



this matter on December 14, 2006, Defendant was forty-three years of age. (N.T. 12/14/06, 8).

3. In May, 1997, Plaintiff hired Defendant to work as a financial counselor in its Philadelphia area office then located in Bala Cynwyd, Pennsylvania. Subsequently, the Philadelphia office was re-located to West Conshohocken, Pennsylvania.

(Complaint and Answer to Complaint, ¶s4; N.T. 12/14/06 at p. 9).

At the time he began working for AMG, Plaintiff's compensation consisted of an annual salary of \$40,000 plus a promise of a \$10,000 anniversary bonus and benefits. (N.T. 12/14/06, 77-78; Exhibits P-3 and F).

4. Prior to his employment with AMG, Defendant had had some experience in the financial services industry, having worked for several banks providing financial services and advice and having received a Bachelor of Science degree in economics and management from the Wharton School of the University of Pennsylvania and a Master's degree in finance from Drexel University. (N.T. 12/14/06, 8-10).

5. Shortly after Defendant accepted the plaintiff's offer of employment, he received a letter dated April 15, 1997 outlining his starting salary, bonus, and vacation accrual and referencing the enclosure of an employee handbook explaining AMG's benefits, employee policies and confidential agreement. That letter also requested that the confidential agreement be

returned to the AMG Director of Human Resources. (Exhibits P-3 and F).

6. Notwithstanding its wording, the April 15, 1997 letter which Defendant received did not enclose either the employee handbook or the confidential agreement. As a result, Defendant did not sign the Confidential Information and Employment Agreement until May 6, 1997, his first day of employment at AMG. (N.T. 12/14/06, at 12-13; Exhibits P-3 and F).

7. Plaintiff did not pay Defendant any additional monies or compensation in exchange for and in consideration of his signing the Confidential Information and Employment Agreement aside from his salary and previously negotiated bonus and benefits package. (N.T. 12/14/06, 77-80). Plaintiff asked Defendant to again sign such restrictive covenants in 2002, 2003 and 2005 when it offered stock options to him, but Defendant refused to sign on each occasion. (N.T. 12/14/06, 161).

8. Prior to actually seeing the Confidential Information and Employment Agreement, Defendant believed that it would be similar to agreements which he had signed with his former employers requiring only that he keep his clients' information confidential. (N.T. 12/14/06, at p. 14).

9. Defendant is not a lawyer, does not have any legal training and did not take the Confidential Information and Employment Agreement to an attorney for review prior to executing

it. (N.T. 12/14/06,80).

10. Subsections 1 and 2 of the Confidential Information and Employment Agreement do indeed define and provide that the signatory employee will keep such defined information regarding AMG and its clients confidential. In addition, however, under Subsection 3 of the Agreement which is entitled "Restrictive Covenant":

During employment with AMG and for two years thereafter (the "Covenant Period"), Employee shall not, within the United States, directly or indirectly contact, solicit, accept business from, or perform or offer to perform services in any capacity for any (i) AMG client or participant, (ii) person to whom AMG proposed providing services by a personal marketing meeting within the twelve months preceding Employee's termination from AMG, or (iii) representative thereof, either for Employee's benefit or the benefit of any person other than AMG, if such services would be in competition with AMG.

(Plaintiff's Complaint, Exhibit "A," ¶ 3(a)).

11. At paragraph 14, the Confidential Information and Employment Agreement also provides:

Governing Law. This Agreement is to be governed by, and construed and enforced in accordance with, the laws of the State of Colorado, without regard to the conflicts of laws principles of such State.

(Plaintiff's Complaint, Exhibit "A," ¶14).

12. When Defendant began working for Plaintiff, he did not bring any financial counseling clients with him from his former employer(s). Every client that he had and/or serviced at AMG was either inherited from another AMG financial counselor who had left the company, was referred to him from an existing client,

was the result of his own, direct solicitation while an AMG employee or was employed by one of the corporations with whom AMG had a relationship. (N.T. 12/14/06, 14-15).

13. At the time of his resignation, Defendant had and was providing services for approximately 65 individual and/or household clients. (N.T. 12/14/06, 63).

