

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

**PLANET STUFF, LLC,
Plaintiff,**

v.

**Case No. 16-156497-CB
Hon. James M. Alexander**

**JEFFREY NELSON, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants North Woods General Store & Chad Miller's and Nelson's motions for summary disposition. Following two prior summary motions, the remaining claims in this case are: (Count I) breach of the employment agreement (against Nelson); (Count II) tortious interference (against all Defendants); and (Count III) a trade secrets claim (against all Defendants).

North Woods and Miller's motion seeks to dismiss the remaining Trade Secrets and tortious interference claims. And Nelson's motion seeks to dismiss the breach of employment agreement claim. Nelson also filed a concurrence in North Woods and Miller's motion as to the other claims.

The Court previously summarized this case as follows:

Nelson is a former Plaintiff employee. Plaintiff claims that, while still employed by Plaintiff, Nelson and Miller began developing and started North Woods to compete in the same business. And for a time, Plaintiff claims that Nelson worked for both companies.

Plaintiff also claims that Nelson was using Plaintiff's contacts to set up a distribution and sales network for North Woods while working for Plaintiff. Eventually, in July 2015, Plaintiff claims that North Woods opened a physical location and Nelson stopped showing up for work.

Plaintiff claims that these actions violate Nelson's Employment Agreement, which included non-competition and non-solicitation provisions and a confidentiality agreement.

All Defendants now move for summary of the remaining claims under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

1. Breach of Agreement (Count I).

Nelson first claims that Plaintiff's breach of employment agreement claim fails because (1) the non-compete is unenforceable as prohibiting use of Plaintiff's general knowledge and skill, and (2) Plaintiff cannot establish that it suffered any damages.

In order to prove breach of contract, a plaintiff must establish: (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).

With respect to Nelson's first argument, that a non-compete may not prohibit use of an employee's general knowledge or skill, Michigan law is clear: "Agreements not to compete are permissible under Michigan law as long as they are reasonable." *Thermatool Corp v Borzym*, 227 Mich. App. 366, 372; 575 N.W.2d 334 (1998). "To be reasonable in relation to an employer's

¹ In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

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." *St Clair Med, PC v. Borgiel*, 270 Mich App 260, 265-266; 715 N.W.2d 914 (2006).

The relevant provision in the parties' Agreement states:

(4.) Covenant Not-to-Compete

a.) I agree that while I am employed by [Plaintiff], I will not, directly or indirectly, compete with the business conducted by [Plaintiff].

b.) I agree that for a period of thirty-six months after cessation or termination of my employment for any reason, with or without cause:

i.) I will not, within the Restricted Area,² accept employment with any business that provides or offers to provide the same or similar products and services as provided by [Plaintiff] to persons who are or were customers or clients of [Plaintiff], within the Restricted Area.

ii.) I will not directly or indirectly sell, attempt to sell, provide or attempt to provide any products or services in competition with those products or services which I sold or provided on behalf of [Plaintiff] to any person:

A.) whether or not they reside or are located within the Restricted Area

B.) who was a customer or client of [Plaintiff] during the last thirty-six (36) months of my employment.

C.) To whom I sold, attempted to sell, provided or attempted to provide such products or services during the last thirty-six months of my employment with [Plaintiff].

iii.) I further agree that I will not make any direct or indirect contact with any past or present customer or client of [Plaintiff].

² "Restricted area" is defined as "the geographic area serviced by [Plaintiff] at any time during the last thirty-six (36) months of my employment with [Plaintiff]. I acknowledge and agree that the geographic area serviced by [Plaintiff] includes, but is not limited to, all fifty states as I understand [Plaintiff] conducts a portion of its business on the internet and that this restriction is reasonable."

Nelson argues that this provision merely prohibits his use of general knowledge and skill. At the conclusion of a three-day evidentiary hearing, the Court previously rejected the precise argument that Nelson now makes. The Court is, again, unconvinced by Nelson's argument.

As stated, Plaintiff claims that Nelson used Plaintiff's contacts to set up a distribution and sales network for North Woods while working for Plaintiff. This is not an allegation that Nelson is using his general knowledge and skills. Instead, it is an allegation that Nelson copied Plaintiff's established business model, methods, and contacts to set up a direct competitor while still employed by Plaintiff. The non-compete provision protects against this and is, therefore, enforceable. As such, Nelson's motion on this ground is DENIED.

Nelson next argues that Plaintiff cannot prove any loss or damage.

