

STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, MI 49417
616-846-8315

FASTENAL COMPANY, dba MANSCO,
Plaintiff,

v

**KURT PATRICK GROSS and HI-TECH
FASTENERS, LLC,**
Defendants.

**OPINION AND ORDER ON
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

File No. 22-007065-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 8th day of May, 2023:

PRESENT: THE HON. JON A. VAN ALLSBURG, Circuit Judge

Plaintiff, Fastenal Company ("Fastenal"), filed this action against a former employee, defendant Kurt Patrick Gross ("Gross"), and his new employer, Hi-Tech Fasteners, LLC ("Hi-Tech") alleging breach of a confidentiality and noncompetition agreement, misappropriation of trade secrets, and tortious interference with a business relationship or expectancy. Gross resigned from Fastenal on June 3, 2022, and began employment with a competitor, Hi-Tech, on the same day. Plaintiff's complaint was filed on November 4, 2022, and an evidentiary hearing on Plaintiff's motion was held January 3, 2023, which the court took under advisement. Upon review of the testimony, the evidence, and the law, the court finds that a preliminary injunction should issue for the reasons described below in this opinion.

Summary of the Facts

Fastenal and Hi-Tech are business competitors who sell and distribute industrial and construction products. During his employment with Fastenal, Gross signed a confidentiality and noncompetition agreement that included the following:

(b) Post-Employment Restrictions.

During the term of his/her employment and for a period of one (1) year after termination of employment, regardless of the reason for termination of Employee's employment, Employee will not, directly or indirectly solicit, sell to or offer or provide the provision of any similar services or similar products to:

- (1) any customer with whom Employee (or other employees or agents under Employee's supervision) has had contact or for whom Employee (or other employees or agents under Employee's supervision) has performed services during the last two years of Employee's employment at Employer.

On January 24, 2022, while still employed at Fastenal, Gross received an email about a commission bonus "bounty" program that targeted accounts that were currently Hi-Tech customers. Three weeks after receiving the message, Gross forwarded the information to his personal email address. Gross testified that he did so "to have something to look back on" because "it was weird" and he "thought it was a funny email." Gross did not identify any other emails he forwarded to his personal address for those reasons.

On June 3, 2022, his last day at Fastenal, Gross updated and printed a "rolodex" spreadsheet listing his Fastenal customers and other confidential customer information. Gross also emailed this spreadsheet to his personal email address and to remaining Fastenal employees Scott Kruizenga and Jason Botsford.

Plaintiff alleges that Gross violated the agreement in multiple ways. Plaintiff presented testimony that Gross inappropriately called on Todd Nedved, supply chain manager at Marvel Refrigeration. Marvel Refrigeration was a customer formerly serviced by Gross at Fastenal. Gross admits that he spoke to Nedved in person at the Marvel Refrigeration facility but testified that he only went by to get the phone number of Nedved's son-in-law. Nedved's son-in-law owned some farmland and had previously given Gross permission to hunt there. Gross told Nedved in that conversation that he could not solicit business for Hi-Tech until after his non-solicitation agreement expired. Nedved corroborated Gross's story in an affidavit.

Plaintiff also charges that Gross inappropriately contacted Powers Fasteners, a supplier to both Hi-Tech and Fastenal, in order to obtain a specific part that Fastenal sold to Charter House International (CHI). CHI was a customer formerly serviced by Gross at Fastenal. Plaintiff argues

that obtaining particular parts from suppliers on behalf of a customer is a service similar to the one he provided for customers at Fastenal and is therefore prohibited under the Confidentiality and Noncompetition Agreement. Gross argues that someone else at Hi-Tech obtained the specific part from CHI and then gave it to him to determine whether it was available. The part was stamped with the name of the supplier. Gross testified that this allowed him to put a member of the Hi-Tech sourcing department in touch with the supplier so that Hi-Tech could then sell the part to CHI.

Plaintiff alleges that Gross must have used his knowledge of Fastenal's proprietary and confidential information for the benefit of Hi-Tech. According to the affidavit of Fastenal employee David Scothorn, a CHI operations manager Ryan Vogelheim asked for and was given a "Bin Audit" report, which is a term only used by Fastenal representatives. Later, Scothorn saw Hi-Tech employee Kyle Greenwood holding that report at the CHI facility. Fastenal lost the CHI business to Hi-Tech despite Fastenal offering CHI deep discounts. Gross disputes Scothorn's account, saying that a "Bin Audit" report is simply an inventory of the parts a customer has in bins at the customer's facility and that the term is not unique to Fastenal. The information in a bin audit report belongs to the customer and the customer may distribute the information as it pleases. Greenwood testified that he did not receive any information from Gross when soliciting CHI.

Plaintiff goes on to state that Gross indirectly solicited Premier Components on behalf of Hi-Tech. Gross emailed Jake Everdeen of Premier Components, asking for contact information for a potential lead at Zook Farm Equipment. Premier Components was a customer formerly serviced by Gross at Fastenal. Zook Farm Equipment was not. Gross refused to sell to Premier Components directly but was willing to introduce Everdeen to Greenwood, who did unsuccessfully solicit Premier Components. Plaintiff calls this introduction an indirect solicitation. Gross says he did not solicit Premier Components because Everdeen is the one who asked to hear from another salesperson.

Fastenal salesman Travis Bordewyk testified that Fastenal had to lower their prices by 10% to keep Premier Components as a customer after Hi-Tech gave Premier a quote without asking for volume or usage. Without asking Premier for volume, the only way Hi-Tech could have generated an accurate quote was by using Gross's confidential information. Fastenal had to lower their prices by 10% to keep Premier Components as a customer. Defendant disputes Bordewyk's testimony.

Greenwood testified that he did get volume information from Premier, but also that Premier's requests were for commodity parts that would not change in price based on volume.

Finally, Fastenal employee Jason Botsford testified that he learned from Haworth, a major Fastenal customer, that Hi-Tech had quoted prices to Haworth that were 30% below what Fastenal was charging. Botsford believed that Hi-Tech could not have made these quotes without specific knowledge from Fastenal. Cory Newman of Hi-Tech testified that Haworth gave Hi-Tech target prices that Hi-Tech was able to meet on some parts. Newman also testified that he did not receive any information or help from Gross in quoting or negotiating with Haworth.

Preliminary Injunction Standard of Review

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."¹ "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights."² The status quo has been defined as "the last actual, peaceable, noncontested status which preceded the pending controversy."³ The Court must bear in mind 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."⁴

In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch Dist*, the Court of Appeals instructed that, "[w]hen deciding whether to grant an injunction under traditional equitable principles,

a court must consider (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

¹ *Davis v Detroit Financial Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012).

² *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–56; 588 NW2d 133 (1998).

³ *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985).

⁴ *Davis*, 296 Mich App at 614.

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.⁵

“Other considerations surrounding the issuance of a preliminary injunction 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.”⁶ The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued.⁷

1. Likelihood of Success on the Merits

The Court will first turn to the initial consideration: whether plaintiff has shown a likelihood of prevailing on the merits. Though plaintiff does not have to prove it *will* succeed on the merits, it does have to prove that it has a *substantial likelihood* of success on the merits.⁸

Fastenal’s complaint alleges three causes of action: breach of a confidentiality and noncompetition agreement, misappropriation of trade secrets, and tortious interference with a business relationship or expectancy. The first two counts are most relevant to the determination as to whether a preliminary injunction should issue. Fastenal’s first count alleges a breach of contract, and it must prove: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach.⁹

In this case, there is no dispute that the parties executed a confidentiality and noncompetition agreement. Fastenal has shown a substantial likelihood of success on the claim that Gross breached that agreement after accepting employment with Hi-Tech Fasteners, a

⁵ *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011), quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

⁶ *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990).

⁷ MCR 3.310(A)(4).

⁸ *Int’l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

⁹ *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

competitor of Fastenal. Gross conceded under oath that he emailed himself confidential information in violation of the confidentiality and noncompetition agreement. Both the “bounty” program email and the “rolodex” spreadsheet were confidential customer information under the terms of the agreement and were not to be distributed. Gross points out that there were around 80 customers on his spreadsheet, and he reasonably would need a list of who he was barred from soliciting. However, the spreadsheet he sent himself contained significantly more information than just a list of customers. Gross’s email exchange with Jake Everdeen of Premier Components also demonstrates an impermissible indirect solicitation. The remaining allegations have not been supported adequately enough to create a substantial likelihood of success on the merits.

Although no actual damages have been shown at this stage of the litigation, it is proper for a court to issue a permanent injunction prohibiting a former employee from continued employment with a new employer for the duration of the non-compete agreement if the court determines that the non-compete agreement is enforceable, the former employee has breached the non-compete agreement, and injunctive relief is otherwise warranted.¹⁰

Fastenal also asserts a trade secrets claim under the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.* MUTSA allows for injunctions and damages based on the misappropriation of trade secrets.¹¹ “Misappropriation” is defined as:

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

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired it under circumstances giving rise

¹⁰ See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994). Although the decisions of lower federal courts are not binding precedent, federal decisions interpreting state law are often persuasive. *Omian v Chrysler Group LLC*, 309 Mich App 297; 869 NW2d 625, 630-31 n6 (2015).

¹¹ MCL 445.1904 to MCL 445.1905.

to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.¹²

“Trade secret” is defined as follows:

“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.¹³

In *Hayes-Albion Corp v Kuberski*, the Michigan Supreme Court stated that an injunction that "effectively prevents defendants from earning a living in the field in which they have expertise" is too broad to support injunctive relief.¹⁴ It is difficult to establish damages in this type of case without direct evidence of disclosure and lost business.¹⁵ “Where ‘evidence and arguments are presented in support of both parties’ contentions’ in a trade secrets case, and plaintiff fails to identify an actual lost customer, plaintiff cannot establish ‘a substantial likelihood of success on the merits’ and injunctive relief is not warranted.”

In this case, Gross has conceded that he emailed himself confidential information in violation of the confidentiality and noncompetition agreement. Gross does not concede and strongly denies that he disclosed the confidential information to anyone else. Fastenal has produced only speculative and circumstantial arguments that Gross disclosed the confidential information to anyone else or that Gross used the confidential information in his employment with

¹² MCL 445.1902(b).

¹³ MCL 445.1902(d).

¹⁴ *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 189; 364 NW2d 609 (1984). Although *Hayes-Albion* was decided before the enactment of MARA, it provides guidance with respect to the nature and scope of appropriate injunctive relief.

¹⁵ *PrimePay, LLC v Barnes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 20, 2015 (Case No. 14-11838), p 25.

Hi-Tech. Fastenal has not yet shown a substantial likelihood of success on the merits of the misappropriation of trade secrets claim.

2. Irreparable Harm

Parties seeking a preliminary injunction must also establish that they will suffer irreparable harm in the absence of that injunction. A party must make “a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.”¹⁶ The presence or absence of irreparable injury “is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief.”¹⁷ The moving party must make a “particularized showing” of irreparable injury.¹⁸ “[A] preliminary injunction should not issue where an adequate legal remedy is available.”¹⁹ Granting a preliminary injunction to remedy economic injuries is unnecessary and inappropriate if the injuries can be remedied by damages at law.²⁰

Plaintiff points to case law showing that breach of a noncompetition agreement may constitute irreparable harm. In *Lowry Computer Products v Head*, a sales agent signed an agreement not to work for her employer’s competitors for one year after her termination and never to disclose trade secrets or confidential information.²¹ Applying Michigan law, the district court held that the “loss of consumer goodwill and the weakened ability to fairly compete that would result from disclosure of trade secrets and the breach of a non-compete agreement does establish irreparable injury.”

¹⁶ *Mich Coalition of State Employee Unions v Mich Civil Serv Comm*, 465 Mich 212, 225; 634 NW2d 692 (2001).

¹⁷ *Michigan AFSCME*, 293 Mich App at 149.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008).

²¹ *Lowry Computer Products, Inc v Head*, 984 F Supp 1111 (ED Mich, 1997).

Gross argues that the cases cited by plaintiff are inapplicable. Gross claims that, despite being styled as a confidentiality and noncompetition agreement, the agreement between the parties is not a noncompetition agreement because it does not completely prohibit Gross from working for a direct competitor of Fastenal. Rather, it prohibits Gross from soliciting his former customers and sharing proprietary information. This distinction is unfounded. By narrowly targeting the post-employment restrictions, Fastenal is complying with MCL 445.774a and its requirement that the agreement not to compete be reasonable as to its type of employment or line of business. Gross provides no authority for why a breach of narrowly targeted restrictions should be treated differently from a breach of restrictions that were broader, but still found to be reasonable.

3. Balance of Hardships

The third factor in determining whether to issue an injunction is 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. Fastenal seeks an injunction:

- (1) Enforcing the terms of the Confidentiality and Noncompetition Agreement executed by Defendant Kurt Patrick Gross, and enjoining Defendant Kurt Patrick Gross from engaging in activity prohibited by the Confidentiality and Noncompetition Agreement, including enjoining Defendant Kurt Patrick Gross from:
 - a. Continuing to breach the Confidentiality and Noncompetition Agreement by failing to maintain confidentiality of Fastenal's Customer Information, trade secrets, and confidential and proprietary information, by continuing to use Fastenal's Customer Information, trade secrets, and confidential and proprietary information;
 - b. Continuing to breach the Confidentiality and Noncompetition Agreement by directly or indirectly soliciting, selling to or offering or providing the provision of any similar services or products to any customer whom Gross (or other employees or agents under Gross's supervision) had contact, or for whom Gross (or other employees or agents under Gross's supervision) has performed services during the last two (2) years of his employment at Fastenal;
 - c. Otherwise continuing to violate the terms of the Confidentiality and Noncompetition Agreement.
- (2) Enjoining Defendant Hi-Tech Fasteners from

- a. Intentionally interfering with Fastenal's business relationship with Gross, and/or intentionally interfering with Fastenal's business expectation that Gross would/will comply with the terms of the Confidentiality and Noncompetition Agreement; and
- b. Inducing or causing Gross to violate the Confidentiality and Noncompetition Agreement, and/or inducing or causing Gross to violate or breach the business relationship or business expectancy held by Fastenal.²²

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights."²³

The balance of hardships here weighs in favor of granting injunctive relief. Fastenal has established that it would suffer at least some irreparable harm from the violation of the agreement. Gross and Hi-Tech have not shown that either of them would be subject to comparable harm. Under the proposed injunction, Gross may continue in his position at Hi-Tech without using Fastenal's confidential information or working with customers he handled in his last two years at Fastenal. Hi-Tech has other salespeople who are not bound by noncompete agreements and who may do business with Fastenal customers. Gross argues that an injunction ordering him to cease working for Hi-Tech would put him out of work and make him unable to support his family. This is not the injunction that Fastenal has proposed, so Gross's arguments against it are irrelevant.

4. Public Interest

The Sixth Circuit Court of Appeals has noted, "No important public policies readily appear to be implicated by the issuance of the preliminary injunction other than the general public interest in the enforcement of voluntarily assumed contract obligations."²⁴ This interest was more forcefully stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc v Ran*, where the District Court observed that the public has an important interest in the enforcement of contracts because if contracts are not enforced by a court, the court will be undermining the legitimate business

²² Plaintiff's Motion for Preliminary Injunction, at 3.

²³ *Alliance for the Mentally Ill*, 231 Mich App at 655–56.

²⁴ *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 551 (6th Cir., 2007).

expectations not only of the parties, but also of all contracting parties.²⁵ “It is the knowledge that valid and enforceable contractual agreements will be enforced in courts of competent jurisdiction which allows our competitive marketplace to thrive.”²⁶ “Without such a rule of law, parties could not rely on contracts to conduct their affairs.”²⁷

The proposed injunction enforces the agreement only to the extent necessary to reasonably protect a former employer. An injunction issued here would not leave Gross, with his years of experience in the industry, unable to put his expertise to economic use in the marketplace. In addition, a consideration of public interests must also consider the needs of customers in the industry. An injunction not only affects the parties to this lawsuit, but “also affects customers by denying them the opportunity to deal with” Gross.²⁸ The public interest is in Fastenal’s favor.

5. Complete Relief

A preliminary injunction would, by definition, only exist until a final resolution can be had on the merits.²⁹ The intent of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties’ rights, without granting final relief to either party.³⁰ Section 6 of the agreement states that, other than for preliminary injunctions, “the parties agree to arbitrate any claims, controversies, and disputes arising out of this Agreement, including but not limited [to] the enforceability, validity and damages.” Whether this Court grants or denies the requested injunction, resolution of the issue will allow the remaining issues to be determined in arbitration, leading to a final resolution of the case.

²⁵ *Merrill Lynch, Pierce, Fenner & Smith, Inc v Ran*, 67 F Supp 2d 764 (ED Mich, 1999).

²⁶ *Merrill Lynch*, 67 F Supp 2d at 781.

²⁷ *Id.*

²⁸ See *Hayes-Albion*, 421 Mich at 189.

²⁹ *Campau*, 185 Mich App at 729.

³⁰ *Id.*

Conclusion

Fastenal has shown that the preliminary injunction factors are in its favor. Plaintiff's motion for a preliminary injunction is GRANTED. A preliminary injunction shall issue, pending final judgment in this case, upon the following terms:

- (1) Defendant Kurt Patrick Gross is enjoined from engaging in activity prohibited by the Confidentiality and Noncompetition Agreement, including:
 - a. Continuing to breach the Confidentiality and Noncompetition Agreement by failing to maintain confidentiality of Fastenal's Customer Information, trade secrets, and confidential and proprietary information, by continuing to use Fastenal's Customer Information, trade secrets, and confidential and proprietary information;
 - b. Continuing to breach the Confidentiality and Noncompetition Agreement by directly or indirectly soliciting, selling to or offering or providing the provision of any similar services or products to any customer whom Gross (or other employees or agents under Gross's supervision) had contact, or for whom Gross (or other employees or agents under Gross's supervision) has performed services during the last two (2) years of his employment at Fastenal;
 - c. Otherwise continuing to violate the terms of the Confidentiality and Noncompetition Agreement.
- (2) Defendant Hi-Tech Fasteners is enjoined from:
 - a. Intentionally interfering with Fastenal's business relationship with Gross, and/or intentionally interfering with Fastenal's business expectation that Gross would/will comply with the terms of the Confidentiality and Noncompetition Agreement; and
 - b. Inducing or causing Gross to violate the Confidentiality and Noncompetition Agreement, and/or inducing or causing Gross to violate or breach the business relationship or business expectancy held by Fastenal.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Dated: May 8, 2023


Hon. Jon A. Van Allsburg, Circuit Judge