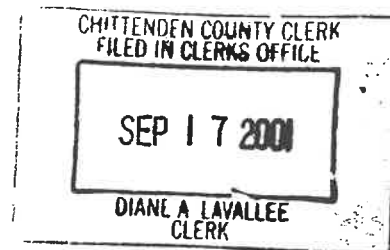


**STATE OF VERMONT  
CHITTENDEN COUNTY, SS.**



**COOPERATIVE RESEARCH SERVICES, INC. and )  
THE ASTEC CONSULTING GROUP, INC. )  
Plaintiffs )**

**v. )**

**THOMAS M. MCKEOWN and )  
ESECLENDING, LLC )  
Defendants )**

**Chittenden Superior Court  
Docket No. 1066-01 CnC**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER**

**Motion for Preliminary Injunction**

This matter came before the Chittenden Superior Court on September 14, 2001 for hearing on the Motion for a Preliminary Injunction. Plaintiffs were represented by Frank P. Urso, Esq. Defendant McKeown was represented by Mitchell Pearl, Esq., and Defendant eSecLending was represented by Andre D. Bouffard, Esq.

**Findings of Fact**

The securities lending industry is a small niche-market industry in which all parties to this suit are participants. Institutions with substantial portfolios loan their securities to broker-dealers on a short term basis to enable securities transactions to be completed quickly. Primary players are the lending institutions who make their securities available for lending and thereby earn additional revenue, the borrowers who use the securities and share in the earnings from the use of the loaned securities, and the agents who facilitate the securities lending transactions. In addition, there are a variety of other entities and businesses involved in the industry as a whole.

Plaintiff Cooperative Research Services, Inc. (hereinafter CRS) is a research firm that compiles industry data and processes and analyzes it into information that is useful for the industry. Plaintiff The Astec Consulting Group, Inc. (hereinafter Astec) is a consulting firm that responds to clients' requests to design models and formulas for creating benchmarks (performance measurements), and provides consulting services in a variety of ways for participants in the industry. It sponsors a research cooperative in which industry participants pay for the use of information compiled and owned by CRS and Astec. Edmon Blount is a principal in both corporations. He has been involved in the industry as a consultant since the early 1980's. His corporations began creating proprietary database information in the late 1980's, and they

create information products and services, such as benchmarking, off the data base. Defendant Thomas McKeown was employed by both corporations from September of 1998 until August of 2001 when he left to take a job that was offered to him by eSecLending, LLC.

ESecLending functions primarily as an agent in the securities lending industry. More recently, it has been expanding the types of services it offers in conjunction with its agency role, and it now describes itself as an "investment advisor" as well as an agent to securities lenders. It has a small research unit. In early 2000, it began to build a research database of securities lending transaction information for use by the industry. Its work on the database, which forms the basis for benchmarking services, became known publicly in January of 2001. It also now offers benchmarking services to lenders other than those for whom it acts as agent. It claimed at trial that benchmarking services are "ancillary" to its work on behalf of lending institutions as an agent, but in its promotional material, its description of the services it offers includes: "**Benchmarking:** Internal performance measurement database, Multiple manager performance reviews, Codeveloping first comprehensive series of securities lending indices." Nothing suggests this service is limited to customers for whom it acts as agent, and the Financial News article describing its services did not describe such a limitation. Its CEO, Susan Peters, did not describe such a limitation. ESecLending is a client of Astec as a sponsor of the research cooperative. As such, it pays for and has access to the proprietary database information available to sponsors.

In general, Astec and CRS have been in the research and information aspect of the securities lending industry for a longer period of time, and the scope of their work is broader than that of eSecLending. Astec offers a wide range of consulting services to several kinds of participants in the securities lending market, including many products and services related to benchmarking. ESecLending markets primarily to lenders, and its central focus has historically been as an agent, but it has expanded its information and research services and now offers informational and advisory services, including benchmarking services, as an "investment advisor." The fee structures of Astec and eSecLending differ.

ESecLending claims that its benchmarking differs from that done by Astec in that its focus is at a "granular" level of daily transactions of particular lenders, whereas it claims that Astec's benchmarking is done on a more "global" industry-wide basis. The evidence does not support this conclusion, as Astec offers consulting services on benchmarking to industry participants at all levels, and has in the past done daily transaction benchmarking at the request of and on behalf of its clients. In short, a lending institution seeking information services such as benchmarking has the choice of contracting with Astec as a consultant to prepare a report for it, or contracting with eSecLending to be its agent and/or provide it with benchmarking services. Since both offer comparable services to the client looking for them, they are in competition with respect to this segment of the industry, even though their other primary business activities and fee structures differ.