Under an April 5, 2017 Order, "Plaintiff's damages are a disgorgement of defendant's profits from use of plaintiff's protected information. If plaintiff's [sic] claim other damages, plaintiff shall provide backup financials to defendants."

But the Court is uncomfortable extending disgorgement damages **against a former employee** under a breach of non-compete theory, and neither party (nor the Court's own search) identified any Michigan law permitting the same.³ But Nelson has identified an 11th Circuit Court of Appeals case applying Florida that refused to allow disgorgement damages in a breach of contract action.⁴

Further, in its Response, Plaintiff fails to articulate any specific calculation of damages. Rather, Plaintiff appears to argue that, although it cannot say now what its damages are, it should be allowed to present evidence of the same at trial. But this is insufficient to survive a summary

³ This reasoning is limited to Plaintiff's **breach of contract claim against Nelson**, its former employee.

⁴ *Proudfoot Consulting Co v Gordon*, 576 F3d 1223, 1245 (CA 11 2009) (concluding "under Florida law, disgorgement of profits earned is not a remedy for breach of contract.")

disposition motion. As such, Nelson's motion for summary disposition of Plaintiff's Count I is GRANTED, and the same is DISMISSED.

2. Tortious Interference (Count II).

Finally, Defendants seeks summary disposition of Plaintiff's tortious interference claim.

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, . . . (3) an unjustified instigation of the breach by the defendant [and (4) damages].

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Health Call of Detroit v Atrium Home & Health Care Services, Inc, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).

Further, "[O]ne who alleges tortuous interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*,

166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986).⁵

Defendants claim that their actions were not unjustified or per se wrongful sufficient to support a tortious interference claim. Defendants also argue that Plaintiff bases said claim solely on an alleged interference with two vendors – Winco and Kaiser. But Plaintiff does not provide any evidence that Defendants interfered with any existing relationships or contracts sufficient to support a tortious interference claim. Instead, Plaintiff concentrates its argument on wrongs committed in alleged violation of Nelson’s non-compete agreement.

As such, Defendant’s motion with respect to Plaintiff’s Count II is GRANTED, and the same is DISMISSED.

3. Trade Secrets (Count III).

Defendants next seek dismissal of Plaintiff’s trade secrets claim because it fails to identify any protectable trade secret under Michigan law.

Under the Michigan Uniform Trade Secrets Act (MUTSA), “Trade secrets” are defined as information that both: (1) “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;” and (2) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” MCL 445.1902(d).⁶

⁵ See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

⁶ Michigan’s Uniform Trade Secrets Act, at MCL 445.1904, provides:

Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be

Our Supreme Court has explained, “a trade secret is ‘a secret formula or process not patented but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.’” *Hayes-Albion v Kuberski*, 421 Mich 170, 181; 364 NW2d 609 (1984).

But “a trade secret **cannot** consist of ‘information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.’” *Wysong Corp v MI Indus*, 412 F Supp 2d 612, 627 (ED Mich 2005) (emphasis added); quoting *Kubik, Inc v Hull*, 56 Mich App 335, 348; 224 NW2d 80 (1974).

“A plaintiff in a trade secrets case bears the burden of pleading and proving the specific nature of the trade secrets.” *Dura Glob. Techs., Inc v Magna Donnelly Corp*, 662 F Supp 2d 855, 859 (ED Mich 2009), quoting *Wilson v. Continental Dev. Co.*, 112 F.Supp.2d 648, 662 (W.D.Mich.1999). “A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity.” *Id.* quoting *Compuware Corp. v. Int'l Business Machines*, 2003 WL 23212863, *6 (E.D.Mich. Dec. 19, 2003).

Defendants argue that Plaintiff has failed to describe any alleged trade secret with any specificity. Instead, Defendants claim that Plaintiff simply alleges that Nelson took certain information that constitutes “trade secrets.”

In response, Plaintiff appears to largely ignore the basis for North Woods and Miller’s motion regarding its trade secrets claim. And Plaintiff certainly fails to directly describe with specificity what information qualifies as a trade secret and how.

measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.

Plaintiff's failure to (1) plead the specific nature of the trade secrets, and (2) particularize and identify the purported misappropriated trade secrets with specificity – particularly when faced with a summary motion seeking dismissal of a claim – is fatal to its trade secrets claim.

For this reason, the Court GRANTS Defendants' motion for summary with respect to Plaintiff's Count III, which is hereby DISMISSED in its entirety.

4. Summary

To summarize, both Defendant motions for summary disposition are GRANTED, and Plaintiff's Complaint is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

December 13, 2017
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge