IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

PHOENIX COMMUNICATIONS
CORPORATION,

PLAINTIFF,

VS.

NO. CH-09-0105-2

ERIC MARQUARDT,

DEFENDANT.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST FOR A TEMPORARY INJUNCTION

NOW COMES the Plaintiff Phoenix Communications Corporation ("Plaintiff" or "Phoenix") in support of its request for temporary injunctive relief in this matter. Phoenix filed its First Sworn Complaint for Injunctive and Other Relief on January 21, 2009, at which time the Court entered a Fiat enjoining the Defendant Eric Marquardt from engaging in certain competitive activities with the Plaintiff and setting a hearing for February 4, 2009. On January 27, 2009, the Defendant entered a Request for Relief from Restraining Order responding to the Plaintiff's Complaint.

At the February 4th hearing, the Defendant requested a two week continuance on the basis that he had retained Attorney Randall Fishman to represent him in this matter. The Defendant also requested the Court to relieve him from the injunction on the basis that he did not work for the Plaintiff, but for its wholly owned subsidiary

Audio Video Creations, LLC ("AVC"), claiming that he was not bound by the terms of the covenant not to compete. The Court entered an Order continuing the hearing to February 18, 2009, and specifying that all terms of the original Temporary Restraining Order remained in place until such time as the Court enters further orders in this matter.

FACTUAL BACKGROUND

The Defendant worked for Phoenix from 1997 until October 27, 2008, at which time Phoenix switched his employment to Phoenix's wholly owned subsidiary Audio Video Creations, LLC. After only six (6) weeks of working under AVC, the Defendant resigned his employment with Phoenix and AVC on December 16, 2008. Shortly thereafter, the Defendant began contacting Phoenix's customers in violation of the covenant not to compete, prompting Phoenix to institute this action for injunctive relief. Despite his long history with Phoenix, the Defendant now claims that he was not an employee of Phoenix and that the noncompete is not binding upon him.

Phoenix is in the business of providing custom-designed, high-end audio-video, lighting, and security systems. Specifically, Phoenix concentrates its business in the highly-specialized craft of "systems integration" for residential properties in which Phoenix custom-designs a customer's audio, video, security and lighting systems, and then integrates the systems so the customer may control all systems through a single interface. *See* Scott Fuelling Aff. ¶2, Feb. 13, 2009. Audio Video Creations, LLC, is a wholly owned subsidiary of Phoenix, *see* Hudgins Aff. ¶2, which specializes in the same craft, although typically AVC projects are on a smaller scale than Phoenix projects.

AVC uses Phoenix technicians, equipment, and vehicles to perform its installations, and orders its various components through Phoenix. *See id.* Likewise, AVC employees enjoy the same benefits as Phoenix employees including the use of Phoenix vehicles, health insurance, dental insurance, disability insurance, and IRA plan. *See id.*.

The Defendant began his employment with Phoenix in 1997 as an installer. Prior to working for Phoenix, the Defendant previously worked for AutoRadio installing car stereos; however, the Defendant's previous experience "in electronics" is in no way comparable to the highly-specialized field of systems integration in which Phoenix operates. *Compare* Scott Fuelling Aff. ¶¶2, 8, Feb. 12, 2009, *with* Def. Req. for Relief ¶8. Throughout the Defendant's work as an installer and continuing after the Defendant's promotion to a Sales Engineer in 2005, Phoenix invested a large amount of time, effort, and money into providing both general and specialized training to the Defendant. *See* Scott Fuelling Aff. ¶¶3-5, Feb. 13, 2009. Among other things, the Defendant obtained specialized knowledge of the Control 4 Product line, for which Phoenix is currently the exclusive dealer in this area. *See id* ¶7. His specialized knowledge in the practices, design fundamentals and involvement in beta testing and training gives him a competitive advantage in direct competition with Phoenix. *See id.*

