STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT- CIVIL DIVISION
811 Port Street, St. Joseph, MI 49085 (269) 983-7111

Arkos Field Services, LP,
Plaintiff

v.

TOM CROUCH, GENE LOOMIS, DANNY VICKERS, KURT WEIR, RODNEY DOHM, AND UPS MIDSTREAM SERVICES, INC.,
Defendants.

Case No.: 2015-0228-CD

HON. JOHN M. DONAHUE

Philip J. Kessler (P15921)
B. Michael Ortwein (P78623)
John J. Rolecki (P78460)
Honigman Miller Schwartz and Cohn LLP
2290 First National Building
660 Woodward Ave
Detroit, MI 48826-3506
Tel: (313) 465-7630

James F. Hermon (P53765)
Elisa J. Lintemuth (P74498)
Dykema Gossett PLLC
300 Ottawa Ave, NW Ste 700
Grand Rapids, MI 49503
jhermon@dykema.com
elintemuth@dykema.com

Stephen F. Fink
Thompson & Knight LLP
One Arts Plaza
1722 Routh St, Ste 1500
Dallas, TX 75201
Stephen.finx@tklaw.com

Mark D. Temple
Nicole S. Soussan
Reed Smith LLP
811 Main St #1700
Houston, TX 77002
(713) 469-3800
mtemple@reedsmith.com

Attorneys for Defendants TOM CROUCH, GENE LOOMIS, DANNY VICKERS, KURT WEIR, RODNEY DOHM, AND UPS MIDSTREAM SERVICES, INC.

Attorneys for ARKOS FIELD SERVICES, LP

At a session of the Berrien County Trial Court, held
On the ____ day of December, 2015, in the City of
St. Joseph, Berrien County, Michigan,

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION TO HOLD DEFENDANTS IN CONTEMPT OF COURT, TO COMPEL RESPONSES TO DISCOVERY REQUESTS, AND FOR SANCTIONS

On November 18, 2015, a hearing was held on Defendants' Motion for Summary Disposition of Plaintiff's First Amended Complaint. Additionally, on December 17, 2015, a hearing was held on Defendant Dohm's Motion for Summary Disposition of Plaintiff's First Amended Complaint and for Plaintiff's Motion to Hold Defendants in Contempt of Court, to Compel Responses to Discovery Requests, and for Sanctions ("Discovery Motion"). The Court first addresses Plaintiff's Discovery Motion and secondly addresses Defendants' Motion for Summary Disposition.

Plaintiff's Discovery Motion

On October 14, 2015, this Court entered a Temporary Restraining Order (TRO) and Discovery Order. The Court ordered "that Plaintiff may take expedited discovery, including depositions *deuces tecum* of Defendants" and "that Defendants shall respond to all document requests submitted by Plaintiff within ten days after their submission." Plaintiff now moves for this Court to find Defendant in contempt of court, to compel responses to discovery requests, and for sanctions as it claims that Defendants' production to date has been wholly inadequate.

Upon reviewing the briefs submitted on behalf of each party, this Court finds that Defendants have generally complied[1] with this Court's Discovery Order.[2] Defendants point out in their brief that over 8,000 pages of responsive documentation have been provided to Plaintiff

[1] This Court acknowledges that the ownership of the service manuals, which were part of the Discovery Order, are in dispute. While Mr. Crouch claims that these service manuals were his before he began work for Plaintiff, he has offered to provide copies of the service manuals to Plaintiff pending the resolution of the case.

[2] It should also be noted that the Court denied Plaintiff's request for immediate production of computers, computer devices, and electronic storage devices in the Discovery Order. Defendants were instructed, however, to "return any flash drives or other devices inserted into [Plaintiff's] computers," in the TRO, which expired on October 29, 2015. With the exception of Defendant Loomis not being able to find a flash drive, it appears that Defendants complied with this order. Further, Defendants' counsel stated at the December 17 hearing that "we can't produce something that can't be found," with which this Court agrees.

since the entry of the Discovery Order. Additionally, it appears that all of the individual Defendants have conferred with attorneys and surrendered their emails and cell phones for inspection, and relevant responsive emails and text messages have been produced for Plaintiff.

While not entirely unsympathetic to Plaintiff's requests, ultimately this Court's Order was non-specific in certain respects and was implemented in order to get discovery started. Upon review of the record, this is not a situation where there has been total noncompliance or months of repeated patterns of substantial noncompliance; rather, there was only a very short time period for the nonmoving party to comply, and it appears to the Court that good faith compliance occurred.

The Court cannot on this record find a willful non-compliance to support a finding of contempt and/or sanctionable offenses. As such, Plaintiff's Motion to Hold Defendants in Contempt of Court, to Compel Responses to Discovery Requests, and for Sanctions is respectfully DENIED.

Defendants' Motion for Summary Disposition

Defendants' Motion for Summary Disposition asserted a lack of subject matter jurisdiction on the basis of a forum selection clause in two Confidentiality Agreements entered between Plaintiff and certain individual Defendants. The Confidentiality Agreement signed by Defendant Crouch reads in pertinent part:

> Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and *jurisdiction and venue for any dispute shall lie exclusively in Houston Texas*. [(emphasis added).]

The Confidentiality Agreement signed by Defendants Loomis and Weir reads in pertinent part as follows:

> Jurisdiction and Venue: All disputes *arising from or relating to* this Agreement shall be subject to the *exclusive jurisdiction of* and be litigated in the state or

> federal courts located in *Harris County, State of Texas*. Both parties hereby consent to the exclusive jurisdiction and venue of such courts for the litigation of all disputes and waive any claims of improper venue, lack of personal jurisdiction, or lack of subject matter jurisdiction as to any such disputes. [(emphasis added).]

Chapter 7 of the Revised Judicature Act, titled Bases of Jurisdiction, contains Michigan's statute regarding Forum Selection Clauses, and it provides:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, *the court shall dismiss* or stay the action, as appropriate, *unless any of the following occur*:
>
> (a) The court is *required by statute* to entertain the action.
>
> (b) The *plaintiff cannot secure effective relief in the other state* for reasons other than delay in bringing the action.
>
> (c) The other state would be a *substantially less convenient* place for the trial of the action than this state.
>
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement. [MCL 600.745(3) (emphasis added).]

Additionally, "[a] party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced." *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 348; 725 NW2d 684, 689 (2006). Further, "unless one of the [above] statutory exceptions applies, Michigan courts will enforce a forum-selection clause as written." *Id*.

The Michigan Court of Appeals wrote that a forum selection provision is "analogous to disputes concerning whether a particular party is subject to an arbitration agreement." *Offerdahl v Silverstein*, 224 Mich App 417, 419; 569 NW2d 834, 836 (1997). Use of "broad language [in an] arbitration clause [such as] '*any dispute or controversy arising out of or relating to' the agreement* . . . vests the arbitrator with the authority to hear plaintiffs' . . . claims, even if they involve nonparties to the agreement." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409, 421 (2007) (emphasis added). The Michigan Court of

Appeals, in an unpublished decision, wrote that "this Court and the United States Supreme Court have held that forum-selection clauses are generally valid, *as long as they are enforced against a party bound by the contract*, and provided they are freely entered and neither unreasonable nor unjust." *Arconcepts, Inc v Paychex, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Feb 3, 2004, (Docket No. 242753), p. 3 (citing *Offerdahl*, 224 Mich App at 419-21; *Burger King Corp v Rudzewicz*, 471 US 462, 473 n 14; 105 S Ct 2174, 2182; 85 L Ed 2d 528 (1985)) (emphasis added).

The gravamen of the instant complaint can be found in Paragraph 16 of Plaintiff's First Amended Complaint. Paragraph 16 of the First Amended Complaint reads as follows:

> Arkos's injuries in this case stem from actions taken by its former District Manager, Defendant Crouch, who ***conspired*** with Defendants Gene Loomis, Todd Dohm, and Kurt Weir, former Arkos employees, and Defendant Vickers, General Manager of UPS to ruin Arkos's Bridgman, Michigan operation. Upon information and belief, Crouch worked for as many as nine (9) months to ***drive business opportunities away*** from Arkos and towards its direct competitor UPS, while together with Vickers, he ***instigated an exodus of employees***, including Loomis, Dohm, and Weir, from Arkos to UPS with the intention of damaging Arkos's Bridgman, Michigan operation to such a degree that the only option would be to close down Arkos's office. In so doing, Crouch, Weir, Dohm, and Loomis ***stole*** Arkos's equipment and documents, including but not limited to, Arkos's service manuals; I-beams; skates; tools; uniforms; and ***confidential information***, also including but not limited to business opportunities which came to Arkos and were diverted to UPS. The Defendants' actions are in violation of Michigan state laws. [Plaintiff's First Amended Complaint, ¶ 17 (emphasis added).][3]

As is clear from reading the above paragraph, it contains allegations that the individual defendants and former employees of Plaintiff conspired with the general manager of UPS with the intention of damaging Plaintiff's Bridgman operation. In doing so, it is alleged that Plaintiff's equipment, documents, and confidential information were stolen from Plaintiff and

[3] Additionally, Paragraph 31 of Plaintiff's First Amended Complaint alleges that a "forensic analysis of the computers indicated that Loomis copied Arkos's confidential information and accessed it after his resignation."

diverted to UPS. Additionally, Plaintiff relied on the Confidentiality Agreements in its Motion for Temporary Restraining Order ("TRO"). In the introductory paragraph of its Motion for TRO, Plaintiff claimed that "[i]njunctive relief is necessary to stop the actual and threatened misappropriation of Arkos's trade secrets and confidential information." Moreover, Paragraphs 9 through 14 of Plaintiff's Motion for TRO specifically focused on each of the Confidentiality Agreements.

The Court ultimately finds that Plaintiff has not satisfied the heavy burden, as described in *Turcheck*, required for non-enforcement of a forum selection clause. Plaintiff has not demonstrated that any of the statutory exceptions listed in MCL 600.745(3) apply. Plaintiff asserted the (3)(a) exception applied because MCL 600.1641, Michigan's tort venue statute, requires the case to be heard in Berrien County. However, Plaintiff ignores that "[v]enue is primarily a matter of convenience . . . and has nothing whatsoever to do with jurisdiction [but] instead . . . is concerned only with the place of trial of an action within the state." *Peplinski v Michigan Employment Sec Com'n*, 359 Mich 665, 668; 103 NW2d 454, 456 (1960). Plaintiff argued that the (3)(b) exception applied because it could not obtain relief from UPS or Vickers in Texas because they are not subject to personal jurisdiction in Texas. However, Defendants noted in their brief in support of their Motion for Summary Disposition and asserted in open court, that both UPS and Vickers have agreed to be subject to the jurisdiction of Texas Courts. Finally, the Court finds no evidence that would support a conclusion that having Plaintiff's Complaint be heard in Texas Courts would be substantially less convenient. Plaintiff is a Texas limited partnership which drafted the forum selection clauses at issue, and all Defendants wish for the Complaint to be heard in Texas. Further, as noted by the *Turcheck* Court, "[w]here the

inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties." *Turcheck*, 272 Mich App at 350.

Additionally, due to the broad language used in the forum selection clauses of both Confidentiality Agreements, and consistent with *Rooyaker & Sitz*, Texas Courts have exclusive jurisdiction to hear Plaintiff's claims, notwithstanding the fact that Plaintiff's claims are brought against non-signatories to the Confidentiality Agreements. Further, Texas courts have exclusive jurisdiction over Plaintiff's claims against all Defendants because Defendants are seeking to enforce the forum selection clauses against Plaintiff who was both a signatory to the Confidentiality Agreements and the drafter of the forum selection clauses at issue.

For all of the above stated reasons, and despite Plaintiff steadfastly contending that its First Amended Complaint does not arise out of the Confidentiality Agreements, it is clear that the gravamen of Plaintiff's First Amended Complaint does indeed materially involve matters arising out of or relating to the Confidentiality Agreements. Having given due consideration to all the above, and in recognition of the heavy burden placed on a party challenging the enforcement of a forum selection clause, Defendants' Motion for Summary Disposition is hereby GRANTED pursuant to MCR 2.116(C)(7).[4]

IT IS SO ORDERED.

DATE: /s/

_____

HON. JOHN M. DONAHUE (P38669)
Berrien County Trial Court

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing document was served upon attorneys and/or parties of record to the above cause by mailing the same to them at their respective address as disclosed by the file, with postage fully prepaid on

_____Kim Williams, Deputy Clerk

[4] MCR 2.116(C)(7) provides that "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . an agreement to arbitrate or litigate in a different forum."