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

VISTEON CORPORATION,

Plaintiff,

v

Case No: 2021-188888-CB
Hon. Michael Warren

MATTHEW COLE, APTIV PLC and APTIV SERVICES US, LLC, and APTIV US SERVICES GENERAL PARTNERSHIP,

Defendants.

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

At a session of said Court, held in the County of Oakland, State of Michigan
July 22, 2021

PRESENT: HON. MICHAEL WARREN

OPINION

I
Introduction

Before the Court is Plaintiff Visteon Corporation's ("Visteon") Motion for Temporary Restraining Order and Preliminary Injunction filed against Defendant Matthew Cole ("Cole"). Having reviewed the Motion, the Response and the Reply, and

entertaining extensive oral argument on July 21, 2021, the Court hereby issues this Opinion and Order.[1]

At stake in this matter is whether this Court should impose preliminary injunctive relief when (1) the public interest (enforcing contracts versus free market competition) favors Visteon, (2) the harms of denying or granting the relief (Visteon's protections of its confidential information, customer relationships, and customer goodwill versus Cole's inability to work for less than a dozen of Visteon's competitors) favors Visteon, (3) Visteon has shown a strong likelihood of prevailing on the merits (as the Agreements are almost certainly enforceable and there is no question that Cole violated them), and (4) as acknowledged by Cole in the Agreements, there is a showing of irreparable harm to Visteon if injunctive relief is not granted? Because all four factors for injunctive relief favor Visteon, the answer is "yes," and the Motion is granted.

II
Background

Matthew Cole is formerly one of nine highly compensated senior executive officers for Visteon. Previously he served as Vice President of Product Development, and Senior Vice President of Product Development. Starting in January 2020, Cole served as Visteon's Senior Vice President of Product Delivery. In or about June 2021, he had the additional position as Interim Chief Information Officer ("CIO").

[1] Although Cole raised the possibility of conducting an evidentiary hearing, the documents provided by the parties more than address the Motion. Even taking at face value the exhibits presented by Cole, they do not alter the Court's straightforward application of the circumstances and law involved in this Motion.

Visteon describes Cole's role as President and Senior Vice President in product development and delivery, Interim CIO and his position on Visteon's Executive Committee as follows:

- Cole was the principal management leader of Visteon's Board of Directors Technology Committee, including with respect to an April 14, 2021 meeting related to all Visteon technologies;
- Cole was substantially involved in all aspects of Visteon's engineering, technical, research, and product development processes;
- Cole was at the heart of Visteon's industry leading success in developing domain controllers to allow for automotive electronic control unit consolidation;
- Cole was substantially involved in developing and maintaining customer relationships, including working directly with Visteon's customers/potential customers on new and current products, quoting, pricing, product strategies, supplier management, and logistics;
- Cole was responsible for quoting new business (including advanced safety bids) to current and prospective customers and reporting financial information to Visteon's Executive Committee and Visteon's Board of Directors;
- Cole had access to all of Visteon's confidential and proprietary information related to all aspects of Visteon's customer/potential customer relationships, products, and business strategies and plans;
- Cole has extensive involvement in and knowledge of Visteon's business operations in all countries and participated in a meeting with Visteon's management team regarding Visteon's business operations in India days before his resignation.
- Cole was provided with Visteon's complete Product and Technology Roadmap for 2020/2021, prepared by Visteon's CEO;
- In the last 18 months, Cole attended at least eight customer dinner meetings with leaders from Visteon's customers and potential customers.

Visteon alleges that Cole was exposed to and developed Visteon's future technology strategy; Cole had access to Visteon's financial strategy to compete with Aptiv

including profit margins; Cole learned Visteon's DriveCore strategy to compete with Aptiv's ADAS product; and Cole reviewed and guided how all of Visteon products (including DriveCore) would compete with Aptiv."

