STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

IDAHO TRUST BANK, *Plaintiff*,

vs.

BRYAN ROSS, *Defendant*.

Case No. **CV 2013 1285**

MEMORANDUM DECISION AND ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY.

This matter is before the Court on plaintiff Idaho Trust Bank's (ITB) motion for partial summary judgment, motion to compel and motion opposing the continuing use of protective order, and defendant Bryan Ross' (Ross) motion for summary judgment and motion for protective order.

On February 13, 2013, ITB filed this lawsuit against its former employee, Ross, claiming that Ross violated covenants not to compete after Ross left the employ of ITB and went to work for Wells Fargo Bank. ITB demanded a jury trial, a factor which limits the Court's ability to make inferences and credibility determinations upon summary judgment. *J.R. Simplot v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006).

On March 27, 2013, Ross filed his "Motion for Protective Order", "Memorandum in Support of Motion for Protective Order" (Memo in Support of MPO) and "Affidavit of Counsel in Support of Motion for Protective Order" (Duke MPO Aff.). On May 28, 2013, ITB filed its "Motion Opposing the Continuing Use of Protective Order" and "Motion to

Compel". On May 29, 2013, ITB filed its "Memorandum in Opposition to Current Protective Order" (Memo in Opposition MPO) and "Affidavit of Scot M. Ludwig in Support of Motion to Compel" (Ludwig MTC Aff.). On June 4, 2013, Ross filed his "Bryan Ross's Memorandum in Opposition to Plaintiff's Motion to Compel" (Memo in Opposition MTC), "Affidavit of Keely E. Duke in Support of Bryan Ross's Memorandum in Opposition to Plaintiff's Motion to Compel" (Duke MTC Aff.), "Reply Memorandum in Support of Motion for Protective Order" (MPO Reply) and "Affidavit of Keely E. Duke in Support of Reply Memorandum in Support of Motion for Protective Order" (Duke MPO Reply Aff.).

ITB's Motion for Partial Summary Judgment is limited to its request for injunctive relief. Motion for Partial Summary Judgment, p. 2. However, in order to grant partial summary judgment for ITB on its request for injunctive relief, the Court would have to find, without any dispute of fact, that Ross violated his restrictive covenants.

On May 14, 2013, ITB filed its "Motion for Partial Summary Judgment", "Memorandum in Support of Motion for Partial Summary Judgment" (Memo in Support Plaintiff's MPSJ), "Affidavit of Scot M. Ludwig in Support of Motion for Partial Summary Judgment" (Ludwig MPSJ Aff.), "Affidavit of Peter Erbland in Support of Motion for Partial Summary Judgment" (Erbland MPSJ Aff.), and "Affidavit of Thomas Prohaska in Support of Motion for Partial Summary Judgment" (Prohaska MPSJ Aff.). On May 20, 2013, Ross filed his "Memorandum in Opposition to Idaho Trust Bank's Motion for Partial Summary Judgment" (Memo in Opposition Plaintiff's MPSJ) and "Affidavit of Counsel in Support of Bryan Ross's Opposition to Idaho Trust Bank's Motion for Partial Summary Judgment" (Duke MPSJ Aff.).

Ross has also filed a motion for summary judgment. Ross argues all of ITB's claims should be dismissed as the restrictive covenants are invalid for a variety of

reasons. Bryan Ross's Motion for Summary Judgment, p. 1; Memorandum in Support of Bryan Ross's Motion for Summary Judgment, pp. 5-24. On May 22, 2013, Ross filed his "Bryan Ross's Motion for Summary Judgment", "Memorandum in Support of Bryan Ross's Motion for Summary Judgment" (Memo in Support Defendant's MSJ), "Statement of Undisputed Facts in Support of Bryan Ross's Motion for Summary Judgment and Discussion of the Common Law and Statutes Related to Restrictive Covenants" (Ross Statement of Facts), "Affidavit of Bryan Ross in Support of Motion for Summary Judgment" (Ross MSJ Aff.), and "Affidavit of Counsel in Support of Motion for Summary Judgment" (Duke MSJ Aff.). On June 5, 2013, ITB filed its "Memorandum in Opposition to Defendant's Motion for Summary Judgment" (Memo in Opposition Defendant's MSJ), "Affidavit of Richard Goldston" (Goldston MSJ Aff.), "Affidavit of Steve Jungen" (Jungen MSJ Aff.) and "Affidavit of Thomas Prohaska in Response to Bryan Ross's Affidavit" (Prohaska MSJ Aff.). On June 13, 2013, Ross filed his "Reply Memorandum in Support of Bryan Ross's Motion for Summary Judgment" (MSJ Reply) and "Affidavit of Counsel in Support of Reply Memorandum in Support of Motion for Summary Judgment" (Duke MSJ Reply Aff.).

Oral argument was held on these motions on June 19, 2013. At oral argument, counsel for ITB first vacated its hearing on its Motion Opposing the Continued Use of Defendant's Protective Order, and counsel for Ross agreed to withdraw his objection to ITB's Motion Opposing the Continued Use of Defendant's Protective Order. Hearing on Ross' Motion for Protective Order was also vacated as the parties agreed to continue to operate under the protective order the parties had agreed to earlier. The Court then heard argument on ITB's Motion to Compel and denied such. Oral argument was then heard on ITB's Motion for Partial Summary Judgment and Ross's Motion for Summary Judgment.

