

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

UBS FINANCIAL SERVICES INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:09-CV-367
)	
TIMOTHY LOFTON, KYLE POLAND)	Judge Dlott
and SHAWN ANDERSON,)	
)	
Defendants.)	

**MOTION TO EXPAND TEMPORARY RESTRAINING ORDER
AND FOR PRELIMINARY INJUNCTION**

Plaintiff UBS Financial Services Inc. (“UBS”), by its undersigned attorneys, hereby moves this Court, pursuant to Federal Rule of Civil Procedure 65 for the entry of a Temporary Restraining Order and Preliminary Injunction restraining and enjoining defendants Timothy Lofton (“Lofton”), Kyle Poland (“Poland”) and Shawn Anderson (“Anderson”) (collectively, “Defendants”), and all persons acting in concert with them (including, but not limited to any officer, employee, agent or other representative of their new employer, Morgan Stanley & Co., Inc. (“Morgan Stanley”), from directly or indirectly:

- a. Soliciting any business from any client or customer whom Defendants served during their UBS employment, or any other UBS customer or client whose name became known to Defendants while in UBS’s employ (excluding members of their immediate families);
- b. Using, disclosing, or transmitting for any purpose (including but not limited to solicitation of said clients), any information contained in UBS’s records, including but not limited to the names, addresses, and financial information of said clients; and

c. Requiring Defendants to return to UBS as promptly as possible all originals, copies or other reproductions, in any form whatsoever, of any UBS record, and to purge or destroy any UBS computerized record that is within their possession, custody or control.

In support of this Motion, UBS states as follows:

1. On May 19, 2009, Defendants Timothy Lofton and Kyle Poland resigned from UBS and joined Morgan Stanley, a competitor securities brokerage firm. On May 21, 2009, UBS filed its complaint for injunctive and other relief and motion for Temporary Restraining Order against the Defendants based on their violation of the express provisions of the “Retiring Financial Advisor Agreement” and “Receiving Financial Advisor Agreements each signed during his UBS employment.

2. At the hearing on UBS’ Motion for a TRO, Defendants took the position that their conduct was permissible by virtue of the Protocol for Broker Recruiting (“the Protocol”) – a forbearance agreement among signatory securities firms, including UBS and Morgan Stanley. As the Court was advised during the hearing, under the Protocol, financial advisors transitioning from one Protocol firm to another are permitted to take a list containing only names, addresses, telephone numbers, e-mail addresses and account titles for those customers whom the financial advisor developed and serviced while employed with the former firm and solicit those clients to transfer their business at their new firm. If the steps provided by the Protocol are followed, signatory firms forebear from enforcing restrictive covenant contracts or taking action against departing financial advisors, provided they are not subject to agreements exempted from the Protocol’s protections.

3. After hearing oral argument and receiving written submissions on the matter, on May 22, 2009, this Court entered a Temporary Restraining Order directing the Defendants and those acting in concert with them not to solicit UBS accounts that were the subject of the

Retiring and Receiving Financial Advisor Agreements and directing Defendants to return all information concerning those accounts to UBS. A copy of the TRO entered on May 22, 2009, is attached as **Exhibit A**.

4. On Wednesday, May 27, 2009, Defendants returned to UBS (i) ten (10) large plastic storage bins containing original hardcopy working files removed from UBS by Lofton and Poland, (ii) two laptop computers used by Lofton and his assistant, (iii) a USB flash drive, and (iv) non-Protocol documents obtained from Morgan Stanley and Lofton containing contact information pertaining to the Received/Referred Accounts. A copy of the cover letter submitted to UBS with the above-referenced materials is attached as **Exhibit B**.¹

5. The plastic storage bins alone contained roughly 350 original client working files for what appears to be for the vast majority of customers whom the Defendants serviced at UBS as well as prospects— both accounts serviced under the Retiring and Receiving Financial Advisor Agreements and other UBS accounts serviced by Lofton and Poland. Most of those hard copy files contained between 30 and 100 pages of highly confidential trade secret client and business information. The working files contained such sensitive information as the financial advisor's original client contact notes, client contact reports, client investment objectives, account numbers, social security numbers, investment portfolio reports and profiles, account statements, legal documents such as powers of attorney, trust instruments and several original signed client documents which UBS is required to maintain in its possession by law.

¹ See also the Affidavit of Brian S. Hormozi attached hereto as Exhibit C and incorporated herein. The documents returned pursuant to the Court Order by the Defendants are not being submitted with this motion as they contain highly sensitive and confidential information pertaining to UBS clients. The documents will be made available to the Court for inspection at the time of argument on this motion.

6. UBS has also briefly reviewed the contents of electronic storage devices returned by the Defendants, including two laptop computers and a USB flash drive taken from UBS. As detailed in the accompanying affidavit of Michelle Minnich, attached hereto and incorporated herein as Exhibit D, the USB flash drive contained spreadsheets which appeared to be Protocol lists, but, upon inspection, were discovered to contain several “hidden” columns containing client social security numbers, dates of birth and client account numbers. One of the returned laptops also contained similar confidential information including client asset reports and profiles and documents reflecting client social security numbers, account numbers, client assets and holdings and other similar information.

7. Defendants’ taking of these highly confidential business records and trade secret information of UBS flies in the face of Defendants’ position at the initial TRO hearing that they had complied with the Protocol. Having failed to substantially comply in good faith with the terms of the Protocol, Defendants are in no position to assert the protections of the Protocol’s “safe harbor,” or claim forbearance of the claims UBS may assert against them for their unlawful conduct.

8. Defendant’s conduct in taking this substantial volume of highly confidential client information and using it for their own personal benefit and on behalf of a competitor, Morgan Stanley to compete with UBS constitutes a clear and flagrant violation of the Ohio Trade Secrets Act.

9. Further, Defendants’ use of this misappropriated information to solicit UBS customers to move their accounts to Morgan Stanley violates the covenants contained in the agreement Poland entered into as a part of UBS’ Financial Advisors In The Development Program.

**Defendants' Violation of the Ohio Trade Secret Act And Poland's Agreement For
Financial Advisors In The Development Program**

10. In connection with their new Morgan Stanley employment, Poland breached various provisions of "The Agreement For Financial Advisors In The Development Program" (Exhibit E hereto) (the "Training Agreement") that he signed at the outset of his UBS employment and Lofton aided him in those breaches. In violation of both the Training Agreement and provisions of applicable law, the Defendants provided information concerning UBS clients to Morgan Stanley and are using that information to solicit UBS clients to transfer their accounts from UBS to Morgan Stanley.

11. Before joining UBS, Poland was not an experienced financial advisor. UBS provided extensive training to him, including materials and courses needed to study for the Series 7 examination, the fees for the basic licensing examination administered by the Financial Institutions Regulatory Authority ("FINRA"), and support for various other licensing examinations. UBS also provided him with time to study for those examinations, and paid him a salary while he was doing so. UBS sent Poland to its national training center for three weeks of concentrated training. All or the vast majority of the expenses incurred in providing this training was borne by UBS.

12. As a condition of his employment by UBS, and in consideration for that employment and the training provided, Poland signed the Training Agreement. The Training Agreement provides, in pertinent part, that UBS would:

- (a) Employ and train him as a UBS financial advisor;
- (b) Compensate him during his UBS employment; and
- (c) Provide each with UBS's support services, facilities, and opportunities.

13. UBS fully performed its duties under the Training Agreement. Without limitation, UBS: (a) compensated Poland at all times during his UBS employment; (b) provided him with extensive training (as is more fully described above); (c) provided him with sponsorship needed in order to take various licensing examinations that he was required to pass in order to work in the securities industry; (d) registered him with the NASD, securities exchanges, and state securities departments; (e) provided him with UBS's benefit packages; and (f) provided him with the resources and facilities of a national, full service brokerage firm (including office facilities, secretarial services, clearing services, sales assistants, research, national advertising, and promotional, marketing and sales support).

14. In addition to the foregoing, in addition to the accounts assigned pursuant to the Receiving Financial Advisor Agreements, UBS provided the Defendants with customer accounts, customer referrals, reassignments of customer accounts, customer leads and new accounts generated by UBS's national advertising campaign, from local seminars, from mailers, from "walk-in" and "call-in" customers, and from lists purchased and acquired by UBS. In addition, UBS provided each with the facilities and resources that gave them the opportunity to develop additional clients for UBS, and UBS paid each of them for their services in developing those clients.

15. In exchange for the benefits and opportunities that Poland received as a UBS employee, he specifically agreed and acknowledged that he would maintain as confidential any information concerning clients of UBS. Specifically, ¶1 (Customer Lists And Other Proprietary And Confidential Information) of the Agreement provide as follows:

1.1. The Employee acknowledges that in the course of and by reason of his/her employment at [UBS], Employee will have access to information that has been acquired by [UBS] through expenditures of time, effort and

money, or will himself or herself develop such information on behalf of [UBS] as a normal and ordinary part of his/her duties and responsibilities of his/her employment by [UBS]. This information, which is valuable to [UBS] and is not generally known to others, includes without limitation: the names, addresses and telephone numbers of [UBS's] customers; the assets and obligations carried in the accounts of [UBS's] customers (commonly called "positions"); holding books or customer book pages; customer monthly statements; customer account histories; customer lists; prospect lists; customer risk profiles; financial and personal information regarding customers and prospects; computer software or hardware for use in computer or word processing equipment; and documents or computer programs prepared or generated by Employee using [UBS's] property and/or records (hereinafter collectively referred to as "Restricted Information"). Employee acknowledges and agrees that: (a) the Restricted Information is unique to [UBS]; (b) it would be difficult and would require the expenditure of substantial time and effort to duplicate or replicate the Restricted Information by proper means; (c) [UBS] views that Restricted Information as highly confidential; and (d) [UBS] takes all reasonable measures including the dissemination of published policies regarding confidentiality to employees to maintain their confidentiality.

1.2 In the course of and solely as a result of his/her employment with [UBS], Employee will also have access to records and documents concerning the business and affairs of [UBS] (hereinafter "Company records"). Such Company Records, whether or not Restricted Information, are and will always be the confidential and exclusive property of [UBS]. Company Records include, but are not limited, to originals and copies of [UBS] books, records and internal memoranda.

1.3 Employee agrees that, during the course of his/her employment with [UBS], he/she will not remove Restricted Information or Company Records from the premises of [UBS] in either original or copied form, except in the ordinary course of conducting business for, and subject to approval by, [UBS] and will not use Restricted Information or Company Records for any purpose other than the purpose of conducting the business of [UBS].

1.4 Employee also agrees that upon the voluntary or involuntary suspension or termination of Employee's employment relationship with [UBS]:

(a) his/her use of Restricted Information Company Records will stop immediately.

(b) he/she will immediately deliver to [UBS] any originals or copies of any Restricted Information or Company Records in his/her possession or control and will not retain any Restricted Information or Company Records or any copies thereof, and

(c) Employee will permit [UBS] to inspect, prior to removal, any materials to be taken from [UBS] offices.

1.5 Employee also agrees that his/her use of Restricted Information and Company Records will stop immediately upon Employee's determination to leave [UBS's] employ, unless otherwise agreed to in writing by [UBS].

1.6 Employee agrees that both during and subsequent to the course of his/her employment with [UBS], Employee will not disclose to any person or entity the content, in whole or in part, of Restricted Information or Company Records, except in the ordinary course of conducting business for [UBS].

1.7 Employee will not at any time assert any claim of ownership or other property interest on Restricted Information or Company Records.

16. Poland also agreed at ¶2 (Non-Solicitation Covenants) of the Agreement that, in consideration for the training each was given and the opportunities and benefits provided, that:

2.1 In the event of Employee's termination or separation from [UBS], for any reason whatsoever, whether voluntary or involuntary, Employee agrees that he/she:

(i) will not solicit, directly or indirectly for a period of six months from the date of termination

of Employee's employment, any of the clients who maintain accounts at [UBS], ("Clients of [UBS]") whom Employee serviced during his/her employment at [UBS] or other Clients of [UBS] whose names became known to Employee while in the employ of [UBS]; and

(ii) will return any and all original, copied and computerized Restricted Information or Company Records, in whatever form they may exist.

2.2 "Solicit" as used in Paragraph 2.1(i) means that the Employee will not initiate, whether directly or indirectly, any contract or communication, of any kind whatsoever, for the purpose of inviting, encouraging or requesting a customer, or that any have the effect of inviting, encouraging or requesting a customer.

(a) To transfer his/her [UBS] account(s) to the Employee or his or her new employer, or

(b) To open a new account with Employee or his or her new employer, or

(c) To otherwise discontinue its existing business relationship with [UBS].

Without limiting the generality of the foregoing, [UBS] and Employee specifically and further agree that the term "solicit" as used in Paragraph 2.1(i) includes any mailing or other communication that is sent directly to one or more of the Clients of [UBS] whom Employee serviced during his/her employment at [UBS] or other Clients of [UBS] whose names became known to Employee while in the employment of [UBS].

2.3 Nothing in this Paragraph shall prevent Employee from retaining records or information referring to relating to his or her won personal accounts with [UBS] or the accounts of Clients of [UBS] who are related by blood or marriage to Employee or from soliciting said accounts.

2.4 For a period of six months following termination of employment for any reason, Employee will not, directly or indirectly recruit or solicit any employee of

[UBS], for employment with, or as a consultant or to provide services of any kind to, any other organization which engages in any line of business in which [UBS], or any of its affiliates is engaged.

17. In addition, during their UBS employment, the Defendants repeatedly acknowledged the confidentiality of information concerning UBS's clients. Each UBS financial advisor is provided with, and is required to read, UBS's "Sales Practice Compliance Manual." The section of that Manual entitled "Security and Privacy of Personal Client Information" specifically provides that:

Regulations and Firm policy require that all employees maintain and preserve the confidentiality of personal client information. Personal client information includes, but is not limited to:

- Client names, addresses and telephone numbers (if unlisted).
- Social security numbers and/or tax identification numbers.
- Account balances.
- Securities holdings and positions.
- Pending orders.
- Client trading plans or strategies.

An employee may only share personal client information with other Firm employees who have a business purpose for knowing such information. AN employee must use care when viewing or handling personal client information to reasonably ensure that other Firm employees who do not have a business purpose for viewing such information do not inadvertently or deliberately gain access to it. Additional policies apply to sharing personal client information with the Firm's affiliates and with unaffiliated third parties.

A copy of the relevant excerpt of the Sales Practice Compliance Manual and UBS's policies for maintaining the security and privacy of personal client information in UBS Compliance Bulletin

05-07 are attached hereto and incorporated herein as Exhibit F.

18. Consistent with UBS's normal procedures, the Defendants each annually certified that they fully complied with and adhered to Firm policies including those for the protection of confidential client information as stated in the Sales Practice Compliance Manual and all other applicable Firm Policy Manuals, Compliance Bulletins, Guidelines and Directives; and the laws, rules and regulations that govern or are otherwise applicable to the financial services industry.

19. Unless Defendants are further enjoined from engaging in conduct violative of the Poland's Training Agreement and the Ohio Trade Secrets Act and from further benefiting from their misappropriation and use of UBS records and information that they improperly removed from UBS, UBS will be irreparably harmed by (among other things):

(a) Disclosure to competitors of information regarding UBS's customers that Defendants expressly agreed was UBS's sole and exclusive property, that they agreed to maintain as confidential, and that they agreed not to disclose to anyone except in the ordinary course of UBS's business;

(b) The loss of the confidentiality of clients's records and financial dealings, with a resulting loss of confidence and trust of clients, loss of goodwill, and loss of business reputation;

(c) The loss of UBS's express contractual right not to have its customers solicited in derogation of the commitments made to UBS in exchange for the employment and training that UBS provided;

(d) An incalculable amount of future patronage from customers who, due to Defendants' solicitation of them, will instead do business with Morgan Stanley, Defendants' new employer;

(e) The loss of a full and fair opportunity to compete with Defendants for the patronage of customers, in view of their sudden resignation from UBS without any prior notice or warning, which was followed immediately thereafter by their solicitation of UBS customers; and

(f) Damage to the stability of the office in which Defendants worked, and the threatened future unlawful taking of confidential information and records (due to the incentive that would be created for other UBS financial advisors to take such confidential

information in derogation of applicable trade secret law and their agreements with UBS not to misappropriate such information to their own use or benefit if recourse is not given.)

In view of these (and other) considerations, UBS has no adequate remedy at law.

20. A balancing of the relevant hardships favors the entry of injunctive relief, and such relief would serve the public interest.

21. Pursuant to FINRA Rule 13804, an expedited arbitration proceeding has already been commenced and the matter will proceed to a permanent injunction hearing on or before June 8, 2009.

22. Pursuant to the Court's Order, Exhibit A hereto, entered on May 22, 2009, UBS has posted a bond in the amount of \$5,000.00. UBS respectfully requests that no additional bond be required should the Court grant UBS's present motion.

WHEREFORE, plaintiff UBS Financial Services Inc. respectfully requests that this Court:

A. Enter immediately a Temporary Restraining Order restraining and enjoining defendants Timothy Lofton, Kyle Poland and Shawn Anderson, and all persons acting in concert with them (including, but not limited to any officer, employee, agent or other representative of Morgan Stanley, their new employer) from directly or indirectly:

(i) soliciting or otherwise initiating any further contact or communication with any client of UBS whom Defendants served or whose name became known to them while in the employ of UBS for the purpose of advising said clients of their new affiliation or for the purpose of inviting, encouraging or requesting the transfer of any accounts or business patronage from UBS (excluding their family members and relatives);

(ii) soliciting or otherwise initiating any further contact or communication with any client of UBS whose records or information Defendants used in violation of the agreements and/or applicable Ohio law. This specifically includes any client whom Defendants may have contacted by mail, phone, overnight delivery or otherwise through the use of any information obtained while in the employ of UBS (excluding their family members and relatives);

(iii) using, disclosing, or transmitting for any purpose, including solicitation of said clients, the information contained in the records of UBS or concerning its clients, and

(iv) destroying, erasing, or otherwise making unavailable for further proceedings in this matter, or in any arbitration proceeding between the parties, any records or documents (including data or information maintained in computer media) in his possession or control which were obtained from or contained information derived from any UBS records, which pertain to UBS clients whom Defendants served or whose names became known to them while employed by UBS, or which relate to any of the events alleged in the Complaint in this action.

B. Nothing in this requested Order prohibits Defendants from communicating with UBS clients who initiate contact (by telephone, email or otherwise) with Defendants.

C. Defendants and anyone acting in concert or participation with them, specifically including their counsel and any agent, employee, officer or representative of Morgan Stanley, is further ordered to return to UBS's counsel any and all records, documents and/or other types of information pertaining to UBS customers ("Customer Information"), whether in original, copied, handwritten, computerized (including computer software, disks, computer hard drive and/or any

other type of computer or digital information storage devices) or memorialized in any other form, within twenty-four (24) hours of notice to Defendants or their counsel of the terms of this Order. Defendants counsel is permitted to keep a copy of the returned Customer Information for “attorneys’ eyes only” for use in defending this proceeding and/or in arbitration before FINRA.

D. Grant UBS such other and further relief as the Court deems to be just and equitable under the circumstances.

Respectfully submitted,

/s/ James M. Moore

James M. Moore
Ohio Bar No. 0009476
Trial Attorney for Plaintiff
312 Walnut Street, Suite 3100
Cincinnati, OH 45202
(513) 421-6630
(513) 421-0212 fax

Of Counsel:

LINDHORST & DREIDAME CO.,LPA
312 Walnut Street, Suite 3100
Cincinnati, OH 45202
(513) 421-6630
(513) 421-0212 fax

Of Counsel:

Michael D. Lee (Illinois Bar No. 6225432)
Brian S. Hormozi (Illinois Bar No. 6288254)
Motion for *Pro Hac Vice* Pending
Schuyler, Roche & Crisham, P.C.
One Prudential Plaza, Suite 3800
130 East Randolph Street
Chicago, IL 60601
(312) 565-2400
(312) 565-8300 fax

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Filing of Bond was served upon Joseph B. Alonso, Brock, Clay, Calhoun & Rogers, LLC, 49 Atlanta Street, Marietta, GA 30060 and Michael W. Sandner, Pickrel, Schaeffer & Ebeling Co., 40 N. Main Street, 2700 Kettering Tower, Dayton, OH 45423 by regular U.S. mail this 3rd day of June, 2009.

/s/James M. Moore _____

James M. Moore

Trial Attorney for Plaintiff