14. Plaintiff takes numerous steps to ensure that its client list remains confidential, one of the most significant of which is that individual passwords permit that individual to access only the information for their own clients. Plaintiff's Employee Manual also contains its policies regarding confidentiality and the importance to the company of maintaining the confidentiality of its client list. (N.T. 12/14/06, 83-84, 86; Exhibit P-11).

15. Defendant knew that client contact and client financial information was confidential to AMG and that if he ever were to leave AMG's employ, he was to leave the confidential client listing and the confidential client information behind. (N.T. 12/14/06, 15).

16. On August 16, 2006 Defendant tendered his resignation to AMG effective September 5, 2006. (Complaint and Answer to Complaint, ¶s14; N.T. 12/14/06, 17).

17. At the time of his resignation, Defendant was receiving approximately \$170,000 in annual compensation from AMG. (N.T.

12/14/06, 11; Complaint and Answer thereto, ¶s13).

18. When Plaintiff began working in AMG's Philadelphia office, there were several other financial counselors working in/out of the office as well as several analysts, secretarial and support personnel and a regional vice president. (N.T. 12/14/06, 68-69, 71-73). By the date of his resignation, Defendant was the only employee working in and out of the Philadelphia office. (N.T. 12/14/06, 128-131, 137, 146-147).

19. On the same day that Defendant tendered his resignation, AMG's President Earl L. Wright sent an e-mail to Masood Dhunna, AMG's regional vice-president of the Midwest region and Defendant's supervisor, advising that AMG needed to "aggressively move to reassign clients, tell [Defendant] what is expected of him (he is not to contact clients, any employees or former employees about his departure) shut off all contact of clients to [Defendant] and get in front of our clients asap." Wright further advised Dhunna that he needed to meet with Defendant, review the status of each client and determine which clients to contact via phone with the new assigned financial counselor and which ones to meet personally and to get additional employees to the Philadelphia office "immediately to answer all phones, sort out files, send client information to new FCs asap, and decide how to close down the office--allocate furniture and file cabinets." (Exhibits P-12, O).

20. The following day, August 17, 2006, AMG sent a letter to Defendant at his home address reminding him of his "continuing obligations to AMG under the Confidential Information and Employment Agreement..." and advising that if any AMG client should ask for financial counseling services or information, he should inform them that he is subject to a restrictive covenant, and cannot provide services or discuss providing services to such person. The letter further provided in relevant part:

"If you have contact with any such person [client] prior to you leaving AMG, you should use your best efforts to do so only with another AMG representative present. While at AMG, you may conduct business in AMG's best interests and may tell such person that you are leaving AMG to take a position with another firm, without providing the name, address or phone number of that firm, or your personal forwarding address or phone number..."

(N.T. 12/14/06, 18, 26-28; Exhibits P-7, G).

21. After receiving the e-mail from Earl Wright, Masood Dhunna called Defendant and told him that he would be coming to Philadelphia the following Monday (August 21, 2007) to discuss client transition. In that conversation, however, Mr. Dhunna did not orally advise Defendant not to have any conversations with any clients until he or another AMG representative was present, nor did he transmit any such instructions to the defendant in writing or via e-mail or some other form of electronic communication. (N.T. 12/14/06, 20, 88-92).

22. Mr. Dhunna arrived at AMG's West Conshohocken office around 10 a.m. and interviewed the defendant in his office with

Ann Kipper, a company Human Resources representative in attendance. Mr. Dhunna gave Defendant additional documents directing that he not contact clients, asked him if he had any AMG information in his briefcase, to which the defendant responded that he did not, and then had defendant delete all client information from his cell phone. Mr. Dhunna then helped Mr. Ries pack up his personal belongings and walked him to his car. (N.T. 12/14/06, 25-26, 93-94). Thus, although he was paid through September 5, 2006, August 21, 2006 was the last day on which Defendant worked for AMG and no efforts were made by AMG to have Defendant assist in the transition of his clients to new financial counselors. (N.T. 12/14/06, 20, 25, 28, 93-94).

23. On or about August 18, 2006, Mr. Wright sent out a letter to all of the defendant's clients advising them of Mr. Ries' departure from AMG and introducing them to the new AMG financial counselor who would be advising them in the future. (N.T. 12/14/06, 94-95; Exhibit P-13).

