STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

CURRICULUM ASSOCIATES, LLC,

Plaintiff,

v

Case No. 24-210794-CB
Hon. Michael Warren

JULIE HUSTON,

Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANT JULIE HUSTON

At a session of said Court, held in the County of Oakland, State of Michigan
January 23, 2025

PRESENT: HON. MICHAEL WARREN

OPINION

I
Introduction

Before the Court is Plaintiff's Motion for Preliminary Injunction against Defendant Julie Huston. Having reviewed the Motion and Response, presided over extensive oral argument, and the Court otherwise being fully informed in the premises, the Court issues this Opinion and Order.

At stake is whether a preliminary injunction should issue when Curriculum Associates, LLC ("CA") fails to cite the proper governing law? Because the argument is deemed abandoned, the answer is "no."

Putting aside the abandonment of the argument, also at stake is whether a preliminary injunction should issue when (1) the public interest does not favor a preliminary injunction in light of the strength of the merits and limited scope of any irreparable harm, (2) CA has not demonstrated it is likely to prevail on the merits, (3) CA has demonstrated the harm by denying injunctive relief outweighs the harm if injunctive relief is granted, but (4) the nature of any irreparable harm is not so grave that it warrants injunctive relief when the likelihood of the merits strongly favors Huston? Because the answer is "no," the requested relief is denied on this second independent basis.

II
Background

CA is an education company that develops and distributes research-based instructional materials. The Defendant Julie Huston ("Huston") is CA's former Senior Vice President of Sales, where she allegedly had access to valuable confidential information and trade secrets essential to CA's business success and competitive advantage.[1] Effective March 26, 2024, Huston executed a Guidelines for Employment and a Nonsolicitation, Confidential Information Obligation and Assignment of Inventions

[1] Huston's employment with CA allegedly began on May 6, 2024.

Agreement ("Nonsolicitation Agreement") with CA. In consideration of her employment by CA, and compensation to be paid and benefits to be provided, Huston agreed, in pertinent part, as follows:

> 1. Nonsolicitation. During the period of the Employee's employment with the Company ("Business Relationship") and during the Nonsolicitation Period, the Employee will not directly or indirectly either for themselves or for any other commercial enterprise: (a) solicit or attempt to solicit any of the Company's existing or prospective customers or clients determined as of the time of termination of such Business Relationship including any customer or client that did business with the Company at any time during the twelve (72) month period preceding such termination) with respect to products and services that are competitive with the then existing or proposed products and services of the Company, or otherwise attempt to induce any such customers or clients to terminate or reduce their relationship with the Company or (b) attempt to hire, or solicit the services of any of the Company's employees, consultants or advisors (including any employees, consultants or advisors who were engaged or employed by the Company at any time during the six (6) month period preceding any termination of such Business Relationship), or assist in such hiring by anyone else, or otherwise attempt to induce any such employees, consultants or advisors to terminate their employment or other service relationships with the Company. For purposes of this Agreement, the "Nonsolicitation Period" shall mean the period of twelve (72) months after termination of the Employee's Business Relationship with the Company for any reason. For purposes of this Agreement, "Prospective customers" shall include those customers being solicited (or that have been explicitly targeted for solicitation) by the Company at the time of the Employee's termination.
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> 2. Confidential Information Obligation. The Employee will not at any time, whether during or after the termination of their Business Relationship, for any reason whatsoever (other than to promote and advance the business of the Company), reveal to any person or entity (both commercial and non-commercial) or use any of the trade secrets or confidential information concerning or otherwise relating to the Company ("Confidential Information") including, without limitation, its research and development activities; product designs, prototypes and technical specifications; show-how and know-how; marketing plans and strategies; pricing and costing policies; customer and supplier lists and their data and

accounts, and nonpublic financial information of the Company so far as any such Confidential Information comes or may come to the Employee's knowledge, except as may be required in the ordinary course of performing their duties for the Company. For the avoidance of doubt, any student data provided to Company by its customers or any student data generated or produced as a result of students' use of Company products and services shall be considered "Confidential Information" for purposes of this Agreement. This restriction shall not apply to: (i) information that may be disclosed generally or is in the public domain through no fault of the Employee; (ii) information received from a third party outside the Company that was disclosed without a breach of any confidentiality obligation; and (iii) information approved for release by written authorization of the Company. The Employee shall keep secret all Confidential Information and shall only use such information as may be required in the ordinary course of performing their duties as an Employee, consultant and/or director of the Company. The restrictions set forth in this Section 2 will not prevent the Employee from complying with any law, regulation, court order or other legal requirement that compels disclosure of any Confidential Information. The Employee will promptly notify the Company upon learning of any such legal requirement, and cooperate with the Company in the exercise of its right to protect the confidentiality of the Confidential Information before any tribunal or governmental agency. The Employee agrees promptly to return to the Company all manuals, business plans, manuscripts, reports, letters, notes, notebooks, drawings, diagrams, prints, models, data storage devices and all other materials belonging to the Company or its customers upon the termination of their Business Relationship. In addition, any confidential information which is in electronic form or cannot otherwise be returned to the Company shall be destroyed by the Employee upon termination of their Business Relationship. Notwithstanding the return or destruction of such confidential business information, the Employee shall continue to be bound by the restrictions set forth in this Section after the termination of this Agreement. Employee understands that nothing in this Agreement is designed to interfere with or restrain the immunity provided under 18 U.S.C. section 1833(a) for confidential disclosures of trade secrets to government officials or lawyers solely for the purpose of reporting or investigating a suspected violation of law or in a sealed filing in court or other proceeding relating to such suspected violation. Employee further understands that nothing in this paragraph is intended to limit in any way Employee's independent legal duty not to misappropriate trade secrets of the Company.

* * *

> 4. Remedies Upon on Breach. The Employee agrees that any breach of this Agreement by the Employee could cause irreparable damage to the Company. The Company shall have, in addition to any and all remedies of law, the right to an injunction or other equitable relief to prevent any violation of the Employee's obligations hereunder.
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> * * *
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> [Nonsolicitation Agreement.]

The Nonsolicitation Agreement provides "This Agreement shall be governed by, and construed in accordance with, the internal laws of the Commonwealth of Massachusetts, without giving effect to the conflict of law provisions thereof." [*Id.* ¶8.]

On August 9, 2024, as a participant of an equity incentive plan, Huston executed a Class B Unit Award Agreement with CRC Management Collector, LLC ("CRC") (the "Award Agreement").[2] Exhibit B titled Restrictive Covenants to the Award Agreement provides, in pertinent part, as follows:

> **Section 2. Confidential Information.** The Participant acknowledges that the Participant's Employment creates a relationship of confidence and trust with respect to any information of a confidential or secret nature that relates to the business of the LLC Group or any other party with whom any member of the LLC Group agrees to hold information of such party in confidence ***("Confidential Information").*** Such Confidential Information includes, but is not limited to, confidential techniques, know-how, financial information, copyrights, patents, trademarks, trade names, slogans, logos, designs, service marks, computer software programs, databases (including all subscriber and potential subscriber databases), magnetic media, systems and programs, trade secrets, business lists, customer lists, client lists, supplier lists, prices, employee personnel files, engineering data, logs, consultants' reports, budgets, ratings, forecasts, format strategy, financial

[2] CRC is not a party to this cause of action.

reports and projections, tapes and electronic data processing files, accounting journals and ledgers, accounts receivable records and sales, operating, marketing and business plans. The Participant stipulates and agrees that such Confidential Information is the sole and exclusive property of the applicable member of the LLC Group (or such customers, clients, vendors or other parties with whom any member of the LLC Group agrees to hold information of such party in confidence as the case may be), that such Confidential Information is confidential and proprietary and that the unauthorized use or disclosure of such Confidential Information would seriously and irreparably damage the business of the LLC Group. At all times, the Participant will keep and hold all such Confidential Information in strict confidence and trust, and will not in any fashion, form or manner, either directly or indirectly, use, disclose, divulge or communicate to any Person any of such Confidential Information, except pursuant to a subpoena or order issued by a court of competent jurisdiction (provided that the Participant shall (a) immediately give the LLC, or the applicable member of the LLC Group, as the case may be, notice of the circumstances surrounding such compelled disclosure in order to provide the LLC or the applicable member of the LLC Group an opportunity to seek an appropriate protective order with respect thereto and (b) in no event make disclosure before the expiration of the compliance date set forth in the subpoena or other request for production). Confidential Information shall not include any information or material (i) to the extent that such information or material is filed by the LLC or any member of the LLC Group with any governmental agency on a non-confidential basis, or (ii) is or becomes generally available to the public other than as a result of a wrongful disclosure by (x) a person otherwise bound to the provisions hereof or (y) any person known or who should reasonably be expected to be known by the Participant to be bound by a duty of confidentiality or similar duty owed to the LLC or any member of the LLC Group. Upon the termination of the Participant's Employment, the Participant will promptly deliver to the LLC or the applicable member of the LLC Group, as the case may be, all documents and materials of any nature pertaining to the LLC or any member of the LLC Group, or their business activities and will not take with the Participant any documents or materials or copies thereof containing any Confidential Information. The Participant cannot be held criminally or civilly liable under any federal or state trade secret law for disclosing a trade secret (1) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law, or (2) in a complaint or other document filed under seal in a lawsuit or other proceeding. Notwithstanding this immunity from liability, the Participant may be held liable if the Participant unlawfully accesses trade secrets by unauthorized

means. For purposes of this Section 2(b) and for Section 3(c), "LLC Group" shall be deemed to include the LLC's Affiliates. Nothing in this Award Agreement limits, restricts or in any other way affects the Participant's communicating with any governmental agency or entity, or communicating with any official or staff person of a governmental agency or entity, concerning matters relevant to the governmental agency or entity or require the Participant to give the LLC or any member of the LLC Group prior notice of the same.

Section 3. Restrictive Covenants. The Participant acknowledges that in the course of the Participant's Employment the Participant has become and shall become familiar with trade secrets and other Confidential Information concerning the LLC and the LLC Group and that the Participant's services have been and shall be of special, unique and extraordinary value to the LLC and the LLC Group. The Participant therefore agrees that the following restrictions on the Participants activities during and after his or her Employment are necessary to protect the goodwill, Confidential Information and other legitimate interests of the Company and its Affiliates, and in consideration of the grant of the Award Units pursuant to this Award Agreement, as well as the severance benefits described in that certain letter agreement between the Participant and Curriculum Associates, LLC dated on or about the date hereof, agrees to the following:

(a). ***Non-Competition.*** For so long as the Participant is Employed by any member of the LLC Group and for a period of twelve (12) months immediately following the termination of the Participant's Employment (the term of such Employment and such period thereafter, the ***"Restricted Period"),*** the Participant will not, directly or indirectly, in any capacity similar or related to the capacity in which the Participant been employed by the Company, (i) acquire, finance, or own any interest in, manage, control, participate in, consult with, render services for, operate or in any manner engage in a business which is substantially the same as or competitive with any business engaged in, or proposed to be engaged in during the Participant's Employment by any member of the LLC Group (a ***"Competing Business"),*** or, with respect to the portion of the Restricted Period that follows the termination of the Participant's Employment, involving any of the services that the Participant provided to any member of the LLC Group during the last two years of the Participant's Employment (such services, hereafter referred to as ***"Services"),*** in any geographic area in which any member of the LLC Group does business or is actively planning to do business during the Participant's Employment or, with respect to the portion of the Restricted Period that follows the termination of the Participant's Employment, at the time the Participant's Employment

terminates (the ***"Restricted Area");*** provided that nothing in this Section 3(a) will prohibit the Participant from becoming a passive investor in any Competing Business that has publicly traded capital stock, if the Participant's level of capital stock ownership is below five percent (5%) of its fully-diluted shares, or (ii) for the purpose of conducting or engaging in a Competing Business anywhere in the Restricted Area, call upon, solicit, advise or otherwise do, or attempt to do, business with any Business Relation of any member of the LLC Group, in each case, anywhere in the Restricted Area. For purposes of this Restrictive Covenant Agreement, ***"Business Relation"*** means any client, supplier, customer, account or other business partner or prospective business partner of any member of the LLC Group for whom the Participant has performed work during the Participant's Employment or has had access to Confidential Information that would assist in the Participant's solicitation of such client, supplier, customer, account or other business partner or prospective business partner.

(b). ***Non-Solicitation.*** During the Restricted Period, the Participant will not, directly or indirectly, (i) induce or attempt to induce any officer, employee, independent contractor, representative or agent of any member of the LLC Group who was performing services at any time during the six (6)-month period prior to the date of such inducement for any member of the LLC Group to leave the employ or service of such member of the LLC Group, (ii) hire any person who was an employee of, or an independent contractor for, any member of the LLC Group at any time during the six (6)-month period prior to the date of such hiring, (iii) in any other way interfere with the relationship between any member of the LLC Group and any employee and independent contractor thereof, or (iv) induce or attempt to induce any Business Relation to cease doing business with a member of the LLC Group, or in any way interfere with the relationship between any member of the LLC Group and any Business Relation thereof (including, without limitation, by inducing or attempting to induce any such person or entity to reduce the amount of business it does with any member of the LLC Group.) Notwithstanding the foregoing, for purposes of clauses (i) and (iii) of this Section 3(b) only, the Participant shall not be considered to have induced or to have attempted to induce any person to leave the employ or service of the LLC Group, or to have interfered with any relationship between any member of the LLC Group and any employee or independent contractor thereof, solely due to the placement of a general advertisement that may be targeted to a particular geographic or technical area but that is not specifically targeted toward any officer, employee, independent contractor, representative or agent of any member of the LLC Group.

Section 4. Enforcement; Remedies. The Participant covenants, agrees and recognizes that the breach or threatened breach of the covenants, or any of them, contained in this Award Agreement will result in immediate and irreparable injury to the LLC and other members of the LLC Group. Therefore, each member of the LLC Group shall, in addition to any other remedies available to it, be entitled to preliminary and permanent injunctive relief against any breach or threatened breach by the Participant of any of the covenants and agreements contained in this Award Agreement to the fullest extent allowed by law without having to post bond, together with an award of its reasonable attorneys' fees incurred in enforcing its rights hereunder. The Participant further acknowledges, covenants and agrees that the Participant's compliance with the provisions of this Award Agreement are conditions precedent to the Participant's right to receive any distributions or other payments in respect of Award Units during and following the termination of the Participant's Employment; and that, if the Participant breaches any such provisions, the Participant shall not, notwithstanding any provision in this Award Agreement or the Plan to the contrary, be entitled to receive any distributions or other payments in respect of Award Units under this Award Agreement that has not already been paid to the Participant during and following the Participant's termination of Employment. The Participant further covenants and agrees that (i) in the event of a breach or violation of any of the respective covenants and agreements contained in this Award Agreement, each member of the LLC Group shall be entitled to receive all such amounts to which they would be entitled as damages under law or at equity and (ii) subject to the last sentence of this Section 4, in the event of a breach, violation or threatened breach of any of the respective covenants and agreements contained in this Award Agreement, each member of the LLC Group shall be excused from making any further payments or distributions to the Participant pursuant to any provision of this Award Agreement or any other agreement, contract or arrangement between any of them and the Participant until the Participant shall cease violating, breaching or threatening breach of the Participant's respective covenants and agreements contained in this Award Agreement and shall have received reasonable assurances from the Participant that the Participant will no longer engage in the same, at which time the previously suspended payments shall, except to the extent provided herein, be made to the Participant, which amounts shall be reduced by the damages suffered by each member of the LLC Group, as applicable. So that the members of the LLC Group may enjoy the full benefit of the covenants contained in Section 3 above, the Participant further agrees that the Restricted Period shall be tolled, and shall not run, during the period of any breach by the Participant of such covenants. If the Participant violates any fiduciary duty to any

> member of the LLC Group or unlawfully takes any confidential or proprietary information belonging to any member of the LLC Group, the Restricted Period will be extended to two (2) years following termination of the Participant's Employment. Nothing herein shall be construed as prohibiting each member of the LLC Group, and its respective successors and assigns, from pursuing any other legal or equitable remedies that may be available to them for any such breach, including the recovery of damages from the Participant.

On September 6, 2024, Huston informed her supervisor and CA's Senior Vice President of National Sales, John Sipe ("Sipe"), that she had a potential job opportunity with another company. Huston provided notice of her resignation to Sipe on September 8, 2024. Her participation in an upcoming meeting with Bain (a consultant) was cancelled, but she was not directed to stop working and her access to CA's data was not terminated. On September 9, 2024, Sipe terminated Huston's access to CA's data, and she ceased working for CA.

Huston is currently employed as Imagine Learning's ("IL") Senior Vice President of Transformation. IL also operates in the Education Technology Industry and is allegedly the largest national provider of digital curriculum solutions. Leslie Curtis, Executive Vice President and Chief Administrative Officer of IL, attests that "Although [IL] and [CA] are both vendors in the EdTech Industry, they have largely different product lines and do not compete as direct competitors in many areas. [Curis Affidavit, ¶10.] Curtis attests that Huston's IL role is "drive strategic initiatives, enhance operational efficiencies, and improve margins" and her specific tasks include "(a) leading the redesign and transformation of key business processes, including order management,

fulfillment, and other operational workflows, to ensure increased efficiency and cost savings; (b) assessing current operational structures to improve productivity and performance and to streamline end-to-end processes; (c) improving go-to-market strategies and processes, ensuring alignment with the [IL's] overall vision and goals; (d) defining the training and readiness for employees related to curriculum concepts; and (e) identifying potential risks associated with transformation initiatives and (e) develop mitigation strategies" and Huston does not manages sales representatives, solicit customers or potential customers for [IL's] products or services and does not receive sales commissions. Curtis claims Huston's employment "is not in a similar capacity as her employment with [CA], and she is not providing similar services to [IL] as the services she provided to [CA.]" [Curtis Affidavit, ¶16-¶20.]

CA alleges that before her resignation and after she received her offer of employment Huston accessed CA's confidential and trade secret information on the company's shared network and copied files with confidential and trade secret information. In particular, CA alleges that: (a) during September 6-9, 2024, Huston accessed several critical and highly sensitive files on CA's computer network, including a PDF document entitled the "CA Bain Strategic Planning Workshop Pre-read Materials" and a PDF document entitled "CA Strategy Steering Committee Update;" (b) on September 8, 2024, Huston accessed and copied CA's territory planning records for several states, CA's sales forecasts, and CA's renewal opportunities for the coming year;(c) on September 9, 2024, Huston accessed online resources in CA's document

management software, including sales reports, open opportunities, sales insights and samples and market penetration data; and (d) on September 18, 2024, Huston used her CA-issued computer to attend a Zoom conference and emptied her "Recycle Bin."

David Kalat, Director of Global Investigations and Strategic Intelligence for Berkley Research Group ("BRG") which was engaged to conduct a forensic examination of Huston's CA-issued laptop computer, attests that

> 8. Forensic evidence shows that on July 9, 2024, the user manipulating Huston's laptop connected a one-gigabyte flash drive to her CA-issued laptop and copied the folder "C:\Users\jhuston\OneDrive-CURRICULUM ASSOCIATES LLC\Documents\IARSSS" which would have included all contents contained within that folder, like a Power Point presentation for the Illinois Association of Regional Superintendents of Schools (aka IARSS). Although the contents of the IARSS folder at that point in time are unknown, my examination also revealed that the user manipulating Huston's laptop separately copied a PowerPoint presentation for the Illinois Association of Superintendents of Schools (aka IARSS) onto the same one gigabyte flash drive during that same period of activity.
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> 9. Forensic evidence on Huston's CA-issued laptop shows that on September 6, throughout the weekend of September 7 and 8, and on through September 9, 2024, the user of Huston's CA-issued laptop accessed several sensitive and confidential files stored on CA's network.
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> 10. On September 6, 2024, Huston's laptop accessed files titled "CA Bain Strategic Planning Workshop Pre-read Materials" at 3:29 pm Eastern and "CA Strategy Steering Committee Update" at 3:36 pm Eastern.
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> 11. On September 8, 2024, at 10:58 AM EST, Huston's laptop accessed several documents in the span of less than a second. The tightly spaced instances of file access are consistent with file copying. Huston's laptop was connected to Google mail at the time, and an email was being composed in juliehuston8@gmail.com's account beginning at 10:57 AM EST. . . . Shortly afterward, Huston's laptop opened the file "Planner 2.xlsx" in the Excel at and around 11:01 AM EST. I understand that these CA records listed above included her employment contracts, restrictive covenants, and other

> confidential materials such as territory planning documents and future renewal opportunities.
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> 12. On September 9, 2024 between 10:05AM EST and 10:32AM EST, Huston's laptop accessed online resources at CA's Domo platform (I understand that Domo is a cloud-based business intelligence platform), and then minutes later connected to Huston's personal Gmail account at 10:35 AM EST. . . . The forensic evidence available on Huston's CA-issued laptop does not identify what actions were taken using that Google webmail account at that time.
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> 13. On September 18, 2024 at 12:04 pm, Huston's laptop connected to a Zoom meeting titled "Julie / Terry Intro," using the address https://imaginelearning.zoom.us, which appears to be an IL-affiliated Zoom account.
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> 14. At 12:02 pm Eastern on September 18, 2024, Huston's laptop re-installed the Microsoft 365 applications on her CA-issued laptop and accessed the "Recycle Bin." This activity is consistent with an attempt to remove evidence of accessing and confidential files stored on CA's network.
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> [Kalat Affidavit.]

