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

FINISHING TOUCH AUTO SPA, LLC,

Plaintiff,

v

Case No. 22-193670-CB
Hon. Michael Warren

RAYMOND W. ARONDOSKI, III,

Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

At a session of said Court, held in the County of Oakland, State of Michigan Cinco De Mayo (May 5), 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I
Introduction

Before the Court is Plaintiff's Motion for Preliminary and Permanent Injunction. Having reviewed the Motion and the Response, presided over oral argument, and otherwise being fully informed in the premises, the Court issues this Opinion and Order.[1]

[1] On May 3, 2022 - the day before the hearing - the Plaintiff filed an Affidavit of Isaac Baker as well as a separate Certificate of Service that states that "Plaintiff's Supplemental Response to Plaintiff's Motion for Preliminary and

At stake is whether a preliminary injunction should issue when (1) the public interest rises and falls with the merits, (2) the balance of harm favors denying the injunctive relief, (3) the Plaintiff has failed to show it is likely to prevail on the merits, and (4) there has been no showing of irreparable harm? Because the answer is "no," the Motion is denied.

II
Background

This cause of action arises out of a Restrictive Covenant, Confidentiality and Non-Compete Agreement (the "Agreement") the Defendant executed on November 20, 2021 at the time and as a condition of his direct hire as an employee of the Plaintiff. The Agreement states, in part, as follows:

> **3. <u>Restrictive Covenants</u>**
>
> Employee understands and agrees that the vehicle enhancement and protection industry is highly competitive. Employee further understands and agrees that due to the nature of Company's business. distinctive reputation for working with and on one of a kind, unique, antique and collector vehicles, and efforts in marketing, solicitation, and training in its specialized procedures, methods and processes, Company has a unique competitive advantage to provide its services to customers and prospective customers. Employee further agrees that due to his/her position with

Permanent Injunction" was e-filed. However, the Plaintiff had not filed any document entitled "Plaintiff's Supplemental Response to Plaintiff's Motion for Preliminary Injunction." Presumably, Mr. Baker's Affidavit is the unidentified "Supplemental Response." Yet, a supplemental response is not permitted by the Rules of Court, MCR 2.119, and the Court did not grant the Plaintiff leave to file the same. Moreover, taken literally, the "Supplemental Response" is the Plaintiff responding to its own Motion - an unusual filing to say the least and again uncontemplated in the Rules of Court. Furthermore, all of the material information reflected in the Affidavit was known by the Plaintiff well before the Motion was filed. The Plaintiff has provided no explanation for why the Affidavit was not attached to its Motion when originally filed. As such, the Affidavit is not properly before the Court and is not considered. See, e.g., *Prussing v General Motors Corp*, 403 Mich 366, 370 (1978); *Kemerko Clawson, LLC v RXIV, Inc,* 269 Mich App 347, 349-353 (2005); *Flanagin v Kalkaska Co Rd Comm*, 319 Mich App 633, 640 (2017).

Company, he/she will have access to Confidential Information of the Company, will be developing close relationships with Company's clients and Company's staff, and potential clients and staff, such that Employee would have an unfair competitive advantage should Employee use such information to the detriment of the Company outside of his/her employment. Accordingly, Employee agrees that the following restrictive covenants are fair and reasonable and necessary to protect the Company and Company's legitimate business interests and will not unreasonably affect Employee's ability to otherwise work or earn a living.

A. <u>Confidential Information</u>

(i) Employee understands and acknowledges that during Employee's employment with the Company, Employee will learn or be given access to. may be entrusted with, or may assist in the development of, trade secrets and other confidential or proprietary information concerning the business and affairs of the Company, its clients and prospective clients, and other third parties who entrust information to the Company with the understanding, express or implied, that it will be kept confidential (collectively, **"Confidential Information"**). Confidential Information specifically includes, but is not limited to, the following, whether in hard copy, electronic copy or any other form or medium: (1) any and all information regarding any clients and prospective clients, including clients lists, contact information for a client, representatives of clients and prospective clients or representatives of clients with decision making authority; (2) the amounts billed to clients and the cost of services completed for clients; (3) employees, contractors, agents, and prospective employees, contractors, agents who have provided services for or on behalf of the Company, or are being solicited to provide such services for or on behalf of the Company; (4) products, services, procedures, methods, processes or programs in use or developed by Company (with or without Employee's assistance) and/or Employee or other Employees; (5) information pertaining to the Company's relationships with vendors and providers of products or services; (6) financial information and accounting procedures; (7) business plans and strategies, including potential acquisitions or divestitures; (8) sales, marketing and ecommerce strategies; (9) business personnel information including compensation structures and strategies. skills and qualifications; (10) training procedures, methods, manuals and processes; (11) intellectual property, including inventions and copyrightable works and procedures, methods and processes unique to services performed by the Company; and (12) any of the above information that is stored, maintained or used on any computer programs or databases. Confidential information is and will remain the sole and exclusive property

of the Company. Employee recognizes and agrees that nothing contained in this Agreement will be construed as granting any property rights, by license or otherwise, to any Confidential Information. Notwithstanding the foregoing, Confidential Information will not include information that Employee proves (i) us or has become generally known to the public or (ii) is or has been lawfully obtained by Employee from an independent third party under no obligation of confidentiality to the Company and without a breach of this Agreement.

* * *

B. **Non-Solicitation**

*** * ***

(ii) **Non-Solicitation of Clients**. During Employee's employment with the Company and for a period of two (2) years period of two (2) years following Employee's termination of employment or any reason (whether voluntary or involuntary or with or without cause), Employee shall not, directly or indirectly, either for Employee's own benefit or on behalf of any other person or entity: (1) solicit any Client or Prospective Client for or on behalf of an existing or prospective Competitive Business; (2) except in connection with Employee's employment by the Company accept employment on behalf of or for any Client or Prospective Client: or (3) interfere with or damage or attempt to interfere with or damage Company's business relationship with any Client or Prospective Client.

(iii) **Non-Compete**. During Employee's employment with the Company and for a period of five (5) years following Employee's termination of employment for any reason (whether voluntary or involuntary or with or without cause), Employee shall not, directly or indirectly, in one or a series of transactions or business structures, own, manage, operate, control, invest. or acquire an interest in, or otherwise engage or participate in a Competitive Business, whether as a proprietor, partner, stockholder, lender, director, officer, employee, joint venturer, investor, lessor, supplier, customer, or other participant. The restrictions contained within this Section apply to the states of Michigan, Indiana, Ohio and Illinois.

* * *

On or about February 7, 2022, the Defendant resigned from his employment with the Plaintiff. His last day of work was March 11, 2022. The Defendant subsequently became employed by Cauley Ferrari Detroit and/or Cauley Performance Automotive (collectively "Cauley").

The Plaintiff seeks injunctive relief to prohibit the Defendant from working for or on behalf of a competitor business or client of the Plaintiff, including Cauley; prohibit the Defendant from disclosing confidential, proprietary and trade secret information of the Plaintiff; prohibit the Defendant from soliciting any clients or prospective clients of the Plaintiff or from soliciting any personnel or prospective personnel of the Plaintiff for a period of two years; and to order the Defendant to return all of the Plaintiff's property.

III
The Plaintiff has not met its burden to prove injunctive relief should be issued

A
The Law

Under MCR 3.310(A), this Court has 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 (the Court of Appeals "will not overturn a trial court's grant or denial of a preliminary injunction save for an abuse of discretion." *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. Michigan law generally favors enforcing written contracts. 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.").[2]

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[2] 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:
>
> > "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and

On the other hand, Michigan favors a free market by which parties may of their own accord reach commercial agreements for the provision of services and goods. See, e.g., MCL 445.774 (Michigan Antitrust Reform Act). In the absence of a legal prohibition, contracting parties should be encouraged to explore the market to find the most mutually beneficial agreement possible. This not only furthers the freedom of contract, but it also benefits society by creating the most rational allocation of goods and services, thereby increasing the wealth of the entire society. See, e.g., Smith, *An Inquiry into the Nature and Cases of the Wealth of Nations, Representative Selections* (Bruce Mazlish, editor, The BobbsMerrile Company, Inc, 1961) (originally published 1776).[3] This proposition is the mirror image of the public policy of favoring the freedom of contract. In the absence of an enforceable agreement to the contrary, the public interest favors the free market and not binding parties to obligations to which they have not assented. Const 1963, art 1, § 9

> enforces it for him after it is made." [15 Corbin, Contracts (Interim ed.), ch. 79, § 1376, p. 17.

[3] Adam Smith at 108 explains in one particularly poignant passage:

> The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from and even opposite to, that of the public. To widen the market and to narrow the competition is always in the interests of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow citizens. The proposal of any new law or regulation of commerce which comes from this order ought always be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men whose interest is never exactly the same with that of the pubic, who have generally an interest Ito deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.

("Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state").

2. Balance of Harm.

Under this prong of the analysis, this Court must evaluate whether the harm suffered by the nonmoving parties 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 case, the balancing of the harm favors the Defendant where the Plaintiff has presented no evidence the Defendant has harmed the Plaintiff by purportedly improperly disclosing confidential information and will be further harmed by the denial of injunctive relief. In contrast, injunctive relief would render the Defendant unemployed. This factor favors the Defendant.

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. Here, the Plaintiff has failed to present an affidavit with the Motion to show its likelihood of prevailing on the merits. [4]Furthermore, the Defendant has presented credible arguments supported by an extensive affidavit that the Plaintiff must overcome to prevail, including that the Agreement does not govern the type of services the Defendant performs, and the

[4] See note 1.

restrictive covenants are not reasonable.[5] In sum, the Plaintiff has not shown it is most likely to prevail on the merits.

4. Irreparable Harm.

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.'

[5] The Defendant's prior employment disputes are irrelevant to the Court's decision.

> 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.

In the instant matter, the Plaintiff has failed to identify any harm, let alone irreparable harm, it has allegedly sustained. There has been no evidence presented that the Defendant has utilized any of the Plaintiff's confidential or proprietary information. No evidence or affidavit was presented with the Motion to support the Plaintiff's claim that "FTA's confidential information is improperly being disclosed and used by Defendant ARONDOSKI and Cauley and Defendant ARONDOSKI'S employment with Cauley is being unfairly exploited and advertised to Clients of FTA to gain an unfair competitive advantage." [Motion, p 11.] Nonetheless, if there are any damages actually sustained by the Plaintiff, such damages likely can be quantified and remedied with money damages based on any alleged lost business.

5. Other Considerations.

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

In light of the foregoing analysis, injunctive relief is unwarranted.

ORDER

In light of the foregoing Opinion, Plaintiff's Motion for Preliminary and Permanent Injunction is hereby **DENIED**.