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

BEAUTY FUSION AESTHETICS, LLC,
a Michigan limited liability company,

Plaintiff,

v.

THE NEW 555 COMMERCIAL LLC,
a Michigan limited liability company,

Defendant, and

ICON ANTI-AGING AND AESTHETICS PLUS,
a Michigan professional limited liability company,

Nominal Defendant.

Case No. 2023-200652-CB

Hon. Victoria Valentine

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

At a session of said Court held on the
6th day of September 2023 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction. The parties appeared for oral argument at which time the Court took the matter under advisement. The Court, having read the briefs, having heard oral argument, and being fully advised in the premises, hereby DENIES Plaintiff's motion for the reasons set forth below.

PERTINENT STATEMENT OF FACTS

Plaintiff, Beauty Fusion Aesthetics, LLC ("Beauty Fusion") signed a Lease Agreement ("Lease") with Defendant, The New 555 Commercial LLC ("555"), which provides in part:

> **1. LEASE.**
>
> Landlord, in consideration of the rents to be paid and the covenants and agreements to be performed by Tenant, does hereby demise and lease unto Tenant that certain premises located in the Building (defined below) known as **Suite 20U (the "Premises") having an area of 1,975 rentable square feet (1,763.4 usable square feet plus 12% common area factor)** (the "Premises Floor Area") (measured to the middle of the side walls and to the exterior of the front and rear walls of the Premises, and not including service corridors), as shown on the *Location Plan attached hereto as Exhibit "A"* and being located in the Building (as defined herein), together with the non-exclusive right and easement to the use of the parking and common facilities (the "Common Areas") which may from time to time be furnished by Landlord in common with Landlord and the tenants and occupants (their agents, employees, customers and invitees) of the Building in which the Premises are located, and of Landlord's other adjacent buildings now or hereafter constructed, if any. The "Building" refers collectively to the group of buildings in the City of Birmingham, Michigan commonly known as 555 South Old Woodward and being situated on land bounded by South Old Woodward Avenue, Haynes Street, South Woodward Avenue, and Hazel Street (the "Land") . . .[1]

The referenced "Location Plan," which was attached to the Lease, is blank:

EXHIBIT A

LOCATION PLAN

[*to be inserted*]

[1] See Plaintiff's Exhibit 1, ¶1 (Bold in original; italics added).

The Lease also contains an exclusivity provision that provides:

> During the Term, *Tenant shall continuously use and use and occupy the Premises as a Medical Spa* with services that include, but not limited to: non-invasive cosmetic procedures injectable treatments (neurotoxins, dermal fillers, collagen, PRP), energy based aesthetics treatment (laser, radiofrequency, ultrasound, body contouring), Micro needling for skin treatments, chemical peels facials, PRP treatments (injectable, facial, hair loss), teeth whiting, skin care products . . . *Landlord warrants that they will not lease retail space to a medical spa that performs similar services to the primary services of Tenant*."[2]

Plaintiff alleges that "[t]wo years into the Agreement, upon information and belief, 555 entered into a lease with Icon [Anti-Aging and Aesthetics PLLC ("Icon")], which advertises itself as providing the same services as Beauty Fusion, which constitutes a direct violation of the Exclusivity and Non-competition Provision [of the Lease]."[3] Beauty Fusion filed a complaint alleging breach of contract and also filed this motion for Preliminary Injunction.

The Defendant 555 argues that Beauty Fusion misconstrues the exclusivity provision contained in the Lease, which provides that Defendant agreed not to lease "retail space" to another "medical spa." Defendant argues that Icon is a medical doctor's office, which is in the designated office section, not retail section of the building. As such, the Defendant does not believe that the Plaintiff can prevail on its claims.

STANDARD OF REVIEW

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

[2] See Plaintiff's Exhibit 1, ¶5a (Emphasis added).
[3] See Complaint, ¶¶ 3 and 29.

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.

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).

"The 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, the 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)).

ARGUMENT

1. Harm to the public if the injunction issues

Under this factor of the analysis, this Court must address whether the public policy of Michigan is furthered or undermined by the granting of injunctive relief. There is a public interest "in the enforcement of voluntarily assumed contract obligations." *Certified Restoration,* 511 F3d at 551, cited approvingly by *Brown Dairy Equip, Inc v Lesoski,* No 291372, 2010 WL 4485919, at *2 (Mich Ct App Nov 9, 2010). Courts should issue preliminary injunctions when they "would hold [d]efendants to the terms of the bargain they entered." *Id.*

Here, Beauty Fusion claims that enforcing the express terms of the Agreement between it and 555 serves the public interest. At the heart of the dispute, however, is the interpretation of the agreement. Therefore, this factor favors neither party.

2. The Balance of Hardships

Beauty Fusion claims the significant hardship it will face without a preliminary injunction far outweighs the potential harm to 555. Beauty Fusion argues that it bargained to be the exclusive medical spa retailer in the building (paying 555 around $1 million in base rent over 15.5 years) and, that based on its interpretation of the lease, 555's violation

of the lease will force Beauty Fusion to lose its customer base, its goodwill, and its bottom line. Plaintiff also claims that because the alleged competitor had not moved into the building, the harm to Icon would be minimal compared with the harm Plaintiff would incur.[4] Plaintiff also claims that Icon would have recourse against 555 for any potential harm it may incur.

The Court finds that both parties are at risk of loss of income. Beauty Fusion, however, is protected by having the ability to seek and collect monetary damages from 555 should it prevail on its interpretation of the lease agreement. This factor favors 555.

3. Likelihood of Success on the Merits

Beauty Fusion claims that it is likely to succeed on the merits of its claims against 555 for breach of contract, arguing that the lease agreement is a matter of contractual interpretation. See *G&A Inc v Nahra,* 204 Mich App 329, 330 (1994). Beauty Fusion argues that the enforcement of agreed-upon restrictive clause is especially important. See *Terrien v Zwit,* 467 Mich 56, 65 (2002). And further argues that restrictive clauses are "specifically enforceable by injunction." *Robert Half Int 'l, Inc v Van Steenis,* 784 F Supp 1263, 1271 (ED Mich 1991) (finding injunctive relief appropriate in highly competitive industries because computing damages is difficult, if not impossible).

The breach of a covenant, "no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien,* 467 Mich at 65. "'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere

[4] Plaintiff's Ex. 2, ¶8; Plaintiff's Ex. 3, Return Notice.

circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.' " (Citations omitted.) *Terrien,* 467 Mich at 65, quoting *Oosterhouse v Brummel,* 343 Mich 283, 289; 72 NW2d 6 (1955).

Beauty Fusion, therefore, claims that Section 5(a) of the Agreement contains an exclusivity and non-competition provision, which warrants that 555 "will not lease retail space to a medical spa that performs similar services to the primary services of [Beauty Fusion]."[5] Beauty Fusion asserts that its primary services include, but are not limited to, "non-invasive cosmetic procedures, injectable treatments (neurotoxins, dermal fillers, collagen, PRP), energy based aesthetic treatment (laser, radio frequency, ultrasound, body contouring), Micro needling for skin treatments, chemical peels facials, PRP treatments (injectable, facial, hair loss), teeth whitening, and skin care products."[6] Based upon its reading of this agreement, Beauty Fusion claims that 555 cannot lease space to a retail medical spa that performs those services. Therefore, Beauty Fusion claims that 555 violated the Agreement by entering into a lease agreement with Icon, a medical spa that offers nearly identical services as Beauty Fusion and that advertises itself as offering "Lasers/Botox/Fillers" and "Minimally Invasive Cosmetic Procedures."[7]

555 claims that Beauty Fusion's Motion should be denied because 555 has not leased "retail space" to any other "medical spa." Rather, Icon leased space on the 7th floor for "general medical use" as a doctor's office. 555 also claims that a medical doctor's *office*

[5] Plaintiff's Brief, p 5.
[6] Plaintiff's Brief, pp 5-6.
[7] See Plaintiff's Ex. 2, ¶ 6, Ex. 4, Icon Instagram and cf Ex. 2 ¶¶ 3, 7.

which, under the City of Birmingham's zoning, cannot be located in retail space (Ex. 1, ¶¶ 18, 23) and that Beauty Fusion does not allege that Icon is a retail store or that 555 is leasing retail space to Icon.

This Court has considered the likelihood of success on the merits of Beauty Fusion's claim for breach of Contract but is unable to determine that at this juncture.

4. Irreparable Harm

Both parties claim that they will suffer irreparable harm in relation to the granting of a Motion for injunctive relief. Irreparable injury is 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." *Slis v State,* 332 Mich App 312,361 (2020) (quoting *Thermatool Corp v Borzym,* 227 Mich App 366, 377 (1998)). The theft of a customer transaction leads to a loss of customer goodwill and a weakened ability to compete fairly. *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp.,* 511 F3d 535, 550 (6th Cir 2007) (interference with customer relationships constituted irreparable harm); *Merrill Lynch, Pierce, Fenner & Smith, Inc v Grall,* 836 F Supp 428, 433-34 (WD Mich 1993) (finding irreparable harm involving "a loss of goodwill, client trust, confidence, confidentiality, and competitive advantage"). The loss of customer goodwill "amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Slis,* 332 Mich App at 361. In addition, "the possibility of going out of business can constitute irreparable harm." *Id.*

Beauty Fusion argues it will suffer irreparable harm if 555 breaches the Agreement and allows Icon to move into 555 S. Woodward Avenue.[8] It claims it specifically contracted with

[8] Plaintiff's Ex. 2, ¶¶ 10-12.

555 for an ***exclusive*** space in the building, to ensure Beauty Fusion's competitive advantage and ability to compete fairly in the medical spa industry. Going further, many of Beauty Fusion's clients are owners and clientele of other tenants in the building.[9] Plaintiff claims that Icon has already begun soliciting Beauty Fusions clients.[10] Beauty Fusion claims that 555's violation of the Agreement will cause Beauty Fusion serious and irreparable injury, and will threaten its ability to continue its business, which its owners have spent years developing.[11]

On the other hand, 555 claims that if a preliminary injunction is granted, it will be in breach of its lease agreement with Icon and it will suffer damages for the breach. Icon will not be able to move into the office space for which it signed a lease and will have to find a new space. 555 will either lose its tenant (Icon) *permanently*; lose the tenant and rent from the lease temporarily while the injunction is in place; or will face an immediate lawsuit from Icon. 555 also claims that it will be an unattractive landlord since it will lose the ability to lease office space to tenants who perform services like Beauty and that no tenant will want to risk being drawn into litigation. The financial impact on 555 will be enormous from lost present and future rents.

The Court finds that the risk of harm at this juncture weighs equally for both parties.

Therefore, for the reasons stated herein the Plaintiff's Motion for Preliminary Injunction is respectfully DENIED.

IT IS SO ORDERED.

This is NOT a final order and does NOT close out the case.

[9] Plaintiff's Ex. 2, ¶11.
[10] Plaintiff's Ex. 2, ¶¶ 8, 10-12.
[11] Plaintiff's Ex. 2, ¶12.

/s/Victoria A. Valentine

DATED: 9/6/23