

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

PLASCORE, INC.,
Plaintiff,

v

JOSEPH MYDOSH,
Defendant.

OPINION AND ORDER ON
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

File No. 22-06847-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 11th day of July, 2022:

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

Plaintiff, Plascore, Inc. ("Plascore"), filed this action against a former employee, defendant Joseph Mydosh ("Mydosh"), alleging breach of an employment agreement, misappropriation of trade secrets, and statutory and common law conversion. The Plaintiff's complaint was filed, and a Temporary Restraining Order (TRO) was issued on April 25, 2022. The court extended the TRO pending a hearing on plaintiff's motion for preliminary injunction. After an evidentiary hearing held June 8, 2022, the court further extended the TRO pending a ruling on the motion which the court took under advisement. Upon review of the testimony and evidence (the ten exhibits admitted at the hearing include a flash drive with three massive electronic files,¹ and a transcript of the deposition testimony of the forensic computer examiner) and the law, the court finds that a preliminary injunction should issue for the reasons described below in this opinion.

Summary of the Testimony and Evidence

Plascore is a Michigan corporation with a forty-year history based in Zeeland, Michigan. The company engages in the manufacture of honeycomb core, honeycomb panels, composite structures, and cleanrooms, and sells and distributes its products in the United States and

¹ A flash drive with these three exhibits was submitted to the court by plaintiff's counsel on June 13, 2022.

globally. Honeycomb-based structural materials provide high strength-to-weight ratios, energy absorption and directional qualities, and are used in aerospace, marine, transportation, RV, and other original equipment manufacturer (OEM) applications. Plascore is structured generally into five business units: the thermoplastic/plastic honeycomb group, the metals group, the Aramid/Kevlar (Nomex) group, the laminated panel group, and the value-added aerospace group.

Mydosh was initially employed by Plascore in April 2013 as a sales engineer in its Zeeland, Michigan facility. In January 2014 Mydosh accepted a promotion to regional sales manager for Plascore's southeast region, and relocated to Winston-Salem, North Carolina. In that role Mydosh was responsible for developing markets and supporting outside sales in the southeast region, principally for the company's thermoplastic/plastic business unit. That unit sells honeycomb core materials, as well as sandwich panels, which consist of a honeycomb core "sandwiched" between two face sheets. Face sheets can be made from a variety of materials (which Plascore does not manufacture).

The agreement signed by Plascore and Mydosh on April 15, 2013, titled "Employment Agreement," contained several paragraphs relevant to the issues before the court.² The first confirmed Plascore's ownership of proprietary information in Section 5 of the Agreement:

5. Proprietary Information of the Employer. All documents and tangible things, including diskettes and other storage media, in any tangible form, containing information generated in the course of employment, are the property of the Employer. Upon termination, for any reason, the Employee will deliver to the Employer all such documents and tangible things, including, without limitation, diaries, phone lists, documents containing customer lists, customer information, product information, pricing information, information as to suppliers and sources of supply or raw or finished goods or services, and financial information of the Employer. *Id.*

Mydosh further agreed not to disclose proprietary information in Section 6 of the Agreement:

6. Nondisclosure of Proprietary Information. Employee shall not communicate or disclose to any person, either directly or indirectly, under any circumstances or at any time, any knowledge or information whatsoever acquired by the Employee during the period of employment relating to or concerning the Employer's inventions, trade secrets, systems, or any other confidential information regarding the property, business and affairs of the Employer, or any of its subsidiaries, without the written consent of the Employer; and the

² Plaintiff's Exhibit 1.

Employee shall not utilize or make available any such knowledge or information, either directly or indirectly, in connection with the soliciting of or the acceptance of employment with any competitor of the Employer. *Id.*

Section 8 of the Agreement stated the parties' noncompete agreement:

8. Covenant Not to Compete. For a period of three (3) years from the date of the termination of the Employee's employment, the Employee will not, within the geographic limits of the United States, directly or indirectly, own, manage, operate, join, control, or be employed in any manner with any business of the type and character of the business engaged in by the Employer at the time of such termination. During the term of the Employee's employment, and for a period of three (3) years thereafter, the Employee shall not, either directly or indirectly, make known to any person, firm or corporation the names or addresses of any of the customers of the Employer or any other information pertaining to them, or call on, solicit, or take away, or attempt to call, solicit, or take away, any of the customers of the Employer, either for himself/herself or for any other person, firm, or corporation. *Id.*

Section 9 of the Agreement provided for enforcement of the mutual promises and covenants in both law and equity, by injunction and otherwise, and Section 10 of the Agreement stated that it would be construed in accordance with the laws of the State of Michigan. *Id.*

Michael Niemerski is the market development engineering manager for Plascore and has been with the company for thirty-one years. He testified that Mydosh in his role was expected to exchange sales opportunities and strategies with the company and other sales managers. Niemerski has attended trade shows and related events pertaining to composites, honeycomb, and sandwich panels with Mydosh, as well as industry-specific trade shows in the marine, RV, and other industries.

Niemerski testified that Plascore began a supply relationship with Ridge Corporation nearly a decade ago, when Plascore bought face sheets manufactured by Ridge to make sandwich panels. Shortly thereafter Plascore also began selling honeycomb to Ridge, enabling Ridge to manufacture sandwich panels itself. Niemerski acknowledged that Ridge became both a supplier and a customer, and thereby became a competitor also. He said Plascore took this step carefully, with the intention of expanding the total market for its products rather than to lose business to Ridge. A key distinction between Plascore's sandwich panels and Ridge's sandwich panels was that Ridge could manufacture sandwich panels in longer lengths than Plascore.

About four to six years ago, Plascore brought Ridge together with one of Plascore's sandwich panel customers, Airstream (an RV manufacturer). Plascore then learned that Ridge

had begun manufacturing sandwich panels with a foam core rather than a honeycomb core and had begun supplying its own foam-core sandwich panels to Airstream. Plascore then ceased to be a supplier to Ridge, and now buys only face sheets from Ridge. Niemerski testified that Ridge now is a direct competitor to Plascore in the manufacture of thermoplastic panels. Ridge has expanded the sale of its competing panels into new industries, as Niemerski has seen Ridge's representatives at trade shows at which it did not previously participate. He was surprised at defendant's assertion, in his affidavit, that Ridge is not a competitor of Plascore.³ Niemerski asserted that Ridge's competition with Plascore is well-known among all of Plascore's sales representatives, and he was alarmed when he heard that Mydosh had accepted employment with Ridge.

Plascore's evidence shows that Mydosh had contacted Ridge in November 2021 to inquire as to Ridge's ability to meet the specifications of a prospective customer. On Friday, November 22, 2021, Mydosh emailed the president of Ridge Corp., Gary Grandominico, as follows:

Good afternoon Gary,

I'm currently in discussions with a prospective client that has a specialized application where a honeycomb panel does not appear to be a practical fit. Out of curiosity, are you able to build a panel as thin as 3mm? If so, would you be able to provide a ft² weight on them? Also very interested in the max operating temperature they are able to withstand.

Best Regards,

Joe Mydosh,

Regional Sales Manager USA – Southeast
Plascore, Inc.

The president of Ridge Corp. responded the following Monday, November 22, 2021:

Well, I need a lot more information on the actual application. I'll get back to you with questions.

VALUE always exceeds price.

Gary A. Grandominico

Founder & CEO

Ridge Corporation⁴

³ Mydosh, in his affidavit of May 9, 2022, does not directly state that Ridge and Plascore are not competitors. His affidavit asserts that "Plascore sells to a variety of markets with its primary market being aerospace, followed closely by "clean room" systems," while "Ridge is focused almost entirely on commercial transportation (bus/rv/semi) and some marine segments." He noted differences between their sandwich panel production capabilities and said, "There are numerous competitors for both Plascore and Ridge." Defendant's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 1, ¶¶ 15-18.

⁴ Plaintiff's Exhibit 8.

On December 1, 2021, Mydosh sent to Gary Grandominico an event titled, “Accepted: Dinner with Joe Mydosh.”⁵ No further evidence was provided as to Mydosh’s contacts with Ridge over the following four months.⁶ Then, on March 30, 2022, at 4:45 p.m.,⁷ Mydosh emailed Olaf Huebner, president of Plascore, to advise that he had been offered “a position with another company.”⁸ Mydosh noted in that email that Plascore had not been replacing other regional sales managers who had left the company, causing him some concern about his future. Heubner replied within a half hour, acknowledging that Mydosh was “seeing this pretty clear eyed” and offered to meet with Mydosh the following afternoon.⁹ The record does not show what transpired at that meeting (or if it was held), but Mydosh sent a letter of resignation on April 14, 2022, effective April 29, 2022, and duplicated it by email that day at 7:01 p.m.¹⁰ It is now known that Mydosh emailed a substantial amount of Plascore data to himself at his personal email address on April 13, 2022, the day *before* he submitted his letter of resignation.¹¹

The following day, Friday, April 15, 2022, Huebner emailed Mydosh at 11:40 a.m., attaching a letter accepting Mydosh’s resignation (effective April 29, 2022), and reminding Mydosh of his obligation to maintain the confidentiality of all of the company’s information and trade secrets, and to return any property, records, or other materials to Plascore, including information stored on electronic devices. Heubner requested that Mydosh sign a copy of the letter and return it to show his awareness and acceptance of these obligations. At 8:48 p.m. that same day, Heubner sent a second email to Mydosh, stating:

⁵ Plascore’s Exhibit 9.

⁶ Mydosh states in his affidavit of May 9, 2022, that he “was scheduled to meet with representatives of Ridge regarding an open sales position at Ridge,” in December 2021, but that the meeting was postponed to January 18, 2022. Defendant’s Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction, Exhibit 1, ¶ 27.

⁷ See footnote 22, referencing the files Mydosh transferred (or copied or updated) to his Plascore laptop just 2½ hours earlier.

⁸ Mydosh states in his affidavit of May 9, 2022, that he received an offer letter from Ridge on March 1, 2022, for a position as a structural composites sales manager. Defendant’s Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction, Exhibit 1, ¶ 28.

⁹ Plaintiff’s Exhibit 2.

¹⁰ Plaintiff’s Exhibit 3.

¹¹ Mydosh states in his affidavit of May 9, 2022, that he “ran a customer/vendor report and a defined opportunities report and exported certain data from the reports to an Excel spreadsheet,” explaining that he did so, “so that I would be aware of Plascore’s customers and so that I would not inadvertently violate the non-solicit portion of the employment agreement.” Defendant’s Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction, Exhibit 1, ¶ 30.

“After discussion with some of our colleagues about your future employer, Ridge Corporation, there is significant concern regarding a conflict. There is concern that you will not be able to perform your new role for Ridge and meet the obligations I sent to you in the letter this morning.

The main concerns surround sandwich panels and the overland market although there are others. Ridge is in the same market, same products, same applications to the same customers. www.ridgecorp.com/transcore”¹²

There is no evidence that Mydosh responded to this second email (and no evidence that the letter sent by Huebner was signed and returned). Huebner sent the following email to Mydosh on April 19, 2022, at 5:02 p.m.:

“Joe,

This is a follow up on our conversation this afternoon (4:42pm).

In light of your decision to pursue employment with Ridge Corporation, in what Plascore has stated is a direct competitor and in violation of your Employment Agreement, Plascore accepts your resignation with an effectivity date of immediately.

Our records indicate you sent a copy of a customer list to your person email on 3/30/22. As is required in your Employment Agreement, Plascore demands that this information be returned and destroyed immediately.

Best regards,

Olaf Huebner

President, Plascore, Inc.”¹³

Plascore uses business database software developed by SAP.¹⁴ Niemerski testified that he and other Plascore employees have limited access to the database, based upon each employee’s “need-to-know,” and each employee has a user ID and a password for access to approved sectors of the database. Niemerski noted that he does not have access to the company’s financial records or human resources information. Mydosh, as a regional sales manager, had access to the company’s business contacts and customers. Niemerski testified that on March 30, 2022, Mydosh emailed to himself, at a private gmail.com email address, a Plascore file titled “Complete Customer and Vendor List,” (“CCVL”) as well as a file titled, “Defined Opp List” (meaning “Defined Opportunities List” (“DOL”), consisting of information as to potential

¹² Plaintiff’s Exhibit 4 and 5.

¹³ Plaintiff’s Exhibit 6 (typographical errors in original).

¹⁴ SAP SE is a German multinational software corporation that develops enterprise software to manage business operations and customer relations. www.sap.com.

customers and sales opportunities. The size of these files was significant, containing over 5,500 lines in spreadsheet format (though Niemerski acknowledged that the number of lines in the spreadsheet does not correspond to the number of Plascore's actual and potential customers, as more than one, and perhaps several, lines in the spreadsheet may correspond to the same customer).

Niemerski testified that the two files have been made available to counsel in the present case pursuant to a protective order and he presented a sample of the database.¹⁵ Each of Plascore's customers and vendors were listed vertically in the CCVL, and the detailed information as to each was contained in columns of data listed horizontally across the spreadsheet. The DOL was formatted in the same way, with years of accumulated data shown as to each potential customer, including projected value of future sales, product categories, type of product opportunity, industry sector, likelihood of sales success, contact names and information, and type and timing of future sales efforts. Niemerski confirmed that the detailed information contained in these databases is knowledge unique to Plascore, accumulated over many years, and is not easily duplicated.

Plascore retained Brandon Fannon, owner of Axis Discovery, as its computer forensics expert. Mr. Fannon has owned and operated Axis Discovery since 2013. He is certified as a Certified Computer Examiner (CCE) through the International Society of Forensic Computer Examiners, is certified as a Data Recovery Expert, and has been a Certified Forensic Computer Examiner. He is also certified as a Computer Hacking Forensic Investigator and as a Data Recovery Expert.¹⁶ Fannon testified that he was given several devices by Plascore to analyze, including Mydosh's Plascore Dell laptop, a Western Digital USB drive, a Microsoft Surface RT (tablet), a Google Chromebook, and a micro SD memory card.¹⁷ He conducted his analysis by documenting the make, model, and serial number of each device, and then creating two full images of the hard drive of each device – one for preservation purposes, and the second for the purpose of analysis.¹⁸

¹⁵ Admitted as a summary pursuant to MRE 1006. Plaintiff's counsel provided a USB flash drive to the court (and opposing counsel) containing exhibit (an Excel file) titled, "Plascore P4 22-6487-CB 34788881_1." This exhibit contains two spreadsheets, one under the title "Defined Opp List" and the second under the title "Complete Customer & Vendor List."

¹⁶ Fannon's deposition was taken June 6, 2022, and the transcript of his deposition was admitted into evidence as Plaintiff's Exhibit 10. His curriculum vitae was attached to that transcript as Exhibit 2. Deposition references are hereafter cited, "Fannon dep., p. ____").

¹⁷ Fannon dep., p. 7.

¹⁸ *Id.*, p. 45-46.

Two exhibits were identified and used at Fannon's deposition, were the subject of cross-examination, and are admitted in evidence here.¹⁹ At the time of his deposition, Fannon had conducted some analysis of the Plascore laptop, and determined that Mydosh last used it on April 19, 2022.²⁰ The Western Digital USB drive was analyzed and found to have previously been connected to that same laptop, and had also been connected to two other devices (one being the Microsoft Surface RT, and the other being an unidentified Windows computer). Mydosh also used a Samsung S20 or S21 cell phone while working for Plascore, but the phone had been "factory reset" on April 27, 2022, before Mydosh turned it over to Plascore.²¹

Fannon's analysis showed that a Plascore file identified as the "Customer List.xlsx" file was copied (or updated) to Mydosh's Plascore Dell laptop computer by March 30, 2022, at 2:15 p.m.,²² and the "Sales Lead Management List_Southeast.xlsx" file was copied to the same laptop two days earlier, on March 28, 2022, at 9:31 a.m. On April 13, 2022, at approximately 11:40 a.m. – the day before Mydosh's resignation from Plascore – both files were transferred to the Western Digital USB drive. The USB drive was then connected to another Windows-based laptop on April 22, 2022, at 8:47 p.m. This laptop was not identified or analyzed by Fannon.

