TWENTY-THIRD JUDICIAL CIRCUIT
OF VIRGINIA

CHARLES N. DORSEY, JUDGE
ROANOKE CITY COURTHOUSE
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF SALEM

December 14, 2015

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Re: *Fame v. Allergy & Immunology, PLC*
CL15-1099
Circuit Court of the City of Roanoke

Dear Counsel:

This matter is before the Court on Plaintiff's Motion for Judgment. Plaintiff seeks a declaratory judgment that a covenant not to compete is overbroad and unenforceable, and a permanent injunction against enforcement of the non-competition covenant by Defendant. Having read all of the briefs and memoranda of law submitted in the case, and with the benefit of additional evidence and argument by counsel on October 14, 2015, the Court grants Plaintiff both a declaratory judgment that the non-competition covenant is

overbroad and a permanent injunction against the enforcement of the covenant by Defendant for the reasons that follow.

FACTS

Dr. Thomas Fame ("Dr. Fame") is a board-certified allergist and immunologist who has lived and practiced in the Roanoke Valley for the past twenty-three years.

In 2010, Dr. Fame left his practice at Lewis-Gale Medical Center to join Allergy & Immunology, PLC ("A&I"). There was initially no written employment agreement between Dr. Fame and A&I. On February 1, 2011, the parties executed a Nonmember Employment Agreement ("NEA"), which was to be retroactively effective from June 21, 2010. Dr. Fame knew what he was signing and intended to be bound by it. Dr. Fame's position with A&I consisted solely of his duties as a Staff Physician. He had no partnership or management duties for A&I.

The NEA, which defined the employment relationship between Dr. Fame and A&I, contained a "Nonsolicitation and Non-Competition" restrictive covenant. This provision ostensibly provides that, *inter alia,* at the termination of his employment, Dr. Fame will be prohibited from competing with A&I for a period of two years within a specified geographic range.[1] Should Dr. Fame be employed by a competitor to treat allergy and immunological disorders as he did for A&I, the NEA prohibits Dr. Fame from later managing, operating, controlling, participating in, being employed by, or being connected in any way with the ownership, management, operation, or control of a professional practice that does similar work to A&I.[2]

On May 1, 2015, A&I terminated Dr. Fame's employment. On June 25, 2015, Dr. Fame brought suit in this Court, seeking declaratory judgment that he should not be bound by his contract on the ground that the NEA's restrictive covenant is unenforceable and further requesting injunctive relief, temporary and permanent, enjoining A&I from enforcing the restrictive covenant.

ANALYSIS

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[1] The specified geographic range from the NEA covers: "Roanoke City, Roanoke County, Botetourt County, Bedford County, Montgomery County, the City of Salem, Franklin County, Floyd County, Henry County, Rockbridge County, Campbell County, Amherst County, Appomattox County, Alleghany County, and the cities of Martinsville, Buena Vista, Lynchburg, Lexington, and Christiansburg, and the Town of Blacksburg." *See NEA* ¶7.4(A).

[2] *See NEA* ¶7.4(A).

Because non-competition provisions serve as restrictions on trade, Virginia does not favor their enforcement.[3] Though not favored, such provisions are enforceable when certain requirements are met. The requirements of an enforceable employment agreement are well settled under Virginia law.[4] Such enforceability requires that: (1) from the viewpoint of the employer, the restraint is reasonable in that is no broader than necessary to protect the employer's legitimate business interest; (2) from the viewpoint of the employee, the restraint is reasonable in that it is not unduly harsh or oppressive in curtailing his ability to earn a livelihood; and (3) from the standpoint of the public, the restraint is not unreasonably against public interests or policy.[5] These three factors are considered together rather than separately,[6] and the clear overbreadth of any factor can defeat the enforceability of the provision, even if the other factors are narrowly drawn.[7] The employer bears the burden of proof on these factors, and any ambiguities will be construed against him.[8] The Court will not edit, add to, or otherwise revise an agreement to make it enforceable.[9]

A non-competition provision in an employment contract that is unambiguous and can be interpreted in only one reasonable way will be read according to its plain meaning.[10] Contracted provisions are considered contextually.[11] As such, if a provision, when taken in context, is capable of more than one reasonable construction, it is ambiguous and the Court's construction will be that which is most favorable to the employee.[12] If a non-

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3 *See, e.g., Lanmark Tech., Inc. v.* Canales, 454 F. Supp. 2d 524, 528 (E.D. Va. 2006); *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001) (citing *Grant v. Carotek*, Inc., 737 F.2d 410, 412 (4th Cir. 1984)).

4 *See, e.g., Simmons*, 261 Va. at 580–81, 544 S.E.2d at 678; *Home Paramount Pest Control Co. v. Shaffer*, 282 Va. 412, 418, 718 S.E.2d 762, 765 (2011); *Omniplex World Servs. Corp. v. US Investigations Servs., Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005); *Modern Env'ts, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002).

5 *Simmons*, 261 Va. at 580–81, 544 S.E.2d at 678.

6 *Id.*

7 *See Home Paramount*, 282 Va. at 419, 718 S.E.2d at 763–764 (describing that while function elements of restrictive provisions are weighed together with scope and duration elements, the clear overbreadth of the function element cannot be saved by narrow drafting of scope and duration).

8 *Omniplex*, 270 Va. at 249, 618 S.E.2d at 342.

9 *See Parikh v. Family Care Ctr., Inc.*, 273 Va. 284, 288, 641 S.E.2d 89, 100, (2007) (internal citations omitted); *see also American Standard Homes Corp. v. Reinecke*, 245 Va. 113, 122, 425 S.E.2d 515, 519–520 (1993); *Pais v. Automation Products*, Inc. 36 Va. Cir. 230, 239 (City of Newport News April 17, 1995).

10 *Lawrence v. Bus. Commc'ns of Va., Inc.*, 53 Va. Cir. 102, 104 (Henrico Cnty. May 5, 2000) (internal citations omitted).

11 *Id.* at 104 (internal citations omitted).

12 *Id.* at 104 (internal citations omitted).

compete clause in an employment agreement is ambiguous and capable of multiple interpretations, any of which are functionally overbroad, then the clause is unenforceable.[13]

The non-competition covenant in this case is overbroad under the first two factors for an enforceable employment agreement. First, the covenant in the NEA is overbroad because it is ambiguous, and at least one of the reasonable interpretations is overly broad and not narrowly tailored to protect only A&I's legitimate business interest. Second, it is overbroad in that it unduly burdens Dr. Fame by curtailing his ability to earn a living in his chosen and highly specialized profession. Due to these determinations, it is not necessary to take up the third factor.

The Covenant is Ambiguous and at Least One Reasonable Interpretation is Overly Broad

The first consideration in the enforceability of a non-competition agreement is whether the provision is drawn narrowly to protect a legitimate interest of the employer.[14] The considerations in evaluating whether a provision is overly broad include, among others: whether the prohibition is ambiguous, whether it actually prevents the employee from performing the services that he had previously provided to the employer, and whether the provision protects more broadly than necessary to protect the employee's legitimate business interest.[15] Covenants that are ambiguous, that prevent an employee from doing work unrelated to the work that they previously did for the employer, or that go beyond the employer's legitimate interest are unenforceable.[16]

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13 *Lanmark Tech.*, 454 F. Supp. 2d at 529 (citing to *Pais*, 36 Va. Cir. at 239).

14 *See, e.g., Simmons*, 261 Va. at 580—81, 544 S.E.2d at 678; *Home Paramount*, 282 Va. at 418, 718 S.E.2d at 765 ; *Omniplex*, 270 Va. at 249, 618 S.E.2d at 342; *Modern Env'ts*, 263 Va. at 493, 561 S.E.2d at 695.

15 *See Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962) (finding as too broad to protect only legitimate business interests of the employer a covenant prohibiting an employee from working in functionally any capacity for a competitor); *Lanmark Tech.*, 454 F. Supp. 2d at 529 (holding that a covenant that prohibited an employee from doing any type of work for a competitor was overbroad); *Pais*, 36 Va. Cir. at 239 (holding, *inter alia*, that a geographic limit with no reasonable connection to the interests of the employer is overbroad and unenforceable); *Lawrence*, 53 Va. Cir. at 104 (holding that an ambiguous restrictive provision which can reasonably be interpreted as overly broad is unenforceable).

16 *See Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962) (finding as too broad to protect only legitimate business interests of the employer a covenant prohibiting an employee from working in functionally any capacity for a competitor); *Lanmark Tech.*, 454 F. Supp. 2d at 529 (holding that a covenant that prohibited an employee from doing any type of work for a competitor was overbroad); *Pais*, 36 Va. Cir. at 239 (holding, *inter alia*, that a geographic limit with no reasonable connection to the interests of the employer is overbroad

The NEA in this case is overly broad because it is ambiguous and at least one reasonable interpretation is not narrowly tailored to protect A&I's legitimate business interests. The terms provide that

