STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

ACADEMY 4 LIL' ANGELS, LLC,
a Michigan limited liability company,

Plaintiff,

vs. Case No. 2020-001471-CB

CORRINA GREEN,

Defendant.
_____/

OPINION AND ORDER

This matter is before the Court on Plaintiff Academy 4 Lil' Angels' motion for preliminary injunction and Defendant Corrina Green's motion for summary disposition.

I. Background

Academy is a childcare center that hired Green as an assistant teacher in March 2016. In April 2018, Defendant signed a noncompete agreement (the Agreement) with Academy that provides, in relevant part:

> 6.1 Employee agrees that during the twenty-four (24) month period following Employee's termination from employment, for any reason, whether voluntary or involuntary:
>
> 6.1.1 Employee shall not join, become employed by, enter into a contractual relationship with or form a direct or indirect competitor of Employer who operates or performs any work within a thirty (30 mile radius of Employer's business address(es).
>
> 6.1.2 Employee will not (directly or indirectly), for himself/herself or on behalf of any other person or entity, solicit, transact, carry on, engage in, conduct, accept from, offer to perform or perform any services to or for any Client or Prospect that are similar to or that compete with the Business of Employer, and
>
> 6.1.3 Employee will not attempt to or persuade, induce, interfere with or cause any of Employer's Clients or Prospects with whom Employer had a relationship at any time during Employee's employment with Employer or with whom Employer was pursuing a relationship at the time of Employee's

> termination to end their relationship with, cease doing business with or otherwise cease receiving Business services from Employer.

(Compl, Ex A.) The Agreement also prohibited Green from disclosing confidential client information during and after her employment with Academy. (Id, ¶3.1).

In January 2020, Green quit working for Academy and began working for a nearby childcare center, Kid Town USA. On April 23, 2020, Academy filed suit against Green alleging she breached the Agreement by working for Kid Town and by taking Academy's confidential client information and using it to solicit business for her new employer. (Compl, ¶¶12-14.) The complaint asserts six claims against Green: breach of contract, claim and delivery, conversion, interference with prospective advantage, breach of fiduciary duty, unfair competition, and violation of the Uniform Trade Secrets Act.

Academy moved for a temporary restraining order and a preliminary injunction barring Green from disclosing Academy's confidential client information and using that information to solicit clients, it also requested the Court order Green to return all of Academy's property and to cease working for Academy's competitor. On April 24, 2020, the Court rejected Academy's motion for a temporary restraining order and scheduled an evidentiary hearing for the preliminary injunction. A month later, Green moved for summary disposition under MCR 2.116(C)(8) and (10).

The evidentiary hearing for the preliminary injunction was held on June 11, 2020 and the Court took the matter under advisement. Eleven days later, on June 22, 2020, the Court heard oral arguments on Green's motion for summary disposition where counsel for Academy stipulated to dismissal of all its claims against Green except for its breach of contract and Uniform Trade Secrets Act claims. (See Resp, p 4.) Additionally,

the Court agreed to take judicial notice of the evidence and testimony presented at the June 11, 2020 evidentiary hearing for consideration in determining Green's motion.

Because Academy's entitlement to a preliminary injunction would be rendered moot if Green's motion for summary disposition is granted, the Court will address Green's motion first. See *Bank of Am v Powers*, unpublished opinion of the Court of Appeals, issued March, 12, 2019 (Docket No. 342548), p 2 (holding "trial court's grant of summary disposition in defendant's favor . . . renders moot any dispute over the appropriateness of a preliminary injunction."); *Palmer v Attorney Gen*, unpublished opinion of the Court of Appeals, issued May 30, 2019 (Docket No. 340119), p 10 (finding trial court did not abuse its discretion by failing to determine whether plaintiffs were entitled to injunctive relief because "summary disposition in favor of defendants . . . renders moot any issue regarding whether plaintiffs are entitled to a preliminary injunction.")

II. Standard of Review

Green's motion seeks summary disposition under MCR 2.116(C)(8) and (C)(10). Because it relies on evidence outside the complaint, consideration under (C)(8) is inappropriate. MCR 2.116(G)(5); *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010) ("A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions.") The Court will evaluate the motion under MCR 2.116(C)(10).

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors*,

469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing such motions, a court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. The initial burden is on the moving party to support its position "by affidavits, depositions, admissions, or other documentary evidence." *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121. "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." *West*, 469 Mich at 183.

III. Law and Analysis

Green argues the Agreement is unenforceable because Academy cannot meet its burden of establishing that it protects any reasonable competitive business interests as required by MCL 445.774a. She further argues that Academy has failed to establish that Green violated the Uniform Trade Secrets Act. In response, Academy contends the Agreement protects its competitive interests in its teaching methods and processes, and it protects Academy's goodwill with its clients. Academy also argues that its teaching methods and processes are trade secrets protected by the Uniform Trade Secrets Act.

a. Reasonableness of the Agreement

Courts generally presume contracts are legal, valid, and enforceable. Noncompetition agreements, however, "are disfavored as restraints on commerce and are enforceable only to the extent they are reasonable." *Coates v Bastian Bros*, 276 Mich

App 498, 507; 741 NW2d 539 (2007); see MCL 445.772 ("A contract . . . between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.") The Michigan Antitrust Reform Act, MCL 445.774a, provides

> 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 or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business.

Under MCL 445.774a, a court must consider whether a noncompete agreement between an employer and an employee protects an employer's reasonable competitive business interests. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 513; 885 NW2d 861 (2016). "Reasonableness of a noncompete agreement is inherently fact-specific, but . . . is a question of law when the relevant facts are undisputed." *Id.* at 507. "The burden of demonstrating the validity of [a noncompetition] agreement is on the party seeking enforcement." *Coates*, 276 Mich App at 507-508.

A reasonable competitive business interest must be something more "than merely preventing competition." *St Clair Med v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). "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." *Id.* citing *Follmer, Rudzewicz & Co v Kosco,* 420 Mich 394, 402–404; 362 NW2d 676 (1984). In *Follmer*, our Supreme Court explained, "[w]hile an employee is entitled to unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers, constitutes property

of the employer and may be protected by contract." 420 Mich at 402-403. However, the *Follmer* Court cautioned, "[a]n employer is not . . . entitled to enforce a contractual provision which would require an employee to pay for using information labelled confidential which is not in fact confidential." *Id.* at 407.

Here, Academy contends the Agreement protects its competitive interests in its teaching methods and its confidential information related to pricing and clients. Academy also argues that Green's position allowed her to acquire goodwill of Academy's clients and the Agreement prevents Green from using that goodwill to compete against Academy in her new job.

As an initial matter, Academy's assertion that its reasonable competitive business interests require a noncompete agreement is undermined by the testimony of Academy's owner, Angie Mittleman, regarding the number of employees who have signed a noncompete agreement. Mittleman testified that only three of Academy's employees (including Green) have ever signed a noncompete agreement. All three of those individuals are no longer employed by Academy, so none of Academy's sixteen current employees is subject to a noncompete agreement. Although Mittleman testified that she had Green sign the Agreement because Green expressed an interest in moving up in the company, other employees who had equal or greater authority and responsibility than Green, who had gone through the same training as Green, and who had access to the same information as Green were not required to sign a noncompete agreement.[1] Academy has not explained why none of its current employees has signed a noncompete

[1] Notably, the current director (i.e., the highest-level employee) of Mittleman's second childcare location is not subject to a noncompete agreement.

agreement. Had Academy believed it had reasonable competitive business interests that needed the protection of a noncompete agreement, it would've had all its employees who were in positions to take advantage of those interests sign non-compete agreements. It did not, and this undisputed fact weighs heavily against finding that Academy's purported competitive interests were reasonable, and that the Agreement was reasonable in light of those interests.

Turning to the specific competitive interests Academy alleges the Agreement protects, Academy first points to its teaching and observation methods. Mittleman testified that Academy employees are trained to use its proprietary "whole child" teaching method and "sensory" observation method. The whole child method, according to Mittleman, is a holistic approach to education that interrelates academic instruction with the particular social and emotional needs of a child. And the sensory observation method teaches employees to observe a child's behavior to catch behavioral problems before they become disruptive.

The evidence doesn't support Academy's argument that these methods are proprietary and confidential. Evidence provided by Green shows that the "whole child" method of early education is a common, well-established teaching method that is the basis of an early child education curriculum called "Creative Curriculum," which is developed and sold by a third-party educational company. (Reply Exs F, G.) Mittleman testified that Academy purchased and uses Creative Curriculum.[2] Green likewise

[2] Mittleman testified that neither the curriculum nor the lesson planning Academy used were developed by her but were instead developed and sold by other companies and institutions and were approved by the State of Michigan.

provided evidence that shows the "sensory" method used by Academy is over 100 years old and is based on the teaching of Maria Montessori (the mother of contemporary Montessori daycare centers). (Id., Exs B-D.) Like the whole child method, the sensory observation method is a well-established and long-studied method of childcare. (Id., Ex E.)

The evidence demonstrates that both the whole child and sensory observation methods are commonly available to the public for purchase from education companies or at no cost from open-source providers, such as educational institutions and the internet. (See id., Exs, B-G). As such, they are not confidential or proprietary. See *Follmer* 420 Mich at 407 ("[a]n employer is not . . . entitled to enforce a contractual provision which would require an employee to pay for using information labelled confidential which is not in fact confidential."); *BHB Inv Holdings*, v Ogg, unpublished opinion of the Court of Appeals, issued February 21, 2017 (Docket No. 330045), p 9 (finding instructional techniques non-proprietary because the information was available to the public).

Mittleman and Green also testified that Academy required Green to attend third-party training sessions and conferences as well as complete annual, state-mandated training. However, Academy has not presented any evidence that establishes the methods taught or the information provided at the third-party events or the state-mandated training was proprietary or confidential. To the contrary, Mittleman and Green testified that the third-party training sessions included employees from other childcare provider and the state-mandated training was required for all childcare employees in the state. Because these additional training opportunities and requirements were open to other individuals who were not Academy employees, Academy's asserted business

interest in protecting the confidentiality of the information provided at these events lacks merit. *Follmer* 420 Mich at 407; see *Nagler v Garcia*, 370 Fed Appx 678, 681 (CA 6, 2010) (finding confidentiality agreement unenforceable under Michigan law where agreement provided that all information would be considered confidential "even if it could also have been acquired in a non-confidential manner.") Accordingly, the Court finds that any knowledge or information Green acquired through her training—whether provided directly by Academy, by third parties hired by Academy, or by the state—is general knowledge that is readily available and commonly acquired in the childcare trade. It is not a competitive interest that can be subject to a noncompete agreement. *Follmer*, 420 Mich at 402-403 ("an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable.")

Academy further argues it has a competitive interest in its client information, such as customer lists and files and daily progress tracking. While "preventing the anticompetitive use of confidential information is a legitimate business interest," *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007), the information must in fact be confidential, *Follmer* 420 Mich at 407, and possess some competitive value, See *Whirlpool Corp v Burns*, 457 F Supp 2d 806, 812 (WD Mich, 2006) (confidential information obtained by appliance salesman not a protectable competitive interest where no evidence was presented showing that the information would be useful in later sales position for competing manufacturer); *N Michigan Title Co of Antrim-Charlevoix v Bartlett*, unpublished opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 248751), p 4 (finding noncompete clause

that completely barred defendants from engaging in title insurance business unenforceable because the clause "does not narrow the focus of the prohibition to prevent *unfair competition*.") (emphasis added).

Mittleman testified that she keeps certain files containing client information, such as notes related to a child's development and learning, in a locked filed cabinet in the main lobby. She allows any employee with whom she has a "level of trust" access to the files; this includes team leaders, trainers, and members of the "management team." Notably, however, none of these employees except Green is subject to a noncompete agreement, thus they are not under a contractual duty of confidentiality. As none of Academy's current employees who have access to the files have a contractual duty to maintain the confidentiality of the client information, the Court finds that the information in the files is not confidential and therefore is not, under these facts, a competitive business interest that can be subject to a noncompete agreement.

Moreover, even if the information in the files is confidential, Academy has failed to provide any argument or evidence showing that the client information would give Green an unfair competitive advantage.[3] See *Whirlpool*, 457 F Supp 2d at 812; *N Michigan Title*, unpub op, p 4. For example, Academy has not provided any evidence that in the childcare industry, client information and teacher notes such as progress reports, meal tracking, diaper changes, and nap times gives one childcare provider a competitive advantage over another such that disclosure of that information would give a competitor an unfair advantage. See cf. *Rooyakker,* 276 Mich App at 158 (finding confidential client

[3] **Again, as noted earlier, any assertion of unfair competitive advantage would be undermined by Academy's failure to have all its employees sign non-compete agreements like the one signed by Green.**

information of accounting firm a legitimate business interest given the nature of the accounting profession). Indeed, Green and the director at her current employer, Kid Town, both testified that Green has never used any of the client information in Academy's files to compete with Academy nor has Green or Kid Town solicited any of Academy's current clients.[4] Accordingly, the Court finds Academy has failed to establish it has a reasonable competitive interest in its client information.

Next, Academy argues Green's position allowed her to develop strong relationships with children and parents based on Academy's goodwill, so Academy has a competitive interest in protecting this goodwill. Generally, an employer has reasonable business interests in protecting its goodwill. *St Clair Med*, 270 Mich App at 268. The rationale for this protection is that "an employee who establishes client contacts and relationships as the result of the goodwill of his employer's business is in a position to *unfairly appropriate* that goodwill and thus *unfairly compete* with a former employer upon departure." (emphasis added) *Teachout Sec Services, Inc v Thomas*, unpublished opinion of the Court of Appeals, issued October 19, 2010 (Docket No. 293009), p 3. Here, however, these competitive concerns are absent. As explained earlier, all of Academy's current employees, most of whom, like Green, have relied on Academy's goodwill to build relationships with clients, are not subject to the same non-compete agreement as Green. As such, those employees are not barred from using the client relationships they developed due to Academy's goodwill to later compete with Academy.

[4] Although Mittleman testified she had heard that Green had communicated with four of Academy's current clients, she did not know whether Green had solicited those clients to change childcare to Kid Town.

Because all the other Academy employees may use their client relationships developed from Academy's goodwill to later compete with Academy, the Court is unconvinced that Green's use of that same goodwill is either an unfair appropriation of Academy's goodwill or is unfairly competitive. If Academy believed it had a legitimate competitive interest in preventing its employees from misappropriating its goodwill and unfairly competing with it, it would've had all its employees sign a non-competition agreement. It failed to do so, and it has not provided any argument or evidence demonstrating that Green's use of Academy's goodwill is different than those of its other Academy employees. Therefore, under the undisputed facts here, the Court finds Academy does not have a competitive business interest in protecting its goodwill.

Finally, although Academy argues it has a competitive interest in maintaining the confidentiality of its pricing, Mittleman conceded during her testimony that Academy's pricing is not confidential and that its base pricing is fixed and provided to prospective clients when they show up for a tour. See *Follmer* 420 Mich at 407 ("[a]n employer is not . . . entitled to enforce a contractual provision which would require an employee to pay for using information labelled confidential which is not in fact confidential.") Moreover, while Mittleman testified she would "sometimes" let teachers know about discounts for clients, she did not indicate whether Green was privy to this information, and Green testified that she never had access to pricing information. Accordingly, the Court finds Academy does not have a competitive business interest in the confidentiality of its pricing.