In 1999 and again on November 12, 2007, Phoenix and the Defendant entered into written agreements regarding the terms and conditions of their employment relationship, including a covenant against competition, solicitation and disclosure of confidential proprietary information. The Agreements made clear that the Defendant was not to compete with Phoenix during his employment and for two years after his termination. As a Sales Engineer for Plaintiff, Defendant was exposed to and participated in the use of trade secrets, confidential processes and procedures, including customer lists and data, marketing and strategic sales information. The Defendant carried out the customary activities of a sales professional, including but not limited to, communicating with customer prospects and customers about the design and installation of customized residential audio-video, lighting, and security systems. During the time that Defendant was a Sales Engineer for Plaintiff, Defendant became fully acquainted with Plaintiff's methods, trade secrets, and systems in conducting its business, and became personally acquainted with Plaintiff's customers and sales strategies.

In reaction to the Defendant's failure to adequately perform his duties, Phoenix presented the Defendant with a letter on October 16, 2008, advising him of his unsatisfactory job performance and of what he must do to *continue* his employment with Phoenix. *See* Def. Req. for Relief, Ex. B. The letter set minimum expectations in order for the Defendant to maintain his employment with Phoenix, and states that the Defendant would be assigned to Phoenix's wholly owned sub AVC as of the end of October. The letter is on Phoenix letterhead and is titled "New Employment Agreement for Eric Marquardt" and is signed by Danis Fuelling, CEO of Phoenix Communications. *See id.* The letter gives "guidelines to be met on a continuous basis to *remain employed*" and also gives "suggestions to help [the Defendant] with *continued employment*." *See id.* (emphasis added).

Defendant voluntarily resigned his position with Phoenix/AVC on December 15, 2008, after representing to Phoenix and his coworkers that he would be employed at Federal Express. *See* Hudgins Aff. ¶3; Scott Fuelling Aff. ¶2, Feb. 4, 2009; Danis Fuelling Aff. ¶2; Weisfeld Aff. ¶3; Morris Aff. ¶2; Winchell Aff. ¶2. His last day of employment with Plaintiff was December 26, 2008. Although the Defendant has claimed in his Request for Relief that he did not believe that he worked for Phoenix after October 2008, the Defendant states in his resignation letter on December 15th that he is tendering his ". . . resignation from *Phoenix Communications*/Audio Video Creations;" that it is tough ". . . leaving such a great company as *Phoenix Communications*;" that he has been a ". . . proud dedicated member of the *Phoenix team*;" and that he "cannot say enough wonderful things about *Phoenix Communications* . . . and all the others on the *Phoenix team*." *See id.* (emphasis added).

Sometime in December 2008 or early January 2009, Defendant took a position with Audio Video Artistry as a sales representative. Audio Video Artistry is a direct competitor of Phoenix and AVC in Shelby County, Tennessee, as well as nearby counties in Tennessee and Mississippi. After leaving Phoenix, the Defendant contacted various customers of Phoenix's in violation of his covenant not to compete. For example, the Defendant contacted Builder Eddie Kircher with whom he was familiar because of his position at Phoenix to advise Mr. Kircher that he was no longer with Phoenix but had taken a position with AVA instead. *See* Kircher Aff. ¶4. Upon learning of the Defendant's actions, Phoenix immediately instituted this action.

ARGUMENT

This Court should enforce a temporary injunction against the Defendant pending trial of this matter on the merits to prevent the Defendant from exercising an unfair advantage in competition with the Plaintiff. In the absence of an injunction, Defendant Marquardt will continue to present a threat of danger to the Phoenix's legitimate business interests. As a threshold matter, this Court should find that the Plaintiff has standing to enforce the covenant not to compete, and that the Plaintiff has a legitimate business interest that is properly protectable by a non-competition covenant. Likewise, the Court should find that the covenant not to compete is reasonable under the circumstances, and should enter an Order preventing the Defendant from unfairly competing with Phoenix in violation of the terms of his Employment Agreement.

I. Phoenix may enforce the covenant not to compete against the Defendant because an employee who agrees not to compete with his employer has no interest in the form of business the employer chooses to operate and because AVC is a wholly owned subsidiary of Phoenix Communications.

In his Request for Relief from Restraining Order, the Defendant claims that he "believes he is no longer employed by Phoenix but by AVC as all paperwork indicates," and that Phoenix "has not and cannot provide [a] written agreement between [D]efendant and AVC." *See* Def.'s Req. for Relief ¶ 6, 7. On this basis, the Defendant seeks to avoid Phoenix's enforcement of the covenant not to compete, arguing in essence that the covenant not to compete either does not exist, or that Phoenix does not have standing to enforce the agreement. Contrary to the Defendant's assertions, Phoenix may enforce the covenant not to compete against the Defendant for three reasons: first, an employee who agrees not to compete with his employer has no interest in the form of business the employer chooses to operate; second, AVC is a wholly owned subsidiary of Phoenix Communications with identical interests as its parent company such that the Court may treat the two entities as one so as not to avoid the purpose of the agreement; and third, in the alternative, Phoenix should at a minimum be permitted to enforce the terms of the non-competition covenant for two years from the date the Defendant left his employment with Phoenix in October 2008.

A. An employee who agrees not to compete with his employer cannot avoid his obligations on the basis that the employer has changed its form of business because he has no interest in the form of business the employer chooses to operate.

Parties who enter noncompetition agreements do so to protect their business from unfair competition with former employees regardless of the form of business the parties ultimately choose to operate. *See Packer's Supply Co. v. Weber*, 2008 WL 1726103 at *7 (Tenn. Ct. App. 2008). The Tennessee Supreme Court first recognized this principle in 1906 in *Bradford & Carson v. Montgomery Furniture Co.*, 92 S.W.2d 1104 (Tenn. 1906). In that case, Mr. Bradford executed a three-year non-compete agreement in connection with the sale of his furniture business to a buyer who shortly thereafter sold the entire business to a corporation. *See id.* at 1105. Several months later, Mr. Bradford opened a business in direct competition with the corporation. *Id.* The corporation sued to enforce the noncompete, but Mr. Bradford claimed that the sale of the business from the buyer to the corporation rendered the noncompete agreement ineffective in the absence of a specific provision allowing for the assignment of the agreement to another party. *Id.*

The Supreme Court rejected the argument that the noncompete covenant was vitiated because there was no clause permitting the assignment of the agreement. *See id.* at 1105-06. Specifically, the Supreme Court reasoned:

> We think the complainants contracted with the defendants not to engage in the furniture business for three years, in competition with them, regardless of whether they conducted their business as individuals, partners, or stockholders in a corporation. The thing contracted for was protection against competition from the complainants.... It was immaterial to the complainants in what name the defendants conducted their business; that was a matter in which they were not interested. Their contract was simply not to engage in a business which would by competition be injurious to, or compete with the capital, energy, and ability which the defendants were investing in and devoting to the furniture business in Nashville.

Id. at 1106. In addition to making clear that noncompete agreements are assignable in the absence of language to the contrary[1], the *Bradford* opinion established that a party to noncompete agreement cannot avoid enforcement of the covenant on the basis of a technicality such as a change in business form. *See id.*

The Tennessee Court of Appeals recently applied *Bradford* to reach the same conclusion in a case where a company seeking enforcement of a covenant not to compete changed both the company's legal business form, as well as a worker's employment status. *See Packer's Supply Co. v. Weber*, 2008 WL 1726103 at *7 (Tenn. Ct.

[1]*See also Jackson v. Moskovitz Agency, Inc.*, 672 S.W.2d 400, 403 (Tenn. 1984) ("*Bradford* holds that a covenant not to compete is a property right and as such, in the absence of a provision prohibiting assignment, is both assignable and transferable.")

App. 2008). In *Packer's Supply*, a corporation filed a suit for injunctive relief against two former employees for violating the terms of a noncompete, and the employees defended on the grounds that the company changed from a sole proprietorship into a corporation, and because the new company changed the legal status of the workers from independent contractors into employees. *See id.* at *1. The Court of Appeals rightly reversed the trial court's determination that the new company did not have standing to enforce the noncompete for two independent reasons: The noncompete agreement was assigned to the new corporation by operation of law, and more importantly, because of the principle established in *Bradford. See id.* at *7.

In applying *Bradford's* reasoning to the issue of the company's change in business form from a sole proprietorship to a corporation, the Court of Appeals stated:

> A common thread running through all those cases[2] (including *Bradford*) is that the purpose for which the parties entered into the non-compete agreement—to protect an existing business from unfair competition from its former employees—was more important than any changes in the legal identity of that business. As the Tennessee Supreme Court stated in *Bradford,* the employees agreed not to compete with their employer, and they have no interest in the form of business the employer chose to use.

See Packer's Supply Co., 2008 WL 1726103 at *7. Likewise, in addressing the company's decision to change the workers from independent contractors into employees, the Court of Appeals properly recognized that the trial court should not have focused on whether

[2] The *Packer's Supply* court reviewed a number of cases from other jurisdictions which support *Bradford's* ultimate lesson that the purpose of the covenant is more important than any changes in the identity of the business. *See Packer's Supply Co.*, 2008 WL 1726103 at *6 (citing *Louisiana Office Systems, Inc. v. Boudreaux,* 298 S.W.2d 341 (La.App.1974), *Equifax Services v. Hitz,* 905 F.2d 1355 (10th Cir. 1990), *Rogers v. Runfola & Associates,* 565 N.E.2d 540 (Ohio 1991)).

the workers were independent contractors or employees "because the potential for unfair competition remains the same." *See id.* at *7 n.10. The Court of Appeals rightly acknowledged, "Allowing the defendants to avoid compliance with the non-compete agreement simply because of a restructuring of the business and of their employment status 'would exalt form over substance.'" *Id.* (quoting *Managed Health Care Associates v. Kethan,* 209 F.3d 923, 929 (6th Cir. 2000)).

This Court should apply the *Bradford* reasoning to reach the correct conclusion that Phoenix Communications may enforce the noncompete provision against the Defendant because the purpose of the Agreement was to prevent unfair competition by former employees. In Phoenix's letter to the Defendant dated October 16, 2008, a copy of which is attached as Exhibit B to the Defendant's Request for Relief, Phoenix states that the Defendant will become an employee of Phoenix's wholly owned subsidiary, Audio Video Creations, LLC, as of October 27, 2008. However, it is important to note that the letter speaks in terms of the Defendant's "continued employment" and makes clear that the Defendant can combine sales from both AVC and Phoenix to reach his monthly sales goals. *See* Def.' Req. for Relief at Ex. B. Furthermore, the letter is on Phoenix's letterhead and purports to be a "New Employee Agreement for Eric Marquardt," and sets out "guidelines to be met on a continuous basis to *remain employed*." *See id.* (emphasis added). The letter goes on to state that the Defendant will have a follow-up meeting with Danis Fuelling, CEO of Phoenix Communications, on November 15, 2008. Thus, unlike the situations at issue in *Bradford* or in *Packer's Supply* where the Tennessee Supreme Court and the Court of Appeals rightly enforced noncompete covenants on behalf of a completely separate legal entity, there is even more reason to enforce this noncompete agreement because Phoenix remained the Defendant's co-employer.

While the Defendant has alleged in his Request for Relief that he "believes he is no longer employed by Phoenix but by AVC as all paperwork indicates," his statement directly contradicts his resignation letter which is attached hereto as Exhibit A. In his letter of resignation, the Defendant explicitly and repeatedly makes it perfectly clear whom he believed he worked for at the time he resigned his position. For example, the Defendant states that he is tendering his ". . . resignation from *Phoenix Communications*/Audio Video Creations;" that it is tough ". . . leaving such a great company as *Phoenix Communications*;" that he has been a ". . . proud dedicated member of the *Phoenix team*;" and that he "cannot say enough wonderful things about *Phoenix Communications* . . . and all the others on the *Phoenix team*." *See id.* (emphasis added).

Most tellingly, the Defendant directly contradicts his Request for Relief by referring to himself in the letter's return address as, "Eric Marquardt, Sales Engineer, Phoenix Communications." *See id.* It is obvious that the Defendant knew exactly for whom he worked at the time he resigned, and he should not be allowed to now claim otherwise merely for the sake of expediency. To allow the Defendant in this case to avoid compliance with the non-compete agreement would exalt form over substance and would subvert the very "purpose for which the parties entered into the non-compete agreement—to protect an existing business from unfair competition from its former employees. . . ." *See Packer's Supply Co.*, 2008 WL 1726103 at *7. At the very least, Phoenix and AVC became co-employers of the Defendant, and the Defendant should be prevented from avoiding his agreement on the basis of such a technicality.

On the other hand, if one were to assume for the sake of argument that Phoenix's letter constitutes an assignment of the Defendant from Phoenix to AVC, there are no provisions in the non-competition agreement which prohibit or restrict the assignment or transfer of the agreement. *See* Pl.' Compl. Ex. 1. In the absence of a provision preventing the assignment of the contract between the parties, this Court should alternatively allow Phoenix to enforce the agreement as a third-party beneficiary to the contract between the Defendant and AVC.

B. This Court should enforce the agreement against the Defendant because AVC is a wholly owned subsidiary of Phoenix Communications and the two companies have identical interests such that one should be substituted for the other in this context.

This Court should find that the agreement entered into between the Defendant and Phoenix applies equally between Phoenix's wholly-owned subsidiary AVC and the Defendant, such that Phoenix may properly enforce the agreement. Courts routinely recognize that the interests of a parent company and a wholly owned subsidiary are so closely aligned as to render them the same entity. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Waste Conversion Systems, Inc. v. Greenstone Industries, Inc.*, 33 S.W.3d 779, 781-82 (Tenn. 2000). For example, in the context of an antitrust case, the United States Supreme Court has stated:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses,

> but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.... [I]n reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Copperweld Corp., 467 U.S. at 771-72. Although the *Copperweld Corp.* Court dealt with an antitrust case, the Tennessee Supreme Court has recognized that this principle is also applicable in other contexts. *See Waste Conversion Systems, Inc.*, 33 S.W.3d 779.

In *Waste Conversion Systems*, the Tennessee Supreme Court recognized the privilege of a parent corporation to interfere in its wholly owned subsidiary's contractual relations. *See id.* at 781. In reviewing the *Copperweld Corp.* decision, the Tennessee Supreme Court stated, "Even though the Court provided this reasoning in the context of an antitrust case, we believe the underlying relationship between the two corporations would be no different in a tortious interference of contract case." *Waste Conversion Systems,* 33 S.W.3d at 782. The *Waste Conversion Systems* Court also approvingly quoted the Texas Court of Appeals where it explained:

> [A] parent and a subsidiary are so closely aligned in business interests as to render them, for tortious interference purposes, the same entity. The court thus ignored the fact that the two were separate entities and held that neither could tortiously interfere with the other because their financial interests were identical, since the parent controlled the subsidiary and its profits.

See id. at 781-82 (quoting *American Medical International, Inc. v. Giurintano,* 821 S.W.2d 331, 336 (Tex. Ct. App. 1991)).

