, 8, 9, and 10. Even if it hadn't, Reflective has failed to bring forth any evidence from which it may be reasonably inferred that it suffered recoverable damages as to Counts 4, 6, 7, 8, and 9. Last, regarding Count 10 only, there is no evidence from which any of the essential elements of the claim might be inferred. Therefore, there are no material issues of fact, and defendants are entitled to summary judgment on each of Counts 4, 6, 7, 8, 9, and 10 as a matter of law.

#### IV. CONCLUSION

There are no genuine issues of material fact with regard to Counts 1 through 10 of plaintiff's Amended Verified Petition. Defendants are entitled to summary judgment in their favor on all of those claims. Defendants' motion for summary judgment is **GRANTED**.

**IT IS SO ORDERED.**

1/18/18

\_\_\_\_\_  
Date

/s/ David W. Hauber

\_\_\_\_\_  
DAVID W. HAUBER  
DISTRICT COURT JUDGE, Div. 7

#### NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL DIVISION

ALMENA STATE BANK,

Plaintiff,

v.

POWERCOMM BROADBAND, LLC

**Serve Registered Agent:**

Bryon Jeffers

15585 Lovers Lane

Excelsior Springs, MO 64024

and

POWERCOMM HOLDINGS, LLC

**Serve Registered Agent:**

Kennis Mann

13713 Fontana

Leawood, KS 66224

and

KENNIS MANN

**Serve at:**

13713 Fontana

Leawood, KS 66224

and

FRANKLIN BODIE COOPER

**Serve at:**

2509 US Hwy 283

Hill City, KS 67642

and

JOAN MANN

**Serve at:**

13713 Fontana

Leawood, KS 66224

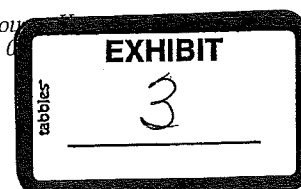
and

Title to Real Estate Involved

Case No. \_\_\_\_\_

Division \_\_\_\_\_

K.S.A. Chapter 60



KENNIS AND JOAN MANN AS  
TRUSTEES OF THE KENNIS AND  
JOAN MANN REVOCABLE TRUST  
DATED FEBRUARY 23, 2011

**Serve at:**

13713 Fontana  
Leawood, KS 66224

and

MID-AMERICA BANK

**Serve Registered Agent:**

Earl E. Sapp  
802 Ames, Box 4  
Baldwin City, KS 66006

and

REFLECTIVE GROUP, LLC

**Serve Registered Agent:**

Reflective Group, LLC  
713 High Street  
Baldwin City, KS 66006

Defendants.

**PETITION ON PROMISSORY NOTE, TO ENFORCE GUARANTIES AND TO  
FORECLOSE MORTGAGE**

Plaintiff Almena State Bank ("Plaintiff" or "Lender"), for its Petition against  
Defendants, states:

1. Plaintiff is a banking corporation organized and existing under the laws of  
Kansas, and doing business in Kansas.

2. Defendant PowerComm Broadband, LLC ("PowerComm Broadband") is a  
limited liability company existing under the laws of the State of Missouri. PowerComm  
Broadband is subject to the personal jurisdiction of this Court because it entered into an  
express contract with a resident of this state to be performed in whole or in part in this  
state.

*Clerk of the District Court, Johnson County Kansas  
07/26/17 01:25pm EC*

3. Defendant PowerComm Holdings, LLC ("PowerComm Holdings") is a limited liability company existing under the laws of the State of Kansas. PowerComm Holdings is subject to the personal jurisdiction of this Court because it was formed under the laws of this state, has a registered agent in this state, and entered into an express contract with a resident of this state to be performed in whole or in part in this state.

4. Defendant Kennis Mann ("Mann") is an individual resident of Johnson County, Kansas. Mann is subject to the personal jurisdiction of this Court because he resides in this state, is subject to service of process within this state, and entered into an express contract with a resident of this state to be performed in whole or in part in this state.

5. Defendant Franklin Bodie Cooper ("Cooper") is an individual resident of Graham County, Kansas. Cooper is subject to the personal jurisdiction of this Court because he resides in this state, is subject to service of process within this state, and entered into an express contract with a resident of this state to be performed in whole or in part in this state.

6. Defendant Joan Mann ("Mrs. Mann") is an individual resident of Johnson County, Kansas. Mrs. Mann is subject to the personal jurisdiction of this Court because she resides in this state, is subject to service of process within this state, and entered into an express contract with a resident of this state to be performed in whole or in part in this state.

7. Defendant Kennis and Joan Mann as Trustees of the Kennis and Joan Mann Revocable Trust Dated February 23, 2011 ("Trust") is a trust formed in and

pursuant to the laws of the State of Kansas. The Trust is subject to the personal jurisdiction of this Court because it was formed in and pursuant to the laws of this state, is subject to service of process within this state and owns real estate located in this state.

8. Defendant Mid-America Bank ("Mid-America Bank") is a bank organized pursuant to the laws of the State of Kansas. Mid-America Bank may have an interest in the real estate which is the subject of this action. Mid-America Bank is subject to the personal jurisdiction of this Court because it is organized pursuant to the laws of this state and has an interest in real property located in this state.

9. Defendant Reflective Group, LLC ("Reflective Group") is a limited liability company existing under the laws of the State of Kansas. Reflective Group may claim an interest in the real estate which is the subject of Lender's action to foreclose mortgage by virtue of a lawsuit filed in the District Court of Johnson County, Kansas, Case No. 16CV06205, *Reflective Group, LLC v. Kennis Mann, et al.* Reflective Group is subject to the personal jurisdiction of this Court because it was formed under the laws of this state and may have an interest in real property located in this state.

10. This Court has jurisdiction over the subject matter of this action and venue is proper in this Court because the contracts at issue were accepted by Plaintiff in Kansas and governed by Kansas law, and because of the connection of the Plaintiff and Defendants to this forum, and because the real property subject to Bank's mortgage is located in this venue.



**COUNT I – ACTION ON PROMISSORY NOTE \*6718**  
**(Lender v. PowerComm Broadband and Kennis Mann)**

11. Plaintiff re-alleges and incorporates herein the allegations contained in the preceding paragraphs as though fully set forth herein.

12. On or about December 15, 2015, PowerComm Broadband and Mann, for valuable consideration, executed and delivered a promissory note bearing Loan No. \*6718<sup>1</sup> to Lender, as the holder, promising to repay the principal sum of Three Million Four Hundred Thirty Thousand Dollars (\$3,430,000.00) plus interest thereon, with a maturity date of December 15, 2030 ("Note 6718").

13. A true and correct copy of Note 6718 is attached hereto as Exhibit 1 and incorporated fully herein.

14. Further, on or about December 15, 2015, PowerComm Broadband and Mann, for valuable consideration, executed and delivered a Commercial Loan Agreement bearing Loan No. \*6718 to Lender ("Commercial Loan Agreement").

15. A true and correct copy of the Commercial Loan Agreement is attached hereto as Exhibit 2 and incorporated fully herein.

