

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL VIDEO CORPORATION,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JAY SOULE & JOHN KILGORE,	:	NO. 99-CV-5117
	:	
Defendants.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

General Video Corporation (“GVC”) commenced this action by filing a Complaint in the Court of Common Pleas of Philadelphia County. Along with the complaint, Plaintiff filed a Petition for a Temporary Restraining Order. On October 13, 1999, the request for the Temporary Restraining Order was granted in part and denied in part. On October 16, 1999, Defendants removed the case to this Court.

The parties requested time to conduct discovery prior to a hearing on Plaintiff’s request for a Preliminary Injunction. Thereafter, testimony was taken on November 19, 30 and December 16, 1999. The parties have now submitted suggested Findings of Fact and Conclusions of Law, together with briefs. From the testimony and documents submitted in evidence, we make the following:

FINDINGS OF FACT

1. Plaintiff, General Video Corporation (“GVC”) is a corporation organized under the laws of the State of Delaware, with a principal place of business in Quakertown, Pennsylvania. (Complaint and Answer ¶ 1.)

2. GVC is a manufacturer and distributor of videowall equipment, based in Quakertown, Pennsylvania. (N.T. 11/19 at 29 (JS)¹; Exh. P-17.) A videowall consists of an array of monitors and sound system which, together with controlling hardware and software, can amplify and display one or more images. (N.T. 11/19 at 111-12 (EK); N.T. 11/30 at 104-05 (BA).) Videowalls are used by retailers, and entertainment and sports facilities, among others. (N.T. 11/19 at 115 (EK); N.T. 11/30 at 105 (BA).)

3. GVC was founded in 1991. Emery Kertesz has served as its President since its inception. (N.T. 11/19 at 115 (EK).) GVC's products include monitors, speakers, projectors and videowall processors. (N.T. 11/19 at 111-14 (EK); Exh. P-12.)

4. GVC maintains a network of "hundreds" of authorized dealers. Distribution through these authorized dealers is GVC's primary selling method. (N.T. 11/30 at 37-38 (AM).)

5. As of June 1999, GVC employed six regional sales managers ("RSM's"), each with an assigned sales territory, reporting to GVC's Vice President for Sales, John Salhus, who joined the company in August 1998. Mr. Salhus's predecessor was Joseph Pearlman. By November 1999, GVC had no RSM's, and its sales functions were being performed by Mr. Salhus and another executive, John Gawa, the National Sales Manager. (N.T. 11/19 at 6-77 (JS); N. T. 11/30 at 42 (AM) & 134 (JK).)

6. Defendant Jay Soule is a citizen of the State of California. (Complaint and Answer ¶ 2.)

¹ *Notes of Testimony are cited by date and page number. Witnesses are identified as follows: John Salhus (JS); Emery Kertesz (EK); Arthur Murphy (AM); Margaret DeValentino (MD); Steven Kinney (SK); Brett Armstrong (BA); John Kilgore (JK); Jay Soule (JXS).*

7. Defendant John Kilgore is a citizen of the State of Colorado. (Complaint and Answer ¶ 3.)

8. Soule and Kilgore were employed by GVC as regional sales managers. (Complaint and Answer ¶ 4.)

9. Soule began to work for GVC on January 1, 1999. (Complaint and Answer ¶ 7.)

10. Kilgore's employment with GVC began on February 23, 1998. (Complaint and Answer ¶ 12.)

11. On December 8, 1998, before Soule began his employment with GVC, GVC signed an offer of employment, which Soule accepted in writing. (Exhibit P-2.)

12. Soule's written offer of employment stated in pertinent part:

12. Agreements: We will require your signature on the standard GVC Confidentiality/noncompete form.

13. Soule signed a Confidentiality/Non-Compete Agreement with GVC on January 5, 1999. (Exhibit P-3.)

14. The Confidentiality/non-Compete Agreement between Soule and GVC provides in pertinent part:

You agree to treat all materials, product and new products knowledge, trade secrets, technical information, ideas, business and marketing plans and strategy, operating procedures, knowledge concerning present and prospective customers and suppliers, and related matters of whatsoever kind known only to GVC and/or which GVC deems proprietary (collectively, the "Information"), as confidential and the exclusive proprietary property of GVC. . . . You shall acquire no rights of any kind in the Information, except the right to use the same solely for the purpose, and only during the time, of performing services for GVC or as otherwise provided for in this Agreement. You agree not to use or cause to permit to be used the information for the benefit of any party other than GVC, and not to disclose or make available any information or any part or modification thereof, directly or indirectly in any manner to any person except as provided herein.

