NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SOLAR INNOVATIONS, INC. | IN THE SUPERIOR COURT OF

PENNSYLVANIA

Appellee

٧.

J. MICHAEL PLEVYAK

Appellant No. 1110 MDA 2012

Appeal from the Order Entered May 11, 2012 In the Court of Common Pleas of Schuylkill County Civil Division at No(s): S-2072-2-11

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: Filed: March 20, 2013

Appellant, J. Michael Plevyak, appeals from the order entered in the Schuylkill County Court of Common Pleas granting a preliminary injunction in favor of Appellee, Solar Innovations, Inc. ("Solar").¹ We affirm.

The relevant facts and procedural history of this case are as follows. Solar is a central Pennsylvania-based company that designs and manufactures commercial windows, doors, and walls. The company heavily relies on research and development to market its products and gain advantages against other industry competitors. Solar's President, Gregory Header, estimated Solar spends \$500,000.00 per year in research and

¹ An order granting a preliminary injunction is appealable as of right. **See** Pa.R.A.P. 311(a)(4); **Cleveland Asphalt, Inc. v. Coalition for a Fair and Safe Workplace**, 886 A.2d 271, 275 n.3 (Pa.Super. 2005).

development costs. Product development and innovation are "lifelines" of Solar's business. Many of Solar's products are multi-faceted windows, with folding panels, retractable segments, wheel mechanisms, and trolleys. Solar attempts to distinguish its products based on durability and their ability to withstand extreme weather elements.

Appellant is the former Vice President of Engineering, Research, and Design at Solar. From 1985 to 2001, Appellant worked in a similar position as a product designer for SkyTech, a fenestration systems and design company owned by Ron Palombo. When an unrelated company purchased SkyTech in 2001, Appellant decided to retire. He remained out of the fenestration industry until 2003, when he agreed to sell the patents for a folding glass wall system to Gregory Header for \$45,000.00.

Mr. Header approached Appellant again a year later, this time about the possibility of working for Solar. Appellant ultimately agreed to come out of retirement, and Solar hired him on April 19, 2004. Appellant completed several items of paperwork on his first day, including an Employee Confidentiality Agreement ("Confidentiality Agreement"). The Confidentiality Agreement is a condition of employment at Solar and contained non-disclosure and non-compete clauses. In signing the Confidentiality Agreement, Appellant agreed to, *inter alia*, (1) not disclose any company confidential information without authorization; and (2) not accept employment with any competitor of Solar within a one hundred-mile radius

for two years following Appellant's termination. (*See* Confidentiality Agreement, 4/19/04, at 1-2; R.R. at 15a-16a.) The Confidentiality Agreement contained additional clauses on return of Solar property (*i.e.*, company laptops), safeguarding of proprietary information, and Solar's ownership rights to all intellectual property and design work created by its employees. *See generally id.*

Appellant signed an **Employment** Agreement ("Employment Agreement") finalizing his compensation, benefits, and hours. (See Employment Agreement at 1-2; R.R. at 13a-14a.) Pursuant to the Employment Agreement, Appellant could work on a part-time basis (approximately 20 hours per week), mostly from home. His salary was set at \$50,000.00 per year, with additional compensation coming through profit sharing from sales of the Monster Folding Glass Wall ("Monster Wall"), a product Appellant would help design. Appellant was entitled to 25% of the profits on the Monster Wall, capped at \$50,000.00 annually. Appellant's yearly compensation could reach a maximum of \$100,000.00.

As Vice President for Research and Development at Solar, Appellant was actively involved with the creation and design of Solar's products. He attended meetings with other Research and Development employees, engineers, and President Greg Header, to discuss manufacturing techniques. Certain Solar products remain in the design phase and are not publically available. Topics discussed at the meetings included information on product

upgrades, manufacturing techniques, and profit margins. Appellant took detailed notes. He became familiar with design strategies which generated successful products, as well as techniques which failed. Appellant's high-level position with Solar gave him access to other non-design information on strategic planning, vendor lists, marketing strategies, and customer feedback.

Most critically, Appellant knew about Solar's design strategy, tolerances, and logic for product development.² One notable product designed by Solar and familiar to Appellant is the Monster Wall, a largely successful product for Solar that increased the company's annual sales. Solar's competitors were unable to duplicate the Monster Wall, which gave Solar a competitive advantage in the marketplace.

Appellant primarily worked from home and used a company laptop to access Solar's network remotely. Solar employed various security controls that limited an employee's access to the entire network. Solar backed up all employee work product on a nightly basis and had IT policies governing the usage of company laptops. Foremost among the policies was a directive forbidding Solar employees from transferring proprietary information onto

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In the context of engineering and design, "tolerances" refers to general design strategies and dimensions for how product components can work and fit together. "Logic" is the sum product of engineering history, research and development, and an overall understanding of how product components work together. The tolerances and logic discussed here are the processes specific to Solar's products.

personal computers or storage disks. Appellant performed the majority of his tasks for Solar on the laptop and consistently removed Solar work product onto his personal laptop.

In 2010, Appellant expressed a desire to reduce his workload. began negotiations on new employment terms, which the parties finalized in agreement dated June 23, 2010 ("Modified **Employment** Agreement"). The Modified Employment Agreement provided Appellant could work 10 hours a week (reduced from a previous 20 hours) and set his compensation at \$60,000.00 per year. (**See** Modified Employment Agreement, 6/23/10, at 1; R.R. at 27a.) Any bonuses would be discretionary. The terms of the Modified Employment Agreement addressed hours, compensation, and benefits only. It did not contain non-disclosure or non-compete clauses; and nothing about the parties' conduct related to the Modified Employment Agreement involved an agreement to void or supplant the Confidentiality Agreement.

Despite entering into a new employment agreement, Appellant was apparently unhappy with his compensation. The root of Appellant's displeasure was an alleged oral agreement reached between Appellant and Mr. Header in 2004. Although Appellant had a written contract specifying salary and bonuses of \$100,000.00 per year (later modified to \$60,000.00 in 2010), Appellant claimed Mr. Header made an oral promise at the outset of Appellant's employment guaranteeing Appellant compensation up to

\$250,000.00 per year. According to Appellant, the oral agreement was not memorialized in his written contracts due to Mr. Header's insistence on keeping the arrangement a secret from other Solar employees who might resent Appellant's massive compensation structure. The alleged oral agreement meant Appellant was due an additional \$150,000.00 in hidden compensation each year from 2004 to 2010. Appellant's pay during that period did not correlate with the purported oral promise of \$250,000.00 in salary; instead, he received salary consistent with his written employment contracts. The alleged shortfalls convinced Appellant that Mr. Header did not intend to honor their side agreement on compensation.

Less than a year after signing the Modified Employment Agreement, Appellant met with his friend and former colleague from SkyTech, Ron Palombo. Sometime after SkyTech closed in 2001, Mr. Palombo founded Acurlite Structural Skylights, Inc. ("Acurlite"). Like Solar, Acurlite is a central Pennsylvania-based company specializing in the manufacture and design of windows, skylights, and other glazing structures. Mr. Palombo visited Appellant at his house in March 2011, bringing along an Acurlite laptop. Although Mr. Palombo and Appellant insisted the meeting was strictly personal in nature, Mr. Palombo left an Acurlite laptop for Appellant's use. On April 11, 2011, Appellant and Mr. Palombo met at the offices of Appellant's counsel. Three days after that meeting, Appellant visited Solar's offices and deleted approximately thirty-nine files from his user folder.

Appellant notified Solar the same day that he would be taking four weeks' vacation.

During the vacation, Appellant again met with counsel and Mr. Palombo; and on the same day as the meeting, Appellant installed ACE Utility software on his Solar-issued laptop. ACE Utility is software designed to delete files permanently and then conceal that deletion activity from network monitors. Appellant utilized this software to access Solar's network and permanently delete approximately 5,000 user files from his Solar laptop. In total, Appellant removed nearly seven years of research and design material from his laptop. Solar technicians have been unable to recover all deleted files. Appellant admitted he took these steps. He additionally acknowledged that Solar's employment policies gave Solar ownership rights to employee work product.

On May 25, 2011, Appellant drove to Solar's facilities with a resignation letter and an empty box. Mr. Header approached Appellant as he was packing up his cubicle. The two men went to Mr. Header's office, where Appellant demanded his deferred pay of \$150,000.00 per year that Mr. Header was allegedly withholding. When Mr. Header refused and told Appellant that Solar had been "more than fair" in its compensation, Appellant submitted his resignation letter. Appellant met with a Human Resources manager, who provided Appellant with a copy of the April 19, 2004 Confidentiality Agreement. Appellant's last official day as a Solar

employee was May 26, 2011.³ That day, Appellant deleted more files from his Solar laptop and permanently removed them from the network. When Solar inspected the laptop following Appellant's departure, it discovered a significant amount of material had been removed from the hard drive. Solar later turned over the laptop to the Pennsylvania State Police.⁴

On June 1, 2011, Appellant began employment at Acurlite as a product design engineer. Acurlite is run by Ron Palombo and competes with Solar in the fenestration industry. Around the same time Appellant began his employment at Acurlite, the company announced the production of the Vista Door. The Vista Door was a new product for Acurlite, one which they had been unable to develop successfully in the past; it was similar to Solar's Monster Wall. Appellant's primary responsibility at Acurlite was to oversee the design and production of the Vista Door.

Solar subsequently filed suit against Appellant to enforce the non-compete clause in the Confidentiality Agreement and enjoin Appellant from working for Acurlite for two (2) years. Following expedited discovery, the court held three days of hearings in April 2012. Nine witnesses testified, including Appellant, Greg Header, Ron Palombo, IT personnel from Solar,

³ Appellant worked one extra day after resigning because of issues with vacation days.

⁴ The record does not indicate why the State Police became involved in this matter. In any event, their role is irrelevant to our review.

and Robert McCloy. Mr. McCloy is a longtime friend and colleague of Appellant and testified as an expert in design engineering.