When Thomas McKeown began work for CRS and Astec in September of 1998, he signed a Confidentiality and Non-Compete Agreement in which he agreed as part of his employment not

to divulge confidential information of his employers (defined in the contract) or use it for the benefit of any third party, and he agreed he would not compete (also defined in the contract) with his employers for three years after completing his employment with CRS and Astec. The contract further provided that if he did so, CRS and Astec would be entitled to certain remedies, including a preliminary injunction without the posting of any bond or other surety. When Mr. McKeown was hired, he had experience working for institutional investors (those in the category of lending institutions), and this experience was valuable to him in his work at Astec. He had no prior experience in the field of securities lending. During the course of his work, he has acquired significant knowledge of the securities lending industry in general, and specific knowledge about CRS and Astec's services and products, including their unique analytic models, and their clients.

While at Astec, he worked in a variety of positions, but his primary expertise developed as a marketer. He acquired a working knowledge of CRS and Astec's services and products, customers and client lists, sales, promotional advertizing, product development and marketing methods and concepts, and trade secrets. While not actively engaged in the research or benchmarking activities of his employers, he understood the general outlines of the analytic methods, and had information about the business plans of Astec clients to the extent that those clients revealed them to Astec as their consultants. He has marketed Astec's benchmarking products to prospective clients.

In August of 2001, eSecLending contacted Mr. McKeown about a job opportunity. He immediately disclosed the Non-Compete agreement and both agreed that it would be honored. He interviewed with eSecLending, and was offered a job as director of marketing. His responsibilities would be to oversee the work of the seven persons on the sales staff in all aspects of marketing eSecLending's products. He would not have direct client contact himself. Susan Peters, CEO of eSecLending, states that she does not wish for Mr. McKeown to disclose any specific information he acquired at CRS or Astec. Nonetheless, the knowledge that Mr. McKeown acquired at CRS and Astec would be extremely helpful to him in his proposed work at eSecLending. He would be supervising a sales staff that would be marketing a portion of eSecLending services to some of the same customers to whom Astec would be offering the same services. In addition, Mr. McKeown has personal knowledge of business plans about Astec's customers, some of whom may be clients or proposed clients of eSecLending. One of the things developed at CRS/Astec was a list of prospective industry customers called the "gatekeepers' list." Mr. McKeown is familiar with this list. He also has extensive information about CRS and Astec's marketing targets and strategy, as well as specific client information. This information would assist him in exercising supervision over eSecLending's marketing efforts, whether or not he has direct client contact.

Mr. McKeown gave his notice in early August, and his employment terminated immediately. He returned or left all documents and tangible confidential information at CRS and Astec, without retaining or taking anything with him. Prior to the commencement of employment at eSecLending, Plaintiffs brought this suit for a preliminary injunction seeking to enjoin Mr. McKeown and eSecLending from entering into an employment relationship and otherwise

communicating confidential information in violation of the Non-Compete agreement, and further to enjoin eSecLending from using confidential information in violation of the sponsorship agreement between eSecLending and Astec. Pursuant to a temporary agreement entered into on September 10, 2001 in anticipation of the hearing for a preliminary injunction scheduled for September 14, 2001, Mr. McKeown began working at eSecLending on September 10<sup>th</sup> with his work limited to "compiling information on a current eSecLending client's lending activity for reporting and client meeting preparation purposes. Work will be done to eSecLending's specifications as specifically requested by Client." Mr. McKeown specifically agreed not to disclose any of Plaintiffs' confidential information.

The testimony of Mr. Blount revealed that his interpretation of the definition of "confidential information" contained in the Non-Compete agreement is extremely broad, and includes facts and information that are publicly available and common knowledge in the industry. There is no specific evidence that as of the hearing on September 14, 2001, Mr. McKeown had disclosed any specific or concrete confidential information to anyone, or used any identifiable confidential information in violation of the Non-Compete agreement. The testimony of Mr. McKeown revealed that his interpretation of the definition of "confidential information" contained in the agreement is overly narrow. He tried to minimize his knowledge of confidential information by claiming that he does not have database information in his head, and he further claimed that information he had about Astec services and products or clients' business was either public knowledge or stale anyway. He said that "people can figure out who Astec's clients are." He fails to recognize that legitimate business interests of Plaintiffs, which he contracted to protect as part of his employment, are represented partially by information and knowledge he carries in his head. Ms. Peters, as CEO of eSecLending, testified that she would not expect Mr. McKeown to reveal confidential information, but she was referring to specific details. Mr. McKeown, as director of marketing, would be in a position to use the knowledge and experience he acquired about both CRS and Astec and their clients for the benefit of eSecLending through the way he carried out his job without ever communicating any specific piece of information to Ms. Peters or anyone else at eSecLending. While the thrust of eSecLending's work historically has been to function as an agent (and neither CRS nor Astec is an agent), and it has a unique auction approach to its work as an agent that will be part of its marketing strategy, its future marketing efforts will also encompass its recently developed and growing work as an investment advisor, including its benchmark and other database services with respect to which it is a competitor with CRS and Astec.

As a consequence, the court finds that there is a high probability that confidential information as actually defined in the Non-Compete agreement would be used by Mr. McKeown for the benefit of eSecLending if he were to continue employment at eSecLending, and that Mr. McKeown would be working in a capacity in which he and eSecLending would be in competition with CRS and Astec.

There is no credible evidence that eSecLending has used Astec proprietary information in violation of its sponsorship agreement with Astec. Mr. Blount testified that he



believed it had. He based his conclusion on a presentation made by an eSecLending employee at a conference in August and on his surprise at the speed at which eSecLending "has gotten where it is," but he did not provide sufficient specific information to support his conclusory statement.

### **Conclusions of Law**

Based on the foregoing facts and consideration of the provisions of V.R.C.P. 65 and related case law, the court concludes that Plaintiffs have shown a likelihood of prevailing on the merits of their request for a permanent injunction with respect to prohibiting an employment relationship between Mr. McKeown and eSecLending, and with respect to prohibiting the use of Plaintiffs' confidential information acquired by Mr. McKeown. The threat of irreparable harm exists, as without such an injunction, the employment relationship and the use of confidential information would take place immediately, resulting in damage to Plaintiffs' legitimate business interests.

Plaintiffs have not shown a likelihood of prevailing on the merits with respect to their request to enjoin eSecLending from misusing information obtained under the sponsorship agreement.

Defendants will not suffer serious harm. Both Mr. McKeown and eSecLending were aware of the Non-Compete agreement, and both do not question its validity. The issue is its applicability to the present circumstances. Both were familiar with the facts, and took the risk of interpreting its terms in the manner they did. Mr. McKeown has the skills and experience to find other employment, and eSecLending has the opportunity to hire another director of marketing who is not restricted by this Non-Compete agreement.

Neither Defendant challenges the Non-Compete agreement as not being in the public interest. While they may challenge the court's interpretation and application of it to the facts of the case, that is a matter that will be addressed at the final hearing on the merits.

Good cause exists to waive the requirement of security with respect to Mr. McKeown based on the specific clause in the Non-Compete agreement that provides for the issuance of a preliminary injunction without bond or other security in the event of a threatened violation. No such cause exists with respect to eSecLending. In view of the extent of the possible disruption to eSecLending's business from having no director of marketing for a limited period of time, the Court requires each Plaintiff to post personal bond without surety in the amount of \$50,000.00.

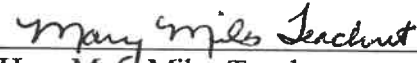
## PRELIMINARY INJUNCTION ORDER

Based on the foregoing facts and conclusions, IT IS HEREBY ORDERED:

1. Defendants Thomas M. McKeown and eSecLending, LLC. shall cease, desist and refrain from entering into or continuing an employment relationship and/or from exchanging any confidential information pursuant to the terms of a Confidentiality and Non-Compete Agreement executed by the Plaintiffs and the Defendant Thomas M. McKeown on September 10, 1998, until further order of the court, and
2. Plaintiff Cooperative Research Services, Inc. and Plaintiff The Astec Consulting Group, Inc. shall each give security of \$50,000.00 by personal bond without surety.

Dated at Burlington this 17<sup>th</sup> day of September, 2001.

CHITTENDEN SUPERIOR COURT

  
Hon. Mary Miles Teachout  
Superior Judge, presiding