

IN THE SUPREME COURT OF OHIO

ROBERT E. MARTIN,

Defendant-Appellant,	:	Case No. 2007-0121 2006-2340
v.		ON REVIEW OF ORDER CERTIFYING
AL MINOR & ASSOCIATES	:	A CONFLICT BETWEEN THE 8 <sup>TH</sup> AND 10 <sup>TH</sup> DISTRICT COURT OF APPEALS
Plaintiff-Appellee.	:	COURT OF APPEALS CASE NO. 2006 AP 217

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REPLY BRIEF OF DEFENDANT-APPELLANT ROBERT E. MARTIN

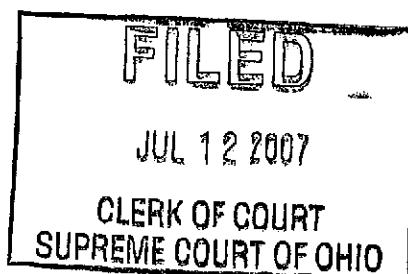
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Samuel N. Lillard (#0040571)  
Elizabeth J. Birch (#0042490)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(Ph) (614) 469-8000  
(Fax) (614) 469-4653  
slillard@mwncmh.com  
ebirch@mwncmh.com

Barry A. Waller (#0013010)  
Fry, Waller & McCann Co., L.P.A.  
35 East Livingston Avenue  
Columbus, Ohio 43215  
(614) 228-2300

Counsel for Defendant-Appellant

Counsel for Plaintiff-Appellee



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## REPLY STATEMENT OF THE FACTS

The fact-finding of the magistrate demonstrates that Appellee displaces two key points of fact. While Appellant may have organized a corporation on his own time prior to leaving his employment with Appellee Al Minor & Associates, it was only *after* Appellant Martin resigned his employment from Appellee that he started his pension analyst business and began to solicit potential clients. (Merit Brief of Appellant Appx. Pg. 43.)

Secondly, the record reflected and the Magistrate correctly found that the [www.freeERISA.com](http://www.freeERISA.com) Internet website did indeed provide not only the names of companies with ERISA plans, but it also listed the benefit plan administrators by name, their addresses, and telephone numbers. The posting of the benefit plan contacts are public information listed openly on the Internet. (Merit Brief of Appellant Appx. Pg. 45.) All of Al Minor's client names, addresses, and contact information are available on [www.freeERISA.com](http://www.freeERISA.com) as a result of filing federally-required Form 5500. (Merit Brief of Appellant Pg. Appx. 45.) These forms are filed with the Department of Labor and are available public information. (Merit Brief of Appellant Appx. Pg. 45.)

The key fact in this action, besides the public availability of the information Appellee claims as "confidential", is the undisputed fact that Robert Martin had been an employee at-will with no non-compete agreement nor trade secrets agreement. (Merit Brief of Appellant Appx. Pg. 42.)

## **ARGUMENT**

### **A. There is a genuine conflict between Ohio Appellate Districts as to whether the memory of a client list is a protected trade secret which subjects an employee to a perpetual non-competition agreement.**

The direct issue before this court is whether customer lists held solely in the memory of a former employee can be the basis for a statutory trade secret violation. The Tenth District bases its reasoning regarding this issue on the limited practical differences among employees who use a written list as opposed to a mental list, whereas the Eighth, Seventh, and Sixth Districts consider the public policy differences between the unethical procurement of a former employer's written customer list and honest use of an employee's memory and experience regarding customers where there is no covenant not to compete. The Eighth, Seventh and Sixth Districts' reasoning should be the law of Ohio as it is based on fair and sound public policy and balances the rights and needs of both the employer and the employee.

Instead of acknowledging the two positions taken by the conflicting appellate districts, Appellee makes an unsupported assertion that the cases cited by Appellant actually show that no conflict exists between appellate districts and that *in spirit*, all Ohio districts really mean to hold that an employee's memories of customers are trade secrets.

In Ellison & Assoc. v. Pkarek, (Sept. 26, 1985), Cuyahoga App. No 49560, 1985 Ohio App. LEXIS 7140 at \*9, unreported, the Eighth District addressed an accounting firm employer who attempted to enjoin its former billing clerk from soliciting her former billing clients after forming her own business. The Eighth

Circuit Court of Appeals held that a list compiled by an ex-employee using nothing more than his memory is not a trade secret. Id. Appellee states that the holding was dicta only and not dispositive of the case herein, although Appellee fails to set forth support for this assertion.

The Eighth District's position is supported by the Restatement (Second) of Agency which has held that a former employee, while prohibited from using written customer lists, is entitled to use "names of customers retained in his memory, if not acquired in violation of his duty as an agent." Restatement (Second) of Agency § 396 (1958).

This is the issue before the Court herein: Where there is no covenant not to compete, can an employer use the Uniform Trade Secrets Act to impose upon an employee a restrictive covenant against the memories the employee has casually picked up during his employment with the contesting employer? In balancing the rights of the employer and employee, the answer must clearly be in the negative. The employer has the right to contract with the employee for the protection of his "confidential information" which the employee has gathered through the normal course of his employment. Where the employer fails to seek that protection, the Uniform Trade Secrets Act should not be used as a legal "crutch" for the employer to grab onto in order to protect in court what he did not protect in the ordinary course of his business.

**B. The modification of the Trade Secrets Act from R.C. 1333.51 to R.C. 1333.61 with the adoption of the Uniform Trade Secrets Act has not altered the positions of the Eighth, Seventh and Sixth District Courts of Appeals.**

Appellee's argument hangs on the proposition that Ohio's adoption of the Uniform Trade Secrets Act in 1994 negates, in total, all trade secret cases that came before it, with the exception of those cases that support Appellee's position.

The differences between R.C. 1333.51 and the 1994 adoption of the Uniform Trade Secrets Act at R.C. 1333.61 do not indicate a legislative preference regarding memorized client lists and further, case law in the districts that support the free use of an employee's memory without a restrictive covenant has not changed their analyses subsequent to the passage of the Uniform Trade Secrets Act. The focus of the appellate courts that recognize that client lists memorized in the ordinary course of doing business cannot be labeled "trade secrets" still hold firm in that conclusion despite the 1994 adoption of the Uniform Trade Secrets Act. In fact, it is clear in State ex rel. The Plain Dealer v. Ohio Dept. of Ins., (1997), 80 Ohio St.3d 513, 687, that the modification from R.C. 1333.51 to R.C. 1333.61 did not invoke a blanket protection of public information in the memories casually retained by an employee in the ordinary course of his employment. This Court held in State ex rel., The Plain Dealer, *supra*, that:

In addition, R.C. 1333.61 grants a document trade secret status only if the information is not generally known or readily ascertainable to the public. R.C. 1333.61(D)(1). Here, many of the documents compiled in the Memoranda are already public documents, such as the title to properties owned by Blue Cross, matters involving its financial structure that appear regularly on its annual statement, and pending litigation. Although some of the other information may not have been released into the public domain, the presence of information already made public prevents us from concluding that the Memoranda, as a whole, are a

document that is not generally known to the public.

This Court went on to state that "R.C. 1333.61 grants a document trade secret status only if the information is not generally known or readily ascertainable to the public." Id. at 529. Here, the information was posted on the Internet via federally-mandated Form 5500 forms which Appellee claims is "confidential" information and protected by trade secret status.

Appellee makes great effort to point out that the term "article" has been omitted from the 1994 version of the Act, which now states in R.C. 1333.61:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following;

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial

information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Appellee attempts to juxtapose this provision with the pre-1994 adoption of the Uniform Trade Secrets Act of 1994, R.C. 1333.51 which states:

- (B) No person shall, with the intent to deprive or withhold from the owner thereof the control of a trade secret, or with the intent to convert a trade secret, or with the intent to convert a trade secret to his own use or the use of another, obtain possession of or access to an article representing a trade secret.
- (C) No person having obtained possession of an **article** representing a trade secret or access thereto with the owner's consent shall convert such article to his own use or that of another person, or thereafter without the owner's consent make or cause to be made a copy of such article or exhibit such article to another;
- (D) No person shall, by force, violence, threat, bribe, reward or offer of anything of value on or to another person or member of his family, obtain or attempt to obtain from such person an article representing a trade secret.
- (E) No person shall, without authorization, enter upon premises or another with intent to obtain possession of or access to an article representing a trade secret.

It is Appellee's argument that the use of the term "article" in R.C. 1333.51 and its omission from the post-1994 adoption of R.C. 1333.61 is a blanket understanding that a memorized client list is *de facto* recognized as a trade secret. This is far from the case. As stated in State ex rel., The Plain Dealer, *supra*, the issue is one of public policy. The issue becomes whether the information, regardless of its substance or physicality, is information that was

public and accessible. Even absent the public nature of the information on the Internet, the memorized client information was not protected by any agreement between the parties. Neither R.C. 1333.51 nor R.C. 1333.61 contemplates an end-run-around the legal concept of the covenant not to compete.

Appellee offers the analogy of the chemical composition of Coca-Cola and a surreptitious and ambitious employee who learns of the recipe and leaves his employment, only to use the memorized composition for his own good. The issue then becomes whether Coca-Cola, as an employer, sufficiently protected its interests with a covenant not to compete or some other non-disclosure agreement. Or does the employer get to circumvent an employee's decision not to sign such an agreement but using the Trade Secrets Act against him when that employee leaves his employment with the company?

The employer holds the balance of power; it can require, as part of the employee's continuing employment, agreement to a covenant not to compete. The employer can even require the employee's agreement to any non-disclosure agreement at anytime during the employee's employment, with the consideration being the continued employment of the employee. The employee may choose not to sign and give up his or her employment opportunity. To impose a contractual obligation that the employee did not agree to during his or her employment relationship is a restriction which counters the balance of a free market economy and tips the balance of power to a more restrictive marketplace. This is surely not the legislative intent of the Uniform Trade Secrets Act.

**C. Even if a memorized client list is a trade secret, the employer does not have the right to control the experience or memory of its former employees absent a mutual contractual agreement.**

To adopt the Tenth District's reasoning that a written list is the same as one's memory would allow the employer to control the former employee's memory and experience after the fiduciary relationship has ended. This is counter to Ohio precedent that, absent a contract to the contrary, the fiduciary relationship of the employee to his employer ends with the termination of the employment relationship.

During the employment relationship in Ohio, this Court has correctly suggested that current employees owe a fiduciary duty to their employers. See Connelly v. Balkwill, (1954), 160 Ohio St. 430, 440. Such a duty exists for the duration of employment. See Sayyah v. O'Farrell (Apr. 30, 2001), Brown App. No. CA2000-06-017, 2001 Ohio App. LEXIS 1914 at \*7, unreported. See also Staffilino Chevrolet, Inc. v. Balk, (7<sup>th</sup> App. Dist. 2004), 158 Ohio App.3d 1, 2004-Ohio-3633, 813 N.E.2d 940 at ¶44; Berge v. Columbus Cnty. Cable Access, (10<sup>th</sup> App. Dist. 1999), 136 Ohio App.3d 281, 326. This common law duty is breached when an employee competes with his or her current employer. Id.

However, this Court has clarified that upon termination of employment, an employee is free to compete with his former employer absent a restrictive covenant. Curry v. Marquart, (1937), 133 Ohio St. 77, 79 paragraph one of the syllabus. This is founded upon the age-old policy of the apprentice/master relationship where the apprentice provides his loyalty and labor in exchange for the master's pay and instruction. Ohio is an at-will employment state, and the

employer is aware that the employee may at any time, leave the relationship and compete directly with the employer. The employer either accepts this or chooses to modify the employment relationship by a contractual agreement.

The First Appellate District noted these historical underpinnings in Wiebold Studio, Inc. v. Old World Restorations, Inc., (1<sup>st</sup> App. Dist. 1985), 19 Ohio App.3d 246, 248.

A former employee can use to his own advantage all the skills and knowledge of common use in the trade that he acquires during his employment. A person who enters employment as an apprentice and leaves it as a master cannot be enjoined from using his enhanced skills and knowledge in future employment.

Id. at 248.

Other jurisdictions that have addressed whether inherently memorized client information alone can be the basis of a trade secret violation have recognized the employee's right to his gained experience and knowledge. The United States Court of Appeals for the Eighth Circuit addressed the issue and reasoned as follows:

In this case, neither Crisp nor the salesmen took any written customer information when they left Vigoro. They brought to Cleveland Chemical only their sales experience and their knowledge of the local customers. Absent an enforceable covenant not to compete, a former employer may not prevent a former employee from exploiting this kind of knowledge with a new employer. The former employer should not be permitted to achieve this anticompetitive objective indirectly through an overly-expansive definition of customer trade secrets. As the court said in Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 514-15 (N.D. Ill. 1985):

All the information [plaintiff] tries to wrap in the [Trade Secret] Act's mantle is nothing more than the kind of knowledge any successful salesman necessarily acquires through experience. In the Act's terms, it is information 'readily ascertainable by proper means' . . . . Nothing prevents such an employer from guarding its interests by a

restrictive covenant. But it would really be unfair competition to allow the employer without such a covenant to obtain trade secret status for the fruits of ordinary experience in the business, thus compelling former employees to reinvent the wheel as the price for entering the competitive market.

We affirm the district court's determination that Crisp did not misappropriate trade secrets or confidential customer information.

Vigoro Industries, Inc., v. Cresp, (8th Cir. 1996), 82 F.3d 785, 790. (Noted: a post-1994 case)

In a similar theme, the Superior Court of New Jersey in Nat'l Title Bd. Corp. v. Panelboard Mfg. Co., (Ch. Div. 1953), 99 A.2d 440, 443-440 also addressed the sound public policy of not prohibiting use of employees' memory to create a non-compete agreement where none existed:

On the other hand, an employee is not compelled to shut his eyes to what goes on in his place of employment nor is he required to wipe his memory clear of those matters which he learns during the course of that employment. So long as no contract express or implied prohibits him from divulging the information learned during his employment, the employee may use that information for his own benefit. Carver v. Harr, 132 N.J. Eq. 207 (Ch. 1942); Boost Co. v. Faunce, 13 N.J. Super. 63 (Ch. Div. 1951), affirmed 17 N.J. Super. 458 (App. Div. 1952).

"Sound public policy encourages employees to seek better jobs from other employers or to go into business for themselves. Contracts which hinder their so doing are strictly construed and rigidly scanned and are declared void unless necessary for the reasonable protection of the employer. In the absence of agreement, as the decisions above cited demonstrate, there must be a very strong case before the court will restrain the former employee from competing with his former employer." Haut v. Rossbach, supra.

Id.

To equate the restrictions of using a misappropriated written list with the mere use of an employee's memory would be directly counter to Ohio's adopted

principle that a former employee is free to compete with his former employer absent a non-compete agreement. To adopt the Tenth District's holding would be to unjustly allow the master to enjoin the former apprentice without an existing fiduciary duty or any contractual obligation.

**D. Courts should not protect employers who choose not to protect themselves.**

At any time during the 4 years of the Appellant's employment with the Appellee, the Appellee could have requested that Appellant Martin sign either a non-compete agreement, a confidentiality agreement, or a trade secrets agreement limiting the Appellant's use of his knowledge of the Appellee's customers for a reasonable period after his termination. The Appellee simply chose not to do so. As a general rule, the courts should not substitute its judgment for that of the employer and will not second-guess the business judgments of employers regarding personnel decisions. Wilson v. Northcoast Behavioral Healthcare Sys., (Ohio Misc. 2005), 2005 Ohio 1291, 2005 Ohio Misc. LEXIS 108 at \* 18.

It is well settled in Ohio that reasonable non-compete agreements are enforced. See Levine v. Beckman, (10<sup>th</sup> App. Dist. 1988), 48 Ohio App.3d 24, 27, 548 N.E.2d 267, 270). Further, those agreements that are unreasonable are "enforced to the extent necessary to protect an employer's legitimate interest." Raimonde v. Van Vlerah, (1975), 42 Ohio St.2d 21, paragraph one of the syllabus.

A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no

greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. See id. paragraph two of the syllabus. See also Rogers v. Runfola & Assoc., Inc., (1991), 57 Ohio St.3d 5, 8, 565 N.E.2d 540, 543.

Instead of leaving the Appellee to the consequences of his own decision-making, the Tenth District expanded the definition of trade secrets to include mental information retained and used by the Appellant, resulting in a unilateral, court-imposed non-compete agreement. The effect is to apply an overbroad interpretation of the Uniform Trade Secrets Act to protect an employer where it chose not to protect itself. Such a broad interpretation should be rejected and reversed.

**E. Reasonable steps to protect the confidentiality of a mental list of customers should be, at minimum, the employer's procurement of a written non-compete agreement.**

As stated above, a written list can be physically destroyed, secured, and if taken, returned; whereas, a "mental list" cannot be physically controlled except by the agreement of the individual whose mind it inhabits. The acts of locking a door, file cabinet or maintaining passwords on computers has little relevance to reasonably securing information retained in an employee's mind. Protection of confidential information is mandated by Ohio's Uniform Trade Secrets Act. O.R.C. § 1333.61(D)(2), which defines a trade secret to include only information that is the "subject of efforts that are reasonable under the circumstances to maintain its secrecy."

How can it be said that an employer has taken reasonable steps to protect his or her proprietary information without a covenant not to compete or, at minimum, a non-disclosure agreement? Is it a true balance of power where the employer declines to suggest the idea of a non-compete agreement or non-disclosure agreement and wait until the end of the employment relationship to use Ohio's Trade Secrets Act to bind an unsuspecting employee, where a perpetual non-compete can be imposed unilaterally and without consent or end?

There exists sound public policy against the prohibition of the use of an employee's memory to create a non-compete agreement where none existed. It has been held that, "[S]o long as no contract express or implied prohibits him from divulging the information learned during his employment, the employee may use that information for his own benefit." Carver v. Harr, (N.J. Ch. 1942), 132 N.J. Eq. 207, 209; Boost Co. v. Faunce, (Ch. Div. 1951), 13 N.J. Super. 63, 67-68, affirmed 17 N.J. Super. 458 (App. Div. 1952).

Accordingly, since the Appellee failed to require an agreement with the Appellant to restrict use of mental customer information after employment, there was no violation of Ohio's Trade Secret Act and the Tenth District decision should be reversed.

#### **F. The New Frontier: The Internet as a Public Forum**

The legal struggle between trade secrets and the Internet is new. Posted on the Internet is the information Appellant is specifically accused of misappropriating. Appellant solicited potential customers by locating client names and addresses from public information listings on the Internet, which

provided the names of companies with ERISA plans, their addresses and telephone numbers, as well as the names of the plan administrators. The website [www.freeERISA.com](http://www.freeERISA.com) culls this information from Form 5500. A search browser permits searches within the website in a variety of different methods. A few of the client's Appellant Martin solicited were the Appellee's current or former clients who were listed on [www.freeERISA.com](http://www.freeERISA.com) via their Form 5500 filings. These filings can also be accessed by a general public records request.

The magistrate found that access to information on the Internet can be precarious, at best. But as stated in Appellant's Merit Brief, a legal review of the "difficulty of access" standard creates a long, legal slippery slope. Difficult for whom? And how? The evidence of record demonstrates that a browser on the [freeERISA.com](http://freeERISA.com) website permits a viewer to access client information using a variety of different search techniques, including zip code, mailing address, and the name of any company with Form 5500 clients. Thus, it was testified to at hearing, all Appellant had to do was type in Appellee's name to obtain the information he sought and, indeed, information about Appellee's clients did appear. (Merit Brief of Appellant Appx. Pgs. 45-46.)

The common pleas court made the distinction that not all of Appellee's clients appeared through this search browser and therefore, access to client information was "difficult". But the court made its error by focusing on the *result* of the search, not the difficulty of access to the information. *Accessibility* is the focus of R.C. 1333.61. "Accessibility" is defined by R.C. 1333.61 as "not being generally known to and not being readily ascertainable by proper means". For

those searching for ERISA plan administrators, it is undisputed pursuant to the facts of this case that the website is readily ascertainable through the Internet. (Merit Brief of Appellant Appx. Pg. 45.) Within this particular website is a search browser that permits access to Appellee's clients. (Merit Brief of Appellant Appx. Pg. 47.) That a search drew only a portion of Appellee's client list was dismissed as a poor result and therefore, not "readily ascertainable".

But certainly search results would be different depending on the person searching the records. A results-oriented focus instead of an "accessibility" focus does not meet the definition of "trade secret". Indeed, in terms of the Internet, the analysis is turned upside down, with successful result being the indicator and accessibility being the last consideration.

This logic fails to take into consideration the individual sophistication of each traveler of the Internet in search of Form 5500 information. If the information is free and accessible, is it the court's responsibility to police accessibility by a measure of the sophistication of Internet users? Does that mean that Appellant is subject to a perpetual non-compete clause where others may have the sophistication of accessibility, knowing of the existence of the Form 5500, that others may not have?

Access to the information through the site's existing browser is available to anyone who enters the website and enters in a zip code, provider name, or mailing address. No access fees are necessary to enter the site to obtain the information listed on the federally-required Form 5500. Neither the common pleas court nor the Tenth District noted that while the Appellant is prohibited from

using this public information, anyone else who enters the website, uses the browser, and retrieves the same Al Minor & Associates Inc. client information listed, is free to contact those clients. Access to the information and its competitive use is free, open and available to anyone but the Appellant.

Most courts outside of Ohio do not struggle with a "difficulty of access" standard. In an action similar to the case herein, ProFI Detailers v. Hemmerick, (Cal App. Dist. 2002), 2002 Cal. Unpub. App. LEXIS 9785 at \*12-13, a California appeals court held that memorized client information that was already posted on the Internet was not a protected trade secret:

There is no evidence that Hemmerick took any written information such as customer lists or rolodexes from PDI. There is evidence that the information Hemmerick had in his head and is accused of improperly using was readily available to the public (or anyone wanting to go into the car detailing business). The prospective customers are the major automobile manufacturers--a finite and small group. Although Hemmerick knew the names of specific contact people from his years of dealing with them, he testified the information could easily be obtained over the Internet or through a telephone call to the automobile manufacturer.

Id.

The Tenth District held that Appellee made some internal effort to "protect" his information with internal office policies and in doing so, Appellee negated a discussion of the fact that his information existed on the Internet. This has been rejected by other state courts, more specifically, the Supreme Court of Arkansas in Weigh Sys. S. Inc., v. Mark's Scales & Equip., Inc., (Ark. 2002), 347 Ark. 868, 874-87, which rejected this analysis, holding that the burden is on the employer to secure a non-competition agreement and if the employer does not, the employee is free to use the Internet in a competitive way.

Several courts have refused to recognize information as a trade secret when the company made no effort to restrain disclosure of the information post-employment. Id. at 876. Once again, the proper method of restraining an employee from using information, even public information, against an employer is to have the employee execute a non-compete agreement, not to create an *implied* non-compete with which the employee did not agree through the Uniform Trade Secret Act.

As long as the client information is *somewhere* in the public domain, trade secret status cannot be awarded. In Classic Limousine Airport Service, Inc. v. Alliance Limousine LLC, (Conn. App. Ct. 2000), 2000 Conn. Super. LEXIS 2077 at \*8-9, unreported, the court reviewed a similar issue:

It is true that a customer list may be a trade secret. "If in any particular business the list of customers is, because of some peculiarity of the business, in reality a trade secret and an employee has gained knowledge thereof as a matter of confidence, he will be restrained from using that knowledge against his employer. On the other hand, where the identity of the customers is readily ascertainable through ordinary business channels or through classified business or trade directories, the courts refuse to accord to the list the protection of a trade secret." Town & Country House & Homes Service v. Evans, *supra*, 150 Conn. 320.

The customer list here consisted of the names of the corporate clients, the contact names and telephone numbers, billing history and customer profiles containing customer preferences. This information was stored on Classic's computer software, Limoware. It was obtained by the plaintiff through advertisement, public information and directories, cold calling and from lists of companies. The contact names and profiles and preferences were obtained from the companies themselves, by having them return information sheets which were then input into the computer. Oyugi formed his business in the same manner, except that he already knew the names of many of the companies and contacts from his experience with Classic. He contacted no customers prior to his severance from Classic, nor is there evidence that he brought with him when he left any written materials or copies thereof, or that he

ever accessed the plaintiffs' computers after he left Classic's employ. From his constant, close and sometimes personal relationships with his former clients, he retained in his memory the names of many companies and people. See Tricoastal Lanthanides, Inc. v. Chang, 1995 Conn. Super. LEXIS 2605, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. CV95 0144760 (September 11, 1995) (D'Andrea, J.).

But what clearly defeats the plaintiffs' claims is that the information sought to be protected is not entitled to "trade secrets" status. To be a trade secret, a customer list must derive "independent, economic value . . . from not being generally known to, and *not being readily ascertainable* by proper means by other persons . . ." (Emphasis added.) Connecticut General Statutes 35-51(d) Besides the names of the companies, the profiles would contain the home address and phone numbers of the passengers, sometimes whether he or she had a driver preference, directions to his or her house, and sometimes whether a stretch limo or a town car was preferred.

Competition in the limousine service business is substantial. There are literally hundreds of companies in Fairfield County whose employees require transportation to New York airports, and there is nothing unique about the business. Companies are readily identified by reference to directories, phone books, the Internet and by pounding the pavement. No companies have exclusive contracts with any one limousine service company, but often avail themselves of the service of several. In fact, some of the defendants' customers still retain Classic on the list of limousine services to be used.

Id.

Thus, there is no restriction from using the Internet to access remembered client names in order to obtain their addresses in an effort to compete with a former employer. As the Supreme Court of California held in DVD Copy Control Assn., Inc. v. Bunner, (Cal. 2003) 31 Cal. 4th 864, 881:

Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. Thus, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.

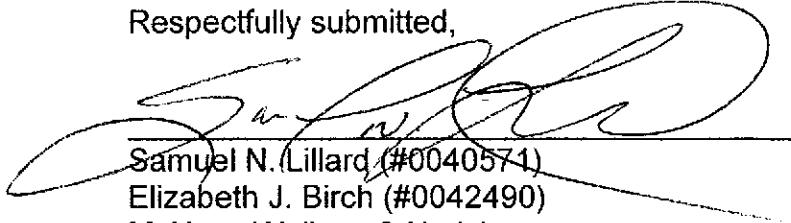
That Appellant obtained poor results from his search has somehow become the focus of this case when, in reality, the focus should properly be on the public access of the information. The information was publicly listed and is publicly available to anyone seeking the information, *except the Appellant* merely because he takes his memory away from his employment relationship. By so holding, the Tenth District is creating an implied fiduciary relationship extending beyond the termination of that relationship, which other courts have explicitly rejected.

We are still a state divided on the issue of the use of an employee's memory on a competitive basis after the fiduciary employment relationship has ended. And we are further a state in need of clear direction on use of an employer's information which is posted on the Internet after that relationship is over.

### CONCLUSION

For the foregoing reasons, Appellant Martin respectfully requests that this Court reverse the decision of the Tenth District Court of Appeals in favor of the Eighth District's decision holding that in the absence of a restrictive covenant or fraud, customers of a former employer, the names of whom are in the memory of the former employee, may be solicited.

Respectfully submitted,

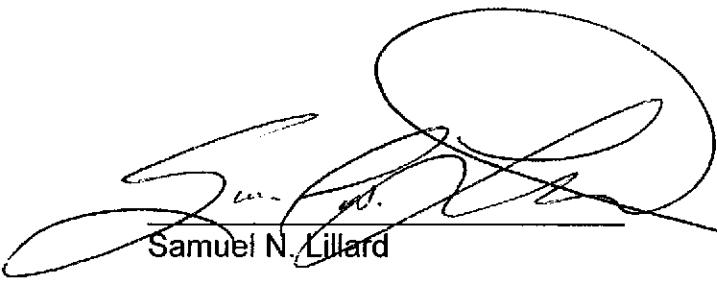
  
Samuel N. Lillard (#0040571)  
Elizabeth J. Birch (#0042490)  
McNees Wallace & Nurick  
21 East State Street 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(Ph) 614-469-8000  
(Fx) 614-469-4356  
Counsel for Appellant Martin

**CERTIFICATE OF SERVICE**

I hereby certify that the Reply Brief of Appellant was sent to the below  
counsel for Appellee by regular U.S. Mail, postage prepaid, on this 12th day of  
July, 2007:

Barry A. Waller  
Derek Graham  
Fry, Waller & McCann Co., L.P.A.  
35 East Livingston Avenue  
Columbus, Ohio 43215  
(614) 228-2300

Barbara K. Besser  
Elfin & Besser  
4070 Mayfield Road  
Cleveland, Ohio 44121

  
Samuel N. Lillard

**BALDWIN'S OHIO REVISED CODE ANNOTATED**  
**TITLE XIII COMMERCIAL TRANSACTIONS**  
**CHAPTER 1333 TRADE PRACTICES**  
**MISCELLANEOUS PROVISIONS**

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**1333.51 THEFT OR CONVERSION OF TRADE SECRET**

**(A) As used in this section:**

- (1) "Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, blueprint, or map.
- (2) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.
- (3) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers, which has not been published or disseminated, or otherwise become a matter of general public knowledge. Such scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers is presumed to be secret when the owner thereof takes measures designed to prevent it, in the ordinary course of business, from being available to persons other than those selected by the owner to have access thereto for limited purposes.
- (4) "Copy" means any facsimile, replica, photograph, or reproduction of an article, or any note, drawing, or sketch made of or from an article.

**(B) No person shall, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with intent to convert a trade secret to his own use or the use of another, obtain possession of or access to an article representing a trade secret.**

**(C) No person, having obtained possession of an article representing a trade secret or access thereto with the owner's consent, shall convert such article to his own use or that of another person, or thereafter without the owner's consent make or cause to be made a copy of such article, or exhibit such article to another.**

**(D) No person shall, by force, violence, threat, bribe, reward, or offer of anything of value on or to another person or member of his family, obtain or attempt to obtain from such other person an article representing a trade secret.**

**(E) No person shall, without authorization, enter upon the premises of another with intent to obtain possession of or access to an article representing a trade secret.**

**HISTORY: 132 v H 730, eff. 11-14-67**

R.C. § 1333.61

**C****BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XIII. COMMERCIAL TRANSACTIONS  
CHAPTER 1333. TRADE PRACTICES  
UNIFORM TRADE SECRETS ACT****→ 1333.61 Definitions**

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Current through 2007 File 9, and 12 to 14 of the 127th GA (2007-2008),  
apv. by 6/30/07, and filed with the Secretary of State by 6/30/07.

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