NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

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

BRUCE D WHITE, CHIEF JUDGE
RANDY I BELLOWS
ROBERT J SMITH
JAN L BRODIE
BRETT A KASSABIAN
MICHAEL F DEVINE
JOHN M TRAN
GRACE BURKE CARROLL
DANIEL E ORTIZ
PENNEY S AZCARATE
STEPHEN C SHANNON
THOMAS P MANN
RICHARD E GARDINER
DAVID BERNHARD

JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

THOMAS A FORTKORT
JACK B STEVENS
J HOWE BROWN
F BRUCE BACH
M LANGHORNE KEITH
ARTHUR B VIEREGG
KATHLEEN H MACKAY
ROBERT W WOOLDRIDGE, JR
MICHAEL P McWEENY
GAYLORD L FINCH, JR
STANLEY P KLEIN
LESLIE M ALDEN
MARCUS D WILLIAMS
JONATHAN C THACHER
CHARLES J MAXFIELD
DENNIS J SMITH
LORRAINE NORDLUND
DAVID S SCHELL

RETIRED JUDGES

August 11, 2017

Michael J. Lockerby
Zachary L. Coffelt
Foley & Lardner LLP
3000 K Street, N.W. Suite 600
Washington D.C. 20007-5109
Counsel for Plaintiff

Charles B. Wayne
Jamie M. Konn
DLA Piper LLP
500 8th Street N.W.
Washington D.C. 20004
Counsel for Defendants

Re: *Advanced Systems Engineering Corp v Intuitive IT LLC, et al v. Jeffrey A. Wallace & Dave Thomas*, Case No. CL-2014-9298

Dear Counsel:

I apologize for the delay in issuing this opinion. Thank you for your patience.

This case is before the Court after a jury trial in December 2016, on Advanced Systems Engineering Corp.'s ("ASEC") complaint for (I) Misappropriation of Trade Secrets, (II) Tortious Interference with Existing and Prospective Customer Contracts and Relationships, (III) violation of the Virginia Business Conspiracy Act, (IV) Conversion, (V-VII) Breach of Contract, (VIII) Breach of Fiduciary Duty, (IX-X) violation of the Virginia Computer Crimes Act, (XI) Unjust Enrichment, and (XII) Breach of Promissory Note against Defendants Intuitive.IT LLC ("Intuitive") and Anita Hohman ("Hohman"), seeking damages and an injunction against any further misappropriation of trade secrets based upon the various contractual relations surrounding a government idea2Solutions ("i2S") contract.

OPINION LETTER

Intuitive brought a counterclaim and third party complaint against Jeffrey Wallace and Dave Thomas for (I) Defamation *per se*, (II) Tortious Interference with Contractual Relations, (III) Tortious Interference with Business Relations, and (IV) Bad Faith Claim for Misappropriation of Trade Secrets, and Hohman's counterclaim for (I) Breach of Contract, seeking payment of accrued vacation pay in accordance with ASEC's employment agreement. The Court granted the defendants' motion to strike as to Counts IV, V, IX and XI, and took under advisement the same motion as to Counts I, II, III, VI and VIII. After trial, the jury then returned a verdict for ASEC, though, as will be explained, for an uncertain amount, and for Hohman on her counterclaim for $33,269.30. Intuitive renewed the motion to strike, and moved for a judgment *non obstante veredicto*. ASEC also moved to set aside the verdict as to Hohman's counterclaim. ASEC's request for equitable relief remains before the Court as well. As a result, four questions are before the Court:

A. Did ASEC present sufficient evidence such that a rational trier of fact could have found the elements of each or any remaining cause of action, namely proximate causation of damages and the value of those damages?

B. Was the jury verdict plainly wrong and/or without any credible evidence; namely, was there any credible evidence presented regarding proximate causation of damages and the value of those damages for any of ASEC's remaining claims?

C. Was the jury verdict plainly wrong and/or without any credible evidence in awarding Hohman unpaid vacation time pursuant to the employment agreement?

D. Was there sufficient evidence presented by ASEC to establish that an injunction against Hohman's misappropriation of trade secrets was necessary to prevent actual or threatened disclosure, or any irreparable harm?