Fannon opined that the Plascore files could have been transferred onto the unidentified laptop. By the time of his analysis of the USB drive and Dell laptop, both files had been deleted from those two devices, probably on April 28, 2022. Fannon concluded there is no way to verify whether the files in question had been transferred to another device before they were deleted on the analyzed devices, but the device on which those files were stored *was* connected to another unidentified laptop.²³ He also found no evidence that the Plascore customer list file had been

¹⁹ The first of these exhibits is contained on the USB flash drive provided by plaintiff's counsel, under the file name, "MFT Analysis of 34872097_1" (MFT meaning "Master File Table"). The Master File Table lists all files on a specific hard drive with various system-related metadata about the file, as well as the actual physical location of the file on the drive. Fannon dep., p. 36. The second of these exhibits is located on the same flash drive under the file name, "Plascore v. Mydosh - external WD HDD of 34862874_1" and lists thousands of files identified on the flash drive, along with access, modification, and deletion dates.

²⁰ *Id.*, p. 8.

²¹ *Id.*, p. 11-13, 30, 32-33, 41-42, 69. Fannon testified that he had not completed his analysis of the Surface tablet, the Chromebook, or the micro-SD card.

²² This file was transferred to Mydosh's laptop just 2½ hours *before* he emailed Huebner about his job offer. See Plaintiff's Exhibit 2.

²³ Fannon dep., p. 49-53, 59-63, 65. Fannon calculated that just over 9,000 files were deleted on or about April 28, 2022. *Id.*, p. 66. This testimony conflicts with Mydosh's affidavit of May 9, 2022, in which Mydosh avers that he deleted the files within minutes after "a meeting on April 19" with Huebner. Defendant's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 1, ¶¶ 37-38. Mydosh's affidavit also conflicts with Fannon's testimony that the files still existed on April 22, 2022, when the Western Digital USB drive was connected to an unidentified Windows-based laptop. Fannon dep., p. 58-65.

emailed by Mydosh to anyone other than himself, and no evidence that Mydosh had contacted any Plascore customers after the date of his resignation. However, Fannon could not conclusively say, based upon his analysis, that Mydosh had not done so, because of the missing laptop to which the USB device had been connected.²⁴

The present action was filed by plaintiff on Monday, April 25, 2022, and a Temporary Restraining Order was issued on the same day. At 4:24 p.m. on that date, plaintiff's counsel sent to Mydosh's personal email account, jmydosh@gmail.com, a cover letter listing and enclosing the documents filed that day with the court, including a copy of the TRO. Defendant's counsel appeared in the action on April 29, 2022, and the initial hearing on plaintiff's motion for preliminary injunction was held on May 16, 2022. In light of Fannon's analysis and testimony, Plascore is unwilling to accept Mydosh's assurances that he did not intend to violate the employment agreement, and that he deleted the Plascore information. The court continued the preliminary injunction hearing on June 8, 2022 and took the matter under advisement pending receipt of the electronic exhibits.

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." *Davis v Detroit Financial Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656; 588 NW2d 133 (1998). The status quo has been defined as "'the last actual, peaceable, noncontested status which preceded the pending controversy.'" *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). 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." *Davis*, 296 Mich App at 614.

In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011), 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

²⁴ *Id.*, p. 29, 43, 62–63.

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.²⁵

“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.” *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990). The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4).

1. Likelihood of Success on the Merits

Not surprisingly, the Court will first turn to the initial consideration, i.e., 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. *Int’l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

Plascore’s complaint alleges four causes of action: breach of an employment agreement, misappropriation of trade secrets, and statutory and common law conversion. The first two counts are most relevant to the determination as to whether a preliminary injunction should issue. Plascore’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. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

In this case, there is no dispute that the parties executed an employment agreement, and Plascore has shown a substantial likelihood of success on the claim that Mydosh breached that agreement by accepting employment with Ridge Corp., a competitor of Plascore. 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. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994).²⁶

²⁵ Quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

²⁶ 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, 630-631 n6 (2015).

Mydosh responds that the terms of the noncompetition agreement are overbroad and therefore unreasonable. However, under Michigan law, noncompetition agreements in employment contracts, even if overbroad, remain enforceable *to the extent they are reasonable*. Contracts in restraint of trade or commerce are generally unlawful. “A contract ... between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.” MCL 445.772. However, there are specific exceptions to this rule. “It is the public policy of Michigan as embodied by statute to enforce reasonable non-competition provisions in employment contracts.” *Leach v Ford Motor, Co.*, 299 F Supp 2d 763 (ED Mich, 2004), at 776. The Michigan Antitrust Reform Act (“MARA”), MCL 445.771 *et seq.*, permits an employer to protect its “reasonable competitive business interests,” stating:

“An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.” MCL 445.774a(1).

A non-compete agreement protects the employer’s reasonable competitive business interests if it protects “against the employee’s gaining some unfair advantage in competition with the employer, but [does] not prohibit the employee from using general knowledge or skill.” *St. Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). To be reasonable in relation to an employer’s competitive business interest, 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. *Coates v Bastian Brothers, Inc.*, 276 Mich App 498, 507; 741 NW2d 539 (2007).

The employer’s reasonable competitive interests include protecting “close contact with the employer’s customers or customer lists, or cost factors or pricing.” *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp.*, 511 F3d 535, 547 (6th Cir., 2007) (quotation marks omitted). In this case, Mydosh’s close contact with the plaintiff’s customers in the southeastern United States would arguably give him an unfair advantage in taking those customers to a competing company. The means by which that unfair advantage is avoided may involve restrictions upon where Mydosh can compete, how long the restrictions continue, and the kinds of business to which the restrictions apply. The geographic, chronological, and scope-of-business restrictions are all at issue. The court may enforce the terms of the parties’ agreement to the extent that its duration, geographical area, and the type of employment or line of business affected are reasonable. The reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed. *Coates*, 276 Mich App at 508.

In *Edwards Publications, Inc. v Kasdorf*, unpublished per curiam opinion of the Court of Appeals (Docket No. 281499, Jan. 20, 2009),²⁷ the Court of Appeals reversed and remanded a trial court's dismissal of a claim alleging breach of a noncompetition agreement, where the plaintiff and plaintiff's former employee's new employer were clearly in competition. The court did not discuss the geographic area or duration of the agreement, but focused on the plaintiff's reasonable competitive business interests, stating:

"Over a 13-year period, Kasdorf developed and nurtured close and personal relationships with numerous business customers while working for Edwards, learning much about their operations, tendencies, and leanings. The businesses reached a comfort level with Kasdorf that might not be reached, or might take awhile to reach, with another sales rep. By going to work for Bilbey, where Kasdorf's accounts would be with many of those same customers or where those customers would be subject to not-so-cold cold calls, Kasdorf would be gaining and taking an unfair advantage in competition with Edwards after years of acquiring a unique insight into various business operations thanks to her employment with Edwards. The development and cultivation of close relationships with people is undeniably a driving force in the sales profession and generates revenue; the more reliable, liked, and accountable the rep, the more income that is generated. And Kasdorf's relationship with each contact person at a particular business most certainly is unique. While Kasdorf may have acquired general knowledge, skill, or facility in relation to the mechanical functioning of sales, e.g., how to generally approach a customer, sell ad space, take ad requests and materials, and finalize an ad for publication, she also developed goodwill and strong personal relationships that are invariably different from person to person or business to business and cannot be labeled as generally acquired knowledge." *Id.*, slip op., p. 2.

The Court in *Edwards Publications* concluded that an employee who establishes direct customer contacts and relationships as the result of the goodwill of his or her employer's business is in a position to unfairly appropriate that goodwill and thus unfairly compete with the former employer upon departure. This analysis is similar to that applied to the medical practice in *St. Clair Medical*, 270 Mich App at 266, and is the key to identifying the employer's reasonable competitive business interests.

²⁷ The court recognizes that it is not bound by this unpublished decision, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and merely views the opinion as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003). Unpublished opinions can be instructive or persuasive. *Beyer v Verizon North, Inc*, 289 Mich App 195; 795 NW2d 826 (2010); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).

Plascore 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. MCL 445.1904-.1905. "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 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. [MCL 445.1902(b).]

"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. [MCL 445.1902(d).]

