STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

COMAU, INC.,

Plaintiff/Counter-Defendant,

vs. Case No. 2014-3070-CK

JOHN NARKUS,

Defendant/Counter-Plaintiff.
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OPINION AND ORDER

Plaintiff/Counter-Defendant Comau, Inc. ("Plaintiff") has filed a motion for summary disposition of Defendant/Counter-Plaintiff's counterclaim pursuant to MCR 2.116(C)(8) and (10). Defendant/Counter-Plaintiff John Narkus ("Defendant") has filed a response and requests that the motion be denied.

Factual and Procedural History

Defendant began his employment with Plaintiff in July 2008. Defendant was employed as the Director of Aerospace Operations. On April 4, 2013, Defendant was asked by Plaintiff to sign an agreement ("Agreement") that contained, in part, a non-compete provision ("Non-Compete"). In November 2013, Defendant resigned his employment with Plaintiff.

In or about February 2014, Defendant was approached by Triumph to consult on a project. While Defendant initially agreed to the offer, he and Triumph both received a cease and desist notice from Plaintiff based on the Agreement/Non-Compete. Based on the notice, Defendant and Triumph's relationship ended before it began.

On August 6, 2014, Plaintiff filed its complaint in this matter asserting claims for breach of contract based on the Agreement's confidentiality provision (Count I); breach of contract based on the Agreement's non-compete (Count II); and breach of fiduciary duty (Count III).

On December 12, 2014, Defendant filed its answer and counterclaim. Defendant's counterclaim contains a sole claim for tortious interference with a business expectancy. Specifically, Defendant's claim is based on Plaintiff's actions with respect to Defendant's potential relationship with Triumph.

On January 2, 2015, Plaintiff filed its instant motion for summary disposition of the counterclaim pursuant to MCR 2.116(C)(8) and (10). Defendant has filed a response and requests that the motion be denied. On January 29, 2015, Plaintiff filed a reply brief in support of its motion.

On February 2, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in

opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121. Since the parties are relying on factual evidence in support of his motion, the Court will review the motion under the (C)(10) standard rather than the (C)(8) standard.

Arguments and Analysis

In order to maintain a tortious interference claim, a plaintiff must establish: "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Association, Inc. v Tomblinson, Harburn Associates, Architects & Planners Inc.,* 492 Mich 40, 45–46; 821 NW2d 1 (2012).

In its motion, Plaintiff contends that Defendant's tortious interference claim fails because its actions, i.e. informing Triumph of the non-compete, was done for legitimate business reasons. One who alleges tortious interference must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law. *Baidee, supra* at 367; *CMI Int'l, Inc v Intermet Int'l, Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Baidee, supra*, quoting *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Baidee, supra*, quoting *CMI Int'l, supra* at 131. If the interferer's actions were motivated by legitimate business reasons, its actions would not establish improper motive or interference. *Baidee, supra* at 366.

In his response, Defendant contends that the non-compete portion of the Agreement is unreasonable and void, and that attempting to "enforce" an unreasonable agreement is not a legitimate business reason. In support of his position, Defendant relies on *Whitesell Int'l Corp v Whitaker*, unpublished per curium in the Court of Appeals, decided September 14, 2010 (Docket No. 287569)[1].

In *Whitesell*, the Michigan Court of Appeals upheld a jury verdict of 6 million dollars in connection with a former employee's counterclaim for tortious interference based on his former employer's attempts to enforce a non-compete it knew was invalid. However, in *Whitesell* the employer admitted that the non-compete was invalid at the time it sought to enforce it. Specifically, the employer knew that the non-compete had expired.

In this case, unlike *Whitesell*, Defendant has failed to present the Court with any evidence that Plaintiff's attempts to enforce the Non-Compete were made with knowledge that the non-compete was invalid. Accordingly, in addition to not being binding precedent, the Court finds *Whitesell* easily distinguishable from the facts presented in this case and unpersuasive. Unlike the employer in *Whitesell*, Plaintiff does not appear to have had any reason to believe that the Non-Compete was invalid or otherwise unenforceable. Consequently, the Court is convinced that Plaintiff's attempt to enforce the Non-Compete was made for a legitimate business reason.

In addition, this Court's conclusion is further supported by the fact that Triumph was attempting to hire Defendant as a consultant on the same project that Defendant had managed for Defendant prior to the relationship between Plaintiff and Triumph ending. As a preliminary matter, the Court agrees with Defendant's position that Plaintiff's interest in preventing a former

[1] The Court notes that an unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1). When case law is limited and the court finds the reasoning persuasive the court can view unpublished opinions as persuasive. *Dyball v Lennox*, 260 Mich App 698, 705 n1; 680 NW2d 522 (2003); *Plymouth Stamping v Lipshu*, 168 Mich App 21, 27-32; 424 NW2d 530 (1988).

employee from working for one of its former customers would generally be less than preventing him/her from working for a direct competitor. However, the facts presented in this case present a situation in which Triumph, a former customer, became Plaintiff's de-facto competitor with respect to a particular project when it ended its relationship with Plaintiff and then sought to hire one of Plaintiff's former employees to help complete the project. Under the unique facts presented in this case, the Court is convinced that Plaintiff's interest in preventing Defendant from going to Triumph was stronger than an employer's general interest in preventing its employees from leaving to work for one of its customers.

Conclusion

For the reasons discussed above, Plaintiff's motion for summary disposition of Defendant's counterclaim is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 23, 2015

JCF/sr

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