This case is presently set for a five-day jury trial beginning December 9, 2013.

II. FACTUAL BACKGROUND.

Ross was a former employee of ITB from May 2000 to October 22, 2012. Memo in Support Plaintiff's MPSJ, p. 2, ¶ 1. Prior to working with ITB, Ross worked as a financial consultant for D.A. Davidson for thirteen years. Ross Statement of Facts, p. 2, ¶ 1. As a financial consultant for D.A. Davidson, Ross had a number of duties, including identifying client goals and objectives, recommending investments based on the client's risk tolerance, making and implementing recommendations with respect to investments, monitoring accounts, quarterly meetings with clients and comprehensive annual reviews to analyze performance of managed assets. *Id*. Ross claims while he was employed at D.A. Davidson he fostered a relationship with a number of clients, including F.B, A.L.G, B.G, D.N., N.N, R.H, and G.H, all of whom allegedly transferred their business to ITB upon Ross' employment there. *Id*. at ¶ 2.

When Ross was hired at ITB in 2000, he and ITB entered into a Confidentiality and Innovation Assignment Agreement (CIAA). *Id*. at 3, ¶ 3. From 2000 until February 2009 Ross' job assignment was an account administrator for ITB's wealth management accounts. *Id*. at ¶ 4. As an account administrator, Ross' duties were procedural responsibilities for wealth management accounts, such as taking certain actions relating to an account, like filing reports. *Id*. at 4, ¶ 4. On February 9, 2009, Ross and ITB entered into the "Idaho Trust Bank Wealth Management Division 2009 Bryan Ross Incentive Plan" (February Incentive Plan). The February Incentive Plan stated he would no longer be in the role of administrative/relationship manager and would have a limited role which included: 1) representing Idaho Trust Financial and LPL, Inc. (LPL is an independent nationwide broker/dealer and distributor of financial products) as a

representative selling fixed annuity and insurance products, 2) representing ITD's Wealth Management Division selling fiduciary and investment services, and 3) developing prospects for the banking and lending services at ITB. *Id*. at ¶ 5. Representation of Idaho Trust Financial and LPL, Inc. required Ross to be licensed with LPL, Inc. *Id*.

On April 6, 2009, Ross and ITB executed an Insurance Only Representative Employment Agreement (April Insurance Only Agreement). Memo in Support of Plaintiff's MPSJ, pp. 2-3, ¶ 4. ITB claims Section 7 of the April Insurance Only Agreement contains a covenant not to compete for a three-year period specifically prohibiting Ross from "directly or indirectly soliciting, diverting, taking away, attempting to take away, or providing services similar to those services provided by Ross while employed at Idaho Trust Bank". *Id*. at 3, ¶ 5. ITB also claims Section 6 of the April Insurance Only Agreement required Ross to return all confidential information upon termination from his employment at ITB. *Id*. at ¶ 6. In addition, ITB argues the April Insurance Only Agreement provided that in the event of a breach by Ross, ITB would be entitled to injunctive relief upon a prima facie showing of breach. *Id*. at ¶ 7.

On February 22, 2012, Ross and ITB executed the Idaho Trust Bank Compensation Addendum (February Incentive Plan Addendum) which included a non-compete provision waiving his "right to solicit any and all of the clients . . . of Idaho Trust Bank" for two years after the last date of employment. Ludwig MPSJ Aff., Exhibit 2.

On October 22, 2012, Ross resigned his employment at ITB and went to work for Wells Fargo Financial Advisors (Wells Fargo). Ross Statement of Facts, p. 7. ITB states at the time of Ross' resignation from ITB, the April Insurance Only Agreement and February Incentive Plan Addendum were in effect. Memo in Support of Plaintiff's

MPSJ, p. 3, ¶ 7. ITB states after Ross left ITB, he began contacting ITB clients with whom he had worked while employed with ITB, and thereafter some of those clients transferred their business to Wells Fargo. *Id*. at 7, 17. On February 13, 2013, ITB filed an action against Ross for breach of the restrictive covenants of the April Insurance Only Agreement and the February Incentive Plan Addendum.

III. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306

(2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

IV. ANALYSIS.

A. Analysis Under Idaho Case Law.

In 2008, the Idaho Legislature enacted the Agreements and Covenants Protecting Legitimate Business Interests. I.C. §§ 44-2701 – 44-2704. Analysis under that statutory framework hinges on whether Ross was a "key employee" under I.C. § 44-2702(1), which will be discussed below. First, the Court will address Idaho case law.

Covenants not to compete in an employment contract are generally disfavored and will be strictly construed against the employer. *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 367, 17 P.3d 308, 311 (2001); *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 419, 111 P.3d 100, 104 (2005); *AMX Intern., Inc. v. Battelle Energy Alliance*, 744 F.Supp.2d 1087, 1094 (9th Cir. 2010). To be enforceable, a covenant not to compete must: 1) be ancillary to a lawful contract, 2) be supported by adequate consideration, and 3) be consistent with public policy. *Id*. As the analysis below demonstrates, while the Court finds there are problems with the non-compete agreements at issue, there is a dispute of material fact as to whether any of these shortcomings individually, or collectively, cause the non-compete agreements to be invalid.

1. "Consideration" (or lack thereof) for the Non-Compete Agreements.

Ross' first argument is the non-compete covenant is not valid because there was no consideration provided to him with respect to the April Insurance Only Agreement and, therefore, is not enforceable. Memo in Support Defendant's MSJ, p. 6. Ross states the February Incentive Plan, which sets forth his compensation structure, did not contain a restrictive covenant, and only two months later, in the April Insurance Only Agreement, did a restrictive covenant appear. *Id*. Ross claims the April Insurance Only Agreement was a memorialization of his status as an insurance only representative, as he did not obtain his license to sell variable annuities. *Id*. at 7. Ross states he received no additional consideration in the April Insurance Only Agreement and so the restrictive covenant it contains is not valid.

ITB argues Ross received $24,685.77 in a lump sum payment via a promissory note executed January 20, 2009, and as consideration for entering into the restrictive covenant, ITB agreed the note would be cancelled at the end of two years, without requiring Ross to make a single payment toward the note. Memo in Opposition Defendant's MSJ, p. 6; citing Affidavit of Thomas Prohaska in Suport of Motion for patial Summary Judgment, ¶ 6. ITB states the note was indeed cancelled without Ross making any payment on the note, as agreed. *Id*. However, other than ITB President Thomas Prohaska's (Prohaska) unsubstantiated statement in his affidavit, there appears to be no evidence of any such agreement; no copy of the note has been produced at this time and no mention of such a note is made in the April Insurance Only Agreement. The February Incentive Plan does reference a promissory note; however, the February Incentive Plan does not list the terms of the note and does not state the note was in consideration for restrictive covenants that would be memorialized in the future. In

addition, ITB states the April Insurance Only Agreement specified Ross would receive 40% of the Adjusted Gross Commission in exchange for Ross' agreement to the other terms of the April Insurance Agreement, including the restrictive covenant. *Id*. at 7. Paragraph 4 of the April Insurance Only Agreement states Ross will receive a commission plan, including 40% of the Adjusted Gross Commission, "[i]n consideration of the services Employee renders to Idaho Trust pursuant to this Agreement." Duke MPSJ Aff., Exhibit E, pp. 1-2. This would purportedly include the non-compete covenant in Paragraph 7. An inspection of the February Incentive Plan shows no commission plan was mentioned in that document. *Id*., at Exhibit D. It appears likely the commission plan was consideration for the non-compete covenant.

Counsel for ITB claimed in oral argument that Prohaska's testimony shows that while some parts of the April 2009 Insurance Only Agreement were decided before that agreement was signed, the agreement still needed to be memorialized. Ross claims the Idaho Supreme Court case *Great Plains Equip, Inc. v. Northwest Pipeline Corp.,* 132 Idaho 754, 769, 979 P.2d 627, 642 (1999), has answered that question, stating "a promise to do, or the doing of, what one is already bound by contract to do, is not valid consideration." That is an accurate quote from *Great Plains*, but Ross' reliance on Great Plains is misplaced. First, *Great Plains* did not deal with a non-compete agreement. It dealt with a mechanics lien following a contract regarding installation of a natural gas transmission pipeline. Second, in *Great Plains*, the contract modification that was an extra price per lineal foot of pipeline would be paid due to "treacherous weather." Thus, *Great Plains* did not deal with the scenario ITB claims where the parties are at a later date simply memorializing what they had already agreed to.

In any event, a dispute of fact exists as to consideration for the agreements.

2. "Reasonableness" (or lack thereof) of the Non-Compete Agreements.

Additionally, a covenant not to compete in an employment contract must be reasonable as applied to the employer, the employee and the public. *Id*. This means a covenant not to compete is reasonable only if it: 1) is not greater than is necessary to protect the employer in some legitimate business interest, 2) is not unduly harsh and oppressive to the employee, and 3) is not injurious to the public. *Id*. If a covenant not to compete is unreasonable in duration, geographical area, or scope of activity, it will be held unenforceable. *Id*.

The first step of theanalysis is whether ITB had a legitimate business interest worthy of protection. The burden is on the employer to prove the extent of its protectable interest. *McCandless v. Carpenter*, 123 Idaho 386, 391, 848 P.2d 444, 449 (Ct.App. 1993). Generally, employers are not entitled to protection against ordinary competition, but are entitled to protect their businesses from the detrimental impact of competition by employees who, *but for their employment*, would not have had the ability to gain a special influence over clients or customers. *Pinnacle*, 135 Idaho 364, 367, 17 P.3d 308, 311 (emphasis added). "[T]he employer has a protectable interest in the customer relationships its former employee established and/or nurtured *while employed by the employer*, and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer." *Id*. (emphasis added).

In *Pinnacle*, the Idaho Court of Appeals held Pinnacle possessed a legitimate business interest in the customer relationship developed by the employee as it was the employment contract which put the employee in direct contact with the competitor. *Id*. In *Freiburger*, the Idaho Supreme Court held the employment relationship between

J-U-B and Freiburger "clearly both placed him in direct contact with J-U-B clients, as well as placed him in the forefront of developing J-U-B's goodwill effort with several clients," and thus J-U-B had a legitimate business interest worthy of protection in the client relationships Freiburger helped develop while employed with J-U-B. 141 Idaho 415, 421, 111 P.3d 100, 106. In *AMX*, the Ninth Circuit Court of Appeals held AMX had a "protectable interest in the customer relationships its former employees 'established and/or nurtured' while employed by AMX; it is therefore entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for AMX," 744 F.Supp.2d 1087, 1094.

The recurring theme above is the employment placed the employee in direct contact with the competitor or the relationship with the competitor was established or nurtured while employed. At the very least here, there is a question of fact on that point. Ross contends a number of his clients who followed him from ITB were in fact clients who followed him initially from D.A. Davidson. Memo in Support of Defendant's MSJ, pp. 10-11. In addition, Ross argues other clients who followed him to Wells Fargo from ITB were the result of personal connections he had to them, not through connections of ITB. *Id*. at 11. Ross characterizes some of these personal connections as his daughter's co-worker, recommendations from friends and classmates in an art class. *Id*. at 11-12.

ITB takes exception of Ross' statements that his "clients" came with him from D.A. Davidson and then followed Ross from ITB to Wells Fargo as ITB states Ross cannot have clients, under Idaho state law and federal law. Memo in Opposition Defendant's MSJ, p. 4, citing Affidavit of Thomas Prohaska in Response to Bryan Ross's Affidavit, ¶ 3-18; Exhibits 1-10. Specifically, ITB states 1) Ross does not now and has never held a charter issued by any banking authority to provide trust,

investment, insurance or banking services to any individual or entity, 2) Ross is not now and has never been licensed as a Registered Investment Advisor by any securities licensing authority, and 3) Ross is not now and has never been licensed as a Broker/Dealer by any securities licensing authority and has never been licensed as an insurance company. Affidavit of Thomas Prohaska in Response to Bryan Ross's Affidavit, ¶¶ 5-6. However, nowhere in Prohaska's affidavits does Prohaska explain the legal basis why Ross cannot have "clients", nor does ITB explain such basis in its briefing. The conclusory statement in Prohaska's affidavit is accorded little weight. The Court notes in its review of ITB's own documents with Ross there is repeated mention of the word "client" and "clients." However, it is not clear whether those references are to these clients as ITB's clients, Ross' clients, or both. In any event, ITB claims that since Ross had no "clients", Ross does not now and has never had the right to "have" clients who receive trust, investment, insurance or banking services, because only a licensed or chartered institution may "have" clients. Memo in Opposition Defendant's MSJ, p. 3.

Even if it is true that Ross cannot legally have "clients", it is not this Court's duty to make such a conclusion. Ross has characterized the people and entities who transferred their business to Wells Fargo as "clients", but it is not clear he intended the term "client" to carry the legal definition. The pertinent question is whether Ross fostered a relationship with these people and entities either a) prior to his employment with ITB or b) as a result of personal relations. Whether they were legally "clients" of Ross is irrelevant to this analysis. On the pertinent question, there is conflicting testimony as to the origin of these "clients", testimony that is not for this Court to decide, but rather a question of fact for the jury to decide.

The second step of the analysis is determining whether the covenant not to compete in the employment contract was a reasonable means of protecting ITB's

interest. The following are the provisions:

> The acceptance of incentive compensation under this plan shall be consideration for the Private Banker waiving his or her right to solicit any and all of the clients, and/or any of the employees, of Idaho Trust Bank for a period of twenty-four months after the last date of employment of the Private Banker at Idaho Trust Bank; and, therefore, the Private Banker does hereby agree to such non-solicitation as a condition of acceptance of the incentive compensation.

February Incentive Plan Addendum, p. 4.

> 7.1 Non-competition Obligations. The book of business serviced and developed by Employee during employment with Idaho Trust is owned by Idaho Trust, therefore, (or such later times as may be described in any other Registered Representative Agreement executed by Employee and Idaho Trust) during the term of employment and for a period of three (3) years thereafter, (or such later time as may be described in any other Registered Representative Agreement executed by Employee and Idaho Trust) Employee will not, directly or indirectly, for himself or on behalf of any other person, partnership, corporate or other entity:
>
> > 7.1.1 solicit, divert, take away, attempt to take away, or provide services similar to those services provided by Employee while employed at Idaho Trust to any of Idaho Trust's customers to whom Employee provided services during Employee's employment with Idaho Trust; . . .

April Insurance Only Agreement, p. 3.

On their face, both covenants not to compete lack a geographical limitation. However, the lack of a geographical limitation is not per se unenforceable. *Pinnacle*, 135 Idaho 364, 368, 17 P.3d 308, 312. "In order to be enforceable, a covenant not to compete must be *reasonable* in geographic scope." *Id*. (quoting *Magic Lantern Prods., Inc. v. Dolsot*, 126 Idaho 805, 807, 892 P.2d 480, 482 (1995) (emphasis in original). The Idaho Supreme Court has held an otherwise overly broad geographical limitation may be considered reasonable if the class of persons with whom contact is prohibited is sufficiently limited. When no geographical limitation is present, the Court must then determine whether the other terms provided in the covenant not to compete here are sufficiently limited such that its lack of an expressed geographical limitation can be considered reasonable. *Id*.