In *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 189; 364 NW2d 609 (1984), 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.²⁸ It is difficult to establish damages in this type of case without direct evidence of disclosure and lost business. *PrimePay, LLC v Barnes*, 2015 US Dist LEXIS 65710, at *62 (E.D. Mich, May 20, 2015) ("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.").

²⁸ Although *Hayes-Albion* was decided before the enactment of MARA, it provides guidance with respect to the nature and scope of appropriate injunctive relief.

In this case, Plascore's personal relationships with its customers in the southeastern United States were generally made through Mydosh's personal contacts with those customers. Mydosh is therefore in a unique position to unfairly appropriate that goodwill through his own personal relationships with the individuals who serve as the contacts with those customers. This is true even if Mydosh does not use Plascore's confidential information to supplement his own personal knowledge. The time, geographic reach, and scope of the noncompete agreement are all intended to reduce Mydosh's ability to unfairly compete against his former employer, as the effectiveness of Mydosh's personal knowledge, as to pricing, customer needs, and his depth of knowledge regarding customer contacts, will fade (as to accuracy and relevancy) over time and will reach a point at which Mydosh's competition against his former employer is no longer "unfair" and such competition is no longer unreasonable. The court concludes that at the present time, however, Plascore has shown a substantial likelihood of success on the merits.

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

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." *Michigan AFSCME*, 293 Mich App at 149. The moving party must make a "particularized showing" of irreparable injury. *Id.* "[A] preliminary injunction should not issue where an adequate legal remedy is available." *Id.* Granting a preliminary injunction to remedy economic injuries is unnecessary and inappropriate if the injuries can be remedied by damages at law. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008).

"A breach of contract, by itself, does not establish that a party will suffer an irreparable injury." *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998). "In order 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.* "The injury must be both certain and great, and it must be actual rather than theoretical." *Id.* (citation omitted). "Economic injuries are not irreparable because they can be remedied by damages at law." *Id.* "A relative deterioration of competitive position does not in itself suffice to establish irreparable injury." *Id.* (citation omitted). 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).

Plascore has yet to provide evidence of actual damages, and focuses at this stage upon the risk of damage and the scope of potential damages arising from the massive amounts of its confidential information which Mydosh cannot prove has been deleted from the devices which were under his control and to which devices Plascore's data was disclosed and potentially shared. These remaining uncertainties – which involve the potential loss of customers and goodwill – support Plascore's claim for preliminary injunctive relief, even if they might not be sufficient to award damages or permanent injunctive relief.

3. Balance of Hardships

In this case Mydosh has nine years of experience as a sales engineer and regional sales manager in the composite panels industry. While his skills and experience in sales is no doubt transferable across industries and products, his experience in the sale of composite panels is certainly more valuable in those industries in which Plascore operates than it would be in any other industry in which Plascore does not operate. To prohibit him from working for any Plascore competitor therefore devalues his sales expertise significantly, as he is unlikely to command as high a salary outside the composite panels industry. Enforcement of the noncompetition agreement therefore imposes a financial hardship upon him.

At the same time, this was a known hardship, voluntarily assumed by Mydosh. He left Plascore voluntarily, knowing that he had obligated himself to a noncompetition agreement with Plascore. Although Mydosh had concerns about the security of his employment and compensation at Plascore, this is not a case in which Plascore terminated Mydosh and then sought to enforce the noncompetition agreement against him.²⁹

In response to Plascore's claim of potential irreparable damage arising from the use of its confidential information to compete against it, Mydosh alleges a good faith explanation for the copying of company information, and further alleges this information has been deleted.³⁰

²⁹ See, for example, *Arakelian v Omnicare, Inc.*, 735 F Supp 2d 22, 41 (SDNY 2010) (New York courts will not enforce a non-competition provision in an employment agreement where the former employee was involuntarily terminated). See also *Bishop v Lakeland Animal Hosp., P.C.*, 268 Ill App 3d 114, 118, 644 NE2d 33 (1994) (The implied promise of good faith inherent in every contract precludes the enforcement of a noncompetition clause when the employee is dismissed without cause); *Wrigg v Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont 496, 503; 265 P3d 646 (2011). Cases from other jurisdictions, although not binding on this Court, may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

³⁰ The court is not aware of any case law permitting a good faith defense to a claim of violating a noncompete agreement or misappropriating trade secret information, and defendant has not offered any.

Plascore does not believe these assertions, and points to the evidence undermining Mydosh's claims of good faith and supporting a conclusion that Mydosh's alleged deletion of such information may not have occurred and may still be in his possession on an unidentified Windows-based laptop. Plascore's point is a valid one. Mydosh has years of experience and personal knowledge relevant to the industries in which composite panels are used, and ordinarily would be permitted to use his "general knowledge and skill" in the composites industry. *Coates*, 276 Mich App at 507. However, his use of an 8,500-line spreadsheet to supplement and enhance his personal knowledge would give him an "unfair advantage in competition with the [former] employer." *Id.*

His assurance that he doesn't have this information and wouldn't use it unfairly or in violation of his employment agreement loses credibility in light of his surreptitious copying of substantial data, sending it to his personal email address, and using a USB drive containing the data in an unidentified laptop prior to allegedly deleting the data. His wiping of all data from his company-provided smartphone before returning it gives credence to his former employer's belief that Mydosh was attempting to cover his tracks with respect to his retention of Plascore's data. And, it must be noted, Mydosh has not yet "come clean" and provided *all* identified electronic devices for analysis to verify that he has in fact deleted all of Plascore's confidential information.

At the same time, however, there is no evidence that disclosure has occurred, and no damages have been shown. The Court of Appeals, in *CMI Int'l v Internet Int'l Corp*, 251 Mich App 125, 133-134; 649 NW2d 808 (2002), stated, "Even assuming that the concept of 'threatened misappropriation' of trade secrets encompasses a concept of inevitable disclosure, that concept must not compromise the right of employees to change jobs." Applying that analysis here, the balance of interests tilts in favor of Mydosh's right to change jobs if he has honestly deleted all of Plascore's information as verified by analysis of all of the devices which have been identified as possible locations of Plascore's confidential information. Until then, the existence of unknown and unevaluated devices which may contain Plascore's confidential information presents an intolerable risk of irreparable harm to Plascore.

4. Public Interest

The 6th 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." *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 551 (6th Cir., 2007). This interest was more forcefully stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc v Ran*, 67 F Supp 2d 764 (ED Mich, 1999), 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 expectations not only of the parties, but also of all

contracting parties. "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." *Merrill Lynch*, 67 F Supp 2d at 781. "Without such a rule of law, parties could not rely on contracts to conduct their affairs." *Id.*

This interest competes with the public interest in permitting individuals to make their own decisions about their careers and employment. In other words, the court should attempt to avoid an outcome that leaves Mydosh, 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" Mydosh. See *Hayes-Albion*, 421 Mich at 189. Unfortunately, the existence of an unidentified computer on which Plascore's extensive confidential information may yet reside tilts the competing interests in Plascore's favor.

5. Complete Relief

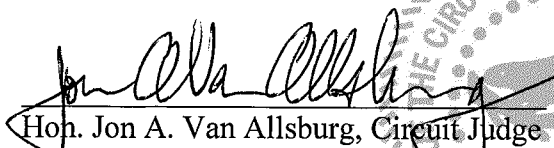
A preliminary injunction would, by definition, only exist until a final resolution can be had on the merits. *Campau*, 185 Mich App at 729. The intent of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights, without granting final relief to either party. *Id.* The preliminary injunction sought by Plascore will temporarily prevent Mydosh from accepting his desired employment, but perhaps not for the three years sought by Plascore, as the parties will return for a final hearing well before then. In the meantime, the parties are engaged in ongoing discovery, and it may be that the balancing of the above considerations will change, perhaps by Mydosh "coming clean" and turning over for analysis all of the devices to which Plascore's files have been exposed.

Conclusion

Plascore has shown a substantial likelihood of success on the merits, and its motion for a preliminary injunction is GRANTED. The terms of the Temporary Restraining Order issued by the court on April 25, 2022 shall continue in force as a preliminary injunction pending final judgment in this case.

IT IS SO ORDERED.

Dated: July 11, 2022


Hon. Jon A. Van Allsburg, Circuit Judge