16. Paragraph 7 of Note 6718 provides, in pertinent part: "I agree to pay this Note on demand."

17. Paragraph 3 of the Commercial Loan Agreement provides, in pertinent part: "I agree to fully repay the Loan on demand."

18. Paragraph 6.Q. of the Commercial Loan Agreement provides, in pertinent part:

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<sup>1</sup> Pursuant to Kansas Supreme Court Rule 123(e)(3), all but the last four digits of any financial account numbers referred to in this Petition or contained within the exhibits thereto are redacted.

**Legal Disputes.** I will promptly notify you in writing of any threatened or pending lawsuit, arbitration or other proceeding against me or any of my property, not identified in my financial statements, or that singly or together with other proceedings may materially and adversely affect my property, operations, financial condition or business.

19. Paragraph 6.AA. of the Commercial Loan Agreement provides:

**Leverage Ratio.** I will maintain at all times a ratio of total liabilities to tangible net worth, determined under consistently applied generally accepted accounting principles, of 5 to 1 or less.

20. Paragraph 6.BB. of the Commercial Loan Agreement provides:

**Minimum Tangible Net Worth.** I will maintain at all times a tangible net worth, determined under consistently applied generally accepted accounting principles, of \$500,000 or more. Tangible net worth is the amount that total assets exceed total liabilities. For determining tangible net worth, total assets will exclude all intangible assets, including without limitation goodwill, patents, trademarks, trade names, copyrights, and franchises, and will also exclude all Accounts Receivable, owed by my insiders, that do not provide for a repayment schedule.

21. Paragraph 7 of the Commercial Loan Agreement provides, in pertinent

part:

**DEFAULT.** I understand that you may demand payment anytime at your discretion. For example, you may demand payment in full if any of the following events (known separately and collectively as an Event of Default) occur:

**E. Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Agreement.

...  
**N. Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

**O. Insecurity.** You determine in good faith that a material adverse change has occurred in Borrower's financial condition from the conditions set forth in Borrower's most recent financial statement before the date of this Agreement or that the prospect for payment or performance of the Loan is impaired for any reason.

22. As set forth in Lender's demand letter, PowerComm Broadband and Mann failed to perform conditions or keep promises or covenants of the Commercial Loan

*Clerk of the District Court, Johnson County Kansas  
07/26/17 01:25pm EC*

Agreement and Lender determined in good faith that a material adverse change has occurred in Borrower's financial condition and that the prospect for payment or performance of the Loan was impaired, which constitutes an Event of Default.

23. Demand has been made on Note 6718 and the Commercial Loan Agreement, but they remain unsatisfied.

24. A true and correct copy of Lender's demand for payment on Note 6718 is attached hereto as Exhibit 3 and incorporated fully herein.

25. Pursuant to Note 6718, interest was to accrue at a variable rate, defined therein as the Wall Street Journal Prime plus rate, plus an additional 2.750 percent

26. As of July 24, 2017, Note 6718 accrued interest at the rate of 6.25 percent.

27. As part of the loan transactions evidenced by Note 6718 and the Commercial Loan Agreement and in order to secure payment, Defendant Mann executed an Assignment of Life Insurance Policy as Collateral dated December 14, 2015, by which he granted Lender an assignment in that certain life insurance policy issued by Primerica Life Insurance Company bearing Policy No. \*0004.

28. As part of the loan transactions evidenced by Note 6718 and the Commercial Loan Agreement and in order to secure payment, Defendant Cooper executed a Request for Collateral Assignment dated October 16, 2016, by which he granted Lender an assignment in that certain life insurance policy issued by Pruco Life Insurance Company, a Prudential company bearing Policy No. \*5350.

29. This lawsuit shall constitute notice to Defendants Mann and Cooper that Lender intends to exercise any and all rights available under the life insurance assignments described above.

30. Note 6418 and Note 4052, *infra*, are also secured by additional collateral, including a Security Agreement executed by PowerComm Broadband and Mann granting a security interest in, among other things, inventory, equipment, fixtures and accounts located in Clay County, Missouri; a Deed of Trust executed by Mann for real property located in Clay County, Missouri; and a mortgage executed by Mann and Mrs. Mann for real property located in Douglas County, Kansas. Because this Court does not have jurisdiction over the real and personal property in other jurisdictions, Lender will exercise its judicial and non-judicial rights to foreclose its interests in said property in the appropriate jurisdiction.

31. Interest on Note 6718 and the Commercial Loan Agreement continues to accrue from July 24, 2017 at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*.

32. The Commercial Loan Agreement also provides, in pertinent part:

"after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Documents. Expenses, included, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me."

33. The entire unpaid balance under Note 6718 and the Commercial Loan Agreement now due and owing to Lender consists of the principal amount of Three Million Three Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 Dollars (\$3,314,562.22) plus accrued interest through July 24, 2017, in the amount of Two Thousand Eight Hundred Thirty-Seven and 81/100 Dollars (\$2,837.81) and accruing thereafter at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*; costs, attorneys' fees and expenses.

WHEREFORE, Plaintiff Almena State Bank prays for judgment against Defendants PowerComm Broadband and Mann for the principal sum of Three Million Three Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 Dollars (\$3,314,562.22), plus accrued interest through July 24, 2017, in the amount of Two Thousand Eight Hundred Thirty-Seven and 81/100 Dollars (\$2,837.81) and accruing thereafter at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*; costs, attorneys' fees and expenses and such other and further relief as the Court deems just and proper.

**COUNT II – ACTION ON NOTE \*4052**  
**(Lender v. PowerComm Broadband)**

34. Plaintiff re-alleges and incorporates herein the allegations contained in the preceding paragraphs as though fully set forth herein.

35. On or about January 13, 2017, PowerComm Broadband, for valuable consideration, executed and delivered a promissory note bearing Loan No. \*4052<sup>2</sup> to Lender, as the holder, promising to repay the principal sum of Five Hundred Thousand

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<sup>2</sup> Pursuant to Kansas Supreme Court Rule 123(e)(3), all but the last four digits of any financial account numbers referred to in this Petition or contained within the exhibits thereto are redacted.

Twenty Dollars (\$500,020.00) plus interest thereon, with a maturity date of October 30, 2017 ("Note 4052").

36. A true and correct copy of Note 4052 is attached hereto as Exhibit 4 and incorporated fully herein.

37. Paragraph 7 of Note 4052 provides, in pertinent part: "I agree to pay this Note on demand."

38. Paragraph 12 of Note 4052 provides, in pertinent part, that the following shall constitute an Event of Default:

**G. Other Agreements.** I am in default on any other debt or agreement I have with you. . . .

**N. Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions. . . .

**O. Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason."

39. As set forth in Lender's demand letter, PowerComm Broadband failed to perform conditions or keep promises or covenants of the Commercial Loan Agreement and Lender determined in good faith that the prospect for payment or performance of the Loan was impaired, which constitutes an Event of Default.

40. Demand has been made on Note 4052, but it remains unsatisfied.

41. A true and correct copy of Lender's demand for payment on Note 4052 is attached hereto as Exhibit 5 and incorporated fully herein.

