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

FMG CONCRETE CUTTING, INC,
Plaintiff,
v.

MANTICORE CONSTUCTION SERVICES, LLC and ARRON INNES.,
Defendants,
_____/

Case No. 20-30866-CB
Hon. Michael P. Hatty

OPINION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION FOR EVIDENTIARY HEARING

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 15th day of September, 2021.

THIS MATTER comes before the Court on Plaintiff FMG Concrete Cutting, Inc's ("FMG")'s Motion for Preliminary Injunction and Defendants' Manticore Construction Services, LLC ("Manticore") and Arron Innes ("Innes") Joint Motion for an Evidentiary Hearing relative to Plaintiff's motion. This Court, having reviewed the Parties' submitted briefs, having heard oral from the Parties, and being otherwise fully advised in the premises, GRANTS Defendants' Motion and holds determination on Plaintiff's motion in abeyance until after an evidentiary hearing, which shall be held at 2 p.m. on October 8, 2021.

I

FMG is a Brighton, Michigan-based construction services corporation. Innes was employed by FMG for several months in 1998 and again from May 8, 2002 until February 14, 2020. In 2003, Innes signed a non-competition and confidentiality agreement ("Agreement") that provided, in pertinent part, that he cannot directly or indirectly compete with FMG for a period of 3 years following the end of his employment with FMG anywhere in "southeastern Michigan,

Jackson, Lansing and Midland areas." The Agreement also provided that Innes cannot use confidential information obtained from FMG. Shortly after Innes resigned from his position with FMG, he and another former FMG employee that is not a party to this action organized Manticore, a Wixom, Michigan-based construction services corporation.

Plaintiff commenced this action, alleging claims of breach of contract, tortious interference, injunctive relief, unjust enrichment, and violations of the Michigan Uniform Trade Secrets Act. Through its instant motion, FMG asserts the contractual breaches of the agreements discussed herein and alleged in its complaint and requests that this Court enjoin both Defendants from such activity.

II

A

An injunction is an extraordinary remedy which should be granted only when justice requires. *Fancy v Egrin*, 177 Mich App 714, 720; 442 NW2d 765 (1989). Four factors must be considered in determining whether to grant injunctive relief: (1) the likelihood that the party requesting the injunction will prevail on the merits; (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued; (3) the risk that the party seeking the injunction will be harmed more by absence of an injunction than the opposing party would be by granting the relief; (4) the harm to public interest if the injunction is issued. *Michigan State Employees Ass'n v Dept of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984).

Demonstrating irreparable harm is an "indispensable requirement" to obtaining a preliminary injunction. *Michigan Coalition of State Employees Unions v Michigan Civil Serv Comm'n*, 465 Mich 212; 634 NW2d 692 (2001). Irreparable harm requires the showing of a non-compensable injury for which there is no legal measure of damages. *Thermatool Corp v Borzyn*,

227 Mich App 366; 575 NW2d 334 (1998). Further, "[a]t 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 or not a temporary restraining order has been issued." MCR 3.310(A)(4).

Of these four factors, the most important is the likelihood that the plaintiff will suffer irreparable injury of a nature beyond the power of the court to remedy before a trial on the merits may occur. The showing of irreparable injury must be "particularized." *Lash v City of Traverse City*, 479 Mich 180; 735 NW2d 628 (2007). There must be a real and imminent danger of irreparable injury. *Michigan Council 25, AFSCME v Wayne County*, 136 Mich App 21, 25; 355 NW2d 624 (1984). Speculative or potential injuries do not suffice. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). Thus, if trial will take place before any injury is likely to occur, injunctive relief is not appropriate. Nor is equitable relief appropriate if the injury is of such a nature that other adequate relief, normally money damages, is available. Thus, once imminent irreparable injury has been established, the court must balance the other factors. In general, the extent to which a party must demonstrate a likelihood of success varies inversely with the degree of harm the party will suffer absent an injunction. *Roth v Bank of the Commonwealth*, 583 F2d 527, 538 (CA6 1978).

B

> 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 or a line of business after termination of 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)

Under Michigan law, such a restrictive agreement is enforceable as long as: (1) it is reasonably drawn as to its duration, geographical scope, and line of business; and (2) it protects the legitimate business interests of the party seeking enforcement. *Apex Tool Group, LLC v Wessels*, 119 F Supp3d 599 (ED Mich 2015). However, such an agreement may not be read to extend beyond an employer's reasonable competitive business interests. *Whirlpool Corp v Burns*, 457 F Supp2d 806 (WD Mich 2006). Such business interests include the anticompetitive use of confidential information and protecting against the solicitation or interference of the employer's customers. *Mapal, Inc v Atarsia*, 147 F Supp 3d 670 (ED Mich 2015). Finally, if such an agreement is reasonable, and thus not violative of the law or public policy, and the terms contained therein are unambiguous, the agreement is not open to judicial construction and must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

III

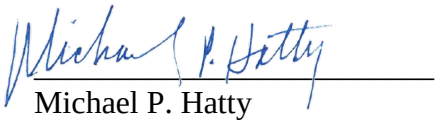
This Court finds an ambiguity in the geographical scope of the Agreement because the terms "southeastern Michigan, Jackson, Lansing and Midland areas" are not defined therein and are "equally susceptible to more than a single meaning." *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 8; 792 NW2d 372 (2010). However, this ambiguity does not make the Agreement unenforceable. Rather, this Court is may "render [the Agreement] reasonable in light of the circumstances in which it was made." MCL 445.774a(1). This Court is unable to perform a proper analysis for the issuance of a preliminary injunction without resolving this ambiguity. Accordingly, this Court finds that an evidentiary hearing is necessary to determine the scope of these three geographical areas, which shall be determined by the intent of the parties and guided by the reasonable business interests FMG seeks to protect. See *Innovation Ventures v Liquid*

Mfg, 499 Mich 491, 513; 885 NW2d 861 (2016); *Rory* at 475 n. 32; and *Whirlpool Corp* at 812. This Court holds a determination on FMG's underlying motion for preliminary injunction in abeyance until such a determination can be made.

IV

Accordingly, it is ordered that Plaintiff's motion is held in abeyance until an evidentiary hearing at 2 p.m. on October 8, 2021 to determine the scope of the three geographical areas discussed in the Agreement consistent with this opinion. Thus, Defendants' motion for an evidentiary hearing is GRANTED.

IT IS SO ORDERED.



Michael P. Hatty
Circuit Court Judge