

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

SCOT S. DE YOUNG,

Plaintiff/Counter-Defendant,

V

TOWN & COUNTRY ELECTRIC, INC.,
a Michigan corporation, **KENNETH G. BING,**
and **PATTI L. BING,** husband and wife,

Defendants/Counter-Plaintiffs.

**OPINION and ORDER GRANTING
PRELIMINARY INJUNCTION**

Case No.: 14-03816-CB

Hon. Jon A. Van Allsburg

Bradley J. Fisher (P64608)
Attorney for Plaintiff/Counter-Defendant

Ronald J. VanderVeen (P33067)
Attorney for Defendants/Counter-Plaintiffs

At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 30th day of December, 2014.

This action was filed by the plaintiff in June 2014 against his former employer and the employer's primary shareholder and his wife, seeking damages for breach of contract, an accounting, and alleging minority shareholder oppression. The defendants counter-claimed alleging breach of a 2005 employment agreement between the parties, by which plaintiff agreed not to compete against the defendant for a period of 24 months following the termination of his employment. Defendant moved for a preliminary injunction, and a hearing was held on September 2, 2014. Both parties presented testimony and evidence, and submitted briefs. Following that hearing the parties participated in facilitative mediation on September 30, 2014, which was unsuccessful. The Court has reviewed the relevant testimony and materials and GRANTS defendant's motion for a preliminary injunction, in the form described below.

FACTUAL BACKGROUND

Defendant Kenneth G. Bing (hereafter Bing) founded Town & Country Electric, Inc. (T&C), an electrical contractor which also sells and services electronic controls and telecommunications equipment. He currently owns 70% of the outstanding shares. Plaintiff De



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Young began working for T&C in 1992 as a master electrician, became a project manager in 1998, and was named general manager in 2002. On December 6, 2005, T&C entered into an employment agreement (the "Agreement") with the plaintiff, by which the parties intended that plaintiff and other participating employees would, over time, purchase up to 40% of the outstanding stock in the company, and that a final buy-out of the plaintiff's remaining 60% ownership interest would occur (on terms to be determined), leaving plaintiff as the ultimate owner of 60% of the outstanding stock. By January 2014, plaintiff owned, and continues to own, 17% of the outstanding stock. That Agreement also contained noncompetition and nonsolicitation terms which are the focus of the present motion.

As recently as 2013 the parties anticipated that plaintiff would eventually become the president of the company. Unfortunately, the relationship between plaintiff and defendant Bing faltered before the parties ever reached agreement on the ultimate buyout of Bing's remaining shares. Plaintiff was terminated from employment on January 6, 2014. The 2005 Agreement provided that for a period of 24 months following the end of his employment, plaintiff would not, in the Michigan counties of Ottawa, Kent, Allegan, and Muskegon, or in any other Michigan county or any state in which the defendant corporation derived five percent (5%) or more of its gross revenues,¹ engage in acts of competition² or solicitation³ against the defendant.

This litigation began after plaintiff obtained employment with Windemuller Electric, Inc. (Windemuller), an Allegan County-based electrical contractor which allegedly competes with the defendant in a variety of electrical contracting and related fields. It is in this context that T&C now claims that the non-compete agreement signed between De Young and Defendant should be enforced with a preliminary injunction.

¹ Paragraph III.B of the Agreement defined the term "Geographic Market," and states that it would be determined as of the date of the expiration or termination of the agreement. There is no allegation that the relevant Geographic Market in this case encompasses any area beyond the four named Michigan counties.

² Paragraph III.D. of the Agreement states that plaintiff "will not (during the Restrictive Period) own or be employed by or provide services to ... nor ... participate, directly or indirectly, [in] any company or business which is ... competing or attempting to compete with T&C within the Geographic Market...."