...

You therefore covenant and agree that for a period of eighteen months from the later of: (1) the end or early termination date of any agreement entered into by you with GVC or (2) the last date you perform services for GVC, that you will not, either directly or indirectly through or with others, in any way develop or market product(s) similar or the same as the Products for yourselves or for any others, or provide your services, expertise, knowledge or otherwise in any manner whatsoever assist any company or entity developing, distributing or selling and such product(s) that competes or intends to compete with GVC or any affiliated company, which except for any current, proposed or contemplated projects or sales of GVC during the term of this agreement, shall not apply to consulting services you provide to a dealer or enduser consumer after you are no longer providing services to GVC. You acknowledge that in the event of any breach of the above provisions GVC would have no adequate remedy at law and GVC may obtain an injunction in addition to its other rights at law or in equity.

...

This agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania without regard to its conflict of law rules.

(Exhibit P-3.)

15. Soule also executed a separate Non-Disclosure Agreement with GVC. (Exhibit P-1.)

16. The Soule Non-Disclosure Agreement provides, in pertinent part:

As used herein, "Proprietary Information" means . . . marketing plans, strategies, business and product development plans, timetables, forecasts and customer lists all as related to videowall, large screen display and related products which Transmitter [GVC] desires to protect against unrestricted disclosure or competitive use. . . .Receiver [Soule] agrees to hold in confidence and trust and to maintain as confidential all Proprietary Information of Transmitter for a period of three (3) years from the date of disclosure.

17. As a condition for employment with GVC, Kilgore was required to sign the standard GVC Confidentiality/Non-Compete Agreement. (Complaint and Answer ¶ 13; Exhibit P-13.)

18. The Kilgore Confidentiality/Non-Compete Agreement provides, in pertinent part:

You agree to treat all materials, product and new products knowledge, trade secrets, technical information, ideas, business and marketing plans and strategy, operating procedures, knowledge concerning present and prospective customers and suppliers, and related matters of whatsoever kind known only to GVC and/or which GVC deems proprietary (collectively, the “Information”) as confidential and the exclusive proprietary property of GVC. . . . You shall acquire no rights of any kind in the Information, except the right to use the same solely for the purpose, and only during the time, of performing services for GVC or as otherwise provided for in this Agreement. You agree not to use or cause or permit to be used the information for the benefit of any party other than GVC, and not to disclose or make available any information or any part or modification thereof, directly or indirectly in any manner to any person except as provided herein.

...

You therefore covenant and agree that for a period of eighteen months from the later of: (1) the end or early termination date of any agreement entered into by you with GVC or (2) the last date you perform services for GVC, that you will not either directly or indirectly through or with others, in any way develop or market product(s) similar to the same as the Products for yourselves or for any others, or provide your services, expertise, knowledge or otherwise in any manner whatsoever assist any company or entity developing , distributing or selling any such product(s) that competes or intends to compete with GVC or any affiliated company. You acknowledge that in the event of any breach of the above provisions GVC would have no adequate remedy at law and GVC may obtain an injunction in addition to its other rights at law or in equity.

...

This agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania with regard to its conflict of laws rules.

(Exhibit P-14.)

19. Kilgore understood the contract when he signed it. (Kilgore, N.T. 12/16/99 at 11, 39-40, 43.)

20. Kilgore understood that he agreed not to compete with GVC. (Kilgore, N.T. 12/16/99 at 12-13.)

21. Although competitive pressures have recently caused GVC to consider pursuing some direct sales to end-users of its videowall products, it is GVC's policy not to compete for sales with its authorized dealers, nor does it permit end-users to do "end runs" around the GVC dealer network. (N.T. 11/19 at 116 (EK); N. T. 11/30 at 43 (AM).)

