

STATE OF MICHIGAN  
IN THE 20<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF OTTAWA  
SPECIALIZED BUSINESS DOCKET

414 Washington Street  
Grand Haven, Michigan 49417  
(616) 846-8320  
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**SHAPE CORP**, a Michigan corporation,

Plaintiff,

V

**AMIT KULKARNI**, an individual,

Defendant.

**OPINION AND ORDER FOR  
PRELIMINARY INJUNCTION**

Case No.: 15-4397-CB

Hon. Jon A. Van Allsburg

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At a session of said Court held in the Ottawa County  
Courthouse in the City of Grand Haven, Michigan  
on the 4<sup>th</sup> day of January, 2016

**FACTUAL BACKGROUND**

Before the Court is plaintiff Shape Corp’s motion for a preliminary injunction. For the reasons stated below, plaintiff’s motion for preliminary injunction is granted subject to conditions stated below.

This is an action in breach of contract and for injunctive relief. Plaintiff Shape Corp (Shape) seeks to enjoin defendant Amit Kulkarni (Kulkarni) from employment with the Holland facility of the Benteler Automotive Corporation (Benteler). Shape also seeks to recover damages and attorney fees.

Shape is a tier-one automotive supplier. Shape designs, engineers, and manufactures metal and plastic products in North America, Europe, and Asia. The focus of Shape’s business is “impact energy management” (IEM). IEM involves the design, engineering, and manufacture of bumper systems and structural components for automobiles that absorb energy in the event of a collision. IEM components must also meet government-mandated standards for fuel efficiency and safety.

Kulkarni was employed by Shape as an engineer and was a member of Shape’s “advanced product development team.” Kulkarni performed computer-aided engineering in Shape’s high-security



technical research center wherein Shape conducts advanced research on plastics, composites, steel, and aluminum components for IEM applications.

On September 29, 2011 Shape and Kulkarni entered into a “Confidential Information/Non-Competition and Non-Solicitation Agreement” (Agreement). Section 2.2 of the Agreement provides, in pertinent part: “Employee ... agrees that ... for a period of two (2) years following Employee’s termination of employment with Company ... Employee will not ... be employed by ... any ... entity that competes or plans to compete with any Impact Energy Management business engaged in by Company during Employee’s employment.”

On August 15, 2015, Kulkarni resigned his position with Shape to accept a position with Benteler. Like Shape, Benteler is a tier-one automotive supplier with facilities in North America, Europe, and Asia. Part of Benteler’s business includes designing and manufacturing IEM component parts for the automobile industry.

On November 24, 2015, this Court entered a temporary restraining order that, in addition to other provisions, enjoined Kulkarni from employment with Benteler pending a show-cause hearing on Shape’s motion for a preliminary injunction.<sup>1</sup>

## LEGAL ANALYSIS

### **1. Noncompetition covenants in employment contracts are enforceable to the extent they are reasonable.**

Contracts in restraint of trade or commerce are generally unlawful. See MCL 445.772. However, there are exceptions. “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, 776 (ED Mich, 2004). The Michigan Antitrust Reform Act (MARA)<sup>2</sup> permits an employer to obtain an agreement or covenant from an employee designed to protect the employer’s reasonable competitive business interests:

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).

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<sup>1</sup> An amended TRO was signed by the Court on November 25, 2015. Counsel agreed that while Kulkarni could remain employed by Benteler pending the hearing on the preliminary injunction, he was not to perform any work for Benteler.

<sup>2</sup> MCL 445.771 *et seq.*

A noncompetition covenant 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). 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 noncompetition covenant if the court determines that the covenant is enforceable, the former employee has breached the covenant, and injunctive relief is warranted. *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994). If the relevant facts are not in dispute, the reasonableness of a noncompetition covenant is a question of law for the court. *Coates v Bastian Brothers, Inc*, 276 Mich App 498; 741 NW2d 539 (2007). the party seeking enforcement has the burden of demonstrating the validity of the agreement. *Id.* at 507.

A noncompetition covenant will be enforced where the employee's former employer and new employer are clearly in competition. *Edwards Publications, Inc v Kasdorf*, unpublished opinion per curiam of the Court of Appeals, 2009 WL 131636 (Docket No. 281499, January 20, 2009).<sup>3</sup> However, if the employee's former employer and new employer both manufacture similar products but the facts reveal that there is enough difference between the products that the two employers are not truly in competition, the court may deny injunctive relief even if the employee and his former employer have a valid noncompetition covenant. *Huron Technology Corp v Sparling*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2014 (Docket No. 316133) 2014 WL 4495207.

**2. A preliminary injunction may be issued in an appropriate case where there is an allegation of breach of a noncompetition covenant.**

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

1. Harm to the public interest if a preliminary injunction issues;
2. Whether harm to the applicant in the absence of a preliminary injunction outweighs the harm to the opposing party if an injunction is granted;
3. The strength of the applicant's demonstration that the applicant is likely to prevail on the merits at trial; 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.<sup>4</sup>

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<sup>3</sup> While a court is not bound by an unpublished opinion of the Court of Appeals, a court may rely on an unpublished opinion to the extent that the court finds the reasoning in the opinion to be cogent and persuasive. See MCR 7.215(C)(1), *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

<sup>4</sup> *State Employees' Association v Department of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984).

“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 Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 551 (CA 6, 2007). “A breach of contract, by itself, does not establish that a party will suffer an irreparable injury.” *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc v E F Hutton & Co, Inc*, 403 F Supp 336, 343 (ED Mich, 1975). “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.” *Id.* “The injury must be both certain and great, and it must be actual rather than theoretical.” *Id.* “A relative deterioration of competitive position does not in itself suffice to establish irreparable injury.” *Id.* “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).

### 3. Analysis.

Oral argument on Shape’s motion — as well as the affidavits and counter-affidavits and the supplemental briefs submitted by the parties — make it clear that there are many factual disputes that bear on whether a preliminary injunction should issue. Counsel for defendant asserts that only 5% of Benteler’s business involves work related to IEM;<sup>5</sup> counsel for plaintiff counters that 75% of the work performed by Benteler at the Holland facility involves IEM-related projects. Counsel for defendant contends that Kulkarni is not working as an engineer for Benteler; counsel asserts that Kulkarni is not performing computer-assisted research but instead is working as a “project leader” in the “pre-production phase of the manufacturing of an aluminum cable support” for “hybrid vehicle battery systems” which has “nothing to do with impact energy management.” Counsel contends that “project management” involves managing relationships between Benteler and its customers *after* a contract has been awarded but *before* the part that is the subject of the contract has been designed and manufactured.<sup>6</sup>

While it is clear that the business Benteler conducts in its Holland plant qualifies it as an “entity that competes or plans to compete with any Impact Energy Management business engaged in by Company during Employee’s employment,” there is clearly a factual dispute as to whether or not defendant’s employment at Benteler implicates the competitive business interests that Shape is seeking to protect. The case poses the question of whether a noncompetition agreement should be enforced as a reasonable restraint on trade if an employee’s new employment is with a company that competes, but his

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<sup>5</sup> The phrase “only 5%” is a relative term. In the context of Benteler, a multi-billion-dollar global corporation, it may mean a quarter-billion dollars in annual revenues.

<sup>6</sup> Defense counsel first presented these assertions in a letter to Shape dated November 17, 2015, (Ex. D to Plaintiff’s Brief in Support of Motion for TRO), which stated that the response to shape’s inquiry regarding Kulkarni’s violation of the non-competition agreement was on behalf of both Kulkarni and Benteler.

work is in a section of the company that is not in competition with the company seeking to enforce the agreement. One way to pose this question is to ask: in order to show a noncompetition covenant is reasonable, must Shape show that Kulkarni is *personally* involved in competing with Shape or need Shape show only that the *entity* that employs Kulkarni is competing with Shape? Another question to ask is whether a non-competition agreement is reasonable if it prevents a person from changing fields and filling a position in a part of the company not in competition if another part of the company is in competition with the party seeking to enforce the agreement.

Shape argues that the *Coates* case should be applied to enforce the agreement. This case differs from *Coates* however, in that in *Coates* the facts relevant to the reasonableness of the noncompetition clause were undisputed, 276 Mich App at 508, while the facts in this case are complicated as to whether the noncompetition agreement is reasonable.

Following the hearing on the motion for a preliminary injunction and a subsequent conference with the court, the parties requested that the decision on a preliminary injunction be determined without an evidentiary hearing. Under the terms of the agreement and the clear, uncontroverted evidence that Benteler's Holland facility is in competition with Shape's IEM business, a preliminary injunction is warranted.

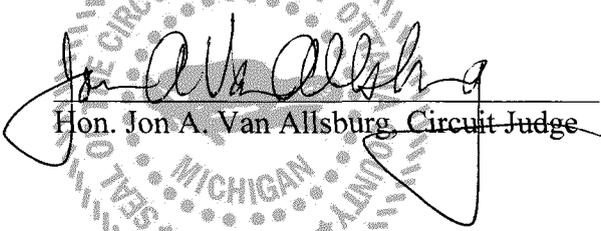
Yet the issue of whether defendant's new job does not implicate the interests Shape is seeking to protect raised questions about both the enforceability of the agreement and whether Shape will sustain irreparable injuries if an injunction is not issued.

### CONCLUSION

On the basis of the current record, the court will issue a preliminary injunction enjoining defendant from being employed by Benteler unless and until, in order to preserve the status quo, defendant and Benteler sign an agreement with Shape submitting to the jurisdiction of the court in this case, and attesting that, during the two-year term of the noncompetition agreement, Kulkarni's employment with Benteler has not and will not be in a position that competes with Shape's IEM business, that Kulkarni will not have a role in Benteler's IEM business, that Kulkarni will not solicit or provide information to assist Benteler to solicit customers or prospective customers of Shape, and that Kulkarni will not reveal or share with Benteler any confidential information he obtained from Shape during the term of the non-competition agreement or until the further order of this court.

*IT IS SO ORDERED.*

Dated: January 4, 2016

  
 Hon. Jon A. Van Allsburg, Circuit Judge

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