STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

INTEGRITY TREE SERVICES, LLC,

Plaintiff,

vs.

TRAVIS MARSHALL,

Defendant.
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Case No. 21-11680-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

For 13 years, Defendant Travis Marshall worked for Plaintiff Integrity Tree Services, LLC ("Integrity"), climbing the company ladder until he obtained the position of account manager. Then, on November 30, 2021, he resigned based upon an undisclosed plan to work for Alpine Tree Service ("Alpine"), which competes with Integrity. Before leaving Integrity, Marshall took confidential and proprietary information that Integrity describes as trade secrets. But Marshall received a cease-and-desist letter from Integrity on December 13, 2021, so he chose to abstain from joining Alpine until the dust settled. Integrity then sued Marshall for breaching several of the restrictive covenants in his employment agreement and stealing trade secrets. In response to Integrity's request for a preliminary injunction, Marshall agreed to be enjoined from disclosing the confidential information to which he had access at Integrity and from soliciting Integrity's clients. But Marshall asked the Court to enjoin Integrity from relying upon the noncompetition provision in the employment agreement to prevent him from working for Alpine. After conducting a hearing on the competing motions for injunctive relief, the Court shall issue a preliminary injunction that places stringent restrictions upon Marshall, but affords him a carefully limited opportunity to work for a competitor of Integrity.

I. Factual Background

Plaintiff Integrity relies on two indisputable propositions to support its request that the Court enjoin Defendant Marshall from working for Alpine in any capacity. First, Marshall surreptitiously exported huge amounts of Integrity's confidential and proprietary information as he was leaving the company in late 2021. Second, Marshall filled positions of trust and responsibility at Integrity, so he would be extraordinarily valuable to Alpine in its effort to compete with Integrity. Marshall, in contrast, insists that he has no intention of working in a sales position at Alpine, so he presents no significant competitive threat to Integrity if the Court permits him to work for Alpine. Beyond that, Marshall points out that, with the assistance of his attorney, he has returned to Integrity everything that he took from the company on his way out the door, so the only appropriate remedy for the taking of confidential and proprietary information is retrospective monetary relief, rather than prospective injunctive relief that bars him from working for Alpine.

To assess the extent of the risk that Defendant Marshall poses to Plaintiff Integrity if he joins Alpine in a non-sales position, the Court must carefully consider the evidence regarding Marshall's transfer of Integrity's proprietary and confidential information prior to his departure. Beginning on November 30, 2021, when Marshall informed Integrity that he was resigning, Marshall began taking an extensive amount of proprietary and confidential information by electronically transferring it to a collection of accounts he controlled. He continued to engage in that activity through his final day on the job, December 10, 2021, when he sent documents from Integrity to himself *via* e-mail. But Marshall left a clear electronic trail, which Integrity followed to uncover his activities. Therefore, on December 13, 2021, Integrity's attorney sent a letter to Marshall describing his purported theft of confidential information and warning him not to work for Alpine. See Plaintiff's Exhibit D.

In the wake of the forensic review conducted by Plaintiff Integrity and the subsequent cease-and-desist letter sent to Defendant Marshall, attorneys for the two sides began working on a plan for the return of all confidential and proprietary information to Integrity by Marshall. Consequently, on December 23, 2021, Marshall provided a "Certification regarding Integrity documents" in which he represented that he had returned to Integrity "all of its property, materials, and information that was in [his] possession when [he] was working for Integrity" and he had not "kept, disclosed, or used any confidential Integrity business information to the detriment of Integrity[.]" See Defendant's Exhibit 1 (Certification regarding Integrity documents). At that point, because Marshall had not taken a job with Alpine, the two sides may have been able to resolve their dispute even though Integrity had filed this action on December 22, 2021. But Integrity understood, through its forensic examination, that Marshall had not returned all of the confidential and proprietary information. Significantly, a thumb drive with a substantial amount of Integrity's confidential and proprietary information was missing. When confronted with that revelation, Marshall furnished more documents and electronically stored information to his attorney, who surrendered those additional materials to Integrity on December 28, 2021.[1]

Throughout Plaintiff Integrity's effort to recover its proprietary and confidential information, Defendant Marshall not only tendered materials to Integrity through his attorney, but also chose not to take a position with Alpine. Instead, in response to Integrity's motion for preliminary injunctive relief, Marshall filed his own motion seeking a preliminary injunction that would prevent Integrity from strictly enforcing the noncompetition obligation in Marshall's employment agreement. Thus,

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[1] At the hearing on its motion for a preliminary injunction, Plaintiff Integrity acknowledged that Defendant Marshall's attorney's actions have been completely appropriate. The Court concurs that Marshall's attorney has acted in a thoroughly professional mannner.

Marshall presented evidence and legal arguments in support of a court order that would enable him to work for Alpine, albeit in a non-sales role. In fashioning his arguments, Marshall conceded that he should be bound by an injunction to the terms of the confidentiality and non-solicitation sections of his employment agreement, but he implored the Court to exercise its discretion and modify the terms of the employment agreement's noncompetition section. Accordingly, the Court shall begin from Marshall's concession that Integrity is entitled to a preliminary injunction that binds him to the terms of his confidentiality and non-solicitation commitments. From there, the Court shall consider the extent to which the noncompetition obligation should be pared back to render it reasonable. See MCL 445.774a(1).

II. Legal Analysis

An injunction "'represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.'" Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). To the extent that each party has asked for injunctive relief, that party bears "the burden of establishing that a preliminary injunction should be issued." See MCR 3.310(A)(4). There are four factors that the Court must consider in determining whether to grant any injunctive relief:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Davis, 296 Mich App at 613. In analyzing these four considerations, the Court must not forget that injunctive relief is only appropriate if "there is no adequate remedy at law, and there exists a real and

imminent danger of irreparable injury." Id. at 614. Because Defendant Marshall has conceded that Plaintiff Integrity is entitled to injunctive relief that binds Marshall to his employment agreement's obligations of confidentiality and non-solicitation, the Court shall confine its analysis to the need for an injunction dealing with Marshall's noncompetition obligation. Under Michigan law, the Court has discretion to either enforce the noncompetition obligation as written or to "limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." See MCL 445.774a(1). In exercising its discretion, the Court must focus upon whether Marshall's noncompetition obligation "is reasonable as to its duration, geographical area, and the type of employment or line of business." Id. With these considerations in mind, the Court shall turn to the four factors that bear upon the propriety of injunctive relief.

A. Likelihood of Success on the Merits.

Because Defendant Marshall has not yet worked for Plaintiff Integrity's competitor, Alpine, Integrity does not yet have any basis for alleging that Marshall violated the noncompetition section of his employment agreement. Consequently, Integrity's showing of its likelihood of success on the merits turns upon Marshall's efforts to solicit Integrity's employees and his handling of confidential and proprietary information of Integrity. Marshall's transfer of the materials may be regarded both as a breach of the employment agreement's confidentiality obligation and a theft of Integrity's trade secrets. Under Michigan law, those two theories are similar, but not identical. Specifically, the legal concept of confidential information encompasses a universe of materials broader than trade secrets. Industrial Control Repair, Inc v McBroom Elec Co Inc, No 302240, slip op at 8 (Mich App Oct 10, 2013) (unpublished decision). Accordingly, Integrity can still prevail on its claim for breach of the

employment agreement's confidentiality obligation even if the materials taken by Marshall do not rise to the level of trade secrets. But proving that the "confidential information" Marshall took rises to the level of trade secrets enables Integrity to seek relief under the Michigan Uniform Trade Secrets Act ("MUTSA"), MCL 445.1901, *et seq*, which includes its own provisions affording remedies and injunctive relief in response to trade-secret misappropriation. CMI Int'l, Inc v Intermet Int'l Corp, 251 Mich App 125, 132 (2002). The record leaves no doubt that Marshall impermissibly took some of Integrity's "proprietary and confidential information," so Integrity appears destined to support its theory that Marshall violated his confidentiality obligation. But the Court nonetheless must address Integrity's specific claims for breach of contract and violation of the MUTSA independently.

To prevail on a breach-of-contract claim against Defendant Marshall, Plaintiff Integrity must "establish by a preponderance of the evidence that (1) there was a contract, (2) [Marshall] breached the contact, and (3) the breach resulted in damages to" Integrity. See Bank of America, NA v First American Title Ins Co, 499 Mich 74, 100 (2016). Integrity has established that Marshall breached his contractual obligation of confidentiality, but Marshall has already agreed to injunctive relief with respect to that obligation (and his non-solicitation obligation). Accordingly, the Court's focus must turn to the contractual noncompetition requirement, which Marshall manifestly has not yet breached. Marhsall's two-year noncompetition obligation might not be too long to withstand a reasonableness challenge under MCL 445.774a(1),[2] Coates v Bastian Brothers, Inc, 276 Mich App 498, 508 (2007) (upholding one-year noncompetition restriction), and the geographical scope confined to areas where Integrity conducts business appears sufficiently narrowly tailored to pass muster. But the Court has

[2] A noncompetition agreement may be enforced in Michigan, "but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable." St Clair Medical, PC v Borgiel, 270 Mich App 260, 266 (2006).

concerns about the breadth of Marshall's obligation to abstain from any involvement in any business that competes with Integrity, which prevents Marshall from working as an employee in any capacity for any competitor of Integrity.[3] Under Michigan law, to be enforceable, a noncompetition provision must "protect[ ] an employer's reasonable competitive business interests[.]" See MCL 445.774a(1). Put another way, the noncompetition agreement "must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." St Clair Medical, PC v Borgiel, 270 Mich App 260, 266 (2006). Consequently, the Court may enforce Marshall's noncompetition agreement to the extent that it prohibits him from working as an upper-level sales manager or even a traditional sales representative, but the Court may not enforce the agreement to the extent that it precludes Marshall from working in the field removing vegetation and underbrush. Accordingly, a total ban on employment with Integrity's competitor is too broad a restriction to be "reasonable" under Michigan law. To the extent that Integrity intends to seek strict enforcement of Marshall's noncompetition obligation, Integrity is not likely to prevail on the merits of its claim for breach of contract.

Plaintiff Integrity's likelihood of success on the merits of its claim for misappropriation of trade secrets depends almost entirely upon whether the confidential and proprietary information that Defendant Marshall took from Integrity rises to the level of trade secrets under the MUTSA. Under Michigan law, not all proprietary and confidential information that can be protected by contract rises to level of a trade secret. See Industrial Control Repair, No 302240, slip op at 8 (Mich App Oct 10, 2013). To prevail on its MUTSA claim, Integrity has to "identify with specificity the 'trade secret'

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[3] The noncompetition section forbids Defendant Marshall, "as an employee, officer, director, independent contractor, consultant, stockholder, partner or otherwise, [to] engage in or assist others to engage in or have any interest in any business which competes with" Plaintiff Integrity.

allegedly misappropriated[,]" id., and the trade secret must meet the statutory definition set forth in the MUTSA at MCL 445.1902(d).[4] At this early stage of the action, the Court concludes that at least some of the confidential and proprietary information identified by Integrity likely rises to the level of trade secrets. Therefore, the Court concludes that Integrity has established a likelihood of success on the merits of a trade-secret-misappropriation claim under the MUTSA. But Marshall has already agreed to the entry of a preliminary injunction that strictly enforces his obligation of confidentiality, so the Court must consider whether Integrity is entitled to much broader injunctive relief that would completely bar Marshall for working for a competitor of Integrity. Integrity insists that Marshall will inevitably disclose the trade secrets to his new employer if he is permitted to work for a competitor of Integrity, but our Court of Appeals has warned that "the concept of inevitable disclosure . . . must not compromise the right of employees to change jobs." CMI Int'l, 251 Mich App at 133-134. As a result, Integrity is obligated to "establish more than the existence of generalized trade secrets and a competitor's employment of [Integrity's] former employee who has knowledge of trade secrets." Id. at 134. The Court shall take up that issue in analyzing the likelihood of irreparable harm.

B. Irreparable Harm.

Michigan law regards the likelihood of irreparable harm as an indispensable element of any request for injunctive relief. See, e.g., Michigan Coalition of State Employee Unions v Civil Service Comm'n, 465 Mich 212, 225 (2001). Moreover, a "mere apprehension of future injury or damage

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[4] According to MCL 445.1902(d), a "'trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process that is both of the following: (*i*) 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. (*ii*) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

cannot be the basis for injunctive relief." Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9 (2008). Finally, "[a] relative deterioration of competitive position does not in itself suffice to establish irreparable injury." Thermatool Corp v Borzym, 227 Mich App 366, 377 (1998). But as the United States Court of Appeals for the Eleventh Circuit noted, although "economic losses alone do not justify a preliminary injunction, 'the loss of customers and goodwill is an irreparable injury.'" BellSouth Telecommunications, Inc v MCIMetro Access Transmission Services, LLC, 425 F3d 964, 970 (11th Cir 2005).

Here, because Defendant Marshall has agreed to the entry of a preliminary injunction strictly enforcing his confidentiality and non-solicitation obligations, the Court must consider whether those safeguards are insufficient to protect Plaintiff Integrity from the likelihood of irreparable harm that will flow from Marshall's employment in any capacity with Integrity's competitor, Alpine. Integrity contends that Marshall thus far has proven himself so untrustworthy that his employment by Alpine will inevitably result in irreparable harm through the disclosure to Alpine of Integrity's trade secrets and other proprietary and confidential information. Courts have found inevitable disclosure of trade secrets where the employee "demonstrated a lack of trustworthiness beyond his decision to work for a competitor." See CMI Int'l, 251 Mich App at 133. Similarly, the Court itself has found on very rare occasions that an employee has proven so untrustworthy as to be disqualified from working in any capacity for a competitor of a plaintiff seeking to enforce a noncompetition obligation. So the question in this case is whether Marshall falls into that narrow category of miscreants.

Defendant Marshall's conduct must be divided into three time periods. When left to his own devices between the announcement of his resignation from Plaintiff Integrity on November 30, 2021, through his receipt of Integrity's cease-and-desist letter on December 13, 2021, his behavior was at

best reckless and at worst devious. He exported an enormous amount of sensitive information from Integrity, and a significant portion of that information had nothing whatsoever to do with his claim for unpaid commissions, which served as his justification for taking the sensitive information. The second time period from December 13, 2021, through December 23, 2021, when Marshall returned a substantial amount of sensitive material to Integrity with the assistance of his attorney, should be characterized as a step in the right direction. But Marshall's certification on December 23, 2021, to Integrity that he had returned "all of its property, materials, and information" was not accurate. Only in the third time period, from December 23, 2021, up to the current date, did Marshall come clean. With the assistance of his able attorney, Marshall not only tendered a second round of materials that seem to comprise all that he had left in his possession, but also agreed to provide unfettered access to all of his electronic devices to Integrity's expert, Brandon Fannon, who is a skilled professional of the utmost integrity. Thus, the Court now believes that, with assistance from his own attorney and Mr. Fannon, Marshall has honored his obligation to return all of Integrity's confidential information to the company.

Now the Court must consider whether Defendant Marshall can by trusted to honor the terms of a preliminary injunction that affords him a restricted opportunity to work for Plaintiff Integrity's competitor, Alpine. If all the Court had to evaluate was Marshall's behavior when he was acting on his own, the Court would certainly conclude that he presents an intolerable risk of irreparable harm to Integrity. But as Justice Felix Frankfurter once observed and as Marshall apparently has learned, "wisdom too often never comes, and so one ought not to reject it merely because it comes late." See Henslee v Union Planters Nat'l Bank & Trust, 335 US 595, 600 (1949) (Frankfurter, J, dissenting). Applying this maxim in conjunction with the admonition that the concept of inevitable discovery of

a trade secret "must not compromise the right of employees to change jobs[,]" CMI Int'l, 251 Mich App 133-134, the Court finds that Marshall does not present an intolerable risk of irreparable harm to Integrity if he is allowed to work for Alpine in a position that has no involvement whatsoever in sales, including the bidding process.

C. Balance of Harms to the Opposing Parties.

In considering injunctive relief, the Court must balance the potential harm to each side in the presence or absence of an injunction, Davis, 296 Mich at 613, which obligates the Court to bear in mind that "a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." St Clair Medical, 270 Mich App at 266. If the Court bars Defendant Marshall from working in any capacity for every company that competes with Plaintiff Integrity, Marshall will be excluded from the industry that he knows well. Although Marshall could still work for companies that provide vegetation-clearing services for residential customers, the record strongly suggests that that industry bears little resemblance to the commercial vegetation-clearing industry, where Marshall has a wealth of experience. In comparison, the likely harm to Integrity if Marshall is allowed to work for Alpine can be limited to virtually nothing through preliminary injunctive relief that not only imposes strict confidentiality and non-solicitation obligations upon Marshall, but also bars Marshall from having any role whatsoever in the sales and bidding efforts of Integrity's competitors.

D. Potential Harm to the Public Interest.

As a general matter, "noncompetition agreements are disfavored as restraints on commerce," see Coates, 276 Mich App at 507, so the Court must tread carefully in enforcing agreements of that

nature by injunctive orders. Nevertheless, the public interest favors enforcement of contracts, and the record makes clear that Defendant Marshall voluntarily entered into the restrictive covenants that are contained in his employment contract. Indeed, Marshall has conceded that the Court should enter a preliminary injunction strictly holding him to his confidentiality and non-solicitation obligations. All the Court is willing to afford him is enough relief from his noncompetition obligation to enable him to work in a job that has no involvement in sales or bidding.

III. Conclusion

For all of the reasons set forth in this opinion, and pursuant to the obligations imposed by the employment agreement executed by Plaintiff Integrity and Defendant Marshall, **IT IS ORDERED that Defendant Marshall shall neither solicit any of the customers of Integrity nor disclose any confidential information that he obtained from Integrity. IT IS FURTHER ORDERED that Defendant Marshall shall not work for any competitor of Integrity in any job that involves any sales activity or any participation in the process of bidding for work.**[5]

IT IS SO ORDERED.

Dated: January 27, 2022

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[5] The Court cautions any prospective employer that competes with Plaintiff Integrity and is contemplating hiring Defendant Marshall that, whenever non-restricted people or businesses act in concert with someone subject to restrictive covenants, "they are equally liable with him" for acts that violate any of the restrictive covenants. Owens v Hatler, 373 Mich 289, 292 (1964).