**CBA Labor & Employment Law**
***Saturn Systems, Inc. v. Militare*: Employers Run Rings Around Employees, and Other Recent Cases from the Non-Compete Solar System**
**Presented by Kevin D. Allen, Esq.[1]**

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## I. Introduction

The employment landscape has changed dramatically over the years, and it is quite common during a person's professional career to move from one organization to another. From the employer's standpoint, the good will that has appreciated can be quickly compromised if steps are not taken to limit the employee's ability to aggressively compete upon departure. From the employee's perspective, they may find a promising career path blocked by an agreement that meant little to them when they signed it. A common agreement involves a prohibition on the disclosure of confidential information or trade secrets, followed by prohibitions on soliciting customers or clients, or other employees. The application of Colorado's non-compete statute to these agreements has left lingering questions that recent case law has attempted to answer. However, these cases also illustrate the shifting line between the enforceability and unenforceability of such agreements.

## II. *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835 (Color. App. 2007)

Before addressing the *Saturn Systems, DISH Network,* and *Lucht's Concrete* cases and their implications on employers and employees, it is important to look back at this holding from 2007, in which the Colorado Court of Appeals further defined the contours of Colorado's non-compete statute, C.R.S. § 8-2-113. *Phoenix Capital* involved the enforcement of a non-solicitation clause in an employment agreement against a senior portfolio analysis from an analytics division of an investment bank. The finding of *Phoenix Capital* included:

- The enforceability of a non-compete clause in an employment agreement is determined when the agreement was executed. Employers are free to enter into new employment agreements as employees take on additional responsibilities, and the employer, rather than employee, has the obligation to protect the employee's best interests.

- The phrase "professional staff" is limited to those persons who, while qualifying as "professionals" and reporting to managers or executives, primarily serve as key members of the manager's or executive's staff in the implementation of management or executive functions.

- Non-solicitation of customers clause is a form of an agreement not to compete. This is because in order to make a living, a former employee needs to be free to solicit (actively and passively) former customers as long as he or she does not use employer's trade secrets to do so.
- Non-solicitation of employees clause is not treated the same as non-solicitation of customers clause under the non-compete statute.

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- Court determined that a non-compete contract is assignable by employer if agreed to by the employee in the employment agreement.

## III. The *Saturn Systems* Case

On February 17, 2011, the Colorado Court of Appeals issued its decision in *Saturn Systems, Inc. v. Militare*, 2011 Colo. App. LEXIS 224 (Colo. App. February 17, 2011).

### A. Facts

- Saturn is a debt collection agency that offers numerous types of debt collection services, including recovery of commercial, consumer, medical, government, and retail accounts, both domestically and abroad.

- Saturn provided services to 1,600 clients since 1997, and spent significant time and money to develop a proprietary website to provide its clients access to its database of client and debtor information.

- Saturn assigns each client a unique username and password that can be used to log in to the website and view *real-time* information related to that client's account.

- Saturn only releases the usernames and passwords to the client and, if needed, to the sales agent assigned to that client's account.

- Militare was hired in 2003 as an independent contractor sales agent. He was authorized to sell Saturn's services, receive funds on Saturn's behalf, and make sales presentations to prospective clients. He agreed to provide ongoing customer care to the clients that he signed up for Saturn's services. In return, Saturn agreed to pay Militare a commission on each sale that he made.

- His agreement included the following "Confidentiality" provision:

> Confidentiality: Agent agrees that any client lists, sales materials and proprietary information will be considered confidential and not revealed to outside persons with the exception of clients and prospective clients during the sales or service of Company's services and that he will not solicit Company clients on behalf of his/her self or any other entity. This provision is to last for the duration of this agreement and for 1 year following the termination of this agreement.

The confidentiality provision of the Agreement did not contain a specific geographic limitation, the parties agreed at trial that its geographic scope was limited to Colorado.

- As a Saturn sales agent, Militare was provided access to and was taught how to use the confidential database on the Saturn website.

- Saturn terminated the Agreement with Militare approximately two years after he was hired. Shortly thereafter, Militare accepted a position with CB Solutions, LLC, a direct competitor of Saturn. After Militare commenced his employment with CB Solutions, he solicited one of Saturn's primary clients, who alerted Saturn.

- A computer investigation confirmed that Militare repeatedly accessed several client accounts, including the notes associated with those accounts, subsequent to his termination from Saturn.

Saturn filed suit alleging misappropriation of trade secrets, breach of the non-solicitation provision of the Agreement and sought injunctive relief. The trial court found in Saturn's favor, finding Militare liable for misappropriation of Saturn's trade secrets and breach of the nondisclosure and non-solicitation clauses set forth in the confidentiality provision of the Agreement. The Court of Appeals upheld the trial court

## B. Misappropriation of Trade Secrets

### 1. Legal Principles

The Court of Appeals referred to the following factors to make a determination as to whether a trade secret[2] exists under the statute:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which it is known to those inside the business, such as the employees;
>
> (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
>
> (4) the savings effected and the value to the holder in having the information as against competitors;
>
> (5) the amount of effort or money expended in obtaining and developing the information; and
>
> (6) the amount of time and expense it would take for others to acquire and duplicate the information.

*Citing Network Telecomms. Inc. v. Boor-Crepeau,* 790 P.2d 901, 902 (Colo. App. 1990); and *Porter Indus., Inc. v. Higgins,* 680 P.2d 1339 (Colo. App. 1984).

[2] Colorado Uniform Trade Secrets Act, C.R.S. § 7-74-101, et. seq. defines a trade secret as: "[T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value."

The alleged secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy, but extreme and unduly expensive measures need not be taken. *Citing Colo. Supply Co. v. Stewart,* 797 P.2d 1303, 1306 (Colo. App. 1990).

**2. Focus of Court of Appeals trade secret analysis was upon the "dynamic nature" of Saturn's information**

The Court of Appeals upheld the trial court's findings that Saturn's client and debtor information stored within its proprietary database qualified as trade secrets under Colorado law based on the following: (1) the information was confidential and not known outside of the business, either by competitors or the general public; (2) the real-time information was available only through the use of a client's username and password; (3) access to Saturn's database was strictly limited on a "need to know" basis; (4) Saturn has taken reasonable efforts to maintain the secrecy of the information stored within its database, including password protected and encrypted website and policy of limited access; (5) significant money had been spent developing and monitoring the database; and (6) the substance of the information in the database allowed for development of a competitive marketing strategy when client was at renewal stage.

Due to the "dynamic nature of the information" constituting a trade secret, the Court of Appeals found it unnecessary for Saturn to identify specifically the confidential information. The Court reasoned that it would be impractical to impose a burden on Saturn to identify the exact information misappropriated when was continually updated.

**3. Accessing the Confidential Website Sufficient to Demonstrate Misappropriation**

The Court of Appeals held that misappropriation includes the "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." § 7-74-102(2)(a), C.R.S. 2010. "'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *Id.* at § 7-74-102(1), C.R.S. 2010. The Court of Appeals observed "[t]here is no requirement in Colorado's [UTSA] that there be actual use or commercial implementation of the misappropriated trade secret for damages to accrue. Misappropriation consists only of the improper disclosure or acquisition of the trade secret." *Citing Sonoco Prods. Co. v. Johnson*, 23 P.3d 1287, 1290 (Colo. App. 2001). The Court of Appeals held that because Militare repeatedly accessed and viewed Saturn's website without permission to review the privileged information, this was sufficient to demonstrate misappropriation.

**C. <u>Non-Solicitation Contained Within Confidentiality Agreement is Enforceable</u>**

The Court of Appeals upheld the restriction on Militare contained in the Confidentiality Provision above:

1. Court of Appeals applied two-part test to determine whether non-compete clause fits within the trade secrets exception of section 8-2-113(2)(b): (a) the trial court must first examine the factual situation to determine whether a restrictive covenant is justified at all; and (b) the trial court must then examine the specific terms of the noncompetition clause to determine the reasonableness of their effect. A non-competition clause designed to protect trade secrets must be narrowly drafted.

Nevertheless, an agreement not to solicit an employer's customers is enforceable so long as its purpose is to protect the employer's trade secrets and it is reasonably limited in time and geographic scope. *Gold Messenger, Inc. v. McGuay*, 937 P.2d 907, 910-11 (Colo. App. 1997).

2. The Confidentiality clause met the test, because: (a) Saturn's information, including client lists, customer contracts, pricing information, detailed debtor information, client information and customer log-in codes, all of which could only be accessed through a password protected website, qualifies as trade secrets; (b) the clause is necessary to prevent employees and independent contractors from using their knowledge of Saturn's confidential information – such as unused pre-purchased collection accounts, a debtor's personal information, percentage of debt recovered per client – to solicit Saturn clients, especially those clients who were ripe for renewal; (c) it was "instructive" that Saturn included non-solicitation clause within a single confidentiality provision in the agreement.

3. The Court of Appeals distinguishes *Colorado Accounting Machines, Inc. v. Merganthaler*, 609 P.2d 1125 (Colo. App. 1980); which held that: employees may not use permitted exception for trade secret protection to transform otherwise naked covenant not to compete, which is void under the statute, into an enforceable agreement. (a) Non-solicitation clause is not separate from the non-disclosure clause; (b) non-solicitation clause is not a "naked" covenant not to compete, rather, it is focused on Saturn's clients.

**D. <u>Food for Thought</u>**

1. What about *Phoenix Capital*? Non-solicitation clause = naked non-compete under the law.

2. Is distinction between naked non-compete and non-solicitation dependent on the nature of the business product? The nature of the trade secret?

3. Why does it matter that non-solicitation clause is included in single confidentiality provision?

4. In order to violate non-solicitation clause, must you also violate confidentiality clause? No, since Court of Appeals does not reach issue. Do you have to appropriate a trade secret?

5. Does the case turn on the dynamic nature of the particular trade secrets? Does it turn on access to the trade secrets after separation by independent contractor?

6. What does this case tell us about cases involving less dynamic information employer claims to be proprietary, such as a client or contact list, containing only email addresses and phone numbers?

7. Does this case solidify principle that non-solicitation clause must have specific geographic scope?

8. How is case instructive with regards to drafting "naked" non-compete and non-solicitation agreements?

a. Better chance of enforcing non-solicitation clause than a naked non-compete covenant for purpose of protecting trade secrets;

b. Minimizes the *Merganthaler* quandary, at least for non-solicitation clauses.

c. Different considerations for management employees;

d. Combining non-disclosure and non-solicitation clause as one provision;

e. Specificity of non-disclosure clauses;

f. Utilizing non-solicitation clauses with everyone, not just sales personnel, who is exposed to trade secrets.

g. An ability to use with independent contractors; and

h. Importance of attorneys' fee provision.

## V. *DISH Network Corp. v. Altomari,* 224 P.3d 362 (Colo. App. 2009)

### A. Facts

- Altomari was hired to be the "Commercial Director" at DISH. As part of his employment, Altomari signed a non-compete agreement as part of a stock option agreement.

- As one of nine directors, he directly supervised fifty of the employer's 22,000 employees nationwide. His division had a $10 million annual budget.

- Although he was several layers under the CEO, he was at the top level of compensation (unclear whether in the entire company or at the director level) and at least at the "start" of the decision-making level. Specifically, Altomari, had some supervisory functions, even though they were closely constrained. He was the only director, out of nine directors employed by DISH to perform installation and service work, who worked on the commercial side of the business, which was approximately five percent of the total of DISH's business.

- Altomari decided to leave DISH six months after joining to work for a competitor, DirecTV.

The trial court granted in part DISH's motion for preliminary injunction and enjoined Altomari from disclosure of DISH's confidential information, but refused to enjoin Altomari from working for the competitor. The trial court found that the employee was a mid-level manager at best, and therefore was not "management personnel" within the meaning of Colo. Rev. Stat. § 8-2-113(2).

The trial court observed that Altomari had "a certain amount of autonomy" in performing his functions, but "had to go through a lot of hoops to get authority to do many, many things." The

trial court relied on *Harrison v. Albright*, 577 P.2d 302 (1977); *Porter Industries, Inc. v. Higgins*, 680 P.2d 1339 (Colo. App. 1984); *Atmel Corp. v. Vitesse Semiconductor Corp.,* 30 P.3d 789 (Colo. App. 2001), abrogated in part on other grounds by *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 124 (Colo. 2007); and *Doubleclick Inc. v. Paikin*, 402 F. Supp. 2d 1251 (D. Colo. 2005), and concluded that the case law required it to "look at whether [Altomari] acts autonomously, is the key man and is in charge of and constitutes the heart of [DISH's] business."

The Court of Appeals reversed on the basis that the trial court erred in relying on "selected phrases in decisions that simply applied section 8-2-113(2)(d)" and limiting the phrase "management personnel" to key personnel at the heart of a business.

### B. Interpretation of "Management Personnel"

1. There is no legislative definition of "management personnel"

3. Nevertheless, the Court of Appeals found that decisions relied on by the trial court were distinguishable because they did not "interpret the plain meaning of section 8-2-113(d)." In its own interpretation, the Court of Appeal noted that "management" and "personnel" are ordinary words of common usage that have unambiguous meanings. "Management" has been defined as the conducting or supervising of something, such as a business. Thus, persons who conduct or supervise a "business" would be considered "management personnel." Court further found that the term "undoubtedly encompasses 'key personnel,' employees who are 'in charge,' those at 'the heart of the business,' and 'those few executives at the highest echelons of a company' ..." Finally, the Court held that "to exclude from the definition of 'management personnel' those managers like Altomari who 'direct, control, and supervise' approximately fifty people nationwide in a division of a business with a ten million dollar budget, inappropriately narrows the statutory language and is inconsistent with the plain language of the statute."

Since Altomari was a (a) mid-level manager who (b) supervised fifty employees, was otherwise at the top of the compensation scheme, was (c) employed in a decision-making capacity, and (d) had a certain level of autonomy, he was "management personnel" under § 8-2-113. Accordingly, a one-year non-compete covenant was enforced, barring him from working for Direct TV, a DISH competitor.

### C. Food for Thought

1. Does Court of Appeals decision merely beg the question of how one applies "plain meaning" of "management personnel" in different contexts?

2. What does "conducting or supervising a business" mean? Can you conduct or supervise a portion of a business?

3. Does this definition apply equally to all sizes of business?

4. How relevant is the management personnel's exposure to the employer's clients in this analysis?

5. Can the management personnel in question be subject to the *Altomari* analysis even if he or she supervises an administrative division of the business, like human resources, and have little or no client contact?

6. How important is the income level of employee in determining management level?

7. Does every case remain a case-by-case analysis despite Court's conclusion that "management" has unambiguous meaning? If so, is it because the word "management" is by its nature ambiguous with different meaning in different contexts?

## V. ***Lucht's Concrete Pumping, Inc. v. Tracy Horner & Everist Materials, Inc.*, 2009 Colo. App. LEXIS 1041 (Colo. Ct. App., June 11, 2009), cert. granted, 2010 Colo. LEXIS 72 (Colo. February 1, 2010)**

### A. Facts

- Lucht's Concrete Pumping ("LCP") is a concrete pumping company that supplies ready-mix concrete to construction sites in the Rocky Mountain region.

- Horner began his employment with LCP in 2001 as a mountain division manager. He was responsible for building client relationships on behalf of LCP. Two years after he commenced employment, Horner was asked to sign and did sign an Employee Non-Disclosure and Confidentiality Agreement with LCP.

- Approximately one year later, Horner resigned and three days later he began working for Everist, a direct competitor of LCP.

The trial court granted summary judgment in favor of Horner on the non-compete agreement, concluding that the agreement was unenforceable due to lack of consideration. The Court of Appeals affirmed, holding that for an employee who continues his or her job without receiving additional pay or benefits when a non-compete agreement is signed, the agreement lacks consideration.

The Court of Appeals upheld the trial, imposing a requirement of new consideration.

### B. The "New Consideration" Requirement

1. Covenant not to compete must be supported by consideration, *citing Int'l Paper Co. v. Cohen,* 126 P.3d 222 (Colo. App. 2005), quoting Black's Law Dictionary 324 (8th ed. 2004)

2. Consideration is something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, especially to engage in a legal act. *International Paper v. Cohen*, 126 P.3d 222, 225 (Colo. App. 2005); *Compass Bank v. Cohen,* 134 P.3d 500, 502 (Colo. App. 2006) (consideration may be "a benefit received or something given up as agreed upon between the parties" (quoting CJI-Civ. 4th 30:5 (1998)).

3. The Court distinguished *Kuta v. Joint Dist. No. 50(J)*, 799 P.2d 379 (Colo. 1990) and *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987) the case dealing with benefits, rather than restrictions, construed in favor of employees, involve policies or procedures that are offered to a group of employees, and involve actions brought by employees to enforce an employer's promise. Furthermore, the Court found that those cases also require a finding that the "continued employment constituted acceptance of and consideration for" the new policies and procedures.

4. The Court notes that by continuing to employ the employee after he signed the Agreement, nothing prevented LCP from later terminating Horner's employment, and therefore did not provide any new consideration to him. On the other hand, Horner made a new promise to not compete against LCP following his termination. Non-competes are both disfavored, and require promises by the employee extending beyond at-will relationship. The Court held that additional consideration was needed, and the independent consideration requirement "reflects the fact that employers and employees have unequal bargaining power."

### C. <u>Food for Thought</u>

1. Isn't the Court's analysis equally applicable at the commencement of employment? Can you combine "at will" employment with a non-compete?

2. If monetary consideration is sufficient, then how much?

3. Is circumscribing "at will" termination rights for any period of time into the future sufficient?

4. What other types of consideration will be sufficient? Court of Appeals in *Lucht's* alludes to "pay increase, promotion, or additional benefits." *Phoenix Capital* alludes to "additional responsibility."

5. What about an employee that was not provided access to trade secret information, but is later provided access to protected information? Would this be sufficient consideration?

## NOTES

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LEXSEE 2011 COLO. APP. LEXIS 224

**Saturn Systems, Inc., Plaintiff-Appellee, v. Delbert J. Militare, a/k/a Del J. Militare, individually and d/b/a Mil-Beau and Mil-Beau, Inc., Defendant-Appellant.**

**Court of Appeals No. 07CA2453**

**COURT OF APPEALS OF COLORADO, DIVISION TWO**

***2011 Colo. App. LEXIS 224***

**February 17, 2011, Decided**

**NOTICE:**

THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

**PRIOR HISTORY:** [*1]

City and County of Denver District Court No. 05CV3976. Honorable Herbert L. Stern, III, Judge.

**DISPOSITION:** JUDGMENT AND ORDER AFFIRMED AND CASE REMANDED WITH DIRECTIONS.

**COUNSEL:** Garlin Driscoll Howard, LLC, Thomas P. Howard, Kenneth R. Morris, Louisville, Colorado, for Plaintiff-Appellee.

Godfrey & Lapuyade, P.C., Steven R. Schumacher, Englewood, Colorado, for Defendant-Appellant.

**JUDGES:** Opinion by JUDGE LOEB. Casebolt and Fox, JJ., concur.

**OPINION BY:** LOEB

**OPINION**

Defendant, Delbert J. Militare, appeals the judgment entered after a bench trial in favor of plaintiff, Saturn Systems, Inc., on its claims of misappropriation of trade secrets and breach of contract. Militare also appeals the trial court's order awarding attorney fees and costs to Saturn. We affirm and remand with directions.

I. Background and Procedural History

Saturn is a debt collection agency that offers numerous types of debt collection services, including recovery of commercial, consumer, medical, government, and retail accounts, both domestically and abroad. According to testimony at trial, since its founding in 1997, Saturn has provided its services to over 1,600 clients, for whom it has processed and helped collect over 120,000 debts.

Evidence at trial showed that Saturn [*2] spent significant time and money to develop a proprietary website to provide its clients access to its database of client and debtor information. Thus, Saturn assigns each client a unique username and password that can be used to log in to the website and view real-time information related to that client's account. For example, a client can view a "status report" for its account, which summarizes Saturn's debt recovery to date and tells the client how many pre-purchased debt collection accounts it has available to designate to debtors in default so that Saturn can initiate collection activities. A client can also view the "debtor notes" for its debtors that have entered Saturn's "hard-core" collection phase. Saturn uses the "debtor notes" component of its website to record pending collection efforts, settlement negotiations, and all known personal information for a debtor, such as addresses, bank accounts, and employment history. Because of the confidential nature of the information that can be accessed via its website, Saturn only releases the usernames and passwords to the client and, if needed, to the sales agent assigned to that client's account.

On January 13, 2003, Saturn hired [*3] Militare for a sales agent position. The parties entered into a written sales agent agreement (Agreement) that outlined their respective roles. In that regard, Militare agreed to act as an independent contractor with the authority to sell Sat-

urn's services, receive funds on Saturn's behalf, and make sales presentations to prospective clients. Additionally, Militare agreed to provide ongoing customer care to the clients that he signed up for Saturn's services. In return, Saturn agreed to pay Militare a commission on each sale that he made. The Agreement also included the following provisions that are pertinent to this appeal:

> (12) Confidentiality: Agent agrees that any client lists, sales materials and proprietary information will be considered confidential and not revealed to outside persons with the exception of clients and prospective clients during the sales or service of Company's services and that he will not solicit Company clients on behalf of his/her self or any other entity. This provision is to last for the duration of this agreement and for 1 year following the termination of this agreement.
>
> . . . .
>
> (14) Attorney Fees: In the event that it is necessary for either party to bring [*4] legal action against the other to remedy any breach of this agreement, both parties agree that the prevailing party will be entitled to reasonable, but not less than actual, attorney's fees and other costs to which that party may be entitled and that these cost [sic] will be paid by the losing party.

Although the confidentiality provision of the Agreement does not contain a specific geographic limitation, the parties agreed at trial (and the trial court found) that its geographic scope was limited to Colorado.

As a Saturn sales agent, Militare was provided access to and was taught how to use the confidential database on the Saturn website.

Saturn terminated the Agreement with Militare approximately two years later by proper written notice. The effective date of the termination was January 18, 2005. Shortly thereafter, on January 31, 2005, Militare accepted a position with CB Solutions, LLC, a Texas-based company and a direct competitor of Saturn.

In March 2005, while working for CB Solutions, Militare personally visited Premier Members Federal Credit Union, a longtime Saturn client that still had unused pre-purchased debt collection accounts available with Saturn. Militare admitted at [*5] trial that he contacted Premier on behalf of CB Solutions to win the Premier account. Although the parties disputed the details of Militare's visit, the record indicates that Premier contacted Saturn shortly after the visit to request a new password for its Saturn account.

Upon learning of Militare's visit to Premier, in early April 2005, Saturn retained David Travis, a computer and website specialist, to investigate suspected unauthorized access of Saturn's website by Militare. Travis's investigation confirmed Saturn's suspicions. According to Travis, Militare repeatedly accessed fifteen client accounts, including the debtor notes associated with those accounts, subsequent to his termination from Saturn. Travis found that in doing so, Militare reviewed a total of seventy-two privileged and confidential Saturn web pages.

In March and April 2005, Saturn also sent cease and desist letters to Militare demanding that he stop using its confidential data and soliciting Saturn clients, in violation of the Agreement and Colorado's trade secret laws.

On May 6, 2005, Saturn filed its complaint in this action, alleging claims of misappropriation of trade secrets and breach of contract and seeking [*6] damages and injunctive relief. The parties submitted cross-motions for summary judgment, which were denied, and the case was then tried to the court on September 11 and 12, 2007.

After the close of evidence, Militare stipulated to the injunctive relief requested by Saturn on its trade secrets claim, and the court entered a stipulated order for injunctive relief on October 1, 2007. That order is not a subject of this appeal.

On October 31, 2007, the court entered a written order of judgment in Saturn's favor, finding Militare liable for misappropriation of Saturn's trade secrets and breach of the nondisclosure and nonsolicitation clauses set forth in the confidentiality provision of the Agreement. The court awarded Saturn $525 in damages for the cost of Travis's investigation as well as attorney fees and costs under the fee-shifting provision of the Agreement. After briefing by the parties on the amount of attorney fees and costs, the court entered an order on January 3, 2008, awarding Saturn $70,619.03 in attorney fees and $2,482.04 in costs. Militare timely appealed from the court's October 31, 2007 judgment and the January 3, 2008 attorney fees order.

## II. Standard of Review

In an appeal [*7] from a judgment entered after a trial to the court, our review of the court's judgment is a mixed question of fact and law. Because the credibility of the witnesses and the sufficiency, probative effect, and weight of all the evidence, plus the inferences and conclusions to be drawn therefrom, are all within the prov-

ince of the trial court, we will not disturb the court's findings of fact unless they are so clearly erroneous as to find no support in the record. *M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380, 1383 (Colo. 1994)*; *Page v. Clark, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979)*; *Skyland Metro. Dist. v. Mountain W. Enter., LLC, 184 P.3d 106, 115 (Colo. App. 2007)*; *Cottonwood Hill, Inc. v. Ansay, 709 P.2d 62, 64 (Colo. App. 1985)*. It is not our role as a reviewing court to decide the facts, and we will not substitute our judgment for that of the trier of fact. *Page, 197 Colo. at 313, 592 P.2d at 796*; *Martinez v. Reg'l Transp. Dist., 832 P.2d 1060, 1061 (Colo. App. 1992)*. While we review a trial court's factual findings under the clear error standard, we review its legal conclusions and application of the governing statutory standards de novo. *Joseph v. Equity Edge, LLC, 192 P.3d 573, 577 (Colo. App. 2008)*; [*8] *DiCocco v. Nat'l Gen. Ins. Co., 140 P.3d 314, 316 (Colo. App. 2006)*.

III. Misappropriation of Trade Secrets

Militare contends the trial court erred by finding that he misappropriated Saturn's trade secrets because there was insufficient evidence to show that (1) Saturn possessed valid trade secrets, and (2) Militare misappropriated Saturn's trade secrets. We reject these contentions in turn.

A. Trade Secrets Finding

First, Militare contends there is insufficient evidence to support the trial court's finding that the client and debtor information contained within Saturn's proprietary website database qualifies as trade secrets under Colorado law. We disagree.

What constitutes a trade secret is a question of fact for the trial court. *Network Telecomms., Inc. v. Boor-Crepeau, 790 P.2d 901, 902 (Colo. App. 1990)*. Accordingly, if the court's trade secret determination is supported by the record, we will not disturb it on appeal. *See Page, 197 Colo. at 313, 592 P.2d at 796*.

The Colorado Uniform Trade Secrets Act (UTSA), *sections 7-74-101 to -110, C.R.S. 2010*, defines a trade secret as:

> [T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, [*9] improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value.

*§ 7-74-102(4), C.R.S. 2010*.

Colorado courts may consider several factors to make the factual determination of whether a trade secret exists under this statutory definition, including: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, such as the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Network Telecomms., Inc., 790 P.2d at 903* (citing *Porter Indus., Inc. v. Higgins, 680 P.2d 1339 (Colo. App. 1984))*.

The UTSA further provides:

> To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons [*10] other than those selected by the owner to have access thereto for limited purposes.

*§ 7-74-102(4)*. Thus, prior divisions of this court have held that "the alleged secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy," but that "[e]xtreme and unduly expensive procedures need not be taken." *Colo. Supply Co. v. Stewart, 797 P.2d 1303, 1306 (Colo. App. 1990)* (citing *Network Telecomms., Inc., 790 P.2d at 902*). Reasonable efforts have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a "need to know" basis, and controlling plant access. *Id*.

Here, the trial court found that Saturn's client and debtor information stored within its proprietary database qualified as trade secrets under Colorado law because: (1) the information is confidential and not known outside of the business, either by competitors or the general public; (2) the real-time information is available only through the use of a client's username and password; (3) access to Saturn's database is strictly limited on a "need to know" basis; and (4) Saturn has taken reasonable efforts to maintain the secrecy of the information [*11] stored within its database.

The record supports the trial court's findings. Saturn's president testified that the specific information contained within its "status reports" and "debtor notes" is highly valuable to it and to competitors. For example, the testimony established that a competitor could use its

knowledge of a client's available pre-purchased accounts and of the amount of debt recovered to date to develop a competitive marketing strategy exactly when that client was ripe for renewal with Saturn. Likewise, the testimony established that a competitor could use the highly detailed information contained within Saturn's debtor notes to usurp sales opportunities.

Further, Saturn's president described the security precautions that Saturn has taken to protect its proprietary information, including a password-protected and encrypted website and a policy of limited access. There was also testimony about the significant amount of money spent by Saturn to develop and maintain its database of information.

Accordingly, because there is substantial evidence in the record to support the trial court's finding that Saturn possessed valid trade secrets, we will not disturb that finding on appeal. [*12] *See Page, 197 Colo. at 313, 592 P.2d at 796*.

We are not persuaded by Militare's contention that because Saturn did not present evidence of the exact data and figures allegedly misappropriated by Militare from its database, Saturn did not carry its burden to prove the existence of valid trade secrets. Given the dynamic nature of the information stored within Saturn's database, it was not necessary for Saturn to produce the exact client and debtor information accessed by Militare. Nor, in our view, would it be practical to impose such a burden on the owner of trade secrets, where, as here, the confidential information is constantly being updated in real time. Saturn produced evidence of the specific types of confidential information stored in its database, with sufficient particularity to identify the existence of its claimed trade secrets. *Cf. Imax Corp. v. Cinema Techs., Inc., 152 F.3d 1161, 1164-65 (9th Cir. 1998)* (plaintiff should describe the subject matter of the trade secret with sufficient particularity, and a general catchall phrase does not achieve the requisite level of specificity when plaintiff claims a numerical dimension as a trade secret). As discussed above, the trial [*13] court properly relied on Saturn's evidence to determine that Saturn possessed valid trade secrets as defined by the UTSA and well-established Colorado case law.

B. Misappropriation Finding

Militare also contends there is insufficient evidence to support the trial court's finding that Militare misappropriated Saturn's trade secrets. He bases this contention in part on a related discovery contention, which we address first.

1. Expert Testimony

Militare contends the court erred by admitting the expert testimony of Travis at trial because Saturn failed to comply with the pretrial disclosure requirements of *C.R.C.P. 26(a)(2)*. We perceive no reversible error by the trial court.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *D.R. Horton, Inc.-Denver v. Bischof & Coffman Constr., LLC, 217 P.3d 1262, 1267 (Colo. App. 2009)*. A court does not abuse its discretion unless its decision is manifestly arbitrary, unreasonable, or unfair. *Id*.

*C.R.C.P. 26(a)(2)(B)(II)* governs pretrial disclosure of expert testimony of experts, like Travis, who are not "retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly [*14] involve giving expert testimony." *Ajay Sports, Inc. v. Casazza, 1 P.3d 267, 274 (Colo. App. 2000)*; *see also C.R.C.P. 26(a)(2)(B)(I)*. Under this rule, a party presenting such an expert must disclose a written report or summary that "contain[s] the qualifications of the witness and a complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor." *C.R.C.P. 26(a)(2)(B)(II)*. This disclosure must be made at least 120 days before trial by a claiming party under a complaint. *C.R.C.P. 26(a)(2)(C)(I)*.

There are sanctions available to the court under *C.R.C.P. 37(c)(1)* for violations of the pretrial disclosure requirements of *C.R.C.P. 26(a)*. *C.R.C.P. 37(c)(1)* provides in pertinent part:

> A party that without substantial justification fails to disclose information required by *C.R.C.P. . . . 26(a) . . .* shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial . . . .

*See also Ajay Sports, Inc., 1 P.3d at 274*. Thus, the rule requires the preclusion of undisclosed expert evidence only where (1) there is no substantial justification for a party's failure to disclose, and (2) the failure to disclose is not [*15] harmless to the opposing party. *See Trattler v. Citron, 182 P.3d 674, 679-80 (Colo. 2008)*.

> In evaluating whether a failure to disclose evidence is harmless under *Rule 37(c)*, the inquiry is not whether the new evidence is potentially harmful to the opposing side's case. Instead, the question is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party

> an adequate opportunity to defend against the evidence.

*Todd v. Bear Valley Vill. Apartments, 980 P.2d 973, 979 (Colo. 1999).*

In this case, Saturn listed Travis's company in its initial *C.R.C.P. 26* disclosures, stating that "[r]epresentatives from this company have information as to the investigations that they performed to gather evidence of unauthorized access to Saturn's website and trade secret information by the defendant." Saturn also timely designated Travis as an expert witness pursuant to *CRE 702*, *703*, and *705*, and provided the following information about Travis and the opinions that he would present at trial:

> Mr. Travis is an expert in computers and websites. He will provide opinions relating to the following matters. Restricted areas of Saturn's website were accessed [*16] by a computer used by the defendant. He will identify the line numbers, dates, times, pages, client names, client IDs, debtor numbers, content and other information relating to the information improperly accessed from the defendant's computer.
>
> The basis and reasons for such opinions are predicated up [sic] Mr. Travis' knowledge of computers and websites, his direct investigation of computer information relating to Saturn's website, examination of e-mails received by Saturn from defendant's computer, and other data.
>
> . . . .
>
> Mr. Travis' qualifications are based on his longstanding experience and training in computers and websites, as well as his direct involvement in the creation and maintenance of Saturn's website.

This designation was accompanied by a spreadsheet listing all instances of improper access of Saturn's website by Militare. Thus, more than a year and a half prior to trial, Saturn disclosed not only its intention to call Travis as an expert at trial, but the substance of Travis's expert opinions, the basis and reasons for the opinions, and the exact dates, times, and web locations of Militare's unauthorized website access that Travis uncovered.

In the weeks prior to trial, in [*17] connection with Saturn's motion for telephone testimony of Travis at trial, Saturn disclosed Travis's curriculum vitae and the remainder of Travis's file, which was a more detailed record of the numerous instances of Militare's unauthorized website access. However, Militare did not receive a formal written report summarizing Travis's expert testimony until the day before trial, after the court granted Militare's request for such a report in connection with the court's order permitting Travis to testify by telephone.

At trial, Militare contemporaneously objected to Travis's testimony on the ground of "nondisclosure of his opinions," specifying the late disclosure of Travis's expert report.

On appeal, Militare contends the trial court abused its discretion by allowing Travis to testify because Saturn did not produce the written summary or report required by *C.R.C.P. 26(a)(2)(B)(II)* until the day before trial. Initially, we question whether the court erred at all by allowing Travis to testify, given Saturn's early disclosure of Travis's expert opinions as contained in the expert witness designation, the early disclosure of the data that Travis collected of unauthorized website access, and [*18] Saturn's consistent provision of information to Militare in the weeks prior to trial.

Nonetheless, even if Saturn technically violated *C.R.C.P. 26(a)(2)(B)(II)* by failing to timely produce a written report, we perceive no prejudice resulting from this late disclosure that would require preclusion of Travis's expert report or the entirety of his expert opinions. *See C.R.C.P. 37(c)(1)*; *Trattler, 182 P.3d at 679-80*; *Todd, 980 P.2d at 979-80.*

Although the report was presented to Militare the day before trial, the record shows Militare was aware of the information summarized within the report long before trial. The raw data of Travis's investigation -- namely, the individual findings of Militare's unauthorized access of the password-protected areas of Saturn's website -- had already been catalogued and presented to Militare in the form of a spreadsheet. *See Kussman v. City & County of Denver, 671 P.2d 1000, 1001 (Colo. App. 1983)* (no reversible error where party did not receive summary of physician's opinion until seven days prior to trial, but received medical records and raw medical data prior to trial), *rev'd on other grounds*, *706 P.2d 776 (Colo. 1985)*. Further, while the spreadsheet was [*19] initially redacted to exclude client names, client IDs, and debtor numbers, Militare received the complete spreadsheet prior to trial. *Cf. Camp Bird Colo., Inc. v. Bd. of County Comm'rs, 215 P.3d 1277, 1290 (Colo. App. 2009)* (expert report admitted but information not previously known to the opposing party redacted). Militare also received all of the information possessed by Saturn's counsel that related to Travis. *See McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394, 398 (Colo. App. 1989)* (no abuse of discretion under lo-

cal discovery rules to allow expert testimony where opposing party is notified of expert more than one year before trial and is furnished with all information in counsel's possession). Moreover, early in the discovery phase of the case, Militare was provided with Travis's contact information, fields of expertise, and the basis for his expert opinions, but never deposed him.

There is no indication in the record, and Militare provides none, that Militare was surprised by the actual report or denied an adequate opportunity to defend against it. *See Ajay Sports, Inc., 1 P.3d at 275* (any error in permitting undisclosed expert testimony was harmless where party [*20] claiming surprise by the testimony does not specify how he was prejudiced or what additional information he could have elicited on cross-examination). Further, upon receiving the report, Militare never asked for a continuance in order to obtain additional information related to Travis's investigation. *See id.; Kussman, 671 P.2d at 1001*.

Under these circumstances, we conclude that any failure to produce Travis's report itself was harmless because Militare had an adequate opportunity to defend against the evidence contained therein. *Todd, 980 P.2d at 979*. Accordingly, we conclude that the trial court did not abuse its discretion by admitting Travis's entire testimony at trial.

2. Misappropriation

Because we conclude that Travis's expert testimony was properly admitted, we reject Militare's contention that the record does not support the trial court's finding that he misappropriated Saturn's trade secrets.

Under the UTSA, "misappropriation" is defined in pertinent part as the "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." *§ 7-74-102(2)(a), C.R.S. 2010*. "'Improper means' includes theft, bribery, [*21] misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *Id*. at *§ 7-74-102(1), C.R.S. 2010*. As a prior division of this court observed, "[t]here is no requirement in Colorado's [UTSA] that there be actual use or commercial implementation of the misappropriated trade secret for damages to accrue. Misappropriation consists only of the improper disclosure or acquisition of the trade secret." *Sonoco Prods. Co. v. Johnson, 23 P.3d 1287, 1290 (Colo. App. 2001)*.

Here, the trial court found that Militare "knowingly misappropriated numerous trade secrets belonging to Saturn" at the time of his termination and that "subsequent to that termination, [he] repeatedly accessed the Saturn website to review and update privileged information, without permission . . . caus[ing] injury to [Saturn]." The court further concluded that Militare "knowingly used improper means in order to use Saturn's trade secrets for his benefit."

The court's findings and conclusions are adequately supported by the record. Travis's expert report and testimony described specific instances of Militare's unauthorized access of Saturn's client accounts subsequent [*22] to his termination, and Militare himself confirmed at trial that he accessed confidential information on the Saturn website after the Agreement was terminated. At trial, Militare testified that he "viewed" the restricted areas of Saturn's website subsequent to his termination, but that he did not "utilize" or "print" any information. For the purposes of a misappropriation inquiry under the UTSA, it is irrelevant whether Militare actually used Saturn's client and debtor information to compete against Saturn, or actually disclosed the information to others. *See § 7-74-102(2)*; *Sonoco Prods. Co., 23 P.3d at 1290*. Thus, because there is ample evidence in the record that Militare knowingly acquired password-protected information by improper means, we will not disturb the court's misappropriation finding on appeal.

IV. Breach of Sales Agent Agreement

Militare contends the trial court erred by finding that he breached the nonsolicitation and nondisclosure clauses of the confidentiality provision of the Agreement with Saturn. Because we conclude that the record supports the court's finding of breach of the nonsolicitation clause, we need not address Militare's contention that the evidence is [*23] insufficient to support the court's finding of breach of the nondisclosure clause.

A. Nonsolicitation Clause

Militare contends the nonsolicitation clause of the Agreement is void under Colorado law, and as such, he cannot be liable for breach of an invalid and unenforceable provision. We disagree.

The interpretation of language in a contract is a question of law that an appellate court reviews de novo. *Roberts v. Adams, 47 P.3d 690, 694 (Colo. App. 2001)*. Whether a contractual provision is enforceable is also a question of law that we review de novo. *Planned Pethood Plus, Inc. v. Keycorp, Inc., 228 P.3d 262, 264 (Colo. App. 2010)*.

In construing a contractual provision to determine its enforceability, our primary obligation is to effectuate the intent of the contracting parties according to the plain language and meaning of the contract. *Albright v. McDermond, 14 P.3d 318, 322 (Colo. 2000)*. A written contract that is complete and free from ambiguity will be

found to express the intention of the parties and will be enforced according to its plain language. *Id.*

An agreement not to solicit customers, as here, is a form of an agreement not to compete. *Phoenix Capital, Inc. v. Dowell, 176 P.3d 835, 844 (Colo. App. 2007)*. [*24] Agreements not to compete, with some narrow exceptions, are contrary to the public policy of Colorado and are void. *Id. at 840*.

> The core policy underlying the unenforceability of noncompetition provisions is a prohibition on the restraint of trade or . . . the right to make a living. In order to make a living, the former employee needs to be free to solicit (actively or passively) former customers, as long as he or she does not use the employer's trade secrets to do so.

*Id. at 844*.

Colorado's statutory approach to agreements not to compete is codified at *section 8-2-113(2), C.R.S. 2010*, which provides:

> Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:
>
> (a) Any contract for the purchase and sale of a business or the assets of a business;
>
> (b) Any contract for the protection of trade secrets;
>
> (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;
>
> (d) Executive and management personnel and officers and employees who constitute [*25] professional staff to executive and management personnel.

Thus, any agreement that restricts a person's right to receive compensation for work performed is void ab initio unless it fits one of the four statutory exceptions. *See Mgmt. Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763, 765 (Colo. App. 1988)*.

The issue before us in this appeal is whether the nonsolicitation clause in the confidentiality provision of the Agreement is valid and enforceable under *section 8-2-113(2)(b)*, as part of a contract for the protection of trade secrets. We conclude that it is valid and enforceable.

A prior division of this court has adopted a two-prong test to determine whether a noncompetition clause fits within the trade secrets exception of *section 8-2-113(2)(b)*. *See id. at 766*. "The trial court must first examine the factual situation to determine whether a restrictive covenant is justified at all. . . . The trial court must then examine the specific terms of the noncompetition clause to determine the reasonableness of their effect." *Id.* A noncompetition clause designed to protect trade secrets must be narrowly drafted. *Id. at 765*. Nevertheless, an agreement not to solicit an employer's customers [*26] is enforceable so long as its purpose is to protect the employer's trade secrets and it is reasonably limited in time and geographic scope. *See Gold Messenger, Inc. v. McGuay, 937 P.2d 907, 910-11 (Colo. App. 1997)*; *Mgmt. Recruiters, 762 P.2d at 766*.

The Agreement between Saturn and Militare included the following confidentiality provision:

> Agent agrees that any client lists, sales materials and proprietary information will be considered confidential and not revealed to outside persons with the exception of clients and prospective clients during the sales or service of Company's services and that he will not solicit Company clients on behalf of his/her self or any other entity. This provision is to last for the duration of this agreement and for 1 year following the termination of this agreement.

As noted above, at trial, the parties stipulated that the geographic scope of this provision was limited to Colorado, and the reasonableness of neither the geographic nor temporal scope of the confidentiality provision is disputed in this appeal.

Here, we conclude that the nonsolicitation clause in paragraph 12 of the Agreement fits within the trade secrets exception to *section 8-2-113(2)*. As [*27] discussed above, the trial court properly found with record support that Saturn's confidential client and debtor information (including "client lists, customer contracts, pricing information, detailed debtor information, client information and customer log-in codes") qualified as trade secrets under the UTSA. Thus, under the plain language of the Agreement, the nonsolicitation clause was necessary to safeguard Saturn's debt collection business. More particularly, the clause was necessary to prevent former employees or independent contractors from using their knowledge of Saturn's confidential information -- such as a client's number of unused pre-purchased collection accounts, a debtor's personal information, and the percentage of debt recovered per client -- to solicit Saturn clients, especially those clients who were ripe for renewal. We find it instructive that Saturn included the nonsolicitation clause within a single confidentiality provision in the Agreement, designed to protect its "client lists, sales materials, and proprietary information," thereby expressing an intent to prohibit former employees or independent contractors from using trade secrets to solicit former clients. [*28] *See Gold Messenger, Inc., 937 P.2d at 911* (a general noncompetition clause that restricts a franchisee from competing with a franchisor is valid under the trade secrets exception because it is read in conjunction with the agreement's preamble to find a clear intent to prohibit a franchisee from using confidential information to compete unfairly against franchisor).

We, therefore, conclude that the nonsolicitation clause restricting Militare's ability to solicit Saturn's clients for one year was necessary to protect Saturn's confidential client and debtor information that can only be accessed through a password-protected website. *See Mgmt. Recruiters, 762 P.2d at 766* (noncompetition agreement that restricts an employee of a recruiting agency from contacting any job candidates with whom he had actual contact during his final year at the agency held valid because it was tailored to prevent the misappropriation of trade secrets by the employee). This case is thus distinguishable from cases where a trial court has found that a trade secret does not exist, and, accordingly, a noncompetition agreement could not be necessary for the protection of trade secrets. *See, e.g., Porter Indus., Inc., 680 P.2d at 1342*.

Further, [*29] Militare's reliance on *Colorado Accounting Machines, Inc. v. Mergenthaler, 44 Colo. App. 155, 156, 609 P.2d 1125 (1980)*, is misplaced because the challenged provision in that case is distinguishable from the contractual provision at issue here. In *Mergenthaler*, a division of this court ruled that where the parties' agreement contained a nondisclosure of trade secrets clause to protect valid trade secrets, a separate and general restrictive covenant prohibiting all forms of competition would not be read to serve that protective purpose as well. *Mergenthaler, 44 Colo. App. at 156, 609 P.2d at 1126* ("Even if we assume, arguendo, that a narrowly drafted non-competition clause specifically protecting trade secrets would be a valid exception under *subsection (b)*, here, the sole purpose behind the restrictive covenant is to prohibit all competition. . . . Consequently, the trade secret provision is valid; the restrictive covenant is not."); *see also Dresser Indus., Inc. v. Sandvick, 732 F.2d 783, 788 (10th Cir. 1984)* (citing *Mergenthaler* for the proposition that a naked covenant not to compete, which is void under the statute, cannot be validated by the insertion of a companion clause dealing [*30] with trade secrets).

Here, by contrast, and contrary to Militare's argument, the nonsolicitation clause is not separate from the nondisclosure clause. Rather, both clauses (which are in the same sentence) are part of an explicit confidentiality provision in the Agreement, which, by its plain and unambiguous language, is designed to protect the confidentiality of Saturn's "client lists, sales materials and proprietary information." Further, the nonsolicitation provision here is not a naked covenant restricting all competition by Militare, but rather, is a narrowly tailored provision restricting him only from soliciting Saturn's clients as a way of protecting Saturn's trade secrets and confidential information.

Because we read the plain language of the nonsolicitation clause here as serving the valid purpose of protecting Saturn's trade secrets and as having a reasonable effect upon former employees or independent contractors given the nature of Saturn's debt collection business, we view the clause as a permissible and enforceable restriction under *Gold Messenger* and *Management Recruiters*, as opposed to the form of impermissible bar on all competition found invalid under *Mergenthaler*. [*31] Therefore, applying the two-prong test articulated by the division in *Management Recruiters*, we conclude that the nonsolicitation clause here fits the trade secrets exception in *section 8-2-113(2)(b)*. As such, we conclude that is not void under Colorado law.

B. Breach of Nonsolicitation Clause

Because we conclude that the Agreement contained a valid nonsolicitation clause, we address and reject Militare's contention that the trial court erred by finding that he breached the nonsolicitation clause.

In reviewing a breach of contract case, we defer to the trial court's findings of fact if the record supports them. *Albright, 14 P.3d at 322*.

Here, the trial court found as follows:

> Militare was the Saturn sales agent serving Premier . . . prior to his termination. In that position, Militare knew (1) that Premier was a Saturn client for the use of Saturn's collection services; (2) that it had entered into [a] contract with Saturn for the use of its collection services; and (3) that it had pre-purchased debtor collection accounts from Saturn. Based on his knowledge of this proprietary business information regarding Saturn, Militare knew that Premier was worth soliciting as a potential purchaser [*32] of debt collection services.
>
> Subsequent to his termination from Saturn, Militare knowingly and intentionally attempted to solicit Premier, a client of Saturn. This constituted a breach of Clause 12 of the Agreement. Militare relied on trade secrets of Saturn in order to facilitate his solicitation of Premier. Travis testified that on December 7, 2004, shortly before leaving Saturn, Militare reviewed two separate Premier status reports on the Saturn System. Those reports told Militare confidential information about the account and when it would be vulnerable for solicitation. Indeed, three months later Militare appeared at Premier and solicited [its] business.
>
> . . . .
>
> The Court finds Clause 12 of the Agreement to be reasonable. Therefore, this Court finds Militare's solicitation of Premier constituted a breach of the non-solicitation clause of the Agreement.

The evidence adduced at trial supports the court's finding that Militare breached the nonsolicitation clause of the Agreement. Indeed, Militare admitted at trial that, while working for CB Solutions, he personally visited Premier to solicit Premier's business:

> Q: Mr. Militare, you contacted Premier Members Federal Credit Union in March [*33] of 2005, correct?
>
> A: I believe that was the later part of March. Yes, that's correct.
>
> . . . .
>
> Q: And you did so in an effort to solicit that company's business, correct?
>
> A: I contacted them to see what their state of mind was as far as looking at the flat fee program . . . .
>
> Q: When you went and spoke to [Premier's employee] you were not working for Saturn Systems, you were working for CB Solutions, correct?
>
> A: I was under contract with CB Solutions, that's correct.
>
> Q: And . . . you went back and spoke to [the employee] at that time in an effort to solicit her business for CB Solutions, correct?
>
> A: I was making an inquiry, yes. And if they were interested I would have pursued it.
>
> . . . .
>
> Q: . . . You specifically asked if you could get their business for CB Solutions for their collection services, correct?
>
> A: I stated that it was available if they were interested, yes.
>
> Q: And that was the purpose of your visiting Premier Financial [sic], correct?
>
> A: It was primary [sic] to see what their position was and see what they were interested [sic]. It was an exploratory visitation.

Because there is ample record support for the trial court's finding of breach of the nonsolicitation clause, we will not disturb [*34] it on appeal. Further, because we affirm the court's finding as to the nonsolicitation clause, we need not address Militare's related contention that the evidence is insufficient to support the court's finding of breach of the nondisclosure clause, including Militare's contention that the court improperly admitted the testimony of a representative of Premier.

V. Damages

Militare contends the trial court erred by finding that he is liable to Saturn for breach of contract damages in the amount of $525 because this amount represents the cost of Travis's investigation, which is not recoverable under Colorado law. We disagree.

> It has long been the law in Colorado that a party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff.

*W. Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992)* (citations omitted).

The measure of damages in a breach of contract action is the amount it takes to place the plaintiff in the position it would have occupied had the [*35] breach not occurred. *Technics, LLC v. Acoustic Mktg. Research Inc., 179 P.3d 123, 126 (Colo. App. 2007)*, *aff'd*, *198 P.3d 96 (Colo. 2008)*. Damages must be also be "traceable to and the direct result of the wrong sought to be redressed." *City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, 478 (Colo. App. 2003)* (quoting *Husband v. Colo. Mountain Cellars, Inc., 867 P.2d 57, 59-60 (Colo. App. 1993))*.

Militare first raised the issue of Saturn's claim for actual damages in his motion for a directed verdict at the close of Saturn's case-in-chief, which the trial court denied. To survive a directed verdict motion challenging proof of actual damages, the plaintiff in a breach of contract action must have presented evidence of both the existence and the cause of damages. *Id. at 477*. The plaintiff must also provide the fact finder with a reasonable basis for calculating actual damages in accordance with the relevant measure. *Id*.

In our view, Saturn's claim for $525, representing the cost of Travis's computer investigation prior to the commencement of litigation, was recoverable as actual damages as a matter of law. Saturn presented testimony that the $525 it spent to retain Travis was [*36] traceable to and the direct result of Militare's breach of the nonsolicitation clause of the Agreement. Further, Saturn introduced as an exhibit Travis's invoice for his investigation, thereby proving the existence and the exact amount of its actual damages. Under these circumstances, we conclude that the trial court did not err by finding that Militare is liable to Saturn for damages in the amount of $525.

VI. Attorney Fees

Militare contends that, in the event that we reverse the trial court's finding that he breached the Agreement, the trial court's award of attorney fees and costs to Saturn must be vacated.

However, because we have concluded that the record supports the court's finding of breach of the nonsolicitation clause, we further conclude that the court did not err in awarding attorney fees and costs to Saturn pursuant to the Agreement.

VII. Appellate Attorney Fees

Finally, we turn to Saturn's request for reasonable attorney fees and costs incurred in connection with this appeal.

Under *C.A.R. 39.5*, "[i]f attorney fees are otherwise recoverable for the particular appeal, the party claiming attorney fees shall specifically request them, and state the legal basis therefor, in the [*37] party's principal brief in the appellate court."

In its answer brief, Saturn specifically requests appellate attorney fees and costs pursuant to the attorney fee provision of the parties' Agreement. Given our conclusion that Militare breached the nonsolicitation clause of the Agreement, we conclude that reasonable appellate attorney fees and costs are recoverable by Saturn as a matter of law.

Pursuant to *C.A.R. 39.5*, we grant Saturn's request for attorney fees and costs incurred on appeal and, exercising our discretion, remand to the trial court to determine the amount of the award.

The judgment and order for costs and attorney fees are affirmed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE CASEBOLT and JUDGE FOX concur.