

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BIMBO BAKERIES USA, INC.,)	CIVIL ACTION NO. 2:10-cv-00194-RBS
)	
Plaintiff,)	
vs.)	
)	
CHRIS BOTTICELLA,)	
)	
Defendant.)	

**DEFENDANT CHRIS BOTTICELLA’S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant Chris Botticella submits the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Mr. Botticella is a senior-level bakery operations executive who began working for Plaintiff Bimbo Bakeries USA, Inc. (“BBakeries”) in 2001. Hr’g Tr. 131:4-12, Jan. 25, 2010. He has worked in the baking industry for more than thirty-eight years. *Id.* 80:4-5.
2. In eight-plus years of employment with BBakeries, Mr. Botticella received uniformly excellent performance evaluations, and his honesty and loyalty to the company were never questioned. *Id.* 131:13-132:3.
3. In or about January 2009, BBakeries merged with or acquired the baked goods unit of George Weston Ltd. Through this transaction, BBakeries acquired certain facilities at which Thomas’ English Muffins ® are manufactured. *Id.* 93:8-12.

4. In 2009, Mr. Botticella was the Vice President of BBakeries' operations for California. *Id.* 68:5-8.

5. Because BBakeries' western operations were not profitable as of January 2009, BBakeries executives including Mr. Botticella and Senior Vice President Daniel Babin embarked on a painful learning process following the January 2009 transaction, the goal of which was to increase the profitability of these western operations. *Id.* 92:5-93:3.

6. Mr. Botticella grew unhappy with BBakeries over the course of the year 2009 due to the painfulness of this process. *Id.* 134:7-19.

7. On September 28, 2009, Interstate Brands Corporation, another bakery company, which later changed its name to Hostess Brands, Inc. ("Hostess"), offered Mr. Botticella a new employment position as its VP Bakery Operations, East, which he accepted on or about October 15, 2009. BBakeries Hr'g Ex. 3; C. Botticella Dep. 78:12-15, Jan. 21, 2010.

8. The new position at Hostess was to pay \$200,000.00 per year, which would constitute a pay cut of \$50,000.00 per year compared to his salary with BBakeries and require a relocation from California to Texas. Hr'g Tr. 134:20-24; BBakeries Hr'g Ex. 3.

9. BBakeries and Hostess are two of only four major competitors in the baking industry. Hr'g Tr. 66:24-67:3.

10. Mr. Botticella chose to remain with BBakeries until January 2009 for two reasons: to ensure that he would receive his bonus for 2009 and to complete two BBakeries projects for which he had responsibility. *Id.* 132:18-133:12; C. Botticella Dep. 119:08-24, 120:11-121:11.

11. On December 7, 2009, Hostess directed Mr. Botticella to execute an “Acknowledgment and Representation Form,” which stated that Mr. Botticella would not share any confidential or proprietary BBakeries information with Hostess after beginning his new employment there, and that Hostess’ management was not interested in obtaining any such information from Mr. Botticella. BBakeries Hr’g Ex. 7.

12. On January 4, 2010, Mr. Botticella informed his supervisor, Joe Dangelmeier, that he was planning to leave BBakeries effective January 15, 2010. BBakeries Hr’g Ex. 4.

13. There is no evidence that anyone at BBakeries asked Mr. Botticella at this time where he would be going, nor is there any evidence that Mr. Botticella ever denied that he would be joining Hostess.

14. The parameters of Mr. Botticella’s rights to compete against BBakeries are set forth in a “Confidentiality, Non-Solicitation and Invention Assignment Agreement.” BBakeries Hr’g Ex. 8. This agreement prohibits Mr. Botticella from competing against BBakeries only during his employment with BBakeries. *Id.* ¶ 2. Following the cessation of employment with BBakeries, Mr. Botticella is prohibited only from using or disclosing BBakeries’ business information, and soliciting employees or customers. *Id.* ¶¶ 3-5.

15. There is no evidence that Mr. Botticella’s new position with Hostess would involve any responsibility for English muffin production. Hr’g Tr. 129:15-130:2.

16. There is no evidence regarding what Mr. Botticella’s responsibilities will be in his new position at Hostess.

17. There is therefore no evidence that it will be impossible for Mr. Botticella to perform his job at Hostess without using or divulging confidential information of BBakeries.

18. During his last month of employment with BBakeries, consistent with the terms of the “Acknowledgment and Representation Form” that he had executed for Hostess on December 7, 2009, Mr. Botticella deleted all confidential materials that he would receive from BBakeries’ sales department, without reading them. BBakeries Hr’g Ex. 7; C. Botticella Dep. 91:21-92:12. Mr. Botticella also made an effort not to look at certain other confidential BBakeries documents during this time period. C. Botticella Dep. 125:11-20, 126:7-9.

19. During the holiday season immediately prior to the cessation of his employment with BBakeries, Mr. Botticella undertook to delete any of his personal materials that were stored on his company laptop. *Id.* 131:21-133:21. These materials included his résumé, pictures, and old presentations on which he had worked in the past. *Id.* 132:17-24; Hrg. Tr. 48:12-16.