> The Employee will not within this Company's business area in which the Employee conducts Company's business for which this agreement is restricted to Roanoke City, Roanoke County, Botetourt County, Bedford County, Montgomery County, the City of Salem, Franklin County, Floyd County, Henry County, Rockbridge County, Campbell County, Amherst County, Appomattox County, Alleghany County, and the cities of Martinsville, Buena Vista, Lynchburg, Lexington, and Christiansburg, and the Town of Blacksburg manage, operate, control, participate in, be employed by, or be connected in any way with the ownership, management, operation, or control or work as an agent or employee of any business (professional practice) similar and competing with this Company in the type of business conducted by this Company as carried out by Employee in the last 12 months prior to termination, if the Employee is employed in the treatment of allergy and immunological conditions, similar to the services he provided to the Company.[17]

The provision can be interpreted in either of two ways: either (i) Dr. Fame is prohibited from treating any patients who hail from any of the listed areas regardless of where his practice is located when he treats them; or (ii) Dr. Fame is prohibited from treating patients while he, Dr. Fame, is physically within any of the listed areas, regardless of where those patients reside. This ambiguity, while apparent from the face of the provision, is further evidenced by the fact that A&I itself is unable to confidently identify the correct interpretation of this provision. Mr. Roger Bohon, the Practice Administrator for A&I, interpreted the provision in the first manner, answering "That's a true statement" to the question "So [Dr. Fame] could be practicing in Richmond and see a patient from Alleghany and he would be practicing in Alleghany?"[18] In contrast, A&I took the position that Dr. Fame was "perfectly free to be in Radford and his

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and unenforceable); *Lawrence*, 53 Va. Cir. at 104 (holding that an ambiguous restrictive provision which can reasonably be interpreted as overly broad is unenforceable).

17 *NEA* ¶7.4(A).

18 *Hr'g Tr.*19:15—24, July 13, 2015.

solicitations could easily extend 25 miles into the area, almost into Salem."[19] This indicates that A&I thought that the second interpretation of the provision was accurate. If A&I is unable to definitively interpret their own contract provision, it would be the epitome of unreasonableness to expect Dr. Fame to be able to do so.

Having established that there are two fair interpretations of the provision, the issue becomes whether either interpretation is unreasonable. If either reasonable interpretation of the contract is overly broad, then the entire provision is unenforceable.[20] The first interpretation of the provision, as advocated by Mr. Bohon, is overly broad as it would require Dr. Fame to screen his patients for connections to the Roanoke Valley regardless of whether he was practicing in Radford, Reno, or Rwanda. While dramatic to some degree, the point is well taken. The restrictive covenant is certainly not narrowly tailored to protect the legitimate business interests of A&I, and is, without question, unduly burdensome to Dr. Fame. Thus, because the restrictive covenant is subject to multiple reasonable interpretations and at least one fair interpretation is overly broad, the restriction is unenforceable.

The Covenant is Not Narrowly Tailored to A&I's Legitimate Business Interests

In the alternative, the non-competition provision in the NEA is also overbroad because it prevents Dr. Fame from managing, operating, or controlling a competing professional practice.[21] A non-competition restraint is too broad when it encompasses activities in which the employee was not engaged on behalf of the employer.[22] Such a restriction is unreasonable because it is greater than needed to protect the legitimate business interests of the employer and because it is unduly harsh on the employee in his attempts to find future employment.[23] Such an unreasonable, overly broad covenant is unenforceable.

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19 *Def.'s Mem. Opp'n Summ. J.* 8.

20 *Lanmark Tech.*, 454 F. Supp. 2d at 529 (citing to *Power Distribution, Inc. v. Emergency Power Engineering*, Inc., 569 F. Supp. 54, 57–58 (E.D. Va. 1983)).

21 *NEA* ¶7.4(A).

22 See *Richardson*, 203 Va. at 795, 127 S.E.2d at 117 (holding as overly broad a restrictive covenant unenforceable because it prohibited the employee from engaging in any branch of marine services business as principal, agent, or servant when the employee had been a salesman for the employer). The covenant was overly broad because it prevented the employee from performing functions for a different employer which he had not performed for his previous employer. *Id.*

23 *Id.*

In this case, A&I emphasizes that Dr. Fame was only a staff physician. He treated patients and served 'on calls,' but both parties agree that Dr. Fame never participated in the management, operation, or control of the partnership at A&I.[24] In light of his limited duties at A&I, to prohibit him so broadly from engaging in functionally any position for another practice goes beyond the scope of what Dr. Fame did for A&I as its employee, and thus beyond A&I's legitimate business interests. Because the provision is not narrowly tailored to the legitimate interests of A&I, it is overbroad, and in turn, unenforceable.[25]

The Two Year Time frame of the Restrictive Covenant is Not Overly Broad

Dr. Fame has argued that the two year time limit is unreasonable in that it is potentially an indefinite timeframe. He arrives at this conclusion by interpreting the NEA provision that states:

> It is agreed that in any event, the period of time during which the Employee competes with Company before litigation has reasonably begun, or during reasonably pursued litigation, will not be counted in calculating the time the Employee was restricted.[26]

Dr. Fame interprets the provision to say that the two year clock re-starts each time that he competes or litigation commences. A&I argues that a plain reading of the language yields a clear and different result. The Court agrees with A&I. In interpreting the language of a contract, the generally accepted rules of construction require a court to interpret words using their plain meaning.[27] The plain language of this provision tolls the two year period of restriction during any time that Dr. Fame is competing with A&I or during any reasonably pursued litigation. Upon the termination of Dr. Fame's competition, or at the conclusion of the litigation, the two year clock would re-start from the time at which it left off, giving Dr. Fame 'credit' for the time that he did not compete before the competition which resulted in litigation. Read as such, there is no

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24 *Pl.'s Br. in Supp. of Mot. for Summ. J.* 4 ("Dr. Fame was at all times with A&I an at-will, non-member, treating physician, excluded from 'all other aspects of management'") (quoting Facts § A(4); *Def.'s Br. Opp'n Mot.for Temp. Inj.* 1–2 ("Dr. Fame never opened or managed a practice for [A&I] anywhere, much less the City of Salem, Virginia. All management services have been provided by the member managers, to-wit, Dane McBride and Saja Eapin, and by the Practice Administrator, Roger L. Bohon, including computerization, record retention, compliance, hiring, firing, policy setting, computer services, training, hiring [sic], termination, supply ordering, taxes, business forecasting, marketing, protocol establishment and all other aspects of management.")

25 *See Richardson,* 203 Va. at 795, 127 S.E.2d at 117.

26 *NEA* ¶7.4(D).

27 *Amos v. Coffey,* 228 Va. 88, 93, 320 S.E.2d 335, 337 (1984).

possible way that the period of actual restriction would last longer than two years total, although the two years might be broken up by competition and litigation.

The NEA is Unduly Burdensome to Dr. Fame

In addition to being unduly burdensome due to an ambiguous restrictive covenant and prohibiting the employee from working in any capacity for a competing employer, the NEA is also unreasonably oppressive because it severely hampers his ability to earn a livelihood. One of the factors in evaluating the enforceability of a non-competition covenant is whether is it unduly restrictive in preventing the employee from making a good faith effort to seek future employment.[28] Regardless of which interpretation of the ambiguous non-competition clause is upheld, the enforcement of this covenant would be unduly restrictive.

The Circuit Court for the City of Newport News Virginia dealt with a substantially similar issue in *Pais v. Automation Prods., Inc.*[29] twenty years ago. In *Pais*, a restrictive covenant prevented a former corporate vice president from competing for two years within a 125 mile radius of each company office.[30] The employee conceded that he would be able to move away from the area and find a job, but explained that due to family circumstances, such a move was not an option for him at the time.[31] In holding the covenant unenforceable, the Court found that "the enforcement of this covenant would force the [employee] to choose between a new career [and] a substantial relocation. Either option would severely curtail the [employee's] legitimate efforts to earn a living."[32]

Dr. Fame's situation is arguably similar to Mr. Pais's situation. Like Mr. Pais, Dr. Fame could relocate and establish a new practice in another area,[33] but it would involve certain difficulties. Like Mr. Pais, the enforcement of the covenant would force Dr. Fame to choose between finding a new career locally or moving away. For the same reasons that the Circuit Court for the City of Newport News found the covenant in Mr. Pais' case unenforceable, this Court finds the covenant in Dr. Fame's NEA unenforceable. This covenant

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28 *See, e.g., Simmons*, 261 Va. at 580—81, 544 S.E.2d at 678; *Home Paramount*, 282 Va. at 418, 718 S.E.2d at 765; *Omniplex*, 270 Va. at 249, 618 S.E.2d at 342; *Modern Env'ts*, 263 Va. at 493, 561 S.E.2d at 695.

29 *Pais*, 36 Va. Cir. 230.

30 *See id.*

31 *Id.* at 237.

32 *Id.* at 238–239.

33 *Mem. of Def. Opp'n Pl.'s Mot. for Summ. J.* 3.

unacceptably precludes the employee from pursuing his field in his chosen home. As such, it is unduly harsh and oppressive, and is thus unenforceable.[34]

CONCLUSION

For the reasons above, the Court grants Dr. Fame declaratory judgment that the NEA's restrictive covenant is unenforceable and further grants Dr. Fame permanent injunctive relief enjoining A&I from enforcing the non-competition covenant. If Mr. Munro would tender an endorsed order, incorporating this opinion, and preserving the objections of both parties, it would be appreciated.

With best regards, I am

Very truly yours,

Charles N. Dorsey

[34] *Simmons*, 261 Va. at 580–81, 544 S.E.2d at 678.