Cole identifies his limited responsibilities as follows:

- He was not responsible for customer relationships;
- He had limited access to general customer information and few opportunities to meet any individual employed by a customer, and usually only to provide gravitas to sales personnel;
- He had no responsibility to report financial information;
- He had no responsibility for technological or market development.

The parties agree that Visteon and Cole entered a legally binding Performance Stock Unit Grant Agreement in 2018 granting him substantial stock awards and entered subsequent Performance Stock Agreements in 2019 through 2021. The Performance Stock Agreements include the following non-compete and non-solicitation covenants that restrict Cole from working for direct competitors of Visteon and from soliciting Visteon customers/potential customers for a period of 18 months after the termination of his employment with Visteon:

> 21. Non-Competition and Non-Solicitation.
>
> (a) For purposes of this Agreement, "Competition" by the Participant means engaging in, or otherwise directly or indirectly being employed by or acting as a consultant to, or being a director, officer, employee, principal, agent, shareholder, member, owner or partner of, anywhere in the world that competes, directly or indirectly, with the Company in the Business; provided, however, it shall not be a violation of this Agreement for the Participant to become the registered or beneficial owner of up to five percent (5%) of any class of share of any entity in Competition with the Company that is publicly traded on a recognized

domestic or foreign securities exchange, provided that the Participant does not otherwise participate in the Business of such corporation.

(b) For purposes of this Agreement, "Business" means the creation, development, manufacture, sale, promotion and distribution of vehicle electronics, transportation components, integrated systems and modules, electronic technology and other products and services that the Company engages in, or is preparing to become engaged in, at the time of the Participant's termination.

(c) The Participant agrees that, during the Participant's employment and for 18 months after the termination of the Participant's employment by the Participant or by the Company for any reason, the Participant will not directly or indirectly engage in Competition with the Company.

(d) The Participant agrees that, during the Participant's employment and for 18 months after the termination of the Participant's employment by the Participant or by the Company for any reason, the Participant will not directly or indirectly: (i) solicit for the Participant's benefit or the benefit of any other person or entity, business of the same or of a similar nature to the Business from any customer that is doing business with the Company or that did business with the Company in the six months before the termination of the Participant's employment; (ii) solicit for the Participant's benefit or the benefit of any other person or entity from any known potential customer of the Company, business of the same or of a similar nature to the Business; (iii) otherwise interfere with the Business of the Company, including, but not limited to, with respect to any relationship or agreement between the Company and any supplier to the Company during the period of the Participant's employment . . .

(e) The Participant acknowledges that the Company would suffer irreparable harm if the Participant fails to comply with Paragraph 20 or 21 of this Agreement, and . . . that, due to the proprietary nature of the Business of the Company, the restrictions set forth in Paragraph 21 are reasonable as to geography, duration and scope.

In January 2017, Cole entered a Restricted Stock Unit Grant Agreement ("Restricted Stock Agreement") awarding him substantial Restricted Stock Units and executed subsequent Restricted Stock Agreements in 2018 through 2021. In March 2018,

Cole executed Nonqualified Stock Option Grant Agreement ("Stock Option Agreement"), in exchange for substantial Stock Option Shares and entered subsequent Stock Option Agreements in 2019 and 2020. In November 2015, Cole executed a Non-Compete and Non-Solicitation Agreement ("Non-Compete and Non-Solicitation Agreement") for which he was given additional consideration of $150,000.00. These Agreements contain substantially similar non-compete and non-solicitation covenants to the Performance Stock Agreements provisions.

Visteon alleges that after voluntarily resigning his employment with Visteon on July 1, 2021, Cole began employment with Aptiv, an automotive supplier that supplies products with the same functionality to the same number of limited customers as Visteon and is one of Visteon's direct competitors. Visteon and Aptiv have each identified each other as a competitor in governmental filings. Visteon argues that while working for Visteon in a high-level leadership position, Cole was intimately involved in all aspects of Visteon's relationships with its customers/potential customers and related product developments and was privy to confidential information regarding Visteon's products, customers/potential customers, as well as financial, strategic, and technical information that Cole and Aptiv may use to divert business from Visteon directly to Aptiv. Beginning in or about May 2021, Cole initiated discussions with Visteon's CEO, Sachin Lawande, regarding his desire to leave Visteon for an executive position at Aptiv in its Advanced Safety and User Experience division, despite his non-compete and non-solicitation commitments. Prior to Cole's resignation, Aptiv, on behalf of Cole, requested that Visteon

waive Cole's non-competition obligations and Visteon's Board refused. Visteon alleges that Cole's employment with Aptiv violates his Agreements and will inherently and inevitably cause irreparable harm to Visteon in the form of lost and diverted business, financial loss, misappropriation of Visteon's information, and improper application of Visteon's customer goodwill.

The Defendants argue Cole's responsibilities were significantly reduced starting in November 2019 and he was merely a business manager. The Defendants claim Cole is working as Aptiv's Vice President and Managing Director of ASUX in North America and his responsibilities would be modified for the first 18 months to remove any and all responsibilities for or involvement with the user experience/infotainment business. For that reason, Defendants argue there is no further reason to restrain his employment. The Defendants claim this Motion is merely a retaliatory tactic and argue injunctive relief would harm Cole and prevent him from being able to work. The Defendants seek their own preliminary injunction prohibiting the cancellation of Cole's stock options under Visteon's 2010 Incentive Plan and granting a waiver of the "competitive activity" conditions of said Incentive Plan pursuant to the Incentive Plan Guidelines.[2]

[2] The Defendants' request for injunctive relief in their favor is predicated upon issues and arguments that are not responsive to the issue underlying Visteon's Motion. As such, the unresponsive arguments for relief are not properly before the Court and will not be considered as they are beyond the matter specifically identified in Visteon's Motion and were not addressed in Visteon's Reply.

III
Analysis

A
The Law

Under MCR 3.310(A), this Court has the authority to grant a preliminary injunction. The burden is on the party seeking injunctive relief to prove why such relief should be issued. MCR 3.310(A)(4) ("At 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 a preliminary injunction should issue is determined by a four-factor analysis . . . ." *MSEA v Dep't of Mental Health*, 421 Mich 152, 157 (1984). This analysis must address the following factors:

> 1) Harm to the public interest if an injunction issues;
>
> 2) Whether harm to the moving party in the absence of injunctive relief outweighs the harm to the opposing party if a stay is granted;
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> 3) The strength of the moving party's demonstration that the moving party is likely to prevail on the merits; and
>
> 4) Demonstration that the applicant will suffer irreparable injury if injunctive relief is not granted.
>
> [*MSEA*, 421 Mich at 157-158.]

In addition, this inquiry "often includes the consideration of whether an adequate legal remedy is available to the applicant." *Id.* at 158. Other considerations to be addressed when considering injunctive relief "are whether it will preserve the status quo

so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits." *Campau v McMath*, 185 Mich App 724, 729 (1990). See also *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998).

Moreover, "[t]he general rule is that whenever courts have found a mandatory injunction essential to the preservation of the status quo and a serious inconvenience and loss would result to plaintiff and there would be no great loss to defendant, they will grant it." *Steggles v National Discount Corp,* 326 Mich 44, 50 (1949). See also *Gates v Detroit & Mackinac Railway Co,* 151 Mich 548, 552 (1908); *L & L Concession Co v Goldhar-Zimner Theatre Enterprises, Inc,* 332 Mich 382, 388 (1952), quoting *Steggles*, 326 Mich at 50.

Furthermore, this Court's ruling "must not be arbitrary and must be based on the facts of the particular case." *Thermatool,* 227 Mich App at 376. Generally, the granting of such relief falls within the broad discretion of the court. *Steggles*, 326 Mich at 50 (holding that granting injunctive relief "is largely a matter of discretion of the trial court"); *Campau*, 331 Mich at 729 (the Court of Appeals "will not overturn a trial court's grant or denial of a preliminary injunction save for an abuse of discretion." *Bratton v DAIIE*, 120 Mich App 73, 79 (1982).

B
Application of the Law

1. Harm to the Public Interest.

Under this factor of the analysis, this Court must address whether the public policy of Michigan is furthered or undermined by the granting of the injunctive relief.

In this particular case, the public interest favors Visteon. Michigan law generally favors enforcing written contracts. See, e.g. Const 1963, art 1, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"); MCL 566.132; *Rory v Cont'l Ins Co,* 473 Mich 457, 468 (2005) (internal footnotes and quotation marks omitted) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.").[3]

[3] The Court in *Rory,* 473 Mich 457, quoting *Terrien v Zwit,* 469 Mich 41, 51-52 (2003) (internal citations omitted), elaborated:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich. 56, 71 (2002). The notion, that free men and women may reach agreements regarding their

Judicial scrutiny of the covenants at issue finds them reasonable. *Coates v Bastian Bros., Inc*, 276 Mich App 498, 507 (2007) ("noncompetition agreements are . . . only enforceable to the extent they are reasonable.") The Agreements are not overly broad given Cole's position within Visteon and do not "impede [Cole's] freedom to pursue his chosen career." Rather, the non-compete and non-solicitation covenants are narrowly tailored in both scope and time. In fact, under the Agreements, Cole "acknowledges that . . . due to the proprietary nature of the Business of the Company, the restrictions set forth in [the Agreement] are reasonable as to geography, duration and scope." Public policy is furthered by enforcing such restrictions and public interest supports protecting confidential information and customer goodwill.

Although public policy also favors a free market for employees and employers to engage in voluntary contractual arrangements, since Visteon has shown a strong likelihood of success on the merits, this factor still favors Vision. Again, Cole has acknowledged himself that these Agreements are reasonable.

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affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:

> One does not have `liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made. [15 Corbin, Contracts (Interim ed.), ch. 79, § 1376, p. 17.

2. Balance of Harm.

Under this prong of the analysis, this Court must evaluate whether the harm suffered by the nonmoving parties caused by granting the proposed injunctive relief will outweigh the harm suffered by the moving party if the injunctive relief is denied.

In the instant case, Cole's alleged violations of the Agreements affect Visteon's protections of its confidential information, customer relationships, and customer goodwill. In contrast, to grant the Motion would not hinder or unduly restrict Cole from earning a living. Cole is only precluded from working for 11 identified direct competitors of Visteon for a period of 18 months after his resignation. He can freely seek and readily gain employment to support himself and his family with any other. Cole is not denied the freedom to pursue career opportunities with non-competitors or even with a competitor 18 months after his resignation.[4] Cole was highly compensated for agreeing to such restrictions. This is hardly akin to a strangling a lower-level employee's ability to earn a living.

The harm suffered by Visteon if injunctive relief is denied clearly outweighs any harm to the Defendants caused by granting the proposed injunctive relief.

[4] *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*, unpublished opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 248751), p 4, upon which the Defendants rely is distinguishable because the noncompete clause there completely prohibited defendants from engaging in the title insurance business and "did not narrow the focus of the prohibition to prevent unfair competition." *Godlan, Inc v Whiteford*, unpublished opinion of the Court of Appeals, issued March 11, 2003 (Docket No. 227696) is also distinguishable because in that case there was no basis on which plaintiff had a legitimate competitive interest in precluding DCL from hiring a former employee to perform in-house computer-related work.

3. The Merits.

Under this prong of the analysis, the moving party must demonstrate that it is likely to prevail on the merits of a fully litigated action. There appears to be no dispute that the Agreements were entered and the non-compete and non-solicitations covenants in the Agreements at first blush appear legally enforceable. See, e.g., MCL 445.774a (defining elements of an enforceable non-competition agreement); *Hayes-Albion v Kuberski,* 421 Mich 170 (1984); *St Clair Medical, PC v Borgiel,* 270 Mich App 260 (2006) (per curium). The length and scope of the application of the non-compete covenant at issue -- "The Participant agrees that, . . . for 18 months after the termination of the Participant's employment . . . the Participant will not directly or indirectly engage in Competition with the Company" -- is certainly reasonable and enforceable.

In addition, there is no dispute that (a) Aptiv is identified as one of eleven "primary independent competitors" Cole is restricted from working for until 18 months after his resignation, (b) Cole signed the Agreements containing non-compete and non-solicitation covenants and received consideration in return, and (c) Cole is currently working for Aptiv in the global market segment in which he worked for Visteon. That alone is sufficient indicia of a breach of the restrictive non-complete covenant of the Agreements.

In light of the foregoing, Visteon has shown it has a high probability of success on the merits.

4. Irreparable Harm.

Irreparable harm means harm that cannot be remedied by damages. *Thermatool,* 227 Mich App at 377. In other words, "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.* Moreover, the "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Id.*

The "threat of irreparable injury" is consistently found "in circumstances when a covenant not to compete is breached." *Hough Assocs v Hill*, 2007 WL 148751 at *18 ("[u]nless parties . . . realize that injunctive relief should be expected in the event of a clear breach, non-competition agreements will not produce their intended effect, breaches will proliferate, and complicated damage inquiries into the 'what might have been' world will ensue."

Here, the Agreements all state that "[Visteon] would suffer irreparable harm if [Cole] fails to comply with [the Confidentiality and Non-Competition and Non-Solicitation provisions] of this Agreement." These are not contracts of adhesion and it cannot be disputed that Cole was highly compensated.[5] Visteon's allegations regarding lost and diverted business, financial loss, misappropriation of Visteon's information, and improper application of Visteon's customer goodwill favor the granting of injunctive

[5] Cole's compensation package for 2020 exceeded $1M.

relief. The parties are engaged in a competitive industry and the confidential information is therefore subject to very vigorous and detailed protection. Visteon's refusal to enforce non-compete covenants against former employees Caryl Brown (a non-senior level executive whose period of non-compete was almost over) and Jeffery Skutnik (a non-senior level executive whose single equity grant had not vested before his voluntary departure) is not a waiver of Cole's covenants. Cole's employment with a direct competitor is a direct breach of his Agreements and will necessarily put him in a position to unfairly compete with and divert business from Visteon, while inevitably using and disclosing Visteon's confidential and proprietary information to Visteon's disadvantage. The point of injunctive relief is to stop the bleeding now before damages are incurred in the future in an incalculable manner. This prong favors the Plaintiff.

In light of the foregoing analysis, injunctive relief is warranted.

ORDER

In light of the foregoing Opinion, Plaintiff Visteon Corporation's Motion for Temporary Restraining Order and Preliminary Injunction is **GRANTED** and the Court hereby **ORDERS** that Defendant Matthew Cole is enjoined (directly or indirectly) and prohibited from any and all conduct in violation of the non-competition, non-solicitation, and confidentiality covenants reflected in the Performance Stock Agreements, the Restricted Stock Agreements, the Stock Option Agreements, and the Non-Compete and Non-Solicitation Agreement including, but not limited to the following:

(1) Working and/or performing any services for any business that is engaged in the Business of Visteon, as defined in Cole's Agreements with Visteon (attached to Visteon's Verified Complaint as Exhibits 1, 2, and 3), including Aptiv until eighteen (18) months from the entry date of this Order;

(2) Directly or indirectly soliciting any Visteon customers who are doing business with Visteon or who did business with Visteon during the six months before Cole's resignation until eighteen (18) months from the entry date of this Order;

(3) Directly or indirectly soliciting any of Visteon potential customers until eighteen (18) months from the entry date of this Order; and

(4) Violating any other terms and conditions of Cole's Agreements with Visteon.

/s/ Michael Warren
_____/
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE