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HOUSE BILL NO. 2064

Offered January 9, 2013

Prefiled January 9, 2013

A BILL to amend and reenact §§ 59.1-336, 59.1-337, 59.1-338, and 59.1-341 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-338.2, relating to the Virginia Uniform Trade Secrets Act; penalties.

Patrons—May and Minchew

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-336, 59.1-337, 59.1-338, and 59.1-341 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 59.1-338.2 as follows:

CHAPTER 26.**VIRGINIA UNIFORM TRADE SECRETS ACT.****§ 59.1-336. Definitions.**

As used in this chapter, which may be cited as the Uniform Trade Secrets Act, unless the context requires otherwise:

"Improper means" includes theft, bribery, misrepresentation, use of a computer or computer network without authority, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

"Misappropriation" means:

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

2. Disclosure or use of a trade secret of another without express or implied consent by a person who:

a. Used improper means to acquire knowledge of the trade secret; or

b. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(1) Derived from or through a person who had utilized improper means to acquire it;

(2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;

(3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(4) Acquired by accident or mistake.

"Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

"Trade secret" means information, including but not limited to, a formula, pattern, compilation, 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, and

2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 59.1-337. Injunctive relief.

A. ~~Actual~~ *Absent exceptional circumstances*, actual or threatened misappropriation ~~may~~ *shall* be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

B. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

C. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

§ 59.1-338. Damages.

A. Except where the user of a misappropriated trade secret has made a material and prejudicial change in his position prior to having either knowledge or reason to know of the misappropriation and the court determines that a monetary recovery would be inequitable, a complainant is entitled to recover

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59 damages for misappropriation. Damages can include both the actual loss caused by misappropriation and
60 the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss.
61 If a complainant is unable to prove a greater amount of damages by other methods of measurement, the
62 damages caused by misappropriation can be measured exclusively by imposition of liability for a
63 reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

64 B. If willful and malicious misappropriation exists, the court may award punitive damages in an
65 amount not exceeding twice any award made under subsection A of this section, or \$350,000 whichever
66 amount is less.

67 **§ 59.1-338.2. Criminal penalties.**

68 *Any person who knowingly and intentionally misappropriates a trade secret or uses a*
69 *misappropriated trade secret is guilty of a Class 1 misdemeanor and, upon a second or subsequent*
70 *conviction, is guilty of a Class 6 felony.*

71 **§ 59.1-341. Effect on other law; interpretation.**

72 A. Except as provided in subsection B of this section G, this chapter displaces conflicting tort,
73 restitutionary, and other law of this the Commonwealth providing civil remedies for misappropriation of
74 a trade secret.

75 B. *The provisions of this chapter shall be interpreted to be in harmony with the federal patent and*
76 *copyright laws.*

77 C. *Trade secrets shall have the attributes of private property, including but not limited to the*
78 *exclusive rights of possession, use, enjoyment, and disposition.*

79 D. *The scope and subject matter of a trade secret shall be interpreted to the fullest extent possible as*
80 *not preempted by federal patent laws.*

81 E. *Subject matter that is not eligible or is eligible for U.S. patent that otherwise qualifies as a trade*
82 *secret under this chapter shall be accorded full trade secret rights.*

83 F. *Trade secrets qualifying under this chapter shall not be held invalid or unenforceable for failure*
84 *to disclose the trade secret in any federal or international patent or application for patent.*

85 G. This chapter does not affect:

- 86 1. Contractual remedies whether or not based upon misappropriation of a trade secret; or
- 87 2. Other civil remedies that are not based upon misappropriation of a trade secret; or
- 88 3. Criminal remedies, whether or not based upon misappropriation of a trade secret.

89 2. **That the provisions of this act may result in a net increase in periods of imprisonment or**
90 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
91 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
92 **3 of the Acts of Assembly of 2012, Special Session I, requires the Virginia Criminal Sentencing**
93 **Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated**
94 **amount of the necessary appropriation cannot be determined for periods of commitment to the**
95 **custody of the Department of Juvenile Justice.**