³ Paragraph III.E. of the Agreement states that plaintiff "will not (during the Restrictive Period) directly or indirectly, alone or in concert with others, contact, solicit, or attempt to contact or solicit (for Employee's account or for the account of others) from any person or entity which is (or was during the two-year period immediately preceding the effective termination date of this Agreement) a customer of T&C or which T&C is (or was during the two-year period immediately preceding the effective termination date of this Agreement) actively soliciting to be a customer, orders for merchandise, product, program, supplies, accessories and/or services sold or rendered by T&C during the term of this Agreement, or any merchandise, product, program, supplies, accessories, and/or services that competes with the business of T&C, nor shall Employee urge any customer or potential customer of T&C to discontinue in whole or in part business with T&C or urge any customer or potential customer of T&C not to do business with T&C." Paragraph III.F. of the Agreement extended the prohibition on solicitation to present and former personnel of T&C.

LEGAL ANALYSIS

1. **Noncompetition agreements in employment contracts are 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). 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). 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 warranted. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994).

2. **A preliminary injunction may be issued may be issued in appropriate cases alleging breach of a noncompetition agreement.**

A four-factor analysis is used to determine if a preliminary injunction should be issued:

1. Harm to the public interest if an injunction issues;

2. Whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted;
3. The strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and,
4. Demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant.⁴

In the case at bar, T&C is actively engaged in the business of electrical contracting, and in selling, programming, and servicing electronic controls and telecommunications equipment. It therefore has competitive business interests, and as noted above, it is the public policy of the State of Michigan to permit a business to protect those interests. There is indirect harm to the public interest when a potential employee is barred from using his general knowledge and skill to advance economic activity and support his or her family. However, because MARA permits the court to limit a non-compete agreement to render it reasonable in light of the circumstances in which it was made, this concern is alleviated. As stated by the 6th Circuit Court of Appeals: "No important public policies readily appear to be implicated by the issuance of the preliminary injunction [enforcing a restrictive covenant] other than the general public interest in the enforcement of voluntarily assumed contract obligations." *Certified Restoration, supra*, at 551. Thus, the public would not be harmed if plaintiff was enjoined.

The next factor is the comparative harm to each party. If plaintiff is enjoined, his economic position will be adversely affected. He should not be enjoined from using his general knowledge and skills, but may be prohibited from using his knowledge to gain an unfair advantage over his former employer. The court is permitted to tailor an injunction to minimize the harm to the former employee while protecting the interests of the former employer. The comparative harm to the former employer is greater if the agreement is not enforced. This factor favors the defendant.

The third factor is the strength of defendant's position. This requires an early evaluation of the merits of defendant's counter-claim, which may or may not be supported by all the facts after completion of discovery and presentation of those facts at trial. However, there does not appear to be any dispute that the parties entered into an employment agreement in December 2005 which contains detailed provisions prohibiting plaintiff from competing against the defendant corporation or soliciting customers, potential customers, and employees for a period of two years after termination from employment, in a limited geographical area. These terms must be reasonable for the contract to be enforceable, but MARA contains a savings clause permitting the court to limit the agreement in order to render it reasonable. There is also no dispute that plaintiff obtained employment with a competing company located within the specified

⁴ *State Employees' Assoc. v Department of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984).

geographical area within two years of his termination, and thereby breached the noncompetition agreement. There are certainly other claims at issue between the parties on which the court renders no opinion at this point, but as to the enforceability of the contract terms raised by defendant to support its motion for injunction relief, it appears that defendant is likely to prevail on the merits.

Finally, as to the fourth factor, it is often difficult to establish damages in unfair competition cases. As the Court of Appeals stated in *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998):

“A breach of the contract, by itself, does not establish that a party will suffer an irreparable injury. 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. The injury must be both certain and great, and it must be actual rather than theoretical. *Merrill Lynch, Pierce, Fenner & Smith Inc. v E. F. Hutton & Co., Inc.*, 403 F Supp 336, 343 (ED Mich, 1975). Economic injuries are not irreparable because they can be remedied by damages at law. *Acorn Building Components, Inc. v Local Union No. 2194, UAW*, 164 Mich App 358, 366; 416 NW2d 442 (1987). A relative deterioration of competitive position does not in itself suffice to establish irreparable injury. *Merrill Lynch, supra.*”

The damage resulting from the loss of an existing customer to the former employee's new employer may be proven by circumstantial and record evidence, but damages resulting from the loss of a *potential* customer is more problematic. The new employer's customers have a relationship with the new employer, and are generally unwilling to testify on behalf of a former or potential business partner. The calculation of damages in such circumstances is equally problematic, with the possible result that a breach of the noncompetition agreement may be established, but damages cannot be established with a sufficient degree of certainty and the harm, if any, is thus irreparable. The legal remedy of damages is therefore inadequate, and injunctive relief becomes appropriate.

In this case, the parties recognized this problem in the contract between them. Paragraph III.G. contained an acknowledgment by the plaintiff that a breach of the non-competition and non-solicitation terms of the agreement “will cause severe and irreparable injury to T&C's business and goodwill, an injury that is not adequately compensable by money damages.” The parties therefore expressly agreed that a breach of those contract terms “would by definition cause irreparable injury to T&C” and that T&C shall “be entitled to immediate and appropriate, temporary and permanent, injunctive relief ... without the necessity of showing any irreparable injury....”

These factors balance in favor of Defendant. The defendant's motion for a preliminary injunction is therefore GRANTED. The scope of the injunction remains to be determined.

3. The Enforceability and Scope of the Noncompetition Agreement 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 v Bastian Brothers, Inc.*, 276 Mich App 498; 741 NW2d 539 (2007). A review of some recent decisions from the Court of Appeals assists the court in this analysis.

In *Coates, supra*, the Court of Appeals upheld a jury verdict enforcing a noncompetition agreement contained in an employment contract. The plaintiff in *Coates* had worked for the defendant graphic communications and advertising firm for many years, rising to become general manager, and the employment contract also contained stock purchase agreements, as in the present case. The non-compete agreement in *Coates* was for a term of one year, and prohibited competition within a 100-mile radius of the defendant company. The Court of Appeals upheld the term, area, and scope of the non-compete agreement without much analysis of the type or line of business involved, other than to note "the undisputed length of plaintiff's employment" with the defendant company (22 years, as in the present case), and concluded that the trial court should have upheld the terms of the noncompetition agreement "as a matter of law." *Id.* at 508.

In *Pitsch Holding Co., Inc. v. Pitsch Enterprises, Inc.*, unpublished per curiam opinion of the Court of Appeals (Docket No. 315800, Aug. 7, 2014),⁵ the Court held that a five-year term in a noncompetition agreement between shareholders in a family-owned company, which commenced upon the selling of such shares, was not unreasonable, and affirmed a jury verdict which awarded damages for breach of the agreement. Similarly, in *Brown Dairy Equipment, Inc. v Lesoski*, unpublished per curiam opinion of the Court of Appeals (Docket No. 291372, Nov. 9, 2010), the Court affirmed the issuance of injunctive relief for breach of a noncompetition agreement and held the five-year term of that agreement, and the injunction, to be reasonable against a salesman of dairy farm supplies who had gone to work for a direct competitor in violation of that agreement.⁶

⁵ The court recognizes that it is not bound by this unpublished decision or the unpublished opinions cited later in this opinion, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and merely views the cited opinions as persuasive or illustrative. *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

⁶ The Court of Appeals has also upheld injunctive relief in cases where the trial court has limited the scope and duration of a noncompetition agreement in order to find it reasonable, as in *Grigg Box Co. v Michigan Box Co.*, unpublished opinion of the Court of Appeals (Docket No. 285862, Oct. 22, 2009) (three-year term of agreement limited to 18 months, and scope of agreement limited to a ban on sales to former employer's customers).

In *St. Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006), the Court of Appeals noted that “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. 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” (citation omitted). The Court concluded that the prohibition on a doctor from competing for one year and within seven miles of his former clinic locations was reasonable (the Court noted that the defendant had disputed the reasonableness of the geographical area, but not the duration of the agreement). *Id.* at 269.

In *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), the Court of Appeals upheld a noncompetition agreement which prohibited the defendant's former employees from offering specific tax and accounting services to the defendant's clients for a period of two years. The Court held, without analysis, that the duration of the prohibition was reasonable. It concluded that the scope of the prohibition was also reasonable as it applied only to the firm's clients, and not to other persons or businesses, or to other kinds of accounting services. Finally, the court noted that the absence of any limit on the geographical area of the prohibition was not fatal to its enforceability, as a reasonable limit can be determined by the court under MARA. MCL 445.774a(1). *Id.* at 158-159.

In *Edwards Publications, Inc. v Kasdorf*, unpublished per curiam opinion of the Court of Appeals (Docket No. 281499, Jan. 20, 2009), 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. See *St. Clair Medical, supra*, at 266. Similarly, the Court of Appeals upheld the enforceability of a one-year, five-mile noncompetition agreement against a hairstylist brought by her former salon in *Lockworks, Ltd. v Keegan*, unpublished per curiam opinion of the Court of Appeals (Docket No. 279894, Jan. 27, 2009). The Court reversed the trial court's decision to reform the parties' agreement to permit her to compete at a salon located only 4.16 miles from the plaintiff's salon, concluding that the former employee would gain an unfair advantage over her former employer if permitted to provide services within the five mile radius stated in the contract.

Finally, in *Huron Technology Corp. v Sparling*, unpublished per curiam opinion of the Court of Appeals (Docket No. 316133, Sept. 11, 2014), the Court of Appeals upheld the denial of injunctive relief to the plaintiff, a maker of conveyor systems for the material handling industry, against its former sales engineer. The trial court denied relief on the basis that the defendant's new employer was not in competition with the plaintiff. Though both companies manufactured conveyors, they worked at opposite ends of the market, with one producing "standard equipment" and the other producing specialized and custom equipment. The Court's opinion provided an interesting analysis of the contract language, but ultimately concluded that the trial court's findings were not clearly erroneous.

In the present case, the plaintiff began work for the defendant in 1992 as a master electrician, then became an estimator and project manager for the company before becoming the general manager of the company in 2002. Defendant Bing testified that plaintiff was in charge of the electrical side of the business, and that someone else ran the telecommunications side of the business. Plaintiff testified (in his deposition on August 14, 2014, admitted as defendant's Exhibit 2):

“There's three departments at Town & Country. There's a communications department, an electrical department and a control department. And Randy Westrate runs the controls department, Tom Kubiak ran the telecommunication department and I ran the electrical department. And then I became general manager and oversaw those two guys.” (defendant's Exhibit 2, p. 8).

Plaintiff testified that from 2005 until he left T&C he had little external interaction with customers (“occasionally”) and focused on internal interactions with staff, as he was “largely doing the internal operations side” of the company. (Exhibit 2, p. 12, 15). Plaintiff was terminated at T&C on January 7, 2014, and now works for Windemuller Electric as the manager of their automation department, one of five divisions in the company (which also include an electrical division, a communications & IT division, an outdoor utilities division, and renewable energy division) (Exhibit 2, p. 91; Exhibit 7).

T&C has had recent gross revenues ranging from \$6.5 million to \$9.5 million per year. Windemuller Electric is a substantially larger company, though there is much overlap in the services they each provide. According to the company websites maintained by each company (relevant printouts of which were admitted into evidence as defendant’s Exhibits 7 and 8, respectively), both companies began as commercial electrical contractors, providing commercial, industrial, institutional, and residential electrical design, engineering and construction services. Both have added telecommunications, automation, and controls services and products. They both offer Panasonic business phone systems, among others. Both companies tout their automation programming capabilities, with emphasis on PLC (programmable logic controls) programming. Plaintiff testified that T&C does not do SCADA programming, although Windemuller does.

