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In light of the clear trend in Virginia law against the enforcement of non-competition agreements, savvy practitioners and their clients increasingly rely on trade secret and confidentiality agreements as effective surrogates. While it is undeniably true that courts in Virginia are more inclined to enforce such agreements, the case of *SanAir Technologies Laboratory, Inc. v. Burrington* demonstrates that although subject to less stringent analysis, trade secret and similar arrangements must also comply with enforceability standards.

David Burrington, a long-time employee of SanAir left that company to go to work for a competitor, Hayes Microbial Consulting. As a result, SanAir sued Burrington for breach of contract and violation of the Virginia Trade Secret Act and Hayes for tortious interference with Burrington's employment contract. Curiously, the plaintiff did not sue for conspiracy between the two defendants, which is usually part of the litigation package in cases of this sort. Hayes and Burrington answered and demurred and SanAir asked the Court to enjoin Burrington and his new employer from competing against SanAir or disclosing its confidential information and trade secrets. The Court's opinion addressed these preliminary issues.

An injunction is an extraordinary remedy and the applicable standard requires a plaintiff to satisfy a four pronged test. The plaintiff must demonstrate a likelihood of success on the merits, irreparable harm in the absence of an injunction, that the balance of equities favors the plaintiff and that the injunction is in the public interest.

Because the Court found that a "reasonable dispute" existed both as to the type of jobs the plaintiff could not hold under the non-compete and the geographical scope of the agreement, the court denied the injunction on the non-competition issue. Even though the Court went out of its way to express "no opinion as to the enforceability of the agreement," ambiguity is usually the kiss of death for any non-compete. The Court's conclusion that it could not find the plaintiff likely to succeed on the merits sounded like the prelude to a final judgment.

The Court also expressed doubt about the plaintiff's trade secret and confidentiality claim.

The Court noted that although customer lists are not included within the statutory definition of a trade secret, a customer list may become one in a particular circumstance. This, however, depends on the uniqueness of the information, the public availability of the information and the steps taken by the employer to protect it. Because SanAir and Hayes service a limited clientele, because most of the clients are well-known in the industry and because the contact information is readily available on the internet, the Court ruled that the plaintiff had not shown that the customer list was

likely to be a trade secret and the Court "cannot find that the plaintiff is likely to succeed on the merits."

The Court reached a similar conclusion with respect to the reach of the confidentiality agreement. Those agreements (there were several substantially identical versions) protected a broad range of information, but each included a standard carve out for information "lawfully obtained from third parties" or that "may be generally available to the public." Following the rationale that led it to refuse the injunction application on the trade secret claim, the Court found that the allegedly sensitive information was easily available on line and from other sources.

Applications for injunction often dictate the final resolution of business tort cases because the result often forces the losing party to capitulate on the broader issues. That appears to be the likely result in this case. This does not mean that reliance on confidentiality agreements or trade secret protections is a misplaced; rather *SanAir* is a reminder that the legitimate protections offered by the law must be properly documented and the rights within them carefully policed.