22. Innovative Design Technologies ("IDT") is a systems integration company based in Burbank, California. IDT's customers are the end-users of videowall and other audio-visual systems. IDT helps its clients design their systems, procures and installs equipment, and then provides after-market service on the equipment. (N.T. 11/30 at 104-05 (BA).) IDT is not a party to this case

23. In addition to providing integration services to end-users, IDT sells two proprietary products -- a software control product called "No X-Cues" and a patent-pending "seamless screen" monitor. GVC does not make products which compete with these. Indeed, GVC has purchased these products from IDT for re-sale to others. (N.T. 11/19 at 73 (JS) & 127 (EK); N.T. 11/30 at 41 (AM) & 106-08 (BA).)

24. As stated above, IDT's system integration services include the procurement and re-sale of appropriate videowall equipment for its customers. As described by IDT's co-owner, Brett Armstrong:

[W]hen we're designing a system for a client we try to determine, based on how much budget the client may have and what their real needs are, as to what the particular type of equipment's going to fit

those needs. So IDT has maintained since - since we began our company we're dealers of almost every audio-visual manufacturer in the market today. So we have a wide variety of equipment to pull from. (N.T. 11/30 at 106-07 (BA).)

Defendants in this case have conceded that the equipment which IDT procures and re-sells in systems for its customers includes equipment that is the same as or similar to GVC's products.

Defendants emphasize, however, that IDT is a dealer re-selling the product of manufacturer/distributors such as GVC to end-users, as opposed to selling to the dealer market.

Defendants contend that IDT is a dealer and customer of GVC, not a competitor. (N.T. 11/19 at 22 (JS); N.T. 11/30 at 116-17 (BA); N.T. 12/16 at 13-14 (JK) & 84-85 (JXS).)

25. IDT is an authorized dealer of GVC products under a written contract. (N.T. 11/19 at 127 (EK), N.T. 11/30 at 37-38 (AM); Exh. P-17.) GVC first approached IDT about three years ago, and Mr. Kertesz and Mr. Pearlman visited IDT on several occasions to encourage it to become a GVC authorized dealer. Mr. Kertesz and Mr. Pearlman assured Mr. Armstrong that "if [IDT] became a dealer that we could rest assured that they would respect the dealer market and they wouldn't sell in - direct to end-users. That was one of the reasons why we became a dealer." (N.T. 11/30 at 109-10 (BA).)

26. The GVC-IDT "Dealer Agreement" recites, inter alia:

WHEREAS, GVC manufactures and/or distributes audio and video electronic products and accessories;

WHEREAS, Dealer [IDT] desires to purchase such products for resale and/or for incorporation into its own finished system;

WHEREAS, Dealer recognizes and acknowledges the importance to GVC. . . . of selling such products only through authorized merchants which have or acquire specialized skills in promoting and selling such product. . . .

GVC hereby appoints Dealer and Dealer hereby accepts appointment as a non-exclusive authorized dealer in the United States (Exh. P-17, emphasis added.)

Pursuant to this relationship, IDT purchases product from GVC at a discounted “dealer price” for re-sale at a mark-up. (N.T. 11/19 at 85-86 (JS) & 130 (EK).)

27. IDT is thus a regular customer of GVC. (N.T. 11/19 at 149 (EK).) Indeed, IDT’s purchases from GVC totaled more than \$700,000 during the first eleven months of 1999. (N.T. 11/30 at 107 (BA).)

28. Defendant John Kilgore lives and works in Denver, Colorado. (N.T. 11/30 at 130-31 (JK).) He has worked in various capacities in the video display industry for more than 18 years, including work as a sales manager for Toshiba, one of GVC’s suppliers of videowall equipment. Mr. Kilgore was responsible for building up Toshiba’s dealer network before Toshiba decided to turn over its distribution to GVC. (N.T. 11/30 at 131-134 (JK); Exh. P-15).

29. Mr. Kilgore was introduced to GVC by Toshiba. GVC hired Mr. Kilgore as an RSM in February 1998. He spoke to Mr. Kertesz and Mr. Pearlman about GVC’s business practices:

I was actually very glad to hear that the dealer network that I had worked very hard to develop was still in place and that it was their policy to sell through that dealer network. And they assured me that they did not sell to end-users, I felt that was a very important point, that selling through the dealer network and maintaining that integrity and the fact that I could - I could honestly say to these dealers that we will not sell against you would be very important to continue the trust and loyalty in maintaining that integrity. (N.T. 11/30 at 134 (JK).)

30. Mr. Kilgore expressed discomfort with the “Confidentiality/Non-Compete Agreement” when it was presented to him, but “Mr. Pearlman [GVC's then-vice president for

sales] assured me that everybody in GVC has to sign one, it's mandatory, and 'between you and me it doesn't hold any water.'" (N.T. 11/30 at 134-35 (JK).)

31. GVC initially assigned Mr. Kilgore to the Midwest region, but GVC changed his territory four times in the 19 months of his employment. (N.T. 11/30 at 135 (JK).) His duties were to stay in contact with his dealer network and to follow-up on sales leads provided by GVC by disseminating them to the dealer network. (N.T. 11/30 at 136 (JK).)

32. Mr. Kilgore's commission reports for his tenure as a RSM for GVC show that all of his sales were made to dealers rather than to end-users of videowall equipment. Many of his sales were to IDT. (N.T. 11/30 at 32-34 (AM); Exh. P-24.)

33. Mr. Kilgore resigned from GVC effective October 1, 1999 to take a position as a sales manager for IDT. One of his reasons for resigning was a change of policy by GVC to pursue end-user leads directly without dealers, which Mr. Kilgore felt would pit GVC against his loyal dealer network. (N.T. 11/30 at 145 (JK).) Mr. Kilgore did not believe that by going to IDT he was taking a competitive position because at GVC he had been selling for a distributor to a dealer network, and now he would be working for a dealer selling to the end-user market. (N.T. 11/30 at 146-47 (JK).)

34. Mr. Kilgore advised Mr. Salhus, GVC's vice president for sales, of his intention to resign to work for IDT approximately a week before submitting his letter of resignation. Mr. Salhus told Mr. Kilgore that he also might be leaving GVC and that he might be calling Mr. Kilgore about future opportunities for himself. (N.T. 11/19 at 83 (JS).) GVC has not hired an RSM to replace Mr. Kilgore (N.T. 11/19 at 77 (JS); N.T. 11/30 at 42 (AM).)

35. In a letter of resignation tendered to Mr. Salhus on September 27, 1999, Mr. Kilgore stated:

As I mentioned to you on the telephone, I hope this transition can be made in an amicable manner. As you are aware, I have several potential projects which may close within the next 30 days. I will work with John Gawa in an effort to ensure that GVC has every opportunity to contact these potential and existing GVC customers.

I will remain working in this industry. I would like to think I will have the ability to work with GVC in the future, either by recommending GVC to others, or in the purchase of several of your products.
(Exh. P-5.)

Mr. Kilgore did work with Mr. Gawa to ensure that GVC could contact these customers, although he had no expectation of receiving a commission upon closing any of these deals. (N.T. 11/19 at 84 (JS); 12/16 at 41-42 (JK).)

36. Since leaving GVC, Mr. Kilgore had been in contact with many of his former dealers, many of whom are friends, but has made it clear that he is no longer with GVC and not accepting business. (N.T. 12/16 at 35-36 (JK).)

37. Mr. Salhus considered Mr. Kilgore an excellent sales manager. (N.T. 11/19 at 84 (JS).) Mr. Armstrong was interested in hiring him for IDT “because of his personality. He’s very well known in the audiovisual industry and has a very, very good reputation of being a reputable sales rep.” (N.T. 11/30 at 110 (BA).)

38. Defendant Jay Soule lives and works in Carlsbad, California. (N.T. 12/16 at 44 (JXS).) He began working in technical capacities in the audio-visual industry in 1981, and began working with videowall technology when it was first introduced in the mid-1980’s. In 1989 he joined Electrosonic, a manufacturer and distributor of videowall equipment, in a regional sales position. In 1991 he became a national accounts manager for Electrosonic, and in 1995 became a sales consultant with responsibility for specific markets. (N.T. 12/16 at 45 (JXS).) Prior to

moving into sales, Mr. Soule developed sophisticated programming capabilities (N.T. 11/16 at 30 (JS).)

39. Mr. Soule was recruited to GVC by Mr. Salhus, who had previously employed him at Electrosonic, which was a competitor of GVC. (N.T. 11/19 at 29 (JS).) Mr. Soule had an excellent reputation in the industry. (N.T. 11/19 at 79-80 (JS).)

