No. _____

In The
Supreme Court of the United States

DALE DE STENO; JONATHAN PERSICO;
NATHAN PETERS,

Petitioners,

v.

KELLY SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

APPENDIX

Robert J. Gastner
Counsel of Record
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW,
12th Floor
Washington, DC 20006
(202) 659-6600 Telephone
rgastner@eckertseamans.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

KELLY SERVICES, INC.,
Plaintiff-Appellee,
v.
DALE DE STENO; JONATHAN PERSICO;
NATHAN PETERS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

BEFORE: BATCHELDER, GIBBONS, and
ROGERS, Circuit Judges

ROGERS, Circuit Judge. Defendants signed one-year noncompete agreements with their employer, plaintiff Kelly Services, and later left Kelly's employ to join one of Kelly's competitors. Kelly sued, and obtained preliminary injunctive relief that lasted long enough to prevent defendants from working for the competitor for the duration of their noncompete clauses. The only remaining relief sought by Kelly was attorneys' fees, which the district court awarded pursuant to provisions in the noncompete agreements. Defendants appeal the

attorneys' fee award, arguing that they did not violate their contractual noncompete obligations in the first place, and that the contractual attorneys' fees in any event could not be awarded without a jury trial under the Seventh Amendment. Neither argument, however, precludes the award of attorneys' fees in this case.

I

Defendants were employees of a division of Kelly Services, a staffing and consulting company, in Minneapolis. They each signed employment agreements when they were hired.

Defendant Dale De Steno's employment agreement contained a noncompete provision, under which De Steno agreed that he would "not compete against Kelly . . . for one year after [he] leave[s] Kelly in any market area in which [he] worked." The agreement also contained an attorneys' fees provision:

> If I break this Agreement, Kelly is entitled to recover as damages from me the greater of the amount of the financial loss which Kelly suffers as a result or the amount of the financial gain which I receive. *I will pay Kelly's reasonable attorney's fees and costs involved in enforcing this Agreement.*

(Emphasis added.) The agreement contained a choice of law provision selecting Michigan law.

Defendants Jonathan Persico and Nathan Peters signed similar employment agreements. Like De Steno's, these agreements contained year-long

noncompete provisions and attorneys' fees provisions. The attorneys' fees provisions read as follows:

> 6. Remedies/Damages. I agree that the Company's remedies at law for any violations of this Agreement are inadequate and that the Company has the right to seek injunctive relief in addition to any other remedies available to it. Therefore, if I breach this Agreement the Company has the right to, and may seek issuance of a court ordered temporary restraining order, preliminary injunction and permanent injunction, as well as any and all other remedies and damages, including monetary damages. *I further agree to pay any and all legal fees, including without limitation, all attorneys' fees, court costs, and any other related fees and/or costs incurred by the Company in enforcing this Agreement.*

(Emphasis added.) These agreements also contained a Michigan choice of law provision.

In early 2016, defendants accepted offers from a competitor of Kelly's. According to defendants, the offers were "for the same or similar staffing position in the same Minneapolis market area." Kelly sued. Kelly asserted three state law causes of action, including breach of the non-competition provisions and a common law claim for breach of duty of loyalty. In its complaint, Kelly alleged that it had suffered "damages" as a result of the two breaches of its contracts, including "lost profits and attorneys' fees." Defendants removed the case to the federal

court below, and Kelly moved for a preliminary injunction. The district court held a hearing, and on May 2, 2016, entered an order granting Kelly's motion for a preliminary injunction.

The district court found first that Kelly had "made an initial demonstration that irreparable harm may occur" if no injunction was granted. Next, the court found that the harm to Kelly from not issuing an injunction outweighed the harm to defendants. Third, the district court found that Kelly had "shown that it would likely prevail on the merits." The district court wrote:

> The Defendants are almost certainly in violation of their non-compete agreements with Kelly. The Defendants' only argument would be that the non-competes are void. They have not alleged any fraud or other defect in the signing of the agreements, so the Defendants' only legal option is to contend that the non-competes are unreasonable. Reasonable non-compete agreements should be enforced as a matter of policy.
>
> The agreements in question had a duration of one year, apply to the markets in which the Defendants worked or had responsibility, and forbid the Defendants from working in Kelly's line of business, staffing services . . . . The Defendants have not provided compelling authority explaining why the outcome here should not be identical [to cases upholding the enforceability of identical agreements.]

> The Defendants are working for staffing companies in the same market they serviced for Kelly within weeks, even days, of leaving Kelly. The Court is especially troubled by the Defendants' suggestion that they were working in IT, and not engineering, staffing . . . . Kelly has presented unrebutted evidence that at least one of the Defendants has solicited for multiple positions in the engineering industry. The attempt to argue otherwise would indicate that the Defendants know they are violating their non-compete agreements . . . . In sum, because the agreements are reasonable, and the Defendants have almost certainly violated them, Kelly has demonstrated a likelihood of success on the merits.

(Citations omitted.) Finally, the court found that the public interest was slightly more favorable to Kelly. The court enjoined the defendants "from violating their noncompete agreements until the dispute is resolved and the Court ends the injunction." A subsequent more specific order, entered on May 29, 2016, broadly prohibited defendants from working for any competitors of Kelly in Minneapolis, and was to last for sixty days, at the end of which Kelly could "request entry of a further injunction." Defendants filed an interlocutory appeal challenging the preliminary injunction.

On July 25, 2016, with the injunction set to expire in three days, Kelly requested a sixty-day extension. On August 30, the court extended the injunction "indefinitely until the Sixth Circuit rules on the defendants' interlocutory appeal." That ruling

never came: Defendants voluntarily dismissed the interlocutory appeal a few weeks later, on September 21. Defendants did not move the court to withdraw the injunction, and the court did not address the matter on its own. February 1, 2017 marked the one-year anniversary of defendants' exit from Kelly. Were it not for the indefinitely running preliminary injunction, the defendants would have been free to work for any competitor of Kelly under the terms of their agreements after that date. But litigation proceeded, and neither defendants nor Kelly sought to lift the injunction. Nor did Kelly or the defendants move the court to dismiss the proceeding as moot.

On June 2, 2017, the court entered a "Mediation Order," retroactively lifting the preliminary injunction as of May 29, 2017, one year from its entry. After a failed attempt at mediation, the court amended the scheduling order in the case and set the dispositive motions deadline for July 29. Both Kelly and the defendants moved for summary judgment.

In defendants' motion papers, they contended primarily that the noncompete agreements were not enforceable in the first place, and that the district court's grant of preliminary injunctive relief did not amount to a determination of the merits of Kelly's claims. They also argued that under the Seventh Amendment they were entitled to a jury determination of any award of contractual attorneys' fees. Kelly's motion stated that, by the time it filed for summary judgment, Kelly had been "granted all of the injunctive relief it sought in its Complaint against defendants and [the] only issue remaining is the amount of attorneys' fees and costs owed to Kelly by defendants." Kelly's response to defendants'

motion for summary judgment further contended that Kelly had "prevailed" by virtue of having obtained all the injunctive relief it had sought, but that:

> Even if Kelly had not prevailed on it[s] claims against Defendants, it would still be entitled to its reasonable attorneys' fees and costs. Defendant De Steno's employment agreement expressly states that he "will pay Kelly's reasonable attorney's fees and costs involved in enforcing this Agreement." Likewise, Defendants Persico's and Peters' employment agreements expressly state they "agree to pay any and all legal fees, including without limitation, all attorneys' fees, court costs, and any other related fees and/or costs incurred by the Company in enforcing this Agreement.

(Citations omitted.) Defendants did not appear to contest the enforceability of the attorneys' fees provisions in their employment agreements, but contended only that the "reasonableness" of the fee should be determined by a jury.

In an opinion and order, the district court, noting that Kelly did not seek further enforcement of the non-compete agreements, accepted Kelly's reasoning and rejected that of the defendants. *See Kelly Servs., Inc. v. De Steno*, Case No. 2:16-cv-10698, 2017 WL 4786105 (E.D. Mich. Oct. 24, 2017). The court determined that Kelly was entitled to fees "under a plain reading of the contracts," relying on the contractual language quoted above providing for fees "involved in enforcing" or "incurred . . . in enforcing"

the contracts. *Id.* at *2. The court rejected each of the defendants' primary arguments because: (1) the operative provisions before the court at that point were the covenants to pay attorneys' fees, not the noncompete clauses, and (2) "a ruling on the merits is not required to trigger the attorney's fees provisions." With respect to the latter holding, the district court reasoned:

> The attorney's fees section is distinct from the noncompete clause, and there is no language specifically linking the two. Moreover, the parties did not include language requiring Plaintiff to prevail before it was entitled to the fees.
>
> Accordingly, a plain reading of the contracts suggests that the parties intended for Defendants to pay attorney's fees if Plaintiff merely sought to enforce the contracts. And enforcement is precisely what the lawsuit involves: Plaintiff, albeit not on the merits, persuaded the Court to enter an order enjoining Defendants from competing for the duration of the noncompete clauses.

Id. at *2. The court accordingly determined that Kelly was contractually entitled to reasonable attorneys' fees, and ordered additional briefing on defendants' jury-trial issue. *Id.*

After additional briefing, the court decided that a jury was not required to decide the amount of damages. The court reasoned that submitting the issue of the amount of fees to a jury would mean that the "trial would then become a trial about the cost of

the trial itself, ultimately requiring the jury to calculate the cost of each passing minute." After Kelly and the defendants submitted briefing on the reasonable amount of fees to be awarded, the district court determined that $72,182.90 was a reasonable fee award, ordered the defendants to pay it, and closed the case. Defendants appeal.

II

Apart from the jury-trial issue, defendants on appeal make essentially the same arguments that they made below: that the noncompete agreements were not enforceable under Michigan law; and that the district court, by making preliminary but not final rulings, did not properly or finally rule on the merits of those issues. In doing so, defendants do not squarely address the district court's reasoning that these arguments are beside the point. The district court ruled in effect that attorneys' fees were owed under the contract even if the district court did not determine that the noncompete agreements were enforceable. On the procedural facts of this case, the district court was correct.

A

Given what the defendants agreed to in their employment agreements, the district court was correct to conclude that defendants owe Kelly attorneys' fees. De Steno agreed that he would "pay Kelly's reasonable attorney's fees and costs involved in enforcing this Agreement." Persico and Peters agreed "to pay any and all legal fees, including . . . all attorneys' fees . . . incurred by the Company in

enforcing this Agreement." Kelly brought an action to enforce the employment agreements, the district court granted Kelly's request for a preliminary injunction, and the defendants were prohibited from working for an alleged competitor for one year, the full scope of injunctive relief available under the employment agreements. Kelly's attorneys' fees in this case were, under a plain reading of the contracts, "involved" or "incurred" "in enforcing" these agreements, and therefore, under a plain reading of the contracts, Kelly is entitled to have the defendants pay those fees. These contracts are governed by Michigan law and Michigan courts "will enforce [attorneys' fees' provisions] like any other term [in a contract] unless contrary to public policy." *Pransky v. Falcon Grp., Inc.*, 874 N.W.2d 367, 383 (Mich. Ct. App. 2015). As with any other term in a contract, courts should look first to the plain language of the contract, and if the language is unambiguous it will be enforced "as written . . . . [A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Prods. and Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 259 (Mich. 2003).

The contracts by their terms do not require a final determination of liability in favor of Kelly as a condition for the award of fees. Unlike numerous similar agreements, these contracts do not employ the words "prevailing party," nor by their literal language do they require a final determination of liability. In fact, as the district court correctly noted, defendants argued below that these provisions were *not* prevailing party provisions. *De Steno*, 2017 WL 4786105, at *2 n.2.

In reasoning that a final determination of contract breach was not required, the district court may have stated too freely that the contract required former employees to pay attorneys' fees "if [Kelly] merely sought to enforce the contracts." *De Steno*, 2017 WL 4786105, at *2. One can imagine cases where efforts to "seek enforcement" could for instance be unreasonable, made with little or no basis, or made for purposes of oppression or harassment, or could be simply unsuccessful. A court might read the words "reasonable . . . fees . . . involved in enforcing" and "fees . . . incurred . . . in enforcing this Agreement" not to extend to such situations. We do not address the possibility of such a limited interpretation, however, because the record is clear that none of these situations is present in this case. The district court entered a preliminary injunction that resulted in substantial relief, based on a determination that Kelly had shown a strong likelihood of success on the merits. Indeed, defendants withdrew their appeal from the grant of that relief. None of the imagined oppressive or unreasonable situations has occurred here. The contracts accordingly clearly provided for recovery of attorneys' fees.

B

The remaining issue is whether the district court erred in determining on its own the amount of fees owed, instead of giving the question to a jury. The district court's ruling refusing to empanel a jury to hear attorneys' fees issues did not violate the Seventh Amendment, which provides that

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Defendants argue primarily that they are entitled to a jury determination of the amount of attorneys' fees. This argument lacks merit for the persuasive reasons given by the Second Circuit in *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993). Under the Seventh Amendment, parties have a right to a jury only for a determination of "legal," as opposed to "equitable," issues, *Curtis v. Loether*, 415 U.S. 189, 193 (1974), and:

> The Supreme Court has held that in determining whether an issue is "legal" or "equitable" under the Seventh Amendment, a court should consider, among other things, "the practical abilities and limitations of juries." *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970). To compute a reasonable amount of attorneys' fees in a particular case requires more than simply a report of the number of hours spent and the hourly rate. The calculation depends on an assessment of whether those statistics are reasonable, based on, among other things, the time and labor reasonably required by the case, the skill demanded by the novelty or complexity of the issues, the burdensomeness of the fees, the incentive

> effects on future cases, and the fairness to the parties. Such collateral issues do not present the kind of common-law questions for which the Seventh Amendment preserves a jury trial right. In fact, in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), the Supreme Court refused to extend the American Rule that parties pay their own fees absent statutory authorization precisely because of the equitable considerations involved in computing a reasonable amount of attorneys' fees.
>
> Accordingly, although plaintiff had the right to a jury decision on whether defendants should recover attorneys' fees, plaintiff did not have the right to a jury decision on a reasonable amount of attorneys' fees. Unlike the client in *Simler v. Conner*, [372 U.S. 221 (1963),] no party here claimed that the contract directed the amount of attorneys' fees to be awarded by specifying a percentage of an ascertainable sum. Therefore, the district court, in its equitable role, should have determined a reasonable fee.

McGuire, 1 F.3d at 1315. The Second Circuit concluded that "there is no absolute right to have a jury determine the amount" of fees, and supported the conclusion with further considerations of fairness and efficiency. *Id.* at 1315-16.

In the instant case it would similarly be highly impractical for a jury to determine the amount of attorneys' fees. As the district court noted below, if

these questions were left to juries, "[t]he trial would then become a trial about the cost of the trial itself, ultimately requiring the jury to calculate the cost of each passing minute." Put differently, it "would be impractical to require the parties to submit evidence on attorney fees before the end of the trial and resultant necessary legal services." *Redshaw Credit Corp. v. Diamond*, 686 F. Supp. 674, 676 (E.D. Tenn. 1988). Further, the jury would have to "look behind the curtain of the case," and review, for example, pre-trial motions in order to calculate the reasonable amount of time spent litigating the case. *McGuire*, 1 F.3d at 1317 (Jacobs, J., concurring).

Defendants rely on cases where plaintiffs brought freestanding breach of contract claims seeking to recover attorneys' fees and in which courts determined that the defendants had a right to a jury determination of the amount of fees awarded. *See J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1116 (10th Cir. 2009); *Timken Alcor Aerospace Techs., Inc. v. Alcor Engine Co.*, No 1:06-CV-2539, 2010 WL 2650026 (N.D. Ohio July 2, 2010). In such cases, however, having a jury determine the amount of fees would not present the same problems as it would in this case. In *J.R. Simplot* and *Timken Alcor*, the legal action for which the party sought attorneys' fees had already concluded, and therefore the juries would not have had practical difficulties determining the legal cost of the proceeding. Because there would be no practical limitation on the jury's determination of damages in such a case, that determination may present "legal" issues under a Seventh Amendment analysis. Indeed, both the *Simplot* and *Timken* courts specifically *distinguished* the *McGuire* holding on the ground that the court in

McGuire (like the district court below) did not "decide the availability of a jury trial for fees where . . . a claimant seeks contractual indemnification for fees incurred in a separate litigation against a third party." *Simplot*, 563 F.3d at 1117; *accord Timken Alcor*, 2010 WL 2650026, at *2.

When determining whether an issue is "legal" or "equitable" under the Seventh Amendment, courts also consider "the pre-merger custom with reference to such questions," *i.e.*, whether such questions were brought in law or in equity before the Federal Rules did away with the distinction. *Ross*, 396 U.S. at 538 n.10. The impracticability concern is dispositive in this case, but "pre-merger custom" also provides some support for considering the calculation and award of attorneys' fees in an underlying action as a matter for the court, and not the jury. *See Schmidt v. Zazzara*, 544 F.2d 412, 414 (9th Cir. 1976); *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118, 122 (N.D. Ill. 1982).

The Seventh Amendment accordingly does not require a jury determination of the amount of attorneys' fees in this case. Although the defendants' Seventh Amendment argument primarily addresses the determination of the amount of fees, their brief at one point appears to argue that the underlying issue of whether Kelly has a contractual right to fees should have gone to a jury. Appellants' Br. 26-27. This aspect of their argument is not disposed of by the reasoning in *McGuire*, which assumes that before the court decides the amount of attorneys' fees, "the jury is to decide at trial whether a party may recover such fees." 1 F.3d at 1313. Here, however, no jury was required because summary judgment was proper on that issue.

Regardless of whether an issue is "legal" or "equitable" for Seventh Amendment purposes, a judge may grant summary judgment when there is no genuine issue of material fact. "[S]ummary judgment does not violate the Seventh Amendment." *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 373 n.3 (6th Cir. 2009) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979)). As discussed above, summary judgment was proper with respect to whether Kelly was entitled to fees in this case, and therefore it was unnecessary to put the question of entitlement to a jury.

Apart from the Seventh Amendment challenge, defendants do not contest the reasonableness of the awarded amount, and we do not address that issue.

III

The district court's judgment awarding fees is affirmed.

JULIA SMITH GIBBONS, Circuit Judge, concurring. I join the portion of Judge Rogers' opinion relating to defendant's argument that they were entitled to a jury trial. My reasoning as to the other issues in the case differs somewhat from his.

Kelly Services' brief does not accurately reflect the procedural history of this case. The district court never reached the ultimate merits questions of whether Kelly was entitled to enforce its contracts and whether defendants had breached those contracts. A preliminary injunction is not a ruling on the ultimate merits of the dispute.

Instead, what happened here is that, after Kelly Services had obtained all the relief it needed via preliminary injunction, the district court decided that a decision on the ultimate merits was unnecessary. It reasoned, in conclusory fashion, that the contract language did not require breach of the agreement to recover attorneys' fees. Defendants have made no effort to counter this interpretation, either in the district court or on appeal.

The district court's interpretation may be the best interpretation of the language, but it is not the only possible interpretation. One might argue that the sentence requires actual enforcement of the contract—a circumstance that did not occur here because of the absence of a merits determination. Or one might argue that the reference to breach in the prior sentence is intended to apply to all remedies, in deciding attorneys' fees. But defendants made neither of these arguments.

In the district court, defendants argued that they had not breached their employment agreements and that the agreements were not enforceable. They also sought a jury trial to determine the amount of attorneys' fees. They did not seem to realize that plaintiff's argument was that plaintiff was entitled to attorneys' fees simply because it had sought judicial help in enforcing the contracts. On appeal, defendants repeat those same arguments, and never address the question of the proper construction of the attorneys' fee provision.[1]

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[1] Although defendants briefly mentioned "the contract language at issue here," they did so only within their argument for a Seventh Amendment right to a jury trial, rather than in an argument about the proper construction of the contract. (CA6 R. 22, Defendants-Appellants Brief, Page ID 33.)

Therefore, defendants waived these arguments. When a party appeals the district court's judgment and raises arguments on appeal that were not raised before the district courts, we generally consider those arguments waived. *Singleton v. Wulff*, 428 U.S. 106, 120 ("It is the general rule, of course, that a federal appellate court does not consider an issue passed upon below."). Only a narrow exception is available under the *Singleton* rule—we will consider untimely arguments in "exceptional cases" or "when the rule would produce a plain miscarriage of justice." *Pinney Dock and Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1998) (citations omitted). This is not an exceptional case. Application of the district court's ruling does not create a plain miscarriage of justice. Defendants therefore waived these arguments.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

ORDER DENYING MOTION TO DISMISS FOR IMPROPER VENUE (document no. 3) **AND GRANTING MOTION FOR PRELIMINARY INJUNCTION** (document no. 2)

The Defendants are three former employees of Kelly Services, Inc. ("Kelly"), who left Kelly and joined a competitor staffing firm on February 1, 2016. Kelly filed suit in Michigan state court pursuant to a venue clause in two of the Defendants' non-compete agreements, and alleged various claims sounding in breach of contract and tort. Essentially, Kelly is concerned that the defendants are not complying with non-compete agreements they signed and that the alleged failure may cause Kelly to lose business and goodwill. The Defendants removed the case pursuant to federal diversity jurisdiction and Kelly then moved for a Temporary Restraining Order or Permanent Injunction to prevent Defendants from allegedly violating the non-compete

agreements. ECF No. 2. Defendants filed a Motion to Dismiss or Transfer Venue, and argued that venue in the Eastern District of Michigan is inappropriate. ECF No. 3. The Court held a hearing on both motions on April 26, 2016. Having carefully considered the parties' arguments, the Court finds that Kelly should prevail on both issues.

BACKGROUND

Defendants were employees of Kelly, a staffing agency, who worked in various capacities to place candidates in engineering jobs across the country, but especially in the upper Midwest. Resp. 2, ECF No. 6. All of the Defendants worked in Kelly's Minneapolis office. Kelly is a Delaware corporation with its headquarters in Michigan, and it does business throughout the country. *Id.* The Defendants all signed non-compete agreements as part of their contracts. The agreements forbid employees from disclosing confidential trade secrets or business information, soliciting Kelly's customers or employees for a competing business, and competing against Kelly by working for a competitor for a term of one year following termination of employment. *See* Agreements, ECF Nos. 2-3, 2-4, 2-5. All three agreements include a Michigan choice-of-law provision, but only Persico's and Peter's agreements include a Michigan venue clause.

Defendants' contacts with Michigan were relatively minimal. Kelly lists the contacts as: (1) signing contracts with a Michigan-based company, (2) correspondence with employees and managers in Michigan, (3) contact with Kelly's Michigan-based IT department, and (4) use of information that came

from Kelly's servers in Michigan. Resp. 2–3, ECF No. 5.

On February 1, 2016, the Defendants left their employment with Kelly and joined a rival staffing company, Pride Technologies, Inc., that also has offices in Minneapolis. Resp. 5, ECF No. 6. Ten days later, Kelly filed suit against them in Michigan state court, and the Defendants then removed to federal court.

STANDARD OF REVIEW

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). That said, "[i]t is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses." *Turcheck v. Amerifund Fin., Inc.*, 272 Mich. App. 341, 345 (2006).

"The object of preliminary injunctions is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either." *Gates v. Detroit & M. Ry. Co.*, 151 Mich. 548, 551 (1908). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Supreme Court has repeatedly characterized "injunctive relief as an

extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. "Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A C. Wright et al., Federal Practice and Procedure § 2948.1 (3d ed. 2013).

DISCUSSION

I. Forum

The Court will address the forum question first. It is clear that Defendants Persico and Peters are bound by the forum selection clauses contained in their agreements. The clauses read:

> Any action arising out of this Agreement or the relationship between the parties established herein shall be brought only in the State of Michigan Courts of appropriate venue, or the United States District Court sitting in Michigan, and I hereby consent to and submit myself to the jurisdiction of such courts.

Agreements, ECF Nos. 2-4. 2-5. The clause clearly provides for venue and personal jurisdiction as to Peters and Persico. Forum selection clauses "generally are enforced by modern courts unless enforcement is shown to be unfair or unreasonable." *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374 (6th Cir. 1999). A forum selection clause may be

unenforceable if it was (1) obtained by fraud or duress, (2) the selected forum would not handle the suit, or do so effectively or fairly, or (3) the selected forum would be unjustly inconvenient for the plaintiff. *Id.* (citing Restatement (Second) of Conflict of Laws § 80 cmt. c (1971)). None of those circumstances apply here.

With Persico and Peters bound by their venue clauses, the analysis turns to DeSteno, whose agreement did not contain a forum selection clause. While Minnesota is almost certainly a better venue for the present litigation than Michigan, the law does not require a case to take place in the best venue. Rather, a venue need only be appropriate.

"To establish personal jurisdiction in this district, Plaintiff must show that (1) Michigan's long-arm statute supports this court's exercise of personal jurisdiction, and (2) that the Due Process Clause of the Fourteenth Amendment is not violated by that exercise." *Kelly Servs. v. Eidnes*, 530 F. Supp. 2d 940, 947 (E.D. Mich. 2008). Meeting the Michigan long-arm statute's threshold is easy, and virtually any act of business connected with the state will suffice. *See* Mich. Comp. Laws § 600.705; *Kelly Servs. v. Noretto*, 495 F. Supp. 2d 645, 652 (E.D. Mich. 2007). The parties' signing of a contract with a Michigan-based company meets the long-arm statute's requirements.

The analysis then turns to a familiar due process "minimum contacts" issue. The Sixth Circuit has established a three-part test for minimum contacts:

> First, the defendant must purposefully avail himself of the privilege of conducting activities within the forum state; second, the

> cause of action must arise from the defendant's activities there; and third, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make its exercise of jurisdiction over the defendant fundamentally fair.

Cole v. Mileti, 133 F.3d 433, 436 (6th Cir. 1998). DeSteno legally "availed himself" of the privileges of conducting business in Michigan, since his agreements with Kelly have a Michigan choice-of-law clause. As to the third requirement, DeSteno's actions affected the business of a Michigan-based company. The test's second question is closer because the cause of action arises from DeSteno's activities in Minnesota, not Michigan. But earlier cases determined that personal jurisdiction existed in similar factual situations.

Kelly points to two previous cases involving them in the Eastern District of Michigan. In *Noretto*, the Court found that a former Kelly employee, who had signed an agreement similar to DeSteno's, had sufficient contacts with Michigan for personal jurisdiction, even though he had worked in Oregon. 495 F. Supp. 2d at 652–54. Besides the contacts shared with the Defendants in this case, Noretto had taken a computer drive from Kelly containing "work proposals for Kelly's customers and prospective customers and other confidential information and trade secrets of Kelly." *Id.* at 649. "Furthermore, during his five year career at Kelly, Defendant attended training sessions in Michigan." *Id.* at 652. The court found that it was "information that was obtained in the training sessions, through Kelly's

Michigan based servers, and through Defendant's actions with the Michigan company" that Kelly sought to protect with an injunction, and ruled, accordingly, that personal jurisdiction existed. *Id.* at 652–54.

The *Eidnes* case is similar, but even more permissive, in upholding personal jurisdiction. 530 F. Supp. at 946–47.

> In this instance, the evidence viewed in a light most favorable to Plaintiff shows that Eidnes accessed a Michigan-based computer server and database networks as part of her job responsibilities . . . Further, as evidenced by the emails and phone logs produced by Plaintiff, it is clear that there is at least a prima facie showing that Eidnes had at least semi-regular contact with Michigan-based supervisors during the course of her employment with Kelly Services . . . From these facts, it is clear to this Court that Eidnes purposefully availed herself of the privileges of conducting activities in Michigan. Maintaining this suit in this Court will not offend the tradition notions of fair play and substantial justice. Accordingly, Defendant's Motion to Dismiss for lack of personal jurisdiction is DENIED.

Eidnes, 530 F. Supp. 2d at 947 (internal citations omitted).

DeSteno's case cannot be distinguished from *Eidnes*. He accessed Kelly's Michigan-based network for his job, corresponded regularly with colleagues in Michigan, and attended a training session in

Michigan. No arguments presented in the briefing or in oral argument provide a compelling reason to act contrarily to previous cases in the District. Because Persico and Peters are bound by their venue clauses, and because venue is proper as to DeSteno, the Court will deny the Defendants' Motion to Dismiss.

Even when venue is proper, though, a Court may still transfer a case "[f]or the convenience of parties and witnesses [or] in the interest of justice . . . to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In exercising the discretion to transfer, the Court considers

> (1) the convenience of witnesses; (2) the location of relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Overland, Inc. v. Taylor, 79 F. Supp. 2d 809, 811 (E.D. Mich. 2000). The Court notes that the Defendants and locus of operative facts are in Minnesota, and that Kelly has greater means than the Defendants. Those concerns were allayed during the hearing, however, when Kelly's counsel stated that he would travel to Minnesota for all necessary depositions and discovery purposes, and that the Defendants would only need travel to Michigan

twice, at most, prior to trial. Based on the totality of the circumstances, and giving weight to Kelly's choice of forum in Michigan and the Court's familiarity with Michigan law, the Court will decline to transfer the case to Minnesota.

II. Preliminary Injunction

Michigan precedent makes it clear that the Court should issue a preliminary injunction against the Defendants. As noted above, the Court must consider 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, IAFF Local 344 v. City of Detroit, 482 Mich. 18, 34 (2008). The Court will address each criterion in turn.

First, Kelly has made an initial demonstration that irreparable harm may occur if an injunction is not granted. Courts in this district have recognized that a former employee's use of information gained in prior experience on behalf of a competitor can cause irreparable harm. *See, e.g.*, *Noretto*, 495 F. Supp. 2d at 659 ("[I]t is entirely unreasonable to expect [Defendant] to work for a direct competitor in a position similar to that which he held with Kelly, and forego the use of the intimate knowledge of

Kelly's business operations . . . Absent an order for preliminary injunction, it appears that Defendant's expansive knowledge of Kelly's business systems and operations will result in a loss of the customer goodwill developed by Kelly."); *Lowry*, 984 F. Supp. at 1116 ("[W]orking for a direct competitor in a similar area, [Defendant's] knowledge is bound to have a significant adverse impact on Lowry's business."); *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994) ("Loss of customer goodwill and fair competition can support a finding of irreparable harm. Such losses often amount to irreparable injury because the resulting damages are difficult to calculate."). Because factual materials demonstrate the Defendants are now working for a direct competitor in the same marketplace they had worked for Kelly, the risk of irreparable harm is great.

Second, the harm to Kelly should the Court not issue an injunction outweighs the harm to the Defendants. The Defendants would lose the ability to continue in their current positions at Kelly's competitor, but are free to seek employment outside the staffing industry or in another market until the year deadline has passed. Kelly, on the other hand, is in a position to lose clients and business permanently should the Defendants use their knowledge to steer business away from Kelly.

Third, Kelly has shown that it would likely prevail on the merits. The Defendants are almost certainly in violation of their non-compete agreements with Kelly. The Defendants' only argument would be that the non-competes are void. They have not alleged any fraud or other defect in the signing of the agreements, so the Defendants'

only legal option is to contend that the non-competes are unreasonable. Reasonable non-compete agreements should be enforced as a matter of policy. *See* Mich. Comp. Laws § 445.774a. "[A] non-compete agreement is enforceable provided it is reasonable with respect to duration, geographical area, and the line of business is seeks to limit." *Lowry Computer Prods., Inc. v. Head*, 984 F. Supp. 1111, 1115–16 (E.D. Mich. 1997).

The agreements in question had a duration of one year, apply to the markets in which the Defendants worked or had responsibility, and forbid the Defendants from working in Kelly's line of business, staffing services. The Eastern District of Michigan previously has found identical agreements to be valid and reasonable. *Kelly Servs., Inc. v. Marzullo*, 591 F. Supp. 2d 924, 940 (E.D. Mich. 2008); *Eidnes*, 530 F. Supp. 2d at 950; *Noretto*, 495 F. Supp. 2d at 657. Each of those decisions found the one-year limitation, the geographic restrictions, and the activity restrictions to be reasonable. The Defendants have not provided compelling authority explaining why the outcome here should not be identical.

The Defendants are working for staffing companies in the same market they serviced for Kelly within weeks, even days, of leaving Kelly. The Court is especially troubled by the Defendants' suggestion that they were working in IT, and not engineering, staffing. *See* Resp. 4–5, ECF No. 6. Kelly has presented unrebutted evidence that at least one of the Defendants has solicited for multiple positions in the engineering industry. The attempt to argue otherwise would indicate that the Defendants know they are violating their noncompete

agreements. Job Listings, ECF No. 7-2. In sum, because the agreements are reasonable, and the Defendants have almost certainly violated them, Kelly has demonstrated a likelihood of success on the merits.

Finally, consideration of the public interest is mixed, but slightly more favorable to Kelly. The public interest is served by enforcing valid contracts and protecting businesses' confidential information. The public interest may be harmed, however, by anti-competitive agreements that artificially protect a company's business. Weighed against each other, the Court finds the public interest calculation to be slightly in Kelly's favor.

Because Kelly has met all four requirements for issuing a preliminary injunction, the Court will grant the motion. The Defendants will be enjoined from violating their noncompete agreements until the dispute is resolved and the Court ends the injunction.

ORDER

WHEREFORE, it is hereby **ORDERED** that Defendant's Motion for a Preliminary Injunction (document no. 3) is **GRANTED**.

The parties are hereby further **ORDERED** to jointly submit within ten days of the date of this order proposed specific terms for the injunction, setting forth as much agreed upon language as possible as to the term, scope and duration of the injunction.

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss for Improper Venue (document no. 2) is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: May 2, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on May 2, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

PRELIMINARY INJUNCTION

The Court having reviewed Plaintiff Kelly Services, Inc.'s ("Kelly") Complaint, Motion for Temporary Restraining Order and Preliminary Injunction, and Brief in Support thereof, Defendants' Brief in Opposition, Plaintiff's Reply, having held oral argument, having issued an order on May 2, 2016 granting Plaintiff's Motion and denying Defendants' Motion to Dismiss and/or For Change of Venue, and being otherwise duly advised in the premises;

IT IS HEREBY ORDERED THAT:

(A) Defendant De Steno is temporarily restrained and enjoined, directly or indirectly:

(1) From working for, or acting as, an employee, partner, stockholder, investor, owner, director, agent, or consultant for a competitor of Kelly,

including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, in the capacity of recruiting or placing positions based in Minnesota, until further Order of this Court;

(2) From soliciting or performing services for any Kelly customer or client for a competing business, including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, until further Order of this Court;

(3) From soliciting or being involved in the recruitment or hire of any Kelly employee for a competing business, including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, until further Order of this Court; and

(4) From using or disclosing any of Kelly's confidential, proprietary or trade secret information or property.

(B) Defendants Persico and Peters are temporarily restrained and enjoined, directly or indirectly:

(1) From participating in the ownership or control of, acting as an employee, agent, or contractor of, or providing any services to, or for, any business that is engaged in Kelly's business, including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, in the capacity of recruiting or placing positions based in Minnesota, or engaging in any activity

that is competitive with Kelly, in Minnesota, until further Order of this Court;

(2) From soliciting, diverting, attempting to solicit or divert, or performing services for any Kelly client or customer that Persico and/or Peters sold or delivered any services to, or to which Persico and/or Peters were exposed to through Kelly meetings or marketing efforts, for a competing business, including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, during the twelve (12) months preceding Persico and/or Peters' resignation from Kelly, until further Order of this Court;

(3) From soliciting, diverting, attempting to solicit or divert, or performing services for any Kelly potential client or customer that Persico and/or Peters contacted to solicit, sell and/or deliver services to, or to which Persico and/or Peters were exposed to through Kelly meetings or marketing efforts, for a competing business, including, but not limited to, Pride Health and/or Pride Technology, or any of its/their affiliates, during the twelve (12) months preceding Persico's and/or Peters' resignations from Kelly, until further Order of this Court; and

(4) From soliciting, diverting, attempting to solicit or divert, or being involved in the recruitment or hire of any Kelly employee and/or candidate for a competing business, including, but not limited to, Pride Health and/or Pride

Technology, or any of its/their affiliates, until further Order of this Court.

(C) That Defendants De Steno, Persico, and Peters are ordered to immediately return all Kelly property to Kelly in their possession, if any, including all originals and copies of tangible property, proprietary documents, trade secrets, confidential information, discs, notes, client files, client information, employment information, business development information, request for proposal, request for bid, client correspondence, meeting minutes, notes of site visits, marketing data, prospect meeting data, proposals, faxes, financial information, pricing, contracts, marketing brochures, marketing database, marketing plans, costs, customer lists, customer information, internal weaknesses, prospect lists, client lists, employee lists, alliance relationships, competitive bid information, client contact lists, sales leads, prospective employee lists, business plans, profit, margin, and forecasting information, strategic planning, project costs, vendor information and contracts, and any other Kelly data whether kept in hard copy or electronic form;

(D) The parties shall preserve all evidence, whether in hard copy or electronic form, which in any way relates to the claims made in this case.

(E) Kelly is required to post a bond of $15,000.

(F) This Order shall remain in effect for 60 days, at the end of which Kelly may request entry of a further injunction. The Court strongly encourages the parties to reach a resolution as quickly as

possible. Should the parties resolve their dispute, the Court may terminate the injunction prior to the expiration of 60 days.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: May 29, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on May 29, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO EXTEND PRELIMINARY INJUNCTION
(document no. 18)

Kelly Services, Inc. sued Dale De Steno, Jonathan Persico, and Nathan Peters, and alleged that they breached a non-competition agreement, a confidentiality agreement and a duty of loyalty. Compl. 1–22, ECF No.1-2. After the Defendants removed the case to federal court, Kelly moved for a preliminary injunction to bar the Defendants from working for competitors or disclosing confidential information. Mot., ECF No. 2. The Court held a hearing and granted the preliminary injunction on May 29, 2016. Prelim. Inj., ECF No. 14. The terms of the injunction provided effect for 60 days and also stated that Kelly could seek to renew the injunction. *Id.* Defendants appealed the injunction to the Sixth Circuit on June 28, 2016. Notice of Appeal, ECF No. 16. One month later, on July 25, 2016, Kelly moved to renew the injunction. Mot., ECF No. 18.

A district court "retains jurisdiction to enforce" a preliminary injunction while an interlocutory appeal is pending. *See Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 626 (6th Cir. 2013). In this case, the Court issued a preliminary injunction order that allowed the Plaintiff to request renewal of the injunction after 60 days. The Defendants appealed. While that appeal is pending, the Court retains jurisdiction to enforce its preliminary injunction order, including the provision allowing for renewal. The Court will therefore extend the preliminary injunction indefinitely until the Sixth Circuit rules on the Defendants' interlocutory appeal.

Accordingly, the Court will **GRANT** Plaintiff's Motion to Extend Preliminary Injunction (document no. 18).

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 30, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 30, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

OPINION AND ORDER
GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [34]
AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [35]

Plaintiff sued Defendants for breach of contract. ECF 1-2, PgID 29. Now before the Court are Plaintiff's Motion for Summary Judgment, ECF 34, and Defendants' Motion for Summary Judgment, ECF 35. The Court has reviewed the briefs and finds that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(f). For the reasons set forth below, the Court will grant in part and deny in part Plaintiff's motion and deny Defendants' motion.

BACKGROUND

Plaintiff Kelly Services, Inc. specializes in providing employment staffing and consulting

services. ECF 1-2, PgID 13. Defendants Dale De Steno, Jonathan Persico, and Nathan Peters are Plaintiff's former employees. *Id.* at 13, 16, 22. Defendants signed employment contracts that entitled Plaintiff to attorney's fees and costs incurred to enforce the contracts. ECF 34-1, PgID 1209, 1213, 1233. Defendants ultimately took jobs with a competitor, and Plaintiff brought suit alleging that Defendants violated their non-compete covenants. ECF 1-2, PgID 29. During the litigation, the Court entered a preliminary injunction, that expired after a year, enjoining Defendants from working for competitors and disclosing confidential information. ECF 30, PgID 1145. Plaintiff does not seek to further enforce the non-compete covenants, so the remaining issue is whether Plaintiff is contractually entitled to the attorney's fee and costs incurred during the case. ECF 34, PgID 1160.

STANDARD OF REVIEW

The Court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must identify specific portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party may not simply rest on the pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted).

A fact is material if proof of that fact would establish or refute an essential element of the cause of action or defense. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). A dispute over material facts is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences "in the light most favorable to the nonmoving party." *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

DISCUSSION

I. Contractual Attorney's Fees

Plaintiff is contractually entitled to attorney's fees. Michigan law governs the dispute because it was selected by the parties in the employment contracts. ECF 34-1, PgID 1214, 1221, 1227. Under Michigan law, "a party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract[,] and (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v. Bennett*, 303 Mich. App. 767, 774 (2013) (quoting *Miller-Davis Co. v. Ahrens Constr., Inc.*, 296 Mich. App. 56, 71 (2012)). When it interprets a contract, the Court's primary obligation is to determine the intent of the parties. *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 352, 375 (2003). If the contract's language is unambiguous, it should be construed and enforced as written. *Id.*

Plaintiff is entitled to attorney's fees and costs under a plain reading of the contracts. Defendant De Steno's contract says that he "will pay [Plaintiff's] reasonable attorney's fees and costs involved in enforcing" the contract. ECF 34-1, PgID 1209. Defendants Persico's and Peters's contracts state that they "agree to pay any and all legal fees, including without limitation, all attorneys' fees, court costs, and any other related fees and/or costs incurred by [Plaintiff] in enforcing" the contracts. *Id.* at 1213, 1233. The litigation here involves enforcement of the contracts: Plaintiff brought suit seeking a court order requiring Defendants to comply with a provision of the contract. Plaintiff therefore has a contractual right to the attorney's fees and costs incurred to bring the lawsuit.

Defendants make two arguments: (1) the non-compete clauses are unenforceable, and (2) the preliminary injunction enjoining Defendants did not require a ruling on the merits.[1] Defendants' arguments are well taken, but misplaced. The first argument fails because the operative provisions before the Court are the covenants to pay attorney's fees and costs—not the non-compete clauses. And attorney's fees provisions are enforceable under

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[1] Defendants also seem to make an argument that judgment on attorney's fees is procedurally improper at the present stage of litigation. *See* ECF 29, PgID 1545–46. Attorney's fees are typically collateral to the merits and awarded after judgment. *See* Fed. R. Civ. P. 54(d). But attorney's fees awarded pursuant to a contract are considered damages, not costs. *Central Transp., Inc. v. Fruehauf Corp.*, 139 Mich. App. 536, 548 (1984). Thus, Rule 54(d) does not govern. Because Plaintiff included a request for the contractual attorney's fees in its complaint, ECF 1-2, PgID 33, the matter is properly before the Court.

Michigan law. *Zeeland Farm Servs., Inc. v. JBL Enterprises, Inc.*, 219 Mich. App. 190, 195–96 (1996) ("The parties to a contract may include a provision that the breaching party will be required to pay the other side's attorney fees and such provisions are judicially enforceable."). The enforceability of the non-compete clauses is thus irrelevant—especially because the contracts include "savings clauses" that provide that the rest of the contract is enforceable even when a particular part of the contract is found unenforceable. ECF 34- 1, PgID 1209, 1215, 1222.

Defendants' second argument fails because a ruling on the merits is not required to trigger the attorney's fees provisions. The attorney's fees section is distinct from the noncompete clause, and there is no language specifically linking the two. Moreover, the parties did not include language requiring Plaintiff to prevail before it was entitled to the fees.[2] Accordingly, a plain reading of the contracts suggests that the parties intended for Defendants to pay attorney's fees if Plaintiff merely sought to enforce the contracts. And enforcement is precisely what the lawsuit involves: Plaintiff, albeit not on the merits, persuaded the Court to enter an order enjoining Defendants from competing for the duration of the non-compete clauses.

Accordingly, Plaintiff is contractually entitled to reasonable attorney's fees and costs it incurred by bringing the suit. Defendants breached their obligation by refusing to pay any fees and costs, ECF 37, PgID 1447, which resulted in damages. Plaintiff is therefore entitled to judgment as a matter of law.

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[2] In fact, Defendants argue elsewhere that "the alleged agreements at issue here do not contain a 'prevailing party' contractual provision." ECF 39, PgID 1545.

II. Additional Briefing

The Court has determined that Plaintiff is contractually entitled to reasonable attorney's fees and costs as a matter of law. The Court next must decide: (1) whether a jury or the Court is the proper body to decide the amount of damages, and (2) if the Court can make the determination, what is the proper amount of damages. Understandably, the parties' briefs primarily focused on the merits of Plaintiff's contractual rights rather than the damages. Although in most situations the issue would be amenable to settlement or mediation, the Court understands that Defendants are not inclined to partake in discussions. The Court therefore will order additional briefing.

ORDER

WHEREFORE, it is hereby **ORDERED** that Plaintiff's Motion for Summary Judgment [34] is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [35] is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff shall **FILE** no later than 14 days after the date of this order a supplemental brief addressing whether the Court may assess damages, and if so, what would be an appropriate amount. Defendants shall **FILE** a response no later than 14 days after the date of Plaintiff's filing. Plaintiff may **FILE** a reply no later than 7 days after the date of Defendants' response. The briefs may not exceed 10 pages each.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: October 24, 2017

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on October 24, 2017, by electronic and/or ordinary mail.

s/David P. Parker
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

CASE MANAGEMENT ORDER

The Court previously found that Plaintiff is contractually entitled to attorney's fees and costs. The remaining issue is the quantity of those fees and costs. Defendants assert that a jury must make the determination, and they rely primarily on Michigan law for the assertion. But "the right to a jury trial in the federal courts is to be determined as a matter of federal law[.]" *Simler v. Conner*, 372 U.S. 221, 222 (1963).

So, the question before the Court is whether the Seventh Amendment to the United States Constitution guarantees the right to a jury trial to determine the quantity of contractual attorney's fees. And it appears the Sixth Circuit has not answered that question. *See Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, No. 2:07-cv- 116, 2016 WL 7009681, at *1 (S.D. Ohio Dec. 1, 2016), *report and recommendation adopted*, No. 2:07-cv-116, 2016 WL 7388383 (S.D. Ohio Dec. 20, 2016);

Escue v. Sequent, Inc., No. 2:09-cv-765, 2015 WL 470838, at *6 (S.D. Ohio Feb. 4, 2015). Other circuits have held that the Constitution does not require the quantity of contractual attorney's fees to be submitted to a jury. *Resolution Tr. Corp v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991) ("Since there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees."); *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1316 (2d Cir. 1993). The present case is distinguishable: Plaintiff is not entitled to attorney's fees as a "prevailing party" but rather because the contract at issue entitled Plaintiff to attorney's fees for an action to enforce the contract. That makes the question more difficult for the Court to resolve because the amount of attorney's fees moves closer to being at the center of the case instead of being a collateral matter. *See J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1116 (10th Cir. 2009); *Clarke v. Mindis Metals, Inc.*, 99 F.3d 1138, 1996 WL 616677 (6th Cir. 1996) (unpublished table decision); *Timken Alcor Aerospace Techs., Inc. v. Alcor Engine Co.*, No. 1:06-cv-2539, 2010 WL 2650026, at *2–3 (N.D. Ohio July 2, 2010).

While a close call, the Court is persuaded that the issue is not required to be submitted to a jury. If it were, the amount of damages would become indefinite. The fees generated to try the case and persuade a jury of the proper amount of damages would itself increase the damages. The trial would then become a trial about the cost of the trial itself, ultimately requiring the jury to calculate the cost of each passing minute. *See McGuire*, 1 F.3d at 1316;

Redshaw Credit Corp. v. Diamond, 686 F. Supp. 674, 676 (E.D. Tenn. 1988).

Accordingly, the Court will not conduct a jury trial to decide a reasonable amount of attorney's fees to award Plaintiffs. And although the Court ordered the parties to submit briefs regarding a reasonable amount of fees, Defendants did not dispute Plaintiff's proffered calculations or propose any alternative award. Defendants did demand an evidentiary hearing, ostensibly to challenge Plaintiff's evidence, and cited as authority Michigan law instead of federal law. Prolonging the litigation will continue to increase Plaintiff's award, therefore, in the interest of justice and judicial economy, the Court will order the parties to confer regarding settlement. If the parties cannot reach an agreement on the amount of money to end the case, Defendants will then be permitted to submit any legitimate challenges to Plaintiff's calculations. If the Court decides to hold an evidentiary hearing, it will say so on the docket.

Finally, the Court notes that on several occasions Defendants have arguably not complied in good faith with the Court's orders. For example, they refused to offer more than zero dollars at a settlement conference and they did not fully engage with the Court's order to submit briefing on the proper amount of fees. The Court may hold Defendants in contempt or issue sanctions if they fail to comply in good faith with this order or any future order.

WHEREFORE it is hereby **ORDERED** that the final pretrial conference scheduled for December 5, 2017 and the trial scheduled for December 18, 2017 are **CANCELLED**.

IT IS FURTHER ORDERED that the parties shall confer in person regarding settlement no later than **DECEMBER 15, 2017**. A representative with full settlement authority for each party must attend. After the conference, the parties shall **JOINTLY FILE** a notice on the docket indicating only whether a settlement was reached. The notice shall be filed no later than **DECEMBER 15, 2017**.

IT IS FURTHER ORDERED that if the parties do not reach a settlement, then Defendants may file a brief addressing any challenges to Plaintiff's calculations of reasonable attorney's fees and offering a counterproposal for the Court to consider. The brief shall not exceed 10 pages and shall be filed no later than **December 22, 2017**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: December 4, 2017

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on December 4, 2017, by electronic and/or ordinary mail.

s/David Parker
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:16-cv-10698
HONORABLE STEPHEN J. MURPHY, III

KELLY SERVICES, INC.,
Plaintiff,
v.
DALE DESTENO, JONATHAN PERSICO,
and NATHAN PETERS,
Defendants.

ORDER AWARDING ATTORNEY'S FEES AND CLOSING CASE

Plaintiff sued three of its former employees for breach of contract. Plaintiff had separate contracts with each Defendant, and the Court found that Plaintiff is entitled to attorney's fees under the terms of each of the three contracts. The Court must now determine the amount of attorney's fees to award to Plaintiff. The parties filed supplemental briefs on the issue, and the Court finds that a hearing is unnecessary. E.D. Mich. LR 7.1(f).[1] For the reasons set forth below, the Court finds that Plaintiff is entitled to $72,182.90.

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[1] Although a party challenging a fee request is entitled to a hearing under Michigan law if there is a factual dispute, the Court finds that particular procedural requirement does not govern federal court practice. *See Gen. Elec. Co. v. Latin Am. Imports, S.A.*, 127 F. App'x 157, 158–59 (6th Cir. 2005) (holding that federal law governs procedural aspects of contractual attorney's fees provisions).

The Court will award only reasonable attorney's fees. Although Defendants Persico and Peters agreed to pay "any and all" fees, Defendant De Steno only agreed to pay "reasonable attorney's fees." Because Plaintiff has not attempted to allocate its fees between the three defendants and has not stated that it is seeking anything more than reasonable attorney's fees, the Court finds that Plaintiff should recover less than what it could be entitled to under Perisco's and Peters's contracts.

Plaintiff is contractually entitled to attorney's fees and the parties selected Michigan law to govern the underlying contracts, so the Court will apply Michigan law to determine the reasonable amount of attorney's fees. *See Bluwav Sys., LLC v. Durney*, No. 09-13878, 2012 WL 5389874, at *1–2 (E.D. Mich. Nov. 5, 2012). Under Michigan law, courts apply a two-step analysis to determine reasonable attorney's fees. *Smith v. Khouri*, 481 Mich. 519, 530–31 (2008). First, courts determine a baseline award by multiplying (a) the fee customarily charged in the locality for similar legal services, by (b) a reasonable number of expended hours. *Id.* Second, courts determine whether an upward or downward departure from the baseline award is appropriate. *Id.* Throughout the process, Plaintiff bears the burden of proving the reasonableness of the requested fees. *Id.*

The Court finds that the baseline award here is $87,786.20. The Court used the Michigan Bar Journal's 2014 Attorney Income and Billing Rate Key Findings Report[2] to determine the customary fee charged in Michigan for similar legal services.

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[2] Both parties cited the report in their briefing, and the Court finds that it is a reliable and credible source.

ECF 43-5. The Court then independently reviewed nearly one-hundred pages of Plaintiff's invoices to determine a reasonable number of expended hours. The Court used the number of hours actually billed because the Court finds that the number is reasonable after considering the difficulty of the questions presented and the requisite skill needed to properly litigate the case. Because Plaintiff provided inadequate data regarding customary fees, the Court did not include paralegal fees in its calculations. The following is a summary of the Court's calculations:

Attorney	**Title**	**Customary Fee**	**Reasonable Hours Expended**	**Fee x Hours**
James Boutrous	Partner	$333	126.6	$42,157.80
Nicole Gray	Partner	$333	21	$6,993
Mary April	Of Counsel	$315	7.5	$2,362.50
Sherri Krause	Of Counsel	$315	88.3	$27,814.50
Adrianna Agosta	Associate	$218	3.6	$784.80
Kathleen Sanz	Associate	$218	3.8	$828.40
David Schelberg	Associate	$218	35.2	$7,673.60

Total: $88,614.60

The Court finds that the baseline should be reduced by $16,431.70. The Court's determination is guided by the factors outlined in *Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich. 573, 588 (1982) and Michigan Rule of Professional Conduct 1.5. *Khouri*, 481 Mich. at 533. Specifically, the Court finds that the reduction is warranted by the amount Plaintiff's counsel actually billed, $72,182.90, which adequately reflects the professional standing and experience of the attorneys involved, the expenses incurred, the nature and length of the professional relationship between Plaintiff and its counsel, and any time or fee limits imposed by Plaintiff. Despite Defendants' arguments to the contrary, the Court finds that a further reduction is not warranted because the case result was favorable to Plaintiff and all events for which counsel prepared were reasonable considering the course of the litigation. The Court will not include additional costs because Plaintiff did not adequately itemize costs in its brief and because the Court finds that the present award adequately compensates Plaintiff.

WHEREFORE it is hereby **ORDERED** that Plaintiff is awarded $72,182.90 in attorney's fees.

This is a final order that closes the case.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: January 2, 2018

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 2, 2018, by electronic and/or ordinary mail.

s/ David Parker
Case Manager