



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 10, 2023

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**Re: Association Resource Group, Inc. v. Lava Technology Services, LLC, and  
John Cooper, Individual  
CL-2023-8799**

Dear Counsel:

This case came before the Court on August 25, 2023, for a hearing on Plaintiff Association Resource Group's Motion to Strike Defendants' Pleas in Bar. Having taken the Motion under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion granting Plaintiff's Motion.

**OPINION LETTER**

## **Facts and Procedural History**

The Plaintiff Association Resource Group, Inc. (ARG) is a technology consulting and brokerage firm which offers information technology services, including “Unified Communications as a Service” and “Contact Center as a Service.”

Defendant Lava Technology Services, LLC (Lava) is also an information technology provider, which contracted with ARG shortly after Lava’s formation. The contract between ARG and Lava included a non-disclosure clause, by which Lava agreed to hold confidential any “trade secrets or other confidential or proprietary matter relating to the ... business of ARG in connection with ARG’s various activities under this agreement except as requested in writing.”

Defendant John Cooper was an employee of ARG who allegedly worked for Lava as an independent contractor at the same time. ARG alleged Cooper stole trade secrets and proprietary information from ARG, during his employment there, for Lava’s benefit, in breach of a similar non-disclosure clause in his contract with ARG.

ARG filed suit on June 13, 2023, alleging the Defendants committed misappropriation of trade secrets, breach of fiduciary duty, breach of contract, tortious interference with contract, conspiracy to injure business, and common law civil conspiracy.

Defendants Lava and Cooper responded by filing pleas in bar, asserting, in part, (1) the contract was not breached because the non-disclosure provisions were unenforceable as a covenant in restraint of trade; (2) the Defendants’ acts had not breached the contract; and (3) intracorporate immunity barred the conspiracy counts.<sup>1</sup> After the hearing, the Court granted the Plaintiff’s motion to strike the plea of non-breach, took the matter under advisement and ordered supplemental briefing be provided on the motion to strike Defendants’ pleas in bar as to intracorporate immunity and unenforceable covenant in restraint of trade. In its supplemental briefing, Defendants abandoned the intracorporate immunity plea in bar, defending only the plea of unenforceable covenant in restraint of trade (“unenforceable restraint”).

Plaintiff argues unenforceable restraint is an improper plea of the general issue, which cannot be asserted by a plea in bar. Plaintiff’s position centers on the inconsistency of which party would bear the burden of proof, as plaintiffs seeking to enforce a restrictive covenant must prove they are reasonable, but the movant must bear the burden of proof at a plea in bar. Because the burden of proof would be on the Plaintiff to prove enforceability of the covenant at trial, unenforceable restraint is a plea of the general issue.

The Defendants contend their asserted plea is comparable to other sustained special pleas in Virginia jurisprudence;<sup>2</sup> and a purportedly-violated unenforceable restraint contract provision

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<sup>1</sup> Other pleas in bar were initially asserted, but were dropped before argument on August 25, 2023.

<sup>2</sup> The Defendants rely on a bevy of cases for comparison, including *Smith v. McLaughlin*, 289 Va. 241 (2015); *Primov v. Serco*, 296 Va. 59 (2018); and *Schmidt v. Household Fin. Corp.*, 276 Va. 108 (2008), among others.

is a single set of facts or circumstances which, if proven, constitutes an absolute defense to a claim, meeting the definition of a special plea. Further, Defendants argue, unenforceable restraint was sub silentio endorsed as a plea in bar in the *Home Paramount* and *Assurance Data* cases.<sup>3</sup> It is not a single element of the Plaintiff's case typically required to be proven at trial, nor would it force the Plaintiff to essentially try his whole case. For all these reasons, Defendants assert, the plea in bar should not be struck.

The Court now rules on whether unenforceable restraint is a special plea assertable by plea in bar, or a plea of the general issue.

### **Standard of Review**

If a defensive pleading is improper a plaintiff may test its sufficiency by a motion to strike. *See* Va. Code § 8.01-274. A plea in bar asserts a special plea, i.e. a distinct issue which, if proven, bars plaintiff's recovery. *Stockbridge v. Gemini Air Cargo, Inc.* 269 Va. 609, 617-18 (2005). "As distinguished from an answer or grounds of defense, it does not address the merits of the issues raised by the bill of complaint or the motion for judgment. [A special] plea is a pleading which alleges a single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms v. Nelms*, 236 Va. 281, 289 (Va. 1988). A plea of the general issue, by contrast, is "a traverse, a general denial of the plaintiff's whole declaration or an attack upon some fact the plaintiff would be required to prove in order to prevail on the merits." *Stockbridge* 269 Va. at 617-18. It has the effect of challenging the plaintiff to go to trial and prove his case. *Id.* Pleas of the general issue have been abolished in Virginia. *Id.*

A plea in bar must assert a special plea, not a plea of the general issue. *Id.* The movant bears the burden of proof, both production and persuasion, in a plea in bar. *Cal. Condominium Ass'n v. Peterson*, 301 Va. 14, 20 n.4 (2022). Typically, a special plea is an affirmative defense, although pleas in bar have been sustained on non-affirmative defenses where the plea was not challenged as a plea of the general issue.<sup>4</sup>

A covenant in restraint of trade "is enforceable if it is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. The employer bears the burden of proving each of

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<sup>3</sup> *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412 (2011); *Assurance Data v. Malyevac*, 286 Va. 137 (2013)

<sup>4</sup> *See Nelms*, 281 Va. at 289 (non-exhaustive list of special pleas, noting special pleas are "typically" affirmative defenses); *see, e.g., Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412 (sustaining plea in bar of covenant in restraint of trade, where plea was not challenged as a plea of the general issue); *accord Smith v. McLaughlin*, 289 Va. 241 (2015) (sustaining plea in bar against a malpractice action on the grounds the law was not settled, not challenged as a plea of the general issue).

these factors” at trial. *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412, 415–16 (2011).

### Analysis

A special plea is defined as a single set of facts or circumstances which, if proven, constitutes an absolute defense to a claim, but this “definition” is clearly broader than what a special plea is in practice. Taken literally, a thus-defined special plea in bar could be used to attack a single element of any offense. For example, if a defendant could prove a plaintiff in a negligence case suffered no damages, this would be a “single set of facts or circumstances” totally barring recovery on the negligence claim; but it is equally clear from Virginia precedent this would be an unacceptable plea of the general issue: “an attack upon some fact the plaintiff would be required to prove in order to prevail on the merits.” *Stockbridge*, 269 Va. at 618. As put in *Joyce v. Center for Brief Counseling*, “[i]t is not the office of the special plea in bar to pluck one essential ingredient from the plaintiff’s case and cause it to be adjudicated ... prior to trial.” 29 Va. Cir. 209, 211 (Fredericksburg 1992).

The only modern Virginia Supreme Court case addressing what constitutes a special plea, and what constitutes a forbidden plea of the general issue, is *Stockbridge v. Gemini Air Cargo, Inc.* 269 Va. 609 (2005). In *Stockbridge*, the trial court below allowed a plea-in-bar hearing, before overruling the plea in bar because the matter needed to be settled by a jury, as it was a plea of the general issue. *Id.* at 617. The Supreme Court indicated this was a misunderstanding of the nature of the special plea and plea of the general issue, as factual findings can be made by the court at a plea in bar proceeding, with or without the aid of a jury. *Id.* at 618. The distinction between special pleas and pleas of the general issue is really, *Stockbridge* tells us, that special pleas assert a separate factual matter that totally bars the claim, while a plea of the general issue seeks to deny the entire case, or to attack some fact the plaintiff would be required to prove at trial. *Id.* at 617-18.

The Defendant is correct that the special plea of unenforceable restraint resembles other sustained pleas, and the special plea of unenforceable restraint has been sustained in the past by the Virginia Supreme Court. *See Home Paramount Pest Control*, 282 Va. at 215. However, the special plea of unenforceable restraint does not sit comfortably among its brethren. Unenforceable restraint is not, after all, an affirmative defense, in contrast to most special pleas. *Cal. Condominium Ass’n*, 301 Va. at 20. Framed differently, the plea of “restrictive covenant” is simply an attack on one of the elements the plaintiff would be required to prove at trial: the existence of an enforceable contract. Most importantly, if there *is* a question whether the contract provision violated is an unenforceable covenant in restraint of trade, it is the plaintiff’s burden to show the restraint is actually reasonable and valid. *Home Paramount Pest Control*, 282 Va. at 414.

The Defendants' reliance on cases which "sub silentio" endorse unenforceable restraint as a special plea is misplaced. *Home Paramount* challenged questions of fact-finding and the underlying substantive law, not unenforceable restraint as a special plea. *Id.* at 412. Further, *Assurance Data* did not find a covenant in restraint of trade was a special plea, but reversed a decision below sustaining a demurrer on a covenant in restraint of trade because a demurrer was an inappropriate procedural tool, without addressing pleas in bar in any way. 286 Va. at 137. The similar pleas in bar sustained by the Virginia Supreme Court, cited by the Defendants, suffer the same fatal flaw: in each, the defense went unchallenged as a special plea.<sup>5</sup> The Virginia Supreme Court's preclusion from answering a question it was not asked does not endorse a legal conclusion of the court below.

A common through-line in Virginia Supreme Court cases is affirmative defenses which provide a complete bar to recovery are appropriate special pleas, which may be asserted through a plea in bar or otherwise.<sup>6</sup> Binding caselaw also confirms the matter to be proven under a plea in bar is one for which, had the matter gone to trial, the defendant would have primarily borne the burden of proof.<sup>7</sup>

The latter rule is not about procedural burden-shifting, but instead defines the special plea, as opposed to a plea of the general issue. The movant bears the burden of proof at the plea in bar stage because it is a special plea, and special pleas are *only* those for which the movant would have borne the burden of proof at trial. *See Stockbridge*, 269 Va. at 618.

A plea of the general issue is, among other things, "an attack upon some fact the plaintiff *would be required to prove* in order to prevail on the merits." *Id.* (emphasis added). Here, the Plaintiff is seeking to enforce a covenant in restraint of trade, and bears the burden of proof in showing the restraint is reasonable. Because the Plaintiff will be required to prove reasonability in order to prevail on the merits, unenforceable restraint is a plea of the general issue, not a special plea. As a result, the Defendants may not attack the unenforceability of the restraint through a plea in bar.

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<sup>5</sup> *See Smith*, 289 Va. 241; *Cornell v. Benedict*, 2022 WL 7205774 (Va. 2022); *Primov v. Serco, Inc.*, 296 Va. 59 (2018); *Schmidt v. Household Fin. Corp.*, 276 Va. 108 (2008).

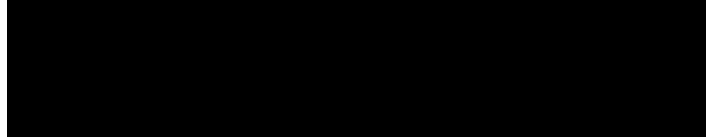
<sup>6</sup> *See Nelms*, 281 Va. at 289 (listing only affirmative defenses as special pleas); *Cal. Condominium Ass'n*, 301 Va. at 20 ("a plea in bar can raise an affirmative defense"); *New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 36 (2013); *cf. Monahan v. Obici Med. Mgmt. Servs., Inc.*, 271 Va. 621, 633-34 (2006) (mitigation of damages is an affirmative defense but not a special plea, because it is not an absolute bar)

<sup>7</sup> *See, e.g., Cal. Condominium Ass'n*, 301 Va. at 20; *Baker v. Poolservice Co.*, 272 Va. 677, 688 (2006); *Compare Schmidt*, 276 Va. at 117 (Defendant asserted plea in bar of statute of limitations and proved action was outside it; only afterward burden was shifted to Plaintiff to show exception).

**Conclusion**

For an unenforceable restraint allegation to be litigated as a plea in bar, the primary evidentiary burden would be forced on to the Plaintiff, which is not appropriate nor supported by precedent. The Plaintiff's Motion to Strike Defendant's Plea in Bar is hereby granted.

Sincerely,



Penney S. Azcarate, Chief Judge  
Fairfax County Circuit Court

**OPINION LETTER**