42. Pursuant to Note 4052, interest was to accrue at a rate of 6.25%.

43. As part of the loan transactions evidenced by Note 4052 and the Commercial Loan Agreement and in order to secure payment, Defendant Mann executed an Assignment of Life Insurance Policy as Collateral dated December 14, 2015, by which he granted Lender an assignment in that certain life insurance policy issued by Primerica Life Insurance Company bearing Policy No. \*0004.

44. As part of the loan transactions evidenced by Note 4052 and the Commercial Loan Agreement and in order to secure payment, Defendant Cooper executed a Request for Collateral Assignment dated October 16, 2016, by which he granted Lender an assignment in that certain life insurance policy issued by Pruco Life Insurance Company, a Prudential company bearing Policy No. \*5350.

45. This lawsuit shall constitute notice to Defendants Mann and Cooper that Lender intends to exercise any and all rights available under the life insurance assignments described above.

46. Interest on the Note 4052 continues to accrue from July 24, 2017 at the rate of 6.25% *per annum*, or Eighty-Five and 62/100 Dollars (\$85.62) *per diem*.

47. Note 4052 also provides, in pertinent part:

"after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Documents. Expenses, included, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me."

48. The entire unpaid balance under Note 4052 now due and owing to Lender consists of the principal amount of Five Hundred Thousand and 00/100 Dollars (\$500,000.00) plus accrued interest through July 24, 2017, in the amount of Three Thousand Five Hundred Ninety-Five and 88/100 Dollars (\$3,595.88) and accruing thereafter at the rate of 6.25% *per annum*, or Eighty-Five and 62/100 Dollars (\$85.62) *per diem*; costs, attorneys' fees and expenses.

WHEREFORE, Plaintiff Almena State Bank prays for judgment against Defendant PowerComm Broadband for the principal sum of Five Hundred Thousand and 00/100 Dollars (\$500,000.00), plus accrued interest through July 24, 2017, in the amount of Three Thousand Five Hundred Ninety-Five and 88/100 Dollars (\$3,595.88) and accruing thereafter at the rate of 6.25% *per annum*, or Eighty-Five and 62/100 Dollars (\$85.62); costs, attorneys' fees and expenses and such other and further relief as the Court deems just and proper.

**COUNT III – ACTION ON GUARANTY**  
**(Lender v. PowerComm Holdings)**

49. Plaintiff re-alleges and incorporates herein the allegations contained in the preceding paragraphs as though fully set forth herein.

50. On or about March 15, 2016, PowerComm Holdings, by and through Kennis Mann and Franklin Bodie Cooper executed a Guaranty (the "PowerComm Holdings Guaranty").

51. A true and correct copy of the PowerComm Holdings Guaranty is attached hereto as Exhibit 6 and incorporated fully herein.

52. Pursuant to the terms of the PowerComm Holdings Guaranty, PowerComm Holdings:



absolutely and unconditionally agree[d] to all terms of and guaranty to [Lender] the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe [Lender], including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to [Lender] in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [\*]6718, dated December 15, 2015, from PowerComm Broadband, LLC and Kennis Mann (Borrower) to [Lender], in the amount of \$3,430,000.00.

53. Paragraph 9 of the PowerComm Holdings Guaranty provides, in pertinent part:

**DEFAULT.** I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

...  
**E. Other Documents.** A default occurs under the terms of any other document relating to the Debt.  
...

**M. Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

**N. Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

54. Further, on or about April 7, 2016, PowerComm Holdings, by and through Kennis Mann and Franklin Bodie Cooper, executed an Unconditional Guaranty (the "PowerComm Holdings Unconditional Guaranty").

55. A true and correct copy of the PowerComm Holdings Unconditional Guaranty is attached hereto as Exhibit 7 and incorporated fully herein.

56. Pursuant to the terms of the PowerComm Holdings Unconditional Guaranty, PowerComm Holdings: "unconditionally guarantee[d] payment to Lender of 100% of all amounts owing under the Note including any costs, due under the Note when Lender makes written demand upon Guarantor."

57. Written demand has been made upon PowerComm Holdings for the amounts due under Note 6718, Note 4052 and the Commercial Loan Agreement, but they remain unsatisfied.

58. Lender is entitled to judgment against Defendant PowerComm Holdings, as Guarantor of Loan No. \*6718, in the principal amount of Three Million Three Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 Dollars (\$3,314,562.22) plus accrued interest through July 24, 2017, in the amount of Two Thousand Eight Hundred Thirty-Seven and 81/100 Dollars (\$2,837.81) and accruing thereafter at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*; costs, attorneys' fees and expenses.

59. Lender is entitled to judgment against Defendant PowerComm Holdings as Guarantor of Loan No. \*4052 in the principal amount of sum of Five Hundred Thousand and 00/100 Dollars (\$500,000.00), plus accrued interest through July 24, 2017, in the amount of Three Thousand Five Hundred Ninety-Five and 88/100 Dollars (\$3,595.88) and accruing thereafter at the rate of 6.25% *per annum*, or Eighty-Five and 62/100 Dollars (\$85.62); costs, attorneys' fees and.

WHEREFORE, Plaintiff Almena State Bank prays for judgment against Defendant PowerComm Holdings for the principal sum of Three Million Eight Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 Dollars (\$3,814,562.22), plus

accrued interest through July 24, 2017, in the amount of Six Thousand Four Hundred Thirty-Three and 69/100 Dollars (\$6,433.69) and accruing thereafter at the rate of 6.25% *per annum*, or Six Hundred Fifty-Three and 18/100 Dollars (\$653.18) *per diem* as follows:

- 6.25% on Three Million Three Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 (\$3,314,562.22); and
- 6.25% on Five Hundred Thousand and 00/100 (\$500,000.00).

Plus costs, attorneys' fees and expenses and such other and further relief as the Court deems just and proper.

**COUNT IV – ACTION ON GUARANTY**  
**(Lender v. Cooper)**

60. Plaintiff re-alleges and incorporates herein the allegations contained in the preceding paragraphs as though fully set forth herein.

61. On or about December 15, 2015, Cooper executed an Unconditional Guarantee (the "Cooper Guarantee").

62. A true and correct copy of the Cooper Guarantee is attached hereto as Exhibit 8 and incorporated fully herein.

63. Pursuant to the terms of the Cooper Guaranty, Cooper: "unconditionally guarantee[d] payment to Lender of 100% of all amounts owing under the Note including any costs, due under the Note when Lender makes written demand upon Guarantor."

64. Written demand has been made upon Cooper for the amounts due under the Note 6718, but it remains unsatisfied.

65. Lender is entitled to judgment against Defendant Cooper, as Guarantor of Note 6718, in the principal amount of Three Million Three Hundred Fourteen Thousand

Five Hundred Sixty-Two and 22/100 Dollars (\$3,314,562.22) plus accrued interest through July 24, 2017, in the amount of Two Thousand Eight Hundred Thirty-Seven and 81/100 Dollars (\$2,837.81) and accruing thereafter at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*; costs, attorneys' fees and expenses.

WHEREFORE, Plaintiff Almena State Bank prays for judgment against Defendant Cooper for the principal sum of Three Million Three Hundred Fourteen Thousand Five Hundred Sixty-Two and 22/100 Dollars (\$3,314,562.22) plus accrued interest through July 24, 2017, in the amount of Two Thousand Eight Hundred Thirty-Seven and 81/100 Dollars (\$2,837.81) and accruing thereafter at the rate of 6.25% *per annum*, or Five Hundred Sixty-Seven and 56/100 Dollars (\$567.56) *per diem*, plus costs, attorneys' fees and expenses and such other and further relief as the Court deems just and proper.

**COUNT V – FORECLOSURE OF MORTGAGE**

**(Lender v. Mann, Mrs. Mann, Trust, Mid-America Bank and Reflective Group)**

66. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs as though fully set forth herein.

67. To secure the principal indebtedness of Note 6718, Note 4052, plus other amounts due thereunder and other indebtedness due from PowerComm Holdings and Mann to Lender, and for valuable consideration, Mann and Mrs. Mann executed and delivered to Lender a Mortgage, dated December 15, 2015 (the "Mortgage").

68. A true and correct copy of the Mortgage is attached hereto as Exhibit 9 and incorporated fully herein.

69. Under the Mortgage, Mann and Mrs. Mann granted Lender and its successors and assigns a mortgage on the real estate commonly known as 13713 Fontana, Leawood, Kansas 66224 and legally described as:

Lot 43, Leawood Meadows, Second Plat a subdivision in the City of Leawood, Johnson County, Kansas.

(the "Property").

70. At the time of execution and delivery of the Mortgage, Mann and Mrs. Mann were the fee simple owners of the mortgaged Property.

71. The Mortgage was duly filed of record on February 3, 2016, in the Office of the Register of Deeds of Johnson County, Kansas as Document No. 20160203-0001131 in Book 201602 at Page 001131. At the time of the recording of the Mortgage, all registration fees were paid in full.

72. After the Mortgage was filed with the Office of the Register of Deeds of Johnson County, Kansas, a General Warranty Deed was filed with the Office of the Register of Deeds of Johnson County, Kansas as Document No. 20160203-0001132, in Book 201602 at Page 001132. This General Warranty Deed purported to transfer the Property from Mann and Mrs. Mann to the Trust.

73. At the time the Trust took title to the Property, it, by and through its trustees, had actual knowledge of Lender's Mortgage.

74. The Trust took title to the Property subject to Lender's Mortgage.

75. The Mortgage secures indebtedness of PowerComm Broadband and Mann up to the sum of Three Hundred Ninety-Five Thousand Dollars (\$395,000) plus "interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security

Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument."

76. Paragraph 22 of the Mortgage provides: "Except to the extent prohibited by law, Mortgagor waives all appraisement, homestead exemption, and redemption rights relating to the Property. However, the waiver of redemption is not applicable to that portion of the Property that covers agricultural land or a single or two-family dwelling owned by or held in trust for a natural person."

77. By virtue of PowerComm Broadband and Mann's default on Notes 6718 and 4052, the Property is subject to foreclosure.

78. Upon information and belief, the individual Defendants are not in the military service or otherwise entitled to the protection of the Service Members' Civil Relief Act of 2003, nor are they minors or otherwise under a legal disability.

79. Defendant Mid-America Bank may have an interest in the Property by virtue of a mortgage executed by Mann and Mrs. Mann to Mid-America Bank, dated May 29, 2014 and recorded with the Office of the Register of Deeds of Johnson County, Kansas on June 10, 2014 as Document No. 20140610-0003443 in Book 201406 at Page 003443, securing an original principal indebtedness of Sixty Thousand Dollars (\$60,000) (the "First Mid-America Bank Mortgage").

80. A true and correct copy of the First Mid-America Bank Mortgage is attached hereto as Exhibit 10 and incorporated fully herein.

81. Defendant Mid-America Bank may have an additional interest in the Property by virtue of a mortgage executed by Mann and Mrs. Mann to Mid-America Bank, dated September 8, 2014 and recorded with the Office of the Register of Deeds

of Johnson County, Kansas on October 6, 2014 as Document No. 20141006-0001602 in Book 201410 at Page 001602, securing an original principal indebtedness of One Hundred Fifty Thousand Dollars (\$150,000) (the "Second Mid-America Bank Mortgage").

82. A true and correct copy of the Second Mid-America Bank Mortgage is attached hereto as Exhibit 11 and incorporated fully herein.

83. Defendant Reflective Group may have an interest in the Property by virtue of a lawsuit filed in the District Court of Johnson County, Kansas as Case No. 16CV06205, *Reflective Group, LLC v. Kennis Mann, et al.*

84. Plaintiff submits that the Property should be foreclosed forthwith as provided by law and the amounts due to Plaintiff as secured by the Mortgage should be decreed as a third lien on the Property, behind only the First Mid-America Bank Mortgage and the Second Mid-America Bank Mortgage.

WHEREFORE, Plaintiff prays for judgment *in rem* against the Property in the principal amount of Three Hundred Ninety-Five Thousand Dollars (\$395,000) plus interest, charges, fees and advancements; that the Court enter its Judgment and Decree herein determining that the Mortgage of Plaintiff referenced in this Petition is a third position lien upon all of the said Property and foreclosing Plaintiff's mortgage thereon forthwith; that if the amount found due this Plaintiff herein be not paid within ten (10) days after the date of said judgment, an Order of Sale then issue out of this Court under the seal thereof directed to the Sheriff of Johnson County, Kansas, commanding him to advertise and sell said real estate hereinbefore described according to law and to apply the proceeds of said sale as follows:

- (1) to any amounts remaining due, if any, under the First Mid-America Bank Mortgage;
- (2) to any amounts remaining due, if any, under the Second Mid-America Bank Mortgage;
- (3) to the payment of costs of this action, including the costs of the sale and attorneys fees;
- (4) to the payment of all ad valorem taxes found to be due and unpaid on said real estate, if any;
- (5) to the payment of Plaintiff's judgment and interest found due Plaintiff herein;
- (6) the balance, if any, to be paid to the Clerk of this Court to abide further orders of this Court;

that the redemption period be set at three months if appropriate; that upon said sale being made and confirmed and upon the expiration of the period of redemption herein, the Sheriff of Johnson County, Kansas, be ordered and directed to execute and deliver to the purchaser at said sale, or its successors and assigns as the case may be, a good and sufficient sheriff's deed for all of said real estate, and thereupon all of the right, title and interest or lien and equity of redemption of each and all Defendants otherwise named in this Petition be forever barred and extinguished; that a writ of assistance be issued out of this Court placing the grantee in full and complete possession of all of said real estate; and that the Plaintiff have such other and further relief as the Court deems just and equitable.

Respectfully submitted,

**McDOWELL RICE SMITH & BUCHANAN,  
A Professional Corporation**

By: /s/ Kristie Remster Orme  
Kristie Remster Orme #18481  
Ania Wlodek Moncrief #25763

*Clerk of the District Court, Johnson County Kansas  
07/26/17 01:25pm EC*



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Phone: 816-753-5400  
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**ATTORNEYS FOR PLAINTIFF**



8. These defendants lack sufficient information to admit or deny whether Mid-America Bank is organized pursuant to the laws of the State of Kansas and therefore deny that allegation. These defendants admit other allegations in paragraph 8 regarding Mid-America Bank.

9. Denied.

10. Denied.

**COUNT I – ACTION ON PROMISSORY NOTE \*6718**

11. These defendants restate and incorporate herein their responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

12. Admitted that PowerComm Broadband and Mann executed and delivered a promissory note bearing Loan No. \*6718 to Almena State Bank (herein referred to as “Bank”), and the remainder of the allegations are legal conclusions which require no response, but in the event the response is required, these allegations are denied.

13. These defendants are without sufficient information to admit or deny the allegations of paragraph 13 and therefore deny same.

14. Admitted that PowerComm Broadband and Mann executed and delivered a Commercial Loan Agreement, the remainder of the allegations are legal conclusions which require no response, but in the event the response is required, these allegations are denied.

15. These defendants are without sufficient information to admit or deny the allegations of paragraph 15 and therefore deny same.

16. The promissory note speaks for itself and these defendants deny the allegation in paragraph 16, particularly in light of the fact that the front page of the note indicates a maturity date of December 15, 2030 as do other documents associated with the transaction.

17. Denied, the front page of the Commercial Loan Agreement provides a maturity date of December 15, 2030. Nowhere on the face of the Commercial Loan Agreement or the Promissory Note is there any warning language that the obligation of the makers was due and owing in full upon the Bank's demand, rather the indication was that the sums were owing on or about December 15, 2030 and it made no sense, and the Bank may not in good faith contend, that the money could be loaned for the construction of broadband system would be due and payable on demand when it provided for payment over 20 years.

18. The Commercial Loan Agreement speaks for itself and the defendants deny the allegation contained in paragraph 18 or that there was any violation of paragraph 6.Q. of the Commercial Loan Agreement. Further, the petition quotes only portions of the document and does not reflect all agreements and understandings of the parties.

19. The Commercial Loan Agreement speaks for itself, and defendants deny the allegation of paragraph 19 taken out of context and without reference to other provisions in the Commercial Loan Agreement.

20. The Commercial Loan Agreement speaks for itself, and defendants deny the allegation of paragraph 20. The excerpt of the Commercial Loan Agreement is taken out of context and without reference to other provisions in the Commercial Loan Agreement.

21. The Commercial Loan Agreement speaks for itself, and defendants deny the allegation of paragraph 21. The excerpt of the Commercial Loan Agreement is taken out of context and without reference to other provisions in the Commercial Loan Agreement.

22. Denied. In fact, the Bank has not acted in good faith and has demanded payment and commenced this action in bad faith against these defendants.

23. Denied that a good faith demand has been made.

24. Deny that Exhibit 3 is a good faith demand under the Note 6718.

25. Admitted that the document speaks for itself and any assertion inconsistent with the document language is denied.

26. These defendants lack sufficient information to admit or deny the allegations contained in paragraph 26 and therefore deny same.

27. Defendant Mann lacks sufficient information to admit or deny the allegations contained in paragraph 27 and therefore denies same. The other defendants similarly deny the allegations contained in paragraph 27.

28. Defendant Mann lacks sufficient information to admit or deny the allegations contained in paragraph 28 and therefore denies same. The other defendants similarly deny the allegations contained in paragraph 28.

29. Denied.

30. The documents identified speak for themselves. Defendants deny any allegations inconsistent with the documents' express language. These defendants lack sufficient information to admit or deny the allegations of paragraph 30 and therefore deny same. Further, these defendants ask that the Court restrain Plaintiff from acting per the allegation in paragraph 30

with regard to any property in Clay County, Missouri pending further resolution of issues in this matter.

31. These defendants lack sufficient information to admit or deny the allegations of paragraph 31 and therefore deny same.

32. The allegations in paragraph 32 identify a portion of the language of the Commercial Loan Agreement, which is not susceptible to interpretation without reference to the entire Commercial Loan Agreement, and therefore defendants deny this allegation.

33. Denied.

#### **COUNT II – ACTION ON NOTE \*4052**

34. These defendants restate and incorporate herein their responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

35. Admitted only that the promissory note was signed and delivered. Defendants deny that it was given for “valuable consideration”, particularly given Bank’s numerous breaches of its duties, promises and breaches of its duties of good faith and fair dealing.

36. These defendants lack sufficient information to admit or deny the allegation contained in paragraph 36 and therefore denies same.

37. The promissory note speaks for itself and these defendants deny the allegation in paragraph 37, particularly in light of the fact that the front page of the note indicates a maturity date of December 15, 2030 and that the parties never contemplated that the Bank would demand payment before the stated Maturity Date.

38. The promissory note speaks for itself and the defendants deny the allegation contained in paragraph 38 or that there was any event of default.

39. Denied.

40. Denied that a good faith demand has been made.

41. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 41 and therefore deny same.

42. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 42 and therefore deny same.

43. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 43 and therefore denies same. Defendant Mann lacks sufficient information to admit or deny the allegations contained in paragraph 44 and therefore denies same. The other defendants similarly deny the allegations contained in paragraph 44.

44. Denied.

45. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 46 and therefore deny same.

46. The allegations in paragraph 47 identify a portion of the language of the promissory note which is not susceptible to interpretation without reference to the entire promissory note, and therefore defendants deny this allegation.

47. Denied.

### **COUNT III – POWERCOMM HOLDINGS GUARANTY**

48. These defendants restate and incorporate herein their responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

49. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 50 and therefore deny same.

50. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 51 and therefore deny same.

51. The document speaks for itself and reference to the excerpted language is without context and therefore defendants deny same. The entire document must be read to give context to each provision of the contract.

52. The Powercomm Holdings guaranty speaks for itself, and to the extent excerpts of it are taken out of context or inaccurately quoted, is denied.

53. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 54 and therefore deny same.

54. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 55 and therefore deny same.

55. The Powercomm Holdings guaranty speaks for itself and the defendants deny the allegation contained in paragraph 56 or that there was any violation of the guaranty or any entitlement to demand payment under it.

56. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 57 and therefore deny same.

57. Denied.

58. Denied.

#### **COUNT IV – COOPER GUARANTY**

60–65. The allegations of paragraphs 60 – 65 do not pertain to these defendants and therefore they do not respond to them specifically. However, out of an abundance of caution,



defendants state that they are unfamiliar with any demands sent to Mr. Cooper by plaintiff, and lack sufficient to form a belief about the truth of the allegations and deny same.

#### **COUNT V—FORECLOSURE OF MORTGAGE**

66. These defendants restate and incorporate herein their responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

67. Defendants deny the allegations contained in paragraph 67, particularly given Defendants' deny the Bank gave "valuable consideration", particularly given Bank's numerous breaches of its duties, promises and breaches of its duties of good faith and fair dealing.

68. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 68 and therefore deny same.

69. The subject documents speaks for itself, and to the extent that Bank has violated its duties to defendants, the mortgage is not valid.

70. Kennis Mann and Joan Mann admit that they were owners of Lot 43, Leawood Meadows, Second Plat, a Subdivision in the City of Leawood, Johnson County, Kansas, and otherwise deny any other allegations of paragraph 70.

71. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 71 and therefore deny same.

72. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 72 and therefore deny same.

73. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 73 and therefore deny same.

74. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 74 and therefore deny same.

75. Defendants deny the allegations of this paragraph, particularly given Bank's numerous breaches of its duties, promises and breaches of its duties of good faith and fair dealing.

76. Denied. The quoted portion of the Mortgage is taken out of context and does not reflect the entire document in question and therefore paragraph 76 is denied.

77. Denied.

78. Admitted.

79. Admit that Mid-America Bank has a mortgage on the subject property.

80. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 80 and therefore deny same.

81. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 81 and therefore deny same.

82. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 82 and therefore deny same.

83. Denied.

84. Denied.

#### **AFFIRMATIVE DEFENSES**

1. Bank's claims are barred in whole or in part by the doctrines of estoppel, waiver, laches and/or unclean hands.

2. Bank's claims are barred because of a lack of consideration and/or a failure of consideration.

3. Bank's claims are barred because it breached its duties to these defendants before any breach by any of these defendants.

4. Bank violated its duty of good faith to defendants thereby extinguishing any of its claims.

5. Bank's interference with the business of PowerComm Broadband extinguished its right to make the claims it has against defendants and bars recovery from any of them.

6. Bank's actions and intimidation tactics towards defendants constitute duress and bar the claims asserted by Bank.

7. Bank waived any right to treat the instruments involved in this action as demand notes and Bank's filing of this action and other wrongful actions operate as a bar to any recovery on its claims related to the loan in question.

8. Defendants reserve the right to amend these affirmative defenses.

### COUNTERCLAIMS

Manns and PowerComm Broadband assert the following Counterclaims against Bank.

### BACKGROUND

1. Since 2015, PowerComm Broadband has engaged in the business of designing, constructing, operating a high speed internet system for commercial and residential use in Excelsior Springs, Missouri. By fall 2016, PowerComm Broadband had constructed a significant portion of the system and PowerComm Broadband was providing commercial and residential customers services.

2. Bank agreed to provide financing to PowerComm Broadband in two phases: Phase I included advancing \$3,500,000 to fund construction and related activities to develop the broadband system and Phase II, which included the Bank funding an additional \$1,500,000 to complete construction and fund the start-up company to provide capital as PowerComm Broadband's revenues grew and the business matured.

3. In email dated December 2016, Bank confirmed to Kennis and PowerComm Broadband that Bank was preparing to make the Phase II financing. Some of that funding was intended to acquire other broadband companies that would have provided additional income to PowerComm Broadband extended PowerComm Broadband's customer base.

4. In the spring of 2017, Bank began improperly interfering with the management of PowerComm Broadband, breaching its duty of good faith to PowerComm Broadband, Kennis, Joan, PowerComm Holdings and perhaps Cooper.

5. Bank also began interfering with the management of the business of PowerComm Broadband. Bank began subverting Kennis' with his employees and interfering with his management of PowerComm Broadband, endeavoring to push Kennis from his role as manager of PowerComm Broadband.

6. In a letter dated April 6, 2017, Bank declared all obligations due without a good faith basis to do so. Bank purportedly based its April 6, 2017 letter on a totally contrived and bad faith declaration of insecurity involving a lawsuit pending in this court. In that action, Reflective Group, LLC sued to obtain a temporary restraining order against Kennis and PowerComm Broadband. But Reflective Group, LLC had already sought and failed to obtain a

temporary restraining order, failing to convince this court that it was likely to prevail on the merits of its claim.

7. Kennis reasserted his authority as manager of PowerComm Broadband on or about April 14, 2017. For a brief period of time, Bank discontinued its efforts to declare full payment of all outstanding amounts under the loan documents.

8. PowerComm Broadband had been negotiating to combine forces with another broadband company in a nearby town. Kennis had informed Bank about this plan for several months and Bank had indicated it would be financially supportive of the combination. Bank abruptly withdrew its support for the transaction.

9. Bank called for a meeting on June 2, 2017, among Kennis, Cooper and Bank in Norton, Kansas.

10. The Manns, Cooper and the Bank met on Friday, June 2, 2017. Kennis explained the status of the business efforts of PowerComm Broadband.

11. The following Monday, June 5, 2017, Bank's counsel, Doug Sebelius, sent an email to the Mann's counsel that stated:

Almena State Bank feels that it must **now insist that your client, Kennis Mann, immediately cease acting on behalf of the company** [PowerComm Broadband]. This means that **Mr. Mann must not** direct employees, negotiate contract, attempt to raise capital or try to arrange for alternative manage of operations. The bank is comfortable with the current key employee, Mr. Geoo, and wants to work directly with him into the future. (emphasis added)

12. Bank had coordinated with Mr. Geoo to prevent the Manns from entering the business property used by PowerComm Broadband, changed the locks on its buildings, and locked out Kennis from receiving his company email, effectively divesting, with no right or authority, Kennis from operating PowerComm Broadband. Bank prevented PowerComm

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Broadband and Kennis from operating the business and Bank coordinated and collaborated with and directed the employees to take all such acts without any right, court order, process or any notice of its intent to do so. When Joan went to one of the facilities of PowerComm Broadband, one of the PowerComm Broadband employees, acting in accordance with his understanding of Bank's instructions, called the police to remove Joan. Bank's conduct and acts, and those that it caused others to take, were unlawful, in violation of Bank's duty of good faith and fair dealing to defendants, and damaged defendants.

13. Kennis had been working to obtain additional investors to advance the interests of PowerComm Broadband, including both local and out of state investors. Bank's actions eliminated those opportunities and seriously damaged the business of PowerComm Broadband and the rights of defendants.

14. About a month later, Bank took control of and removed all funds from PowerComm Broadband's accounts at Bank.

15. At the time of all the above actions and conduct of Bank, PowerComm Broadband was current on its loans to Bank.

16. Bank has breached its obligations to Manns and PowerComm Broadband under Bank's promissory notes, commercial loan agreement, mortgages, assignments and security agreements, and unlawfully breached its duties of good faith and fair dealing to Manns and PowerComm Broadband by:

- a. Demanding payment without just cause in April 2017;
- b. Interfering and exercising control over the business of PowerComm Broadband;

- c. Suggesting and or directing PowerComm Broadband employees to take action to prevent Kennis from managing the business of PowerComm Broadband;
- d. Interfering with and directing the cessation of efforts to raise capital and in effect preventing PowerComm Broadband from raising capital from local investors;
- e. Interfering with and directing the cessation of efforts to raise capital and in effect preventing PowerComm Broadband from raising capital from out of town investors;
- f. By preventing, frustrating, interfering with, and directing the cessation of efforts to obtain financing from other lenders;
- g. Seizing all funds from PowerComm Broadband's deposit accounts at Bank;
- h. Seeking to foreclose the mortgage on the Mann's residence;
- i. Seeking to foreclose on life insurance assignments;
- j. Declaring defaults without cause or basis and thereby creating turmoil in the business of PowerComm Broadband and lives of the Manns;
- k. Threatening to foreclose on security instruments relative to the Manns' real property located in Excelsior Springs, Missouri; and
- l. Declaring a default in July 2016 and filing this action.

COUNT I -- BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

17. Manns and PowerComm Broadband incorporate herein by reference paragraphs 1-16 herein by reference.

18. Bank owed Manns and PowerComm Broadband duties of good faith and fair dealing.

19. Bank breached its duties of good faith and fair dealing.

20. Manns and PowerComm Broadband have sustained substantial damages as a result of the Bank's breaches of its duties of good faith and fair dealing.

Wherefore, Manns and PowerComm Broadband pray for damages from Bank in the amount of more than \$75,000, its costs, attorneys' fees and such other relief as the court deems just and equitable.

#### COUNT II – BREACH OF CONTRACT

21. Manns and PowerComm Broadband incorporate herein by reference paragraphs 1-20 of their counterclaim.

22. Bank declared twice a default without right under its agreements with Manns and PowerComm Broadband. Such actions were breaches of contract.

23. Bank owed a duty to Manns and PowerComm Broadband to refrain from interfering with the business of PowerComm Broadband or trying to operate PowerComm Broadband.

24. Manns and PowerComm Broadband have sustained substantial damages as a result of the Bank's breaches of its agreements with Manns and PowerComm Broadband.

Wherefore, Manns and PowerComm Broadband pray for damages from Bank in the amount of more than \$75,000, its costs, attorneys' fees and such other relief as the court deems just and equitable.

#### COUNT III –TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP

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Almena State Bank v. Powercom Broadband, LLC, et al.

Case No.: 17CV04201

Mann's, PowerComm BroadBand's, PowerComm Holding's Answer, Affirmative Defenses and Counter Claims - Page 15

*Clerk of the District Court, Johnson County Kansas*  
09/22/17 04:59pm KK



25. Manns and PowerComm Broadband incorporate herein by reference all preceding paragraphs of their counterclaim.

26. Manns and PowerComm Broadband had relationships with prospective investors who were interested in investing in PowerComm Broadband.

27. Manns and PowerComm Broadband had relationships with a prospective lender who was interested loaning money to PowerComm Broadband. Manns and PowerComm Broadband anticipated they would probably benefit economically from these investor and lending relationships.

28. Bank knew of the relationships of Manns and PowerComm Broadband and the prospective investors and lender.

29. Manns and PowerComm Broadband were reasonably certain that, but for the Bank's improper actions described above, the relationships with the investors and lender would have continued and resulted in economic benefit for Manns and PowerComm Broadband.

30. Bank maliciously interfered with the above relationships.

31. As a result of Bank's conduct and improper actions, Manns and PowerComm Broadband have sustained damage in an amount exceeding \$75,000.

Wherefore, Manns and PowerComm Broadband pray for damages from Bank in the amount of more than \$75,000, its costs, attorneys' fees and such other relief as the court deems just and equitable.

#### COUNT IV – BREACH OF FIDUCIARY DUTY

32. Manns and PowerComm Broadband incorporate herein by reference all preceding paragraphs of their counterclaim.

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Almena State Bank v. Powercomm Broadband, LLC, et al.  
Case No.: 17CV04201

Mann's, PowerComm BroadBand's, PowerComm Holding's Answer, Affirmative Defenses and Counter Claims - Page 16

Clerk of the District Court, Johnson County Kansas  
09/22/17 04:59pm KK

33. Manns grew up in the area where Bank was located and Bank indicated it would look out for the Manns' and PowerComm Broadband's interest in connection with the loans in question. Bank indicated it would prepare loan documents to describe that the loan it made to PowerComm Broadband. Bank indicated that the loan made in December 2015 would mature fifteen years later on December 15, 2030.

34. Bank also assured PowerComm Broadband and Manns that it would make a Phase II loan when needed by PowerComm Broadband.

35. Bank had superior knowledge of the loan documents used in the transaction and prepared all of them.

36. Bank owed a fiduciary duty to PowerComm Broadband and the Manns.

37. As described above, Bank began breaching its duties to Manns and PowerComm Broadband during the first half of 2017, and used its position of trust and confidence to PowerComm Broadband and Manns to harm them.

38. As a result of Bank's fiduciary duties, Manns and PowerComm Broadband have sustained damages exceeding \$75,000.

39. Wherefore, Manns and PowerComm Broadband pray for damages from Bank in the amount of more than \$75,000, its costs, attorneys' fees and such other relief as the court deems just and equitable.

#### DEMAND FOR TRIAL BY JURY

Powercomm Broadband, LLC, Powercomm Holdings, LLC, Kennis Mann, Joan Mann, and Kennis and Joan Mann as Trustee of the Kennis and Joan Mann Revocable Trust dated February 23, 2011 hereby demand a trial by jury of all issue in this action.

McANANY, VAN CLEAVE & PHILLIPS, P.A.  
10 East Cambridge Circle, Suite 300  
Kansas City, Kansas 66103  
Phone: (913) 371-3838  
Fax: (913) 371-4722  
[lgreenbaum@mvplaw.com](mailto:lgreenbaum@mvplaw.com)

By: /s/ Lawrence D. Greenbaum  
Lawrence D. Greenbaum - KS #12175  
*Attorneys for Powercomm Holdings, LLC,  
Powercomm Broadband, LLC, Kennis Mann, Joan  
Mann, and the Kennis and Joan Mann Revocable Trust dated  
February 23, 2011*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 22, 2017, a copy of the foregoing document is being emailed  
to:

Kristie Remster Orme  
[korme@mcdownellrice.com](mailto:korme@mcdownellrice.com)  
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Attorney for Mid-America Bank

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Attorneys for Reflective Group, LLC

/s/ Lawrence D. Greenbaum

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT

ALMENA STATE BANK,

Plaintiff,

Case No. 17CV4201  
Division 11  
Chapter 60

v.

POWERCOMM BROADBAND, LLC, et al,

Defendant,

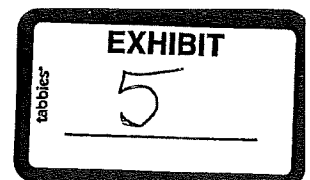
CASE MANAGEMENT ORDER

Now on this 27th day of November, 2017, after review of the court file and consultation with counsel, the Court enters the following orders and deadlines which will govern the discovery in this case:

1. **TRIAL SETTING:** This case is set for ~~court~~/jury trial beginning the week of January 14, 20 19. The length of trial will be 5 days.

2. **DISCOVERY DEADLINE:** All discovery in this case shall be completed on or before the 14<sup>th</sup> day of September, 20 18. No written discovery may be served by any party within thirty days before the discovery completion date, absent agreement of the parties or order of this Court.

3. **PRELIMINARY AND FINAL WITNESS AND EXHIBIT LISTS:**  
The parties shall file and serve on all other parties, a preliminary list of witnesses and



exhibits on or before the 2<sup>nd</sup> day of April, 20 18. Any witness known to a party as of this deadline who may be reasonably anticipated to be called as a witness and who is not listed may be excluded at trial. Similarly, exhibits that are not listed that are known to a party as of this deadline may be excluded at trial. A final list of witnesses and exhibits shall be specific, and shall be filed and served on all other parties on or before the Pre-Trial Conference date identified in Section 7 of this Case Management Order.

4. **EXPERT WITNESSES:**

A. *Any party with affirmative claim who intends to use an expert in support of the claim*  
Plaintiff must file and serve on all other parties, a designation of expert witnesses on or before the 1<sup>st</sup> day of June, 20 18. *Any party wishing to ~~intend~~ use an expert in response to initial expert designation*  
The defendant must file and serve on all parties, a designation of expert witnesses on or before the 16<sup>th</sup> day of July, 20 18. Such designations must include the name and business address of each expert witness. In addition, the designations must state the subject matter on which each designated expert is expected to testify, the substance of the facts and opinions of the expert and a summary of the grounds for each opinion.

Along with the designations, counsel must provide at least two dates that each expert is available to have his/her deposition taken within 30 days of the service of the expert designation. If for some reason, the parties cannot agree upon a date for the deposition of an expert witness within 30 days of the service of the expert designation, counsel must contact the Court for a conference call to set a deposition date for the expert witness.

B. Any party that wishes to call a rebuttal expert to testify at trial must file and serve on all other parties, a designation of expert witnesses no later than thirty (30) days after the defendant expert identification date contained in Section A above. Such designation must include information required in Section A above.

C. Any party who has an objection to the form of another party's expert designation, must file such objection with the Court within ten (10) days of receipt of such expert designation. If the objection is not timely filed, it is waived. The parties are mutually responsible for contacting the Court to set a hearing on the objection.

D. Any motion pursuant to K.S.A. 60-457(b) as amended shall be filed no later than the deadline for completion of all discovery. Any response to the motion must be filed within fourteen (14) calendar days of the filing of the motion. The party filing the motion must contact the Court to schedule a hearing on the motion on a date prior to the pretrial conference. Failure to timely file the motion shall be deemed a waiver of any objection under K.S.A. 60-456 to the testimony of an expert witness.

5. **MOTIONS TO AMEND:** Any motions to amend the pleadings and/or join parties must be filed on or before the 16<sup>th</sup> day of March, 2018.

Absent agreement of the parties, no such motions will be granted after this date. Any motion to extend this deadline must be filed prior to this deadline. *Any motion to strike request for jury trial shall be filed by 3/16/18.*

6. **MOTIONS:**

A. Dispositive Motions: Any dispositive motion must be filed by September 28, 2018. Such motion and any response thereto, must be in compliance

with Kansas Supreme Court Rule 141, or it will not be considered. ~~A hearing in~~  
~~anticipation of any such motion is set for \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at~~  
~~\_\_\_\_\_m.~~ The parties are to contact the Court for a hearing date at the time any  
dispositive motion is filed.

B. Motions To Compel Discovery: Any motion to compel discovery must be  
filed within 45 days of the default, service of response, answer or objection that is the  
subject of the motion. If the motion is not filed within this time, the motion may not be  
considered. Any such motion must recite with particularity, the communications or  
attempted communications aimed at resolving the discovery dispute prior to the filing of  
the motion, or it will not be considered.

C. Other motions: If a motion is filed, and neither the Kansas Statutes, nor the  
Kansas Supreme Court Rules clearly set forth a deadline for a response to such motion,  
the deadline shall be 14 calendar days after service of the motion.

D. Any motion (other than a motion to dismiss, motion for judgment on the  
pleadings, motion for summary judgment or motion to compel) must contain a statement  
that counsel for the moving party has attempted to consult with opposing counsel, the  
result of those attempts, and whether or not opposing counsel agree(s) to the relief sought  
in the motion.

E. The moving party shall not provide a proposed journal entry relating to the  
motion filed, unless the journal entry is signed by all counsel of record in the case, or, the  
motion recites specifically that all counsel of record have been consulted, and that they

agree to the relief granted in the proposed journal entry.

F. The parties must comply with Johnson County District Court Local Rule 8.

G. Scheduling motions: Any party who desires a hearing for oral argument on any motion filed is responsible for contacting the Administrative Assistant for Division 11 to schedule such hearing. Such party must then send written notice of the hearing to all other parties.

H. A chamber copy of any motion, memorandum in support, and any response in opposition, shall be submitted to the Court in advance of any scheduled hearing date.

7. **PRE-TRIAL AND FINAL TRIAL CONFERENCES:** A Pre-Trial Conference shall be held on the 13<sup>th</sup> day of December, 2018, at 10:30 a.m. Prior to this date, the parties are to provide the Court with an agreed Pretrial Order in compliance with Johnson County District Court Local Rule 13. A final trial Conference will be conducted on the 9<sup>th</sup> day of January, 2019 at 3:30 p.m.

8. **SETTLEMENT CONFERENCE:** The parties shall participate in a settlement conference/mediation prior to the Pre-Trial Conference. Failure to participate in a settlement conference/mediation prior to the Pre-Trial Conference may result in a dismissal of the case, a dismissal of a parties' claims or defenses, continuance of the trial date, or other sanctions to be determined by the Court. The parties may schedule a settlement conference/mediation with any other district court judge, any retired district court judge, or any other mediator who may be agreed upon by the parties. If the parties



cannot agree upon a mediator, the Court will appoint one.

9. **FINAL TRIAL CONFERENCE SUBMISSIONS:** Two weeks before the date of the final trial conference, the parties will:

a. Submit joint jury instructions and any instructions that cannot be agreed upon which are requested by any party.

b. Mark and exchange all Exhibits and an Exhibit Index. Plaintiff shall begin with Exhibit No. 1, and Defendant shall begin with Exhibit No. 100. A copy of the Exhibit Index shall be filed with the Court.

c. Designate any depositions a party intends to use in its case in chief, identifying deponent, page and line.

d. File any motions in limine and trial briefs.

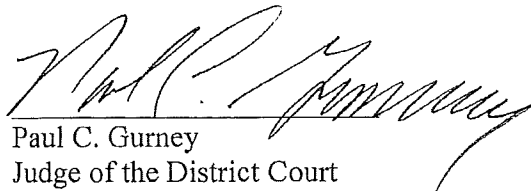
One week before the date of the final trial conference, the parties will file any objections to the other party's jury instructions, exhibits, deposition designations, file any deposition counter-designations, and any responses to trial briefs and motions in limine.

10. **OTHER SCHEDULING:**

These dates were agreed on by counsel and the Court, and will not be extended except on order of the judge on motion filed prior to the date and for good cause shown.

IT IS SO ORDERED.

Dated: 11/27/17

  
Paul C. Gurney  
Judge of the District Court  
Division 11