VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

GOVERNMENT STRATEGY & TECHNOLOGY, LLC	)	
Plaintiff,	)	
v.	)	**Case No. CL 67664**
MARK F. O'DONNELL, VERONICA A. O'DONNELL, and TECHNICA CORPORATION	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER RULING ON DEMURRER

Plaintiff Government Strategy & Technology, LLC ("GovStrategy") opposes Defendants' motion for reconsideration of the Court's ruling overruling Defendants' Demurrer to Counts I (breach of non-compete agreement) and VI (tortious interference with non-compete agreement). The Court ruled correctly in allowing those counts to stand, and the Virginia Supreme Court's recent ruling in *Home Paramount Pest Control Cos. v. Shaffer* does not suggest the ruling should have been otherwise. The key distinction between the instant case and *Home Paramount* (and all the other cases relied upon by Defendants in their Demurrer) is that the non-compete agreement[1] at issue in this case only restricts activities with a very limited number of GovStrategy ***clients***, whereas the non-compete clause found unenforceable in *Home Paramount* and similar cases all involved a purported restriction on activities with ***any competitor***, a much

[1] For ease of reference, the terms "non-compete" and "non-solicitation" are used interchangeably in reference to the covenant signed by Mr. O'Donnell. While the clause is perhaps more accurately characterized as a non-solicitation restriction, the law governing the enforceability of non-competition agreements and non-solicitation agreements is the same. *See Foti v. Cook*, 220 Va. 800, 805 (1980) (applying the same three prong reasonableness test used for non-competes to a non-solicitation clause).

larger pool of potential employers. It is undoubtedly an unreasonable restraint of trade to restrict a former employee from engaging in any activity for any competitor; it is not unreasonable, on the other hand, to restrict a former employee from soliciting business from a small number of clients of the former employer. Employers are entitled to take reasonable measures to protect the goodwill they have established with their clients and customers. The non-solicitation agreement at issue here is such a reasonable measure. Therefore, it is enforceable and the Demurrer was properly overruled.

I. *Home Paramount* Does Not Change Existing Law.

Defendants mischaracterize the holding and overstate the significance of the Virginia Supreme Court's decision in *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412 (2011). Defendants suggest that this Court would have ruled differently if only it had more time in which to consider the *Home Paramount* decision, which was issued on the same day the Defendants' Demurrer was argued. The decision was of "critical importance," write the Defendants in their Motion to Reconsider, in that it "clarif[ied] the standard for demurrers" and "expressly held that when, on its face, a non-compete provision is unenforceable as to function, a plaintiff employer is not entitled to survive demurrer and conduct discovery...." (*See* Motion to Reconsider at 3). In fact, *Home Paramount* did not even involve a demurrer, and there is no mention of discovery anywhere in the opinion.

At issue in *Home Paramount* was whether the trial court correctly granted a plea in bar, a ruling it made after conducting an evidentiary hearing. As in the case at bar, the defendants were seeking to dismiss counts relating to an alleged breach of a non-compete agreement, arguing that the clause was overly broad and therefore unenforceable. The Virginia Supreme Court affirmed the dismissal of the counts, finding the non-compete to be unreasonably broad in scope. *See Home Paramount*, 282 Va. at *5.

Unlike the narrow non-compete signed by Mr. O'Donnell, which applies only to a small number of GovStrategy clients (two, actually), the non-compete in *Home Paramount* purported to restrict all activity with any and all competitors and potential competitors. It read:

> The Employee will not engage directly or indirectly or concern himself/herself in any manner whatsoever in the carrying on or conducting the business of exterminating, pest control, termite control and/or fumigation services as an owner, agent, servant, representative, or employee, and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever, in any city, cities, county or counties in the state(s) in which the Employee works and/or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount].

Id. at *1.

The Court had little trouble finding the clause unreasonably broad, as the language was very similar to the clauses found unenforceable in *Simmons v. Miller*, 261 Va. 561 (2001) and *Motion Control Systems, Inc. v. East*, 262 Va. 33 (2001), both of which are over 10 years old. In all three of these cases, the non-compete at issue restricted the former employee from working in any capacity for ***any competing business*** or business in the same industry as the former employer. *See Home Paramount*, 282 Va. at *5; *Simmons*, 261 Va. at 580; *Motion Control*, 262 Va. at 36. In finding the non-compete overbroad and unenforceable, the Court reasoned that "On its face, it prohibits Shaffer from working for Connor's or any other business in the pest control industry in any capacity. It bars him from engaging even indirectly, or concerning himself in any manner whatsoever, in the pest control business, even as a passive stockholder of a publicly traded international conglomerate with a pest control subsidiary." *See Home Paramount*, 282 Va. at *3.

Home Paramount reached this decision by applying existing law to the facts before it; it did not create new law or modify the existing body of law in any way that could affect the enforceability of the non-compete signed by Mr. O'Donnell in this case. There is nothing in the *Home Paramount* decision that should cause this Court to reverse itself or otherwise reconsider its prior ruling overruling the Demurrer. This Court's ruling was correct before *Home Paramount* was decided and remains correct today.

II. The Non-Solicitation Clause at Issue Is Reasonable Because it Applies Only to GovStrategy's Clients For Whom Mr. O'Donnell Performed Services On Behalf of GovStrategy.

The law in Virginia is well established that a non-competition or non-solicitation agreement is enforceable if it is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. *See, e.g., Omniplex World Servs. Corp. v. U.S. Investigations Servs.*, 270 Va. 246, 249 (2005); *Simmons v. Miller*, 261 Va. 561, 580–81 (2001); *Advanced Marine Enterps., Inc. v. PRC Inc.*, 256 Va. 106, 118 (1998). In *Home Paramount*, the Virginia Supreme Court invalidated a non-compete provision that was broader than necessary to protect the employer's legitimate business interests, and because it was unduly burdensome on the employee's ability to earn a livelihood. In the case at bar, there are no such concerns.

Unlike the non-compete provisions at issue in *Home Paramount, Simmons*, and *Motion Control*, Mr. O'Donnell's non-compete agreement does not extend to the entire universe of competing (or potentially competing) companies; rather, it applies only to two specific GovStrategy clients with whom Mr. O'Donnell had developed a relationship, Technica Corporation (the company he joined, in direct breach of the Agreement) and LGS Innovations, LLC. Specifically, the clause provides as follows:

> During the term of this agreement and for a period of one year following the termination of this agreement, O'Donnell Consulting[2] shall not directly solicit, nor accept business from, any GovStrategy.com client for which O'Donnell Consulting has provided services under this contract.

(*See* Consulting Agreement ¶ 8, attached as Exhibit A to Am. Compl.) The clause is clear, unambiguous, and narrowly tailored to protect GovStrategy's legitimate business interest in protecting its client relationships and goodwill.

While working as a GovStrategy consultant, Mr. O'Donnell provided services to only two GovStrategy clients, Technica and LGS. Thus, provided that Mr. O'Donnell not accept work from either of those two specific clients, Mr. O'Donnell remained free to compete with GovStrategy and accept employment with any employer of his choice, in any industry, at any time, and in any geographic area. The non-compete agreement does not restrict in any way Mr. O'Donnell's ability to earn a living by, for example:

- Taking a job with any of GovStrategy's competitors;
- Taking a job with any other company engaged in management consulting or proposal management;
- Starting his own competing management consulting or proposal management business;
- Taking a job with a GovStrategy client with whom he had not previously established a relationship while at GovStrategy;
- Taking a job with a GovStrategy client for which he had not provided services, even if he had formed a relationship with that client while working for GovStrategy; or
- Investing or purchasing stock in any company he chooses, including GovStrategy clients.

The former employee in *Home Paramount* was not free to do any of these things, as he was under a non-compete agreement that barred him from taking any job with any company in his

[2] "O'Donnell Consulting" was Mr. O'Donnell's trade name.

employer's line of business. Here, however, because these activities are unrestricted, the non-compete is not unduly burdensome on Mr. O'Donnell's ability to earn a living and the agreement is enforceable.

Defendants argue in a footnote that the non-compete clause is overbroad because it "fails what is commonly referred to by practitioners as the 'copy person' or the 'janitor' test" in that it would appear to restrict Mr. O'Donnell from working as a copy person or janitor for Technica and LGS. (*See* Motion to Reconsider at 3 n.2). What is apparent from a review of the case law in this area, however, is that the so-called "janitor test" has no applicability to narrow non-compete agreements limited to an employer's clients or customers, such as the one at bar. The janitor test is applied only in those cases involving provisions that prohibit former employees from working for ***any competitor*** in any capacity—the point being that the clause will be deemed unreasonably broad if it would preclude a former employee from obtaining any job in his chosen field or profession. Mr. O'Donnell's non-solicitation agreement, as discussed above, leaves him free to work as a management consultant, IT professional, janitor, secretary, or in any other capacity for any company in the world, with the exception of two GovStrategy clients.

Virginia courts have recognized that employers have a legitimate business interest in protecting their client relationships and goodwill. *See, e.g., Paramount Termite Control Co. v. Rector*, 238 Va. 171, 175 (1989) (client contact justified employer's use of non-compete agreement); *Stoneman v. Wilson*, 169 Va. 239, 246 (1937) (noting that noncompete agreements often upheld where employees come into personal contact with their employer's customers); *Arrowhead Travel, Inc. v. Hinton*, 25 Va. Cir. 54, 55 (Lancaster Cir. Ct. 1991) (employers have the right to protect their goodwill from misappropriation). Narrowly drawn covenants designed to protect that legitimate business interest will be enforced.

As explained in *Johnson v. MPR Associates, Inc.*, 894 F. Supp. 255 (E.D. Va. 1994), "[a] restraint is easier to justify...if the restraint is limited to the taking of [the] former employer's customers as contrasted with competition in general." *Johnson*, 894 F. Supp. at 258 (applying D.C. law) (citing RESTATEMENT (SECOND) OF CONTRACTS, Section 188, cmt. g (1981)).

Numerous opinions from Virginia's state and federal courts demonstrate that when the non-compete or non-solicitation restriction is limited to certain customers and clients, rather than applying to an entire industry or field of competitors, it may be perfectly reasonable to restrict the former employee from soliciting ***any*** business from those customers and clients, as such a restriction may still be deemed sufficiently narrowly designed to protect the employer's legitimate business interest in protecting its goodwill and client relationships, and not unduly burdensome or restrictive on the employee's ability to earn a living. *See, e.g., Brainware, Inc. v. Mahan*, --- F. Supp. 2d ---, 2011 WL 3734456 (E.D. Va. Aug. 24, 2011) (upholding as reasonable a non-solicitation clause in which the employee agreed not to "Solicit, divert or take away or attempt to divert or to take away, the business or patronage of any of the clients, customers or accounts, or prospective clients, customers or accounts, of the Company which were contacted, solicited or served by the Employee while employed by the Company"); *Hilb, Rogal and Hamilton Co. v. DePew*, 247 Va. 240, 247 (1994) (enforcing non-compete agreement providing that the employee "shall not directly or indirectly...approach, contact or solicit, or continue to allow himself to be approached or contacted by, any individual or firm, which was a Customer...of the Employer ...for the purpose of offering...services in the field of insurance or any other business engaged in by the Employer during Employee's term of employment").

In short, Mr. O'Donnell's non-solicitation agreement, which restricts only his ability to accept employment with two companies and leaves him free to accept employment anywhere

else (including with GovStrategy's competitors), is narrowly drawn to protect GovStrategy's legitimate business interests, is not unduly burdensome on Mr. O'Donnell's ability to earn a living, and is not against public policy. As such, the agreement is enforceable and the Court correctly overruled the Demurrer.

III. The Court Acted Appropriately By Declining to Find the Non-Compete Overbroad On Its Face and Calling for "Factual Development".

A demurrer "lies only for a matter already apparent on the face of the pleadings" and does not permit the presentation of evidence outside the complaint. *County Sch. Bd. of Tazewell County v. Snead*, 198 Va. 100, 103 (1956). At trial, GovStrategy has the burden to prove, and will prove, that the non-compete agreement signed by Mr. O'Donnell was reasonable under the facts and circumstances of this case. In most cases, it would be inappropriate for a trial court to rule at the demurrer stage that a non-compete agreement is unreasonably broad, as doing so would deprive the employer of the opportunity to meet its burden of proof. According to the Virginia Supreme Court, a covenant not to compete should be examined "in light of all the circumstances in the case," and a court should not merely "limit its review to considering whether the restrictive covenant [is] facially reasonable." *Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 494-95 (2002); *see Foti v. Cook*, 220 Va. 800, 805 (1980) (noting that "whether restrictive covenants in an employment contract will be enforced in equity depends upon the facts in the particular case"); *Johns Brothers Security Inc. v. Jennings*, 2002 WL 32318314 (Norfolk June 5, 2002) (unpublished opinion) (overruling demurrer because "whether not the non-compete provisions contained in the employment contracts are overbroad, and contrary to public policy is not an issue for this Court to decide on demurrer").

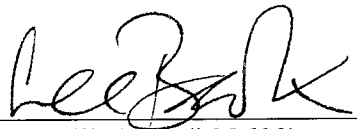
Federal courts applying Virginia law have similarly declined to dismiss claims for alleged breach of a restrictive covenant absent development of a factual record. *See Shire LLC v. Mickle*, 7:10-CV-00434, 2011 WL 3320506 (W.D. Va. Aug. 2, 2011) (denying defendant's motion for judgment on the pleadings, reasoning that "[t]he court finds that the pleadings fail to provide sufficient context for the court to make the fact-laden inquiry required to determine the reasonableness of the contract provisions in question.").

Here, the Court indicated that it would need to hear evidence before it could find the non-compete agreement unenforceable in light of the particular facts and circumstances of this case, finding that the non-compete was not facially overbroad. That ruling was correct for the reasons explained above and the Court should not modify its ruling. If the Defendants wish to present evidence in support of their argument that the non-compete is unreasonable as applied to Mr. O'Donnell, the time for doing so will come at trial.

CONCLUSION

Mr. O'Donnell is bound by the provisions of his non-compete agreement, which is reasonable and enforceable. The recent decision in *Home Paramount* does not compel or even suggest a contrary result. The Court's decision to overrule Defendants' Demurrer to Counts I and VI was well-informed and correct, and the Court should not modify its prior ruling in any respect.

GOVERNMENT STRATEGY &
TECHNOLOGY, LLC
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2012, a true and correct copy of the foregoing Memorandum in Opposition to Defendants' Motion to Reconsider Ruling on Demurrer was served by facsimile on:

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