GEORGE MASON AMERICAN INN OF COURT

Injunctions Practice in Virginia's Federal and State Courts

February 26, 2019

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AGENDA

- Introduction (7:00-7:05)
    - Introduction of subject matter, presenters, and student members
- Standard of review (7:05-7:15)
- Case studies (7:15-7:45)
    - *Update, Inc. v.* Samilow, 311 F. Supp. 3d 784 (E.D. Va. 2018) (preliminary injunction under noncompetition agreement)
    - *TP Host, LLC v. Host*, Case No. CL 18-009771 (Norfolk 2019) (temporary injunction under noncompetition agreement)
    - *Peraton, Inc. v. Raytheon Co.*, Case No. 1:17-cv-979 (E.D. Va. 2017) (preliminary injunction under the Defend Trade Secrets Act) (7:25-7:35)
    - *Jackson's MFF RTC, LLC v. BP South of Market LLC d/b/a South of Market LLC et al.*, Case No. CL 2017-4267 (Fairfax 2017) (temporary injunction under lease) (7:35-7:45)
- Common defenses (7:45-7:50)
- Bond (7:50-7:55)
- Summary of lessons learned (7:55-8:00)
- Question and answer (throughout)

Written Materials

I. Federal versus Virginia

a. Standard of review

Federal Rule of Civil Procedure 65 authorizes federal courts to issue preliminary injunctions. "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "In order to receive a preliminary injunction, the movant must establish that (1) it is likely to succeed on the merits of its case; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) an injunction would be in the public interest. *Winter*, 555 U.S. at 22.

Section 8.01-620 of the Virginia Code provides that "[e]very circuit court shall have jurisdiction to award injunctions." "[T]he granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *CG Riverview, LLC v. 139 Riverview, LLC*, 2018 Va. Cir. LEXIS 3, *8 (Norfolk 2018). "Although the Virginia Supreme Court has not yet articulated a standard for awarding a temporary injunction, the United States Supreme Court has provided a four-part test in determining whether a temporary injunction is appropriate." *Id.* This test includes the following: (1) likelihood of success on the merits; (2) irreparable harm; (3) the balance of the equities; and (4) the public interest. *Id.* (citing *Winter*, 555 U.S. at 20). "Virginia Courts have applied this four-part test in their state preliminary injunction analyses. *Id.* at *8-9.

b. Means of proof

U.S. District Courts have a preference for affidavits and argument on briefs. Federal courts prefer not to take testimony.

Virginia Circuit Courts have a preference for witness testimony.

II. Case studies

a. ***Update, Inc. v. Samilow***, 311 F. Supp. 3d 784 (E.D. Va. 2018) (preliminary injunction under noncompetition agreement) (opinion attached as Exhibit 1)

b. ***TP Host, LLC v. Host***, Case No. CL 18-009771 (Norfolk 2019) (temporary injunction under noncompetition agreement) (order attached as Exhibit 2)

c. ***Peraton, Inc. v. Raytheon Co.***, Case No. 1:17-cv-979 (E.D. Va. 2017) (preliminary injunction under the Defend Trade Secrets Act) (opinion attached as Exhibit 3)

d. ***Jackson's MFF RTC, LLC v. BP South of Market LLC d/b/a South of Market LLC et al.***, Case No. CL 2017-4267 (Fairfax 2017) (temporary injunction under lease) (opinion attached as Exhibit 4)

III. Common defenses

a. Adequate remedy at law

From the Fourth Circuit:

> In *Hughes Network Systems*, we noted that a preliminary injunction is not normally available where the harm at issue can be remedied by money damages. Id. at 693–94. However, we stated that, "[e]ven if a loss can be compensated by money damages ..., extraordinary circumstances may give rise to the irreparable harm required

> for a preliminary injunction." *Id.* at 694. We explained that such circumstances may exist where, for example, "the moving party's business cannot survive absent a preliminary injunction or where damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected." *Id.* (internal quotations marks and alterations omitted).
>
> In the narrow circumstances in which preliminary injunctions are warranted despite the adequacy of money damages, injunctions are "carefully tailored, generally operating simply to preserve the plaintiff's opportunity to receive an award of money damages at judgment."

Bethesda Softworks, L.L.C. v. Interplay Entm't Corp., 452 F. App'x 351, 353–54 (4th Cir. 2011) (affirming denial of preliminary injunction).

From the Supreme Court of Virginia: [t]o secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law." *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 431 (1994) ("The Cab Companies here have shown the difficulty of ascertaining monetary damages with precision…").

b. Unclean hands

From the Eastern District of Virginia: "Lastly, in pursuing a declaratory judgment, plaintiff invokes the equitable powers of this court. A party with unclean hands can be equitably estopped from recover. Unclean hands bars a party from receiving equitable relief because of that party's own inequitable conduct." *Newcom Holdings Pty. Ltd. v. Imbros Corp.*, 369 F. Supp. 2d 700, 713 (E.D. Va. 2005) (citations and quotations omitted).

From the Supreme Court of Virginia: "The doctrine of 'unclean hands' is an ancient maxim of equity courts." *Cline v. Berg*, 273 Va. 142, 147 (2007) (quoting *Richards v. Musselman*, 221 Va. 181, 185 (1980).

> Pursuant to the equitable maxim that 'He who comes into equity must come with clean hands,' ... the complainant seeking equitable relief must not himself have been guilty of

> any inequitable or wrongful conduct with respect to the transaction or subject matter sued on. Equity will not give relief to one seeking to restrain or enjoin a tortious act where he has himself been guilty of fraud, illegality, tortious conduct or the like in respect of the same matter in litigation.

Cline v. Berg, 273 Va. at 147 (citations omitted) (reversing the trial court for failing to apply unclean hands to bar equitable relief).

c. Undue delay

From the Fourth Circuit: "[A]ny delay attributable to plaintiffs in initiating a preliminary injunction request, coupled with prejudicial impact from the delay, should be considered when the question of irreparable harm to plaintiffs is balanced against harm to defendants." *Candle Factory, Inc. v. Trade Associates Group, Ltd.*, 2001 WL 1523349 (4th Cir. 2001).

IV. Bond

a. Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security."

b. Section 8.01-631(A) provides that "[e]xcept in the case of fiduciary or any other person from whom in the opinion of the court awarding an inunction it may be improper or unnecessary to require bond, no temporary injunction shall take effect until the movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by

any party found to have been incorrectly enjoined, with such conditions as the trial court may prescribe."

EXHIBIT 1

311 F.Supp.3d 784
United States District Court, E.D. Virginia, Alexandria Division.

UPDATE, INC., Plaintiff,
v.
Lawrence SAMILOW, Defendant.

Civil Action No. 1:18cv462
Filed 05/17/2018

Synopsis

Background: Employer brought action against former employee, alleging breach of contract. Employer moved for preliminary injunction.

Holdings: The District Court, T. S. Ellis, III, J., held that:

employer established likelihood of success on merits;

employer established irreparable harm; and

balance of hardships and public interest favored preliminary injunction.

Motion granted.

Attorneys and Law Firms

*785 Brandon Hall Elledge, Kevin Myles D'Olivo, Holland & Knight LLP, Tysons Corner, VA, for Plaintiff.

David Parker Phippen, Robert Patrick Floyd, III, Constangy Brooks Smith & Prophete LLP, Fairfax, VA, for Defendant.

MEMORANDUM OPINION

T. S. Ellis, III, United States District Judge

In this action for breach of contract, plaintiff, Update, Inc., alleges that its former employee, defendant Lawrence Samilow, breached the non-compete and non-solicitation clauses in his employment agreement. Plaintiff seeks a preliminary injunction pursuant to the non-solicitation and non-compete clauses of its contract with defendant, enjoining defendant from continuing to solicit its customers and to enforce the terms of the non-compete clause.

*786 I.

Plaintiff, a Delaware corporation with its principal place of business in New York, provides eDiscovery and legal staffing services throughout the United States.

Defendant, a New Jersey citizen, began working at plaintiff in 1995, and eventually, in 2016, was promoted to Chief Customer Officer, the company's top sales executive position. In that role, defendant was responsible for developing new sales opportunities and managing client relationships. Defendant was directly responsible for customer service for a number of New York and New Jersey clients. Defendant was also responsible for supervision of national sales, and therefore had access to client information across the country.

Approximately a year after defendant was promoted to Chief Customer Officer, plaintiff offered defendant a new compensation plan. In connection with the plan, defendant entered into an "Employee Nondisclosure and Assignment Agreement" (the Agreement) dated July 12, 2017. The Agreement contains a non-solicitation clause, which provides:

> I acknowledge that information about [plaintiff's] customers and customer prospects is confidential competitive information and constitutes a valuable trade secret. Accordingly, I agree that during the term of this agreement and for a period of one (1) year after my employment ends, I will not, either directly or indirectly, separately or in association with others, solicit or encourage others to solicit any of [plaintiff's] customers or customer prospects located within fifty (50) miles of any office, branch office, or production facility of the

> [plaintiff] or with whom I had any contact during the term of my employment for the purpose of diverting or taking away business from [plaintiff].

Agreement at § 12(a).

In addition to the non-solicitation clause, the Agreement also contains a non-compete clause which states:

> I agree that during the term of my employment with Company, and for one (1) year after my employment ends for any reason, I will not directly or indirectly compete with Company by providing to another person or entity in competition with Company (defined below) the same or similar services as those that I provided to the Company during the term of my employment with Company. For purposes of this agreement, a person or entity is in competition with the Company if it provides legal staffing, managed review, legal consulting, information governance, electronic data discovery and litigation support services within fifty (50) miles of any office, branch office, or production facility of the Company, with the exception of any person or entity listed below as a "Prior Relationship".
>
> This covenant not to compete is limited to the types of activities and services included within my Job Description described in my offer letter.

Agreement at § 13.

On January 10, 2018, defendant resigned his employment at plaintiff.[1] At approximately the same time as his resignation, Driven, Inc. had acquired Update, Inc., and defendant proposed to Driven moving all legal staffing and eDiscovery clients defendant had been servicing to defendant's soon to be formed consulting practice. That proposal was rejected.

*787 On January 11, 2018 defendant contacted a law firm, Lowenstein Sandler LLP, a client with which defendant had worked during his employment, to solicit business. In January, defendant also formed Samilow Harvest Group LLC, a new company headquartered in Roseland, New Jersey, within 50 miles of plaintiff's New York headquarters. Samilow Harvest Group's website states that it provides eDiscovery services similar to those provided by plaintiff.

Currently, defendant is providing services similar to those provided at plaintiff to two of plaintiff's clients: (i) Porzio, Bromberg & Newman, P.C. (Porzio), and (ii) Teligent, Inc. (Teligent). With respect to Porzio, defendant is providing legal staffing services similar to those provided by plaintiff in the past. And with respect to Teligent, defendant is alleged to have diverted a large project from plaintiff, and Teligent has informed plaintiff that it transferred its engagement to another vendor.[2]

On April 20, 2018 plaintiff filed its verified complaint alleging that defendant was in breach of his Agreement (i) by soliciting plaintiff's customers Porzio, Teligent, and Lowenstein Sandler, and (ii) by engaging in similar services he provided to plaintiff within a 50–mile radius of plaintiff's New York headquarters. Plaintiff moved for a preliminary injunction the same day. An initial hearing on the motion for a preliminary injunction was held on Friday, May 11, 2018. Defendant filed a response brief before that hearing, making a number of arguments in opposition to the motion for a preliminary injunction, but at the May 11 hearing, his newly retained counsel made a number of new arguments. Following an additional round of briefing and argument, the matter is now ripe for disposition.

II.

The standard for the issuance of a preliminary injunction is too well-settled to require extended discussion. A party seeking a preliminary injunction must demonstrate "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)).

With respect to likelihood of success on the merits, the Fourth Circuit has made clear that although the movant need not show a certainty of success, the movant must make a "clear showing" of likelihood of success on the merits. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013).

Analysis of each of these factors discloses that plaintiff has made the required showing for a preliminary injunction.

A.

To begin with, plaintiff has made the requisite clear showing of likely success on the merits. The central issue with respect to likelihood of success on the merits is whether the non-solicitation and non-compete clauses of the Agreement are enforceable or unenforceable under Virginia Law.[3] In Virginia, non-compete clauses are disfavored restraints on trade. *See* ***788** *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666, 678 (2001). Given this disfavored status, non-compete clauses "have been upheld only when employees are prohibited from competing directly with the former employer or through employment with a direct competitor." *Omniplex World Servs. Corp. v. U.S. Investigations Servs. Inc.*, 270 Va. 246, 618 S.E.2d 340, 342 (2005).

Consistent with these principles, the Supreme Court of Virginia has established a three-part test for determining the enforceability of non-solicitation and non-compete clauses. This test "requires that the employer show that the clause (i) is narrowly drawn to protect the employer's legitimate business interest; (ii) is not unduly burdensome on the employee's ability to earn a living; and (iii) is not against sound public policy." *Lanmark Technology, Inc. v. Canales*, 454 F.Supp.2d 524, 528 (E.D. Va. 2006) (citing *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113, 117 (1962)).[4] Analysis of these factors requires courts to consider "the restriction in terms of function, geographic scope, and duration." *Simmons*, 544 S.E.2d at 678.

Importantly, courts employing this three-part test must take the non-compete as written; courts have no authority under Virginia law to " 'blue pencil' or otherwise rewrite the contract" to eliminate illegal overbreadth. *Pais v. Automation Products*, 36 Va. Cir. 230, 239, 1995 WL 17049090 (1995). Thus, where a non-compete clause is ambiguous, susceptible to two or more differing interpretations, one of which is overbroad and unenforceable, the entire clause fails even though it may be reasonable as applied to the specific circumstances. *Id.* at 57–58. Still, the Supreme Court of Virginia has made clear that "restraints on competition are neither enforceable nor unenforceable in a factual vacuum" and as such "[a]n employer may prove a seemingly overbroad restraint to be reasonable under the particular circumstances of the case." *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804, 808 (2013). Accordingly, in interpreting a non-compete clause, courts are required to take into account the factual context surrounding the agreement.

The first step in the analysis is to assess whether the clause is narrowly drawn to protect plaintiff's legitimate business interest. *See Richardson*, 127 S.E.2d at 117. Plaintiff has a legitimate business interest in imposing a reasonable non-compete clause "to protect itself from losing potential work to competitors through employees who leave the company and then compete against [plaintiff] using the business sensitive knowledge and contacts they acquired" as an employee. *See Power Distrib. v. Emergency Power Engineering, Inc.*, 569 F.Supp. 54, 57 (E.D. Va. 1983) (finding that employer had a legitimate business interest in protecting itself from competition by former employees who had gained sensitive information).[5] The Agreement's ***789** non-solicitation clause serves the same purpose, namely, preventing a former employee from using contacts acquired as an employee to compete with a former employer.

The legitimacy of the business interest does not end the analysis, because the non-solicitation and non-compete clauses must also be "reasonable in the sense that it is no greater than is necessary to protect" an employer's legitimate business interest. *Richardson*, 127 S.E.2d at 117. In determining whether the clauses are reasonable, courts must consider "the restriction in terms of function, geographic scope, and duration." *Simmons*, 544 S.E.2d at 678. The non-solicitation and non-compete clauses at issue here pass this test. There is no dispute that the one-year duration of the non-solicitation and non-compete clauses[6] is reasonable. Indeed, the Supreme Court of Virginia has deemed reasonable even longer non-compete agreements. *See Blue Ridge Anesthesia*, 389 S.E.2d at 470 (upholding a three year non-compete).[7] In this context, a one-year duration for the non-solicitation and non-compete agreement is reasonable because plaintiff invests significant resources in its legal services clients and built relationships with many of them through defendant's work on behalf of plaintiff. Pish Decl. at ¶¶ 7–8, 16. Therefore, the one-year limitation allows plaintiff a reasonable time to convince customers to remain with plaintiff without interference from defendant.

The geographic scope of the non-solicitation and non-compete clauses is also reasonable. The Agreement bars solicitation of customers "located within fifty (50) miles of any office, branch office, or production facility" of plaintiff, and similarly bars competition "within fifty (50) miles of any office, branch office, or production facility[.]" Agreement at ¶¶ 12(a), 13. The Supreme Court of Virginia has upheld similar "fifty-mile from office" clauses as reasonable. *See Advanced Marine Enterprises, Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148, 155 (1998) (upholding a restriction limited to a fifty-mile radius around former employer's 300 offices).[8] Indeed, where, as here, the employee has company-wide knowledge about customers and sales practices, the Supreme Court of Virginia has upheld even less definite geographic restrictions. In *Roanoke Eng'g*, the Supreme Court of Virginia held that a non-compete geographic clause that referred to all "territory covered by" the former employee was reasonable because the employee had company-wide knowledge that would allow him to compete with his former employer nationally. *See Roanoke Eng'g*, 290 S.E.2d at 884–85.[9] Here, defendant was employed as Chief Customer Officer, and in that role provided personal customer service to New York and ***790** New Jersey customers, and was informed about customer information spanning the entire reach of plaintiff's business locations. Pish Decl. ¶¶ 12, 14–15, 17.[10] Additionally, defendant admits that at his recently established competing company, Samilow Harvest Group, he "has a national practice[.]" Compl. Ex. B. Accordingly, the Agreement's non-solicitation and non-compete clauses' geographic scope is reasonable because it covers only the territories in which plaintiff conducts business and in which defendant conducted business.[11]

Finally, the functional scope of the non-solicitation and non-compete clauses is reasonable in light of defendant's former role at plaintiff. The non-solicitation clause provides that defendant

> will not ... solicit any of [plaintiff's] customers or customer prospects within fifty (50) miles of any office, branch office, or production facility of [plaintiff] or with whom I had any contact during the term of my employment for the purpose of diverting or taking away business from [plaintiff]

Agreement at § 12(a). The Agreement's non-solicitation clause is limited to the two categories of solicitation which plaintiff might reasonably expect from defendant, namely solicitation of clients in geographic areas that would compete with plaintiff and solicitation of former clients with whom defendant worked. Furthermore, the non-solicitation clause is limited because it only bars defendant's solicitation "for the purpose of diverting or taking away business from [plaintiff]." *Id.* Thus, defendant's mere contact with former clients or possible customers of plaintiff's does not violate the non-solicitation clause. The Supreme Court of Virginia has upheld similar non-solicitation clauses as reasonable because the scope of the clause is limited only to solicitation that takes business away from the former employer. *See Advanced Marine Enterprises, Inc.*, 501 S.E.2d at 155 (upholding as valid a non-solicitation clause that barred solicitation of customers with whom employee worked and customers within a fifty-mile radius of former employer). Accordingly, the non-solicitation clause is narrowly limited in scope to protect plaintiff's legitimate business ***791** interests, and is not unduly burdensome on the defendant's ability to earn a living.

Similarly, the Agreement's non-compete clause has a functional scope entirely reasonable under the circumstances. This clause states in pertinent part "[defendant] will not ... compete with [plaintiff] by providing to another person or entity in competition with [plaintiff] ... the same or similar services as those that I provided to [plaintiff] during the term of my employment." Agreement at § 13. The non-compete clause goes on to define a person or entity in competition as a person or entity that "provides legal staffing, managed review, legal consulting, information governance, electronic data discovery and litigation support services" within fifty miles of plaintiff's offices. *Id.* Finally, the scope of the non-compete clause is further limited "to the types of activities and services included within [defendant's] Job Description described in [his] offer letter." *Id.* Thus, the non-compete clause does not prevent defendant from providing services to competitor companies provided those services fall outside the scope of defendant's former role at plaintiff.

Seeking to avoid this conclusion, defendant argues that the Agreement's non-solicitation and non-compete clauses are not narrowly tailored because the Agreement fails to define a number of terms in both clauses. Specifically, with respect to the non-solicitation clause defendant argues that the failure to define (i) "solicit," (ii) "customers," (iii) "office, branch office, or production facility," and (iv) "located" makes the clause functionally and geographically overbroad. With respect to the latter three terms—customers, office *et al*, and located—defendant cites no case or authority for the proposition that these terms must be defined in the Agreement for the Agreement to be enforceable or understandable. Under ordinary circumstances, Virginia law requires giving contract terms their "ordinary meaning," and doing so here suffices to make the non-solicitation clause not only easily understandable but also far from fatally ambiguous or vague. *See TravCo Ins. Co. v. Ward*, 284 Va. 547, 736 S.E.2d 321, 325 (2012) ("Words that the parties used are normally given their usual, ordinary, and popular meaning.") (quoting *City of Chesapeake v. States Self–Insurers Risk Retention Group, Inc.*, 271 Va. 574, 628 S.E.2d 539, 541 (2006)). Indeed, as noted *supra*, the Supreme Court of Virginia has routinely upheld non-solicitation and non-competition agreements that do not define similar words. *See, e.g.*, *Advanced Marine Enterprises, Inc.*, 501 S.E.2d at 155. Accordingly, the failure of the Agreement to define every term in the non-solicitation clause does not render the clause ambiguous, and defendant's argument therefore fails.

With respect to the term "solicit," defendant cites only one case for the proposition that failure to define the term "solicit" might render a non-solicitation clause fatally ambiguous, namely *Prudential Secs., Inc. v. Plunkett*, 8 F.Supp.2d 514 (E.D. Va. 1998). [12] This case is ultimately ***792** neither controlling nor persuasive. The court in *Plunkett* addressed the validity of a non-solicitation clause governed by New York law, not Virginia law. *Id.* at 516. And although there is some authority in New York law for the proposition that failure to define "solicit" in a non-solicitation agreement might render the clause unenforceable, there is *no Virginia authority* supporting such a contention. Indeed, the Supreme Court of Virginia has repeatedly upheld non-solicitation agreements which do not define "solicit." *See, e.g.*, *Advanced Marine Enterprises, Inc.*, 501 S.E.2d at 155. Thus, the *Plunkett* case is inapposite, and relevant Virginia precedents make clear that the failure to define the term "solicit" in a non-solicitation clause does not render the clause vague and unenforceable.

With respect to the non-compete clause, defendant makes the same argument, namely that failure to define a number of terms in the Agreement renders the non-compete overbroad and unenforceable. This time defendant's laundry list of undefined terms grows to include eleven supposedly undefined terms. [13] As with the non-solicitation clause, these terms are not ambiguous and no ambiguity is created by the failure of the Agreement to provide a glossary or serve as a dictionary; Virginia law makes clear that where terms are undefined they are to be given their ordinary meaning. *See Ward*, 736 S.E.2d at 325. To hold otherwise would require every contract to include a contract-specific glossary or dictionary. Rather, Virginia law requires that terms be given their ordinary meaning which in this case eliminates any ambiguity or lack of clarity.

Defendant also argues that both the non-solicitation and non-compete clauses are fatally ambiguous due to misplaced modifiers. Specifically, the non-solicitation clause provides that defendant

> will not ... solicit any of [plaintiff's] customers or customer prospects **[Clause 1]** within fifty (50) miles of any office, branch office, or production facility of [plaintiff] or **[Clause 2]** with whom I had any contact during the term of my employment **[modifier] for the purpose of diverting or taking away business from [plaintiff]**

Agreement at § 12(a) (emphasis added). According to defendant, it is unclear whether the modifier "for the purpose of diverting or taking away business from [plaintiff]" modifies only clause [2], contact during defendant's employment, or modifies both clause [1]—solicitation of customer and customer prospects within fifty-miles of plaintiff's offices—*and* clause [2]—plaintiff's solicitation of customers with whom defendant had contact while employed by plaintiff. According to defendant, this ambiguity is fatal to the Agreement

because if the modifier applies only to clause [2], then clause [1] is overbroad because it would bar any solicitation of business by defendant, including solicitation of non-competing business. This argument is entirely unpersuasive.

Although the placement of the modifier at the end of the solicitation clause may be inartful, it is not ambiguous because *793 defendant's interpretation of the clause is not reasonable. If defendant's interpretation is accepted, clause [2] bars defendant's solicitation of customers defendant had already solicited during his employment for the purpose of taking away business from his employer. Thus, under defendant's interpretation, clause [2] is exceedingly narrow, barring only defendant's efforts to re-solicit clients he already solicited during his employment. It is also unclear why the non-solicitation clause would even bother to cover this scenario, since defendant presumably would not be contacting clients for the purpose of diverting or taking business from plaintiff while defendant was employed by plaintiff. Defendant's reading makes little sense, as it would cover a scenario unlikely to arise, and Virginia law requires that "an unreasonable construction is always to be avoided." *Hairston v. Hill*, 118 Va. 339, 87 S.E. 573, 575 (1916). [14]

Moreover, a reading that applies the modifier to both clauses is the only reasonable interpretation given the context of the Agreement and defendant's employment. *See Assurance Data, Inc. v. Malyevax*, 286 Va. 137, 747 S.E.2d 804, 808 (2013) (noting that context is essential to the interpretation of non-compete clauses because "restraints on competition are neither enforceable nor unenforceable in a factual vacuum."). Defendant worked as the Chief Customer Officer at plaintiff. In this role, defendant personally provided services to a number of customers in New Jersey and New York. Defendant also supervised plaintiff's sales nationally, and as such he had access to information relating to plaintiff's customers throughout the country. Given the information defendant had access to, and the possible clients he might attempt to solicit, the interpretation of the non-solicitation clause that covers both groups of customers is the most reasonable. Clause [1] protects plaintiff from defendant's solicitation of customers with whom defendant did not work, and clause [2] protects plaintiff from defendant's solicitation of customers outside the fifty-mile geographic scope, but who defendant had worked with personally. In sum, the Agreement's non-solicitation clause, contrary to defendant's argument, is not reasonably susceptible to two readings, [15] and thus defendant's argument that the clause is fatally ambiguous fails. [16]

*794 With respect to the non-compete clause, defendant argues that its language is also fatally ambiguous. The non-compete clause includes language limiting its scope "to the types of activities and services included within [defendant's] Job Description described in [defendant's] offer letter." Agreement at ¶ 13 (emphasis added). Defendant argues this phrase is susceptible to multiple meanings, but that is incorrect; the clause clearly sets the scope of competitive activities to include only the activities and services described in plaintiff's offer letter. To be sure, the offer letter does include a number of items that are not part of the "Job Description," including compensation terms. And, the offer letter does not have a section specifically entitled "Job Description." But neither of those facts renders the Agreement's non-compete clause ambiguous. Indeed the offer letter and the attached job description make clear that defendant is simply barred from performing for a competitor the same job duties he performed for plaintiff. [17] Defendant points to only one clause that he believes to be vague: "creating interest, developing opportunities, managing client relationships ... and driving revenue by closing business with decision makers at corporations and law firms." *See* Offer Letter. This language is not vague. Defendant was expected to work in sales and client management with respect to the law firms and companies for which plaintiff provided legal staffing and eDiscovery services. Nothing about defendant's job description is unclear, and the non-compete clause simply bars defendant from engaging in the same work he engaged in at plaintiff.

Defendant next argues that the entire Agreement is invalid because of blue pencil clauses contained in § 13a of the Agreement. The clause provides that:

> Paragraph 13 shall be severable, and if any of them is held invalid because of its duration, scope of area or activity, or any other reason, the parties agree that such clause shall be adjusted or modified by the court to the extent necessary to cure that invalidity, and the modified clause

> shall be enforceable as if originally made in this agreement.

Agreement at § 13a. Although the Supreme Court of Virginia has not weighed in on the issue, multiple Virginia circuit courts have held that blue pencil clauses are invalid under Virginia law. Defendant attempts to take this argument a step further, citing language in *BB & T Insurance Servs., Inc. v. Rutherfoord*, 80 Va. Cir. 174, 2010 WL 7373709 (2010) and *Pace v. Retirement Plan Administrative Serv., Inc.*, 74 Va. Cir. 201, 2007 WL 5971432 (2007) for the proposition that the addition of a blue pencil clause in a contract with a non-compete renders the entire contract invalid. This argument is ultimately unpersuasive. To begin with, it is not clear that the Virginia circuit court cases defendant cites stand for the proposition that the insertion of a blue pencil clause invalidates the entire agreement. In each case, the circuit courts first found that the non-compete itself was invalid, and then discussed the impact of the blue pencil clause. *See Rutherfoord*, 80 Va. Cir. at 5 ("[blue pencil] clauses have been deemed invalid and render the agreement unenforceable"); *Pace*, 74 Va. Cir. at 4 ("[blue pencil] clauses have been deemed invalid and render ***795** the agreement unenforceable"). It appears that the courts may have simply been stating that the non-compete agreements were invalid because the blue pencil clauses could not be used to salvage them.

Even if that were not the case, these statements amount merely to dicta. Indeed, the cases cited by those courts stand only for the proposition that blue pencil clauses are invalid under Virginia law. *Better Living Components, Inc. v. Willard Coleman & Blue Ridge Truss & Supply*, 67 Va. Cir. 221, 226, 2005 WL 771592 (Albemarle County Cir. Ct. 2005) ("Although the Supreme Court of Virginia has not expressly ruled on the existence of a "blue pencil" power, it is clear that that Court does not consider the possibility of reforming unreasonable restraints on trade in any way."); *Cliff Simmons Roofing, Inc. v. Cash*, 49 Va. Cir. 156, 158, 1999 WL 370247 (Rockingham County Cir. Ct. 1999) ("[T]his court has not been granted the authority to 'blue pencil' or otherwise rewrite the contract, the covenants therefore fail.").

Finally, a rule of law that would strike an entire non-compete agreement because of the inclusion of an invalid blue pencil clause does not comport with common sense or sound public policy. Where, as here, there is no need to blue pencil the non-compete or non-solicitation clauses, it makes little sense to frustrate the parties' intentions to be bound by those clauses because a separate, inert blue pencil clause exists in the contract. Accordingly, defendant's argument that the blue pencil clause in § 13a of the Agreement invalidates the non-compete and non-solicitation clauses fails.

Lastly, defendant argues he was "forced" to sign the Agreement because defendant's increased salary was contingent on his accepting the non-compete and non-solicitation clauses. Samilow Decl. at ¶ 15. But the fact that a salary increase was contingent on acceptance of non-compete and non-solicitation clauses does not, on this record, support a claim of duress. *See Goode v. Burke Town Plaza, Inc.*, 246 Va. 407, 436 S.E.2d 450, 452–53 (1993) ("the application of economic pressure by threatening to enforce a legal right is not a wrongful act [and] cannot constitute duress.") (citing *Bond v. Crawford*, 193 Va. 437, 69 S.E.2d 470, 475 (1952)). Rather, the increased compensation constituted consideration for the agreement not to compete, and Virginia courts have routinely upheld such arrangements. *See, e.g.*, *Paramount Terminate Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922, 926 (1989).

In sum, a review of the non-compete and non-solicitation clauses suggests that they are narrowly tailored to protect plaintiff's legitimate business interests, that the clauses are not unduly burdensome to defendant's ability to earn a living, and that the clauses do not violate public policy. Given the record in this case, it also appears that defendant is violating the non-solicitation clause by soliciting plaintiff's clients, Lowenstein Sandler, Porzio, and Teligent, and is violating the non-compete by diverting Porzio's and Teligent's business from plaintiff. Accordingly, at this stage plaintiff has made a clear showing of success on the merits.

B.

With respect to irreparable harm, plaintiff contends that the loss of future business from customers diverted by defendant constitutes irreparable harm. Generally, irreparable harm "is suffered when monetary damages are difficult to ascertain or are inadequate." *Multi–Channel TV Cable Co. v. Charlottesville Quality Cable Operating*

Co., 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)). Irreparable harm must be "neither remote nor speculative, but actual and imminent." ***796** *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (quotation and citation omitted).

In this case, the harm plaintiff faces is neither remote nor speculative. Plaintiff has presented evidence that defendant has already diverted customers from plaintiff and appears intent on continuing to do so through his Samilow Harvest Group business. Specifically, defendant has solicited and diverted business from plaintiff's clients that defendant serviced during his employment including Lowenstein, Porzio, and Teligent. *See* Pish Decl. ¶¶ 24–29, 30–31, 33–35. The harm plaintiff is suffering is therefore actual, particularly with respect to its project with Teligent which was diverted by defendant. Thus, plaintiff is suffering present harm from defendant's breach of the non-solicitation and non-compete.

Defendant argues that this kind of harm—the loss of customers—is not irreparable because money damages are reasonably easy to measure. According to defendant, damages can be measured by calculating the money earned from the diverted clients and deals, and simply awarding that amount as damages. Although it may be easy to calculate the amount of harm caused with respect to a single transaction between defendant and a client, the Fourth Circuit has repeatedly recognized that "[t]he threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm." *Multi–Channel TV Cable Co.*, 22 F.3d at 552. [18] In this case, plaintiff is harmed not only by the loss of particular deals or particular work from clients, but plaintiff also risks losing future business opportunities with the clients defendant has diverted. Thus, plaintiff has sufficiently shown a risk of irreparable harm.

In the alternative, defendant argues that there is no harm to plaintiff because plaintiff abandoned the New Jersey and Philadelphia markets in which defendant is working and soliciting clients. Simply put, that does not appear to be true on this record. *See* Supp. Pish Decl at ¶¶ 8, 18, 19; Supp. Williams Decl. ¶¶ 4, 5, 12. Thus, defendant's argument that plaintiff is suffering no harm because plaintiff abandoned the market is without merit, and plaintiff has shown a risk of irreparable harm.

C.

Finally, the balance of hardships and the public interest both weigh in favor of issuing an injunction on this record. Although it is undoubtedly true that subjecting defendant to the restrictive covenant may impair his ability to earn a living, plaintiff has an interest in protecting its customers from diversion pending resolution of the case. *See Power Distrib.*, 569 F.Supp. at 57 (finding that an employer has a legitimate business interest in protecting itself from competition by former employees who possess sensitive information). And the public has an interest in protecting the legitimate expectations of parties to a contract, including non-compete agreements. To be sure, contracts in restraint of trade are generally disfavored under Virginia law as a matter of public policy. *See Simmons*, 544 S.E.2d at 678. But, Virginia law does encourage the enforcement of *valid* non-compete agreements, such as the one at issue here. [19] Accordingly, the final two *Winter* factors ***797** point persuasively to the conclusion that a preliminary injunction must issue.

III.

In sum, plaintiff in this case has made a clear showing that it is likely to succeed on the merits of its claim, and that the balance of hardships and public interest favor the issuance of an injunction. For these reasons, the motion for a preliminary injunction must be granted. To be clear, however, this injunction is only preliminary, it is not a final judgment on the merits of the case. The case will now proceed to discovery, and if warranted, trial. If during the course of discovery the parties discover additional facts demonstrating that the preliminary injunction is not necessary or must be altered, they are urged to file an appropriate motion.

An appropriate Order shall issue.

All Citations

311 F.Supp.3d 784, 2018 IER Cases 177,039

Footnotes

1 Defendant's pleading states that defendant was terminated. Whether defendant resigned or was terminated is not material to the preliminary injunction analysis, as the validity of the Agreement's non-solicitation and non-compete clauses is not affected by whether he was discharged or resigned.

2 Plaintiff has also presented evidence that defendant intends to act as the "presenting sponsor" at the upcoming New Jersey General Counsel of the Year Award event to be held on Friday, May 18, 2018. According to plaintiff, defendant's role in that event will allow him to present his competing services to other possible clients.

3 Despite the fact that plaintiff and defendant are both out-of-state residents and the events leading to this dispute occurred outside Virginia, Virginia law nevertheless governs pursuant to § 19 of the parties' Agreement. The Agreement also designates Virginia's state and federal courts as the exclusive fora for deciding any disputes under the Agreement. *Id.*

4 *See also Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 144, 747 S.E.2d 804 (2013) (holding that enforceability of a non-compete agreement depends on "whether a restraint is [1] narrowly tailored drawn to protect the employer's legitimate business interest, [2] is not unduly burdensome on the employee's ability to earn a living, and [3] is not against public policy.") (citations omitted).

5 *See also Worrie v. Boze*, 191 Va. 916, 62 S.E.2d 876, 882 (1951) ("Freedom to contract must not be unreasonably abridged, but neither must the right to protect by reasonable restrictions that which a man by industry, skill, and good judgment has built up, be denied."); *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467, 469 (1990) (holding that a company has a legitimate business interest in barring employee-competitor's use of customer contacts); *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548, 290 S.E.2d 882, 885 (1982) (holding that a company has a legitimate business interest in preventing the use of "lists of customers, lists of suppliers, detailed knowledge of overhead factors, pricing policies, and bidding techniques" by employee-competitor).

6 *See* Agreement at ¶¶ 12(a), 13.

7 *See also Roanoke Eng'g*, 290 S.E.2d at 885 (three years); *Hair Club for Men, LLC v. Ehson*, 2016 WL 4577019, at *5–6 (E.D. Va. Aug. 31 2016) (two years).

8 *See also New River Media Group, Inc. v. Knighton*, 245 Va. 367, 429 S.E.2d 25, 26 (1993) (holding that a "60–mile, 12–month limit is not unduly harsh and oppressive in diminishing [the employee's] legitimate efforts to earn a living.").

9 *See also Blue Ridge Anesthesia*, 389 S.E.2d at 884–85 (upholding a similar covenant limited to territories serviced by former employee).

10 Defendant argues that plaintiff abandoned the markets in which defendant is now working, and that the geographic scope of the non-compete is therefore not narrowly tailored. The record evidence, at this stage, demonstrates that plaintiff has not abandoned the New Jersey and Philadelphia markets. Declarations from plaintiff suggest that plaintiff continues to do a significant amount of business in New Jersey and Philadelphia, amounting to millions in revenue. *See* Supp. Pish Decl. at ¶¶ 8–10, 12–13, 15; Supp. Williams Decl. at ¶¶ 3–9; Grant Decl. at ¶ 9. Defendant points out that plaintiff closed its office space in Newark, New Jersey, but as plaintiff explains this did not mean that plaintiff stopped working with customers in New Jersey. Supp. Pish Decl. at ¶¶ 10, 12. Defendant also argues that plaintiff does not provide office space for clients in New Jersey, a service defendant provides, but plaintiff still provides this service in its New York office to its New Jersey customers. Thus, the evidence demonstrates that plaintiff still does substantial business in New Jersey and Philadelphia, and the geographic scope of the non-compete does not appear to be unreasonable.

11 The non-solicitation clause also covers customers with whom defendant worked directly. *See* Agreement at ¶ 12(a) ("I will not solicit ... or encourage others to solicit any of [plaintiff's] customers ... with whom I had any contact during the term of my employment ..."). As explained *supra*, the Supreme Court of Virginia has routinely upheld non-competition and non-solicitation provisions that cover past clients with whom the employee had direct contact. *See supra* n. 9. *See also Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 394, 732 S.E.2d 676 (Va. 2012) ("The lack of a specific geographic limitation is not fatal to the covenant because the noncompete clause is so narrowly drawn to this particular project and the handful of companies in direct competition ...")

12 Defendant also cites *Summer Wealth Mgmt., LLC v. Investment Placement Group*, 2016 WL 153087 at *2–3 (E.D. Va. 2016), but that case simply noted that although the agreement at issue did not define the term solicit, the meaning was readily discernible by looking to the ordinary meaning of the word as required by Virginia law. *Id.* at *2 ("The parties have merely obligated themselves to refrain from 'solicit[ing]' ... anyone presently employed by the other party.... 'The plain meaning of the word 'solicit' requires the initiation of contact.' ") (quoting *Mona Elec. Group, Inc. v. Truland Serv. Corp.*, 56 Fed.Appx. 108, 110 (4th Cir. 2003)). Although the district court denied plaintiff's motion for a temporary restraining order, it did so on the ground that plaintiff had failed to present evidence showing that defendant had taken affirmative

steps to solicit employees. *Id.* at *2–3. Unlike the plaintiff in *Summer Wealth Mgmt., LLC*, plaintiff here has provided substantial evidence that defendant has made efforts to solicit clients and divert customer work from plaintiff.

13 According to defendant, the following terms in the Agreement are undefined: (i) compete, (ii) providing, (iii) similar services, (iv) similar, (v) services, (vi) provides, (vii) legal consulting, (viii) information governance, (ix) services within, (x) office, branch office, production facility, and (xi) types of activities or services. Defendant's double-counting of terms such as "providing" and "provides," however, makes the list appear more dramatic than it is on closer inspection. In any event, defendant's attempt to invent ambiguity where none exists fails.

14 *See also Gov't Employees Ins. Co. v. Moore*, 266 Va. 155, 580 S.E.2d 823, 829 (2003) ("the construction adopted should be reasonable, and absurd results are to be avoided."); *Allemong v. Augusta Nat. Bank*, 103 Va. 243, 48 S.E. 897, 899 (1904) ("The words of a contract will be given a reasonable construction, where it is possible, rather than an unreasonable one"); *Baistar Mechanical Inc. v. Billy Casper Golf, LLC*, 2015 WL 10990120 (Va. Oct. 22, 2015) (unpublished) ([w]here there is ambiguity, [courts] will not apply such an unreasonable construction.").

15 Defendant cites *Power Distribution, Inc. v. Emergency Power Engineering, Inc.*, 569 F.Supp. 54 (E.D. Va. 1983), for the proposition that any ambiguity in a non-compete or non-solicitation provision compels the conclusion that the provision is fatally overbroad. This decision is neither binding nor is it persuasive given defendant's reading of it. Defendant over-reads the case. Unlike the case here, the provision in *Power Distribution* was, in fact, susceptible to multiple reasonable interpretations one of which would have barred the employee from performing duties for a competitor that were unrelated to the employee's past work. *Id.* at 58. By contrast, this provision is unambiguous and not reasonably susceptible to multiple interpretations, so there is no risk of barring the employee from performing non-competing tasks with competitor companies.

16 Even if the Agreement's non-solicitation clause was, as defendant argues, ambiguous on its face, Virginia law bars facial attacks on the validity of non-compete agreements, instead requiring courts to look at the facts of the particular case. *Assurance Data, Inc.*, 747 S.E.2d at 808. Indeed, the Supreme Court of Virginia has stated that "[a]n employer may prove a seemingly overbroad restraint to be reasonable under the particular circumstances of the case." *Id.* at 808 (citing *Simmons*, 544 S.E.2d at 678)). Given the circumstances of this case, the non-solicitation provision at issue is not functionally overbroad in its application to defendant.

17 Defendant argues that items such as being "a team player" are also included in the job description and would be barred, but that example is not persuasive because being a team player is an employer expectation, clearly not a "service or activity" as defined in the non-compete clause.

18 *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (finding preliminary injunction appropriate where plaintiff "faced irreparable, noncompensable harm in the loss of its customers.").

19 Defendant urges a different conclusion on the ground that legal services contracts are different. In essence, defendant seeks a rule of law stating that non-compete and non-solicitation agreements are always invalid if the agreements relate to legal services. Defendant cites no case for this proposition and there is no compelling reason to believe that contracts not to compete should be uniformly unenforceable where legal services are provided. In fact, as this case demonstrates, many of the same concerns about misuse of customer information and relationships apply in the legal services business, just as they apply across the business landscape.

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EXHIBIT 2

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

TP Host, LLC

Plaintiff,

v. Civil Action No. CL18009771-00

David F. Host, Jr.

Defendant.

ORDER

THIS MATTER came before the Court on Plaintiff TP Host, LLC's ("TPH") Motion for Temporary Injunction. Based on the briefing submitted by the parties, as well as the evidence and arguments presented at the evidentiary hearing held on January 24, 2019, the Court determines that TPH has satisfied all four prongs required to obtain a temporary injunction. *See CG Riverview, LLC v. 139 Riverview, LLC*, 2018 Va. Cir. LEXIS 3, at *8-9 (Norfolk 2018).

First, the Court finds that TPH is likely to succeed on the merits of its claims. TPH is likely to succeed on its claim that Finn has engaged in actual or threatened misappropriation of trade secrets in light of the copying of files to a personal hard drive, files that include various confidential, proprietary, and trade secret information of TPH, shortly before Defendant submitted his notice of termination. ~~TPH is likely to succeed on its claims for violation of the Virginia Computer Crimes Act and breach of fiduciary duty based on these same actions.~~ TPH also is likely to succeed on the merits of its breach of contract and declaratory judgment claims because the restrictive covenants in Defendant's employment agreement are ancillary to the sale of a business, were negotiated at arms-length with the assistance of counsel, were agreed to in exchange for substantial consideration, and relate to an executive-level employee. Finally, TPH

is likely to succeed on the merits of its detinue claim because Defendant caused his company phone number—which TPH has rights in—to be transferred to his personal account.

Second, TPH is likely to suffer irreparable harm in the absence of temporary injunctive relief. The likely loss of customers and goodwill and the threat of use or disclosure of TPH's trade secrets constitute irreparable harm.

Third, the balance of the equities favors an injunction. Defendant is simply required to abide by an agreement he negotiated and entered at arms-length, with the assistance of counsel, and for which he received substantial consideration. Defendant is also simply required to abide by the laws of this Commonwealth. In contrast, TPH is likely to be irreparably harmed in the absence of an injunction.

Fourth, the public interest favors an injunction because the public interest favors enforcing valid contracts and protecting trade secrets.

Therefore, it is hereby ORDERED that TPH's motion is GRANTED. It is further ORDERED that, for the pendency of this case:

a) Defendant and all others acting in concert with him are enjoined from directly or indirectly possessing, using, or disclosing any of TPH's trade secrets or confidential or proprietary data;

b) Defendant and all others acting in concert with him are enjoined from directly or indirectly engaging in or participating in any Restricted Business in the Restricted Area as provided in Defendant's employment agreement;

c) Defendant and all others acting in concert with him are enjoined from directly or indirectly revealing the name of, soliciting or interfering with, or endeavoring to

entice away from TPH any of its suppliers, customers or employees, or any person who was a supplier, customer or employee of the company at any time within the two (2) year period prior to the Effective Date as provided in Defendant's employment agreement;

d) Defendant is enjoined from using the phone number he ported from TPH, ~~and~~ while this case is pending; and Defendant shall return the number to TPH who ~~Defendant shall return the number to TPH while this case is pending;~~ shall forthwith cause it to be disconnected

e) Defendant shall return any TPH data in his possession, custody, or control or the possession, custody, or control of any others acting in concert with him within five (5) days of this Order.

This order is effective upon Plaintiff's proof of $303,000 bond.

Date: January 25, 2019

The Honorable John R. Doyle, III
Judge, Circuit Court of City of Norfolk

ENDORSEMENTS WAIVED - EXCEPTIONS NOTED BY DEFENDANT AS STATED ON THE RECORD

TPH

Copy Teste:
George E. Schaefer, Clerk
Norfolk Circuit Court
BY Bmonsanto
Bernadette Monsanto, Deputy Clerk
Authorized to sign on behalf
of George E. Schaefer, Clerk
Date: January 28, 2019

SEEN AND AGREED:

By: _____
Of Counsel

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Counsel for Plaintiff

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Counsel for Defendant

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PERATON, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:17-cv-979 (AJT/JFA)
	)	
RAYTHEON CO.,	)	
	)	
Defendant.	)	
	)	

PRELIMINARY INJUNCTION ORDER

Presently pending is Plaintiff's Motion for a Preliminary Injunction [Doc. No. 54] ("the Motion"). The Court held a hearing on the Motion on October 23, 2017, following which it took the matter under advisement. For the reasons stated herein, the Motion is GRANTED in part and DENIED in part. Specifically, the Court will require Raytheon to re-impose the firewalls put in place on May 2, 2017 with respect to six employees identified in the record likely to be in possession of Peraton's protectable trade secrets and enjoin Raytheon from otherwise using any marked proprietary documents or information from Peraton in pursuing the Grimlock and Broadside opportunities.

I. BACKGROUND

Plaintiff Peraton, Inc. ("Peraton") and Defendant Raytheon Co. ("Raytheon") entered into Teaming Agreements ("TAs") regarding two government programs, called Grimlock and Broadside. First Amended Complaint [Doc. No 50] ("FAC") ¶¶ 9, 11. They also entered into

several non-disclosure agreements (the "NDAs") that pertained to certain proprietary information that was shared in connection with those TAs from December 15, 2014 through 2017. [1]

Raytheon exercised its right to terminate the TAs, effective as of April 20, 2017.[2] Before the termination of the TAs was effective, Peraton sent a letter to Raytheon identifying twenty-four Raytheon employees Peraton believed to have received its proprietary information during the course of the TAs (nineteen for Broadside and thirteen for Grimlock, with some employees appearing on both lists). Peraton claimed that "based on the extent to which Raytheon has received [Peraton's] sensitive strategic, financial, and technical Proprietary Information, [the] restriction [in the NDAs] acts as a prohibition on any future Grimlock or Broadside activities for" the identified Raytheon employees. Declaration of James Winner ("Winner Decl."), Exhibit 3 [Doc. No. 64-3] ("April 20, 2017 Letter"). On May 2, 2017, Raytheon confirmed that "the Raytheon employees in receipt of or having access to [Peraton's] sensitive strategic, financial, and technical Proprietary Information have been firewalled from supporting another team in a parallel Grimlock or Broadside activity." Pl.'s Mem., Winner Decl., Exhibit 4 ("May 2, 2017 Letter"). The letter went on to say, however, that as to 10 of the employees identified by Peraton, "there [was] no record or recollection of [these employees] receiving any [Peraton] Proprietary Information or sensitive data[,]" *id.*, and they would therefore not be excluded from Ratheon's future activities pertaining to the Grimlock or Broadside programs.

On May 12, 2017, Raytheon rescinded the firewall as to all of the employees identified by Peraton on the grounds that because Peraton was prevented from competing for the Grimlock and Broadside programs because of a conflict of interests, the companies were no longer in

[1] The TAs and NDAs were originally entered into between Harris IT Services and Raytheon. Harris IT Services subsequently sold the relevant division, which became Peraton. For clarity, this Order refers to the Plaintiff as "Peraton," even during the period when it was a department of Harris IT Services.
[2] In April, 2017, Peraton was sold to a new parent company, an event that triggered Raytheon's right to terminate the TAs.

competition with each other and "there is no longer a need for Raytheon to firewall its employees who have been involved with the pursuits to date on any future Grimlock or Broadside activities." Pl.'s Mem, Winner Decl. Exhibit 5 ("May 12, 2017 Letter"). The parties continued to discuss a resolution, without success, and on August 9, 2017, Raytheon took the position that no firewalls were required as to any employees because "[t]he Peraton teaming relationship never reached a point where proprietary and trade secret information that would threaten the fairness and integrity of these procurements was disclosed." FAC ¶ 47. Peraton filed this action the next day, asserting causes of action for (1) breach of the NDAs; (2) breach of the TAs; (3) violation of the Virginia Uniform Trade Secrets Act, Va. Code § 59.1-338.1 ("VUTSA"); and (4) violation of the Defend Trade Secrets Act, 18 U.S.C. § 1836, *et seq.* ("DTSA").[3] On September 22, 2017, Peraton filed the Motion. [4] In the Motion, Peraton asks Raytheon to "(1) re-establish the firewall that Raytheon previously put in place" and "(2) conduct a comprehensive assessment and search to locate all other personnel that Raytheon exposed to Peraton's trade secrets and firewall such personnel." Motion 1.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65 authorizes federal courts to issue preliminary injunctions. "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001) ("[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-

[3] Peraton originally filed this action in the Circuit Court for Fairfax County. On August 31, 2017, Raytheon removed this action to this Court [Doc. No. 1]; and on September 20, 2017, Peraton filed its Amended Complaint [Doc. No. 50].

[4] Peraton filed its first motion for a preliminary injunction on September 12, 2017 [Doc. No. 33]

reaching power to be granted only sparingly and in limited circumstances.") (internal quotation marks omitted). In order to receive a preliminary injunction, the movant must establish that (1) it is likely to succeed on the merits of its case; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) an injunction would be in the public interest. *Winter*, 555 U.S. at 22; *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997); *see also Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013). "*Winter* thus requires that a party seeking a preliminary injunction . . . must *clearly show* that it is likely to succeed on the merits." *Dewhurst*, 649 F.3d at 290 (internal quotation marks and alterations omitted) (emphasis added).

III. ANALYSIS

A. Likelihood of Success on the Merits

Under the VUTSA, the term "trade secret"

> means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> >
> > 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Va. Code § 59.1-336. DTSA, similarly, defines "trade secret" as

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--
>
> > (A) the owner thereof has taken reasonable measures to keep such information secret; and

> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

18 U.S.C. § 1839(3).

Based on the record presently before the Court, Peraton has made the required showing that it is likely to succeed in establishing that it provided to Raytheon, and Raytheon is presently in possession of, its trade secrets. However, a significant number of the individuals Peraton seeks to have firewalled are only alleged to have received trade secrets verbally in the course of presentations or phone calls. The NDAs explicitly require Peraton to confirm and document in writing the disclosure of any verbally disclosed trade secrets. Pl.'s Mem., Declaration of Gary Kay, Ex. 1 [Doc. No. 56-1] ("Grimlock NDA") ¶ 8. There is no such documentation in the preliminary injunction record; and based on that record, Peraton has demonstrated at this point that it is likely to succeed in establishing Raytheon's possession of protectable trade secrets only with respect to the information contained in its marked presentations, not its alleged undocumented verbally disclosed secrets.

Peraton has identified only two individuals who received marked proprietary information pertaining to Grimlock and four who received marked proprietary information pertaining to Broadside. *See* Pl.'s Mem. Exs. 1 ("Kay Declaration"), 3 ("Williams Declaration") [Doc. Nos. 56, 58].[5] Because the only documented trade secrets in the preliminary injunction record are

[5] While the Kay Declaration asserts that seven people "for certain had access to Peraton's proprietary and confidential information," regarding Grimlock, and of that group, three "had the most exposure to sensitive competitive information[,]" Kay Declaration ¶¶ 39, 40, it also states that properly marked presentations were shared only with two individuals: Shayna Colson and Rob Kouzel. Kay Declaration ¶ 24. Similarly, the Williams Declaration regarding the Broadside program identifies a long list of communications generally asserted to have involved the sharing of proprietary information; but only four employees, Darrell Gettman, Ken Frankovich, Don Schmidt, and Ronnette Sutherland, are identified as having received properly marked documents containing proprietary information. Williams Declaration ¶¶ 19 (Gettman and Frankovich), 30 (Schmidt and Sutherland).

these marked presentations, Peraton has demonstrated at this pint a likelihood of success in establishing that only these six individuals are in possession of protectable trade secrets.

As to the alleged misappropriation, the Court concludes that Peraton is likely to succeed on its theory of "threatened" misappropriation under the VUTSA and DTSA. *See* Va. Code § 59.1-337; 18 U.S.C. § 1836(b)(3)(A)(i). Peraton's trade secrets theory here is similar to the plaintiff's in *Dionne v. S.W. Foam Converting & Packaging, Inc.*, 240 Va. 297 (1990), where a former employee who helped develop a trade secret left the company to work for a direct competitor in the same field working on the same types of products. Were Raytheon to pursue the Grimlock and Broadside opportunities in direct competition with Peraton, its actions would similarly "threaten" disclosure or misuse of Peraton's alleged trade secrets. Indeed, the threat of misappropriation here appears even greater than in *Dionne* since Raytheon would be competing for precisely the same programs for which they partnered with Peraton and for which Peraton provide its trade secrets. While there is currently no direct evidence that Raytheon has started pursuing these opportunities on its own or in conjunction with another teaming partner, Raytheon has consistently maintained that nothing about its relationship with Peraton would preclude it from doing so. Such parallel competition for identical opportunities substantially and sufficiently "threatens" misappropriation or misuse. Peraton is therefore likely to succeed on its VUTSA and DTSA claims.

Additionally, Peraton has sufficiently demonstrated its entitlement under the NDAs to the "firewalling" of Raytheon employees with demonstrated access to Peraton's proprietary information. In that regard, Section 10 of the NDAs states that Raytheon is to "protect the disclosed Proprietary Information by using the same degree of care, but no less than a reasonable degree of care, that the Receiving Party uses to protect its own Proprietary Information."

Grimlock NDA, ¶ 10. The record at this stage sufficiently establishes that the standard of care imposed under the NDA requires firewalling Raytheon employees with access to sensitive Peraton information, as reflected in Raytheon's own initial agreement to impose a firewall and the deposition testimony of its designated corporate representative. *See* Pl.'s Supp. Br., Ex. 3 [Doc. No. 78-3] ("Broadbent Deposition"), 26:20-27:3, 43:8-44:9.

B. Irreparable Harm

As a general matter, "[t]he disclosure of trade secrets establishes immediate irreparable harm because 'a trade secret, once lost is, of course, lost forever.'" *Home Funding Group, LLC v. Myers*, No. 1:06-cv-1400, 2006 WL 6847953 at *2 (E.D. Va. Dec. 14, 2006) (quoting *Acierno v. New Castle Co.*, 40 F.3d 645, 657 (3d Cir. 1994)). Specifically, the alleged trade secrets disclosed in this case relate to Peraton's business strategy and the technical details which underlie its bids for Grimlock and Broadside. Failure to firewall Raytheon employees who have access to and knowledge of Peraton's strategy and technical approach could disadvantage Peraton in competing for those opportunities, valued at over $400 million.

Additionally, Peraton's motion is in part based on violations of VUTSA and DTSA. "[A] complainant need not allege or prove irreparable harm when it involves a statute that authorizes injunctive relief. All that need be proved is a violation of the statute." *Capital Tool & Mfg. Co., Inc. v. Maschinenfabrik Herkules, Hans Thoma GmgH*, 837 F.2d 171, 172 (4th Cir. 1988). Because the Court concludes that Peraton is likely to succeed on its trade secrets claims, Peraton has sufficiently demonstrated the threat of irreparable harm to support a limited preliminary injunction.

C. Balance of the Equities

Because Peraton has established at this point an entitlement to protection against disclosure of its trade secrets by only six Raytheon employees, the potential harm to Raytheon of a preliminary injunction is markedly reduced, as Raytheon essentially conceded at the October 23, 2017 hearing on the Motion. See Hearing Tr., October 23, 2017, 46:17-18 [Doc. No. 125] (a preliminary injunction limited to the six people identified in the Kay and Williams Declarations "would [do] far less irreparable" harm to Raytheon). In light of the irreparable harm that Peraton would suffer, the balance of the equities favors a preliminary injunction.[6]

D. Public Interest

As a general matter, the "[p]ublic interest is . . . served by enabling the protection of trade secrets," as a preliminary injunction in this case would. *Henry Schein, Inc. v. Cook*, 191 F. Supp. 3d 1072, 1078 (N.D. Cal. 2016). As this Court has previously held, "there is certainly a significant public interest in maintaining the confidentiality of trade secrets and preventing their misappropriation." *MicroStrategy, Inc. v. Business Objects, S.A.*, 369 F. Supp. 2d 725, 736 (E.D. Va. 2005). The injunction provisions in VUTSA and DTSA reflect a legislative recognition that the public interest is furthered by the protection of trade secrets through appropriate injunctive relief. Additionally, the public interest in fostering the integrity of the government procurement process is furthered in this case by the imposition of an appropriate preliminary injunction.

IV. CONCLUSION

For the above reasons, it is hereby

ORDERED that Plaintiff Peraton's Motion for Preliminary Injunction [Doc. No. 54] be, and the same hereby is, GRANTED in part and DENIED in part. It is GRANTED to the extent

[6] The limited impact of injunctive relief on Raytheon is somewhat reflected in the fact that Raytheon has not requested the posting of any security in connection with the issuance of any injunctive relief.

that it seeks to preclude Ratheon's use of its properly marked documents and to require Raytheon to re-impose its firewalls as to Shayna Colson, Rob Kouzel, Darrell Gettman, Ken Frankovich, Don Schmidt, and Ronnette Sutherland; and it is otherwise DENIED; and it is further

ORDERED that Defendant Raytheon Company, its officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with any of them, be, and the same hereby are, preliminarily ENJOINED from accessing, circulating or otherwise using any of Peraton's documents marked as confidential or proprietary; and are further ORDERED to take all necessary steps to "firewall" the following Raytheon employees from any involvement in the following government procurement programs: Shayna Colson, and Rob Kouzel, as to the Grimlock program; and Darrell Gettman, Ken Frankovich, Don Schmidt, and Ronnette Sutherland as to the Broadside program; and it is further

ORDERED pursuant to Fed. R. Civ. P. 65(c) that Peraton post a bond with the Clerk in the amount of $500, and that this preliminary injunction shall become effective as of the posting of that security; and it is further

ORDERED that Defendant Raytheon's Motion to Exclude Plaintiff's Reply Declarations [Doc. No. 114] be, and the same hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
November 7, 2017

EXHIBIT 4

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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COUNTY OF FAIRFAX CITY OF FAIRFAX

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RETIRED JUDGES

June 13, 2017

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Re: *Jackson's MFF RTC, LLC v. BP South of Market LLC d/b/a South of Market LLC et. al.*, Case No. CL 2017-4267

Dear Counsel:

This matter came before the Court upon the Plaintiff's motion for a preliminary injunction. The court started an evidentiary hearing on April 26, 2017. Due to unforeseen circumstances, the parties ended the hearing earlier than anticipated and continued the matter for a second day to June 1, 2017. At the conclusion of the second day, the Court took this matter under advisement to consider the evidence and legal arguments the parties had thoroughly presented in their opening briefs.

The question presented is whether a dispute over the installation of a paid parking system between a commercial landlord and a tenant, who had been promised free parking, supports the granting of a preliminary injunction. A preliminary injunction is an extraordinary remedy. It is a temporary determination of rights before the final judgment of the merits of a case. It commands

the enjoined party to either refrain from taking certain actions or to take specific actions. It is granted by a court in its sound discretion only after taking into consideration well-established equitable principles.

Under Virginia law, the decision of whether to grant an injunction is not susceptible to a formulaic exercise. It requires a balancing of the equities that include a consideration of the specific facts and circumstances then presented to the court. To obtain the extraordinary relief in the form of a preliminary injunction, the moving party has to show that absent such relief, it will suffer harm during the pendency of the litigation that cannot be adequately addressed by the award of monetary damages or capable of redress at the final trial.

I. BACKGROUND

On March 22, 2017, Plaintiff Jackson's Mighty Fine Food & Lucky Lounge ("Jackson's"), seeking to preserve free parking for its customers, commenced litigation against Defendants BP South of Market LLC and South of Market Garage LLC (collectively referred to as "Defendants" or "Boston Properties"). Jackson's is a subsidiary of Great American Restaurants, Inc. ("Great American"), and operates in the Reston Town Center.

Jackson's three count Complaint, includes, Count I (Breach of Contract), Count II (Declaratory Judgment), and Count III (Interference with Easement). For each of these counts, Jackson's seeks an injunction prohibiting Boston Properties from using a pay-to-park system in an adjoining garage that had previously provided free parking to the general public. Jackson's asserts that the pay-to-park system violates its contractual rights under several provisions of the Lease, interferes with easement rights, causes irreparable injury, and leaves it with no adequate remedy at law. The parties' dispute center on Boston Properties' installation of a pay-to-park system that prior to 2017 had not been in place at the Reston Town Center.

The trial is set for February 12, 2018. Jackson's motion for preliminary injunction was heard prior to the setting of the trial date and this decision shortly follows the setting of the trial date.

According to the Complaint and as is further evident from the exhibits attached to the Complaint, in 2006, Boston Properties developed two parcels of land at the Reston Town Center referred to as South of Market.

One parcel was developed as a three building office complex consisting of two (2) ten (10) story buildings and one (1) six (6) story building for a total of 557,051 square feet of rentable space. The first floor contains 61,563 square feet rentable space for retail businesses. The office complex has 469 parking spaces for passenger vehicles.

The second parcel was developed as a commercial garage and multi-story office building. The development of second parcel includes 23,000 rentable square feet for retail establishments on the first floor, approximately 1,950 parking spaces for passenger vehicles located on eight (8) levels of above grade parking and (2) levels of below grade parking and a multi-office buiding.

A recorded Declaration of Easements ("Declaration") provided that Boston Properties, in its capacity as Landlord, had the right to access and use, on a non-exclusive and unreserved basis, up to one thousand four hundred sixteen (1,416) of the garage's parking spaces. Declaration ¶3. The Declaration further granted the landlord, for the benefit of "tenants, employees, agents, guests, customers, licensees and invitees . . . , the perpetual, irrevocable and non-exclusive right . . . to use, on an unreserved basis, up to one thousand four hundred sixteen (1,416)" parking spaces. *Id.*

The Declaration mandated that the exercise of the parking rights by the beneficiaries "shall be free of charge." Declaration at ¶ 3(b).

In 2007, Boston Properties reached out to Great American to discuss opening a restaurant in Reston Town Center. Great American negotiated parking rights to assure that its customers would receive free parking. On November 19, 2007, the parties executed a lease for operation of Jackson's restaurant in the first-floor retail area of the garage structure.

The Lease addresses the parking rights in Sections 24.1 through 24.8. The parking rights pertained to the "Parking Structure," which was described as containing approximately one thousand nine hundred and seventy-five (1,975) parking spaces designated for retail use. (The number of parking spaces was more than originally anticipated, although the difference is immaterial because the accessible number remained at one thousand four hundred sixteen (1,416) parking spaces under the Declaration of Easements). In addition, the Lease identified the "Parking Garage" which contains below grade parking.

The provisions at issue under § 24.5 of the Lease provided that:

1. All parking in the garage "shall be free" for Jackson's and its customers and employees;

2. Any access control system used in the parking garage would not "unduly impede [Jackson's] rights for free parking and access";

3. If the landlord instituted charges for customer or employee parking, it would "at its sole cost and expense" institute a system allowing Jackson's to validate tickets for all of its customers and employees; and

4. The validation system would operate "so that parking for such customers and employees shall be free and without charge at all times and in all instances."

In January 2017, Boston Properties implemented a pay-to-park system. Advanced notice of the system had been provided to tenants and the public. Under the system, customers are encouraged to pay primarily by using a software application known as Park RTC, which is downloaded on their smartphone. The software application is referred to as an "App." Customers can also pay at kiosks or though the website without downloading the App. The new pay-to-park system was met with public complaint and public protests.

Jackson's complains that Boston Property violated the Lease agreements by not providing free parking for its customers and employees. At the hearings, Jackson's introduced evidence that

the pay-to-park system has harmed its business and forced Jackson's to incur additional operating expenses to address the parking situation and manage growing customer dissatisfaction.

Boston Properties countered by introducing evidence that implementation of a pay-to-park system is necessary since a Metro station opened nearby in 2014. The Court takes judicial notice that the Reston-Wiehle Metro station is located less than two miles from the Reston Town Center. Boston Properties presented evidence that commuters started to park in the garages located at Reston Town Center in order to access the metro from a free parking facility. In addition, residents of the Reston Town Center were using the garages to store or park cars that they could not park at their residences and guests from a nearby Hyatt Regency Hotel regularly filled up the parking spaces during special events held at the hotel, which prevented Boston Properties from meeting its contractual obligations to provide its tenants with accessible parking.

Boston Properties expressed concerns that with the imminent Metro plans to add another Metro Station directly at the Reston Town Center, the parking situation will become direr given the expected invasion of commuters seeking to benefit from free parking while commuting on the metro line.

Boston Properties argues that the Lease clearly contemplates a future when paid parking would be necessary and complaints about paid parking simply reflect an unrealistic expectation by suburbanites that all parking should be free.

II. LEGAL ANALYSIS

A. STANDARD

In Virginia, "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). The purpose of a preliminary injunction is to maintain the status quo until a final trial on the merits can be held. *See Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988).

The "status quo" is the position the parties were in before the alleged invasion of rights occurred. It is not limited to the position the parties find themselves at the time of the hearing. If a party unreasonably delays in asserting its rights, equitable principles may estop a party from obtaining injunctive relief. However, those principles of estoppel and laches do not define what constitutes the "status quo." Since 2007, Jackson's employees and customers have enjoyed unfettered access to parking. The implementation of a pay-to-park system changed that status quo and the question presented is whether the system should be enjoined pending the litigation.

Virginia Code § 8.01-628 provides: "No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." The Virginia Supreme Court has not defined additional elements or standards that the moving party must meet in every case before an injunction is granted. However, some principles reoccur in decisions addressing injunctions, such as the requirement that plaintiff lacks an adequate remedy at law, or suffers irreparable harm. *Wright v. Castles*, 232 Va. 218, 220 (1986).

Both parties, however, approached the question of whether a preliminary injunction should be granted under the four-prong test adopted by the federal courts and various judges of the 19th Judicial Circuit. The four-prong test includes:

(1) the likelihood that the plaintiff will succeed on the merits;
(2) the likelihood of irreparable harm if the injunction is denied;
(3) the balance of the equities tip in the Plaintiff's favor; and
(4) the injunction is in the public interest.

Winter v. NRDC, Inc., 555 U.S. 7, 19 (2008); *Wings, LLC v. Capitol Leather, LLC*, 88 Va. Cir. 83, 89 (Va. Cir. Ct. 2014) (citing *Real Truth About Obama Inc. v. Federal Election Com'n*, 575 F. 3d 342, 345 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010), *aff'd* 607 F.3d 335).

Of the four factors, the two most important considerations are the irreparable harm to the plaintiff if the injunction is not granted and the irreparable harm to the defendant if the injunction is granted. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). The United States Supreme Court has explained irreparable harm as follows:

> The key word in this consideration is *irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.* The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added).

Boston Properties further argues that the Court has to consider that the relief sought by Jackson's may be a mandatory injunction as opposed to a prohibitive or preventive injunction. "A 'preventive' injunction commands a party to refrain from doing an act, while a 'mandatory' injunction commands the performance of some positive act." 10A M.J. *Injunctions* § 2.

Boston Properties contends that discontinuing a parking payment system that has been in place since January 2017 is a mandatory injunction and Jackson's evidence does not meet the heightened standard required for a mandatory injunction. In *Handsome Brook Farm*, a federal court noted the different standards:

> In cases where the request for preliminary relief encompasses both an injunction to maintain the status quo and to provide mandatory relief, the two requests must be reviewed separately, with the request for mandatory relief being subjected to a more exacting review. A mandatory preliminary injunction is disfavored, and warranted only in the most extraordinary circumstances. When mandatory relief is sought a strong showing of irreparable injury must be made, since relief changing the status quo is not favored unless the facts and law clearly support the moving party.

Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 193 F. Supp. 3d 556, 574–75 (E.D. Va. 2016) (citations omitted) (internal quotations omitted).

However, federal circuit courts are split over whether a heightened standard is necessary. *Compare O Centro Espirata Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) with *United Foods & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998).

While the Virginia Supreme Court has not expressly required a heightened standard of proof for injunctions, whether mandatory or preventive, the "strong and imperious necessity" language cited by Boston Properties and attributed to mandatory injunctions remains good law. *Virginian Ry. Co. v. Echols*, 117 Va. 182, 184 (1915) ("A mandatory injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear."). As recently as 2011, the Circuit Court of Norfolk quoted that exact language. *See Dean v. Va. High Sch. League, Inc.*, 83 Va. Cir. 333, 334 (Va. Cir. Ct. 2011) (Norfolk). This Court interprets that language as meaning that there has to be extraordinary reasons to grant the extraordinary remedy of a preliminary injunction.

Both *Virginian Ry. Co* and *Dean* are otherwise distinguishable from the facts and circumstances here. In *Virginia Ry*, the Virginia Supreme Court reversed the granting of a preliminary injunction in the absence of all necessary parties and relying upon affidavits. Although the Court is mindful that Boston Properties complained of the lack of discovery, the hearing provided the Court an opportunity to consider evidence that the trial court in *Virginia Ry* did not consider.

In *Dean*, the trial court found that the plaintiff was unlikely to succeed on the merits when asking the Court to overturn the decision of a High School football league decision to not grant a waiver allowing a high school student to play football. In both cases, creating a higher standard of proof from the phrase of "strong and imperious necessity" was unnecessary and adds nothing further than the admonition that an injunction is an extraordinary remedy.

Regardless, the facts of this case do not support defining the relief sought as a mandatory injunction. Temporarily discontinuing the use of the parking system is more akin to a preventive injunction than a mandatory injunction. The preliminary injunction would not require removal of the parking system pending trial, or other positive steps, other than simply discontinuing enforcement of the present system. By June, the second day of the evidentiary hearing, Boston Properties had declared that the parking system would not be in effect Mondays through Fridays after 5:00 p.m. and on weekends.

Notably, the parking system was initially planned to have been implemented in September 2016. Boston Properties delayed the implementation of the parking system for four months until January 2017 to avoid any negative impact upon the tenants during the busy holiday season and to allow the parties more time to resolve their differences. Consequently, under the facts and circumstances in this case, a preliminary injunction to discontinue the parking system would simply repeat a delay of the installation of the system.

Most importantly, the Virginia Supreme Court has not adopted any specific test or heightened standards, but instead reminds this Court that "[t]he granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co.*, 276 Va. at 60.

Therefore, while federal courts' four-prong test and decisions discussing "heightened caution" are helpful guidelines, they do not constitute binding rules or controlling factors that govern the decision of a Virginia state court as to whether a preliminary injunction should be granted.

Consequently, although this Court will consider the arguments presented under the federal four-prong test, the ultimate decision will turn on whether the evidence, under the totality of the circumstances, is sufficient to satisfy the Court as to the equities of the moving party.

B. COMPARISON OF FACTORS AS ARGUED BY THE PARTIES

(1) Jackson's argues the pay-to-park system violates the lease as well as the Declaration of Easments' provisions mandating free parking.

A. Likelihood of Success on the Merits

Jackson's says that it will likely succeed on the merits because 1) the pay to park system fails to assure that its customers would receive parking that is "free and without charge at all times and in all instances," 2) the pay-to-park system does not allow for the validation of tickets because if a customer does not correctly use the system, the customer is charged and has to be reimbursed rather than having the ticket validated, 3) the system impedes Jackson's rights to free parking because of its complexity, 4) the pay-to-park system violates the Lease by imposing costs and expenses as Jackson's has had to bring on additional staff to help confused customers with using the parking system and 5) the system burdens and interferes with unfettered parking rights granted under the Declaration of Easement. The evidence, as a whole, favored Jackson's request for relief.

B. Irreparable Injury

Jackson's concludes that it will suffer irreparable injury if not granted an injunction pending the February 2018 trial because there will be a permanent loss of customers and goodwill. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551–52 (4th Cir. 1994) (concluding that irreparable harm was satisfied due to the difficulties of calculating damages, as well as a threat of permanent loss of customers and potential loss of goodwill). Jackson's has reported a significant decline in sales and loss of goodwill from its customers who tell Plaintiff they will no longer dine there due to the pay-to-park system. This factor also favored Jackson's request for relief.

C. Balance of Equities

The evidence further supports an injunction when balancing the parties' interests. Jackson's argues that irreparable injury will result if the Court does not grant the injunction and Boston Properties cannot shown that it will suffer an injury as a result of the injunction.

D. Public Interest

Finally, Jackson's argues that the public interest will be served by a preliminary injunction because it is in the public interest to enforce contracts. *See HotJobs.com, Ltd.*, 53 Va. Cir. at 42. Boston Properties agreed with the standard expressed, but disagreed that the facts support Jackson's interpretation of its rights under the governing Lease.

(2) Boston Properties argues that the Lease contemplated a pay-to-park system and that advancement in technology enables the development of a parking system that complies with and is necessary to comply with its contractual obligations.

A. Likelihood of Success on the Merits

Boston Properties argues that the evidence fails to show a "strong and imperious necessity" and that its use of the parking system will likely succeed on the merits at trial. *See Virginian Ry. Co.*, 117 Va. at 184. Boston Properties contends that the Lease expressly contemplates that a pay-to-park system could be implemented and the Lease does not limit use of a gate and paper ticket system only. The only language agreed to in the Lease is that the parking system must not "unduly impede" Jackson's customers' rights to access and free parking.

While Jackson's argues that the system "unduly impedes" its rights because customers are charged up front to pay for parking, Boston Properties contends that the customer is not charged up front as the credit card is merely authorized. Boston Properties argue a pending credit card charge is not an actual charge. The Court agrees that using present-day technology to validate "tickets" in electronic form does not violate the Lease under any reasonable construction of the language used and asking the tenants to use an App to manage parking is not expressly prohibited. Jackson presented sufficient evidence that the manner in which the particular App is being deployed creates sufficient confusion and concerns by the customers that the current system is inappropriate.

Boston Properties further argues that the Declaration of Easements does not govern Jackson's parking rights, which are expressly governed by the Lease. At the time the Declaration was signed, Jackson's was not a tenant and could not be a member of the class of beneficiaries of the parking easement. The Lease did not suggest that the Declaration somehow enhanced the rights that Jackson's negotiated under the Lease; rather, the Lease should be the controlling document as to this dispute.

Evidence regarding the applicability of the Lease and Declaration favors Boston Properties to the extent the evidence failed to show the second Defendant, South of Market Garage, LLC, has taken any action that would warrant that it be enjoined.

B. Irreparable Injury

Boston Properties parallels this case to that of *Wings, LLC v. Capitol Leather, LLC*, 88 Va. Cir. 83 (Va. Cir. Ct. 2014) (Fairfax). In *Wings*, the plaintiff argued that it had already lost customers to defendants and that without a preliminary injunction, it would continue to lose customers and might lose its entire business by the time of the trial. *Id.* at 87. While this Court acknowledged that the plaintiff would likely continue to lose customers if the preliminary injunction was not issued, the likelihood of lost business did not amount to irreparable harm. *Id.* at 91–92. This Court rejected the argument that it would be difficult to calculate damages, noting it "does not seem reasonable that Wings would not be able to determine how much income it received from certain customers prior to and after the breach of the Agreements, the difference presumably being the income lost due to the breaches." *Id.*

Boston Properties also points to the fact that Virginia courts routinely hold that if money damages could adequately compensate a plaintiff, then it fails to meet the irreparable harm standard. *See Preferred Sys. Solutions, Inc.*, 284 Va. at 402.

Furthermore, Boston Properties argues that Jackson's relies on a misplaced standard from the Fourth Circuit announced under *Multi-Channel TV Cable Co. v. Charlottesville Quality Operating Co.* that a possibility of loss of customers or goodwill can support the granting of the preliminary injunction. Under the United States Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, the standard is stricter for irreparable harm: the plaintiff must make a "clear showing that it is likely to be irreparably harmed." 555 U.S. 7, 22 (2008). Boston Properties argues that no Virginia case decided since *Winter* has found irreparable harm based on possible "loss of goodwill" or "loss of customers," and the standard that Jackson's suggests is not applicable where a mandatory rather than permissive injunction is sought.

For reasons stated previously, the Court found that the injunction is permissive, that there is no additional heightened standard to be applied and for the moment, given that discovery has not been completed, the evidence favors Jackson's interpretation of whether sufficient injury has been shown.

C. Balance of Equities

Boston Properties concludes that the balance of equities does not tip in Plaintiff's favor. Defendants would be harmed if the preliminary injunction is issued because the injunction would cause the entire system to shut down. Shutting down the entire pay-to-park system would clearly result in harm to Defendants who have spent significant time, money, and resources implementing a system that was expressly contemplated by the parties in the Lease. This conclusion however is refuted by Boston Properties' recent decision to suspend charges at particular times and days and any investment spent in creating the system could still be realized in the future.

D. Public Interest

As noted above, Boston Properties agrees with Jackson's that it is in the public interest in Virginia to enforce contracts as written, but concludes that this factor does not weigh in Jackson's favor. Boston Properties argues that the pay-to-park system implemented does not breach the Lease and is consistent with the right to implement a controlled access system including charging for parking. The public interest factor does not strongly favor either party, as each is partially correct in their interpretation of the Lease. Technically, Boston Property may implement parking controls and impose charges upon other customers and tenants. The method chosen cannot, however, unduly interfere with Jackson's parking rights. The difficulty in applying this particular factor at this stage of the litigation is that changes or offered alternatives in the pay-to-park system affects the analysis of whether a specific system unduly interferes with Jackson's rights. For the moment, consideration of this factor weighed along with the other factors support Jackson's position, but it awaits the final trial to be weighed separately.

C. FINDINGS IN SUPPORT OF PRELIMINARY INJUNCTION

At the preliminary injunction stage, the evidence presented must raise a question "going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Multi-Channel TV Cable Co*, 22 F.3d at 551–52 (quoting *Direx Israel Ltd. V. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)).

i. The Current Pay-to-Park System Violates the Lease Provisions that Require Jackson's Customers Unfettered Access to Free Parking.

Here, the parties' disagreement rests on the interpretations of Lease provisions and such language as is repeated in the Declaration of Easements. In particular, the parties dispute the phrases such as "tickets," "unduly impede," and "free and without charge at all times and in all instances."

From the plain reading of the contractual provisions, the pay-to-park system that Jackson's and its customers are required to use violates the lease provisions by not providing parking that is "free and without charge at all times and in all instances." It is the inclusion of the phrase "at all times" and "in all instances" that grants the tenant broad rights and reasonable expectations that any parking system would not impose charges on the tenant's customers. Significantly, that phrase also envisions unlimited parking and precludes the adoption of any system that penalizes a guest who has overstay time limits imposed by the system.

The plain meaning of "without charge" is not merely that parking will be free, but that customers and employees will not be charged for parking before or after any type of validation is issued or parking enabled.

If the landlord does charge for parking for other customers and employees, the Lease requires Boston Properties to institute a system that allows Jackson's to "validate the parking tickets" of all its customers and employees. Under the Lease, customers should receive a parking

ticket with no initial charge, present the ticket for validation, and then receive free parking. However, the current pay-to-park system exposes Jackson's customers to potential parking charges, such as those who use the parking software but do not input the validation code in time or those customers who prefer not to use the software and choose instead to pay cash.

Boston Properties relies on § 24.5 of the Lease that provides, in pertinent parts:

> All parking in the Parking Structure and in the Parking Garage (if available) shall be free to the Tenant, its employees and customers; provided, however, Landlord may develop, construct and institute access control systems in the Parking Structure and the Parking Garage as long as such systems do not unduly impede Tenant's rights for free parking and access. In addition, Landlord may institute charges for such customer and employee parking in the South of Market Complex; provided, however, Landlord at its sole cost and expense and not as part of the Operating Expenses, shall provide a system that allows Tenant to validate the parking tickets of all of Tenant's customers and employees so that parking for such customers and employees shall be free and without charge at all times and in all instances.

Although Boston Properties may institute an access control system "as long as such systems do not unduly impede [on Jackson's] rights for free parking and access," the evidence presented persuades the Court that the system in place is contrary to the simplicity envisioned under the Lease and the Declaration of Easements. There are possible solutions to what is now in place and, in fact, Boston Properties has taken steps to mitigate the negative impact of the system, but the steps taken to date may not be enough.

ii. Loss of Business and Inability to Calculate Damages Will Cause Jackson's to Suffer Irreparable Harm if this Preliminary Injunction is Not Granted.

Presently, as a result of the implementation of the parking system, Jackson's credibly reports a decline in sales, loss of customers, less overall customer traffic in the shopping center, and that the loss of business will be difficult to quantify. Evidence of a drop of business, or comparing revenue before and after a claimed breach, without more, is insufficient to establish damages proximately caused by wrongful conduct. *See Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188-91 (2006).

When the circumstances support it, injunctive relief is merited when it would be difficult or impossible to quantify monetary damages with precision. *See Hotjobs*, 53 Va. Cir. at 45 ("There is substantial support in Virginia for the proposition that irreparable harm is sustained, and injunctive relief appropriate, when it would be very difficult or impossible to quantify monetary damages with precision."). It does not matter how large the damages may be, they just need to be incalculable. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977) (noting that the harm to the Plaintiff was "incalculable -- not incalculably great or small, just incalculable"), *overruled on other grounds by, The Real Truth About Obama, Inc.*, 575 F.3d at 346–47.

The threat of a permanent loss of customers and potential loss of goodwill rises to the level of irreparable harm. *See Multi-Channel TV*, 22 F.3d at 551–52 ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied."); *Blackwelder*, 550 F.2d at 197; *Handsome Brook Farm*, 193 F. Supp. 3d at 574–75 (finding that the Plaintiff met the irreparable harm prong due to a loss of customers and goodwill).

Jackson's claim of lost business is more persuasive than its claim of loss of goodwill. The animus to the paid parking system appears directed mostly to Boston Properties and the Reston Town Center as a whole. If anything, Jackson's customer oriented responsiveness has garnered it positive reviews. Nonetheless, the loss of business is palpable and a restaurant cannot long ignore the impact of an unpleasant dining experience. It is not the one or two customers who decides not to return that is at issue, it is the impact of the consumer's decision not to view Jackson's as being a convenient destination spot and sharing that belief with countless others. It is improbable that Jackson's could ever quantify the loss of such businesses.

iii. The Pay-to-Park System Also Causes Jackson's Irreparable Harm.

Parking rights are, as Boston Properties acknowledged, believed by many as an inherent right necessary to life, liberty and the pursuit of happiness. The recognition of Jackson's rights to enforce the Lease is about more than promoting an outdated belief and suburban angst. A business's inability to meet the parking needs of its customers can cause irreparable harm. *See Burka v. Aetna Life Ins. Co.*, 917 F. Supp. 8, 15 (D.D.C. 1996) (finding the "University's commitment to faculty, students, and staff that they will be provided safe and convenient parking will be seriously jeopardized," as will the viability of the school, absent an injunction to prohibit the enforcement of parking rules contrary to an easement providing for such parking); *Hamden Realty Assocs., L.P. v. 2319 Hamden Ctr. I., LLC*, No. CV156054261, 2015 Conn. Super. LEXIS 1912 at *17-18 (Super. Ct. July 23, 2015) (finding removal of available parking spaces constitutes irreparable harm to businesses whose customers may be discouraged from patronizing those businesses). *But see Safeway Inc. v. CESC Plaza Ltd. P'ship*, 261 F. Supp. 2d 439, 471-472 (E.D. Va. 2003) (finding that a change from above ground parking to underground parking as part of an urban revitalization project does not warrant the granting of a permanent injunction).

In addition to the impact on its customer, Jackson's complains that responding to the pay-to-park system has imposed a financial burden on the restaurant. The additional financial burdens arguably violate the Lease because the Lease requires that if the landlord does charge for customer and employee parking, the landlord will provide a validation system at the landlord's "sole cost and expense." Jackson's contends that it has instead incurred various costs and expenses due to the current pay-to-park system.

First, Jackson's must train employees on the complicated parking payment methods and process of the system. Second, additional staff has been hired to address customer complaints and problems with the parking system. Third, Jackson's has had to include new signage at its entrance and hand-outs at every table explaining and apologizing for the new system. Fourth, if customers are paying in cash or over the phone for parking and cannot receive a validation code, it is Jackson's that has to pay the customer and then recover compensation afterwards.

In essence, Boston Properties has effectively shifted the daily burdens and expenses of administering the parking system to Jackson's. At the same time, those additional burdens and expenses are not recoverable under ¶ 15.1 of the Lease. ¶ 15.1 is a limitation of liability clause and limits claims against the Landlord for the interruption of business or loss of business from any cause except the Landlord's negligence. The limitation of liability provision supports the granting of a preliminary injunction as it removes the ability of Jackson's to seek full redress even if its interpretation of the Lease later proves correct.

Lastly, Jackson's contends that Boston Properties not only violated the lease, but they also violated the Declaration of Easements. ¶ 3(b) of the Declaration provides:

> Parking Rights. In addition to the Parking Garage Access Rights, the Garage Owner hereby grants to the Building Owner [Boston Properties], for the benefit of the Building Owner and the Building Owner Parties [tenants, employees, agents, guests, customers, licensees and invitees] the perpetual, irrevocable and non-exclusive right and easement (the "Parking Rights"), appurtenant to the Building Parcel and burdening the Garage Parcel, and to be exercised upon the completion of the construction of the Garage Parcel Building by the Building Owner, to use, on an unreserved basis, up to one thousand four hundred sixteen (1,416) of the parking of the Garage Parcel Parking Spaces (collectively, the "Building Owner Parking Spaces") for the parking of passenger vehicles. **The exercise of the Parking Rights by the Building Owner and the Building Owner Parties shall be free of charge, and the Building Owner shall have no obligation to pay any fees or other charges to the Garage Owner in connection therewith.**

(Emphasis added).

Plaintiff, as a tenant, was granted parking rights under the easement with the specific provisions that the parking rights shall be "free of charge." Any pay-to-park system arguably violates this right. This particular system, even recently modified, does.

Vested property rights do trigger a greater measure of protection. In balancing equities between a property owner and the needs to address changing needs of the community, the Court have sided on preserving those property rights. *See Blue Ridge Poultry & Egg Co. v. Clark,* 211 Va. 139, 144 (1970) (citing *Townsend v. Norfolk Ry. & Light Co.,* 105 Va. 22, 49 (1906)); *Shoffner v. Sutherland,* 11 Va. 298, 301 (1910); *Smith v. Pittson Co.,* 203 Va. 711, 717 (1962).

At the same time, the rights as expressed under the Lease are not as broad as that provided for under the Declaration of Easements. For purposes of granting a preliminary injunction, the Court reads both documents consistently to warrant the imposition of a preliminary injunction as to the pay-to-park system in place. The Court reserves for a future determination whether there are provisions of the Lease that overrides rights under the Declaration.

CONCLUSION

Having concluded that the Court should issue a preliminary injunction, the inquiry has to turn to how to issue an appropriate narrow and specific injunction and to the question of an appropriate bond.

As mentioned above, any injunction would be directed to the Landlord, South of Market, LLC and not South of Market Garage, LLC. In addition, there is less of a necessity to apply the injunction to Jackson's employees. Boston Properties, Inc.'s Tenant Parking Reference Guide describe a reliable system of providing electronic permits to the employees. The license plate scanning system can help manage the number of employee parking to ensure that other tenants are not unnecessarily using up parking spaces. The software system is more intrusive upon the occasional visitor and not an employee who regularly makes use of the parking facilities.

With respect to the issue of bond, Va. Code § 8.01-631 provides that ". . . [N]o temporary injunction shall take effect until the movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by any party found to have been incorrectly enjoined . . . ."

Boston Properties argues that if the system is enjoined, then the entire pay-to-park system will have to shut down, thus resulting in an amount likely to be many millions of dollars. That argument, however, is inconsistent with Boston Properties' initial argument that the pay-to-park system was necessary to ensure parking spaces would be available for the tenants and their employees and customers. Boston Properties has not yet admitted that the primary motivation to install the pay-to-park system was to monetize an asset that has become more valuable as the area has become more densely populated. Thus, the Court does not consider Boston Properties' lost revenues argument to be persuasive in determining the amount for bond.

The Court accepts the argument that the pay-to-park system is for the benefit of the tenants and, given that the Landlord had previously delayed implementing the system from September 2016 to January 2017, an additional delay of nine months until the final trial would not give rise to any compensable damages.

Rather, Article XIX ¶ 19.8 of the Lease provides that a non-prevailing party in any court action to enforce the covenants and obligations under the Lease shall be liable for attorneys' fees and expenses. There are two instances when Boston Properties could show that it was a prevailing party for purposes of determining an appropriate bond. The first is if there is a successful appeal of the preliminary injunction. The second is if at the final hearing, it is determined that Boston Properties is the prevailing party as to the entirety of the case. In both instances, the damages under Va. Code § 8.01-631 would be the attorney's fees and costs related to the arguments over the issuance of a preliminary injunction.

The Court will therefore require Jackson's to post a bond in the sum of $25,000.00, which would be payable upon a successful appeal of the Order granting a preliminary injunction or after

the final determination at trial if at that time the preliminary injunction is held to have been improperly issued and Boston Properties incorrectly enjoined.

The parties will kindly note that any express or implicit factual findings from the evidence do not have a preclusive effect and are not binding on the final trier of fact. A preliminary injunction is an interlocutory order. Although it is appealable, it is an order that is subject to vacation, modification, and suspension under Virginia Supreme Court Rule 1:1.

The interpretation of the Lease and Declaration of Easements is reviewed *de novo* on appeal and does not bind any other judge of this Court. Nonetheless, in assessing the equities presented, the Court finds that Jackson's has met its burden.

An Order reflecting the Court's decision shall be issued separately.

Sincerely,

John M. Tran
Judge, Fairfax Circuit Court