More recently, the Tennessee Supreme Court took up the issue in *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785 (Tenn. 2006), where the Court again addressed a parent's qualified privilege to interfere with a subsidiary's business contracts. In discussing the qualified privilege, the Court stated, "When there exists such an identity of interest, *courts are justified in treating two legally separate entities as one* and in extending the immunity from tortious interference that is normally enjoyed only by the *parties to a contract*." *Cambio Health Solutions*, 213 S.W.3d at 788 (emphasis added). The same justification should equally compel the Court to treat the entities as one in circumstances where the parties' original intent was to restrict unfair competition by former employees against all of a company's interests, which necessarily includes its property interests in a wholly owned subsidiary. In the context of tortious interference with a contract, a parent corporation of a wholly owned subsidiary is treated as if it entered into the contract itself so as to shield the parent from liability. *Cambio Health Solutions*, 213 S.W.3d at 788. Likewise, the principle should apply in the context of a covenants not to compete and operate to treat a wholly owned subsidiary as if it also entered into a contract when necessary to shield a parent corporation from unreasonable attempts to subvert the parent company's agreements in situations where, as in this case, a parent company's interests are so closely aligned with its wholly owned subsidiary as to render the companies a single entity.

In this case, employees of both AVC and Phoenix enter the same noncompete agreement. *See* Hudgins Aff. ¶ 2. Phoenix owns AVC, supplies technicians for installation of AVC's sales, supplies vendors for AVC's equipment, provides all of AVC employee benefits including company vehicles, health insurance, dental insurance, disability insurance, and AVC's IRA plan. *See id.* The two companies' interests are identical, and the employees understand the companies to be one in the same as evidenced by the Defendant's repeated references in his resignation letter to the fact that he was resigning from Phoenix and his reference to himself as a Sales Engineer for Phoenix Communications. For these reasons, the Court should find that the agreement between Phoenix and the Defendant is as equally binding between Phoenix's wholly owned subsidiary AVC and the Defendant such that Phoenix may enforce the agreement.

C. Even if the Court were to find that Phoenix is not a co-employer of the Defendant and has no standing to enforce the noncompete agreement on behalf of AVC, the Court should nevertheless enforce the covenant not to compete from the Defendant's last day of work with Phoenix Communications.

In the event that the Court fails to recognize Phoenix as a co-employer of the Defendant or Phoenix's standing to sue on behalf of AVC, the Court should nevertheless enforce the agreement for two years from the Defendant's last day of work with Phoenix Communications. Nothing in the letter informing the Defendant that his employment was being transferred to AVC indicates that Phoenix had any intention of revoking or otherwise ending the covenant not to compete against Phoenix. If the Defendant had left to work in another industry in October 2008 only to return to a competitor several months later, Phoenix's right to enforce the noncompete agreement would have arisen the moment the Defendant entered into competition with Phoenix and could be enforced for two years from the Defendant's last day of work with

Phoenix. It stands to reason that Phoenix would not enforce the covenant not to compete so long as the Defendant worked for a wholly owned subsidiary of the Plaintiff whose business complements rather than competes with Phoenix's business. Accordingly, Phoenix's actions in allowing the Defendant to work for AVC could not reasonably be said to have waived any rights Phoenix had in enforcing the covenant as to the Defendant. Thus, even if the Court were to find that Phoenix is otherwise barred from enforcing the agreement for a lack of standing or similar reason, the Court should nevertheless enforce the agreement for two years beginning with the Defendant's last day of work with Phoenix, October 27, 2008.

II. Phoenix has a legitimate business interest which is properly protectable because of the specialized training Phoenix provided to the Defendant, because of the Defendant's access to trade or business secrets and other confidential information, and because Phoenix's customers associate Phoenix's business with the Defendant.

In Tennessee non-competition covenants are legally enforceable if reasonable under the particular circumstances of the case. *Central Adjustment Bureau v. Ingram,* 678 S.W. 2d 28 (Tenn. 1984); *Hasty v. Rent-A-Driver*, 671 S.W. 2d 471 (Tenn. 1984). The relevant factors in determining whether a covenant not to compete is reasonable include "the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed upon the employee by such a covenant; and whether or not such a covenant should be inimical to public interest." *Alright Auto Parts, Inc. v. Berry,* 409 S.W. 2d 361, 363 (1966); *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

The non-competition agreement in this case is supported by valid consideration because of the length after which the Defendant continued working after entering into the agreement. *See Central Adjustment Bureau, Inc. v. Ingram,* 678 S.W.2d 28, 34 (Tenn. 1984). In *Central Adjustment Bureau,* the Tennessee Supreme Court recognized that an agreement not to compete between a current employer and his current employee may be valid by virtue of the parties' performance. *See id.* Specifically, the Court reasoned that "although there was no mutuality or consideration to bind the employer when an employee, already employed, signed a non-competition covenant, performance under the contract supplied the mutuality and consideration necessary to make the contract binding."

Of course, the Court makes clear that reasonableness is the touchstone of determining whether performance alone will suffice in the absence of additional consideration. *Id.* For instance, in referencing a case from Mississippi, the Court suggests that "employment for only a short period of time would be insufficient consideration under the circumstances." *Id.* (citing *Frierson v. Sheppard Building Supply Co.*, 154 So.2d 151, 154 (1963) ("If appellant had been discharged shortly after signing the agreement, this Court would probably hold the agreement was not supported by consideration"). The Court also instructs trial courts to examine the circumstances under which an employee leaves his former position and to scrutinize those cases where a discharge ". . . is arbitrary, capricious or in bad faith," because such factors ". . . clearly ha[ve] a bearing on whether a court of equity should enforce a non-competition covenant." *See id.*

In this case, valid consideration exists because no such concerns exist. After the execution of the most recent covenant not to compete in November 2007, the Defendant worked for another two years for the Defendant. Moreover, the Defendant left on his own terms after working for Phoenix for eleven years. The Defendant has not made any allegations of constructive discharge or other bad faith on the part of the Plaintiff, and nothing in the Defendant's resignation letter indicates that the Defendant harbored such sentiments. Accordingly, this Court should find that the lengthy performance of the agreement and the circumstances surrounding the Defendant's resignation support a finding of consideration for the covenant not to compete.

The Court should also find that the covenant is enforceable because the Plaintiff has a legitimate business interest which is properly protectable by a covenant not to compete. In *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999), the Court of Appeals found that in evaluating the consideration and the threatened danger to the employer along with the economic hardship to the former employee and the public interests, that one must view this factors in light of "whether the employer has a legitimate business interest, i.e., one that is properly protectable by a non-competition covenant." *Vantage Technology*, 17 S.W.3d at 644. The Court of Appeals explained that an employer cannot restrain ordinary competition, rather it must show "special facts" such that the employee would gain an "unfair advantage" in competition with his former employer. *See id.* The *Vantage Technology* court outlined the following considerations as appropriate in considering whether an unfair advantage exists:

> (1) whether the employer provided the employee with specialized training;
> (2) whether the employee is given access to trade or business secrets or other confidential information; and
> (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer.

See id. Importantly, the *Vantage Technology* court pointed out that these factors may operate on their own *or in combination* to give rise to a properly protectable business interest. *See id.*

This Court should find that the Plaintiff had a properly protectable business interest such that the covenant not to compete in this case is enforceable. As shown in Mr. Fuelling's Affidavit of February 12, 2009, and the attachments thereto, Phoenix has invested an enormous amount of time, effort, and money into providing both specialized and general training to the Defendant. *See* Scott Fuelling Aff. ¶¶3-5, Feb. 12, 2009. Moreover, by virtue of his employment with Phoenix, the Defendant possesses trade secrets and confidential information which gives Phoenix its edge over and sets it apart from its competitors. For instance, the Defendant knows the Plaintiff's pricing policies and procedures, its source of materials and vendors, and is familiar with the system integration software used exclusively by Phoenix in this market. *See id.* ¶¶7-8. The Tennessee Supreme Court has recognized that training in conjunction with other factors such as these may present a sufficiently protectable interest. *See Hasty,* 671 S.W.2d 741 *(citing Morgan's Home Equipment Corp. v. Martucci,* 136 A.2d 838 (Penn. 1957), and *Vermont Electric Supply Company, Inc. v. Andrus,* 315 A.2d 456 (Vt. 1974)).

Additionally, the Defendant is not only aware of the Plaintiff's clients, but has already initiated contact in an effort to solicit their business. *See* Kircher Aff. ¶4.

Tennessee Courts have consistently held that an employer has a legitimate business interest in keeping its former employees from using the former employer's confidential information in competition against the former employer. *Hasty,* 671 S.W. 2d at 473. Likewise, Tennessee Courts have consistently held that an employer has a legitimate protectable interest in the relationship between its employees and its customers. *Vantage Technology,* 17 S.W.3d at 645. An employee becomes "the face" of the employer based on the employer's goodwill. *See AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379, 385-87 (M.D. Tenn. 1993). Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship or the information that flows through it for the employee's own benefit. *See id.*

The Federal District Court for the Middle District of Tennessee dealt with a situation similar to this matter in *AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379. In that case, the defendants acknowledged that they knew the employer's customer list and had a "rudimentary understanding of AmeriGas's pricing system." *Id.* at 385. The defendants attempted to argue that the employer's customers were ascertainable by reference to a phone book or by following a delivery driver, and that the information was therefore not confidential. *Id.* The court rejected the argument and rightly reasoned that "the former employee not only has this information, but the ability to utilize it in a way that can be particularly harmful to a former employer." *Id.* In quoting a Tennessee Court of Appeals decision from 1953, the *AmeriGas Propane* court stated that "[i]t is particular knowledge acquired by [defendant] by virtue of his employment rather than general knowledge and experience of the trade; and it is necessarily tied in with the question of good will." *Id.* (quoting *Arkansas Dailies v. Dan*, 260 S.W.2d 200 (Tenn. Ct. App. 1953)).

The Defendant in the case not only possesses confidential information by virtue of his employment with Phoenix, he has the ability, and in fact has shown a proclivity, ". . . to utilize it in a way that can be particularly harmful to a former employer." *See id.* Under similar circumstances, the *AmeriGas Propane* court correctly reasoned:

> Crook and Jenkins had no experience in the propane gas industry prior to their employment with AmeriGas. Their knowledge about AmeriGas's customers is not derived from general knowledge, but from acting on AmeriGas's behalf. By divulging information gained from their employ and soliciting AmeriGas customers, Crook and Jenkins have breached the trust that they agreed to and were paid to keep.

See id. Defendant Marquardt likewise had no prior experience in his current industry, he derived his knowledge from acting on Phoenix's behalf, and he has likewise breached the trust of his former employer. Accordingly, this Court should properly enforce the covenant not to compete in this case.

The covenant not to compete at issue here is reasonable both in scope—because it is limited to the geographic area in which the employer markets or has marketed its business in the year preceding termination—and in duration—because the covenant terminates two years after the termination of the Defendant's employment. The agreement is supported by valid consideration, and covers a legitimate business that is properly protectable. Because the Defendant has threatened and indeed engaged in unfair competition with the Plaintiff and for all of the foregoing reasons, this Court should enforce the terms of the agreement between the parties and restrict the Defendant from competing against the Plaintiff pending a resolution of this matter on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Timothy A. Perkins do hereby certify that a true and correct copy of the foregoing has been forwarded to Attorney Randall Fishman, 200 Jefferson Ave # 1250, Memphis, TN 38103, via email and regular U.S. Mail a this 13th day of February, 2009.

Timothy A. Perkins