20. In the process of deleting such personal materials, Mr. Botticella accidentally deleted certain work files. C. Botticella Dep. 132:3-16, 133:15-17. As a result, he then asked BBakeries’ information technology specialist to restore the files. *Id.*

21. During his final month at BBakeries, Mr. Botticella also used an external device to practice his computer skills — specifically, transferring files. *Id.* 138:18-139:2.

22. The evidence observed by BBakeries’ computer forensic expert, Brian Harris, is consistent with this type of usage. Hr’g. Tr. 47:19-48:6.

23. Many of the files on which Mr. Botticella practiced were stale or nonconfidential. *Id.* 50:23-51:3, 52:2-53:20.

24. There is no evidence that Mr. Botticella retained possession of any confidential documents when he left his employment at BBakeries.

25. All access to documents on Mr. Botticella's computer took place during BBakeries' normal business hours. *Id.* 50:13-22.

CONCLUSIONS OF LAW

1. To obtain a preliminary injunction, a movant must establish that (a) success on the merits is likely, (b) irreparable injury will result if the requested injunction is denied, (c) granting the injunction will not cause even greater harm to the non-movant, and (d) the public interest favors the granting of injunctive relief. *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006).

2. It is not likely that BBakeries will succeed on the merits in this case. BBakeries' request for this Court to enjoin Mr. Botticella from working for Hostess is premised on its allegation that, in the absence of an injunction, it would be inevitable for Mr. Botticella to disclose confidential BBakeries trade secrets to Hostess in the course of that employment.

3. The "inevitable disclosure" doctrine is inapplicable to this matter and BBakeries should not be permitted to rely upon the doctrine as support for its preliminary injunction request. BBakeries memorialized the parameters of Mr. Botticella's right to compete in its "Confidentiality, Non-Solicitation and Invention Assignment Agreement" of March 13, 2009, which prohibited Mr. Botticella from competing against BBakeries only while employed

by BBakeries. BBakeries Hr'g Ex. 8. The agreement did not place any restrictions upon Mr. Botticella's rights to seek or obtain employment from competitors following the cessation of his employment with BBakeries, provided that he not use or disclose confidential information of BBakeries and that he refrain from soliciting BBakeries' customers and employees. *Id.* Considering that BBakeries had every opportunity to restrict Mr. Botticella's post-employment rights to compete but freely chose not to add such language to its own agreement, it was clearly the intent of both BBakeries and Mr. Botticella to allow Mr. Botticella to compete after leaving BBakeries' employ, subject only to the confidentiality and non-solicitation restrictions in the agreement. This clearly expressed contractual intent should trump a loose application of the inevitable disclosure doctrine.

4. Further, under Pennsylvania law, employee non-compete agreements are disfavored "as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co.*, 570 Pa. 148, 157, 808 A.2d 912, 917 (2002). Thus, they are strictly construed, *Harry Blackwood, Inc. v. Caputo*, 434 A.2d 169, 170 (Pa. Super. 1981), and are enforceable only if, among other things, they are reasonably limited in time and geographic scope. *Bilec v. Auburn & Assoc. Pension Trust*, 588 A.2d 538, 541 (Pa. Super. 1991). Plaintiff's request that the Court enjoin Mr. Botticella from working for Hostess is, in essence, a request that the Court rewrite the contract between the parties, in derogation of the above-stated principles.

5. Moreover, even if it assumed *arguendo* that the inevitable disclosure doctrine applies to this case, BBakeries is not entitled to a preliminary injunction because it has failed to satisfy the doctrine's requirements.

a. As discussed in greater detail in Mr. Botticella's bench memorandum of January 22, 2010, under Pennsylvania law, a former employer may obtain an injunction barring a former employee from accepting new employment based on a theory of "inevitable disclosure" only if the former employer establishes that it "would be impossible for the employee to perform his duties at the new employer without disclosing trade secrets." *Bacharach, Inc. v. Testo, Inc.*, No. 1257 WDA 2009, at 9 (Pa. Super. Sept. 4, 2001) (copy of opinion attached hereto as Exhibit A) (explaining and applying *Air Prods. & Chems., Inc. v. Johnson*, 442 A.2d 1114 (Pa. Super. 1982)).¹ It is insufficient even if the former employee establishes that its former employee is likely to disclose such trade secrets. *Id.*; see also *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007).

b. Here, BBakeries has failed to establish even that disclosure by Mr. Botticella to Hostess will be likely upon the commencement of his new employment, let alone impossible to avoid. Indeed, BBakeries has failed to introduce any evidence showing that Mr. Botticella's new job duties would be similar to those he had with BBakeries, or even any evidence describing what those new job duties will be (other than the admission of BBakeries' witness, Mr. Babin, that Mr. Botticella will have no responsibility for English muffins at Hostess). Hr'g Tr. 129:15-130:2. Thus, BBakeries has fallen woefully short of sustaining its

¹ Even in *Air Products*, the court did not prevent the employee from working for a competitor. To the contrary, the trial court ruled that the defendant (Mr. Johnson) *could* commence working for the new employer (Liquid Air), but simply enjoined Liquid Air from employing Mr. Johnson in its "on-site operations," which represented one small component of the new employer's business. 442 A.2d at 1115-6. The Superior Court affirmed that ruling.

burden of proving that Mr. Botticella would inevitably use or disclose its trade secrets and confidential information during his employment with Hostess.

