February 19, 2014

Paul G. Beers, Esquire
Robert A. Ziogas, Esquire
Glenn, Feldman, Darby & Goodlatte
37 Campbell Avenue
P.O. Box 2887
Roanoke, Virginia 24001

Joshua F.P. Long, Esquire
Daniel C. Summerlin, Esquire
Woods Rogers, P.L.C.
10 South Jefferson Street, Suite 1400
Roanoke, Virginia 24011

Re: *Virginia Transformer Corporation v. Ashwini Labh*
Case No. CL12-475
Circuit Court for the City of Roanoke

Virginia Transformer Corporation v. Rohit Kanti
Case No. CL12-476
Circuit Court for the City of Roanoke

Dear Counsel:

Virginia Transformer Corporation brings these actions for injunctive relief against two former employees, Ashwini Labh and Rohit Kanti, for breach of noncompete and nondisclosure agreements. The litigation against each was combined into a single evidentiary proceeding, and evidence was presented over two

days on June 25, 2013 and September 6, 2013. During the course of the litigation, the employees agreed to submit to an injunction prohibiting disclosure of confidential information. The matter proceeded on the issue of the enforceability of the noncompete agreement. Counsel submitted sterling post-trial briefs and delivered closing arguments on December 17, 2013.

The Court, having had an opportunity to maturely consider the testimony of witnesses, the exhibits admitted into evidence, and the arguments of counsel, is prepared to rule. For the reasons that follow, the Court finds that the restrictive covenant at issue is enforceable. Because the Defendants breached the restrictive covenants, and because the equities favor VTC, the Court will enjoin Defendants from continuing to breach the noncompete.

I. Factual and Procedural Background

Virginia Transformer Corporation ("VTC") located in Roanoke, Virginia, designs, manufactures, and sells custom-built power transformers. VTC operates in conjunction with three wholly owned subsidiary corporations: one in India ("VTI"); one in Idaho ("VTCU"); and one in Mexico ("VTC West").[1] VTI is primarily a design facility, while VTC, VTCU, and VTC West are design and production facilities. VTC primarily deals with medium-size transformers, while VTCU deals with larger capacity units. Each corporation is critically staffed with engineers who specialize in transformer design and production.

In order to maintain adequately trained engineers, VTI would recruit and hire newly graduated engineering students from India's best engineering schools. During the first year, these recruits would be rotated to VTC for training in the actual working world of power transformer production in the United States. If the training went well and the company and trainees were found to be a good fit, then VTI would transfer the trainees to VTC. VTC would then hire them as employees. It is against this backdrop that the current dispute arose.

Defendants Ashwini Labh ("Labh") and Rohit Kanti ("Kanti") are natives of India. Upon their graduation from engineering school in 2008, VTI hired Labh and Kanti to work as trainee engineers in India for one year and for a second year at VTC.

As part of its hiring process, VTI presented both Labh and Kanti[2] with "appointment letters" detailing the terms and conditions of their respective job offers.[3] The terms and conditions cover various topics including compensation, rules and regulations, duties, and leave eligibility.

---

1 Pl.'s Ex. 21.

2 While the letters had identical terms, each employee had his own separate letter.

3 Defs'. Exs. 1 & 9.

Three sections of the appointment letters are worthy of note here. Section 4, titled "Place of Posting and Inter-Company Transfer/Work," provides that VTI "reserves the right to transfer you at any time to any of its affiliated companies in India or abroad *provided that such terms and conditions of service shall not be less favorable than that stipulated in this letter*."[4] That section also states that Labh and Kanti would be "subject to the policies of the plant/company" and all national laws while working for any of VTI's affiliated companies.[5]

Section 5, titled "Relocation Abroad," outlines VTI's intention to transfer Labh and Kanti to an affiliate in the United States after one year of training.[6] Section 5 also provides that if Labh and Kanti left "the company before completing one year of employment abroad (1 + 1 year), [they] must indemnify to pay the company" an amount equivalent to one year's salary at VTI plus all costs related to their relocation abroad. Section 13, titled "Bond," reiterates this indemnity provision.

Section 16, titled "Notice of Termination," provides that the employee's service in India could be ended with or without cause upon two weeks' notice, and that termination "while employed abroad will be per that plant/company policy."[7]

Labh and Kanti signed their appointment letters, and, by doing so, agreed "with all terms as above and . . . [to] abide by all general rules of service which are now or may thereafter to be in force . . . ."[8]

While employed by VTI, Labh and Kanti's work schedule required them to spend one month at VTI in India followed by three months working in the United States at VTC. They were permitted to enter the US on a B-1 visa (arranged for by VTI), which permits temporary entry for training purposes only. During that first year visiting VTC, Labh and Kanti learned through casual conversations with other employees about a mandatory VTC noncompete policy and how one former employee had successfully avoided its reach.[9] The evidence revealed that noncompete agreements are almost unheard of in India as an employment term.[10]

The first-year training program was successful. In October 2009, VTI issued each defendant a "transfer letter" confirming that they would be transferred to VTC for the second year in accordance with the plan set out in the appointment letters.[11] The transfer letter confirmed to Labh and Kanti that they would be allowed to enter the US on L-1 work visas. L-1 visas allow employees with "specialized knowledge" to