At the time this litigation began, both companies were preparing to bid for a large project to be undertaken by Davenport University. Mr. Bing testified that both companies were represented at a pre-bid meeting, and that plaintiff was present as well. He said that plaintiff had previously attended Davenport University events as a representative of the defendant corporation, and that Windemuller had not previously sought Davenport University business before employing plaintiff. There is therefore some dispute between the parties as to the extent to which plaintiff had direct customer contacts in his final years at T&C, but no dispute that plaintiff had detailed knowledge of the operations, practices, pricing, and customers of the company, obtained over his last twelve years as its general manager.

The noncompetition agreement between the parties specifically prohibits plaintiff, for a period of two years, from being employed by or providing services to any company which is competing with or attempting to compete with the defendant corporation within the four-county geographic area identified in the agreement. This prohibition therefore applies to any competing company, similar to the prohibition in the *Coates* case, *supra*. It does not prohibit competition as to every product or service offered by a competing company, as in *Huron Technology*, *supra*. However, the overlap in products and services offered by plaintiff’s employer and by the defendant are not complete or identical. Windemuller offers a broader range of services, in more fields of service, than does T&C. According to the testimony and evidence, although they compete in all areas of electrical contracting, they do not compete in all areas of automation. For

example, T&C does not compete against Windemuller in SCADA programming. T&C also does not compete against Windemuller in the field of outdoor utilities and renewable energy. A complete prohibition on plaintiff's employment by Windemuller is thus broader than necessary to protect T&C's reasonable competitive business interests, and also prohibits the plaintiff from using his general knowledge and skill acquired over the past twenty-two years.

4. Conclusion

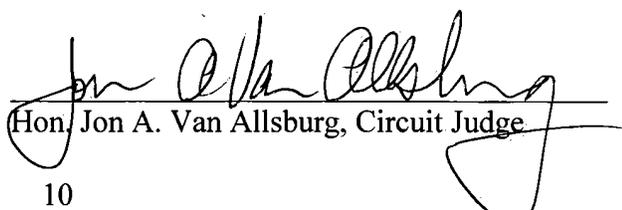
The court concludes that the two-year term of the noncompetition agreement is reasonable and enforceable. It falls well within the 6-month to five-year range represented in the cases cited above, and is a reasonable period of time to give defendant the opportunity to retain the customers with whom plaintiff had personal relationships, and thereby retain its goodwill. The two-year period of the Agreement commenced on January 7, 2014, and shall be deemed to be tolled for the period commencing with plaintiff's employment by Windemuller Electric as provided in Paragraph III.C. of the Agreement. The geographic area within which working for a competitor is prohibited is also reasonable and enforceable. It encompasses only the four-county area in which defendant's primary business takes place (although both companies do business throughout the State of Michigan and elsewhere).

As noted above, the Agreement's prohibition on working for any competing company within the four-county area effectively prohibits plaintiff's employment by Windemuller, even though Windemuller and T&C are not competitors with respect to some products and services. The Agreement's scope is therefore unreasonably overbroad, and goes beyond what is necessary to protect T&C's reasonable competitive business interests. In such circumstances, the 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). The defendant, at the time of the 2005 Agreement, was engaged in electrical contracting, telecommunications, and automation.

Plaintiff shall be enjoined from being employed in the business of electrical contracting, telecommunications products and services, and controls (including PLC programming, but excluding SCADA programming) for any customer who is or has been a customer of T&C, which shall be deemed to include Davenport University. No findings are made with respect to damages or T&C's reasonable attorney's fees, or any other claims made by the parties, and such matters are reserved for trial. Defendant may submit an Order for Preliminary Injunction in accordance with this Opinion.

IT IS SO ORDERED.

Dated: December 30, 2014


Hon. Jon A. Van Allsburg, Circuit Judge