After considering the pleadings and exhibits, testimony of witnesses, authorities, and oral arguments presented by Counsel, the Court finds that ASEC failed to present any credible evidence on the proximate causation and value of damages sustained by Intuitive's and Hohman's conduct. Accordingly, the motion to strike previously taken under advisement is granted; furthermore, the judgment *non obstante veredicto* would also be granted if not for the motion to strike. The Court denies ASEC's motion to set aside the verdict on Hohman's counterclaim for breach of contract. The Court further denies the injunction sought by ASEC.

OPINION LETTER

I. BACKGROUND[1]

A. Factual Background

ASEC is a corporation that provides systems engineering and technical support services to Federal agencies. Sec. Am. Compl. ¶ 16. Intuitive is a Virginia LLC who similarly provides Federal customers with IT services. Sec. Am. Compl. ¶ 19. Both participate as subcontractors in a pool for government contracts with the U.S. Intelligence Community through a "revolving fund" program called idea2Solutions ("i2S").

In i2S revolving fund contracts, the government's work projects are staffed through a collaborative procedure which relies upon flexibility amongst the prime and subcontractors. *See generally* Trial Transcript 873-877. The government issues a Contract Staffing Request ("CSR"), seeking an individual with a particular skill set. Prime contractors then collaborate with subcontractors to submit resumes of individuals, employed by the subcontractors, to the i2S program office. *Id* The office then selects the desired candidate. Sec. Am. Compl. ¶ 17.

Once selected by the Federal government, the individual remains an employee of the subcontractor but is solely supervised, for the course of the work, by the Federal government. Notably, the subcontractors may submit individuals as candidates to multiple prime contractors, but are prohibited from communicating with the government agency requesting staffing. If the individual is selected, the subcontractor is paid by the prime contractor, who then pays the individual, but the subcontractor cannot communicate with the agency or their employee about the actual work being performed. The standard contract under this arrangement, for a CSR selection, is at will. Trial Transcript at 1082:5-1130:6.

Anita Hohman was employed by ASEC from 2004 to 2014, and played an integral and trusted role in the company's origins and growth. *Id.* Her employment did not contain a non-compete provision, and she was primarily assigned to ASEC's i2S division. *Id.* at 1112:4-6. Included in her work was the development of Identities and Access Management ("IdAM") strategies for software solutions, which in turn helped foster key relationships with prime contractors. As part of Hohman's employment, ASEC promised to pay certain fringe benefits when she left their employ; namely, ASEC promised to make payment for unused vacation time. Trial Transcript 1133:2-1137:10. During the course of employment, ASEC also loaned Hohman $50,000 to help pay her son's tuition. *Id* at 292:2-293:15. Hohman thus signed a promissory note for the same amount; however, payments were never made. *Id.*

After a decade of work with ASEC, Hohman desired to develop a solutions-based IT practice, which was not part of ASEC's intended plan for corporate growth. *Id.* at 1104:5-14. Hence, in 2014, Hohman began conversations with Intuitive. Intuitive then made Hohman a

[1] In forming its opinion, the Court has reviewed all of the admitted exhibits and the transcripts of witnesses' testimony. The following recitation of facts is a summary of the pertinent facts. The Court has cited to several exhibits and deposition transcripts, but relied upon all of the evidence in its decision.

contingent offer of employment, contingent upon her selection for a CSR with Intuitive as the subcontractor. *Id.* at 1109:16-1110:10. Intuitive then collaborated with Praxis Engineering, a prime contractor, to submit Hohman's name for a CSR. *Id.* at 1113:-1117:13. Notably, ASEC did not submit any resumes, or otherwise compete, for the same CSR. *Id* She was eventually selected, and her security clearance was completed by the end of May 2014. *Id* She promptly provided her two weeks notice to ASEC, and joined Intuitive on June 16, 2014. *Id.* at 1120:4. ASEC lost its still active CSR with Hohman, *id.* at 1116:10-15, and the profits it might have received therefrom. *Id.* at 776:1-13.

B. Procedural Background

ASEC brought this action in July 2014. After substantial discovery, a motion in limine was argued before Judge Gardiner on December 9, 2016. After hearing arguments, Judge Gardiner excluded the admission of any evidence regarding damage to ASEC's *corporate value*. As a result, ASEC's damages were limited to lost profits it would have made on Hohman's CSR had she not departed for Intuitive, in addition to any lost contract, damaged client relationship, unjust enrichment or reasonable royalty it might prove, for allegedly misappropriated trade secrets and interference with business expectations.

The trial began the following Monday, December 12, and lasted nearly two weeks. After ASEC presented its case-in-chief, a motion to strike was sustained as to counts IV, V, IX and XI for want of evidence of damages. The motion was taken under advisement as to Counts I, II, III, VI and VIII.

At the end of the trial, the jury returned a verdict for ASEC. However, the verdict form is confusingly inconsistent. The jury found that all six trade secrets had been misappropriated and were valued at $138,990.00 each. This would total $833,940.00. Verdict Form at 2–17. The jury then determined that there had been tortious interference with an existing contract, a conspiracy to damage ASEC's business, and a breach of contract and fiduciary duty by Hohman. *Id.* at 18–19. Nevertheless, when asked to total the compensatory damages for "*any* of the above claims," the jury awarded $833,942.00, and attributed $13,775.00 to the conspiracy claim. *Id* at 19 (emphasis added). Hence, the total is only $2 greater than the cumulated trade secrets alone, yet almost $14,000 were supposed to be for the conspiracy claim. These numbers do not reconcile. The jury then further concluded that ASEC proved actual malice and wanton disregard, but declined to award any punitive damages. Finally, the jury found that Hohman still owed back the promissory note, worth $53,583.00, and that ASEC owed Hohman unpaid vacation time, in the amount of $33,269.30. In sum, the only clarity on the verdict form was in regard to the note and unpaid vacation time, with inconsistency as to all other claims.

Intuitive and Hohman then renewed the motion to strike and moved to set aside the verdict as to all counts except for the promissory note. ASEC moved to set aside the verdict as to Hohman's unpaid vacation time. These, and ASEC's outstanding equitable claims, are presently before the Court.

I. STANDARD OF REVIEW

In ruling on a Motion to Strike, the Court determines whether the Plaintiff failed to provide sufficient evidence such that a rational trier of fact could have reasonably found the essential elements of a cause of action. *Lawlor v Commonwealth*, 285 Va. 187, 223 (2013). A Court may take a motion to strike under advisement and wait until the disposition of the case to issue its ruling. *Austin v. Shoney's, Inc.*, 254 Va. 134, 137-38 (1997). When doing so, the Court should consider the evidence presented during the *defendant's* case as well, but must "accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action..." but "not...judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense." *Id*

Similarly, though more demanding, a Court may grant a motion for judgment *non obstante veredicto*, setting aside the jury verdict, when "it is contrary to the evidence, or without evidence to support it." Va. Code. § 8.01-430. Virginia Courts have clarified that this requires the verdict to be "plainly wrong or without credible evidence to support it." *Doherty v. Aleck*, 273 Va. 421, 424 (2007) (citing *Lane v. Scott*, 220 Va. 578 (1979)). Hence, if the evidence gives rise to multiple and conflicting inferences which the jury resolves in reaching the verdict, it should not be set aside. *Lane*, 220 Va. at 580.

Primarily at issue in *this* motion to strike and judgment *non obstante veredicto* is evidence of proximate causation and a reasonably ascertainable amount for damages. The plaintiff has the burden of proving "first...a causal connection between the defendants' wrongful conduct and the damages asserted" and "[s]econd...the amount of those damages by using a proper method and factual foundation for calculating damages." *Saks Fifth Ave, Inc. v. James, Ltd.*, 630 S.E. 2d 304, 311 (Va. 2006).