40. At his orientation, Mr. Soule was presented with the same form of “Confidentiality/Non-Compete Agreement” signed by Mr. Kilgore. Mr. Soule objected to the form, and Mr. Salhus suggested adding certain language to Paragraph 4 which had also been added to Mr. Salhus’s own agreement with GVC. (N.T. 11/19 at 78-79 (JS); N.T. 12/16 at 49-50 (JXS).) The relevant portions of Paragraph 4 of Mr. Soule’s “Confidentiality/Non-Compete Agreement,” with the added language in boldface, read as follows:

4. You acknowledge that GVC will suffer great loss and damage if you directly or indirectly, for yourselves or for or through others, offer for sale or solicit the sale to others who might compete with GVC any of the enhancements, improvements, modifications or procedures that improve, enhance or in any way modify the Products developed, manufactured by or on behalf of GVC or Products distributed in a territory or area by GVC. You further recognize that it will be difficult, if not impossible, to compute the amount of loss or damage to GVC if you violate any of the covenant hereof and that GVC will be accordingly without adequate legal remedy in the event that you violate the covenants of this agreement. You therefore covenant and agree that for a period of eighteen months from the later of (1) the end or early termination date of any agreement entered into by you with GVC or (2) the last date you perform services for GVC, that you will not, either directly or indirectly through or with others, in any way develop or market products(s) similar or the same as the Products for yourselves or for any others, or provide your services, expertise, knowledge or otherwise in any manner whatsoever assist any company or entity developing, distributing or selling any such products(s) that competes or intends to compete with GVC or any affiliated company, **which except for any current, proposed, or contemplated projects or sales of GVC during the term of this agreement, shall not apply to consulting services you provide to a dealer or enduser consumer after you are no longer providing services to GVC.** (Exh. P-3, emphasis added.)

Mr. Salhus told Mr. Soule that the agreement was “really not worth the paper that its written on.” (N.T. 11/19 at 80 (JS); N.T. 12/16 at 51-52 (JXS).)

41. GVC assigned Mr. Soule to a western sales territory encompassing California, Nevada, Washington, Oregon, Hawaii and Alaska. His duties consisted of taking leads obtained from trade shows or advertisements, qualifying those leads, and “if there was a qualified lead, looking at the capabilities of the dealers in the area in the region and taking the lead to them, to fulfill.” (N.T. 12/16 at 52 (JXS).)

42. Mr. Soule’s commission reports for his nine-month tenure at GVC show that all of his sales were to dealers rather than end-users of videowall equipment. Indeed, well over half his sales were to IDT. (N.T. 11/30 at 32-34 (AM); Exh. P-24.)

43. Since leaving GVC, Mr. Soule has been self-employed as a sales consultant on retainer to IDT. He receives a flat monthly fee of \$9,000 with no benefits or sales commissions. His responsibilities as an independent contractor include tracking industry trends, attending trade shows, seeking new locations, and working with vendors and end-users. (N.T. 12/16 at 44, 67-68 & 73-74 (JXS).)

44. GVC seeks to enjoin Mr. Kilgore and Mr. Soule from working for IDT. Because GVC has failed to prove that Defendants’ association with IDT violates or imminently threatens to violate their restrictive covenants with GVC, this requested relief will be denied.

45. Defendants have conceded from the outset that IDT, as part of its system integration services, re-sells videowall equipment that is the same as or similar to equipment sold by GVC. Indeed, it is an authorized dealer that purchases a substantial amount of product from GVC, as well as other manufacturers, for re-sale to end-users.

46. GVC, however, must show more than that IDT sells the same or similar products -- it must show that it sells those products in competition with GVC. The covenants which GVC seeks to enforce are contained in agreements that are each styled “Confidentiality/Non-Compete Agreement.” The language of the covenants is also clear in this regard. First, the preamble to Paragraph 4 of each agreement states that the employee acknowledges that GVC will be harmed if the employee “offer[s] for sale, solicit[s] the sale to others who might compete with GVC.” The body of the covenant itself applies to providing services to any company or entity “that competes or intends to compete with GVC, or any affiliated company.” Thus, the restrictive covenant applies only to sale of the same or similar products in competition with GVC. (Exhs. P-3 & P-14.)

47. To the extent there is any ambiguity in Paragraph 4 as to whether competition is required, under the doctrine of contra proferentem that ambiguity must be resolved against GVC, which requires its employees to sign this standard form agreement as a condition of employment (while at the same time it orally tells the employee that the agreement is “not worth the paper that its written on” or that it “doesn’t hold any water”).

48. GVC has failed to show that IDT is in competition with it. To the contrary, IDT is a high-volume customer of GVC under a written authorized dealer agreement. IDT is an important part of GVC’s distribution system, serving as the “middleman” between GVC as manufacturer/distributor of high-priced, complex equipment that requires integration, installation and service, and the end-user of that equipment.

49. GVC asserts that it, too, due to competitive pressures, now pursues sales to end-users. Notably, however, it has presented none. To the contrary, GVC’s witnesses conceded that

as a matter of policy it does not compete with its dealer network, which is its primary sales method. (N.T. 11/19 at 116 (EK); N. T. 11/30 at 43 (AM).)

50. GVC assured IDT, at the time it entered into its dealership agreement, that GVC would not sell direct to end-users. Mr. Kilgore received the same assurance upon entering into employment with GVC. Neither Mr. Kilgore nor Mr. Soule sold to end-users while employed by GVC. Even if GVC is now departing from this policy, it would be inequitable to enjoin Mr. Kilgore and Mr. Soule from selling to end-users when, at the time they signed their agreements, GVC's policy was to the contrary.

51. Not a single witness testified to a single sale where GVC and IDT found themselves in competition, or to a single sale that GVC has lost to IDT. (N.T. 11/16 at 151-52 (EK); N.T. 11/30 at 110 (BA) & 152 (JK).)

52. GVC has introduced evidence that it is hoping to bid on a large project referred to as the "Las Vegas Amphitheatre Project" which would be a direct sale to an end-user. (N.T. 11/16 at 43 (JS).) Defendants concede that IDT is also preparing to bid. Thus, there may be actual competition with respect to this project. This does not support the extraordinary relief that GVC seeks.

53. In the absence of evidence of actual competition in the end-user market, GVC has sought to prove that IDT may compete with it for sales to dealers in the future. The evidence of this speculative possibility is scant. GVC found that IDT once prepared its own dealer price list for Toshiba products which GVC distributes to dealers. As explained by Mr. Armstrong, however, this occurred when Toshiba approached IDT about becoming a distributor. IDT determined that the dealer market would not be profitable for it, however, and never became a Toshiba distributor. (N.T. 11/30 at 121-24 (BA); Exh. P-9.)

54. GVC has also failed to prove its entitlement to an injunction against use of “trade secrets” or confidential information by Mr. Soule and Mr. Kilgore.

55. GVC has failed to show that Mr. Soule or Mr. Kilgore, both of whom worked out of their homes thousands of miles from GVC’s offices, were privy to trade secret or confidential information. As regional sales managers, the only sales information they received was their own sales data. (N.T. 12/16 at 126-27 (JS).) They were not privy to GVC's financial statements. (N.T. 12/16 at 56 (JXS) & 126 (JS).) They received no information about GVC’s product costs. (N.T. 12/16 at 127 (JS).) There is no evidence of any technical trade secrets.

56. In discovery Defendants propounded document requests to GVC seeking: “all dealer agreements between [GVC] as manufacturer and others as dealers, which agreements were in effect at any time in 1998 and 1999,” documents regarding GVC’s “systems integration group,” “documents used by plaintiff to promote its products and services used in 1998 and 1999,” “documents that mention or identify the ‘products’ as used in Paragraph 4 of the Confidentiality/Non-Compete Agreement,” “directories of dealers in the videowall industry,” and GVC’s “price book.” GVC objected on the grounds that these requests sought disclosure of documents **“that were never disclosed to defendants at any time during their employment by GVC and to whose contents defendants were never privy at any time during their employment at GVC.”** (Exhs. D-11 & D-12.) It is abundantly clear from the record that Mr. Soule and Mr. Kilgore pose no security risk as former employees.

57. The only information even arguably qualifying for protection which Mr. Soule or Mr. Kilgore was privy to were sales leads generated by GVC’s telemarketing and advertising. GVC has not, however, shown that either Mr. Soule or Mr. Kilgore has used such lead information, which GVC admits must be acted upon quickly because leads rapidly grow stale in this fast-

moving business (N.T. 11/30 at 43 (AM)), since leaving GVC. Mr. Armstrong and IDT were not interested in any such information and told Mr. Kilgore and Mr. Soule not to bring any such information to IDT. (N.T. 11/30 at 111 (BA).) The evidence is undisputed that both Mr. Kilgore and Mr. Soule fully briefed GVC regarding their pending transactions at the time of their departures. (N.T. 11/19 at 84 (JS); 12/16 at 41-42 (JK); N.T. 12/16 at 64-65 (JXS).) There is no evidence that this is a case of departing employees attempting to spirit away customers in the dark of night. To the contrary, Mr. Soule and Mr. Kilgore are now associated with one of those customers and selling to a different customer base.

58. For the same reasons, GVC has failed to establish its entitlement to its requested preliminary injunctive relief against Mr. Soule or Mr. Kilgore soliciting or accepting business from its current customers.

59. In addition, Mr. Soule's agreement specifically states that he may provide "consulting services to a dealer or an end-user consumer after [he is] no longer providing services to GVC." (Exh. P-3). As Mr. Kertesz agreed, under this provision "Mr. Soule is enabled to do consulting work for dealers." (N.T. 11/16 at 124 (EK).) IDT is a dealer and Mr. Soule is providing consulting services to it as he is specifically permitted to do under the agreement.

CONCLUSIONS OF LAW

1. The Court has diversity jurisdiction over the parties and the subject matter of this action. 28 U.S.C. § 1331.
2. GVC has not established by competent evidence a reasonable probability of success on the merits of its claims for breaches of the agreements not to compete.
3. GVC has not established by competent evidence that it will be irreparably harmed if the preliminary injunction is not granted, or that its remedies at law, such as for damages, would not provide adequate relief.
4. Greater harm would result to defendants from the issuance of a preliminary injunction than to GVC if the injunction is not granted.
5. Granting the requested preliminary injunction will not be in the public interest, including the public policies of the States of California and Colorado.
6. Although the Agreements sued on provide that the laws of the Commonwealth of Pennsylvania shall govern, the Court will disregard the parties' choice of law because it would be contrary to a fundamental public policy of the State of California, which has a materially greater interest than Pennsylvania in the determination of the issue of whether the defendants may be employed by a California-based company.
7. California law applies to the enforceability of the covenants not to compete as to prospective employment with a California-based company and as to Mr. Soule, who is a California resident.
8. California law provides that covenants not to compete in any business or profession are void except as necessary to protect trade secrets. Section 16600 of the California Business and Professions Code.

9. Colorado law also applies to the enforceability of the covenant not to compete in Mr. Kilgore's Agreement.

10. Colorado law provides that covenants not to compete are void unless they are in contracts for the protection of trade secrets. Colorado Revised Statutes § 8-2-113(2).

11. Under California and Colorado law, none of GVC's claimed confidential information is a trade secret.

12. GVC's Exhibit P-27 is admitted.

13. GVC's Exhibit P-6 is not admitted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JAY SOULE & JOHN KILGORE,	:	NO. 99-CV-5117

O R D E R

AND NOW, this day of MARCH, 2000, upon consideration of Plaintiff's Petition for Preliminary Injunction filed in state court and Defendant's Response, and after a hearing, it is hereby ORDERED that the Petition is DENIED.

It is further ORDERED that the Temporary Restraining Order entered by the Court of Common Pleas of Philadelphia County, October Term 1999, No. 649 on October 13, 1999 is VACATED.

BY THE COURT:

ROBERT F. KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL VIDEO CORPORATION, : CIVIL ACTION
: :
Plaintiff, : :
: :
v. : :
: :
JAY SOULE & JOHN KILGORE, : NO. 99-CV-5117

O R D E R

AND NOW, this 15th day of MARCH, 2000, it is hereby ORDERED that Plaintiff's Motion for Expedited Discovery and Plaintiff's Motion to Quash are DENIED as MOOT.

BY THE COURT:

ROBERT F. KELLY, J.