STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE DIEDERICH AGENCY, INC.,
And TDA INSURANCE & FINANCIAL
AGENCY, LLC,

Plaintiffs,

v.

Case No: 08-089497-C K
Hon. Mark A. Goldsmith

ALICIA HOLBROOK and CHARLES
L. DESCAMPS & SON INSURANCE
AGENCY,

Defendants.

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By: Deputy

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This matter came before the Court on Plaintiffs' motion for a preliminary injunction. The Court conducted an evidentiary hearing on March 14, 2008 and has considered the briefs submitted by the parties. For the reasons set forth below, the Court denies the motion.

Plaintiffs are related insurance agencies, who allege that Defendant Holbrook had entered into an employment agreement, containing a non-competition and non-solicitation provision. Plaintiffs claim that Holbrook, who had served as an account manager, was terminated after Plaintiffs learned that she was working for a competing agency, Defendant Charles L. Descamps & Son Insurance Agency. This suit followed, with Plaintiffs asserting claims for breach of the non-competition agreement, misappropriation of trade secrets and tortious interference with contractual relations.

Plaintiff Diederich Agency entered into an Associate Agent Contract with Holbrook, which prohibited Holbrook from engaging in the sale or solicitation of fire, casualty, health or life insurance within 25 miles of Novi for three years after the termination of the agreement. Specifically paragraph 10 provides:

> NO COMPETITION. Associate agrees that he/she will not, either directly or indirectly by and for himself or as agent for another or through others as agent, engage in or be in any way connected with the sale, advertising or solicitation of fire, casualty, health or life insurance in the area described below for a period of three years after the date of termination of the this [sic] two party agreement in the following areas: Within Twenty Five miles of the cities of Novi, Michigan. This includes, but is not limited to representing other Nationwide Agents.

The agreement also prohibited Holbrook from soliciting customers of Plaintiff Dietrich agency for three years after termination if paragraph 10 was held to be invalid. Specifically paragraph 11 provides:

> POLICYHOLDER SOLICITATION. In any jurisdiction where a covenant similar to that appearing in paragraph 10 is held to be invalid either by statute or by judicial decision, the Associate agrees that upon termination of this contract he/she shall thereafter refrain from further solicitation or in any way for a period of three years with existing policies and policyholders in the geographical area described in paragraph 10 or such other period being the longest period permitted by law less than three years. Further, Associate acknowledges he has no right to policyholder lists, expiration dates, or marketing techniques.

It is undisputed that Descamps is located within 25 miles of Novi. It is also undisputed that Holbrook is now working for Descamps.

Plaintiffs allege that Holbrook has confidential information, including customer lists, pricing and contract information. They also claim that Holbrook has used Plaintiffs' trade secrets to steal customers from Plaintiffs and lure them to Descamps. As a consequence, they now seek a preliminary injunction to prevent Holbrook from competing

with Plaintiffs, soliciting Plaintiffs' customers or using any of Plaintiffs' trade secrets.

In deciding whether to grant a preliminary injunction, a court must consider four factors: (i) whether the applicant will suffer irreparable injury; (ii) whether the applicant is likely to prevail on the merits; (iii) whether the balance of harms favors the issuance of injunction; (iv) the public interest. See Michigan State Employees Association v Department of Mental Health, 421 Mich 152 (1984).

With respect to the merits, the principal question is whether the non-competition and non-solicitation provisions are enforceable. Michigan law permits an employer and employee to enter into a covenant not to compete, so long as the covenant advances "the reasonable business interest" of the employer. MCL 445.774a (1) provides, in pertinent part:

> 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 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.

The statute has been construed as prohibiting only unfair competition. St. Clair Medical PC v Borgiel, 270 Mich App 260 (2006); Northern Michigan Title Company of Antrim-Charlevoix v Bartlett, unpublished per curiam opinion of the Court of Appeals, decided March 15, 2005 (Docket No. 248751). See also Follmer Rudzewicz & Co v Kosco, 420 Mich 394 (1984). As the court stated in St. Clair Medical, supra at 266:

> Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. United Rentals (North America), Inc. v. Keizer, 202 F Supp 2d 727, 740 (W.D.Mich., 2002). 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. Id.; Follmer, Rudzewicz & Co., PC v. Kosco, 420 Mich. 394, 402-404, 362 N.W.2d 676 (1984).

As these cases make clear, a covenant that simply bars competition is not enforceable. Only covenants that bar unfair competition may be enforced. Thus to the extent that the covenant in our case purports to bar Holbrook from competing, as distinct from barring her from unfairly competing, it is not enforceable.

Plaintiffs attempt to justify the covenant on the ground that Holbrook is unfairly competing, on the theory that she is utilizing confidential information of Plaintiffs to which she gained access as an employee of Plaintiffs. Plaintiffs' factual contention is that she is using that information for purposes of selling insurance on behalf of Descamps, a competitor of Plaintiffs. The information that Plaintiffs claim as confidential is the information that Holbrook supposedly has regarding the premiums that various clients pay for insurance. Plaintiffs theorize that Holbrook has either taken documents containing that information and/or has memorized such information.

Based on the testimony received at the evidentiary hearing, this Court concludes that Plaintiffs have not demonstrated any likelihood of success on that point. Plaintiffs presented no evidence that Holbrook has such information in written form. Nor did Plaintiffs show that Holbrook could retrieve such information from memory. In fact, the testimony of Diederich Agency's president, Mark Diederich, totally undercuts that position. He testified that he could not remember the premiums paid for auto insurance, property insurance or general liability insurance for one of his largest accounts. If Diederich could not remember such vital premium information for his own accounts, it is difficult to

understand how Holbrook would remember such information and utilize it in soliciting former customers. Indeed, Holbrook testified that she did not remember what the premium amounts were that her former customers paid because there were too many prices to remember. She also testified that, even if she could remember such information, the information would not be very useful, because customers may have been underinsured, rendering pricing information less valuable. Thus, this Court concludes that Plaintiffs have not shown any likelihood that they can establish that Holbrook utilized any confidential information or misappropriated trade secrets.[1]

The Court also finds that Plaintiffs fail to establish irreparable harm. Our Supreme Court has held, in the context of a non-competition agreement, that "economic injuries are not irreparable because they can be remedied by damages at law." Thermatool Corp v Borzym, 227 Mich App 366, 377 (1997). Further, "relative deterioration of competitive position does not in itself suffice to establish irreparable injury." Id. Here, Plaintiffs have shown nothing more than that they have lost accounts. This is nothing more than economic harm. While Plaintiffs claim that they will never recover this business, such a claim is simply speculative. This is insufficient to establish irreparable harm. Id ("The injury must be both certain and great, and it must be actual rather than theoretical.").

The balance of hardships tips in favor of not granting an injunction. If an injunction were granted, Holbrook would lose her ability to make a living. Denial of an injunction would not necessarily insure that Plaintiffs would retain all of their clients. In such circumstances, no injunction should be issued.

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[1] Diederich testified that Holbrook attended one session where marketing plans were discussed. But there was no explanation about how these plans were confidential or whether and how Holbrook utilized them.

The Court believes that the pubic interest is served by the denial of an injunction because this will facilitate healthy competition, which inures to the public good.

For all of the above reasons, Plaintiffs' motion for a preliminary injunction is denied.

IT IS SO ORDERED.

HON. MARK A. GOLDSMITH
CIRCUIT COURT JUDGE

Dated: MAR 2 8 2008.