Curtis attests Huston "has not been asked to use, nor has she used, any [CA] confidential or proprietary information on behalf of [IL]", "has not been asked to disclose, nor has she disclosed "any [CA] confidential or proprietary information on behalf of Imagine Learning" and "has not been asked to solicit, nor has she solicited, any [CA] customers or [CA] employees on behalf of[IL]." [Curtis Affidavit, ¶21-¶23.]

At oral argument, the Court asked if CA had a proposed order, and it conceded it had no such order. Instead, CA referred to its prayer for relief. The Motion moves the Court to "(a) restrain[] and enjoin[] Huston from using, disclosing, or otherwise misappropriating CA's confidential, proprietary, and trade secret information; (b)

direct[] Huston to return or delete any of CA's confidential, proprietary, and trade secret information; (c) prohibit[] Huston from providing any services that are the same or similar to the duties and responsibilities she performed for CA during her employment with CA; and (d) prohibit[] Huston from soliciting, contacting, or otherwise interfering with CA's customers or clients." The First Amended Verified Complaint has a nearly identical prayer for relief. Although at oral argument CA suggested that Hutson would need to go on a "vacation" if the Motion was granted (and both sides argued this point), CA does not move the Court to order Huston to terminate her employment with IL. Instead, CA moves the Court to "prohibit[] Huston from providing any services that are the same or similar to the duties and responsibilities she performed for CA during her employment with CA."

III
Because CA Fails to Cite the Governing Law,
the Argument is Deemed Abandoned

The Nonsolicitation Agreement provides "This Agreement shall be governed by, and construed in accordance with, the internal laws of the Commonwealth of Massachusetts, without giving effect to the conflict of law provisions thereof." [Nonsolicitation Agreement, ¶8.] CA's Motion seeks relief without citing Massachusetts law. At oral argument, without citing any law whatsoever, CA posited that the difference between Michigan law and Massachusetts law is insignificant. However, it is not the duty of this Court to confirm CA's position. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their

dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). By failing to cite appropriate authority or cogently apply analysis of the same, CA's arguments are deemed abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) (a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" (citations omitted)).

IV
CA Has Not Met Its Burden of Showing that Injunctive Relief Should Be Granted

Even presuming that the Massachusetts law is identical to Michigan law (and an unfounded proposition which the Court does not accept), as discussed below, CA has failed to meet its burden.

A
The Law Regarding Injunctive Relief

Under MCR 3.310(A), this Court is vested with the authority to grant a preliminary injunction. The burden is on the party seeking injunctive relief to prove why such relief should be issued. MCR 3.310(A)(4) ("At the hearing on an order to show cause why a preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued"). "Whether a preliminary injunction should issue is determined by a four-factor analysis . . . ." *MSEA v Dep't of Mental Health*, 421 Mich 152, 157 (1984). This analysis must address the following factors:

1) Harm to the public interest if an injunction issues;

2) Whether harm to the moving party in the absence of injunctive relief outweighs the harm to the opposing party if a stay is granted;

3) The strength of the moving party's demonstration that the moving party is likely to prevail on the merits; and

4) Demonstration that the applicant will suffer irreparable injury if injunctive relief is not granted.

[*MSEA,* 421 Mich at 157-158.]

In addition, this inquiry "often includes the consideration of whether an adequate legal remedy is available to the applicant." *Id.* at 158. Other considerations to be addressed when considering injunctive relief "are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits." *Campau v McMath*, 185 Mich App 724, 729 (1990). See also *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998).

Moreover, "[t]he general rule is that whenever courts have found a mandatory injunction essential to the preservation of the status quo and a serious inconvenience and loss would result to plaintiff and there would be no great loss to defendant, they will grant it." *Steggles v National Discount Corp,* 326 Mich 44, 50 (1949). See also *Gates v Detroit & Mackinac Railway Co,* 151 Mich 548, 552 (1908); *L & L Concession Co v Goldhar-Zimner Theatre Enterprises, Inc,* 332 Mich 382, 388 (1952), quoting *Steggles*, 326 Mich at 50.

Furthermore, this Court's ruling "must not be arbitrary and must be based on the facts of the particular case." *Thermatool,* 227 Mich App at 376. Generally, the granting of such relief falls within the broad discretion of the court. *Steggles*, 326 Mich at 50 (holding that granting injunctive relief "is largely a matter of discretion of the trial court"); *Campau*, 331 Mich at 729; *Bratton v DAIIE*, 120 Mich App 73, 79 (1982).

A preliminary injunction should not be issued if an adequate legal remedy is available, and the mere apprehension of future injury or damage cannot be the basis for injunctive relief. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9 (2008). Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. *Alliance for Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 664 (1998).

B
Application of the Law

1. Harm to the Public Interest.

Under this factor of the analysis, this Court must address whether the public policy of Michigan is furthered or undermined by the granting of the injunctive relief.

In this particular case, the public interest rises or falls with the underlying merits of the case. After all, Michigan law generally favors enforcing written contracts and agreements. See e.g., Const 1963, art 1, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"); MCL 566.132; *Rory v Cont'l Ins Co,*

473 Mich 457, 468 (2005) (internal footnotes and quotation marks omitted) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.").[3] There is nothing in this case that would otherwise affect this public policy analysis.

[3] The *Rory* Court, quoting *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 51-52 (2003) (internal citations omitted), elaborated:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich. 56, 71 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
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> > "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." [15 Corbin, Contracts (Interim ed.), ch. 79, § 1376, p. 17.

Notwithstanding the foregoing, as revealed below, Michigan public policy and jurisprudence prohibit the issuance of injunctive relief unless there is a risk of irreparable harm. As set forth in the Nonsolicitation Agreement, the misappropriation of confidential information would be irreparable. This factor favors CA.

2. Balance of Harm.

Under this prong of the analysis, this Court must evaluate whether the harm suffered by the nonmoving party caused by granting the proposed injunctive relief will outweigh the harm suffered by the moving party if the injunctive relief is denied.

In the instant action, CA argues that it will be significantly impacted if Huston is allowed to continue her role at IL while in possession of CA's confidential information and an injunction will order Huston to immediately return or delete any of CA's confidential and trade secret information without causing any prejudice or harm to her. Huston counters that she does not possess any such confidential information and that the injunction would severely hamper her employment with IL. Hutson's position is nonsensical. If she does not possess CA's confidential information, there is nothing to return. If she does possess it but is not using it, there is no harm to her. If she is wrongfully possessing and using CA's confidential information, she is not entitled to do so and the harm suffered by CA outweighs that of Huston. This factor favors injunctive relief.

3. The Merits.

Under this prong of the analysis, the moving party must demonstrate that it is likely to prevail on the merits of a fully litigated action. That is, the moving party must demonstrate a substantial likelihood of success.

Here, CA argues that it "has demonstrated some unbelievably wild coincidences and a strong likelihood of success on the merits" and will likely succeed in proving it claims. However, Huston identifies several threshold issues that may preclude recovery. In particular, the doctrine of unclean hands may preclude recovery where (a) Huston attests that CA's CEO, Rob Waldron, and Sipe asked her identify the best employees at Great Minds in order for CA to recruit them despite knowledge of Huston's nonsolicitation covenant Great Minds, her former employer, [Huston Affidavit, ¶14-¶15], and (b) CA's employment of IL's former employee Elda Garcia ("Garcia") may be a breach of Garcia's nonsolicitation agreement with IL to the benefit of CA. Although Hutson has not necessarily proven she will prevail on the unclean hands theory, she has set forth a strong showing that it may apply.

Furthermore, CA is not a party to the Award Agreement and appears to lack standing to enforce the Restrictive Covenants and its non-competition provisions. CA was provided the opportunity to file a First Amended Verified Complaint after this issue was raised and failed to name CRC as a party. Again, Hutson may not eventually prevail on this standing argument, but she has set forth a strong showing that it may apply.