The court issued extensive findings of fact and conclusions of law, determined Appellant was bound by the non-compete clause in the Confidentiality Agreement, and found his employment with Acurlite would violate the non-compete covenant with Solar. In an order dated May 11, 2012, the court concluded Appellant could not accept employment with Acurlite, or any other competitor of Solar located within 100 miles of Solar's facility, for a period of two (2) years from the date of the order. The court further prohibited Appellant from disseminating any confidential material to Acurlite and ordered Appellant not to provide design, engineering, or other services to Acurlite or any other competitor for a three (3) year period from May 26, 2011, the date of Appellant's resignation from Solar.

Appellant timely filed post-trial motions. The court denied them on June 5, 2012, explaining its May 11, 2012 order was a preliminary injunction and remained in effect pending a final hearing. On June 11, 2012, Appellant filed a *praecipe* to reduce the order to a judgment. The same day, Appellant timely filed a notice of appeal. The court ordered Appellant to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b); Appellant timely complied.

Appellant raises nine issues for our review:

1. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN FINDING THE RESTRICTIVE

COVENANT/CONFIDENTIALITY AGREEMENT OF APRIL 19, 2004 IS A VALID AND ENFORCEABLE AGREEMENT, AS SAID RESTRICTIVE COVENANT/CONFIDENTIALITY AGREEMENT WAS VITIATED BY THE PARTIES' LETTER AGREEMENT OF JUNE 23, 2010, WHICH STATED THAT THIS WAS THE FINAL AGREEMENT BETWEEN THE PARTIES AND SUPERSEDED ALL PRIOR AGREEMENTS BETWEEN THE PARTIES.

- 2. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN ENFORCING THE APRIL 19, 2004 RESTRICTIVE COVENANT/CONFIDENTIALITY AGREEMENT, AS THE SUBJECT AGREEMENT WAS NOT EXECUTED AS A CONDITION OF EMPLOYMENT NOR WAS THERE SUFFICIENT CONSIDERATION FOR THE SUBJECT RESTRICTIVE COVENANT/CONFIDENTIALITY AGREEMENT.
- 3. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING UNDER THE PENNSYLVANIA UNIFORM TRADE SECRET ACT (PUTSA) AND/OR COMMON LAW TRADE SECRETS THAT SOLAR IDENTIFIED SECRETS NECESSITATING PROTECTION UNDER THESE ACTS, AS SOLAR NEVER IDENTIFIED SPECIFIC FORMULAS, DRAWINGS, PROGRAMS, DEVICES, MARKETING STRATEGIES, MANUFACTURING **TECHNIQUES** PROCESSES WHICH WERE ALLEGEDLY TRADE SECRETS NOR DID SOLAR MAKE REASONABLE EFFORTS TO PROTECT ALLEGED TRADE SECRET OR CONFIDENTIAL BUSINESS INFORMATION.
- 4. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN APPLYING THE INEVITABLE DISCLOSURE DOCTRINE UNDER PUTSA AND/OR COMMON LAW TRADE SECRETS LAW, AS THERE WAS NO TESTIMONY NOR EVIDENCE TO SUPPORT THAT SOLAR HAS OR HAD TRADE SECRETS AND TOOK REASONABLE PRECAUTIONS TO SAFEGUARD THEIR ALLEGED TRADE SECRET INFORMATION.
- 5. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN FINDING THAT [APPELLANT] WAS HIRED BY [ACURLITE] TO TAKE ADVANTAGE OF TRADE SECRETS AND PROPRIETARY INFORMATION OF SOLAR, WHEN THERE WAS NO EVIDENCE THAT SOLAR

POSSESSED ANY TRADE SECRETS OR PROPRIETARY INFORMATION AND FURTHER NO EVIDENCE THAT [APPELLANT] TRANSFERRED ANY INFORMATION TO ACURLITE.

- 6. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN ITS FACTUAL FINDINGS IN THIS CASE, AS THE TRIAL COURT'S FINDINGS ARE CLEARLY ERRONEOUS.
- 7. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SOLAR'S PRELIMINARY INJUNCTION, AS SOLAR DID NOT PROVE BY CLEAR AND COMPETENT EVIDENCE THAT IT WILL BE IRREPARABLY HARMED BY THE DENIAL OF THE RELIEF REQUESTED.
- 8. THE TRIAL COURT ERRED AS A MATTER OF LAW OR IN ITS DISCRETION IN NOT FINDING THAT [APPELLANT'S] INTEREST WITH HIS SIGNIFICANT DISABILITY IS FAR GREATER THAN THE HARM ALLEGED BY SOLAR, THEREBY PREVENTING THE ISSUANCE OF A PRELIMINARY OR PERMANENT INJUNCTION.
- 9. THE TRIAL COURT ERRED IN GRANTING WHAT AMOUNTS TO A PERMANENT INJUNCTION AGAINST [APPELLANT], PREVENTING [APPELLANT] FROM WORKING FOR ACURLITE OR ANY COMPETITOR FOR A PERIOD OF TWO (2) YEARS AND BY THE IMPOSITION OF ALL THE RESTRICTIONS SET FORTH IN THE TRIAL COURT'S ORDER DATED MAY 11 2012.

(Appellant's Brief at 7-9).

Appellate courts review an order granting a preliminary injunction for an abuse of discretion. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 645, 828 A.2d 995, 1000 (2005). "[W]e do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below." *Jarl Investments, L.P. v. Fleck*, 937 A.2d

1113, 1125 (Pa.Super. 2007) (emphasis in the original). This Court will interfere with the trial court's decision only when "it is plain that no grounds exist to support the decree or that the rule of law relied on was palpably erroneous or misapplied." *Id.*

A party seeking a preliminary injunction must establish: (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to the *status quo* as it existed before the alleged wrongful conduct; (4) the likelihood of success on the merits; (5) the injunction is reasonably designed to prevent the wrongful conduct; and (6) the injunction will not adversely affect the public interest. *Summit Towne Centre, Inc., supra* at 646-47, 828 A.2d at 1001.

In issue one, Appellant challenges the enforceability of the non-compete by claiming the 2010 Modified Employment Agreement superseded the non-compete clause in the 2004 Confidentiality Agreement. To support his assertion, Appellant relies on the language of the respective documents. The Modified Employment Agreement does not contain a non-compete clause; it does, however, include an integration clause stating, "This letter will supersede all previous agreements reached between you and Solar Innovations, Inc." (See Modified Employment Agreement at 1; R.R. at 27a.) Appellant highlights the existence of an integration clause in the Modified Employment Agreement, as well as the absence of a non-compete provision,

to conclude the Modified Employment Agreement is the sole controlling contract between the parties and does not prohibit Appellant from accepting employment with Solar's competitors. We disagree.

A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties. *Kmart of Pennsylvania*, *L.P. v. MD Mall Associates*, *LLC*, 959 A.2d 939, 943 (Pa.Super. 2008), appeal denied, 602 Pa. 667, 980 A.2d 609 (2009). The intent of the parties in a written contract is contained within the writing itself. *Id.* at 944. When the contract is clear and unambiguous, the meaning of the contract is ascertained from the writing alone. *Id.* When examining the terms of a contract, "the language of the instrument should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed." *Hart v. Arnold*, 884 A.2d 316, 333 (Pa.Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2006).

Two or more contracts can form the basis for a parties' agreement, even when one of those contracts contains a merger clause. *Huegel v. Mifflin Const. Co., Inc.*, 796 A.2d 350, 356-57 (Pa.Super. 2002). A court faced with multiple contracts made as part of one agreement must read those documents together and construe each contract with reference to the other. *Id.* at 355-56. An integration clause stating the parties mean the writing to represent their entire agreement is a "clear sign" the writing represents the entire agreement, *i.e.*, the writing "expresses all of the

parties' negotiations, conversations and agreements made prior to its execution." *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 49, 928 A.2d 186, 204 (2007). Once a writing expresses the parties' entire agreement, the parol evidence rule applies to exclude evidence of any previous oral or written negotiations or agreements **involving the same subject matter as the contract** that would alter or contradict the terms of the written agreement. *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 498, 854 A.2d 425, 436-37 (2004) (emphasis added).

In the present case, Appellant signed the Confidentiality Agreement on April 19, 2004. That document covers Appellant's obligations to protect Solar's proprietary information and contains a non-compete clause. Appellant executed two Employment Agreements, first in 2004, and again in 2010. Both Employment Agreements cover hours, compensation, and bonus eligibility; neither contains language on the protection of confidential materials or a non-compete clause. The Modified Employment Agreement does include language stating, "This letter will supersede all previous agreements reached between you and Solar Innovations, Inc." (See Modified Employment Agreement at 1; R.R. at 27a.)

Solar seeks to enforce the terms of the Confidentiality Agreement, specifically the non-compete clause, while Appellant is attempting to avoid the operation of the non-compete by claiming the Modified Employment Agreement displaced all prior agreements and is the **only** operative contract

between the parties. The trial court rejected Appellant's arguments on this point, concluding the Modified Employment Agreement and Confidentiality Agreement are independent contracts; and the integration clause in the Modified Employment Agreement did not displace the Confidentiality Agreement. The court noted each agreement dealt with separate subjects. Solar had a company policy requiring employees to sign two documents as part of employment—a written offer letter on hours and compensation, as well as a separate contract covering confidentiality and employee restrictions on use of proprietary material. Thus, the court concluded the parol evidence rule was inapplicable and the Modified Employment Agreement did not supplant the Confidentiality Agreement.

The record supports the court's reasoning. The language in the Modified Employment Agreement stating, "this letter will supersede all prior agreements" refers to prior agreements on compensation and benefits and operates to exclude oral promises and negotiation-stage written agreements involving the same subject matter as the written Modified Employment Agreement. The clause protects against subsequent claims by either party relating to compensation and benefits, which might contradict or alter the terms of the written agreement. *See Yocca, supra* at 498, 854 A.2d at 436-37 (stating proposition that parol evidence rule operates to exclude oral promises and other written agreements dealing with same subject matter as parties' final agreement). The integration clause in the

Modified Employment Agreement does not affect the validity of the Confidentiality Agreement because that document addresses protection of company data and non-competition, an entirely different subject matter. Appellant's claim to the contrary is a red herring and misunderstands the nature of the parol evidence rule. As a result, we conclude Appellant cannot obtain relief on the grounds asserted in issue one.

In his second issue, Appellant raises several arguments challenging the enforceability of the Confidentiality Agreement. Appellant first argues that the Confidentiality Agreement was not ancillary to employment. Appellant essentially reads "ancillary to employment" as meaning "signed the same day" as the commencement of employment. In Appellant's view, he did not start working at Solar until May 9, 2004, and the Confidentiality Agreement cannot be valid because he executed it three weeks earlier, on April 19, 2004.

Appellant alternatively complains there was insufficient consideration to support the Confidentiality Agreement. For the pay period April 12 to April 29, 2004, Appellant received only \$732.00 in salary. In Appellant's view, that amount is plainly insufficient to support an agreement for a company vice-president to refrain from working for any competitor within 100 miles for a two-year period. Appellant concludes that a mere \$732.00 in salary cannot serve to warrant such a severe restriction on his employment rights. We disagree.

For a covenant not to compete to be enforceable in Pennsylvania, it must be: (1) ancillary to the employment relationship; (2) reasonably necessary for the protection of the employer; (3) reasonable in duration and geographic reach. *Missett v. Hub Inter. Pennsylvania, LLC*, 6 A.3d 530, 538 (Pa.Super. 2010). For an employment restriction to be considered "ancillary to employment," the restriction must relate to a contract of employment. *Modern Laundry & Dry Cleaning Co. v. Farrer*, 536 A.2d 409, 411 (Pa.Super. 1987). There is no requirement that the restriction appear in the initial employment agreement. Id. So long as the employment restriction is "an auxiliary part of the taking of employment and not a later attempt to impose additional restrictions on an unsuspecting employee, such a covenant is supported by valid consideration and is therefore enforceable." Id. Pennsylvania courts have consistently held the acceptance of employment is sufficient consideration for a restrictive covenant. Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa.Super. 1995); *Modern Laundry & Dry Cleaning Co., supra* at 411; Records Center, Inc. v. Comprehensive Management, Inc., 525 A.2d 433 (Pa.Super. 1987).

In the instant case, Appellant signed the Confidentiality Agreement on April 19, 2004, and executed the initial Employment Agreement on May 9, 2004. Appellant's claim that the Confidentiality Agreement was not ancillary to employment, and thus unenforceable, is both factually and legally flawed.

As an initial matter, there is no merit to the suggestion that a restrictive employment covenant must be signed the same day a person begins employment. For a non-compete clause to be considered "ancillary to employment," it need only relate to the employment relationship and not amount to a subsequent attempt to impose employment restrictions without consideration. *See Modern Laundry & Dry Cleaning Co., supra* at 411 (holding non-compete clause was ancillary to employment when employee signed non-compete in connection with signing of full-time employment contract). Here, the Confidentiality Agreement was a condition of employment for all Solar employees. The document is directly related to Appellant's employment at Solar because it requires Appellant to refrain from disclosing proprietary material he might learn as a Solar employee. Therefore, the record amply supports the court's conclusion that the Confidentiality Agreement was ancillary to employment.

In any event, the factual record belies Appellant's claim that he did not start employment at Solar until May 9, 2004. The trial court made the factual finding that Appellant began his employment at Solar on April 19, 2004. Gregory Header testified Appellant commenced his employment on April 19, 2004, and payroll records indicate Appellant received some salary for the pay period including the last two weeks of April 2004. The text of the initial Employment Agreement also identifies Appellant's start date as April 19, 2004. (*See* Employment Agreement at 1; R.R. at 13a.) (reading:

"Starting Date: April 19, 2004"). Appellant offers no compelling reason to call the court's factual finding into question, other than Appellant's own testimony that he began work at Solar on May 9, 2004. The court expressly rejected that testimony as incredible, and we are bound by that determination. Aside from Appellant's own view of the facts, he cannot demonstrate his "true" employment start date at Solar was May 9, 2004.

Likewise, Appellant cannot prevail on his assertion that the Confidentiality Agreement is void for lack of consideration. Appellant signed the Confidentiality Agreement as a condition of employment. Taking the employment provides sufficient consideration for non-compete and non-disclosure agreements; thus, Appellant's arguments regarding inadequate consideration are meritless. *See Insulation Corp. of America, supra* at 733.

Issues three, four, and five compose an identical refrain—that Solar did not possess any identifiable trade secrets to trigger Appellant's nondisclosure and non-compete obligations under the Confidentiality Agreement. To support his claim, Appellant points to Solar's use of reverse engineering and its decision to market products on its website as evidence that Solar's designs are not "innovative" or "secret." With respect to the alleged reverse engineering, Appellant argues Solar's products cannot be subject to legal protection as unique trade secrets because they are capable of duplication by a third party. Regarding Solar's website, Appellant contends the decision to place sketches and photos in the public domain eliminates any claim of secrecy in the design and manufacture of those products. Appellant concludes the court erred when it essentially gave protection to non-existent trade secrets. We disagree.

The Pennsylvania Uniform Trade Secrets Act ("UTSA") defines the term "trade secret" and allows a court to issue injunctive relief based on threatened or actual misappropriation of a trade secret. **See** 12 Pa.C.S.A. §§ 5302-03. The UTSA specifically defines a trade secret as:

§ 5302. Definitions

* * *

"Trade secret." Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa.C.S.A. § 5302.

The "crucial *indicia* for determining whether certain information constitutes a trade secret are substantial secrecy and competitive value to the owner." *Pestco, Inc. v. Associated Products, Inc.*, 880 A.2d 700, 706 (Pa.Super. 2005). There is no bright line rule on what constitutes a trade secret; rather, Pennsylvania courts analyze trade secrets on a case-by-

case basis. *Id.* Several factors are relevant to such an analysis: (1) the extent to which the information is known outside of the company's business; (2) the extent to which it is known by employees and persons inside the company; (3) the extent of measures the employer has taken to guard the secrecy of the information; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa.Super. 2006).

In the present case, Solar is mid-sized company that designs and produces windows, doors, and similar structures. It invests nearly \$500,000.00 each year in research and development costs and requires all employees to sign a Confidentiality Agreement as a condition of employment. Certain vendors who are exposed to proprietary material must also sign Confidentiality Agreements. Appellant was the Vice President of Research and Design at Solar and signed the Confidentiality Agreement upon employment at Solar. That document describes Appellant's obligation to protect "Company Confidential Information" in great detail as follows:

Preamble

As an at-will employee under contract with the Company, Employee acknowledges that he/she may have access or be exposed to certain trade secrets, confidential, and/or proprietary information of the Company and/or of parties with whom the Company contracts. All such information in any form (written, oral, electronic, or otherwise) relating

to either or both the Company or any party with whom the Company may be contracting, including without limitation information relating to products, plans, programs, systems/subsystems, procedures, designs, equipment, marketing strategies, business and methods of operation practices, financial and accounting information, customer lists, technology, computer software and related documentation, patents and patent applications, "knowhow," inventions, technical data, production methods, research and development activities, and other intellectual etc., is referred to herein as "Company property, Confidential Information." Company Confidential Information is proprietary to the Company and/or to those with whom the Company contracts. Company Confidential Information must be kept confidential, and may be released to only those persons or entities authorized to receive such information by the Company.

(Confidentiality Agreement at 1; R.R. at 15a.)

The court's findings of fact noted Appellant was exposed to a multitude of "Company Confidential Information" in his position as Vice President of Research and Development. Appellant attended meetings where he became familiar with Solar's cost positions, marketing strategies, and planned product lines. *See Verizon Communications, Inc. v. Pizzirani*, 462 F.Supp.2d 648, 658-59 (E.D.Pa. 2006) (finding inside information on Verizon's marketing plans, network development plans, and costs warranted trade secret protection). As the head of Research and Development, Appellant was actively involved with the design strategies, tolerances, and logic Solar utilized to create its products. *See Den-Taz-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1230 (Pa.Super. 1989) (explaining that information on product construction such as tolerances of component

parts are trade secrets). He also knew the successful and unsuccessful design strategies Solar would employ in creating its products, techniques representing Solar's "know how." *See SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1261 (3d Cir. 1985) (stating empirical formulas, cumulative knowledge of entity, and company "know how" for system designs can constitute protected trade secrets).

Solar's systems on logic, tolerances, and engineering "know how" fit squarely within the definition of trade secrets provided by the UTSA as well as within Solar's own definition of "Company Confidential Information." See 12 Pa.C.S.A. § 5302 (defining trade secrets as formulas, drawings, patterns, devices, methods, techniques or processes that derive independent economic value from their secrecy and are subject to protection by Solar took steps to secure its trade secrets by requiring all employees to sign non-disclosure agreements and implementing security controls for employee access to the company network. See De Lage Laden Operational Services, LLC v. Third Pillar Systems, Inc., 693 F.Supp.2d 423, 440 (E.D.Pa. 2010) (concluding employer took reasonable steps to maintain secrecy of confidential data by requiring all employees, contractors, vendors, and consultants to sign confidentiality agreements). decision to put some product drawings and photos on its website does not invalidate its claim to secrecy in the design and creation of those products. Pictures of products might have been in the public domain; but the design

techniques and associated data for those products certainly were not.

Many of Solar's products are custom-made and have not successfully been reproduced by competitors. Appellant produced testimony on reverse engineering from Robert McCloy, but the court rejected that testimony in favor of other evidence from Solar on its unique design processes. The inability of competitors to duplicate certain Solar products like the Monster Wall is strong evidence that Solar's methods possess economic value and are not readily ascertainable by ordinary means.

