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Protecting Trade Secrets Insufficient to Enforce Covenant Not to Compete in Any Capacity Worldwide

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Addressing the enforceability of a non-compete agreement to protect trade secrets, the U.S. Court of Appeals for the ***Eighth Circuit*** upheld a ruling finding that a non-compete agreement which prevented the employee from performing *any* work for *any* competitor *anywhere* in the world was overbroad and unenforceable under Arkansas law. ***NanoMech, Inc. v. Suresh***, Case No. 13-3671 (8th Cir., Feb. 6, 2015) (Colloton, J.).

Arunya Suresh, a former employee of NanoMech, involved in the research and development of nanotechnology, signed a non-compete agreement before being hired. Governed by Arkansas law, the non-compete agreement prohibited the employee from "directly or indirectly" entering into, being employed by or consulting "in any business which competes with the Company" for two years after her departure. The covenant contained no geographic limitation and did not define "any business which competes with" NanoMech. Suresh left NanoMech, ostensibly to pursue her doctorate degree. After discovering that she had actually joined a competitor as a chemist, NanoMech sued to enjoin her from working there for the remainder of the term of the non-compete and to prevent her from disclosing any of NanoMech's confidential information. NanoMech sought compensatory damages.

The employee answered and counterclaimed for tortious interference with business expectancy and also filed a motion to dismiss for failure to state a claim.

Although covenants not to compete are reviewed on a case-by-case basis in Arkansas, the Court determined that judgment on the pleadings (without discovery) was warranted in this case because this agreement was unreasonable on its face. Generally, a non-compete agreement is enforceable under Arkansas law if the employer has a valid interest to protect, the geographical restriction is not overly broad and a reasonable time limit is imposed.

The Court rejected NanoMech's argument that the covenant was reasonable due to the global nature of the business and the employee's broad access to trade secrets. Notwithstanding the increased protection for trade secrets under Arkansas law, the Court refused to enforce the covenant finding it was overbroad. The covenant's plain language prohibited the employee from working for any competitor of NanoMech, in any capacity, worldwide. The Court noted that global non-compete agreements may be permissible if the prohibitions on employee activities are narrowly drawn, *e.g.,* a

restriction from soliciting former clients anywhere in the world.

Practice Note: Regardless of the proprietary interests that an employer may seek to protect, circumscribing the scope of the prohibited activity is the key to drafting an *enforceable* non-compete agreement under Arkansas law and the law of many other states. Either a geographic or a customer-specific limitation may be used to provide a readily discernible boundary likely to demonstrate to a court that the employee retains the ability to work in his/her chosen field and thus is not overbroad.

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