c. There is also no evidence that Mr. Botticella has any inclination to provide Hostess with confidential information from BBakeries. Mr. Babin admitted that in eight-plus years of employment with BBakeries, Mr. Botticella received uniformly excellent performance evaluations, and that his honesty and loyalty to the company were never questioned. *Id.* 131:13-132:3. Likewise, there is no evidence that Mr. Botticella retained any confidential documents when he left BBakeries. Even BBakeries' own computer forensic expert, Mr. Harris, testified that Mr. Botticella's computer usage was consistent with his testimony that he only used a thumb drive to practice file transfers, that all such activity took place during BBakeries' normal business hours, and that many of the files on which Mr. Botticella practiced were stale or nonconfidential. *Id.* 47:19-48:6, 50:13-51:3, 52:2-53:20. In addition, Mr. Botticella demonstrated that he had no inclination to divulge confidential information to Hostess when he signed Hostess' "Acknowledgment and Representation Form" on December 7, 2009. BBakeries Hr'g Ex. 7.

6. For the same reasons discussed above, BBakeries has also failed to show that it would suffer irreparable injury in the absence of an injunction. BBakeries has failed to introduce any evidence of what Mr. Botticella's new job duties will be. Thus, there is no evidence in this record that would support a finding of this Court that Mr. Botticella's performance of his duties at Hostess will cause *any* injury, let alone irreparable injury, to BBakeries.

7. Similarly, BBakeries cannot dispute that granting the injunction will cause even greater harm to Mr. Botticella. As Mr. Babin himself acknowledged in his testimony

before the Court, Mr. Botticella has worked in the baking industry for more than thirty-eight years. Hr'g Tr. 80:4-5. Hostess and BBakeries are two of only four competitors in the baking industry. *Id.* 66:24-67:3. The number of executive-level positions within Mr. Botticella's expertise is therefore extremely limited, and even if a position were available with one of the other two competitors in the industry, BBakeries would presumably seek to enjoin Mr. Botticella from being employed there as well. BBakeries' motion for an injunction preventing Mr. Botticella from working for Hostess is therefore equivalent for all practical purposes to a request to prevent Mr. Botticella from being employed at all.

8. Finally, BBakeries cannot establish that public policy favors its request for a preliminary injunction. Pennsylvania law clearly disfavors non-compete agreements and closely construes them against employers. *See, e.g., Hess v. Gebhard Co.*, 769 A.2d 1186, 1191 (Pa. Super. 2001), *rev'd on other grounds*, 570 Pa. 148, 157, 808 A.2d 912, 917 (2002). An expansive interpretation of the inevitable disclosure doctrine would be inconsistent with these settled legal principles.

9. Accordingly, BBakeries has failed to satisfy any of the prerequisites for obtaining a preliminary injunction and its request must be denied.

Respectfully submitted,

/s/ Elizabeth K. Ainslie

Elizabeth K. Ainslie (Pa. I.D. No. 35870)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000

Counsel for Defendant Chris Botticella

Dated: January 29, 2010.

EXHIBIT A

J. A22027/01

BACHARACH, INC.,
Appellant

v.

TESTO, INC., JAMES E. BURKE,
JOHN W. FIGAN, JAMES E. PRITCHARD
and WILLIAM P. SPOHN
Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1257 WDA 2000

Appeal from the Order dated June 27, 2000,
Court of Common Pleas, Allegheny County,
Civil Division at No. GD 99-20135.

BEFORE: DEL SOLE, P.J., JOHNSON, and BECK, JJ.

FILED SEP 4 2001

MEMORANDUM:

Bacharach, Inc. appeals the trial court's order refusing a preliminary injunction against Testo, Inc., and the individual defendants. Bacharach seeks to prevent Testo's employment of the respective individuals, all of whom are former Bacharach employees, on the basis that Testo obtained their services by raiding Bacharach's key employees in an effort to seize trade secrets and market share. Bacharach also seeks enforcement of restrictive covenants to which the employees agreed prior to or during their employment with Bacharach. The court concluded that Bacharach's evidence failed to satisfy multiple elements of proof necessary for entry of an injunction. Bacharach contends that the court failed to apply controlling

law and entered findings of fact unsupported by the evidence. For the following reasons, we affirm.

This matter arises out of a trade dispute between two manufacturer/suppliers of heating, ventilation, and air conditioning (HVAC) components for the commercial market. Bacharach, a Delaware corporation headquartered in Pittsburgh, was at the time of these events the dominant provider of such components in the North American market. Testo, the American subsidiary of a German corporation, marketed some products similar to Bacharach's, but controlled only a small segment of the North American market. James E. Burke, John W. Figan, James E. Pritchard, and William P. Spohn are currently employed by Testo at the level of regional marketing director or higher. Each of them was previously employed by Bacharach in a similar capacity. Figan, Pritchard, and Spohn were subject to restrictive covenants that purported to govern their respective rights to engage in employment with one of Bacharach's competitors and/or to use or divulge Bacharach's "trade secrets."

In May 1998, Spohn, who was Bacharach's "Director of Strategic and New Product Planning," left Bacharach's employ and went to work for a third party, where he remained until July 1999. That same month, after several months of preliminary negotiations, Spohn accepted employment with Testo as director of all Testo's sales and marketing efforts in North America.

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Subsequently, Spohn spoke with Pritchard and Burke about coming to work for Testo. In turn, Burke apprised Figan of Testo's hiring needs and Figan submitted his application for employment at Testo. Testo offered employment to each of the three men and all accepted, submitting their resignations to Bacharach on November 9, 1999. Notwithstanding a four-month restriction on employment by a competitor specified by their prior employment agreements, Pritchard and Figan started work with Testo immediately. Each man assumed primary responsibility for marketing Testo's products in a large segment of the North American market that corresponded with the territory for which he had been responsible while employed by Bacharach.

Bacharach commenced the underlying action on December 3, 1999, by "Verified Complaint in Equity" asserting as causes of action unfair competition, theft of trade secrets, breach of restrictive covenants, tortious interference, and civil conspiracy. With its complaint, Bacharach filed a "Motion for Special and/or Preliminary Injunction" pursuant to Pa.R.C.P. 1531 seeking to prevent Testo's continued employment of Pritchard, Burke, and Figan and Testo's solicitation of any customer that was then, or ever had been, a customer of Bacharach. Following expedited discovery, the trial court convened a hearing before the Honorable Judith L. A. Friedman on Bacharach's motion for preliminary injunction. Following six days of

testimony, Judge Friedman issued Findings of Fact and Conclusions of Law determining that the evidence adduced at the hearing failed to establish Bacharach's entitlement to injunctive relief. Consequently, on June 27, 2000, the court denied Bacharach's motion for preliminary injunction. Bacharach filed this appeal.

Bacharach presents the following questions for our review:

- I. Whether the Honorable Trial Judge abused her discretion and/or committed an error of law by failing to file and/or apply the rule set forth by the Pennsylvania Supreme Court in ***Morgan's Home Equipment v. Martucci***, 390 Pa. 618, 136 A.2d 838 (1957).
- II. Whether the Honorable Trial Judge erred when she failed to follow and/or apply ***Air Products & Chemicals v. Johnson***, 296 Pa. Super. 405, 44[2] A.2d 1114 (1982) and failed to enjoin Burke, Pritchard, Cole and Figan from commencing employment at Testo despite evidence that disclosure of Bacharach's trade secrets is "inevitable"?
- III. Whether the Honorable Trial Judge erred when she misapplied ***Air Products & Chemicals v. Johnson*** by admitting improper character evidence concerning the trustworthiness of Burke, Pritchard, Figan and Spohn?
- IV. Whether the Honorable Trial Judge abused her discretion by making findings of fact and conclusions of law not supported by the record?
- V. Whether the Honorable Trial Judge abused her discretion and/or committed an error of law by improperly admitting evidence relating to and/or concerning Burke, Pritchard and Figan's state of mind prior to their resignations on November 9, 1999?

- VI. Whether the Honorable Trial Judge abused her discretion and or committed an error of law when she failed to enforce the restrictive covenants applicable to Spohn, Pritchard, Figan and Cole?

Brief for Appellant at 4.

Bacharach's questions on appeal raise issues of trial court error arising from the court's refusal to enter a preliminary injunction. Our standard of review of such questions is exceptionally narrow, granting substantial deference to the chancellor's determinations. "[A]n appellate court's review of the grant or denial of a preliminary injunction is limited to a determination of whether any apparently reasonable grounds existed for the action taken by the trial court[.]" ***Sovereign Bank v. Harper***, 674 A.2d 1085, 1091 (Pa. Super. 1996). "We are bound by the chancellor's findings of fact, and may not revisit the merits of the underlying controversy." ***West Penn Specialty MSO, Inc. v. Nolan***, 737 A.2d 295, 299 (Pa. Super. 1999). Accordingly, "[w]e may interfere with the chancellor's decision only if the certified record reveals that *no grounds* exist to support the decree, or that the rule of law upon which the court relied was palpably erroneous or misapplied." ***Id.*** (emphasis added).

As a general matter, the chancellor may grant a preliminary injunction only if: 1) the plaintiff's right to relief is clear as a matter of controlling law; 2) the need for relief is immediate; and, 3) the plaintiff will sustain

irreparable injury if the injunction is not granted. *See Harper*, 674 A.2d at 1091 (quoting *Willman v. Children's Hospital of Pittsburgh*, 479 A.2d 452, 454 (Pa. 1984)). "An injury is regarded as 'irreparable' if it will cause damage that can be estimated only by conjecture and not by an accurate pecuniary standard." *Nolan*, 737 A.2d at 299.

In support of its first question on appeal, Bacharach asserts that the chancellor erred, ostensibly as a matter of law, in failing to apply our Supreme Court's decision in *Morgan's Home Equipment v. Martucci*, 136 A.2d 838 (Pa. 1957). *Morgan's Home* provides, in part, that a business entity may not expropriate the employees of a competitor as a means to obtain that competitor's confidential business data, or "trade secrets." Accordingly, we interpret Bacharach's assertion of *Morgan's Home* to state that the chancellor failed to recognize or apply caselaw proscribing certain conduct by an employer to obtain the services of members of a competitor's workforce. Brief for Appellant at 18-19

The rule in *Morgan's Home* to which Bacharach cites provides as follows:

The systematic inducing of employee[e]s to leave their present employment and take work with another is unlawful when the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employee[e]s. So also, when the inducement is made for the purpose of having the employee[e]s commit wrongs, such as disclosing their former

employer's trade secrets or enticing away his customers, the injured employer is entitled to protection.

Morgan's Home, 136 A.2d at 847. Upon review of the chancellor's memorandum, we find Bacharach's assertion of legal error unsupported. The chancellor's conclusions, in fact, mirror the foregoing rule. The chancellor concluded: "By offering employment to Spohn, Burke, Figan and Pritchard, Testo *did not intend to cripple and destroy* Bacharach. . . . Testo did not hire Burke, Figan and Pritchard for the purpose of having them *commit wrongs, such as disclosing Bacharach's trade secrets or enticing away customers.*" Memorandum in Support of Order, 7/14/00, at 16 (¶¶98, 99). Accordingly, Bacharach's assertion that the chancellor failed to apply the law as stated in ***Morgan's Home*** is without foundation. Bacharach's further suggestion that the chancellor's failure to reference ***Morgan's Home*** by name constitutes some form of error, Brief for Appellant at 18-19, is unsupported by reference to authority and as such bears no further discussion.

Upon further review, we conclude that Bacharach's lengthy argument in support of this first issue amounts primarily to an assertion that the chancellor's adjudication is against the weight of the evidence. Bacharach's analysis of the record, while rendered in exhaustive detail, demonstrates only that evidence was adduced to support a disposition contrary to the one

the chancellor ultimately reached; it does not discuss how or why the evidence on which the court relied does not support her findings. **See** Brief for Appellant at 21-29. The fact that evidence of record is consistent with an alternative disposition does not constitute a deficiency in the disposition the chancellor reached, and so does not demonstrate reversible error. So long as the record provides "any apparently reasonable grounds" for the chancellor's decision, we are compelled to affirm. **See *Sovereign Bank v. Harper***, 674 A.2d at 1091. Thus, the evidence Bacharach advances, that Testo engaged in a process of "raiding" Bacharach's key employees, cannot establish grounds for reversible error so long as other evidence supports the chancellor's conclusion. Because Bacharach has failed to demonstrate or even to discuss the deficiency of the evidence *on which the court relied*, we find neither error of law in the court's application of the principles of ***Morgan's Home***, or abuse of discretion in its consideration of the evidence relative to this issue.

In its second question, Bacharach contends that the chancellor erred in refusing to enjoin Burke, Pritchard, Figan, and another employee named MaLou Cole, from commencing employment with Testo because each employee inevitably would disclose Bacharach's trade secrets to Testo. In support of its reliance on this "inevitable disclosure" theory, Testo cites our

decision in ***Air Products & Chemicals, Inc. v. Johnson***, 442 A.2d 1114 (Pa. Super. 1982).

Initially, we must dispel the notion, implicit in Bacharach's argument, that our holding in ***Air Products*** enshrines the "inevitable disclosure" doctrine as an inviolable rule of law. In ***Air Products***, we concluded merely that the trial court did not commit reversible error in applying this doctrine to help define the injury necessary for issuance of an injunction. The following discussion is illustrative:

[The appellants] contend that inevitability of disclosure is not the proper standard by which the trial court can determine that it was clear that an immediate and irreparable injury would result unless an injunction issued. *While we do not adopt the reasoning of the trial court or its use of the term inevitable, we are unable to find that the trial court committed reversible error.* The lower court held that: "It would be impossible (for [the appellant employee]) to perform his managerial functions in on-site work without drawing on knowledge he possesses of Air Products' confidential information." We are satisfied that this expression of its determination of the likelihood of disclosure was proper. The court reasoned that the duties which [the appellant employee] was to perform at Liquid Air would make it impossible for [that employee] not to disclose trade secrets. . . . Accordingly, we hold that the trial court acted reasonably when it issued a preliminary injunction.

Air Products, 442 A.2d at 1124-25 (emphasis added, internal citations omitted). Thus, our endorsement of the concept of inevitable disclosure was conditioned both upon the specific facts raised in ***Air Products*** and the limitations of our standard of review. Accordingly, Bacharach's assertion

that the chancellor was necessarily bound by **Air Products** to apply "inevitable disclosure" as a measure of irreparable harm is not a correct statement of law.

Air Products is properly applied, however, to define the term "trade secret," and to state the law generally applicable to issuance of injunctive relief to prevent disclosure of such trade secrets. **Air Products** provides generally that "[u]nder Pennsylvania law, a person may be enjoined from engaging in employment or certain aspects of his employment where that employment is likely to result in the disclosure of information held secret by the former employer, of which the employee gained knowledge as a result of his former employment situation." *Id.* at 1120. Actual entry of an injunction, however, is not appropriate in the absence of specific elements of proof to be satisfied by the former employer.

To be entitled to equitable relief, the burden [is] on (the employer) to show: (1) that there was a trade secret, or . . . a secret process of manufacture; (2) that it was of value to the employer and important in the conduct of business; (3) that by reason of discovery or ownership[,] the employer had the right to use and enjoyment of the secret; and (4) that the secret was communicated to (the employee) while he was employed in a position of trust and confidence, under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer.

Id. (quoting **Felmlee v. Lockett**, 351 A.2d 273, 277 (Pa. 1976)).

A "trade secret" is defined by the Court in **Air Products** as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competition who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.... A trade secret is a process or device for continuous use in the operation of the business.

Id. at 1120-1121 (quoting RESTATEMENT OF TORTS § 757 cmt. B). A trade secret does not, however, include a worker's "aptitude, his skill, . . . his manual and mental ability, and such other subjective knowledge as he obtains while in the course of his employment...." **Christopher M's Hand Poured Fudge, Inc. v. Hennon**, 699 A.2d 1272, 1275 (Pa. Super. 1997) (quoting **Pittsburgh Cut Wire Co. v. Sufrin**, 38 A.2d 33, 34 (1944)). Moreover, a "trade secret" must be a particular secret of the complaining employer and not a general "secret" of the trade in which he is engaged. **See Air Products**, 422 A.2d at 1121.

In this matter the chancellor declined to enter an injunction, finding that the information Bacharach's former employees possessed was merely subjective knowledge garnered during employment and so did not satisfy our definition of "trade secret." Memorandum in Support of Order, 7/14/00, at 18, 19 . The chancellor concluded accordingly that the record did not support Bacharach's theory of "inevitable disclosure." **Id.** at 17-19. Bacharach contends that the chancellor's determination is erroneous, as

Burke, Pritchard, Cole, and Figan enjoyed access to Bacharach's monthly sales reports and distributor discount tables "that are not known outside of Bacharach." Brief for Appellant at 34. Bacharach argues as well that Burke and Pritchard were "involved in new product development," *id.* at 32, and "aware of 'unique engineering limitations' and other 'mechanical issues' with existing Bacharach products," *id.* Finally, Bacharach asserts that Figan, among other things, reviewed Bacharach's "sales histories, costs and market projections," *id.*, "helped to negotiate special confidential pricing arrangements with large appliance manufacturers," *id.* at 33, and "authored 'Program Proposals' for new product lines," *id.*

We cannot conclude, based on Bacharach's argument, that any of the knowledge the company ascribes to its former employees constitutes a trade secret. Notwithstanding the fact that the record in this matter was sealed by order of the trial court, Bacharach's description of its purported "secrets" and its former employees' involvement with them, is sufficiently cryptic that we are unable to make any precise determination regarding the legal character of the information the employees may possess. Nonetheless, assuming for the sake of argument that these employees did possess trade secrets, we cannot conclude, on the basis of that factor alone, that the chancellor erred in refusing to enjoin their employment by Testo.

In ***Air Products***, we reaffirmed the requirement of multiple elements of proof necessary prior to issuance of an injunction to prevent the disclosure of trade secrets. **See** 442 A.2d at 1120 (quoting ***Felmlee v. Lockett***, 351 A.2d 273, 277 (Pa. 1976)). The existence of a cognizable trade secret, in itself, is not enough; in the absence of proof to establish the likelihood of disclosure, even the former employees' intimate familiarity with *acknowledged* trade secrets is irrelevant. In this particular, Bacharach's argument fails. Bacharach relies on the general proposition, discussed in ***Air Products***, that "a person may be enjoined from engaging in employment, or certain aspects of his employment, when that employment is 'likely' to result in the disclosure of his prior employer's confidential information." Brief for Appellant at 30. Thus, Bacharach argues elements of the testimony, or inferences to be drawn therefrom, to establish that Testo might be motivated by business concerns to obtain a disclosure from the employees of any trade secrets they may possess. Brief for Appellant at 40 ("The likelihood of disclosure is amplified by the fact that Testo has always been interested in Bacharach's trade secrets . . . Testo was in trouble and needed to somehow obtain advantage over Bacharach."). Bacharach fails to recognize, however, that our resolution in ***Air Products*** was not based on the mere "likelihood" of disclosure Bacharach advocates. In point of fact, we determined that the inevitable disclosure doctrine might be properly applied

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because "it would be *impossible* for the employee to perform his duties at the new employer without disclosing trade secrets." **See** 442 A.2d at 1124-25 (emphasis added). Bacharach fails to satisfy this standard as it largely omits to discuss the duties of the employees at Testo and to analyze how and why these duties cannot be performed without recourse to Bacharach's trade secrets. We have identified only one occasion in its voluminous discussion of this issue where Bacharach attempts to satisfy this standard. Brief for Appellant at 41. Referring to Spohn, Bacharach provides only a summary conclusion that: "There is almost no way he can effectively manage the development of Testo's refrigerant leak detector without using Bacharach's trade secrets." **Id.** Bacharach fails entirely, however, to explain why this must be so; e.g. to aver that the technology employed by Bacharach provides the only means by which a refrigerant leak detector may be made. Without such proof we are compelled to conclude that it is Bacharach, rather than the chancellor, that has failed to satisfy the requirements of **Air Products**. Accordingly, we find no merit in Bacharach's second question presented.

In Bacharach's third question presented, the company poses a challenge to the chancellor's admission of character evidence tending to demonstrate that Burke, Pritchard, Figan and Spohn are trustworthy and would not divulge Bacharach's confidential information to Testo. Brief for

Appellant at 4. Bacharach argues that such evidence is not relevant to analysis of the factors applied in **Air Products** for issuance of equitable relief, as a consequence of which, the chancellor erred in admitting it. **Id.** We find no merit in Bacharach's assertion.

The question of admissibility of evidence, including character evidence, is within the sound discretion of the trial court. **See Peled v. Meridian Bank**, 710 A.2d 620, 625 (Pa. Super. 1998). Accordingly, our standard of review is narrow; we may reverse only if the court abused its discretion or erred as a matter of law in admitting the evidence in question. **Id.** Moreover, the burden of persuasion rests with the appellant to show not only a technical error, but also harm or prejudice resulting from the error. **See Turney Media Fuel, Inc. v. Toll Bros.**, 725 A.2d 836, 839 (Pa. Super. 1999).

The basic requisite for the admission of any evidence is that it be both competent and relevant. Evidence is "competent" if it is material to the issues to be determined at trial, and "relevant" if it tends to prove or disprove a material fact in issue. The question of whether evidence is relevant and, therefore, admissible, is a determination that rests within the sound discretion of the trial court and will not be reversed on appeal absent a showing that the court clearly abused its discretion.

Id. See also Pa.R.E. 401.

Upon review of the evidence to which Bacharach objects, in the context of its allegations in this case, we find no error in the court's ruling.

The proffered character evidence was both competent, and relevant to Bacharach's assertion that Testo engaged in predatory hiring practices intended to gain access to Bacharach's "trade secrets" through disclosure by the company's key employees. Although, as Bacharach argues, such evidence does not necessarily bear on the factors enumerated in ***Air Products*** to establish inevitable disclosure, it is directly relevant to the case Bacharach attempted to make under ***Morgan's Home***. ***See*** 136 A.2d at 847 ("So also, when the inducement is made for the purpose of having the employe[e]s commit wrongs, such as disclosing their former employer's trade secrets or enticing away his customers, the injured employer is entitled to protection."). Clearly, evidence that the employees on whom Testo might rely to disclose trade secrets would not cooperate in doing so tends to disprove Bacharach's allegations. Thus, evidence concerning the character of the individual employees was relevant to the issue most central to Bacharach's case. Accordingly, Bacharach fails, in its third question, to demonstrate reversible error.

In its fourth question, Bacharach asserts that the chancellor erred in reaching certain findings of fact and conclusions of law that it claims are unsupported by the evidence. Brief for Appellant at 43. In support, Bacharach designates multiple findings and cites evidence to support

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contrary findings. **Id.** at 43-45 (citing chancellor's findings ¶¶ 42, 68, 88, 98, 99, 105, 106, 107, 111, 112).

We recognize, as Bacharach points out, that the chancellor's findings and conclusions are reviewable and may serve as a basis for reversal if unsupported by the record. Indeed, "where a lack of evidentiary support is apparent, reviewing tribunals have the power to draw their own inferences and make their own deductions from facts and conclusions of law." **Horner v. Horner**, 719 A.2d 1101, 1103 (Pa. Super. 1998). We recognize as well, however, that as in all matters on appeal, the appellant bears the burden of persuasion to demonstrate that the determinations it assigns as error are, in fact, grounds for reversal. For multiple reasons, we find Bacharach's discussion of the points at issue insufficient to demonstrate such grounds.

Initially, we observe that Bacharach chose "[f]or the sake of brevity," not to provide discussion in support of its assertion that the chancellor's findings 42, 98, 99, 105, 106, and 107, are unsupported by the evidence. Brief for Appellant at 45. Bacharach asserts that these findings "have already been addressed in other parts of this Brief." **Id.** Bacharach provides no indication, however, of where in its voluminous submission these discussions appear; indeed, upon inspection of the Brief, we find no discussion designating these findings and conclusions by number, save for a single reference to finding number 99 in footnote 1. Accordingly, we find

these assertions waived. **See *Borough of Mifflinburg v. Heim***, 705 A.2d 456, 467 (Pa. Super. 1997) (concluding that because appellant's discussion in support of issue was limited to one sentence and failed to include pertinent citations, Superior Court would deem issue waived). To the extent that Bacharach addresses the substance of these findings in its discussions of the prior issues, we have determined that its assertions are without merit. We will not revisit those determinations here.

Concerning Bacharach's challenge to the remainder of the chancellor's findings, we observe that the company's analysis of the record, as in its first question, demonstrates only that evidence was adduced to support a disposition contrary to the one the chancellor ultimately reached. Bacharach does not demonstrate how or why the evidence on which the court relied does not support its findings. **See** Brief for Appellant at 43-45. The fact that evidence of record is consistent with an alternative disposition does not constitute a deficiency in the disposition the chancellor reached, and so does not demonstrate reversible error. So long as the record provides "any apparently reasonable grounds" for the chancellor's decision, we are compelled to affirm. **See *Sovereign Bank v. Harper***, 674 A.2d at 1091. Because Bacharach has failed to demonstrate that there are *no grounds* for the chancellor's findings, we conclude that the issues raised in Bacharach's

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fourth question are without merit. **See *West Penn Specialty MSO, Inc. v. Nolan***, 737 A.2d at 299.