Appellant's own actions when departing Solar strengthen that Before resigning, Appellant engaged in a deliberate and conclusion. systematic effort to remove confidential data from Solar's network; he even installed software to cover his tracks. Although Appellant claimed he was merely removing his personal files, the court rejected that evidence as incredible. The dates on which Appellant removed material from Solar computers generally corresponded with meetings between Appellant, his attorney, and Ron Palombo, Acurlite's President. Within days after Appellant resigned his position at Solar on May 26, 2011, he began employment as a product engineer at Acurlite. Shortly thereafter, Acurlite announced the development of the Vista Wall, a new folding glass wall system Acurlite had previously been unable to produce, which was similar to Solar's Monster Wall. The court concluded Appellant's decision to accept a position at Acurlite and the announcement of the Vista Wall were not coincidental.

Instead, those events formed a coordinated plan to use confidential material from Solar and capitalize on that information at Acurlite. We agree with the trial court that Solar's methods, practices, and design techniques qualified as protectable trade secrets; and Appellant was attempting to misappropriate those trade secrets for Acurlite.⁵ Consequently, Appellant cannot obtain relief on issues three, four, or five.

In issue six, Appellant challenges a multitude of the court's factual findings as unsupported by the record. Appellant contends there was sparse and vague evidence on Solar's trade secrets and disputes the court's finding that Solar expends \$500,000.00 yearly on research and development costs. Appellant additionally finds fault with the conclusion that Solar would suffer irreparable harm in the event Appellant worked for Acurlite. In Appellant's view, he could not misappropriate proprietary information because Solar has no confidential trade information. Appellant asserts any knowledge he might transfer to Acurlite would derive exclusively from Appellant's years of experience in the fenestration industry at SkyTech. Appellant concludes the

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⁵ We decline to address Appellant's claims that the court misapplied the inevitable disclosure doctrine. That legal principle generally applies to enjoin an employee who is not bound by a non-disclosure or non-compete agreement from accepting employment with a competitor when new employment would likely result in the disclosure of trade secrets. *See Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (3d Cir. 2010). We have already concluded the Confidentiality Agreement in this case is enforceable and bars Appellant from accepting employment with a competitor or disclosing Solar's proprietary information.

court's decision to enforce the non-compete was an abuse of discretion lacking record support. We disagree.

In the present case, the court heard testimony from nearly ten witnesses over three days of hearings. The transcripts from those hearings contain extensive testimony from Gregory Header on Solar's design techniques, manufacturing processes, and the company's efforts to protect proprietary data. (*See generally* N.T. Preliminary Injunction Hearing, 4/25/12, at 227-295; R.R. at 565a-633a.) Mr. Header also stated Solar spends an estimated \$500,000.00 on research and development. (*See id.* at 252; R.R. at 590a.) This testimony is evidence of record and undermines Appellant's claim of unsupported factual findings about Solar's trade secrets and development costs.

The testimonial evidence similarly supports the court's factual findings on irreparable harm. In reaching a conclusion on that issue, the court primarily considered the testimony from Mr. Header and Appellant. Mr. Header stated generally that Acurlite is a competitor of Solar and would benefit from insight into Solar's design techniques, while Appellant steadfastly denied any intent to misappropriate Solar's confidential information. The court rejected Appellant's testimony as incredible while largely accepting testimony from Mr. Header. There is nothing inappropriate about the court's decision to reject one set of factual proposals in favor of another. Appellant's claim that the court should have believed Appellant's

take on the value of his knowledge is simply insufficient to disturb the court's well-supported factual findings. As a result, Appellant cannot obtain relief on his sixth issue.

In issues seven and eight, Appellant claims the decision to issue a preliminary injunction was improper because Solar could not show irreparable harm. Appellant contends Solar has no trade secrets. As a result, Appellant could not possibly harm Solar by working at Acurlite and misappropriating non-existent proprietary material. Relatedly, Appellant faults the court for failing to recognize the significant harm that an injunction would cause Appellant personally. For those reasons, Appellant concludes the court's decision to issue a preliminary injunction was flawed. We disagree.

The purpose of a preliminary injunction is to avoid "irreparable injury or gross injustice until the legality of the challenged action can be determined." *West Penn Speciality MSO, Inc. v. Nolan*, 737 A.2d 295, 299 (Pa.Super. 1999). "An injury is irreparable if it cannot be adequately compensated by money damages." *Sovereign Bank v. Harper*, 674 A.2d 1085, 1091 (Pa.Super. 1996), *appeal denied*, 546 Pa. 695, 687 A.2d 379 (1996). Pennsylvania courts have consistently held threatened or actual use of a former employer's trade secrets at a competitor cannot be remedied through money damages and is "the type of injury that most warrants" injunctive relief. *See Den-Taz-Ez, Inc., supra* at 1233 (concluding

employee's use of former employer's trade secrets represents irreparable harm to employer and warrants injunctive relief). Injunctive relief is particularly appropriate in these situations because of the threat to or actual disruption of business relations that would likely result in the loss of new business. *See West Penn Speciality MSO, Inc., supra* at 299 (holding Dr. Nolan's defection to competitor hospital damaged prior employer's existing patient relationships, imposed substantial competitive disadvantage on prior employer, and resulted in injury that cannot be calculated in monetary terms). *See also Milicic v. Basketball Marketing Co, Inc.*, 857 A.2d 689, 695 (Pa.Super. 2004) (stating basketball player's loss of business opportunities and marketing advantages qualified as irreparable injury).

In the present case, Appellant's arguments on this issue essentially replicate his prior claims that Solar has no trade secrets. We have already rejected that contention as meritless. Despite Appellant's misguided arguments, the trial court appropriately considered the irreparable-harm issue to conclude Solar would suffer irreparable harm if Appellant was permitted to work at Acurlite. Specifically, the offending injury would be the disruption of sales and loss of the market advantage Solar had gained with the Monster Wall product, caused by the development of the Vista Wall competing product by Acurlite. In hiring Appellant and relying on the inside information he had acquired at Solar regarding the Monster Wall, Acurlite would be able to capitalize on Solar's research and development on that

product without incurring similar costs. The record fully supports the court's conclusion. Appellant is aware of the logic, tolerances, and "know how" Solar employed in the development of the Monster Wall and his actions in deleting Solar's network files demonstrated his apparent willingness to trade on that information. Solar's threatened loss of business opportunities and market advantage qualifies as irreparable injury and made a preliminary injunction the suitable remedy. *See West Penn Speciality MSO, Inc., supra* at 299.

Further, Appellant cannot show the court abused its discretion in balancing the corresponding personal harm to Appellant. The court was aware of Appellant's glaucoma but concluded the condition did not preclude a preliminary injunction. Appellant had glaucoma when he first accepted employment at Solar in 2004 and functioned effectively at Solar despite his physical condition. Over the intervening years, the court found the glaucoma had not worsened to such a degree that substantially impeded Appellant's ability to work. The record fully supports these conclusions, and we reject Appellant's invitation to re-litigate the court's factual findings on this topic.

In issue nine, Appellant claims the court's May 11, 2012 order issuing a preliminary injunction was tantamount to a permanent injunction. In support of his claim, Appellant relies on the fact that the court order imposed non-compete restrictions for an extended period of time. Appellant

claims the time limitations in the May 11, 2012 order converted the order into a permanent injunction. Appellant concludes the court's order was legally improper and should be vacated. We disagree.

Instantly, there is no merit to the claim that the May 11, 2012 order was intended to serve as a permanent injunction. In a supplemental order issued June 5, 2012, the court explained the May 11, 2012 order was a preliminary injunction that would remain in effect only until either party requested a final hearing. Therefore, the court's June 5, 2012 order belies Appellant's assertions regarding a permanent injunction. Appellant could ask the court to schedule a final hearing on the injunction; he merely declined to do so.

To the extent Appellant is unhappy with the length and effective date of the injunction, that claim is similarly unfounded. Solar's amended complaint sought injunctive relief under Section 5303 of the Pennsylvania Uniform Trade Secrets Act ("UTSA") as well as for breach of the Confidentiality Agreement. In its request for relief, Solar asked the court "to enjoin [Appellant] from any activities that would compete with Solar for a total period of two years, without credit for any period of time during which he did compete with [Solar]." (*See* Amended Complaint, dated 11/9/11, at 15; R.R. at 71a.) Solar also requested the court to enjoin Appellant for two years from the date of the court's order. (*See id.* at 16; R.R. at 72a.)

At the hearing, Solar produced evidence to show Appellant had accepted employment at Acurlite in June 2011, misappropriated trade secrets, and competed with Solar at Acurlite for about one year. The court's order, dated May 11, 2012, enforced the Confidentiality Agreement and prohibited Appellant from working for Acurlite, or any other competitor of Solar "for a period of **two years from the date of this Order.**" (*See* Order, 5/11/12, at 1; R.R. at 2042a) (emphasis added). A separate portion of the order stated Appellant cannot provide "information of a design, technical, or other nature that might have business value to [Acurlite]...for a period of **three years from the date of May 26, 2011.**" (*See id.* at 2-3; R.R. at 2043a-2044a.) (emphasis added). Both aspects of the May 11, 2012 order bar Appellant from accepting employment with a competitor of Solar until May 2014.

The length of the court's order is consistent with the requested relief under the relevant law. Solar's pleadings included a count under the UTSA, which gave the court discretion to continue the injunction for an additional reasonable time to protect Solar's commercial interests. *See* 12 Pa.C.S.A. § 5303(a) (stating injunction shall be terminated when trade secret ceases to exist, but allowing continuation of injunction for "an additional reasonable period of time in order to eliminate commercial advantage that would otherwise be derived from the misappropriation"). Because Appellant had already worked for Acurlite for one year before issuance of the preliminary

injunction, the court concluded an injunction that would effectively prohibit Appellant from competing with Solar for two years (from May 2012 until May 2014) was a reasonable time period to eliminate commercial disadvantage to Solar. Moreover, Solar expressly asked the court to enjoin Appellant from two years from the date of the court's order, to prevent Appellant for receiving "credit" for the one year he spent working at Acurlite in competition with Solar. Therefore, the record supports the court's decision to enter an injunction precluding Appellant from accepting a position with a competitor of Solar until May 2014.

Based on the foregoing, we conclude Appellant's issues merit no relief.

Thus, we affirm the court's decision to enter a preliminary injunction in favor of Solar.

Order affirmed.