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6
7 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
8 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
9 UNLIMITED CIVIL JURISDICTION

10
11 WELLS FARGO SECURITIES, INC., a California)
corporation,)
12 Plaintiff,)
13)
14 v.)
15)
16 SCOT LANCE, an individual, PAINWEBBER)
INCORPORATED, a corporation, and DOES 1-50,)
17 inclusive,)
18 Defendants.)
_____)

No. 305184

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF EX PARTE APPLICATION
FOR A TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

Date: July 28, 1999
Time: 11:00 a.m.
Room: 302
Hon. Ronald E. Quidachay

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

A. Lance Is Employed By WFSI 1

B. Lance Is Given Access to Confidential Information 2

C. Lance Prepares to Leave WFSI 3

D. Lance and PaineWebber Begin Their Solicitation Campaign 3

III. ARGUMENT 5

A. WFSI Is Entitled to a TRO 5

B. WFSI Is Also Entitled to an Order to Show Cause re Preliminary Injunction and the Issuance of the Injunctive Relief 7

1. WFSI Has a Reasonable Probability of Success on the Merits 8

a. The WFSI Company Information Which Lance Misappropriated is Clearly a Trade Secret as Defined by UTSA 8

b. Lance Misappropriated, and PaineWebber Misused, WFSI’s Trade Secret Information 9

c. Lance’s Conduct is Also Contractually Prohibited 10

2. WFSI Has No Adequate Remedy at Law and Will Suffer Irreparable Injury if This Court Does Not Issue a TRO and an Injunction 11

3. Granting Injunctive Relief Outweighs Denial and Serves the Public Interest 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

American Credit Indem. Co. v. Sacks, 213 Cal.App.3d 622 (1989) 5-7, 10, 11
Boughton v. Socony Mobil Oil Co., 231 Cal.App.2d 188 (1964) 11
Courtesy Temp. Service v. Camacho, 222 Cal.App.3d 1278 (1990) 7, 10, 11
George v. Burdusis, 21 Cal.2d 153 (1942) 13
Greenly v. Cooper, 77 Cal.App.3d 382 (1977) 7
Hollingsworth Solderless Terminal v. Turley, 622 F.2d 1324 (9th Cir. 1980) 10
IT Corporation v. County of Imperial, 35 Cal.3d 63 (1983) 8
Landmark Holding Group, Inc. v. Superior Court, 193 Cal.App.3d 525 (1987) 5
Merrill Lynch v. Bradley, 756 F.2d 1048 (4th Cir. 1985) 12
Merrill Lynch v. Patinkin, 1991 U.S. Dist. LEXIS 6210 (N.D. I11. 1991) 12
Merrill Lynch v. Stidham, 658 F.2d 1098, 1102 (5th Cir. 1981) 12
Morlife, Inc. v. Perry, 56 Cal.App.4th 1514, 1520 (1997) 8-10
Ruscitto v. Merrill Lynch, 777 F.Supp. 1349, 1354 (N.D. Texas 1991) 11
State Farm Mut. Auto Ins. Co. v. Dempster, 174 Cal.App.2d 418 (1960) 11

STATUTES

B&P Code section 16600 11
C.C.P. § 527(a) 7
Cal. Civ. Code §3426.1(2) 8,9
Cal. Code Civ. Proc. §526 12
Civil Code section 3426 8

1 I. INTRODUCTION

2 This is a case about a stockbroker who, rather than simply announcing his change
3 of employment and awaiting the reaction of the customers he serviced at his prior firm, delivered
4 to his new employer confidential customer information from his prior firm and then engaged in
5 an uninvited mass solicitation campaign in an effort to get his former customers to transfer their
6 accounts to his new firm. In so doing, the broker violated contractual and fiduciary duties owed
7 to his former firm, and he and his new employer are guilty of misappropriation of trade secrets,
8 unfair competition, and interference with economic relations. Plaintiff Wells Fargo Securities,
9 Inc. (“WFSI”) hereby applies for a Temporary Restraining Order to put an immediate halt to
10 defendants’ unlawful activities.

11 II. STATEMENT OF FACTS

12 A. Lance Is Employed By WFSI

13 Defendant Scot Lance (“Lance”) became employed by WFSI as a registered
14 representative in June 1994. Declaration of Theodore J. Spinardi II (“Spinardi Decl.”) ¶ 3. At
15 the time he was hired, Lance signed a Personal Financial Officer Acknowledgment Letter in which
16 he agreed that, if he left Wells Fargo, he would “not use any information about customers which
17 [he] acquired during [his] employment for the purposes of soliciting business from Wells Fargo
18 Bank.” Id. Ex. A.

19 Later, in December 1997, Lance executed a Wells Fargo Private Client Services
20 Trade Secrets, Confidential Information, and Arbitration Agreement (the “Trade Secrets
21 Agreement”). Id., Ex. B. The Trade Secrets Agreement defined Wells Fargo’s trade secrets and
22 confidential information (“Confidential Information”) to include “all names, addresses, telephone
23 numbers, account numbers, balances, loans, investments, insurance or annuity policies,
24 applications, investment objectives, and any other personal or financial information of any
25 account, customer, client, prospect, or referral.” It required Lance to use such information,
26 “solely and exclusively, for the purpose of conducting business on behalf of Wells Fargo” and
27 provided that he was “not to divulge or disclose this information except for that purpose.”

28 The Trade Secrets Agreement also provided that, if Mr. Lance resigned or was

1 terminated, he would “not take or disclose such Confidential Information” and, for a period of
2 one year following termination, he would not “call upon or solicit (either directly or indirectly)
3 any client, customer, prospect, or referral whose name became known to [him] during his
4 employment.” Id. In addition, the Trade Secrets Agreement provided that, for the same one year
5 period, Mr. Lance would not transfer the accounts or assets of any such customers out of Wells
6 Fargo nor open a new account on their behalf with any other company. Finally, in the Trade
7 Secrets Agreement, Lance acknowledged that breach of the confidentiality and non-solicitation
8 provisions would result in “immediate and irreparable harm” and agreed that provisional
9 injunctive relief was an appropriate remedy in such event.

10 B. Lance Is Given Access to Confidential Information

11 WFSI employs registered representatives (now known as Financial Consultants)
12 such as Lance to market and sell mutual funds, annuities and other securities products to
13 customers who have an established banking relationship with Wells Fargo Bank (“WFB”).
14 Declaration of Fergus Henahan (“Henahan Decl.”) ¶ 3. In the course of performing their duties,
15 Financial Consultants are given access to confidential financial and trade secret information
16 belonging to WFB and WFSI, including customer lists identifying customers by name, address,
17 telephone number, account type(s), account number(s), account balance(s), and other information
18 concerning customers' banking and lending relationships with WFB and investment relationships
19 with WFSI. Id. In addition, as a WFSI Financial Consultant, Lance received regular printouts
20 of the account statements of all of the WFSI customers for whom he was assigned as the Financial
21 Consultant. Spinardi Decl. ¶ 7. These statements contained the customers' names, addresses,
22 telephone numbers, social security or tax identification numbers, and WFSI account numbers.
23 They also showed the assets held, and transactions made, in the customers' accounts.

24 Customers do business with WFB and WFSI with the expectation that they will
25 protect the confidentiality of their financial affairs, including their banking relationships with
26 WFB and their investment relationships with WFSI. Henahan Decl. ¶ 4. See Declaration of
27 Kathryn M. Bandarrae (“Bandarrae Decl.”) ¶ 5; Declaration of Jerry L. Farber (“Farber Decl.”)
28 ¶ 4; Declaration of Jerry Schmitz (“Schmitz Decl.”) ¶ 4; Declaration of Richard C. Somers

1 (“Somers Decl.”) ¶ 5. Preserving the financial privacy of their customers is a preeminent concern
2 of WFB and WFSI. Henehan Decl. ¶ 4.

3 **In addition to containing private financial information, the customer information**
4 **maintained by WFB and WFSI has substantial economic value, in that it has been developed over**
5 **time through the ingenuity and labor of WFB and WFSI employees, and enables WFB and WFSI**
6 **to compete for and service their customers. Henehan Decl. ¶ 5. Such information is not known**
7 **to others in the banking and securities communities. WFB and WFSI have made substantial**
8 **efforts to ensure that their customer lists and trade secret information contained therein remain**
9 **secret by, among other precautions, requiring those given access to such information to sign**
10 **agreements ensuring that they will be kept confidential, and by restricting distribution of such**
11 **materials on a needs-to-know basis. Id.**

12 **C. Lance Prepares to Leave WFSI**

13 **Lance resigned his employment with WFSI on July 23, 1999. About two weeks**
14 **before he left, Lance approached Jesse Denham, a college student working as a part-time teller**
15 **at the WFB branch where Lance worked who had volunteered to help Lance and his sales**
16 **assistant with their filing. Declaration of Jesse Denham (“Denham Decl.”) ¶¶ 3-4. Lance told**
17 **Denham he had a “project” for him: he wanted Denham to take a printout Lance had obtained**
18 **from Wells Fargo’s records showing names and addresses of VIP customers of the Bank and to**
19 **annotate the printout with the phone numbers and *bank balances* of the customers on the list. Id.**
20 **¶ 4. Denham assumed that Lance was compiling information for his use as a WFSI Financial**
21 **Consultant. Id. ¶ 5. *The day before Lance left*, he asked Denham to give him the annotated**
22 **printout. Denham complied. Id. ¶ 7.**

23 **Around the same time, Joe Ernst, WFB’s San Rafael branch manager, gave Lance’s**
24 **sales assistant a printout showing the names and account numbers of all branch customers who**
25 **maintained Individual Retirement Accounts with WFB. Declaration of Joe Ernst (“Ernst Decl.”)**
26 **¶ 3. Ernst believed that the list provided a good source of leads for potential WFSI customers,**
27 **since it identified customers who already had retirement savings. By the same token, he knew that**
28 **any disclosure of the information contained in the printout to third parties would be highly**

1 **damaging to Wells Fargo as well as a violation of the customers’ rights to financial privacy. Id.**
2 **Lance’s sales assistant never returned the list to Ernst, and when he searched Lance’s work**
3 **station after his departure, it was nowhere to be found. Id. ¶ 4.**

4 **D. Lance and PaineWebber Begin Their Solicitation Campaign**

5 **Lance handed in his resignation at 1 p.m. on Friday, July 23. Spinardi Decl. ¶ 6.**
6 **At that time, Spinardi gave him a letter reminding him of his obligation not to disclose WFSI’s**
7 **confidential customer information and not to solicit WFSI’s customers to transfer their accounts**
8 **to Paine Webber. Id. Ex. C. Spinardi also gave him Lance a copy of the Personal Financial**
9 **Officer Acknowledgment Letter and the Trade Secrets Agreement. Id., Exs. A & B.**

10 **Unbeknownst to Spinardi and WFSI, the solicitation campaign already was well**
11 **under way. Although, as of this writing, only two business days have elapsed since Lance’s**
12 **resignation, WFSI has obtained, and is submitting herewith, declarations from five WFSI**
13 **customers who tell the same story:**

14 **# Over the weekend, the customer received an Airborne Express Package from**
15 **PaineWebber’s San Francisco office. Bandarrae Decl. ¶ 3; Farber Decl. ¶ 3;**
16 **Declaration of Jerome P. Lucey (“Lucey Decl.”) ¶ 3; Schmitz Decl. ¶ 3; Somers**
17 **Decl. ¶ 4.**

18 **# Enclosed in the package was an undated letter signed by one Francis X. Roche, who**
19 **was identified as branch manager of PaineWebber’s 555 California Street office.**
20 **The letter touted the “high level of operational and technical expertise” of**
21 **PaineWebber and the “tremendous benefit” of a PaineWebber account. It also**
22 **stated that Lance and his sales assistant “are looking forward to continuing their**
23 **investment relationships with you.” Bandarrae Decl., Ex. A; Farber Decl., Ex. A;**
24 **Lucey Decl., Ex. A; Schmitz Decl., Ex. A; Somers Decl., Ex. A.**

25 **# In addition to the letter, the package also contained an account transfer form for**
26 **each of the customer’s WFSI accounts. The form was filled in with the customer’s**
27 **WFSI account number and, in most cases, his or her social security or tax**
28 **identification number. Also enclosed was a PaineWebber new account application**

1 for each WFSI account. **Bandarrae Decl., ¶ 3; Farber Decl., ¶ 3; Lucey Decl., ¶ 3;**
2 **Schmitz Decl., ¶ 3; Somers Decl., ¶ 4.**

3 **The five WFSI customers who have come forward in the last two days can hardly**
4 **be the only ones whom Lance and PaineWebber have solicited. The use of identical undated form**
5 **letters and account transfer forms with WFSI account numbers already filled in suggests nothing**
6 **less than a mass solicitation of WFSI clients. In fact, Lance told one of the WFSI customers that**
7 **he had arranged for PaineWebber to mail similar packages to 900 WFSI customers. Somers Decl.**
8 **¶ 6.**

9 *None of the WFSI customers who has reported receiving PaineWebber’s mail*
10 *solicitation requested the package from Lance or PaineWebber. Bandarrae Decl., ¶ 5; Farber Decl.,*
11 *¶ 4; Lucey Decl., ¶ 4; Schmitz Decl., ¶ 4; Somers Decl., ¶ 5. None expressed any interest in*
12 *“continuing” any “investment relationship” with Lance. Id. To the contrary, these customers are*
13 *angry and annoyed at what they regard as the misuse of confidential information by Lance and*
14 *PaineWebber. One customer, Richurd C. Somers, characterizes their conduct as “unethical.”*
15 *Somers Decl. ¶ 7. Another, Jerry Schmitz, regards it as “unfair competition.” Schmitz Decl. ¶ 4.*
16 *A third, Jerome P. Lucey, was so appalled that he dashed off a complaint letter to the Securities*
17 *and Exchange Commission. Lucey Decl. ¶ 5 and Ex. B.*

18 **III. ARGUMENT**

19 **A. WFSI Is Entitled to a TRO**

20 **WFSI respectfully submits that this Court should issue a TRO to preserve the status**
21 **quo pending the hearing on the OSC re preliminary injunction. It is well-settled that:**

22 **The issuance of a temporary restraining order is not a determination**
23 **of the merits of the controversy. . . all that is determined is whether**
24 **the temporary restraining order is necessary to maintain the status**
quo pending the noticed hearing on the application for preliminary
injunction.

25 **Landmark Holding Group, Inc. v. Superior Court, 193 Cal.App.3d 525, 528 (1987) (citations**
26 **omitted).**

27 **The need for immediate injunctive relief is particularly critical where, as here, a**
28

1 former employee is misusing trade secret information and is unlawfully soliciting his former
2 employer’s customers. Further, Lance’s Trade Secrets Agreement acknowledges the
3 appropriateness of injunctive relief. See Spinardi Decl. Ex. B. As the Court held in American
4 Credit Indem. Co. v. Sacks, 213 Cal.App.3d 622, 627 (1989), a plaintiff-employer is entitled to
5 immediate injunctive relief in the face of aggressive solicitation of its clients by an avaricious
6 former employee. The acts done by Lance and PaineWebber are virtually indistinguishable from
7 the conduct enjoined in the American Credit case. There, the defendant resigned from ACI, a
8 provider of “credit insurance,” and immediately formed a new company to compete with ACI in
9 the credit insurance market. Immediately after this change of employment, she wrote a letter to
10 each ACI client whose account she had previously serviced. The letter read, in pertinent part:

11 After almost fifteen years as both an agent and policyholder, I have left [ACI] and
12 am very pleased to announce the formation of an independent insurance agency.
13 I shall continue to specialize in Credit Insurance but will now primarily be
14 representing FIDELITY AND DEPOSIT COMPANY OF MARYLAND [F&D],
15 who is offering companies a very interesting alternative to the types of policies
16 being written by both [ACI] and Continental. If you would like to learn more about
 the [F&D] policy, I will be happy to discuss it in detail with you when you are ready
 to review your ongoing credit insurance needs at renewal time. In the meantime,
 ACI will assign a new agent to your policy. If I can be of assistance to you during
 the transition period or answer any question for you at any time, please do not
 hesitate to call me.

17 Id. at 626.

18 The Court of Appeal found that this language constituted an impermissible
19 solicitation. Id. at 634-36. The Court concluded that the letter constituted a solicitation because
20 it “inform[ed] ACI’s customers of the interesting competitive alternative F&D policies as
21 compared to ACI’s policies,” and “invit[ed] their inquiry about the F&D policy and indicate[d]
22 she would be happy to discuss it in detail when they [were] ready to renew.” Id. at 636. The
23 Court then ruled that such “solicitation” constituted “a misappropriation of ACI’s trade secrets
24 within the meaning of the [Uniform Trade Secrets Act].” Id. at 638.

25 American Credit is dispositive here. The letter that Paine Webber sent to WFSI
26 customers itself is a clear solicitation. In it, the PaineWebber branch manager touts the “high
27 level of operational and technical expertise” of PaineWebber and the “tremendous benefit” of a
28 PaineWebber account. Lest there be any doubt about the purpose of the letter, each package also

1 enclosed a form for transferring the customer’s WFSI account to PaineWebber, a PaineWebber
2 new account application, and PaineWebber promotional material -- even though none of the
3 customers had requested a transfer form or expressed any interest in “continuing” a
4 “relationship” with Lance. Under American Credit, the PaineWebber package constitutes an
5 “impermissible” solicitation. See also, Courtesy Temp. Service v. Camacho, 222 Cal.App.3d 1278,
6 1287 (1990) (“a customer list produced by substantial time, effort and expense is a protected trade
7 secret” subject to injunctive relief); Greenly v. Cooper, 77 Cal.App.3d 382, 392 (1977) (“A list of
8 subscribers of a service, built up by ingenuity, time, labor and expense” is employer’s property).

9 The overwhelming evidence here establishes that Lance and PaineWebber are
10 soliciting WFSI’s clients using WFSI’s confidential trade secret customer information. Lance
11 carefully prepared for his departure by inveigling a part-time Wells Fargo Bank employee to give
12 him information -- which he then took with him -- about the bank balances of VIP clients. His
13 sales assistant obtained, and then did not return, a list of all branch customers who had Individual
14 Retirement Accounts -- an ideal list of target clients. And the account transfer forms
15 PaineWebber has sent to WFSI clients contain their WFSI account numbers, and, in many cases,
16 their social security numbers -- information that could only have come from WFSI’s own
17 confidential records. Such actions by Lance constitute a misappropriation of trade secrets and
18 are a clear violation of his obligations to WFSI. Likewise, PaineWebber’s conduct constitutes an
19 unlawful use of trade secrets, unfair competition, and unlawful interference with economic
20 relations.

21 A TRO may issue upon notice to defendant “within a reasonable time prior to the
22 hearing.” C.C.P. § 527(a). As set forth in the Declaration of Robert T. Sullwold, Lance and
23 PaineWebber were given 24 hours notice of this hearing. Especially in light of the fact that it is
24 Lance’s and PaineWebber’s own calculated solicitations of WFSI’s clients -- which threatens
25 WFSI with irreparable harm -- such notice is not only reasonable, but is also the only notice which
26 WFSI could have given consistent with an effort to preserve the status quo.

27 As the papers herewith demonstrate, WFSI seeks to do nothing more than preserve
28 the status quo by obtaining an injunction which would prevent Lance from using in any way

1 WFSI’s trade secret information, including its use to solicit business from WFSI’s clients. Once
2 solicited, these customers cannot be unsolicited, rendering any ultimate hearing on the parties’
3 dispute a “hollow formality,” and wholly ineffectual.

4 B. WFSI Is Also Entitled to an Order to Show Cause re Preliminary Injunction and
5 the Issuance of the Injunctive Relief

6 In determining whether to issue a preliminary injunction, the Court should evaluate
7 two interrelated factors: (1) the likelihood that plaintiff will prevail on the merits; and (2) the
8 interim harm that plaintiff is likely to suffer if the preliminary injunction is denied, as compared
9 to the harm, if any, the defendant is likely to sustain if the preliminary injunction is issued. IT
10 Corporation v. County of Imperial, 35 Cal.3d 63, 69-70 (1983). California courts have
11 consistently granted injunctive relief under virtually identical circumstances as here.

12 ///

13 1. WFSI Has a Reasonable Probability of Success on the Merits.

14 a. The WFSI Company Information Which Lance Misappropriated is
15 Clearly a Trade Secret as Defined by UTSA.

16 California has adopted the Uniform Trade Secrets Act (“UTSA”) (See, Civil Code
17 section 3426, et. seq.), expressly recognizing that “the right of free competition does not include
18 the right to use confidential work product of others.” Morlife, Inc. v. Perry, 56 Cal.App.4th 1514,
19 1520 (1997). In Morlife, the court, applying the UTSA, held that an employer’s customer list is
20 a trade secret entitled to UTSA protection where the customer information:

21 (1) derives independent economic value, actual or potential, from
22 not being generally known to the public or to other person who could
obtain economic value from its disclosure or use; and

23 (2) is the subject of efforts that are reasonable under the
24 circumstances to maintain its secrecy. [Quoting from Cal. Civ. Code
§3426.1(2)]

25 Id. at 1520-21.

26 In Morlife, the court found that the employer-roofing company’s customer list was
27 a trade secret, utilizing the two-prong test quoted above. When that analysis is applied to the facts
28

1 here, there is no doubt that the information that Lance lifted from WFSI constitutes protestable
2 trade secret information as well.

3 The Morlife court rejected the defendant-employee’s argument that the information
4 at issue was generally available through public sources and therefore did not qualify as a trade
5 secret:

6 Where the employer has expended time and effort identifying
7 customers with particular needs or characteristics, courts will
8 prohibit former employees from using this information to capture a
9 share of the market. Such lists are to be distinguished from mere
10 identities and locations of customers where anyone could easily
11 identify the entities as potential customers. [Citations omitted.] As
12 a general principle, the more difficult information is to obtain, and
13 the more time and resources expended by an employer in gathering
14 it, the more likely a court will find such information constitutes a
15 trade secret. [Id., at 1521-22].

16 As in Morlife, the WFSI trade secret information at issue here is not generally
17 available, and indeed represents the work product and fruit of substantial time and effort on the
18 part of Wells Fargo Bank and WFSI. Henehan Decl. ¶ 5. Especially in the narrow context of
19 obtaining investor clients, it is extremely difficult to develop and maintain such a information.
20 Moreover, the leads, referrals and sources which go into developing such customer information
21 are not publicly available. Id.

22 In addition, as the Declaration of Fergus Henehan establishes, WFSI has carefully
23 engaged in precisely the efforts to maintain the confidentiality of its trade secret information
24 necessary to satisfy the second prong of the Morlife test. Henehan Decl. ¶ 5. The Morlife court
25 found compelling the plaintiff’s “reasonable efforts” to maintain secrecy of customer identity by
26 limiting circulation of customer lists and advising employees through an employment agreement
27 and handbook that the information was valuable and confidential. Id. at 1521. As in Morlife and
28 other decisions cited therein, Lance executed the Trade Secrets Agreement (Spinardi Decl., Ex.
B) in which he expressly acknowledged the confidential trade secret status of WFSI’s confidential
customer information.

b. **Lance Misappropriated, and PaineWebber Misused, WFSI’s Trade Secret
Information.**

1 California Civil Code section 3426.1 (which codifies the UTSA) defines
2 misappropriation, among other things, as (1) acquisition of a trade secret by a defendant who
3 knows or should know the trade secret was acquired improperly, or (2) *unauthorized disclosure*
4 *or use of another's trade secret with knowledge that the information was acquired under*
5 *circumstances which gave rise to a duty to maintain its secrecy or limit its use.* Cal. Civ. Code
6 §3426.1. As the declarations of WFSI customers submitted herewith establish, the acts done by
7 Lance and PaineWebber fall squarely within these definitions: Immediately after Lance's
8 departure, he and PaineWebber commenced an aggressive campaign targeting WFSI customers
9 for the purpose of soliciting them to transfer their accounts to PaineWebber. Plainly, Lance and
10 PaineWebber could not have conducted this campaign without WFSI's confidential customer list.
11 The fact that Lance bragged that PaineWebber had sent packages to 900 WFSI customers
12 suggests a mass mailing using WFSI's customer list. The fact that all of the PaineWebber
13 packages contained account transfer forms filled in with WFSI account numbers and, in many
14 cases, the customer's social security number confirms it.

15 Although it is one of the most recent decisions affording UTSA protection to
16 customer lists and injunctive relief to the owners thereof, Morlife is only one of many controlling
17 decisions on the issue. For example, in American Credit, the Court granted an employer
18 injunctive relief to protect its trade secret customer list. The Court noted that the employer's
19 customer list was a trade secret and required injunctive protection because it was the result of
20 significant expenditures incurred by the employer and because it allowed a competitor "to direct
21 sales efforts to the elite 6.5 percent of those potential customers which already had evinced a
22 predisposition to purchase credit insurance." 213 Cal.App.3d. at 631. Just as in Morlife and
23 American Credit, WFSI's customer list and related information was developed over time through
24 the ingenuity and labor of Wells Fargo Bank and WFSI employees and enables Wells Fargo to
25 compete for and service its customers. (Henehan Decl. ¶ 5).

26 Likewise, in Courtesy Temp. Service, the Court enjoined the defendant / employee
27 from "contacting or dealing with [plaintiff's] customers," finding that the employer's customer
28 list was "the product of substantial time and expense" and that "the trial court's refusal to grant

1 injunctive relief was an abuse of discretion.” 222 Cal.App.3d at 1281. As the foregoing authorities
2 demonstrate, immediate injunctive relief is necessary in this case both to enforce WFSI’s
3 contractual rights and to prevent further misappropriation of WFSI’s trade secret customer list.
4 See also, Hollingsworth Solderless Terminal v. Turley, 622 F.2d 1324, 1332-34 (9th Cir. 1980).

5 c. Lance’s Conduct is Also Contractually Prohibited

6 As an independent basis for ordering the relief requested herein, Lance’s conduct
7 is also expressly prohibited by his Trade Secrets Agreement, which provides that, upon
8 termination, he may not take any confidential WFSI customer information with him, disclose such
9 information to any other person, or solicit WFSI customers whose names became known to him
10 during his employment with WFSI.

11 WFSI does not seek to bar Lance from earning a living as a “stockbroker” even
12 though his doing so will be with a competitor firm servicing the same community. Rather, WFSI
13 seeks only to enjoin Lance from taking WFSI’s customers and confidential customer information
14 and from soliciting those customers, conditions to which he specifically agreed. See, Boughton v.
15 Socony Mobil Oil Co., 231 Cal.App.2d 188, 192 (1964) (while B&P Code section 16600 bans
16 restraints on pursuit of an entire business, “where one is barred from pursuing only a small or
17 limited part of the business, trade or profession, the contract has been upheld as valid”); see also
18 Ruscitto v. Merrill Lynch, 777 F.Supp. 1349, 1354 (N.D. Texas 1991) (“Here, Ruscitto will be
19 permitted to pursue his current profession and to compete with Merrill Lynch in the very
20 community in which he long resided.”)

21 In sum, California trade secret law itself entitles WFSI to injunctive relief. In
22 addition, because Lance also agreed contractually not to utilize the confidential customer
23 information that he has now wrongfully obtained, injunctive relief in WFSI’s favor should enter
24 forthwith.

25 2. WFSI Has No Adequate Remedy at Law and Will Suffer Irreparable Injury
26 if This Court Does Not Issue a TRO and an Injunction.

27 As the court readily recognized in American Credit, 213 Cal.App.3d at 637-38, the
28 solicitation of a company’s clients by one of its former representatives cannot be remedied by

1 money damages alone. See also, Courtesy Temp Service, 222 Cal.App.3d at 1278; State Farm Mut.
2 Auto Ins. Co. v. Dempster, 174 Cal.App.2d 418 (1960). Accordingly, WFSI has suffered, and will
3 continue to suffer, irreparable harm as a result of Lance’s and PaineWebber’s conduct.

4 In American Credit, the defendant solicited her former employer’s clients both
5 orally and in writing. The court expressly found that the plaintiff would “sustain continuing
6 interim harm in the absence of an injunction.” *Id.* at 637. If Lance and PaineWebber are allowed
7 to continue their solicitation of WFSI’s clients using WFSI’s trade secrets, they will reap the full
8 benefit of their wrongdoing before the Court has ever had a chance to consider the matter. The
9 misuse of WFSI’s critical client information, loss of clients and goodwill would irreparably injure
10 WFSI and would not be readily calculable in damages. Therefore, this Court should grant the
11 preliminary injunction as WFSI has requested. See, Cal. Code Civ. Proc. §526(2), (4) & (5).

12 Indeed, absent immediate injunctive relief, WFSI will suffer irreparable harm on
13 at least two separate and distinct levels. First, unless immediate injunctive relief is granted, it will
14 be impossible to measure WFSI’s damages with any reasonable degree of certainty. In Merrill
15 Lynch v. Stidham, 658 F.2d 1098, 1102 (5th Cir. 1981), the court held under virtually identical
16 circumstances that the defendant/employee’s misappropriation of a securities brokerage firm’s
17 trade secrets caused irreparable harm:

18 Were defendant permitted by the law to exploit the clientele of their
19 former employers, every investment that reasonably flowed from the
20 exploitation should be included in the damages award. How such a
figure could be arrived at escapes us.

21 *Id.*; See, also, Merrill Lynch v. Bradley, 756 F.2d 1048 at 1055 (4th Cir. 1985) (securities firm
22 employer “faced irreparable, non-compensable harm in the loss of its customers”).

23 It is impossible to determine at this time the number of WFSI’s clients who will be
24 pirated by Lance and PaineWebber. Nor is it possible to determine with any degree of certainty
25 the commissions each of these clients will generate not only this year, but 5, 10 or 30 years into the
26 future. Accordingly, the misuse of WFSI’s trade secrets by Lance and PaineWebber involves
27 financial loss to WFSI that is incapable of measurement, requiring the issuance of an injunction
28 to protect WFSI from irreparable harm.

1 **Second, immediate injunctive relief also is necessary to protect the stability of**
2 **WFSI’s Bay Area operations, and to discourage registered representatives from scheming to**
3 **breach their contracts, misuse WFSI’s confidential customer information, and divert WFSI’s**
4 **trade secret client lists to a competitor. In Merrill Lynch v. Patinkin, 1991 U.S. Dist. LEXIS 6210**
5 **(N.D. Ill. 1991), the court found that “denial of the extension of the TRO under the circumstances**
6 **presented in this case would leave Merrill Lynch vulnerable to the same conduct from other**
7 **employees. Hence, the potential harm plaintiff faces, on several levels, is enormous.” So, too,**
8 **here.**

9 **In sum, WFSI faces significant irreparable harm on numerous levels, including the**
10 **infliction of incalculable damages, and a threat to office stability, all of which necessitate the**
11 **issuance of immediate injunctive relief.**

12 **3. Granting Injunctive Relief Outweighs Denial and Serves the Public Interest**

13 **WFSI seeks a return to the status quo, such that Lance should be required to return**
14 **all confidential customer information he wrongfully took from WFSI. A return to the status quo**
15 **further requires that Lance and PaineWebber be enjoined from further solicitation of WFSI’s**
16 **customers. Nor may Lance and PaineWebber enjoy the fruits of their illegal acts -- they also must**
17 **be enjoined from engaging in or receiving business from any customer they have solicited in**
18 **violation of Lance’s obligations to WFSI and PaineWebber’s duties under California law.**

19 **Such an order is expressly provided for in Lance’s Trade Secrets Agreement in**
20 **which he specifically agreed not to transfer any account or assets out of WFSI for a period of one**
21 **year after termination of employment. (See, Exhibit A to Complaint). In George v. Burdusis, 21**
22 **Cal.2d 153 (1942) the California Supreme Court (en banc) ruled that a former employee must be**
23 **enjoined both from soliciting his former employer’s customers and from accepting business from**
24 **the customers he wrongfully solicits.**

25 **Not only should the employee be enjoined from the solicitation of his**
26 **former customers, but the court’s order should prohibit the new**
27 **employer from obtaining the benefits of such an unfair practice,**
28 **thereby making the remedy complete.**

27 **Id.**

28 **The benefit of injunctive relief to WFSI will vastly outweigh any minimal detriment**

1 to Lance and PaineWebber. On the one hand, an injunction will protect WFSI's goodwill,
2 business reputation, trade secrets, methods of business operation, and contract rights. Most
3 importantly, an injunction will protect WFSI's highly sought-after client list and the
4 confidentiality of those clients' records. By contrast, Lance has deliberately breached his
5 commitments to WFSI and misappropriated WFSI's trade secrets, and PaineWebber has
6 knowingly used those trade secrets to solicit business for itself.

7 Finally, WFSI seeks only to require Lance to abide by his obligations to WFSI and
8 PaineWebber to honor its duties under California law. WFSI's injunction will not prevent Lance
9 from earning a living at the same trade, even with a competitor.

10 Dated: March 15, 2005

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