JULY 2020 MICHIGAN BAR EXAMINATION
EXAMINER'S ANALYSES

EXAMINER'S ANALYSIS OF QUESTION NO. 1

Under Michigan law, "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local v City of Pontiac*, 482 Mich 1, 8 (2008) (citations and internal quotation marks omitted).

In determining whether to grant a preliminary injunction, the court must consider four factors: "whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Ass'n v City of Detroit*, 482 Mich 18, 34 (2008) (footnote omitted.).

Applying the preliminary injunction factors, the court should grant Pax's motion. The first factor involves Pax's ability to show irreparable harm. The Michigan Supreme Court has held that this requirement is "an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters*, 482 Mich at 9 (footnote omitted). To establish irreparable harm, a plaintiff 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." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998).

Pax's allegations of loss of customer goodwill and Delta's use of confidential information it acquired as a Pax franchisee to compete against it are sufficient to show a risk of irreparable harm [Factor (1)].

"'[T]he loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.'" *Slis v State of Mich*, ___ Mich App ___; 2020 WL 2601577, at *21 (2020), quoting *Basicomputer Corp v Scott*, 973 F2d 507, 512 (CA 6, 1992). Cf. *Thermatool*, 227 Mich App at 377 (finding no irreparable harm where the plaintiffs alleged only "a single breach of the noncompetition agreement in the sale of one [product] to a known customer," such that "[a]ny damages suffered by plaintiffs as a result of that sale" were "easily calculable").

Similarly, the loss of fair competition resulting from use of confidential information in breach of a non-compete provision has been recognized as likely to cause irreparable harm. *Basicomputer*, 973 F2d at 512. "[P]reventing the anticompetitive use of confidential information is a legitimate business interest" that may validly be protected by enforcing a noncompete. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158-159 (2007).

As for the balance of harms [Factor (2)], Delta has not identified any harm it would suffer that would outweigh the irreparable harm being claimed by Pax. Indeed, the covenant not to compete does not completely prohibit Delta from providing home health care services—it just cannot solicit patients or provide services to Pax patients within a 20-mile radius for one year.

Pax has also shown a likelihood of success on the merits [Factor (3). Delta's plan to abandon its Pax franchise and continue to operate under a new name is a plain breach of the covenant not to compete. And while Delta claims that the noncompete provision is unenforceable, such provisions are valid and enforceable in Michigan so long as they are reasonable in duration and geographical area. *Rooyakker*, 276 Mich App at 157; MCL 445.774a. There is nothing to suggest that the covenant not to compete is unreasonable. Indeed, courts applying Michigan law have upheld noncompete agreements containing similar restrictions. See *Whirlpool Corp v Burns*, 457 F Supp 2d 806, 813 (WD Mich, 2006) (observing that "[c]ourts have upheld non-compete agreements covering time periods of six months to three years"); *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 550 (CA 6, 2007) (upholding agreement prohibiting competition within a 25-mile radius).

Finally, the public interest factor [Factor (4)] is either neutral or weighs in favor of granting preliminary injunctive relief. Enforcement of valid noncompete agreements is in the public interest. *Lowry Computer Products, Inc v Head*, 984 F Supp 1111, 1116 (ED Mich, 1997). Moreover, while Delta asserts that its existing patients will be harmed if it cannot continue to provide home health care services to them, there is no evidence to support that claim.

Although the better answer is that the court should grant Pax's request for a preliminary injunction, some credit will be given for a reasoned analysis reaching a contrary conclusion.