24. Within one day of resigning from AMG and using both the office and his personal cell phones, Defendant called a number of his clients to let them know of his resignation. Defendant placed these calls himself, with no other financial counselors or representatives from AMG on the line. (N.T. 12/14/06, 22-24). In the course of his discussions, Defendant told his clients that while he didn't know what he was going to be doing, he was

considering starting his own business as a registered investment advisor; he did not tell any of these clients that he was subject to an agreement that would prevent him from providing services to them for a two-year period after leaving AMG. (N.T. 12/14/06 24-25).

25. After leaving AMG's premises for the last time on August 21, 2006, Defendant still had in his possession a client list with client telephone numbers and other information and he continued to call his clients to let them know that he was no longer with AMG until at least August 24, 2006. Further, Defendant kept track of those clients whom he had called in a Microsoft Word document. (N.T. 12/14/06 28-32).

26. In early 2006, Defendant was contacted by David Rosenthal, a former financial analyst in AMG's New Jersey office who was then operating his own investment and financial planning services business under the name of "Wealth Management Solutions" in Scottsdale, Arizona. (Exhibit Q, 5, 25-26, 31). Mr. Rosenthal and his business partner were looking to find a certified financial planner to set up an office on the East Coast and approached not only Mr. Ries but also several other AMG employees in the New Jersey office about working with Wealth Management Solutions (Exhibit Q, 31-36). Over the ensuing months, Mr. Rosenthal and Mr. Ries had a number of discussions, which discussions continued after Defendant had resigned from

AMG. Because Defendant was subject to a non-competition agreement, Mr. Rosenthal contacted AMG's legal counsel and David Wright, who was in charge of mergers and acquisitions at AMG to inquire into whether AMG would be interested in selling its Philadelphia office and that office's client list to Wealth Management Solutions ("WMS") if Defendant was willing to work for WMS. (Exhibit Q, 52-57). David Wright flatly refused and the discussions about Defendant's opening an east coast office for WMS ceased. (Exhibit Q, 58-67). There is no evidence that any of WMS' clients were formerly clients of AMG. (Exhibit Q, 68-69).

27. Subsequent to his departure from AMG, Defendant continued to provide assistance and some financial advice to several of the clients whom he had serviced at AMG at least until October 12, 2006. (N.T. 12/14/06, 32-39, 46-49; Exhibit A).

28. Apparently after learning of Defendant's departure from AMG, a number of his clients told him that they wished to terminate their relationships with AMG. Subsequently, Defendant assisted several of his clients to "de-link" their Charles Schwab custodial accounts from AMG. (N.T. 12/14/06, 39-48; Exhibits A, B).

29. Since Defendant's departure from AMG, approximately 38% of his clients have advised Plaintiff that they no longer wish to continue receiving financial counseling services from AMG. Some 12% of Defendant's clients have not responded to requests from

AMG to contact their newly-assigned financial counselors. (N.T. 12/14/06, 95-100).

30. Although there is evidence that Defendant was continuing to provide services to approximately ten of his AMG clients after leaving AMG's employ, many of his former clients have terminated their relationships with AMG simply because Defendant is no longer their assigned financial counselor or for other reasons unrelated to Defendant's departure--not because Defendant is continuing to provide financial counseling and services to them independently from AMG. (N.T. 12/14/06, 49, 54, 56, Exhibits H, I, J, K, L, M, N).

31. On October 3, 2006, this Court entered a temporary restraining order and Defendant was temporarily enjoined pending further hearing on Plaintiff's motion for preliminary injunction from directly or indirectly contacting, soliciting, accepting business from or performing or offering to perform services in any capacity for any client or prospective client as defined in the Confidential Information and Employment Agreement. Despite the entry of this Order, Defendant did perform services for a handful of his former AMG clients, albeit in response to telephone calls from them. (N.T. 12/14/06, 43-52, 54-56, 62, 64).

32. Following the hearing in this matter on December 14, 2006, the Court essentially directed that the terms of the

previously issued restraining order remain in full force and effect pending the issuance of a written decision and prohibiting the defendant from having any contact with any client of AMG that he was servicing while employed by AMG. The Court further ordered the defendant that "[i]f any client contacts you, you're to indicate that you cannot discuss or talk to them about anything while this injunction is going on, and there's an injunction at this time." (N.T. 12/14/06, 165).

33. There is no evidence on this record that the defendant has been employed in any capacity since leaving AMG on August 21, 2006.

34. There is no evidence on this record that the defendant has rendered any financial services to any of his AMG clients since November 2, 2006.

#### **DISCUSSION**

The threshold issue in this case is whether Defendant Ries should be preliminarily enjoined from, *inter alia*, directly or indirectly contacting, soliciting, accepting business from or performing or offering to perform services in any capacity for any AMG clients or participants or otherwise using any AMG confidential proprietary information or trade secrets in purported violation of the terms and conditions of the Confidential Information and Employment Agreement which he signed at the outset of his employment with AMG.

Preliminary injunctive relief is "an extraordinary remedy" that "should be granted only in limited circumstances." KOS Pharmaceuticals, Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004), quoting American Tel. & Te. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994). "One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." Id., quoting Opticians Association of America v. Independent Opticians of America, 920 F.2d 187, 197 (3d Cir. 1990).

The test for preliminary relief is a familiar one. A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. Rogers v. Corbett, 468 F.3d 188, 192 (3d Cir. 2006). As the initial step in any preliminary injunction analysis is to ascertain the likelihood that the plaintiff will succeed on the merits, in this case we must first examine the agreement at issue and determine if it is enforceable. Because the Confidential Information and Employment Agreement which Defendant signed also contains a choice of law provision, it is further incumbent upon us to decide what state's law to apply in resolving the enforceability

question. Specifically, under paragraph 14,

Governing Law. This Agreement is to be governed by, and construed and enforced in accordance with, the laws of the State of Colorado, without regard to the conflicts of laws principles of such State.

It has long been held that when jurisdiction is premised upon the diverse citizenship of the parties, the district court is to apply the conflict of law rules of the state in which it sits. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed.1477 (1941); Huber v. Taylor, 469 F.3d 67, 73 (3d Cir. 2006). Because this is a diversity case, we apply the choice-of-law rules of the forum state, that is, Pennsylvania. Hammersmith v. TIG Insurance Co., 480 F.3d 220, 226 (3d Cir. 2007).<sup>1</sup> In contractual matters, the Pennsylvania courts generally honor the intent of contracting parties and enforce choice of law provisions in contracts executed by them so long as the transaction bears a reasonable relationship to the state whose law is governing and where the parties have

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<sup>1</sup> Recently in Hammersmith, the U.S. Court of Appeals for the Third Circuit opined:

"[W]e think it is now clear that Pennsylvania applies the more flexible 'interest/contacts' methodology to contract choice of law questions. ...Under this methodology, the courts must first determine whether there is a 'false conflict' between the competing states' laws such that only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's laws." Hammersmith, 480 F.3d at 226-227, 229.

"...In that event, the court should apply the law of the state whose interests would be harmed if its laws were not applied. Hence, "[a] deeper (choice of law) analysis is necessary only if *both* jurisdictions' interests would be impaired by the application of the other's laws (i.e., there is a true conflict)." Hammersmith, at 230, citing Cipolla v. Shaposka 439 Pa. 563, 267 A.2d 854, 856 (1970).

sufficient contacts with the chosen state. Berg Chilling Systems, Inc. v. Hull Corp., 435 F.3d 455, 463-464 (3d Cir. 2006), citing Restatement (Second) Conflicts of Law, §187(2); Stone Street Services, Inc. v. Daniels, Civ. A. No. 00-1904, 2000 U.S. Dist. LEXIS 18904 at \*12 (E.D. Pa. Dec. 29, 2000), citing Smith v. Commonwealth National Bank, 384 Pa. Super. 65, 557 A.2d 775, 777( 1989); Meade v. Florida Infusion Services, 120 F.Supp.2d 499, 501-502 (2000). Having adopted Section 187 of the Restatement (Second) Conflict of Laws, however, Pennsylvania courts will ignore a contractual choice of law provision if that provision conflicts with a strong public policy interest of Pennsylvania. Berckley Investment Group, Ltd. v. Colkitt, 455 F.3d 195, 224, n. 28 (3d Cir. 2006); Kruzits v. Okuma Machine Tool, Inc., 40 F.3d 52, 55, 56 (3d Cir. 1994), citing Schifano v. Schifano, 324 Pa. Super. 281, 290, 471 A.2d 839, 843 n.5 (1984)(citing with approval the Restatement, Second Conflict of Laws §187). And it is the party challenging the validity of the agreement which bears the burden of proving that the terms of the non-compete and other restrictions are not supported by consideration and/or are unreasonable. Fisher Bioservices, Inc. v. Bilcare, Inc., Civ. A. No. 06-567, 2006 U.S. Dist. LEXIS 34841 at \*30 (E.D.Pa. May 31, 2006), citing John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 360 A.2d 1164, 1169-70 (1977).

In application of the foregoing principles, we find that

AMG is, and has apparently at all times relevant to this cause of action, been headquartered in Colorado and that Defendant was at all times relevant a resident and citizen of New Jersey. Although Defendant worked in AMG's Pennsylvania office and it was in response to an advertisement in the Philadelphia Inquirer that Defendant became aware of employment opportunities with AMG, he had both a telephone and an in-person interview with AMG President Earl Wright in Denver, Colorado and the record reflects that he traveled to Colorado on other occasions for meetings during the course of his employment with AMG. Additionally, the financial analyst who was assigned to support Defendant was located in the Denver office. (N.T. 12/14/06, 70-73, 130-131, 142-144, 147). Because AMG closed the Philadelphia office after Defendant's resignation, it further appears that a number of his clients were re-assigned to financial counselors who were working out of the Colorado office (N.T. 12/14/06, 106-107, 112). Thus, we find that the transactions at issue here (*i.e.*, Defendant's acceptance of business from and performance of financial services in purported violation of his employment agreement) bear a reasonable relationship to Colorado and that the parties to this lawsuit have sufficient contacts with that state. Accordingly, we see no reason to not enforce the choice of law clause here and

we shall therefore apply Colorado law<sup>2</sup> to determine the enforceability and to construe the terms and conditions of the parties' Confidential Information and Employment Agreement. See

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<sup>2</sup> Defendant here argues that the Court should disregard the choice of law provision in his employment agreement because the application of Colorado law would be contrary to important policies of Pennsylvania (*to wit*, Pennsylvania disfavors restrictive covenants, requires consideration beyond continuation of employment and has an interest in protecting employees that offer their services for hire inside the Commonwealth). We disagree.

It is true that Pennsylvania courts have historically been reluctant to enforce contracts that place restraints on trade or on the ability of an individual to earn a living; however, post employment non-competition covenants are not *per se* unreasonable or unenforceable. Wellspan Health v. Bayliss, 869 A.2d 990, 996 (Pa. Super. 2005). Thus, though still disfavored, Pennsylvania courts recognize that "covenants have developed into important business tools to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them." Victaulic Company v. Tiemann, No. 07-2088, 2007 U.S. App. LEXIS 20077 at \*23-\*24 (3d Cir. Aug. 23, 2007), quoting Hess v. Gebhard & Co., 570 Pa. 148, 160, 808 A.2d 912, 918 (2002). At a minimum, for a non-competition or restrictive covenant to be enforceable, it must be "reasonably related to the protection of a legitimate business interest." Wellspan, *supra.*, quoting Hess, *supra.* Pennsylvania courts have consistently held that the taking of employment is sufficient consideration for a restrictive covenant but if an employment contract containing a restrictive covenant is entered into subsequent to employment, it must be supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status. Insulation Corp. of America v. Brobston, 446 Pa. Super. 520, 528-529, 667 A.2d 729, 733 (1995); Modern Laundry & Dry Cleaning Co. v. Farrer, 370 Pa. Super. 288, 536 A.2d 409, 411 (1988). Hence, compliance with such covenants can be mandated where: (1) the covenant is incident to an employment relationship between the parties, (2) it is supported by adequate consideration; (3) the restrictions imposed by the covenant are reasonably necessary for the protection of the legitimate business interests of the employer; and (4) the restrictions imposed are reasonably limited in duration and geographic extent. Victaulic, 2007 U.S. App. LEXIS at \*16-\*17; Fisher Bioservices, Inc. v. Bilcare, Inc., Civ. A. No. 06-567, 2006 U.S. Dist. LEXIS 34841 at \*29 (E.D.Pa. May 31, 2006), both quoting Hess, 570 Pa. at 157, 808 A.2d at 917.

Interestingly, Defendant acknowledges the strong similarities between the laws of Colorado and Pennsylvania as regards restrictive covenants in general. The linchpin of Defendant's argument appears to be that because he did not sign his employment agreement until the day he started working at AMG, additional consideration was necessary to support the restrictive, non-competition provisions in that agreement. Similar to the Pennsylvania cases cited above, however, we find that Defendant's execution of the agreement was contemporaneous with and adequately supported by his acceptance of AMG's initial agreement to employ and train him as a financial counselor. We therefore do not find any conflict between a strong public policy interest of Pennsylvania and the choice of law provision at issue here.

Also, Zavec v. Yield Dynamics, Inc., No. 05-2232, 179 Fed. Appx. 116, 122, 2006 U.S. App. LEXIS 10984 at \*16 (3d Cir. May 3, 2006)(finding that sole fact that one of the parties was California corporation gave contracting parties reasonable basis for choosing California law as law governing the "validity, construction and performance of ...agreement").

On these points, Colorado public policy disfavors covenants not to compete and they are void except in very limited circumstances. Reed Mill & Lumber Co. v. Jensen, No. 06COA431, 2006 Colo. App. LEXIS 1586 at \*6 (Colo. Ct. App. Sept. 21, 2006); DBA Enterprises, Inc. v. Findlay, 923 P.2d 298, 302 (Colo. App. 1996). See Also, King v. PA Consulting Group, Inc., 485 F.3d 577, 586 (10<sup>th</sup> Cir. 2007)("Colorado thus has a fundamental policy of voiding noncompete provisions that do not fall within one of the statutory exceptions.") This policy is codified at Colo. Rev. Stat. §8-2-113, which reads as follows in pertinent part:

(1) It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit.

(2) Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:

(a) Any contract for the purchase and sale of a business or the assets of a business;

(b) Any contract for the protection of trade secrets;

(c) Any contractual provision providing for recovery of the expense of educating and training an employee who

has served an employer for a period of less than two years;

(d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

...

In the preliminary injunction context, the employer has the burden to establish that the covenant not to compete falls within one of those narrow exceptions. Phoenix Capital, Inc. v. Dowell, No. 05CA2712, 2007 Colo. App. LEXIS 1401 at \*6-\*7 (Colo. App. LEXIS July 26, 2007). The validity of a noncompetition provision is determined as of the time the agreement is entered into and not as of any time thereafter, with the determination of whether an employee is executive or management personnel or professional staff being a question of fact for the trial court. Phoenix, at \*9, \*10-\*11, citing, *inter alia*, Management Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763, 765 (Colo. App. 1988).

Plaintiff asserts that Defendant Ries falls under two of the four exceptions delineated in the statute: that providing for the protection of trade secrets and that governing executive and management personnel. We must agree.

First, in addition to the restrictive covenant provision quoted in Finding of Fact No. 10 above, Sections 1 and 2 of Mr. Ries' Confidential Information and Employment Agreement discuss at length the definition and importance of confidential information to AMG and the agreement by Defendant to keep and

treat such information (including client/customer lists and information) as confidential and as a trade secret of AMG.

Specifically, under Section 1,

- a) For purposes of this Agreement, "confidential information" means all oral or written information affecting or relating to AMG, whether generated before or after the date of this Agreement, including such information that was or is conceived, originated, discovered or developed by Employee solely or jointly with other persons or that otherwise arises out of or is obtained from Employee's employment by AMG, except for such information that is generally known by non-AMG persons other than as the result of Employee's actions. AMG treats such information as confidential.
- b) Confidential information includes, without limitation:(i) all information about AMG client corporations and participants and their representatives, including, without limitation client lists, contracts, binders, codes, names, telephone numbers, and addresses; the personal financial affairs, information, objectives, circumstances and opinions of such persons and their relationship as AMG clients; (ii) research, designs, discoveries, development and proprietary ideas; (iii) formulae, concepts, techniques, processes, methods and procedures; (iv) computer data, programs and models; (v) marketing techniques, contacts and proposals; (vi) price lists; (vii) contracts; (viii) financial information; (ix) investment reviews and AMG-recommended investments; (x) plans; (xi) forecasts; (xii) models, manuals and drawings; (xiii) training methods; (xiv) benefits and compensation structure; (xv) information relating to the identity, qualifications, performance and other employment related characteristics or qualities of AMG employees; and (xvi) all other trade secrets and confidential information.

Although what constitutes a trade secret is a matter of fact for the trial court, under Colo. Rev. Stat. §7-74-102, "trade secret"

means the whole or any portion or phrase of any scientific

or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Network Telecommunications, Inc. v. Boor-Crepeau 790 P.2d 901, 902 (Colo. App. 1990). Furthermore, the alleged secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Colorado Supply Company, Inc. v. Stewart, 797 P.2d 1303, 1306 (Colo. App. 1990). Extreme and unduly expensive procedures need not be taken and reasonable efforts have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a "need to know basis," and controlling plant access. Id., citing Network Telecommunications, supra.

Here, in addition to the clear and unambiguous language contained in the Confidential Information and Employment Agreement which Mr. Ries executed at the start of his employment with AMG, the record reflects that AMG undertook numerous measures to ensure that its client lists, addresses, phone numbers, financial data, marketing and other materials, etc. remained confidential and exclusive to AMG employees and clients as noted in Finding of Fact Nos. 14, 19-23 above. In light of this evidence and the language of the agreement itself, we find

that the restrictive/non-competition covenant contained in Mr. Ries employment agreement constitutes a "contract for the protection of trade secrets" within the purview of Colo.Rev.Stat. §8-2-113 which is thus enforceable under Colorado law.

Second, we find that Mr. Ries falls within the statutory exception for "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel." As is the case with trade secrets, Colorado law provides that ordinarily the determination of whether an employee is executive or management personnel or professional staff, is a question of fact for the trial court. Phoenix Capital, Inc. v. Dowell, No. 05CA 2712, 2007 Colo. App. LEXIS 1401 at \*10-\*11 (Colo. App. July 26, 2007), citing Management Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763, 765 (Colo. App. 1988). Although the statute is silent as to the definition of "professional or executive personnel" or "professional staff to executive and management personnel," it now appears that Colorado law recognizes that "the commonly accepted meaning of the term 'professional' is ... broader than simply a member of a 'learned profession,' ..." and "that, by education and experience, a person may be considered to be a 'professional.'" Phoenix Capital, 2007 Colo. App. LEXIS at \*14. Additionally, "the phrase 'professional staff to executive and management personnel' is limited to those persons who, while

qualifying as 'professionals' and reporting to managers or executives, primarily serve as key members of the manager's or executive's staff in the implementation of management or executive functions." Phoenix Capital, 2007 U.S. App. LEXIS at \*16.

In this case, the record evinces that by signing the Confidential Information and Employment Agreement, the defendant acknowledged that he was an executive and/or professional and/or professional staff to executive and management personnel. Indeed, on this point the language of his employment agreement clearly provided in the third paragraph:

"The undersigned employee (Employee) is a member of AMG's executive or management team or professional staff supporting such team and works in a capacity in which Employee may obtain or contribute to Confidential information that is the property of AMG."

Furthermore, the evidence of record reflects that Plaintiff was well-educated, having received his bachelor's degree from the prestigious Wharton business school of the University of Pennsylvania and an MBA from Drexel University. At the outset of his employment with AMG he reported to David Marschall, an AMG vice-president who headed up the Philadelphia office. At the end of Defendant's tenure with AMG some nine years later, he was the only employee staffing and running the Philadelphia office reporting directly to Masood Dhunna, the regional vice president, who was then based in Chicago. From this evidence, we easily

conclude that the defendant was functioning as an executive or manager and/or as professional staff to the executive and/or managerial levels at AMG. The Confidential Information and Employment Agreement is therefore clearly enforceable and we turn now to consider the likelihood that Plaintiff would succeed on the merits of its claims.

In this regard, the evidence thus far adduced demonstrates that the defendant continued to service a number of his clients after he had terminated his employment with AMG, despite knowing that AMG considered his clients and their information to be confidential and proprietary and that he was prohibited by the restrictive covenant portions of his employment agreement from soliciting, accepting business from and/or servicing those clients. The record further shows that the defendant continued these prohibited activities *even after* he had been temporarily enjoined via this Court's Order of October 3, 2006. Thus, we believe that, were this matter to proceed to trial on the plaintiff's complaint, plaintiff would succeed on the merits of its causes of action.

We also find that AMG has successfully demonstrated that it would suffer irreparable harm were we not to continue the terms and conditions of the TRO. Indeed, Mr. Dhunna testified that approximately 38% of Defendant's clients discontinued their relationships with AMG following Mr. Ries' departure from the

company, although the record does suggest that not all of those clients have been lost because Mr. Ries has continued to provide them with financial counseling services. (N.T. 12/14/06, 96). Unquestionably, Mr. Ries' ability to contact those clients poses a threat of further significant financial losses to AMG given that all of its clients are high net worth investors.

Next, we note that the restrictive covenant does not prevent Mr. Ries from immediately accepting employment as or continuing to work as a financial counselor anywhere else. Rather, it precludes him only from providing financial services to those clients whom he serviced while in AMG's employ for a two-year period. This is, we find, eminently reasonable and thus the granting of injunctive relief in favor of Plaintiff should not result in undue or greater harm to the defendant and would generally favor the overall public policies of holding parties to their contracts and preventing interference with existing business relationships. In as much as all of these factors militate in favor of continuing the existing injunction, we now make the following:

#### **CONCLUSIONS OF LAW**

1. This court has jurisdiction over the parties and subject matter of this litigation pursuant to 28 U.S.C. §1332.
2. The law of Colorado is appropriately applied in construing and enforcing the Confidential Information and

Employment Agreement executed by Defendant Stephen C. Ries on or about May 6, 1997.

3. The terms and conditions of the Confidential Information and Employment Agreement executed by Defendant on or about May 6, 1997, including the restrictive covenant portions thereof, are fair, reasonable and enforceable under the law of Colorado.

4. By providing financial services and information to clients whom he had serviced while in the employ of AMG, Defendant Stephen Ries breached the terms and conditions of the Confidential Information and Employment Agreement which he signed on May 6, 1997 to the detriment and damage of Plaintiff.

5. Without injunctive relief precluding and preventing Defendant from contacting, servicing, etc. his former AMG clients, Plaintiff is likely to suffer irreparable harm that cannot be adequately compensated by money damages.

6. Plaintiff is likely to succeed on the merits of its cause of action when and/or if this matter should proceed to full trial on the merits.

7. In as much as Defendant is not precluded from pursuing employment as a financial counselor for another employer or on his own but is precluded only from serving those clients and/or contacts whom he serviced and with whom he became acquainted while an AMG employee for a two-year period, the risk of harm to be suffered by him is significantly less than the risk of harm to be suffered by Plaintiff if injunctive relief were not granted.

8. In as much as it is in the public's best interest to ensure that parties to contracts comply with those agreements which they have made, the public interest is best served by granting injunctive relief to Plaintiff in this action.

9. By continuing to provide financial services, advice and/or information to several clients whom he had serviced while in the employ of AMG after October 3, 2006 when this Court issued a temporary restraining order precluding him from doing so, Defendant was in civil contempt of a valid Court Order.

An appropriate order follows.

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

|                         |   |                |
|-------------------------|---|----------------|
| AMG NATIONAL TRUST BANK | : | CIVIL ACTION   |
|                         | : |                |
| vs.                     | : |                |
|                         | : | NO. 06-CV-4337 |
| STEPHEN C. RIES         | : |                |

**ORDER**

AND NOW, this 13th day of September, 2007, upon consideration of Plaintiff's Motions for Preliminary Injunction and for Contempt, it is hereby ORDERED that the Motions are GRANTED, Defendant Stephen C. Ries is ENJOINED from:

1. Directly or indirectly contacting, soliciting, accepting business from, or performing or offering to perform services in any capacity for any client or prospective client as defined in the Confidential Information and Employment Agreement or any representative thereof of AMG for a period of two years or until September 5, 2008;

2. Using or disclosing Plaintiff's trade secrets and confidential or proprietary information, as defined in the Confidential Information and Employment Agreement in any manner whatsoever.

3. Plaintiff is DIRECTED to submit whatever evidence it may have as to the damages suffered by it as the result of Defendant's contempt of this Court's Order of October 3, 2006

and/or supplemental memoranda as to an appropriate remedy therefor within thirty (30) days of the date of this Order. Defendant is DIRECTED to file his response thereto, if any, within sixty (60) days of the date of this Order.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.