---

4 Defs'. Exs. 1 & 9 at § 4 (emphasis added).
5 *Id.*
6 *Id.* at § 5.
7 *Id.* at § 16.
8 Defs'. Exs. 1 & 9 at *5.
9 Trial Tr. 133:4-134:19, 139:6-20, 168:2-22, June 25, 2013.
10 Trial Tr. 224:14-225:10, Sept. 6, 2013.
11 Pl.'s Exs. 10 & 26.

work in the United States temporarily for the duration of the employment. The VTI transfer letter went on to state

> you will be issued a detailed letter of employment on your arrival in USA by VTC indicating your position, reporting authority, responsibilities, annual package and other terms and conditions of employment. While at VTC you shall be governed by the rules/regulations and policies of VTC, USA as contained in the letter of employment.[12]

On November 1, VTC issued an employment letter to each defendant that set out terms of moving expenses, compensation, vacation, and general references to benefit programs and work hours.[13]

On November 2, 2009, just prior to leaving India for Virginia, Labh and Kanti met with VTI's Director of Operations Harikishan Rustogi ("Rustogi") to discuss VTC's policies and any additional agreements they might have to sign. Rustogi was unaware that VTC required a noncompete policy as a condition of employment.[14] He indicated to Labh and Kanti that they would have to abide by the VTC policies, whatever they were, but that the terms of employment in the letters would be met. While there is some dispute as to whether Rustogi was asked specifically about a noncompete agreement,[15] the evidence is clear that Labh and Kanti were not specifically told that they would have to sign a noncompete upon their arrival in the United States.[16]

Labh arrived at VTC on November 5, 2009, and VTC's Human Resources Department presented him with a packet of employment documents to review and sign. The packet included the noncompete agreement at issue here. Labh signed all of the other documents (with a slight interlineation modifying a relocation term)[17] but refused to sign the noncompete. On November 7, he emailed Rustogi and complained about the noncompete since he had been led to believe during their November 2 meeting that no new agreements would be required.[18] Rustogi contacted his counterpart at VTC and learned about the noncompete agreement term.[19] He replied to Labh that the "policies" Labh had agreed to abide by in the appointment letter included VTC's noncompete.[20] Labh responded

---

12 Pl.'s Exs. 10 & 26 at *1.
13 Defs'. Exs. 2 & 10.
14 Trial Tr. 187:19-21, 206:3-210:24, Sept. 6, 2013.
15 *Compare* Trial Tr. 39:3-40:23, 168:2-171:20, June 25, 2013, *with* Trial Tr. 186:3-24, Sept. 6, 2013.
16 Trial Tr. 40:1-41:2, 169:1-171:20, June 25, 2013; Trial Tr. 184:4-186:17, 205:21-206:19, Sept. 6, 2013.
17 Pl.'s Ex. 27.
18 Defs'. Ex. 3 at *2-3.
19 Trial Tr. 201:14-202:12, Sept. 6, 2013.
20 Defs'. Ex. 3 at *2.

> this agreement applies upon one's termination or resignation (willingly or unwillingly), so that he/she can not begin work for the competitor company up to 1 year. A non-compete clause is a term used in contract law under which an employee agrees not to pursue a similar profession or trade in competition against the employer. Being an engineer, I can't accept this agreement.[21]

On November 10, Rustogi replied that the noncompete was part of the VTC policy and "had been the practice much before now. There is no escape from that. [VTC] is very particular that all VTI employees going on L-1 sign [the noncompete]."[22] Labh signed the noncompete and backdated it to November 5.[23]

Kanti arrived at VTC in the middle of November 2009. He received the same packet of documents, and on November 16 signed the documents including the noncompete without objection.[24]

Labh and Kanti's two-year obligation to VTI and VTC expired in November 2010. In early 2011, Labh began conversations with Crompton Greaves Power Systems ("CG Power"), another transformer manufacturer. Labh accepted a position with CG Power at its facility in Missouri in March 2011. In June 2011, CG Power hired Kanti to work at the same facility. Alleging Labh and Kanti breached the noncompete, VTC filed these actions in March 2012.

II. Discussion

VTC's claim for injunctive relief stands on the noncompete, as does Labh and Kanti's plea in bar asserting that it is overbroad. Accordingly, the Court will first address the validity of the agreement, and then address the issue of whether it should be enforced.

A.

Sufficiency of the Noncompete Agreement

1.

Restraints on trade, such as covenants not to compete, are disfavored in Virginia.[25] To be enforceable, a noncompete provision must be reasonable; it must be (1) narrowly drawn to protect the employer's legitimate business interest; (2) not unduly burdensome on the employee's ability to earn a living, and (3) not against

---

21 Defs'. Ex. 3 at *1-2.

22 Defs'. Ex. 3 at *1.

23 Trial Tr. 141:5-17, June 25, 2013.

24 Trial Tr. 178:11-181:15, June 25, 2013.

25 *Preferred Sys. Solutions, Inc. v. G.P. Consulting, LLC*, 284 Va. 382, 392, 732 S.E.2d 676, 681 (2012).

public policy.[26] These factors are interrelated and analyzed in terms of function, geographic scope, and duration.[27] The function, geographic scope, and duration of the noncompete are considered together, and "'a single [term] that is unreasonable may be reasonable as construed in light of the other two.'"[28]

VTC must establish that the noncompete is reasonable.[29] And the Court will strictly construe the covenant against VTC, resolving any ambiguities in Defendants' favor.[30]

The noncompete's enforceability is a question of law that "'must be determined on its own facts.'"[31] Indeed, a noncompete appearing facially overbroad might be reasonable in light of the case's "particular circumstances."[32] Some facts a court should consider are "'the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the employee actually violated the terms of the noncompete agreements, and the nature of the restraint in light of all the circumstances of the case.'"[33]

2.