In its fifth question on appeal, Bacharach challenges the chancellor's admission of evidence of Burke's, Pritchard's, Cole's and Figan's respective states of mind prior to their resignation from Bacharach on November 9, 1999. Brief for Appellant at 45. As we have discussed earlier in this Memorandum, "[t]he basic requisite for the admission of any evidence is that it be both competent and relevant." ***Turney Media Fuel, Inc.***, 725 A.2d at 839. "The question of whether evidence is relevant and, therefore, admissible, is a determination that rests within the sound discretion of the trial court and will not be reversed on appeal absent a showing that the court clearly abused its discretion." ***Id.*** Upon review of Bacharach's argument, we find no basis for reversal on this issue, as the disputed evidence was demonstrably relevant to the issues posed by Bacharach's causes of action. Bacharach's core allegations raise the specter of a predatory competitor bent on destroying Bacharach as market leader with the assistance of key Bacharach employees, all of whom cooperated, some gleefully, in the process of defection. To the extent that evidence of the defecting employees' states of mind would tend to demonstrate other motivations for their respective departures, it was most certainly relevant to the issue of Testo's alleged predation and the employees' participation in

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that endeavor. As such, this evidence was relevant and properly admitted. Accordingly, Bacharach's fifth question fails to raise reversible error.

Finally, in its sixth question on appeal, Bacharach challenges the chancellor's refusal to apply restrictive covenants present in the employment agreements of Figan, Pritchard, Cole, and Spohn. Brief for Appellant at 47. The chancellor concluded that there are "no significant contractual bars to inhibit the individual defendants from competing with Bacharach," as agreements with Figan, Pritchard, and Spohn had expired prior to the court's disposition of Bacharach's petition for injunctive relief, and MaLou Cole was not joined as a party defendant. Memorandum in Support of Order, 7/14/00, at 2, 3.

We note, initially, that Bacharach fails to address the bases upon which the chancellor resolved the issues surrounding the parties' various restrictive covenants. In view of the appellant's burden on appeal to demonstrate trial court error, this omission in itself provides sufficient basis for our affirmance of the chancellor's determination. We conclude also that the grounds for reversal Bacharach raises, when adjudged on the merits, provide no basis for reversal of the chancellor's determination.

In Pennsylvania restrictive covenants are enforceable if they are incident to an employment relationship between the parties, the restrictions imposed by the covenant are reasonably necessary for the protection of the employer, and the restrictions imposed are reasonably limited in duration and geographic extent.

All-Pak, Inc. v. Johnston, 694 A.2d 347, 350 (Pa. Super. 1997) (citing ***Morgan's Home***, 136 A.2d 838). However, because restrictive covenants operate to restrain an employee's right to earn a livelihood, they must be strictly construed against the employer and may not be assigned between employers. ***See id.*** at 351.

Upon review of the record, we conclude that none of the covenants on which Bacharach relies satisfy the forgoing criteria for enforceability. Indeed, Bacharach acknowledges in its Brief that the covenants by which they attempt now to bind Pritchard and Figan were executed in favor of AMBAC Industries, Inc., of which Bacharach had once been a division. Brief for Appellant at 47. AMBAC was later acquired by United Technologies, Inc., which in turn spun off its Bacharach Instrument Division as an independent business entity. Notwithstanding these succeeding changes in ownership, the record bears no indication that these successor entities ever obtained or even sought assignment of AMBAC's rights under the original agreements; nor does Bacharach posit an argument that it succeeded to those rights by operation of law. We conclude accordingly, that Bacharach has no rights against either Pritchard or Figan under the asserted restrictive covenants.

Concerning Spohn, Bacharach directs our attention to an agreement the two executed on April 25, 1988, pursuant to which Spohn agreed "not to

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disclose any such confidential, proprietary or trade secret information [as he may receive in the employ of Bacharach] to any person without the consent of another employee who is an executive officer of Bacharach, either during my employment by Bacharach or thereafter[.]” Reproduced Record at 0064a. Bacharach argues that this agreement binds Spohn in perpetuity. Brief for Appellant at 48. Assuming that Bacharach’s interpretation of this provision is correct, the company cannot demonstrate that “the restrictions imposed are reasonably limited in duration,” as required by our law. **See All-Pak**, 694 A.2d at 350. Moreover, it has not attempted to do so. Accordingly, we find no error in the chancellor’s determination that Spohn was not subject to a “significant contractual bar[.]” either to competition or disclosure.

Finally, Bacharach posits no substantial argument concerning the covenant allegedly binding MaLou Cole. Brief for Appellant at 7 n.7. We conclude accordingly that Bacharach’s assertions concerning Cole are waived. **See Borough of Mifflinburg**, 705 A.2d at 467.

For the foregoing reasons, we affirm the order of the trial court denying Bacharach’s motion for injunctive relief.

Order **AFFIRMED**.

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Judgment Entered:

Eleanor K. Valecko

Deputy Prothonotary

Date: SEP 4 2001

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010, I caused a true and correct copy of the foregoing Defendant Chris Botticella's Proposed Findings of Fact and Conclusions of Law to be served upon the following counsel of record via the ECF System and first class mail.

Michael L. Banks, Esquire
Victoria L. Gorokhovich, Esquire
Kasturi Sen, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

Counsel for Plaintiff Bimbo Bakeries USA, Inc.

/s/ Elizabeth K. Ainslie

Elizabeth K. Ainslie