In The

Supreme Court of Virginia

RECORD NO. 121989

ASSURANCE DATA, INC.,

Appellant,

v.

JOHN MALYEVAC,

Appellee.

BRIEF OF APPELLANT

C. Dean Latsios (VSB No. 17350)
MATTHEWS, SNIDER & FITZNER, P.C.
4161 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-1131 (Telephone)
(703) 273-1167 (Facsimile)
cdeanlatsios@msnflaw.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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ASSIGNMENTS OF ERROR

1) The court erred in sustaining, *on the merits*, the defendant's objection to the enforceability of the non competition and non solicitation paragraphs of the parties Agreement, raised through a demurrer, and dismissing the complaint with prejudice. (App. 45 – 48, 49 – 51, 54, 57 – 60, 64 – 65, 68 – 69).

2) <u>In the Alternative:</u> The court's Order of August 27, 2012, sustaining defendant's demurrer, *in its entirety*, without leave to amend, and dismissing the *entire* complaint with prejudice, erroneously foreclosed plaintiff's right to pursue its legal remedies against the defendant for improper use of and failure to return confidential information. (App. 70 – 73).

3) <u>In the Alternative:</u> The court abused its discretion in denying plaintiff leave to amend its complaint to allow plaintiff to pursue its legal remedies against the defendant for improper use of and failure to return confidential information. (App. 68 – 69, 70 – 73).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On August 3, 2012, the plaintiff filed a Complaint against the defendant alleging that the defendant breached a Consulting Agreement entered into between the parties on or about March 21, 2012, by violating the Non Competition (¶5), Non Solicitation (¶12), Non Disclosure of Confidential Information (¶10) and return of "confidential information" (¶17) provisions of the Agreement. The plaintiff prayed, *inter-alia*, that the court: 1) issue a temporary

injunction prohibiting the defendant, his agents and employees from breaching the Agreement, directly or indirectly, by not adhering to the aforesaid contract provisions, 2) order the defendant, his agents and employees to return all “confidential information”, documents, items and materials to the plaintiff and 3) issue, on final hearing, a permanent injunction prohibiting the defendant, his agents and employees from breaching the Agreement, directly or indirectly, by not adhering to the aforesaid contract provisions.

On or about August 10, 2012, the defendant filed a Demurer to the Complaint challenging it on two (2) grounds: a) that the Complaint failed to state a claim upon which the relief requested may be granted and b) that the non competition and non solicitation provisions of the parties Agreement were overly broad and unenforceable.

On August 27, 2012, a hearing was held on the defendant’s demurrer. At the conclusion of the hearing the court entered an order sustaining, *on the merits*, the defendant’s demurrer, in its entirety, without leave to amend and dismissed the plaintiff’s entire complaint with prejudice.

On September 11, 2012, plaintiff flied a Motion for Reconsideration on the grounds that the order entered by the court was a) an inaccurate statement of the court's actual ruling and b) was erroneously overbroad as it erroneously foreclosed the plaintiff's ability to pursue legal remedies against the defendant relative to the improper use of and failure to return "confidential information" to the plaintiff, pursuant to paragraphs 10 and 17 of the parties Agreement, which paragraphs were not challenged by defendant's demurrer. The plaintiff requested that the court grant it leave to amend its Complaint to allow it to assert the claims that the defendant breached paragraphs 10 and 17 of the Agreement as stated above.

On September 17, 2012, the court entered an order denying plaintiff's Motion for Reconsideration stating, *inter-alia*, that its Order of August 27, 2012, was an accurate statement of its ruling and that no relevant matters had been raised that had not been previously considered by the court.

On September 24, 2012, plaintiff filed a timely Notice of Appeal.

STATEMENT OF FACTS[1]

The plaintiff, Assurance Data, Inc., (ADI) is a corporation organized and existing under the laws of the State of Pennsylvania, with a principal place of business at 5600 General Washington Drive, Suite B-210, Alexandria, Virginia 22312. (App. 1, 11). It is engaged in the sales and servicing of computer hardware and software integrated security solution products for computer Network Defense protection, to protect, secure and manage information resources. (App. 42). Its customers include various departments within the Department of Defense, Intelligence and Civilian agencies of the federal government, state and local governments and educational institutions, as well as commercial sales to private industry. (App. 19, 22).

The defendant, John Malyevac, is an individual, resident of the State of Virginia, residing at 1753 Preston Road, Alexandria, Virginia, 22302. (App. 1, 11).

On or about March 21, 2012, the plaintiff entered into a Consulting Agreement (Agreement) with the defendant, whereby the defendant was engaged as an independent contractor to sell the

[1] It is believed that the defendant disputes at least some of the facts underlying the Assignments of Error.

plaintiff's computer products and services to customers of the plaintiff, as specifically authorized, in writing, in advance by the plaintiff. (App. 1 – 2, 11 – 26).

The defendant performed services for the plaintiff, pursuant to the Agreement, until on or about May 25, 2012, when the defendant resigned and his services under the Agreement were terminated. (App. 3).

Under paragraph 5 of the Agreement (Non Competition), the defendant, *inter-alia*, specifically agreed that for a period of six (6) months, after the termination of his services under the Agreement, and within a fifty (50) mile radius of the plaintiff's Virginia offices, the defendant would not, either directly or indirectly, solicit, provide, promote or sell a) computer software or hardware products b) services for customers or prospective customers of plaintiff and c) training, managed services, installation, implementation or related professional services for software and or hardware products provided by the company, which are competing with and/or in competition with the products and/or services provided by the plaintiff. (App. 3, 13).

Under paragraph 12 of the Agreement (Non Solicitation), the defendant, *inter-alia*, further agreed that for a period of twelve (12)

months, after the termination of his services under the Agreement, the defendant would not, directly or indirectly, seek, engage in or solicit from any past, present or prospective customer of plaintiff, with whom the defendant has been in contact or obtained contact/user information in connection with his consulting activities for the plaintiff or its vendors, any business which is competitive with plaintiff's offering of services or products or in any way discourage client or customer usage of the plaintiff's services or products. (App. 3 – 4, 14).

Under paragraph 10 of the Agreement (Non Disclosure of Confidential Information), the defendant, *inter-alia*, further agreed that he would not, at any time during or after termination of the Agreement, use or disclose any "confidential information" to any person whatsoever or permit any person whatsoever to examine and/or make copies of any reports or any information or documents prepared by him or that came into his possession or under his control by reason of his consulting services pursuant to the aforesaid Agreement. (App. 4, 14).

Under paragraph 17 of the Agreement (return of "confidential information"), the defendant, *inter-alia*, further agreed that, upon

termination of his services, he would deliver to the plaintiff all plaintiff or plaintiff's customer or vendor keys, passwords, property, equipment, vendor marketing information and material, data, reports, summaries, test results, computer software and such other items and materials and/or "confidential information" (and copies thereof) as may have been prepared for and/or accumulated by the defendant in performing the Agreement or services for plaintiff, whether completed or in process (including all copies thereof in whatever format). (App. 4, 16).

The plaintiff alleged, in its Complaint, that since on or about April 7, 2012, within the relevant time periods and geographical prohibitions contained within the Agreement, the defendant had violated the aforesaid provisions of the parties Agreement (App. 5 – 6); it alleged that it had sustained known pecuniary business profit losses to the date of filing of the Complaint of $50,000; it alleged that due to the difficulty of determining the full nature or extent of its actual or potential damages incurred or to be incurred as a direct result of the defendant's activities, that plaintiff's damages and injuries sustained and threatened are irreparable and cannot be adequately

measured or compensated by money; plaintiff alleged that it had no adequate remedy at law. (App. 6 – 7).

As the matter was heard on a demurrer, no evidence or testimony was presented to the court. Just legal argument was made. At the beginning of the hearing, counsel for defendant advised the court that he was moving forward on that part of his demurrer that related to the enforceability of the restrictive covenants which was the heart of the case. (App. 38).

Counsel argued that paragraph 3 of the parties Agreement gave the plaintiff too much leeway in determining questions that related to the sale of products or services giving it the right to periodically alter the sales area and target customers. (App. 38). He argued that paragraph 5 of the Agreement (the non compete clause) barred the defendant from working for or selling to companies that are not in competition with the plaintiff and was consequently overbroad and that the terms relating to the products and services that the paragraph relates to, as well as what is a customer or prospective customer, are undefined. (App. 39 – 40). He stated that under paragraph 12 of the Agreement (the non solicitation clause) a prospective customer is defined as anyone the defendant came into

contact with while working for the plaintiff. (App. 40). He argued further that Exhibit 8 (sic) of the parties Agreement was unclear as to what specific accounts were being referred to and whether or not those accounts were customers of plaintiff. (App. 42).

With respect to the non solicitation paragraph of the parties Agreement, counsel argued that it was fatally ambiguous as to the duration of the restriction by the naked term “twelve” without any qualification as to the length of time. (App. 43).

On the issue of the breach of the Non Disclosure provisions of the Agreement (paragraph 10), counsel stated that the allegations were not sufficiently specific and were simply conclusions, stating that it would be possible to re-plead or that a Bill of Particulars could be ordered by the court. (App. 44 – 45).

In rebuttal, as a threshold matter, counsel for plaintiff contested the ability of the counsel for the defendant to contest the merits of the enforceability of the Agreement’s restrictive covenants through a demurrer, arguing that to do so goes beyond the permissible scope of a demurrer. (App. 45 – 46). Counsel argued that a demurrer does not allow the court to resolve the merits of a claim, which is what counsel for the defendant was asking the court to do. Counsel argued

that, on demurrer, the court is confined to a determination of whether or not the Complaint was properly pled and that a proper Complaint was, in fact, pled. Counsel pointed out that counsel for the defendant had asserted in his memorandum that the burden to prove the validity of the contested non compete clauses of the Agreement is on the plaintiff, but that within the context of a demurrer, the plaintiff is denied the ability to meet its burden. Consequently, to dismiss the case without affording the plaintiff the opportunity to put forth evidence is improper. (App. 46 – 51).

Counsel argued that counsel for the defendant did not address the issue of whether the Complaint failed to state a claim relative to paragraph 10 of the parties Agreement, pertaining to the disclosure of "confidential information", but that his objection, stated within his memorandum on that point, was without merit and that the pleading, as alleged, met the standard to withstand a demurrer. (App. 48 – 49, 51 – 52). The same was asserted relative to the defendant's objection that the allegation that the defendant had redirected to other competitor/resellers, contract deals for the sale of various software and hardware products was insufficient to show it was "confidential information". (App. 52 – 53).

Counsel also asserted that the defendant's claim that the plaintiff's Complaint failed to identify any actual damages incurred by the plaintiff as a result of the defendant's actions was without merit as the Complaint clearly alleged that the plaintiff has incurred known pecuniary business profit losses to date of $50,000, suffered as a result of the prohibited conduct of the defendant. (App. 53 – 54).

Counsel argued that the defendant's claim that the plaintiff's Complaint failed to state a claim upon which the relief requested may be granted should be overruled on that ground and that defendant's objection regarding the alleged over breath of the non competition (paragraph 5) and non solicitation (paragraph 12) clauses of the parties Agreement is not cognizable within the context of a demurrer and should be overruled. (App. 54).

In reply, counsel for the defendant argued that the court could address the issue of the enforceability of the non competition covenants of the parties Agreement within the context of a demurrer, stating that the court had done so in previous cases and reasserted that the allegation in the Complaint, relative to a breach of the non disclosure provision, relating to "confidential information" was simply a conclusory statement. (App. 54 – 55).

In surrebuttal, counsel for the plaintiff reiterated that is was improper, within the context of a demurrer, to decide the merits of the enforceability of the non compete covenants without giving the plaintiff the opportunity to put forth evidence. (App. 57 – 58). Counsel argued that the term prospective customer is defined within the Agreement and was not overbroad, and that the restrictive covenants themselves were worded narrowly in accordance with the principles of Ominplex World Services Corporation v. US Investigation Services, Inc., et. al., 270 Va. 246, 618 S.E.2d 340 (2005), which upheld covenants prohibiting an employee from activities which attempt to compete with a former employer. (App. 57 – 58).

Counsel argued that there was no ambiguity regarding the duration of the non solicitation paragraph of the Agreement, because within the four corners of the Agreement, no reasonable construction was possible, other than that the term “twelve” meant twelve months. (App. 58 – 59). Counsel again reiterated that argument on these points went beyond the proper scope of a demurrer. (App. 59 – 60).

In closing, counsel for the defendant reiterated that he believed that the term “twelve” in the non solicitation paragraph was

ambiguous and that the Agreement did not adequately define the term prospective customer. (App. 60 – 62).

After a brief recess the court ruled that the defendant could, in fact, challenge the enforceability of the non competition and non solicitation clauses of the parties Agreement on a demurrer and sustained the demurrer, *in its entirety,* without leave to amend and dismissed the plaintiff's *entire* Complaint with prejudice. The court made no finding or ruling with respect to that portion of the defendant's demurrer claiming that the Complaint failed to state a claim upon which the relief requested may be granted. (App. 64 – 65, 68 – 69).

The plaintiff's Motion for Reconsideration: 1) stating, *inter-alia*, that the court's order sustaining the defendant's demurrer, *in its entirety*, without leave to amend, was erroneously over broad as it erroneously foreclosed the plaintiff's ability to pursue its claims against the defendant for the improper use of and failure to return "confidential information", pursuant to paragraphs 10 and 17 of the parties Agreement, which paragraphs were not challenged by the defendant's demurrer and 2) requesting, *inter-alia*, leave to amend its

complaint so as to pursue those claims was denied. (App. 70 – 73, 75).

ARGUMENT

I. THE COURT ERRED IN SUSTAINING, *ON THE MERITS*, THE DEFENDANT'S OBJECTION TO THE ENFORCEABLILITY OF THE NON COMPETITION AND NON SOLICITATION PARAGRAPHS OF THE PARTIES AGREEMENT, RAISED THROUGH A DEMURRER, AND DISMISSING THE COMPLAINT WITH PREJUDICE.

Standard of Review:

Whether the court erred in sustaining, *on the merits*, the defendant's objection to the enforceability of the non competition and non solicitation paragraphs of the parties Agreement, raised through a demurrer, and dismissing the Complaint with prejudice, is a question of law. Questions of law are subject to *de novo* review.

Argument:

The enforceability of a provision that restricts competition is a question of law. Home Paramount Pest Control Companies, Inc. v. Justin Shaffer, et. al., 242 Va. 412, 718 S.E.2d 762 (2011). Such a provision is enforceable if it "is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy." Omniplex World Services Corporation v. US Investigations

Services, Inc., et al., 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005). The employer bears the burden of proof. Simmons v. Miller, 261 Va. 561, 544 S.E.2d 666 (2001). "Each non competition agreement must be evaluated *on its own merits*, balancing the provisions of the contract with the circumstances of the businesses and employees involved." Omniplex, 270 Va. at 249, 618 S.E.2d at 342 (Emphasis supplied).

As set out above, the determination of the question of law regarding the enforceability of a contract provision that restricts competition requires an evaluation of the merits of the provision in question. Since the employer bears the burden of establishing the validity of the contract provision in question and the legitimate business interest sought to be protected, fundamental fairness dictates that the employer be given the opportunity to meet the burden that the law imposes upon it.

In the case at bar, despite the strenuous assertions by counsel for the plaintiff, that the defendant's objection to the enforceability of the non competition and non solicitation paragraphs of the parties Agreement, could not be properly addressed within the context of a demurrer (App. 45 – 51, 54, 57 – 60), because with a demurrer, the

plaintiff is denied the opportunity to meet its burden of proof, and a demurrer does not permit the court to reach the merits of a claim, the court proceeded to address the merits of defendant's objection, ruled that as a matter of law the contract provisions in question are unenforceable, sustained the demurrer and dismissed the plaintiff's Complaint with prejudice. (App. 64 – 65, 68 – 69).

The fact that the contract provisions at issue may appear to be overly broad on their face does not end the inquiry or defeat the plaintiff's claim and justify the court reaching the merits of the defendant's objection on demurrer. A facially overly broad restrictive covenant requires the employer to prove the legitimate business interest justifying such a broad provision. Home Paramount, 718 S.E.2d at 765.

By evaluating and deciding the merits of the non competition and non solicitation provisions of the Agreement in question, within the context of a demurrer, the court erroneously exceeded its proper scope and authority and improperly and erroneously, denied the plaintiff the opportunity to meet the evidentiary burden that the law places upon it. "A demurrer … does not allow the court to evaluate and decide the merits of a claim; it only tests the *sufficiency* of the

factual allegations to determine whether the motion of judgment states a cause of action." Fun v. Virginia Military Institute, 245 Va. 249, 252, 427 S.E.2d 181, 183 (1983) (Emphasis supplied).

To be sure, while two of the pivotal issues in the underlying Complaint filed by the plaintiff may be whether the non competition (paragraph 5) and non solicitation (paragraph 12) provisions of the parties Agreement are enforceable, the dispositive issue before the court, on a demurrer, is whether the plaintiff's pleadings state a cause of action. Id. On that issue, the court is "[C]onfined to the facts alleged when analyzing the pleading; no consideration properly can be given to additional facts that may be asserted on brief or during oral argument." Elliott v. Shore Stop, Inc., et al., 238 Va. 237, 240, 384 S.E.2d 752, 753 (1989).

The plaintiff pled a Consulting Agreement between itself and the defendant, entered into on or about March 21, 2012; that the defendant resigned and his services under the Agreement were terminated on or about May 25, 2012; that since on or about April 7, 2012, the defendant violated the non competition (paragraph 5), non solicitation (paragraph 12), Non disclosure of "confidential information" (paragraph 10) and failure to return "confidential

information” (paragraph 17) provisions of the Agreement; that it had sustained know pecuniary business profit losses to date of filing of the complaint of $50,000 as a result of the defendant’s actions; that due to the difficulty of determining the full nature or extent of its actual or potential damage incurred or to be incurred as a result of the defendant’s activities, that the plaintiff’s damages and injuries sustained and threatened are irreparable and cannot be adequately measured or compensated by money; that the plaintiff has no adequate remedy at law and that it sought, *inter-alia*, an injunction, both temporary and permanent, prohibiting the defendant, its agents and employees from breaching, directly or indirectly, the aforesaid Agreement by not adhering to the aforesaid provisions of the Agreement and an Order requiring, *inter-alia*, the defendant, his agents and employees to return to the plaintiff all of the “confidential information”, documents, items and materials in their possession as required by the aforesaid Agreement. (App. 1 – 32).

To the extent the enforceability of the non competition (paragraph 5) and non solicitation (paragraph 12) provisions of the parties Agreement is in doubt, for the purposes of consideration of the defendant’s demurrer, the doubt must be resolved in favor of their

enforceability as alleged by the plaintiff in its pleadings. Fun, 245 Va. at 253, 427 S.E.2d at 183.

In the instant case, in order to sustain the defendant's objection to the enforceability of the non competition and non solicitation paragraphs of the parties Agreement, raised through a demurrer, and to dismiss the plaintiff's Complaint with prejudice the "[C]ourt had to reject [plaintiff's] allegations, accept [defendant's] view of the facts, and resolve the claim on the merits. In the context of consideration of a demurrer, this was error." Id.

The court's denial to the plaintiff of the opportunity to meet its evidentiary burden of establishing the validity of the non competition and non solicitation provisions of the parties Agreement, by evaluating and deciding *the merits* of the enforceability of same, within the context of a demurrer, and dismissing the Complaint with prejudice was error. Accordingly, the court's Order of August 27, 201, should be vacated and this matter remanded.

II. IN THE ALTERNATIVE: THE COURT'S ORDER OF AUGUST 27, 2012, SUSTAINING DEFENDANT'S DEMURRER, *IN ITS ENTIRETY*, WITHOUT LEAVE TO AMEND, AND DISMISSING THE *ENTIRE* COMPLAINT WITH PREJUDICE, ERRONEOUSLY FORECLOSED PLAINTIFF'S RIGHT TO PURSUE ITS LEGAL REMEDIES AGAINST THE DEFENDANT FOR IMPROPER USE OF AND FAILURE TO RETURN CONFIDENTIAL INFORMATION.

Standard of Review:

Whether the court's Order of August 27, 2012, sustaining defendant's demurrer, *in its entirety*, without leave to amend, and dismissing the *entire* complaint with prejudice, erroneously foreclosed plaintiff's right to pursue its legal remedies against the defendant of improper use of and failure to return confidential information is a question of law. Questions of law are subject to *de novo* review.

Argument:

A part of plaintiff's claim against the defendant was that the defendant had breached paragraphs 10 and 17 of the parties Agreement dealing with the non disclosure of "confidential information" and the failure to return "confidential information" imparted to and acquired by the defendant from the plaintiff, respectively. (App. 4 – 6). The defendant's demurrer never attacked the validity or enforceability of paragraphs 10 and 17 of the Agreement. (App. 33).

Regarding plaintiff's claims of breach by the defendant of paragraphs 10 and 17, defendant's demurrer claimed that the Complaint failed to state a breach by defendant of paragraph 10, the non-disclosure of "confidential information" provision. No objection was raised relative to the allegation of breach by the defendant of paragraph 17, the failure to return "confidential information" provision. (Def. Memorandum at 5).

The court's ruling on the defendant's demurrer didn't address defendant's claim that the Complaint failed to state a breach by him of paragraph 10, the non disclosure of "confidential information" provision.[2] Its ruling encompassed only that portion of defendant's demurrer dealing with the enforceability of the non competition and non solicitation paragraphs of the Agreement (paragraphs 5 and 12, respectively) and whether the defendant's objections, relative to those paragraphs, could be addressed within the context of a demurrer. (App. 33, 64 – 65).

The court's Order of August 27, 2012, sustaining the defendant's demurrer, *in its entirety*, without leave to amend, and

[2] The court's ruling also didn't address the defendant's objection that the Complaint failed to identify any actual damages incurred by the plaintiff as a result of defendant's actions. Def. Memorandum at 5.

dismissing the *entire* complaint with prejudice was error. (App. 68 – 69). The order erroneously foreclosed the plaintiff's right to pursue its legal remedies against the defendant for the improper use of and failure to return "confidential information", pursuant to paragraphs 10 and 17 of the Agreement, absent any underlying ruling to support such a result.

The plaintiff's legal remedies against the defendant for inappropriate use of and failure to return "confidential information" are separate and distinct from the issue of the enforceability of the non competition and non solicitation provisions of the Agreement. "[A] former employee, after termination of his employment, may compete with his former employer, the only restraint being that he may not use confidential information or trade secrets obtained from the employer, appropriating, in effect, to his competitive advantage what rightfully belongs to his employer." Community Counselling Service, Incorporated v. Reilly, 317 F.2d 239, 244 (4th Cir. 1963); 35 Am. Jur. *Master and Servant* § 99 (1941); Restatement (Second) Of Agency § 396 (1958). "Where a contract of employment expressly requires the employee to disclose [return] certain information, the

employer is entitled to have this contract enforced." Am. Jur. *Master and Servant* § 98 (1941)."

The court erroneously conflated plaintiff's legal remedies relative to the inappropriate use of and failure to return "confidential information" with the issue of the enforceability of the non competition and non solicitation provisions of the parties Agreement. This is shown in the colloquy between the court and counsel for the defendant just prior to the court recessing to consider its ruling. Both the court and counsel for the defendant agreed that plaintiff's claims of breach of the "confidential information" provisions of the parties Agreement were co-joined with its claims of breach of the non competition and non solicitation provisions of the Agreement. And that should the court determine that the non competition and non solicitation paragraphs were unenforceable there was no need to amend and the *entire* complaint should be dismissed with prejudice. (App. 62 – 63).

This erroneous conflation by the court also finds its expression in the court's Order of September 17, 2012, denying plaintiff's Motion for Reconsideration. In response to counsel's assertion that the court's Order of August 27, 2012, was, *inter-alia*, erroneously

overbroad as it erroneously foreclosed the plaintiff's ability to pursue its independent legal remedies against the defendant for the alleged violations of the parties Agreement, relative to the improper use of and failure to return "confidential information" to the plaintiff, and requesting, *inter-alia*, leave to amend its complaint to allow it to assert those claims, the court denied the request ruling, *inter-alia*, that "no relevant matters were raised that had not been previously considered by this court." (App. 70 – 75).

The conflation by the court of these separate and distinct legal remedies of plaintiff's with the issue of the enforceability of the non competition and non solicitation provisions of the parties Agreement, in its Order of August 27, 2012, sustaining the defendant's demurrer *in its entirety*, without leave to amend, and dismissing the *entire* complaint with prejudice was error. Accordingly, the court's Order of August 27, 2012, should be vacated and this matter remanded.

III. IN THE ALTERNATIVE: THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LEAVE TO AMEND ITS COMPLAINT TO ALLOW PLAINTIFF TO PURSUE ITS LEGAL REMEDIES AGAINST THE DEFENDANT FOR IMPROPER USE OF AND FAILURE TO RETURN CONFIDENTIAL INFORMATION.

Standard of Review:

Whether the court abused its discretion in denying plaintiff leave to amend its complaint to allow plaintiff to pursue its legal remedies against the defendant for improper use of and failure to return confidential information, is reviewed under an abuse of discretion standard.

Argument:

Upon the reasons and authorities set out above within the argument for Issue II (*See* pp. 20 – 24 *supra*), which argument is incorporated herein by reference, the court abused its discretion in denying plaintiff's request for leave to amend its complaint to enable it to pursue its legal remedies against the defendant for the improper use of and failure to return "confidential information."

Any defect, if any, in the form of plaintiff's complaint with respect to the allegations made therein, relative to the defendant's improper use of and failure to return "confidential information", could easily be corrected through an amended pleading. An amended

pleading would further the ends of justice by allowing the plaintiff to pursue against the defendant its claims for the breach of paragraphs 10 and 17 of the Agreement, the validity and enforceability of which were never attacked by the defendant's demurrer. Rules of the Supreme Court of Virginia 1:4, 1:8.

The court's denial to the plaintiff of the requested leave to amend its complaint violated the express policy set out within Rule 1:8, that leave to amend shall be liberally granted in furtherance of the ends of justice. The court's denial was absent any underlying court ruling to support such a result. This is an abuse of discretion. Accordingly, the court's Orders of August 27, 2012, and September 17, 2012, should be vacated and this matter remanded.

CONCLUSION

For the reasons previously set forth, the court's Orders of August 27, 2012, and September 17, 2012 should be vacated and the matter remanded for a correct and proper consideration of the matters presented, in accordance with the arguments set forth herein.

Respectfully submitted,

ASSURANCE DATA, INC.,
By Counsel

C. Dean Latsios
Virginia Bar No. 17350
Attorney for Appellant
Matthews, Snider & Fitzner
4161 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 273-1131
Facsimile: (703) 273-1167
cdeanlatsios@msnflaw.com

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(h) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and ten (10) copies of the Appendix, with ten (10) electronic copies on CD, have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) copies of the Opening Brief of Appellant, and one (1) copy of the Appendix, with one (1) electronic copy on CD, have been served, via UPS Ground Transportation to counsel for appellee, Mr. Christopher T. Craig, VSB No. 36983 and Mr. Lee Warren, VSB No. 77446, Cook, Craig and Francuzenko, PLLC, 3050 Chain Bridge Road, Suite 200, Fairfax, Virginia 22030, on this 3rd day of April, 2013.

C. Dean Latsios
Virginia Bar No. 17350
Attorney for Appellant
Matthews, Snider & Fitzner
4161 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 273-1131
Facsimile: (703) 273-1167
cdeanlatsios@msnflaw.com