Moreover, CA's Motion does not demonstrate that Huston has committed a breach. Despite CA's argument that "[t]he BRG forensic analysis of Huston's CA-issued computer demonstrates she manipulated CA's confidential information in violation of the confidentiality provisions," the Kalat Affidavit does not demonstrate that Huston violated any confidentiality provision. Instead, Kalat's affidavit only reflects that Huston accessed alleged confidential files and documents on CA's network and Huston refutes that such access was a violation of any provision because it occurred for purposes of employment with CA. There is no direct evidence Huston actually copied, transferred or forwarded the files and documents, or committed any breach. Further, CA argues "[a]dmissions from Huston and IL officials will prove she is actively competing with CA in violation of the non-competition agreement(s) she formed with CA" but the unrefuted affidavits of Huston and Curtis reflect that Huston is not actively competing with CA in violation of the non-competition agreement, has not used CA's confidential or proprietary information, has not disclosed CA's confidential or proprietary information, and has not solicited CA's customers or employees. Indeed, Huston attests that she has "not solicited any [CA] customers, potential customers, or [CA] employees on behalf of [IL] or otherwise;" "did not acquire or retain any [CA] confidential or proprietary information by improper means;" and "did not unlawfully or impermissibly disclose or use any [CA] confidential or proprietary information." [Huston Affidavit ¶37-¶39.] Huston also attests that at the time of each of the events reflected in the allegations of the

First Amended Complaint and the Kalat Affidavit, she was still in the employment of CA and performing her job. [Huston Affidavit, ¶40.]

Furthermore, there is some dispute whether IL is a competitor. Although that may be a losing proposition in the long-term, it is yet another obstacle to CA showing it is likely to prevail on the merits.

In the end, CA has not met its burden of demonstrating it is more likely to prevail on the merits. In fact, there are many barriers to potential success. This factor strongly favors Huston.

4. Irreparable Harm.

"[A] particularized showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters Union Local 376,* 482 Mich at 9 (quotation marks, citation, and ellipses omitted). Irreparable harm means harm that cannot be remedied by damages. *Thermatool,* 227 Mich App at 377. In other words, "to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Id.* Moreover, the "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Id.* Our Supreme Court elaborated in *Michigan Coalition of State Employee Union v Civil Service Comm'n*, 465 Mich 212, 225-226 (2001) (footnote omitted) in the context of injunctive relief sought pursuant to Const 1963, art 11, § 5:

> Thus, it is clear that in 1940 it was beyond dispute in the legal community that a party needed to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction. Moreover, there is no basis to conclude that the requirements to secure a preliminary injunction changed in any pertinent way between the adoption of the amendment in 1940 and the adoption of its successor, § 5, in the present Michigan Constitution in 1963, or even up to this day. The requirement of a showing of irreparable harm remains as it did a century ago. In our latest statement on this issue in *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984), this Court reiterated the requirement of a showing of irreparable harm as a prerequisite for a preliminary injunction, explaining that it was a requirement for the issuance of a preliminary injunction to demonstrate "that the applicant will suffer irreparable injury if a preliminary injunction is not granted."
>
> Accordingly, we conclude that a particularized showing of irreparable harm was, and still is, as our law is understood, an indispensable requirement to obtain a preliminary injunction. Moreover, the people, in causing the Michigan Constitution to be amended in 1940, evidenced no desire, as they had done with standing, to modify the traditional rules that had pertained with regard to this requirement for a preliminary injunction. Therefore, when considering the request for a preliminary injunction in this matter, the trial court and the Court of Appeals were in error in granting any preliminary injunction without a showing of concrete irreparable harm to the interests of a party before the Court.

By the terms of the Nonsolicitation Agreement, Huston has agreed that misuse of the confidential information is irreparable harm. The scope of that irreparable harm is mitigated by the fact mere apprehension of future injury or damage cannot be the basis for injunctive relief. *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9. CA has not lost any clients, market share or goodwill. Moreover, any damages incurred by the loss of customer relationships can likely be quantified and compensable with money damages. In the end, CA has met its burden of demonstrating irreparable harm, but the nature of

the harm is not so grave that it warrants injunctive relief when the likelihood of the merits strongly favors Hutson.

5. Other Considerations.

None of the other miscellaneous considerations set forth in Michigan jurisprudence favor granting injunctive relief.

In light of the foregoing analysis, under the totality of circumstances, injunctive relief is denied.

ORDER

In light of the foregoing Opinion, Plaintiff's Motion for Preliminary Injunction against Defendant Julie Huston is DENIED.

/s/ Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE