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BUSINESS LAW NEWSLETTER

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BUSINESS TORTS IN VIRGINIA

BY JAMES V. IRVING, ESQUIRE

In late January, the United State District Court for the Eastern District of Virginia, sitting in Richmond, handed down an opinion that provided a succinct analysis of the pleading standards applicable to several Virginia business torts. The case is A*lliance Technology Group, LLC v. Achieve 1, LLC* and the opinion is by the Honorable Henry E. Hudson.

Alliance sued Achieve, a competitor entity, as well as a cohort of former employees who left Alliance to form Achieve. One of these employees, William Ralston brought a Motion to Dismiss and Judge Hudson's ruling addressed only this Motion. Because the case arose from the Defendant's Motion to Dismiss, the court viewed the factual allegations in the light most favorable to the Plaintiffs.

Alliance was a "Value-added Reseller" of information technology services. Vice President Michael Thomas directed a staff of eight employees, all of whom had access to Alliance's trade secrets and proprietary information, including sales forecasts, data tracking presentations, financial data and customer lists (collectively "trade secrets"). All Alliance employees agreed that Alliance's trade secrets were proprietary, that they would protect the information as confidential, and that Alliance took measures to protect the confidentiality of the trade secrets. Among these employees was William Ralston, who was hired only one month before Thomas's resignation.

Achieve was formed by Thomas and his wife prior to Thomas's departure from Alliance. Also prior to that time, Achieve began using Alliance trade secrets for Achieve's benefit. In doing do, the Complaint alleged, Achieve diverted to itself business opportunities that would have otherwise gone to Alliance. It was further alleged that Achieve could not have captured these opportunities without the improper use of Alliance's trade secrets.

In Alliance's Complaint, the former employees were sued collectively as "Former Employee Defendants" under the following theories: Breach of Fiduciary Duty; Aiding and Abetting a Breach of Fiduciary Duty; Misappropriation of Trade Secrets; Conversion; Tortious Interference with Contract; Tortious Interference with Existing Contract, Contract Expectancy, Prospective Business Relationship and Economic Advantage; Common Law Conspiracy; Conspiracy under Virginia's Business Conspiracy Statute; and Fraud. The Complaint alleged at least one specific tortious act against each of the Former Employee Defendants – except Ralston. Ralston moved to dismiss each claim

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as it pertained to him because the Defendants had been sued "indiscriminately," and because there was no factual allegation against him specifically.

Judge Hudson noted that each claim stated in a Complaint must be "accompanied by factual allegations that 'raises a right to relief above the speculative level' such that the claim is 'plausible on its face.'" With this test in mind, the judge analyzed the ten counts in the Complaint as they applied to Ralston and in doing so provided a template to the elements required to state each claim.

Fiduciary Duty. While the Plaintiff's allegations were "hazy" in many respects, Alliance did plead that Ralston "is now using" Alliance trade secret information, and Judge Hudson concluded that "it can be inferred that he now uses the same confidential information and trade secrets learned at Alliance, as are his co-workers." For these reasons, Hudson denied the Motion to Dismiss the Breach of Fiduciary Duty count. The Aiding and Abetting Breach of Fiduciary Duty count also survived because "Ralston did not need to actually use the confidential information himself; it is sufficient that he knew" that Achieve was using it.

Misappropriation of Trade Secrets. This claim also survived. While the statute is detailed and specific, for the purpose of analyzing the claim at the preliminary stage, it was sufficient that Alliance had alleged that Ralston was using Alliance trade secrets in his employment at Achieve, coupled with his knowledge of those secrets while at Alliance.

Conversion is the wrongful exercise or "assumption of authority over another's goods, depriving the owner of possession, or any act of dominion wrongfully exerted over the property in denial of, or inconsistent with, the owner's rights." Since Ralston joined Alliance five months after the alleged conspiracy was under way and is not alleged to be the actor who actually converted the property, the temporal gap between the alleged tort and the hiring of Ralston make it implausible that he engaged in the conversion. The Motion to Dismiss was granted on the Conversion count.

Tortious Interference with Contract. The court also granted the Motion to Dismiss the allegation that Ralston had tortious interfered with Defendant Pierce's employment contract. After finding the Complaint "devoid of any allegation remotely suggesting that Ralston was familiar with the terms of Pierce's employment contract," nor any allegation that he committed any intentional act calculated to interfere, the court found general and conclusory allegations insufficient to support this claim.

Interference with Prospective Business Relations adds the element of "improper methods" to the Tortious Interference template; however, the court denied the Motion on this count as well. Noting that the improper methods component may be satisfied by an allegation of misuse of confidential information, the court concluded it was reasonable to infer that Ralston "knew about Alliance's customer contracts and possess at least some knowledge of its existing and prospective customer base." The court deemed this enough to render plausible the allegations related to interference with Alliance's future business relations

Common Law Conspiracy requires "at least one member of the conspiracy to commit an 'underlying tort'." Because the Complaint merely alleged that the "Defendants acted in concert" before Ralston left Alliance, there was no sufficient allegation that Ralston "joined the already formed conspiracy." The Common Law Conspiracy Count was dismissed.

Statutory Conspiracy adds the element of "legal malice" - an unlawful act or unlawful purpose - to the traditional conspiracy formulation. This Count was dismissed for the same reason Common Law Conspiracy failed.

Fraud requires pleading with specificity, including the time place and manner of the alleged fraud. Conclusory allegations such as those characterizing the Alliance pleading are insufficient as a matter of law to satisfy fraud's heightened pleading requirements.

None of the Plaintiff's allegations were detailed or specific as they applied to Ralston. However, because the law permits the court to reach reasonable inferences as to some counts, but not as to others, the case against Ralston continues on the Counts of Breach of Fiduciary Duty, Aiding and Abetting a Breach of Fiduciary Duty, Misappropriation of Trade Secrets, Tortious Interference with Contract, and Tortious Interference with Prospective Business Relationship. The

other counts, which require specificity or where inferences were not reasonable, failed.

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VIRGINIA NON-COMPETITION LAW AFTER HOME PARAMOUNT

BY JAMES V. IRVING, ESQUIRE

The 2011 Virginia Supreme Court decision in *Home Paramount Pest Control Companies, Inc. v. Shaffer* turned Virginia non-competition law upside down. As I discussed more fully in a prior article, *Home Paramount* established a new, stricter test for enforceability of post-employment limitations based on job function. Due to this decision, many businesses have reviewed and revised their existing agreements to bring them into compliance with the new standards. Another result of the case is that employees found to be in violation under the old law have challenged prior court determinations favorable to the employer. One such case is *United Marketing Solutions, Inc. v. Goldberg*.

Prior to *Home Paramount,* the Loudoun County Circuit Court had found the anti-competition language in the United Marketing Solutions' ("UMS") franchise agreement to be enforceable, meaning that restrictions on Goldberg's post-contract competition were permissible under existing Virginia standards. The UMS covenant included broad restrictions on "performing services" for certain identified parties after the conclusion of the franchising relationship. In light of *Home Paramount*, counsel for Goldberg asked the Court to reconsider its ruling.

The arguments presented by the franchisor appeared to assume that the agreement could not withstand scrutiny under the new *Home Paramount* test, and Judge Thomas D. Horne of the Loudoun County Circuit Court agreed. No judge wants to overturn a prior ruling, so after recognizing that the UMS non-competition agreement was substantively unenforceable under the new standard, Judge Horne considered procedural theories that might avoid the necessity of reversing the prior decision.

Among these positions was whether the severability provision contained in the contract could be construed to permit excising the overbroad language while preserving the substance of the agreement. The Court considered and rejected UMS's argument that the provision could be preserved through "blue penciling" the offending provision. As Judge Horne observed, "blue penciling," the process by which a provision is re-written to bring it into compliance with the law, is not permitted in Virginia.

UMS also argued that the severability provision in the agreement permitted the Court to excise the portion of the language that ran afoul of *Home Paramount*. Judge Horne rejected this argument as a veiled attempt to "parse rather than eliminate words within sentences in such a way as to create a new provision" of the agreement – what UMS called severing was just "blue penciling" under a different name.

Ultimately, the Court ruled that the non-competition agreement was overbroad as to function. Therefore, it was unenforceable. *UMS* may be the first in a series of cases by disappointed former employees seeking a second bite at the apple. Judge Horne's opinion suggests that the second bite might taste better than the first.

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2013 MILEAGE RATES ALERT

The Internal Revenue Service has released its allowable mileage rates for 2013. As of January 1, 2013, these rates may be used to calculate deductible costs when operating an automobile for business, charitable, medical or relocation purposes.

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The rates are as follows:

- **Business** – $0.565 per mile driven, a $0.01 increase from last year
- **Relocation or Medical** – $0.24 per mile driven, a $0.01 increase from last year
- **Charitable** – $0.14 per mile drive, unchanged from last year

Taxpayers are not required to use the published rates, but may instead calculate the actual costs of operating the vehicle for these purposes. Also, taxpayers may not rely on the standard rates after using any depreciation method under the Modified Accelerated Cost Recovery System or after claiming a Section 179 deduction for that vehicle.

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