Treating each count in turn, proximate causation is an element of every offense, and shows that the "act or omission...in natural and continuous sequence, unbroken by an efficient intervening cause, produces" the damaging event, "and without which that event would not have occurred." *Wells v. Whitaker*, 207 Va. 616, 622, 151 S.E.2d 422, 428 (1966). Additionally, damages must not only be proven with reasonable certainty *generally*, but was even an *element* of each remaining claim after the motion to strike. *Banks v. Mario indus. Of Va., Inc* , 650 S.E. 2d 687, 696 (Va. 2007) (damages necessary to prove Misappropriation of Trade Secrets); *DuretteBradshaw, P.C. v MRC Consulting, L.C.*, 670 S.E.2d 704, 706 (Va. 2009) (damages necessary to prove Tortious Interference with Contract); *Syed v. ZH Techs., Inc* , 694 S.E.2d 625, 633 (Va. 2010) (damages necessary to prove Virginia Business Conspiracy Act); *Isle of Wight Cnty. V. Nogiec*, 704 S.E.2d 83, 86 (Va. 2011) (damages necessary to prove Breach of Contract); *Williams v. Dominion Tech. Parnters, L.L.C.*, 576 S.E.2d 752, 758-59 (Va. 2003) (damages necessary to prove Breach of Fiduciary Duty).

Finally, a party is only entitled to permanent injunctive relief to protect trade secrets when it can show "actual or threatened" disclosure thereof; "mere knowledge" of trade secrets is insufficient to support an injunction. Va. Code § 59.1-337; *Motion Control Sys., Inc. v. East*, 262 Va. 33, 38 (2001).

II. ARGUMENTS

A. Plaintiff's Argument

In proving damages and justifying those awarded, ASEC's brief primarily relies on the "Unjust Enrichment" theory permitted by Jury Instruction number 33. The instruction provided that the jury, in calculating damages for misappropriation of trade secrets, could use "unjust enrichment caused by the Defendants' misappropriation" or, if unable to prove by those methods, "exclusively by imposition of liability for a reasonable royalty for Defendants' unauthorized use of a trade secret."

ASEC then argues it not only presented evidence of ASEC's lost profits, based upon Hohman's departure for Intuitive, but also testimony and evidence regarding Intuitive's growth. Specifically, ASEC argues that Intuitive's "gross profit and total income increased by $2,850,764.15," which was a more than 50% increase from the previous year. Post Tr. Memorandum of Plaintiff at 21. In addition, ASEC presented testimony where Gilbert Guarino ("Guarino"), as CEO for Intuitive, stated that the IdAM practice, one of the alleged trade secrets, was part of the plan to increase profits. Trial Transcript at 1301:7-1303:18; 1304:15-1305:24. Taken together, ASEC argues, the jury had a reasonable evidentiary basis for finding that trade secrets allegedly misappropriated were used to increase revenue up to just over $2.8 million. This is credible evidence from which a rational trier of fact can deduce an independent economic value for the trade secret, deduce Intuitive's unjust enrichment, and find damages for ASEC. Thus, the verdict cannot be *plainly wrong*, or without *sufficient evidence* for a rational trier of fact.

Additionally, ASEC argues that the award on Hohman's unpaid vacation time should be set aside as a matter of law. The jury found that Hohman breached, and as the first breaching party, is no longer entitled to the unpaid vacation time.

B. Defendant's Argument

Intuitive's argument, though well developed and extensively argued, can be reduced to a few propositions: (1) there is no legal entitlement to the lost profits on Hohman's CSR with ASEC, given it was an at will contract, (2) there was no causal link between a wrongful act and some damage suffered by ASEC, or lost contract *other than* Hohman's CSR, and (3) there was no evidence of the *causal connection* between Intuitive's economic growth and ASEC's trade secrets, or of the *independent economic value* of those trade secrets on which to base a reasonable royalty. ASEC had the burden of proving this causal connection, an independent economic value, and/or damages suffered by ASEC other than the lost CSR. It failed to do so,

and thus there was not even any *credible evidence* upon which to find proximate causation of damages or the amount of damages, let alone sufficient evidence upon which a rational trier of fact could rest the same.

Additionally, the verdict on Hohman's counterclaim should be confirmed. Under Virginia law, an employee may bring a breach of contract claim for unpaid fringe benefits, and here, weighing the evidence, the jury determined that Hohman did not breach first, and was entitled to her unpaid vacation time. Thus, this judgment should be confirmed.

III. ANALYSIS

A. The Evidence Presented On Proximate Causation and Damages

As already noted, Judge Gardiner's December 9, 2016, ruling on Intuitive's motion in limine limited ASEC's capacity to present evidence of damages suffered by the corporation itself—ASEC could not present any evidence of decreased corporate value, but only lost profits on the remaining ten years of Hohman's contract, or some contract ASEC lost as a result of an allegedly wrongful act. Although it had no other method of proving damages *suffered by* ASEC, it was still permitted to prove damages via evidence of the independent economic value of allegedly misappropriated trade secrets (to calculate a reasonable royalty), or unjust enrichment to Intuitive as a result of that misappropriation. Jury Instruction 33.

Thus, there were in essence several possible mechanisms for presenting evidence of damages available to ASEC: (1) Lost profits or lost contracts/bids, (2) unjust enrichment to Intuitive, and/or (3) independent economic value of the trade secrets. Naturally, regardless of the method each was also contingent upon presenting evidence of *proximate causation.*

Each set of claims, and the evidence of proximate causation and damages presented, will be explored below in light of these available methods. Nevertheless, as will be seen, ASEC's proffered evidence of proximate causation and damages for any of the remaining counts was essentially limited to: (1) Intuitive's $2.8 million growth in gross profit and total income between 2013-2014, Trial Transcript at 1302:2-13, (2) Intuitive's profit on Hohman's CSR, *id* at 957-60, and (2) testimony from Intuitive's CEO Gilbert Guarino that IdAM practices were included in the growth plan, and that he received emails with other potential confidential ASEC information. *Id.* at 1305:2-5, 1306:17-1307:9. There was no evidence of lost contracts or bids on government work requests or damaged relationships with government clients and prime contractors. Furthermore, the mere admission that Intuitive received certain information and/or that IdAM practices were part of a growth plan does not prove that any alleged trade secrets proximately caused unjust enrichment, nor does it prove the independent economic value of those practices. Hence, there was no credible evidence of proximate causation linking profit growth and IdAM practices, or *any other* alleged trade secret, even if misappropriated.

a. Count I: No Credible Evidence of the Value of Trade Secrets, Proximate Causation of Damages, Nor Unjust Enrichment Resulting From Misappropriation

ASEC alleged six misappropriated trade secrets: (1) ASEC rates, (2) ASEC load factors, (3) ASEC loaded rates, (4) ASEC bidding strategies, (5) ASEC business development opportunities, and (6) subject to NDAs. While each of these secrets was introduced and discussed, no potential misappropriation was ever causally linked, through any credible evidence, with a lost bid, a damaged client relationship, a lost contract or any other evidence of damages. Nor was any evidence ever offered which might provide a basis for the reasonable ascertainment of any damages, unjust enrichment, or an independent economic value.

The case of *Saks Fifth Ave., Inc. v. James, Ltd.* is instructive for identifying similar shortcomings in previous Virginia cases. 272 Va. 177, 189-90 (2006) (a motion to strike should have been granted when a plaintiff failed to prove lost profits caused by the defendant). In *Saks*, an individual left the plaintiff's employ for a competitor, and after so doing, the plaintiff "filed a bill of complaint against the Defendants alleging breach of fiduciary duty, intentional interference with contractual relations, intentional interference with prospective business and contractual relations, violation of Virginia's Uniform Trade Secrets Act, violation of Virginia's Computer Crimes Act, and conspiracy to injure another in a business, trade or profession." *Id* at 182. The Supreme Court later reversed the Circuit Court, finding that the plaintiff failed to prove how any wrongdoing proximately caused damages, or a reasonably ascertainable amount for those damages. The plaintiff's evidence included:

> a historical analysis of Thompson's sales while at James, [a calculation of] Thompson's projected sales on the assumption that Thompson had remained at James Then, using sales records, [a calculation of] the average amounts Thompson's former customers continued to spend at James after his departure, terming sales revenues from those customers "house sales."...subtract[ing] those "house sales" that were not "lost" from the amount of projected sales Thompson would have made had he remained at James... [a calculation of] James' estimated gross profit lost by multiplying Thompson's projected sales by James' average gross profit margin of 43.63%... subtract[ing] the incremental costs that would have been incurred to generate the additional sales, but add[ing] to damages the incremental increases in other employees' base pay James gave after Thompson left. This calculation generated...[a] determination of James' net lost profits for the first year following Thompson's departure.

Id. ASEC has presented even less.

For example, plaintiff's counsel attempted to introduce evidence of damages to ASEC's business relationships through the misappropriation of rates and loaded rates on direct examination of ASEC former VP and CFO Curtis Carlson ("Carlson"). Trial Transcript 724:6-726:6. Nevertheless, despite testimony regarding the secrecy of these rates, the fear of disclosure

of such rates to competitors, it did not show any damages actually *caused* by such disclosure to Intuitive by Hohman. There was no testimony or evidence even offered to suggest that ASEC had perceived it lost profits. Rather, the only testimony was that access to such information by competitors would "cause concern." *Id.* at 725:21-22 (Carlson's testimony); 206:12-20; 208:4-13 (Matthew Dix' testimony). In fact, the *only* damages Carlson discussed *at any point* were those from Hohman's lost CSR. *Id.* at 776:10-13. However, Hohman was an at will employee, and thus ASEC is not entitled to collect lost profits from her depatured. *Id.* at 1112:4-6.

Similarly, the testimony of President Jeffrey Wallace ("Wallace") simply never went beyond the potential misappropriation, into the realm of resultant damages or independent value. Wallace testifies about the potential effect of a competitor having the rates and loaded rates of ASEC employees, which Hohman had sent to Intuitive via email. This information could arguably help a competitor to calculate what ASEC will bid for certain work and thus outbid them. *Id.* at 531:13-24. Still, ASEC did not show that Intuitive did use that information, that it out-bid ASEC for any contract, or that ASEC lost anything as a result of this conduct. The closest the testimony comes to producing credible evidence of damages is when discussing a potential client's "broad area announcement," requesting proposals for certain work efforts that ASEC was pursuing, and an email which showed that Intuitive might pursue the same. *Id.* at 582:7-25. The missing link is any actual damages resulting. There was evidence of arguably wrongful conduct, of *possible* competitive bidding where ASEC *might have* lost to Intuitive, but the testimony and emails fail to provide any credible evidence that it did.

Furthermore, even using an unjust enrichment theory, as permitted by Jury Instruction 33, ASEC failed to present any credible evidence regarding the *causal connection* between a misappropriation of trade secrets and Intuitive's profit margin, or even a misappropriation and Intuitive's gross income increases. There was no evidence, no testimony whatsoever, which indicated that Intuitive used ASEC's load factors or rates to outbid ASEC, or adopted ASEC's bidding strategy, which then proximately caused growth. There was only testimony: (1) from Intuitive employee Joel Henson, that he knew Hohman's rates *after* negotiating rates with Praxis, Trial Transcript at 908:13-909:9, and that profits were made on her new CSR, *id.* at 957-960, alongside (2) testimony from Guarino of increased gross income, and the intention to use IdAM practices. *Id* at 1302-1305:2-5.

A growth in *gross* income is in itself unhelpful, as it does not represent the actual *profit margin*, the amount Intuitive was actually enriched. When combined with a statement that part of Intuitive's growth plan was IdAM practices, which Guarino also testified Intuitive had already been using for seven years, it is no more helpful. *Id* at 1285:6-14. Although the jury did find IdAM information to be a misappropriated trade secret, there is still not sufficient evidence, let alone *any* credible evidence, upon which a rational trier of fact can conclude the misappropriated trade secret *proximately caused* the growth, or a *reasonably ascertainable amount of the growth.* Again, as stated above, Guarino only admitted that IdAM practices were part of the growth

plan—not that Intuitive acted on Hohman's ideas, on ASEC's ideas, nor that those ideas contributed in any meaningful way to the experienced growth.

Finally, the Virginia Code permits a claimant to prove the "independent economic value" of a trade secret's alleged misappropriation, which this evidence is also incapable of showing. Va. Code. § 59.1-3.36. The jury was left with no evidence it could rationally use in determining a 'reasonable royalty.' Essentially, the jury had nothing from which to draw a number. It could only pull a number from the air, which it seems to have done, given there is no rational connection between the $2.8 million growth, Intuitive's profits from Hohman's CSR, and the $138,990 awarded per trade secret.

None of this survives the motion to strike, nor could it even satisfy the "credible evidence" standard; without any credible evidence, ASEC could not prove all the necessary elements of its claims.

b. Count II: No Credible Evidence on Damages, or the Proximate Causation Thereof, from Violation of the Virginia Business Conspiracy Act

ASEC's conspiracy claim was based upon a conspiracy to misappropriate trade secrets, and thus the evidentiary deficiencies are essentially the same. Once more, *Saks* is directly on point. In *Saks*, the Circuit Court should have granted the motion to strike when the plaintiff:

> failed to connect the lost profits he claimed James incurred after Thompson's departure to *anything other than the mere fact that Thompson was no longer working at James*. This fact alone cannot be a basis for recovering damages, however, because Thompson was an *at will employee* who was free to stop working at James at any time. Rather than being connected to Thompson's employment at Saks, solicitation of James' customers, or removal of James' confidential information,...[the calculation] of damages focuses solely on a "but-for" model of what James' profits would have been had Thompson remained employed there.

Saks Fifth Ave , 272 Va. at 189-190 (emphasis added). ASEC's theory of damages is nearly identical, and thus likewise insufficient.

ASEC did not present any evidence of contracts lost as a result of a conspiracy to misappropriate trade secrets. Rather, ASEC lost an *at will employee* who was free to leave at any time and was not bound by any contractual covenants. Furthermore, as already discussed above, the unjust enrichment and independent economic value methods of proving damages, available in the counts involving trade secrets, were equally unsatisfied.

c. Count III: No Credible Evidence on Damages or the Proximate Causation Thereof from Tortious Interference with Contracts and Business Expectancies

In the same way, ASEC's evidence failed to indicate any causal connection between some tortious interference and any damages suffered, or the amount of damages. The required

elements of tortious interference with a contract include "inducing or causing a breach or termination of a relationship or expectancy...and *resultant damage* to the party whose expectancy was disrupted." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011) (emphasis added).

As in *Saks*, the mere loss of an at will employee is by itself insufficient. ASEC needed to produce something more. Interference with a contract needed to be causally linked with actual damages suffered. Once more ASEC might have presented evidence of contracts it lost as a result of Intuitive's and Hohman's relationship: it might have presented evidence of ASEC and Intuitive competing for the same contract, and losing to Intuitive, or evidence of meddling with prime contractors who *otherwise* would have cooperated and combined with ASEC on a particular contract, or some other interference with a client, *causing quantifiable damage* to the relationship. It did not present any such evidence, and any tortious interference, if proved at all, could not be causally linked with damages by a rational trier of fact. ASEC points towards various emails between Hohman and Intuitive, along with a number of other ASEC employees, indicating Hohman's willingness and desire to help Intuitive develop relationships with ASEC employees or some shared prime contractors, *see, e.g.*, Trial Transcript at 426-449; however, at no point did ASEC present evidence that it lost a bid, lost a contract, or otherwise suffered any type of damages as a result.

The examination of Wallace provides a snapshot of the plaintiff's attempt at producing evidence of damages from tortious interference. Emails between Hohman and Intuitive regarding potential business developments with intelligence agency "NGA" were accompanied by testimony from Wallace stating that ASEC was simultaneously "doing business with NGA" and were "pursuing several opportunities." Trial Transcript 447:18-448:11. Nevertheless, even this does not reveal any opportunities *lost* by ASEC, or lost by ASEC *to Intuitive*, as a *result* of anything Hohman said or did. Hence, there was no evidence of *resultant damages* suffered by ASEC. Similarly, later in the same testimony, Wallace discusses communications between Hohman and Intuitive regarding a company called ManTech, and their business development lead Michael Slavins, for capture of a government work request. *Id.* at 460:23-461:21. Again, without any evidence of damages *actually* suffered and caused by Hohman. Elsewhere, Wallace testifies that Hohman drew in other ASEC employees in an attempt to assist Intuitive, either sending resumes or otherwise including certain employees in her efforts, but all named employees remained at ASEC or else were fired, and did *not* go to Intuitive. *Id* at 473:20-474:5; 605:13-607:13. This is a pattern that repeats itself throughout Wallace's testimony, and consistently with each witness. *Id* at 685:6-686:24 (in Dougherty's examination, conversations about ASEC employees going to Intuitive, though did not end up doing so), 689:17-690:14 (possible interference with NGA contract, but no damages discussed), 692:10-693:6 (equity and compensation packages between companies, but no non-at will employee left), 698:1-25 (again, potential competition for NGA contract, but still no evidence of actual damages), 700:20-701:13 (potential competition for ManTech contract, but no evidence of damages), 703:7-705:14 (other potential interference with active contracts, but still no evidence of anything resulting); 738:22-

743:23 (in examination of Carlson, counsel abandoned lines of questioning regarding interference with business expectancies, involving two different prime contractors, at one point even admitting they did not believe Hohman caused any loss of business).

There is no evidence of which the Court may even assess the sufficiency; there is simply no credible evidence at all with regard to damages. ASEC only presented evidence of lost profits caused by Hohman's departure, Trial Transcript at 776:6-13, and was precluded by Judge Gardiner's pre-trial ruling from showing any damage to ASEC's corporate value otherwise. Once more, only Hohman's lost CSR remains. Hohman's contract was *at will*; and, furthermore, consistent with the theme of each witness and as testimony from former ASEC Vice President Donald Languuth revealed, Hohman left after being selected for a CSR *on which ASEC did not even bid. Id.* at 1317:14-18.

d. Counts VI and VIII: No Credible Evidence of Damages or Proximate Causation Thereof on Breach of Contract or Fiduciary Duty by Hohman

Finally, while ASEC did present evidence of communications between Hohman and Intuitive while still an ASEC employee, for all the reasons already stated, none of these communications could be proximately tied to *any* lost contract or *any* lost profits, which ASEC can enforce against Hohman or Intuitive.

B. Hohman's Counterclaim for Breach of Contract Seeking Payment of Unused Vacation

Although an employee manual, by its own terms, is not a bilateral contract, the Supreme Court of Virginia has held that a promise to pay benefits is an enforceable obligation because it constitutes an "offer which [is] accepted when [an employee] continued working for the company..." *Dulany Foods, Inc. v. Ayers*, 260 S.E.2d 196, 201, 203 (Va. 1979). Hohman, in turn, presented evidence through interrogatories and testimony that ASEC owed $28,927.76 plus interest, for unpaid vacation. Trial Transcript at 1133:2-1137:10.

The jury was charged with determining whether or not ASEC breached this agreement, or if Hohman was precluded from enforcing this obligation as a result of a first breach. The jury, weighing the testimony, found that Hohman did not breach first and was thus entitled to collect payment for her vacation time. There was sufficient evidence for the jury to make this determination, and so that verdict will remain.

C. ASEC's Equitable Claims

A statute governs when allegedly misappropriated trade secrets may be protected through permanent injunctive relief. Va. Code § 59.1-337(A). In accord with the foregoing assessment of the evidence presented at trial, ASEC failed to prove the "actual or threatened" disclosure of trade secrets; at most, the evidence showed "mere knowledge" of trade secrets. *Motion Control Sys , Inc.*, 262 Va. at 38. Furthermore, even if applying the traditional standards for injunctive

relief, ASEC also failed to produce evidence of any irreparable harm caused by Hohman's conduct.

IV. CONCLUSION

For the foregoing reasons, the Court finds in favor of Intuitive and Hohman, granting the renewed motion to strike (or setting aside the jury verdict in favor of ASEC) on Counts I, II, III, VI and VIII, and denying ASEC's request to set aside the jury verdict on Hohman's Breach of Contract claim. Thus, judgment is entered in favor of ASEC in the amount of $53,583.00 on Count XII for the promissory note, and for Hohman in the amount of $33,269.30 on the breach of contract claim.

Would Mr. Wayne please prepare an order reflecting the Court's ruling and submit it to Mr. Lockerby for his endorsement? I will place this matter on the Court's September 29, 2017, docket at 10 a.m. If the order is submitted prior to that date, it can be removed from the docket.

Sincerely,

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER