VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICROTECHNOGIES, L.L.C., Plaintiff, v. FEDSTORE CORPORATION, et al., Defendants.	Case No.: CL2017-8945

(Judge's Ruling)

Fairfax, Virginia

Wednesday, February 14, 2018

The hearing in the above-captioned matter was held pursuant to notice, at Fairfax Circuit Court, 4110 Chain Bridge Road, Fairfax Virginia, before Christina Patino, a certified Verbatim Reporter, and a Notary Public in and for the Commonwealth of Virginia, commencing at 9:59 a.m., before the HONORABLE DAVID A. OBLON.

A P P E A R A N C E S

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ALSO PRESENT:

Joe Uglialoro, MicroTech Chief Operations Officer and General Counsel

J U D G E 'S R U L I N G

THE COURT: Thank you. We're back on the record of MicroTechnologies, L.L.C., versus FedStore Corporation, et al., Case Number CL2017-8945. The parties have rested and the Court is now prepared to enter judgment.

The Court has already ruled on the -- the motion to strike.

Regarding the -- the -- the -- FedStore's plea in bar, the Court notes that restrictive covenants of trade are disfavored. Omniplex World Services Corporation versus U.S. Investigation Services, Inc., 270 Va. 246, 2005, says that the rules for non-competes and non-solicitations are the same, so cases really referencing one does affect the other.

Since 2012 I found only one non-compete agreement affirmed by the Supreme Court of Virginia: Preferred Systems Solutions, Inc., versus GP Consulting, L.L.C., 284 Va. 382, 2012. However, the Court is also very familiar with numerous cases from the Court of Appeals -- or

not -- the circuit courts. I gave ourselves a promotion. I didn't mean to do that. The circuit courts do this quite routinely. In fact, in the -- the past month, this -- this judge has heard now two restrictive covenant cases, and that's not unusual in this court.

And non-compete agreements and -- I'm sorry -- restrictive covenants have a good place in Virginia. Some states ban them. Virginia has not. And as long as they meet certain rules, they are enforceable, and they should be enforceable.

The employer has the burden of proof. A contract is to be construed in favor of the employee. They're enforceable if they are narrowly drawn. To protect an employer's legitimate business interest the covenant must be limited to direct competitors. That's what Omniplex says on page 250. Covenant -- restrictive covenant cannot require an employee to commit mass memorization of an employee list. That didn't really happen here.

I -- I considered the -- the exhibit that was offered, Defense Exhibit 1, and I -- I believe

that in this case the employer did let the employees know which customers they were -- they were thinking about.

The scope of the covenant must be readily determined. In Preferred Systems Solutions versus GP Consulting, 284 Va. 382, there was a non-compete agreement, which, of course, as I said, was the last time the Supreme Court spoke on this. And it really sets the gold standard for what a non-compete agreement should read. This non-compete agreement, in Preferred Systems, said, During the term of the agreement and for 12 months thereafter GP hereby covenants and agrees that they will not either directly or indirectly, A, enter into a contract as a subcontractor with Accenture, L.L.P., and/or DLA to provide the same or similar support that PSS is providing to Accenture, L.L.P., and/or DLA and in support of the DLA -- and in support of the DLA Business Systems Modernization, BSM, program, and, B, enter into an agreement with a competing business to provide the same or similar support that PSS is providing to Accenture, L.L.P.,

and/or DLA and in support of the DLA Business Systems Modernization, BSM, program.

I -- I -- I mention that because that, of course, is the last time the Supreme Court spoke on -- on the subject and because that is very narrowly drafted. It talks specifically about, one, the -- being in the same business, the same or similar support that PSS was providing for a prior customer, and further -- further narrows it, too, to a specific program within the employee's job for the company. Very narrow.

The -- another rule that -- that the Court needs to consider is whether it is unduly harsh and oppressive and curtailing employee's ability to earn a living, and, of course, whether it's against public policy. Non-compete agreements and -- and restrictive covenants generally are reasonable if the duration of restraint is reasonable, the geographic scope is reasonable, and the scope of the activity being restricted is reasonable.

It is a question of law as to whether a

restrictive covenant is enforceable or not. Of course, that's decided on a case by case basis. That's the entire reason we're here on a plea in bar.

The Court needs to take evidence in order to determine whether on a case by case basis a particular restrictive covenant is legitimate or not. And, of course, Virginia provides for no blue penciling, so if the Court finds that the Court -- that the agreement would have been permissible if certain language was added or deleted, the Court's not allowed to do that.

I've considered -- I've heard all -- all of your arguments. I've considered all of the -- the facts that -- that are in evidence. And turning first to the detrimental conduct, customer solicitation agreement restrictive covenant. The Court reads the application in -- in, really, three parts. One, MicroTech's cust- -- Micro- -- it addresses MicroTech's customers with whom the employee has contact. Two, MicroTech's customers with whom the employee becomes aware of because of

employment. And, three, MicroTech's protective -- potential customers that employee pursues on behalf of MicroTech.

So when I look at it and I break down my reading of the restrictive covenant, listening to the -- to the facts that are in evidence, I -- I -- I don't think that the employees were unaware of who this applied to, but I -- I -- I am concerned about whether the agreement is -- is narrowly drawn, applying the reasonableness of -- reasonableness of scope prong of the analysis. It says, Employee shall not engage in any contact -- contact detrimental to MicroTech's interests with regard to any of MicroTech's customers or potential customers.

I think that's overbroad, and the reason I think it's under -- overbroad is that while detrimental conduct is undefined, I don't find the language to be ambiguous in any way. I think a normal reading is that it's intentionally very broad in its normal meaning; that it means anything harmful to MicroTechnologies. Even Mr. Jimenez

testified that he thought it was very broad. That was -- I think he said, was his intent.

Detrimental conduct is more expansive than legitimate business interest, which is what Omniplex tells us that we have to limit it to. Omniplex, in their restrictive covenant, said -- found that covenants not to compete have been upheld only when employees are prohibited from competing directly with the former employer, competing directly with the former employer, or through employment with a direct competitor. That's some magic language I see repeated through restrictive covenant language, where the restrictive covenant will tie it to competing directly with a former employer. We'll hear more of that as I go through this analysis.

The clause detrimental conduct could prohibit a wide range of enterprises unrelated to legitimate business interest. It would prohibit an employee from reporting wrongdoing to -- by MicroTech in relation to a customer. It would prohibit an employee from working for a potential

client of MicroTech's that wants to hire him to lobby for a change in law that affects government contracts that has a disadvantage to MicroTech. Or to work for a customer of MicroTech in a non-competitive way, but one in -- but in a way that is still detrimental because, as Mr. Jimenez testified, anyone who leaves the company is detrimental. So if an employee leaves to join any -- any other business, that, by definition, is -- is somehow detrimental as long as they're working for a -- a competitor. However, this is not a legitimate business interest.

Now, it would be really convenient if the Supreme Court would -- would bless some language, because these cases come up so frequently. It would be really nice if -- if -- if we had that, but in Assurance Data the -- the Court has done the exact opposite, and they said, This is all done on a case by case basis and so we can't give you magic language to use.

But -- but looking at some of the cases, you know, I -- I see some -- some language that

seems to repeat that certainly helps in -- in making a narrowly-tailored restrictive covenant. Both sides have cited Daston Corporation versus MiCore, 80 Va. Cir. 611, 2010. That restrictive covenant reads, Non-solicitation of customers during the employment period and for a period of two years following termination of employee's employment, employee covenants and agrees that employee will not, directly or indirectly, solicit, invite, or by any way, manner or means, attempt to induce any of Daston's customers to do business with a competitor. "Customer" means any government agency, commercial entity, or individual receiving services during employee's employment with Daston, except where Daston provided services only to a specific component of the governmental or commercial entity. Customer means the specific component of such entity.

The employment agreement also contains the following definitions. "Competitor" means any firm, person, or entity that provides services or products that are directly competitive with the

services. It defines services to mean those information technology, financial management, business consulting and other services that are provided by Daston or employee during the employment period or are being research, developed by Daston with the employee's assistance as to the expiration -- as to the expiration of the employment period.

The things that really stand out are induce customers to do business with -- with a competitor. It defines competitor very specifically. It defines services very specifically. It prohibits the employee from doing work that's substantially similar. That's language I see in a lot of non-compete agreements. With -- for the benefit of business in competition with the employer; I see that repeatedly. And those are things I don't see in this particular restrictive covenant.

Also, in -- in -- as I -- as I -- as I'm looking at the prong of whether the agreement is narrowly drawn or not, I heard the testimony from

Marquez (sic), Burley, and Cantarilho. Marquez and Burley did not impress the Court as particularly important employees. And I don't mean to insult anyone in saying this. I did find that Cantarilho appeared to be very valuable. But I note that all three of them had exactly the same restrictive covenant. Well, it seems that this is Exhibit A for a non-narrowly-tailored restrictive covenant.

And the employee with a bachelor's degree from VCU, who's in sales, compared with the lifetime fed- -- federal contract supervising salesman have the same restrictions. That just seems odd, and it doesn't strike me as being narrowly drafted.

The Court's considered the prongs of unduly harsh or oppressive to the employee, or violations of public policy. I -- I don't weigh those as high.

So my conclusion is that the customer solicitation agreement is invalid and unenforceable because it's not narrowly drawn in the context of this business relationship to protect a legitimate

business interest, based on the evidence from this trial.

MicroTech has some legitimate interest to protect with relation to its -- its proprietary information, customers, and employees, and I think a proper restrictive covenant would be something appropriate for them to use, but the one that they did choose to use failed because it didn't protect those interests by narrowly drafting the restrictive covenant.

The record shows that employees will sign almost anything an employer puts in front of them. In fact, that's the testimony we had today. They don't even read it. An employer runs the risk of losing its entire covenant if it tries to overreach or draft its covenant without great care.

There may have been a day when one-size-fits-all restrictive covenants applied. That day has long passed. And a business must tailor the agreement to the employee and to the business circumstances.

Turning to the -- turning to the -- the

customer solicitation -- I'm sorry -- the -- the employee non-solicitation. I -- I read that restrictive covenant as follows: The employee -- number one, the employee will not recruit any other employee of MicroTech with whom he has had contact during employment. And, two, that the -- that contact is to be read as broadly as possible. The contact defines contact as being any interaction whatsoever.

So just like as in the first analysis, is this narrowly drawn? I don't think it is narrowly drawn. It is very overbroad. It covers solicitation of employees even if the offered employment was unrelated to MicroTech's business, and that's not limited to a legitimate business interest. It's not limited to employees from competing directly with the former employer or through employment with a direct competitor. It would not -- it would not restrict -- it restricts an employee from working at a pizza parlor, a business completely unrelated to the employer's business.

I -- I heard and considered and thought about Mr. Greenspan's argument that it has to be read in context with the business relationship, but that's not what the -- the restrictive covenant says. And if I'm strictly construing the restrictive covenant against the employer, then I have to consider some hypotheticals that are not limited by the employer, especially when I see other restrictive covenants that the Supreme Court has blessed that do so and -- and do limit it in those ways.

It would restrict the defendants from hiring a part-time mailroom clerk or secretary for an unrelated job. And -- and Home Paramount talks about that.

MicroTech cites -- cites with approval MeadWestvaco Corp. v. Bates. It's at 91 Va. Cir. 509. However, that -- that agreement was -- was very limited. It reads, The non-solicitation covenant implements a one-year period following cessation of employment with MWV, during which Bates will not solicit, hire, or attempt to hire

any employee of MVW (sic), or any of its affiliates, or solicit or do business with or attempt to solicit or do business with any customer for whom MWV or any of its affiliates provided or actively sought to provide goods or services within 12 months to Bates' date of termination -- and this is the magic language -- for the purpose of providing such customer with services or products competitive with those offered by MWV or any of its affiliates.

The Court is -- is unpersuaded by MicroTech's business justification that was stated, which is their -- it's their desire to have a lean workforce where employees don't leave. Every employer dreams of having that arrangement, where they have an employee who, once trained, never leaves. However, the way to achieve that is to offer competitive compensation and good work conditions, not to have a broad restrictive covenant.

The Court considered the prongs of oppressive to the employer, violation of public

policy, and the Court didn't weigh those as high as the -- as the first prong.

So my conclusion is that the employee non-solicitation agreement is invalid and unenforceable because it's not narrowly drawn in the context of this business relationship which protected legitimate business interest.

So I'm going to ask Mr. Cronogue: Would you be willing to draft an order to which Mr. Greenspan you may, and Mr. Thomas, you may take exception?

MR. CRONOGUE: Be happy to, Your Honor.

THE COURT: All right. Thank you. Let's put this down...

THE CLERK: The 23rd?

THE COURT: Thank you.

MR. THOMAS: We're actually here this Friday, if -- if that's...

THE COURT: I'm sorry?

MR. THOMAS: We're actually here this Friday on a motion to compel.

THE COURT: Okay.

MR. CRONOGUE: Hopefully we can resolve that before then, but if we can't, if you can still set it for Friday and --

THE COURT: Okay. Well, let's -- let's go ahead and schedule it for -- for Friday, for the 16th. And if you can't come up with the order -- which this should be a pretty easy order to do. I mean, I know you disagree with it, of course, but it shouldn't be that -- that long. If you disagree with it, then remind me and we can reschedule it for the 26th.

Does anyone have any questions about my ruling or do you understand what I did? I denied -- I -- I sustained the -- the plea in bar on both counts.

MR. CRONOGUE: None from FedStore, Your Honor.

MR. GREENSPAN: We understand --

THE COURT: Okay.

MR. GREENSPAN: -- the ruling, Your Honor.

THE COURT: Okay. And as I said, you

know, before I did the ruling, you guys did an excellent job and, you know, both -- all -- all counsel. And I -- I -- I -- you know, the parties -- I know that, you know, the parties for MicroTech are disappointed on this particular ruling, but I hope you recognize how well your lawyers did. Good luck to everyone.

MR. GREENSPAN: Thank you, Your Honor.

MR. CRONOGUE: Thank you, Your Honor.

THE COURT: Court's in recess.

MR. BONELLO: Thank you.

(Whereupon, at 5:25 p.m., the proceeding was concluded.)

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CERTIFICATE OF NOTARY PUBLIC

I, CHRISTINA PATINO, the officer before whom the foregoing hearing was taken, do hereby certify that the testimony appearing in the foregoing hearing was taken by me in stenotypy and thereafter reduced to typewriting by me; that said transcription is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Christina Patino

Notary Public in and for the
Commonwealth of Virginia
My commission expires: July 31, 2019
Registration Number: 7127100
Job Number: 67733