In sum, there is no genuine issue of material fact concerning the Agreement between Academy and Green. The Court finds as a matter of law that Academy has failed to meet its burden to establish that the Agreement protects its reasonable

competitive business interests. This failure renders the Agreement unenforceable under MCL 445.774a, and Green is entitled judgment as a matter of law on Academy's breach of contract claim.

b. Trade Secrets

Green next argues that general knowledge about Academy's clients and procedures are not trade secrets under the Michigan Uniform Trade Secrets Act (MUTSA), and, even if they are, Green has not taken or used that information. In response, Academy contends its "'sensory' approach to caring for children" and its client information are valid trade secrets under MUTSA. (Resp Br, pp 4-6).

MUTSA provides a statutory cause of action for the misappropriation of trade secrets. MCL 445.1903. It "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." MCL 445.1908(1). A claim of misappropriation of trade secrets has three elements: "(1) the existence of a trade secret, (2) the defendant's acquisition of the trade secret in confidence, and (3) the defendant's unauthorized use of it." *Stromback v New Line Cinema*, 384 F3d 283, 302 (6th Cir 2004).[5] MUTSA defines "trade secret" to mean

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[5] "It is appropriate to look to the law of other jurisdictions to interpret [MUTSA]." *Polytorx, LLC v Univ of Michigan Regents*, unpublished opinion of the Court of Appeals, issued May 7, 2015 (Docket No. 318151), p 6; see *Innovation Ventures*, unpub op, p 12.

MCL 445.1902(d). To qualify as a trade secret, the information must "be a secret." *Dura Glob. Techs., Inc v Magna Donnelly Corp*, 662 F Supp 2d 855, 859 (ED Mich, 2009) quoting *Kubik, Inc v Hull*, 56 Mich App 335, 348; 224 NW2d 80 (1974). The owner of a trade secret must take "sufficient measures . . . to guard the secrecy of the information and preserve its confidentiality." *Kubik*, 56 Mich App at 347-48.

As explained above, the sensory approach used by Academy is a well-established and long-studied method of childcare, and information about it is readily available to the public. (Reply Exs, B-E.) This information, therefore, is not a trade secret. *Kubik,* 56 Mich App at 348 ("The term 'trade secret' does not encompass information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.")

Likewise, the Court has already determined that Academy's client information is not confidential. Mittleman allows any employee with whom she has a "level of trust" access to certain customer files, including team leaders, trainers, and members of the "management team." None of these employees (including all of Academy's current employees) except Green is subject to confidentiality agreement and there is no evidence that Academy informed them of the confidential nature of the information. Under these undisputed facts, the Court finds that Academy failed to guard the secrecy of its client information and preserve its confidentiality; therefore, this information is not a trade secret. See *Sulfo Techs., LLC v Schmoyer*, unpublished opinion of the Court of Appeals, issued February 8, 2011 (Docket No. 294246), p 8 (rejecting plaintiff's argument that its information was a trade secret where, other individuals besides defendant were not subject to any confidentiality agreement and were not barred from disclosing the

information); See *Sheets v Yamaha Motors Corp, USA,* 849 F2d 179, 183-184 (CA 5, 1988) ("disclosure of a trade secret to others who have no obligation of confidentiality extinguishes the property right in the trade secret").

There is no genuine issue of material fact that neither Academy's sensory approach nor its client information constitute valid trade secrets under MUTSA. Green is therefore entitled to judgment as a matter of law on Academy's MUTSA claim.

As noted at the outset, because Green's motion for summary disposition is granted, Academy's entitlement to a preliminary injunction is rendered moot and the Court need not address it. *Palmer*, unpub op, p 10; *Powers*, unpub op, p 2.

II. Conclusion

For the reasons set forth above, Green's motion for summary disposition is GRANTED. Academy's complaint is dismissed. This Opinion and Order resolves the last pending claim and closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

COUNTY OF MACOMB STATE OF MICHIGAN

Kathryn A. Viviano

Date: 08/03/2020 Signed by KATHRYN VIVIANO 08/03/2020 01:39:43 3bIShtBj

Hon. Kathryn A. Viviano, Circuit Court Judge