VTC alleges that Labh and Kanti have breached section 2.2(iii) of the Virginia Transformer Corporation Agreement. Subsection (iii)'s two restrictions prohibit departing employees from "providing *services* to or on behalf of" a *Restricted Business enterprise*" for a period of one year after termination of their employment.[34]

The "services" that the employees cannot provide to others fall into two categories. The first prohibited services include those that "are the same as, substantially similar to or directly related to the job duties or functions which [Defendants] performed for Company during the two (2) years prior to the termination of employment with Company."[35] The second restriction prohibits a

---

[26] *Id.* at 392-93, 732 S.E.2d at 681; *Capital One Fin. Corp. v. Kanas,* 871 F. Supp. 2d 520, 530 (E.D. Va. 2012).

[27] *Capital One*, 871 F. Supp. 2d at 530 (citation omitted).

[28] *Id.* (quoting *Cantol, Inc. v. McDaniel*, No. 2:06-cv-86, U.S. Dist. LEXIS 24648, 2006 WL 1213992, at *4 (E.D. Va. Apr. 28, 2006)).

[29] *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 415, 718 S.E.2d 762, 764 (2011).

[30] *Brainware, Inc. v. Mahan*, 808 F. Supp. 2d 820, 825 (E.D. Va. 2011) (quoting *Modern Env'ts., Inc. v. Stinnet*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002)).

[31] *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 144, 747 S.E.2d 804, 808 (2013) (quoting *Modern Env'ts.*, 263 Va. at 493, 561 S.E.2d at 695).

[32] *Id.* at 145, 747 S.E.2d at 808 (citing *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001)).

[33] *Brainware, Inc.*, 808 F. Supp. 2d at 826 (quoting *Modern Env'ts.*, 263 Va. at 494-95, 561 S.E.2d at 696).

[34] Defs.' Exs. 4 & 11 at *1 (emphasis added).

[35] *Id.*

departing employee from providing services that "involve work or services on or related to products, systems and/or services competitive with the products, systems and/or services manufactured, sold, leased, serviced or provided by Company[36] during [Defendants'] employment *and* about which [Defendants are] in possession of confidential information."[37]

A "Restricted Business enterprise" to which service may not be given is any enterprise "which derives revenue"—whether "directly, indirectly, individually, or through one or more affiliates"—from the "Restricted Business of Company."[38] The "Restricted Business of Company" encompasses the United States and Mexico, and is:

> the design, development, engineering, manufacture, construction, or marketing of power transformers for sale to industrial, commercial, manufacturing, or municipal entities where such power transformers are the same as, substantially similar to, or competitive with power transformers designed, developed, engineered, manufactured, constructed, marketed, and/or sold by Company during the term of [Defendants'] employment.[39]

Exhibit A to the Virginia Transformer Corp. Agreement lists thirty-three entities—and their subsidiaries—that are Restricted Business enterprises. Exhibit A includes Pauwels, but it does not list its successor, CG Power.[40] Exhibit A does, however, list "Crompton Greeves" (sic).

3.

An analysis of the noncompete's function, geographic scope, and duration elements together convinces the Court that the covenant is a reasonable restriction that protects VTC's legitimate business interests.

a.

First, the noncompete's durational element—one-year from the date of termination—is reasonable and aligned with Virginia precedent. For instance, although the noncompete at issue in *Home Paramount* was functionally overbroad, the Supreme Court of Virginia noted that the agreement's two-year duration element was narrowly tailored.[41] Indeed, courts interpreting Virginia law have even

---

36 "Company" means Virginia Transformer Corporation and "its successors, subsidiaries, and affiliated companies."

37 Defs.' Exs. 4 & 11 at *1 (emphasis added).

38 *Id.*

39 *Id.*

40 *Id.* at *3.

41 *Home Paramount*, 282 Va. at 419, 718 S.E.2d at 765.

found five-year restrictions to be reasonable under the right circumstances.[42] Regardless, courts applying Virginia law have repeatedly upheld one-year restrictions.[43] Therefore, VTC's one-year restriction of itself is not facially unreasonable and not unduly burdensome on Labh or Kanti.

b.

Next, Labh and Kanti attack the restrictive covenant's geographic scope. They argue its scope is overbroad because it encompasses areas where they did not work and includes several states in the United States and Mexico where VTC has not sold transformers within the last two or more years. VTC argues the geographic scope is reasonable because it distributes or markets its transformers throughout the United States and Mexico, and the one-year duration reinforces the covenant's reasonableness.

The Court is satisfied that the geographic limitation here is sufficiently limited to an area "covered or serviced" by VTC.[44] VTC has a global reach, and it has done business in the Middle East, Australia, Canada, Europe, and China, as well as in the United States and Mexico.[45] VTC actively markets its products throughout the United States and Mexico at trade shows, in trade publications, and through sales representatives.[46] Simply because VTC has not been successful in its product marketing in every state of the United States or Mexico in the last few years does not mean that VTC does not actively engage in competition throughout the United States and Mexico. In fact, the geographic restriction does not cover VTC's "entire market area," and it is limited to two countries where its production facilities are located.[47] Thus, the noncompete's geographic scope is not unreasonable. This is especially true given the covenant's short duration.

c.

Finally, Labh and Kanti attack the restrictive covenant as functionally overbroad. They argue that it prevents them from "the design, development, engineering, manufacture, construction or marketing of power transformers for sale to industrial, commercial, manufacturing or municipal entities."[48] Their interpretation, however, fundamentally misconstrues the noncompete's terms.

---

42 *See, e.g., Capital One*, 817 F.Supp. 2d at 534-35; *Meissel v. Finley*, 198 Va. 577, 582, 95 S.E.2d 186, 190 (1956); *Zuccari, Inc. v. Adams*, 42 Va. Cir. 132, 135, 1997 Va. Cir. LEXIS 98, at *6 (Fairfax Cnty. 1997)

43 *Preferred Sys.*, 284 Va. at 393, 732 S.E.2d at 681; *Brainware, Inc.*, 808 F.Supp. 2d at 827.

44 *Capital One*, 817 F.Supp. 2d at 534.

45 Trial Tr. 67:7-68:23, Sept. 6, 2013.

46 Trial Tr. 67:7-68:12, 104:19-24, 111:5-17, Sept. 6, 2013.

47 *Blue Ridge Anesthesia and Critical Care, Inc., v. Gidick*, 239 Va. 369, 373, 389 S.E.2d 467, 469 (1990); Trial Tr. 106:5-15, September 6, 2013.

48 Defs.' Br. at 15.

As already stated, subsection (iii) of the noncompete has two restrictions prohibiting Defendants from "providing services to or on behalf of" a Restricted Business enterprise "where the services":

- are the same as, substantially similar to or directly related to the job duties or functions which [Defendants] performed for Company during the two (2) years prior to the termination of employment with Company; or

- involve work or services on or related to products, systems and/or services competitive with the products, systems and/or services manufactured, sold, leased, serviced or provided by Company during [Defendants'] employment *and* about which [Defendants are] in possession of confidential information.[49]

"Company" means Virginia Transformer Corporation and "its successors, subsidiaries, and affiliated companies."[50]

A Restricted Business enterprise is any enterprise "which derives revenue"—whether "directly, indirectly, individually, or through one or more affiliates"—from the "Restricted Business of Company."[51] The Restricted Business of Company" encompasses the United States and Mexico, and is:

> the design, development, engineering, manufacture, construction, or marketing of power transformers for sale to industrial, commercial, manufacturing, or municipal entities where such power transformers are the same as, substantially similar to, or competitive with power transformers designed, developed, engineered, manufactured, constructed, marketed, and/or sold by Company during the term of [Defendants'] employment.[52]

Essentially, the noncompete prevents Labh and Kanti from performing jobs or duties for a competitive enterprise either (1) "the same as," "directly related," or "substantially similar to" their jobs at VTC, or (2) that entail work on products, systems, or services for a competitive enterprise when the products, systems, or services are similar to those that Defendants gained confidential information about at VTC. Those two prohibitions are the noncompete's functional elements; the definition of "Restricted Business of Company" defines the companies to which these functional elements apply, not the functions Labh and Kanti may not perform.

---

49 Defs.' Exs. 4 & 11 at *1 (emphasis added).
50 *Id.*
51 *Id.*
52 *Id.*

The Court assesses the noncompete's function by "determining whether the prohibited activity is of the same type as that actually engaged in by the former *employer*."[53] The analysis focuses on the former employer's activities, not the former employee's specific role with the former company.[54] The focus turns to the employee's activities only when "'a former employer seeks to prohibit its former employees from working for its competitors *in any capacity* . . . .'"[55]

On its face, the noncompete does not restrict Labh and Kanti from working for VTC's United States and Mexico competitors in *any* capacity. Nor does it prevent them from "engaging in all reasonably conceivable activities while employed by a competitor."[56] Instead, the noncompete restricts them from working in a capacity that is "the same as, substantially similar to or directly related" to their former positions or from working on products, systems, or services for a competitive enterprise when the competitor's specific products, systems, or services are similar to those that Defendants gained confidential information about in their former positions at VTC. Labh and Kanti are only prohibited from serving in similar roles which would compete with VTC's business or providing competing services to VTC's competitors.[57] Because the noncompete is not a "blanket prohibition against working for a competitor" and is limited to the same activity "as actually engaged in by [VTC]," the noncompete is not functionally overbroad.[58]

Weighing together the function, geographic scope, and duration elements of the noncompete, the Court finds the covenant is not overbroad.

4.

Having determined that the covenant is enforceable against Labh and Kanti, the Court must now determine whether Labh and Kanti breached the noncompete when they left VTC to accept positions with CG Power before the one-year restrictive period expired.

a.

The parties agree that CG Power competes with VTC.[59] It is clear from the evidence that CG Power derives revenue from the "Restricted Business" defined in the noncompete. CG Power designs and manufactures electrical transformers and other distribution and power products for commercial and industrial customers.[60]

---

53 *Home Paramount*, 282 Va. at 416, 718 S.E.2d at 764 (emphasis supplied).
54 *Capital One*, 871 F. Supp. 2d. at 536.
55 *Id.* (quoting *Home Paramount*, 282 Va. at 417-418, 718 S.E.2d at 765).
56 *Home Paramount*, 282 Va. at 418, 718 S.E.2d at 765.
57 *Id.* at 416-17, 718 S.E.2d at 764.
58 *Id.* at 416, 718 S.E.2d at 764.
59 Trial Tr. 70:8-71:24, Sept. 6, 2013.
60 Pl.'s Ex. 7.

CG Power and VTC have submitted competing bids for projects.[61] Moreover, Exhibit A to the noncompete specifically lists both "Crompton Greeves" (sic) and "Pauwels," CG Power's predecessor.[62] Thus, the Court is satisfied that CG Power derives revenue from the "Restricted Business" defined in the noncompete. Therefore, if Labh and/or Kanti violated either of the two restrictions prohibiting them from providing services to or on behalf of CG Power, they are in breach of the noncompete.

b.

The noncompete first prohibits Labh and Kanti from providing services that are the same, substantially similar to, or directly related to the duties or functions they provided while employed by VTC. The Court will address each defendant's compliance with this provision in turn.

i.

Per his employment letter, VTC hired Labh as a "Design Engineer" at the Roanoke facility.[63] Labh testified, and his former supervisor at VTC confirmed, that he was actually a "development engineer" in the electrical engineering department while employed by VTC.[64] Development engineers primarily prepare "rules for designs" and look for opportunities to optimize transformer designs for efficiency, cost reduction, and overall improvement.[65] Labh's development work also involved writing code and programs for design-testing software.[66]

Labh claims he did not do any design or production work on transformers for customers while at VTC.[67] Labh's former supervisor, Subhas Sarkar ("Sarkar"), however, testified that Labh did some design work at VTC.[68] Labh in fact prepared an electrical design for an actual VTC customer in May 2011.[69] Labh also helped develop a confidential costing tool used by VTC sales engineers.[70] Labh's work at VTC involved accounting for material quantities, grades, and rates.[71] Labh also performed load loss calculations and transfer impulse voltage calculations at VTC.[72]

---

61 Pl.'s Ex. 24.
62 Defs.' Exs. 4 & 11.
63 Defs.' Ex. 2 at *1; Trial Tr. 63:11-13, June 25, 2013.
64 Trial Tr. 63:11-13, June 25, 2013; Trial Tr. 124:11-16, Sept. 6, 2013.
65 Trial Tr. 124:15-21, Sept. 6, 2013.
66 Trial Tr. 63:19-64:20, June 25, 2013.
67 Trial Tr. 71:15-24, June 25, 2013.
68 Trial Tr. 128:23-130:3, Sept. 6, 2013.
69 Trial Tr. 129:3-17, Sept. 6, 2013; Pl.'s Ex. 8.
70 Trial Tr. 130:17-132:7, Sept. 6, 2013.
71 Trial Tr. 92:9-93:9, June 25, 2013.
72 Trial Tr. 92:19-93:13, 95:9-14, June 25, 2013.

CG Power hired Labh as an "R & D Engineer."[73] Labh's duties include electrical design for production of liquid-filled power transformers for CG Power customers.[74] Labh performs many similar, if not identical, functions and calculations at CG Power as he did at VTC.[75] While some of the tools Labh uses at CG Power may be different from those at VTC,[76] his job functions at CG Power as a design engineer are substantially similar and directly related to his functions as a development engineer at VTC. Labh produced at least one transformer design for a VTC customer while employed there—the same function his job at CG Power requires now. Moreover, design and development engineers are "closely related" to each other in this industry.[77] At VTC, they sit next to each other and consult with each other regularly.[78]

Based on this evidence, the Court finds that Labh breached the noncompete by providing services to CG Power that are the same, substantially similar, or directly related to his duties at VTC.

ii.

VTC also hired Kanti as a "Design Engineer" at its Roanoke facility.[79] Kanti testified that he was actually a "development engineer" in the mechanical engineering department while employed by VTC.[80] His VTC supervisor testified, however, that Kanti did both design and development work at VTC.[81] As a mechanical development engineer, Kanti primarily used computer aided design ("CAD") software to produce two-dimensional and three-dimensional design drawings.[82] Production engineers at VTC used these design drawings as templates.[83] Kanti produced a cable rack assembly design for VTC.[84] He also performed stress calculations on mechanical designs and even developed a method to calculate a mechanical design's ability to withstand seismic activity.[85] In addition, in May 2011, Kanti worked on the design of a liquid-filled transformer for a specific VTC customer.[86]

---

73 Trial Tr. 71:8-14, June 25, 2013; Pl.'s Ex. 3 at *2.
74 Trial Tr. 71:15-72:4, 88:17-21, June 25, 2013; Pl.'s Ex. 7.
75 Trial Tr. 92:9-93:24, 95:9-96:7, June 25, 2013.
76 Trial Tr. 147:14-148:12, June 25, 2013.
77 Trial Tr. 124:17-126:5, 126:21-127:3, Sept. 6, 2013.
78 *Id.*
79 Defs.' Ex. 10 at *1.
80 Trial Tr. 182:12-19, June 25, 2013.
81 Trial Tr. 126:6-20, Sept. 6, 2013.
82 Trial Tr. 183:2-184:14, June 25, 2013.
83 Trial Tr. 185:22-186:9, 226:13-227:1, June 25, 2013.
84 Pl.'s Ex. 18; Trial Tr. 226:9-12, June 25, 2013; Trial Tr. 141:17-24, Sept. 6, 2013.
85 Trial Tr. 142:1-18, Sept. 6, 2013.
86 Trial Tr. 118:12-120:18, Sept. 6, 2013; Pl.'s Ex. 25.

CG Power offered Kanti a position as a Mechanical Design Engineer in June 2011.[87] At CG Power, Kanti works directly with customers and produces three-dimensional models and designs transformers according to their specifications.[88] His duties include using the same CAD software and other software products to produce mechanical designs for medium-power transformers.[89] Kanti performs stress and other structural calculations related to mechanical designs for CG Power.[90]

As already noted, the difference between "design" and "development" engineers in this industry is slight, and the two positions are closely related.[91] Moreover, the evidence shows that Kanti performs some of the same functions at CG Power as he did at VTC. He uses the same software programs to create three-dimensional mechanical designs of transformers and runs the same calculations on those designs. Kanti even designed a transformer for a VTC customer—the crux of his position with CG Power. Indeed much of what Kanti does now as a CG Power employee is at least substantially similar and directly related to, if not the same as, the work he performed for VTC.

Based on the evidence that Kanti performs the same, substantially similar, and directly related functions for CG Power as he did for VTC, the Court finds that Kanti is in breach of the noncompete provision.[92]

B.

Suitability of Injunctive Relief

1.

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."[93] The party seeking an injunction must show "irreparable harm and the lack of an adequate remedy at law."[94] In addition, whenever a party seeks equitable relief, the Court must balance the parties' equities.[95] If the equities do not tip in the aggrieved party's favor, equity will not

---

87 Pl.'s Ex. 13 at *2.

88 Trial Tr. 191:22-192:7, June 25, 2013.

89 Pl.'s Ex. 19; Trial Tr. 18:20-19:23, 26:18-21, Sept. 6, 2013.

90 Trial Tr. 231:5-11, June 25, 2013.

91 Trial Tr. 124:17-126:5, 126:21-127:3, Sept. 6, 2013.

92 Because both Labh and Kanti violated the first restriction of the noncompete provision, it is unnecessary to address whether they violated the noncompete's second restriction.

93 *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008).

94 *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 431, 442 S.E.2d 391, 395 (1994).

95 *Akers v. Mathieson Alkali Works*, 151 Va. 1, 8-10, 144 S.E. 492, 494 (1928).

protect that party's interests.[96] And the Court will not provide equitable relief when the aggrieved party has unclean hands.[97]

2.

The Court is persuaded that VTC has suffered, and will continue to suffer, irreparable harm and has no adequate remedy at law to redress the loss. It is manifest that employees competing with a former employer in contravention of a reasonable restrictive covenant—as Labh and Kanti have here—irreparably harm the former employer.[98]

VTC bargained for the benefit of a one-year noncompete, and Defendants have denied it that benefit. As the employment letter described, VTC offered employment to each "with an expectation that you will be making a long term commitment to Virginia Transformer Corporation."[99] VTC expended time, personnel and money on training recent graduates with no practical engineering experience. VTC gave them invaluable exposure to the daily hurdles involved in competitive transformer design and production in the context of a corporate business structure. It is clearly to VTC's competitive detriment to see the return on this investment inure to the benefit of a direct competitor by producing for it young, well-educated, and experienced transformer engineers. This is particularly true where the experience exposes the engineer to the specifications, product tolerances and proprietary methods used by the former employer, even without the actual provision of the proprietary information to the new employer.

Labh and Kanti left VTC in 2011 and have worked for CG Power continuously since then. Since their departure, VTC has lost a number of contracts to CG Power.[100] Although VTC has insufficient evidence to show that Labh or Kanti were directly involved in these lost projects,[101] the knowledge Defendants have of VTC and its business gives CG Power a significant competitive advantage. VTC and CG Power's industry is highly competitive. Customers accept and reject bids based on a function of production costs and long-term costs.[102] Any expertise or experience that gives a competitor an advantage in reducing production costs or increasing efficiency gives that competitor a significant business advantage.[103] For a business,

---

96 *Richmond v. Hall*, 251 Va. 151, 158, 466 S.E.2d 103, 106-07 (1996).

97 *Firebaugh v. Hanback*, 247 Va. 519, 526, 442 S.E.2d 134, 138 (1994).

98 *Worrie v. Boze*, 191 Va. 916, 928, 62 S.E.2d 876, 882 (1956) ("That irreparable injury will be sustained by the former employers if the employee be allowed to violate reasonable restrictive covenants of this character is well recognized.").

99 Defs.' Exs. 2 & 10 at *1.

100 Trial Tr. 72:12-74:21, Sept. 6, 2013.

101 Trial Tr. 78:24-79:3, Sept. 6, 2013.

102 Trial Tr. 73:5-24, Sept. 6, 2013.

103 Trial Tr. 72:12-74:21, 75:8-19, 147:9-148-16, Sept. 6, 2013.

lost contracts means lost revenue, lost goodwill, and lost opportunities to develop the business's expertise and experience.[104] These losses irreparably harm VTC.[105]

Since Labh and Kanti left VTC, CG Power has benefited from their experience and expertise. VTC's COO, Matthew Gregg, and Sarkar testified about how Labh and Kanti's breach has benefited CG Power.[106] Having considered this testimony, the Court finds that, by leveraging Labh and Kanti's experience and expertise gained from VTC, CG Power is benefiting (and VTC is suffering) from their breach of the restrictive covenant.

3.

The difficulty in precisely establishing the degree of harm also supports the contention that VTC does not have an adequate remedy at law. VTC cannot establish and quantify the damages at law that it suffers on a particular bid lost to CG Power. Even if such damages might be provable, they cannot adequately redress lost goodwill and client exposure and development that a successful bid also provides.[107] CG Power has gained an important competitive advantage—and although that bell cannot be completely unrung—the Court can give VTC the benefit of its bargain by preventing Labh and Kanti from continuing to compete against VTC for a year.

4.

Finally, the equities favor an injunction. Both Labh and Kanti clearly intended to seek employment outside of VTC upon the completion of their one year term there. Both were clearly aware of the restrictions imposed by the noncompete. Both were aware that they could resort to the courts to test the enforceability of the agreement, by virtue of their knowledge that a previous VTC employee had successfully done so.[108] Yet rather than seek a legal declaration before joining a competitor, they chose to hope for forgiveness rather than seek permission.

Labh and Kanti engaged in a pattern of deception, hiding their departure to CG Power. Both told VTC they were quitting and returning to India, but both lied. On June 6, 2011, Labh left VTC purportedly to go on two weeks of paid vacation.[109] Yet the next day Labh began working for CG Power.[110] He waited five days to

---

104 *See, e.g.*, *Singh v. Batta Envtl. Assocs.*, 2003 Del. Ch. LEXIS 59, at *33 & *35 (May 21, 2003) (noting how business lost to a competitor deprives the former employer of goodwill and important business relationships and opportunities).

105 *Id.*

106 Trial Tr. 72:12-74:21, 75:8-19, 147:9-148-16, Sept. 6, 2013.

107 *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 680 (7th Cir. 2012) (noting that an ongoing business's lost goodwill cannot be adequately remedied with damages).

108 Trial Tr. 133:4-134:19, 139:6-20, 168:2-22, June 25, 2013.

109 Trial Tr. 116:9-12, June 25, 2013.

110 Trial Tr. 112:13-21, June 25, 2013.

officially resign from VTC, stating that he was returning to India to be closer to family.[111] Thus, Labh continued to work for VTC after accepting a position with a competitor—maintaining access to VTC's confidential information.[112] Even more egregious, he worked for a competitor while still on VTC's payroll.

Kanti was similarly dishonest. He accepted a job with CG Power on June 7, 2011, but waited until July 11, 2011 to resign.[113] Although he told VTC he was leaving to go to school in India,[114] Kanti started at CG Power as soon as he left VTC in August 2011.[115]

By accepting positions with CG Power, continuing to work for VTC, and lying about their post-employment plans, Labh and Kanti were clearly not acting in good faith toward VTC and went to extraordinary lengths to avoid detection of their violation of the noncompete.

Nonetheless, Labh and Kanti contend that VTC also was duplicitous in its behavior and urge the Court not to reward that conduct. Labh and Kanti argue that VTC's conduct in inducing them to sign the agreement brings VTC to the court with unclean hands and therefore bars its resort to equity to enforce the noncompete. They accuse VTC of orchestrating a "classic bait and switch"[116] in their transfer to the US by promising them terms "no less favorable,"[117] but requiring them to sign a noncompete. Since they were not bound by a noncompete in India, they argue, VTC's requirement that they sign one created a restriction that was "less favorable."

Whether the noncompete was an onerous "new agreement" as the employees suggest or simply a "policy" as VTC urges is not dispositive. The terms set out in the appointment and transfer letters did not prohibit the imposition of a noncompete by VTI or VTC. First, Labh and Kanti's appointment letters from VTI required them to abide by all current *and future* "rules and regulations."[118] Nothing prohibited VTI from promulgating a noncompete if it so chose. Similarly, although the transfer letters promised that VTC would abide by "the commitment made to [Defendants] in" their appointment letters, the transfer letters also stated that Labh and Kanti would be "governed by the rules/regulations and policies of VTC."[119] It is beyond question that VTC's "rules and regulations" had required noncompetes from its technical employees for many years before the current situation arose.

---

111 Pl.'s Exs. 5 & 6.
112 Trial Tr. 115:7-116:5, June 25, 2013.
113 Pl.'s Exs. 13 & 14.
114 Pl.'s Ex. 14.
115 Trial Tr. 159:12-13, 217:12-13, June 25, 2013.
116 Defs.' Post-Trial Brief at 24.
117 Defs.' Exs. 1 & 9.
118 Defs.' Exs. 1 & 9.
119 Defs.' Exs. 2 & 10.

Viewed in their entirety, the terms of Defendants' VTC employment were not less favorable than the terms of their India employment. Labh and Kanti promised they would serve a year abroad. In exchange for that year abroad and compliance with VTC's terms and conditions, including the noncompete, VTC paid Labh and Kanti an additional $30,000 per year in salary, reimbursed their relocation expenses, promised a $10,000 bonus after three years, and provided a number of other benefits.[120] Viewing the terms and conditions of Defendants' VTC employment together—and not as isolated provisions—the terms and conditions of their VTC employment are not less favorable than the employment terms available to them with VTI.

Labh and Kanti also make much of the circumstances surrounding the execution of the noncompete. According to Defendants, VTC purposefully failed to inform them of the noncompete prior to their emigration and then, in conjunction with the vague language in the appointment letters about monetary penalties on leaving employment, led them to believe that they were trapped into signing the agreement when they arrived here. Considering all of the evidence and the demeanor of the witnesses, the Court is persuaded that any confusion about whether VTC required a noncompete was not due to coordinated deception, but rather due to cultural and policy differences between VTC and VTI.

Accepting that Labh and Kanti specifically asked about a noncompete during their November 2 meeting in India with VTI manager Rustogi, Rustogi simply told them that they would have to abide by VTC's policies.[121] The Court believes that Rustogi was unaware of VTC's noncompete policy. Noncompetes are uncommon in India, and VTI did not require a noncompete.[122] Although Labh and Kanti had become aware that VTC might require a noncompete during their trainee rotation,[123] it is understandable that Mr. Rustogi was not. The internal personnel documents and policies differed between VTI and VTC, and neither affiliate's management was conversant with the other's paperwork.[124] In addition, Rustogi never worked in Roanoke, so he was never exposed to conversations like those overheard by Labh and Kanti about VTC's noncompete requirement. The Court is satisfied that Rustogi did not intentionally mislead the employees at the November 2 meeting.

Labh and Kanti urge that Rustogi did contribute to their misimpression about the noncompete by failing to let them know about it once he discovered the VTC policy. The evidence is certainly clear that Rustogi did find out about the noncompete policy after the meeting. On November 3 or 4, 2009, Rustogi followed

---

120 Defs.' Exs. 2 & 10.
121 Trial Tr. 185:12-22, 186:14-20, Sept. 6, 2013.
122 Trial Tr. 224:14-225:10, Sept. 6, 2013.
123 Trial Tr. 39:13-18, 167:14-22, June 25, 2013.
124 Trial Tr. 256:24-257:13, Sept. 6, 2013.

up on Labh and Kanti's concerns, speaking with Mudassar Hohsin in Roanoke.[125] Mudassar told Rustogi that VTC requires a noncompete.[126] But the Court will not fault Rustogi for not scrambling to ease concerns neither employee raised until just prior to their departure. Rustogi clearly considered the noncompete simply another "policy" of VTC that would have to be followed upon transfer. Neither employee was immediately available in any event. Labh was heading to the US almost immediately after the meeting, and Kanti went on two weeks of vacation before heading straight to the US. The Court does not find that Rustogi's failure to notify the employees was part of a scheme to deprive them of an opportunity to consider the fact that a noncompete would be expected at VTC.

Labh and Kanti implicitly urge that VTC created a coercive atmosphere once they arrived in the US that essentially forced them into signing the noncompete. They observe that Section 5 paragraph 5 of the appointment letter requires an employee to repay a year's salary plus expenses if he should "leave the company." VTC urges that "leave" should only be interpreted as encompassing a voluntary separation by the employee. Labh and Kanti urge that "leave" can be interpreted as including an involuntary termination. Since they labored under the latter interpretation, they claim that their fear that they would face termination (and penalty) if they did not sign the noncompete was justified. They urge that VTC either misled them or allowed them to remain under a misapprehension as to the effect of the terms of disengagement. Labh and Kanti contend that by adding this perceived risk to the fact that the noncompete requirement was "sprung on them" at the last minute, VTC unfairly pressured them into signing the agreement. According to Labh, VTC threatened that if he did not sign, VTC would fire him and return him to India without a job. And once in India, VTI would sue him for its costs.[127] Additionally, Labh asserts that when he initially refused to sign the noncompete, VTC locked his VTC computer and told him he had 10 minutes to sign the agreement. Both defendants urge the Court not to reward VTC's heavy handed approach by granting equitable relief.

The Court is not persuaded. First, because Labh balked at the noncompete, it was prudent for VTC to block his access to the information contained on its computer. Next, the Court does not find that the language in the appointment letter amounts to coercive or misleading conduct by VTC. The Court does recognize that the language in the appointment letter fails to clearly describe the circumstances that trigger the imposition of the monetary penalties if an employee should "leave the company." Depending on how broadly it is read, the paragraph can be reasonably taken to support either side's interpretation. But the Court is not persuaded that VTC drafted the language with the intention of making it

---

125 Trial Tr. 207:7-13, Sept. 6, 2013.

126 Trial Tr. 208:21-209:1, Sept. 6, 2013.

127 Trial Tr. 59:5-61:16, June 25, 2013.

misleading. Bad drafting of itself does not rise to the level of intentional misconduct.

Taken as a whole, the Court finds that VTC's actions did not impede or impinge on either employee's ability to consider the effect of the noncompete and to make a voluntary and intelligent choice to accept or reject it. Both employees had a least some sense of what a noncompete was by virtue of their training tour at VTC. Kanti raised absolutely no objection to signing the agreement when it was presented to him upon his arrival. While Labh certainly objected to it, his communication with Rustogi showed that he was familiar with its effect and how it would impact his decision to be employed at VTC. Moreover, the fact that he did not sign the agreement for several days demonstrates that he had an adequate opportunity to consider his options and he made a conscious and voluntary decision to sign and be bound by the noncompete.

Considering all of the equities involved, the Court finds that injunctive relief is appropriate.

Conclusion

For the foregoing reasons, the Court finds that the noncompete agreement is valid and should be enforced through equitable relief. Accordingly, the employees' plea in bar is denied and VTC's request for an injunction is granted.

It would be appreciated if counsel for VTC would prepare an order reflecting the rulings of the Court (which may incorporate this opinion by reference for ease of drafting), preserving the objections of the employees as articulated in oral argument and on brief, and circulate it for endorsement and ultimate entry.

Thanks again to counsel for both sides for top drawer work.

With Best Regards,

William D. Broadhurst, Judge