In *Pinnacle*, the Idaho Court of Appeals acknowledged Pinnacle had a

protectable business interest in the customer goodwill developed by the employee while working for Pinnacle, and held such a business interest is reasonably protected by prohibiting the employee from providing services to those clients with whom the employee developed such customer goodwill. *Id*. However, the Court held a blanket prohibition against doing business with an employer's clients, without regard to whether a relationship existed between the client and employee, is overbroad. *Id*. The failure of Pinnacle to limit the covenant not to compete to only clients with whom the employee had contact made the covenant greater than necessary to protect Pinnacle's legitimate business interest. *Id*. Additionally, the Court of Appeals took issue with the general term "services" without further explanation or definition. *Id*. The covenant in *Pinnacle* stated the contractor agrees to "not offer, sell, or trade his services" to Pinnacle's clients. *Id*. The Court stated the failure to define "services" failed to limit the scope of activities the employee was prohibited from offering, selling or trading. *Pinnacle*, 135 Idaho 364, 369, 17 P.3d 308, 313. The Court went on to hold "a covenant not to compete which prohibits an employee from working in any capacity or which fails to specify with particularity the activities that the employee is prohibited from performing is too overbroad and indefinite to be considered reasonable." *Id*. The Court concluded the covenant not to compete was unreasonable in that it 1) failed to reasonably limit the prohibited "services", 2) failed to reasonably limit the clients for whom the employee could provide those services, and 3) failed to include a geographical limitation. *Id*.

In *Freiburger*, the Idaho Supreme Court held the covenant not to compete was overbroad as it 1) included past clients or projects, without any meaningful limitation, and 2) unreasonably prohibited Freiburger from providing any services to J-U-B's clients, without any limiting language. 141 Idaho 415, 422, 111 P.3d 100, 107.

In *AMX*, the Ninth Circuit Court of Appeals held (under *Pinnacle and Freiburger*) the noncompete agreement there was unenforceable because it 1) did not limit the restrictive covenant to only those clients with whom its employees had prior contact, 2) failed to define the "work" its employees were prohibited from performing, and 3) failed to restrict the geographic area to which it applied. 744 F.Supp.2d 1087, 1095.

In the present case, there are two separate covenants not to compete which will each be dealt with in turn. First, the February Incentive Plan Addendum states Ross waives his right "to solicit any and all of the clients . . . of Idaho Trust Bank for a period of twenty-four months after the last date of employment." Ludwig MPSJ Aff., Exhibit B, February Incentive Plan, p. 4. This non-compete agreement is unenforceable under *Pinnacle, Freiburger* and *AMX* as it 1) does not have a geographical limitation, 2) does not limit the services for which Ross may not perform or solicit, and most importantly, 3) does not limit the clients Ross cannot solicit. The clause does not distinguish between clients Ross had contact with and clients he did not and attempts to throw a blanket prohibition on Ross for all clients, past, present and pending. *Pinnacle*, *Freiburger* and *AMX* all took care to explain a limitation to only clients with whom the employee had contact is necessary to ensure a covenant is not overbroad. Under these cases, the February Incentive Plan Addendum covenant not to compete is unenforceable.

The April Insurance Only Agreement states for three years, "Employee will not directly or indirectly . . . solicit, divert, take away, attempt to take away, or provide services similar to those services provided by Employee while employed at Idaho Trust to any of Idaho Trust's customers to whom Employee provided services during Employee's employment with Idaho Trust." Unlike with the February Incentive Plan Addendum, this covenant limits the customers to whom it pertains as only those

customers Ross provided services to while employed at ITB. It also does not contain a geographical limitation, which is not necessarily fatal depending on the rest of the covenant language. It comes down to whether the language "solicit, divert, take away, or provide services similar to those services provided by Employee while employed at Idaho Trust" is overly broad. *Pinnacle* and *Freiburger* have held simply using the word "services" without more is overly broad and unreasonable. However, that is not the case here. In the present case, the covenant does say "services" but then goes on to qualify those services as those similar to services provided by Ross while employed with ITB. The question then becomes whether that phrase is still too broad to reasonably protect ITB's interest. Ross claims the language is too vague, and adds there are significant differences between his work at ITB and his work at Wells Fargo. Those differences include: 1) wealth management services for Wells Fargo, which at ITB were handled by the chief investment officer, not Ross, 2) providing account analysis and having exclusive control over the management of the account at Wells Fargo and 3) providing services related to the sale of variable annuities at Wells Fargo, which Ross never performed at ITB. Memo in Support Defendant's MSJ, pp. 9-10. Ross argues the covenant is too restrictive as it forces Ross to abandon clients who have followed him all the way from D.A. Davidson. *Id*. at 10.

ITB argues unlike *Pinnacle* and *AMX*, the April Insurance Only Agreement is limited because it "clearly related to the work Ross was doing for Idaho Trust" and this language has meaning and is capable of being defined "by looking at what Ross was doing for Idaho Trust and comparing that work to what he is now doing for Wells Fargo". Memo in Opposition Defendant's MSJ, p. 12. In response, Ross argues ITB's claim the prohibited services can be ascertained simply by comparing Ross' duties at ITB with his duties at Wells Fargo in itself is proof the language is too vague and overbroad. MSJ

Reply, p. 7.

While the language in the April Insurance Only Agreement is not as general as the "services" language of *Pinnacle* and *AMX*, it is still difficult to ascertain from the covenant exactly what services are prohibited. It is not so clear cut as ITB argues; it requires the Court to determine exactly what services Ross provided at ITB and what services he currently provides at Wells Fargo. This Court is not equipped to make such a determination. It appears this covenant in the April Insurance Only Agreement is too vague and, coupled with the lack of geographical limitation, may be invalid under Idaho law.

In support of its argument regarding geographical limitation, ITB cites *Insurance Associates Corp. v. Hansen*, 111 Idaho 206, 723 P.2d 190 (Ct.App. 1986) and *Marshall v. Covington*, 81 Idaho 199, 339 P.2d 504 (1959). Memo in Opposition Defendant's MSJ, p. 3. It is true restrictive covenants prohibiting an employee from soliciting an employer's clients are enforceable. However, as shown in the above cases, each non-compete covenant must be judged on its own particular language. In *Hansen*, the Idaho Court of Appeals held a non-compete clause stating the employee could not "directly or indirectly, solicit or accept insurance or bond business from, or perform any of the services included within the Insurance Associates business for any Insurance Associates customer with whom he has had business or personal relations during the term of this Agreement" was valid. 111 Idaho 207, 209, 723 P.2d 190, 193. The Idaho Court of Appeals focused primarily on the language regarding "customer[s] with whom he has had a business or personal relations during the term of this Agreement", clarifying *any* contacts developed as customers after the agreement date belonged to the company, not the employee, regardless of whether the employee had

communicated with or had information relating to the customer prior to the execution of the agreement. *Id*. However, the Idaho Court of Appeals did not address the "services" language of the non-compete clause. *Id*.

In *Marshall*, the non-compete was for a medical practice and states the defendant "shall not practice medicine or surgery within a radius of twenty-five (25) miles from Twin Falls, Idaho for a period of three (3) years immediately following such separation." 81 Idaho 199, 201, 339 P.2d 504, 505. The Idaho Supreme Court did cite the rule set forth in Minnesota, that "the territorial scope of a restrictive covenant will be held reasonable if the area of the restraint is not broader than the territory throughout which the employee during the term of his employment was able to establish contact with his employer's customers. *Marshall*, 81 Idaho 199, 206, 339 P.2d 504, 508. However, it is important to note *Marshall* was a case dealing with the medical profession and specifically situations in which doctors who work in a medical partnership leave the partnership and, to that end, the Idaho Supreme Court focused on cases dealing with that same situation, which include rules specifically targeting that situation. Such is distinguishable from the case here, as this is not a case of a medical profession but of a bank employer/employee relationship. Also, in *Marshall*, the territorial scope was made clear, whereas here, it was not mentioned at all. ITB argues a geographic restriction was not necessary here because ITB is a State of Idaho chartered commercial bank with the authority to exercise fiduciary powers and so is limited to doing business from branches located within Idaho only. Memo in Opposition Defendant's MSJ, pp. 8-9. ITB claims Ross knew of this and knew ITB had branches only in Coeur d'Alene and Boise, so a restriction was not warranted. *Id*. at 9. However, it is difficult to see how this "implied" restriction is reasonable, given Ross appears to have only worked in the Coeur d'Alene

branch, yet is restricted from providing similar services to any ITB client in the State of Idaho with whom he had contact. ITB's argument is not persuasive.

If this Court determines the covenants not to compete are unreasonable as written, the Idaho Supreme Court has sanctioned the modification of otherwise unreasonable covenants not to compete. *Pinnacle*, 135 Idaho 364, 369, 17 P.3d 308, 313. However, a covenant not to compete may not be modified to make it reasonable if the covenant is "so lacking in the essential terms which would protect the employee" such that the trial court is no longer modifying but rewriting the covenant. *Id*. The Court of Appeals held in *Pinnacle* the covenant not to compete failed to reasonably limit the geographical area, the prohibited "services" and the clients, and to make the covenant reasonable, the trial court would have been required to rewrite essentially the entire covenant, so the district court did not err in refusing to modify the covenant. 135 Idaho 364, 370, 17 P.3d 308, 314. The Supreme Court in *Freiburger* refused to hold the district court erred in refusing to modify the covenant because in that case, it concluded it would be necessary "not only to strike some of the words of the Covenant, but in addition, to add clauses relating to good will and relationships between Freiburger and the clients and defining the parameters of what services Freiburger would be prohibited from providing to J-U-B clients." 141 Idaho 415, 423, 111 P.3d 100, 108.

In this case, the covenant in the February Incentive Plan Addendum and April Insurance Only Agreement lack similar details as the covenants in *Pinnacle*, *Freiburger*, and *AMX*. Without those details, this Court would be forced to essentially rewrite the covenant to be reasonable. Under Idaho case law, the Court should not abuse its discretion and modify the covenants in the February Incentive Plan Addendum and April Insurance Only Agreement, at least not at this summary judgment juncture. There is at

least an issue of fact as to whether or not the non-compete agreements were supported by consideration, and an issue of fact as to whether the terms are reasonable. Accordingly, both ITB's motion for partial summary judgment and Ross' motion for summary judgment must be denied at this time.

B. Analysis Under Idaho's "Agreements and Covenants Protecting Legitimate Business Interests", I.C. §§ 44-2701 – 44-2704.

ITB argues this case falls under Title 44, Chapter 27 of the Idaho Code, dealing with agreements and covenants protecting legitimate business interests.

Idaho Code § 44-2701 states:

> A key employee or a key independent contractor may enter into a written agreement or covenant that protects the employer's legitimate business interests and prohibits the key employee . . . from engaging in employment or a line of business that is in direct competition with the employer's business after termination of employment, and the same shall be enforceable, if the agreement or covenant is reasonable as to its duration, geographical area, type of employment, or line of business, and does not impose a greater restraint than is reasonably necessary to protect the employer's legitimate business interests.

I.C. § 44-2701. "Key employees" are defined as:

> [t]hose employees . . . who, by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customer vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests.

I.C. § 44-2702(1). There are a number of rebuttable presumptions in this legislation, including:

> (1) Under no circumstances shall a provision of such agreement or covenant, as set forth herein, establish a postemployment restriction of direct competition that exceeds a period of eighteen (18) months from the time of the key employee's . . . termination unless consideration, in addition to employment or continued employment, is given to a key employee. . .
> (2) It shall be a rebuttable presumption that an agreement or covenant with a postemployment term of eighteen (18) months or less is reasonable as a duration.

* * *

> (4) It shall be a rebuttable presumption that an agreement or covenant is reasonable as to type of employment or line of business if it is limited to the type of employment or line of business conducted by the key employee . . . while working for the employer.
> (5) It shall be a rebuttable presumption that an employee . . . who is among the highest paid five percent (5%) of the employer's employees . . . is a "key employee" . . . To rebut such presumption, an employee . . . must show that it has no ability to adversely affect the employer's legitimate business interests.

I.C. § 44-2704. "Legitimate business interests" are defined as including:

> [A]n employer's goodwill, technologies, intellectual property, business plans, business processes and methods of operation, customers, customer lists, customer contacts and referral sources, vendors and vendor contacts, financial and marketing information, and trade secrets . . .

I.C. § 44-2702(2).

ITB claims Ross was a key employee because he was a highly compensated employee, in the top five percent of annual compensation for ITB for the aggregate years of 2007-2012. Memo in Support Plaintiff's MPSJ, p. 2; Affidavit of Thomas Prohaska in Support of Motion for Partial Summary Judgment, p. 2, ¶ 2. However, this statement by Prohaska is conclusory. There is no indication as to how many employees ITB had at the time. There is no spreadsheet showing their annual compensation relative to Ross' annual compensation. ITB also states his regular contact with ITB clients helped him nurture and develop relationships with those clients and Ross had the ability to harm ITB's business interest in its clients through his inside knowledge of ITB's pricing and business plans as well as the trust of ITB's clientele. *Id*. at 15. ITB claims Ross used such inside knowledge and relationships to take away ITB clients. *Id*.

Ross argues I.C. § 44-2702 does not apply to him because he was not a "key employee" of ITB. Memo in Support of Defendant's MSJ, p. 14. In that argument in briefing, Ross cites to "Ross Aff. at ¶ 7". *Id.* A review of the "Affidavit of Bryan Ross in Support of Motion for Summary Judgment" shows that nowhere in paragraph seven of

Ross' affidavit does he discuss this subject. In Ross' briefing, Ross also cites to his "Statement of Undisputed Facts in Support of Bryan Ross's Motion for Summary Judgment and Discussion of the Common Law and Statues Related to Restrictive Covenants", which in turn cites to paragraph six of Ross' affidavit, for that same proposition that he was not a "key employee" of ITB. A review of paragraph six shows Ross states: "While at ITB, I was not one of the top 5% of the highest paid employees." Affidavit of Bryan Ross in Support of Motion for Summary Judgment, p. 2, ¶ 6. However, Ross' statement is just as conclusory as Prohaska's. Ross does not mention how many employees ITB had, who the employees were that made more than he did and who made less.

Both sides disagree that Ross was in the highest paid 5% of ITB's employees. While ITB provides in Prohaska's response affidavit a chart of employees listing Ross as a Private Banker and Vice President and states on the last day of his employment Ross was only one of three persons holding the title of Vice President at ITB, it does not provide any proof of compensation to show Ross was in the top 5% of paid employees at ITB. Ross, for his part, simply states he was not in the top paid 5% and submits no proof to that effect. Without more definitive proof, whether or not Ross was presumed to be a "key employee" by virtue of his compensation being in the top 5% at ITB is a dispute of material fact which cannot be decided at summary judgment.

However, ITB does not simply argue Ross was in the top paid 5%, but also claims Ross satisfies the definition of "key employee" under I.C. § 44-2701. Memo in Opposition Defendant's MSJ, pp. 4-5. Again, that statue reads:

> [t]hose employees . . . who, by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customer vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility,

> notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests.

To support this position, ITB states Ross was: 1) placed in a position to develop relationships with ITB clients, 2) consulted about and participated in key corporate strategic decisions such as facilities management, branch location and shareholder communications, 3) communicated with regularly by ITB's President on client, marketing and operational issues, and 4) selected to assist in the maintenance and retention of important client and professional referral source relationships. Memorandum in Opposition Defendant's Motion for Summary Judgment, pp. 4-5; Memorandum in Support of Motion for Partial Summary Judgment, p. 5, citing Affidavit of Thomas Prohaska, p. 2, ¶ 3. ITB also claims the ITB clients serviced by Ross during his employment who have since transferred their business to Wells Fargo represented almost fourteen million dollars in assets and over one hundred thousand dollars in fees, making Ross' ability to harm ITB not only a possibility, but a reality. Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 5-6.

While Ross does not address these specific allegations in his reply, he does generally address the claim he has inside knowledge regarding ITB's pricing and business plans and by way of his position has nurtured and developed relationships with clients. Ross argues he cannot be a "key employee" under the statute because ITB's employees and ITB cannot show his inside knowledge, influence, credibility, notoriety, fame, reputation or public persona were acquired and/or developed "by reason of ITB's investment" during the course of his employment with ITB. Memo in Support of Defendant's MSJ, p. 14. Ross states his knowledge was acquired, not as a result of his employment at ITB, but as a result of working in the financial industry for seventeen years in the Coeur d'Alene community prior to working at ITB. *Id.,* pp. 14-15. Ross

claims his skills and attributes were developed by reason of his previous employers' investment, not ITB's, so I.C. § 44-2701 does not apply. *Id*. at 15. Ross also argues ITB does not have a legitimate business interest in the clients in dispute as they were clients of Ross who followed him from D.A. Davidson or were the result of personal contacts with Ross. *Id*. at 15-16.

Unfortunately, there are no Idaho cases which help to further define "key employees." In any event, there is certainly a dispute of material fact as to whether Ross is a "key employee" under I.C. § 44-2701.

There seems to be no question Ross was in a position to financially harm ITB, as many of ITB's clients followed Ross to Wells Fargo and those client accounts represented almost fourteen million dollars in assets. However, there is also no question that some of those people followed Ross from D.A. Davidson to ITB. The question is whether Ross "gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona" as a representative of ITB by reason of ITB's investment of time, money, trust, etc. There is disagreement between the parties as to whether Ross gained his knowledge as a result of ITB's investment or prior employers' investments.

As stated above, Ross was an employee at ITB for twelve years. Ross states he has been a fixture in the Coeur d'Alene financial industry for seventeen years. Memo in Support Defendants' MSJ, p. 15. Ross also states he was employed at D.A. Davidson for thirteen years. Defendant Statement of Facts, p. 2. It is likely many of the skills Ross has developed are a result of his employment with D.A. Davidson. However, it is just as likely there are skills Ross has developed in his time with ITB. By reason of his position at ITB of Vice President, it is reasonable to assume Ross was privy to inside information regarding client accounts, business practices at ITB. ITB also states Ross

participated in key corporate strategic decisions, regularly communicated with ITB's president regarding client, marketing and operational issues and assisted in the maintenance and retention of important client and professional referral source relationships. Memo in Opposition Defendant's MSJ, p. 5. In addition, Prohaska, in his affidavit, states Ross, on a number of occasions, gave presentations on behalf of ITB to the public and submitted as exhibits the powerpoints Ross used in those presentations. Prohaska MSJ Aff., p. 4, Exhibits 1-3. None of these facts have been disputed by Ross. However, it would be a quantum leap, at least at this point in the litigation, based on the affidavits presented to the Court, for the Court to conclude as a matter of undisputed fact that Ross, while working at ITB, "…gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer," and that he did so "by reason of the employer's [ITB's] investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customer vendors or other business relationships during the course of employment," when Ross claims that he already had all that knowledge, influence, notoriety, reputation, when he went from D.A. Davidson to ITB.

Based on the above, this Court cannot conclude there is no reasonable dispute of material fact as to whether Ross was a "key employee" of ITB for purposes of I.C. § 44-2701. As of this juncture, whether Ross was a "key employee" of ITB will be an issue for the jury to decide.

However, Ross' status as a key employee does not conclude the analysis. Under I.C. § 44-2701, a key employee may enter into a noncompete covenant if the covenant is "reasonable as to its duration, geographical area, type of employment, or line of business, and does not impose a greater restraint than is reasonably necessary to

protect the employer's legitimate business interests." As the analysis above under Idaho case law shows, there is no geographical restriction and the type of services restricted is overbroad, so it is likely it imposes a greater restraint than is reasonably necessary to protect ITB's legitimate business interests. Ross also argues the timeline is overbearing as the statutory maximum time allowed is eighteen months. However, that maximum can be exceeded if there is consideration for such. I.C. § 44-2704. Consideration is also an issue, but as stated above, there is a reasonable argument the covenant in the April Insurance Only Agreement was made with the consideration of the commission structure. As to all of these deficiencies, the Idaho Legislature in the "Agreements and Covenants Protecting Legitimate Business Interests", incredibly, made it mandatory for the Court to restrict or modify each deficient aspect of the agreement. Idaho Code § 44-2703 reads in its entirety:

> **Construction and enforcement.** To the extent any such agreement or covenant is found to be unreasonable in any respect, a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified.

This turns normal interpretation of an agreement upon its head. A literal reading of that statute indicates that even if *every* provision in a restrictive covenant fails, the court *shall* "limit or modify" the agreement. It is understandable that when a provision in an agreement is overbroad, the statute requires a court to then "limit" an agreement. But the statute also requires that when a term in the agreement is *missing*, the court is then required to "modify" an agreement by inserting terms. This statute mandates the judicial re-writing of contracts, an idea certainly not incorporated in common law. Under common law, courts "may" "blue-pencil" or limit an agreement, a discretionary act which courts are reluctant to do; however, under this new Idaho statute, courts "must" "blue-

pencil" the agreement. At the present time, this Court need not reach that issue. If a jury finds Ross to be a "key employee", either via the presumption in I.C. § 44-2704(5), or under the statutory definition of I.C. § 44-2704(1), then it would appear that under I.C.§ 44-2703, it is the Court, not the jury, that will make the appropriate limitations and modifications.

V. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny both motions for summary judgment.

IT IS HEREBY ORDERED ITB's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED Ross' Motion for Summary Judgment is DENIED.

Entered this ____ day of June, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Scott M. Ludwig	208-387-1999	Keely E. Duke	208-342-3299

_____
Jeanne Clausen, Deputy Clerk