IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIGITAL GENERATION, INC. f/k/a DG FASTCHANNEL, INC., Plaintiff, v. STEVEN A. BORING, Defendant.	Civil Action No.: 3:12-cv-00329

PLAINTIFF'S *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IN AID OF ARBITRATION AND BRIEF IN SUPPORT

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I.

INTRODUCTION

This is an action for interim relief in aid of arbitration. Concurrently with the filing of this Motion, Plaintiff Digital Generation, Inc. f/k/a DG FastChannel, Inc. ("DG") is filing its Original Verified Complaint for Injunctive Relief in Aid of Arbitration ("Complaint"), which DG incorporates here by reference.

This case arises from Mr. Boring's decision to leave his position as DG's Regional Sales Manager for the Detroit office to take a substantially similar position at one of DG's primary competitors, Extreme Reach, Inc. ("Extreme Reach"). Extreme Reach is a direct competitor of DG in the highly-competitive market of delivering digital advertising, and Mr. Boring's position with Extreme Reach violates multiple restrictive covenants in his Employment Agreement with DG (the "Employment Agreement"), a copy of which is attached to the Complaint as **Exhibit A**.

Specifically, in his Employment Agreement, Mr. Boring agreed not to solicit DG's customers (the non-solicitation provision), not to misuse DG's confidential business information and trade secrets (the non-disclosure provision), and not to recruit other DG employees (the anti-piracy provision). Despite these promises, DG has discovered that Mr. Boring has breached or threatens to breach, the non-solicitation, non-disclosure, and anti-piracy covenants of his Employment Agreement, creating an imminent threat of irreparable harm to DG.

Indeed, the offer letter from Mr. Boring's current employer (the "Offer Letter") indicates that Mr. Boring has been provided a direct and substantial financial incentive to violate the covenants in his Employment Agreement with DG. Extreme Reach offered Mr. Boring separate $10,000 bonuses if he persuaded General Motors Company ("GM") and Chrsyler Group, LLC ("Chrysler") – the two largest advertiser clients of DG's Detroit office – to move their business

from DG to Extreme Reach. Not surprisingly, DG has learned that Mr. Boring already has violated his non-solicitation provision by visiting the Detroit office of Goodby Silverstein & Partners, one of GM's advertising agencies, on January 25, 2012.

In addition to the restrictive covenants, the Employment Agreement provides for binding arbitration of any disputes between the parties before the American Arbitration Association ("AAA") in Dallas, Texas. The only exception to arbitration in the agreement is a judicial action for injunctive or other preliminary relief in aid of arbitration, to prohibit Mr. Boring from violating certain provisions of the Employment Agreement and, thereby, rendering the arbitration a nullity. In accordance with the Employment Agreement, DG has initiated an arbitration with the AAA in Dallas, Texas, and brings this action for injunctive relief in aid of arbitration to prevent Mr. Boring from further breaching the Employment Agreement pending arbitration.

Accordingly, DG respectfully requests that this Court enter a temporary restraining order preventing Mr. Boring from violating the covenants of his Employment Agreement pending a hearing on DG's request for a preliminary injunction enforcing the restrictive covenants in the Employment Agreement pending resolution of the Arbitration, without prejudice to reconsideration of the propriety of injunctive relief by a duly-appointed arbitrator.

II.

FACTS

A. Background and Parties

DG, headquartered outside of Dallas, Texas, is an industry leader in delivering digital advertising, distributing syndicated television programming, and preserving digital and other media assets. Compl. ¶ 8. It serves advertisers, agencies, television affiliates, and cable

providers across the globe. *Id.* Mr. Boring joined DG in 2004, after his former employer, AGT-Broadcast (where he had worked since 2002), was acquired by DG.

Until December 2011, Mr. Boring was the Regional Sales Manager for DG's Detroit office. Compl. ¶ 9. In this role, Mr. Boring managed or directly participated in virtually all sales to DG's Detroit-area advertising agencies and was directly assigned client responsibility for the agencies of two of the three major American automobile manufacturers – GM and Chrysler. *Id.* As a result of his position, Mr. Boring was privy to DG's highly-confidential information regarding all aspects of sales to DG's Detroit-area agencies. *Id.* This information included knowledge of the advertisers' pricing points, marketing strategies, and upcoming advertising campaigns; confidential communications relative to DG's competitive strengths and weaknesses, as well as selling strategies designed to counter any perceived weaknesses; recent instances in which advertising campaign technical and service issues may have been attributed or attributable to DG systems and/or personnel; and regional revenue by agency and advertiser client. *Id* .

As the only sales-dedicated person in DG's Detroit office, Mr. Boring was supported and encouraged to develop close working relationships with key personnel at DG's Detroit-area agencies. *Id.* ¶ 10. DG nurtured these relationships through enormous investments of time and resources, including funding client retention and business development activities by Mr. Boring. Given that Mr. Boring had worked for DG or its predecessors for nearly 10 years, virtually all of his relationships with Detroit-area agencies were formed or solidified while working for DG. *Id.*

B. <u>Mr. Boring's Employment Agreement With DG</u>

Mr. Boring was highly compensated as DG's Regional Sales Manager, earning approximately $120,000 per year in salary ($65,000 base in 2011) and commissions (approximately $55,000 for 2011 under a newly-revised plan). Compl. ¶ 11. In exchange for this generous compensation package, access to DG's constantly-evolving confidential

information, and DG's ongoing development of his relationships with Detroit-area agencies, Mr. Boring executed an "At-Will Employment Agreement" with DG on March 7, 2011. *Id.* & Employment Agreement (Compl. Ex. A). Mr. Boring agreed to several provisions explicitly intended to protect DG's trade secrets and confidential information to which he had access as the Regional Sales Manager, as well as to prevent Mr. Boring from exploiting Detroit-area agency relationships nurtured on DG's time and at DG's expense.

First, Mr. Boring agreed not to disclose "any trade secret, confidential, proprietary, or non-public information and materials concerning [DG] or its clients." Employment Agreement (Compl. Ex. A) ¶ 2. By virtue of his Regional Sales Manager position, Mr. Boring had access to DG's most highly-confidential information, competitive counter-selling strategies, and competitive analysis for Detroit-area agencies. Compl. ¶ 12. This contractual agreement not to disclose DG's confidential information is in addition to Mr. Boring's statutory and common-law duty not to misuse or disclose DG's trade secrets. *Id.*

Second, Mr. Boring agreed not to solicit DG's customers for a period of one year following the termination of his employment with DG. This non-solicitation covenant is limited to DG customers or prospective customers with whom or which Mr. Boring had dealt within the last two years of his employment with DG. Employment Agreement ¶ 4.

Third, Mr. Boring agreed not to recruit other DG employees for a period of one year following the termination of his employment with DG. This "anti-piracy" provision is limited to DG employees with whom Mr. Boring had contact during his employment with DG. *Id.* ¶ 5.

Finally, Mr. Boring agreed to advise any future employer or business partner of the restrictions and obligations in the Employment Agreement. *Id.* ¶ 6.

The Employment Agreement is governed by Texas law (*id.* ¶ 9) and provides for binding arbitration before the AAA in Dallas, Texas:

> Arbitration. Employee agrees that any dispute or controversy arising out of, relating to, or concerning any interpretation, construction, performance or breach of this Agreement or Employee's employment with [DG], including claims of discrimination or harassment, shall be exclusively settled by final and binding arbitration to be held in Dallas, Texas, to be administered by the American Arbitration Association (AAA) pursuant to its national rules then in effect, except that [DG] shall be entitled to seek injunctive relief in any court of competent jurisdiction to prevent any continuation of any violation of the provisions of Sections 2, 4, 5 and 7 of this Agreement. The Arbitrator still may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The parties agree that the arbitrator shall not be empowered to award punitive damages against any party to such arbitration. [DG] and Employee shall each pay one-half of the costs and expenses of the arbitration, and each shall separately pay his/her/its own counsel fees and expenses. This arbitration clause constitutes a waiver of either party's right to a jury trial for all disputes relating to all aspects of the employer/employee relationship including, without limitation, claims for wrongful discharge, breach of contract, or claims relating to violation of any laws and regulations relating to employment discrimination or harassment.

Id. ¶ 14.

C. Mr. Boring's Termination of His Employment with DG

On or about December 19, 2011, Mr. Boring provided notice he was terminating his employment with DG and going to work for DG's competitor, Extreme Reach. Compl. ¶ 17. Extreme Reach is one of DG's arch competitors in the digital advertising delivery market. In connection with this direct competition, Extreme Reach often compares itself directly with DG in an effort to secure additional market share. A true and correct copy of an exemplar marketing brochure by Extreme Reach, entitled "TV Ad Delivery & Management: Comparing the advantages of Extreme Reach," is attached to the Complaint as **Exhibit B** and available at www.extremereach.com, under the tab "Why Us? – See How We Compare."

At the time he left DG, Mr. Boring explained that he was not looking to compete directly with DG and that he was not sure yet what he would be doing for Extreme Reach. Compl. ¶ 18. After Mr. Boring terminated his employment with DG, he returned to his office to access certain "personal" folders on his DG-issued laptop. When DG personnel reviewed Mr. Boring's DG-issued laptop computer to pull the "personal" folder he had requested, however, they discovered that the folder actually contained several types of highly-confidential DG information. *Id.* Specifically, the folder included: accounts compensation; an internal DG presentation regarding High Definition (HD) advertising; holiday mailing lists for both 2010 and 2011 (containing important client contact names, addresses, phone numbers, and other information); DG contact sheet (including internal employee cell phone numbers); a highly-confidential pricing document entitled "GM HD Pricing Model by Destination"; a highly-confidential letter entitled "GM HD Rate Reduction Agency Letter"; and a sales report regarding "November Pacing" pertaining to Detroit-area agencies and advertisers. *Id.*

The folder Mr. Boring sought to retrieve from his laptop computer also contained documents from Extreme Reach. Compl. ¶ 19. One document was the Offer Letter from Extreme Reach, signed by Timothy Conley (Extreme Reach's Chief Operating Officer). A true and correct copy of the Offer Letter is attached to the Complaint as **Exhibit C**. In the Offer Letter, Mr. Boring was offered significantly increased compensation to become Extreme Reach's "Director of Sales," including a $90,000 base salary, a $10,000 bonus, and a guaranteed minimum commission of $5,000 a month for 11 months (for a minimum salary in 2012 of $155,000). *Id*. at 1-2. Furthermore, Mr. Boring's commissions, calculated as 3% of collections for the prior month, could easily exceed the minimum monthly draw of $5,000. Compl. ¶ 19.

The Offer Letter from Extreme Reach also included a direct financial incentive for Mr. Boring to breach the non-solicitation provision of his Employment Agreement with DG with respect to GM and Chrysler, DG's top two Detroit-area advertisers and accounts for which Mr. Boring had direct client responsibility while at DG. Compl. ¶ 20. Specifically, Extreme Reach agreed to "pay [Mr. Boring] $10,000 following the signed contracts or Letter of Agreements for both General Motors and Chrysler. Payment will be made along with the next Commission Payout date following the signed LOA for each account." *See* Exhibit C, at 1.

D. Events Following Mr. Boring's Departure

In January of 2012, Mr. Boring updated his LinkedIn page to confirm that he was now the "Director of Sales at Extreme Reach." Compl. ¶ 21. A true and correct copy of Mr. Boring's LinkedIn page, as accessed on January 26, 2012, is attached to the Complaint as **Exhibit D**.

On January 19, 2012, Extreme Reach announced the opening of its Detroit office. See "Extreme Reach Continues Geographic Expansion to Detroit, America's Auto Capital," attached to Complaint as **Exhibit E** and available at Extreme Reach's website, www.extremereach.com, under the tab "About Us – Press." The press release regarding Extreme Reach's new Detroit office confirms it will be targeting GM and Chrysler, DG's top two Detroit-area advertisers. *See id.* ("'As the auto industry hub, we felt it essential to expand our presence to Detroit,'" said Tim Conley, Chief Operations Officer at Extreme Reach.").

On January 25, 2012, DG received information that Mr. Boring and Chris Palmer, another former DG employee who has taken the position of Client Manger for Extreme Reach's new Detroit office, were visiting the Detroit office of advertising agency Goodby Silverstein & Partners ("Goodby"). Compl. ¶ 23. Goodby handles an enormous volume of advertising for GM and recently won several awards at the 2011 "D Show" in Detroit in connection with its advertising of GM's Chevrolet brand. *Id.* Thus, it appears that Mr. Boring is directly soliciting

GM to move its advertising business from DG to Extreme Reach, in violation of the non-solicitation provision of the Employment Agreement.

III

ARGUMENT AND CITATIONS OF AUTHORITY

A. Standard of Review

The legal standard for obtaining a temporary restraining order is the same as that required to obtain a preliminary injunction. *See, e.g.*, *Smith v. Tarrant County College Dist.*, 670 F. Supp. 2d 534, 537 (N.D. Tex. 2009). To obtain a temporary restraining order or preliminary injunction, a movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire,*, 647 F.3d 585, 595 (5th Cir. 2011).

Where parties to an agreement specify arbitration to resolve disputes, it is well-settled that a district court nevertheless may enter preliminary injunctive relief in aid of such arbitration. *See Janvey*, 647 F.3d at 595 (affirming the grant of injunctive relief pending the district court's decision on whether to compel arbitration); *Positive Software Solutions*, 259 F. Supp. 2d 531, 534-35 (N.D. Tex. 2003) (concluding that the issuance of the preliminary injunction was proper to "preserve the status quo between the parties pending arbitration"). Indeed, the Fifth Circuit has recognized that "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration, and, *ipso facto*, the meaningfulness of the arbitration process." *Janvey*, 647 F.3d at 595 (*citing Teradyne v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986)).

In addition to the above-cited authorities, the injunctive relief sought here is authorized by Section 14 of the Employment Agreement, which provides that "[DG] shall be entitled to seek injunctive relief in any court of competent jurisdiction to prevent any continuation of any violation of Section 2 [confidentiality], 4 [non-solicitation of customer], 5 [anti-piracy of employees], and 7 [inventions] of this Agreement."

The AAA Commercial Arbitration Rules further recognize that an injunction to preserve the *status quo* pending a decision by the arbitral panel furthers the objectives of arbitration. Specifically, the Rules provide that "[a] request for interim measures addressed by a party to a judicial authority shall ***not*** be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." *See* AAA Commercial Arbitration Rules, R-34(c) (emphasis added). Regarding the forum for resolving claims for injunctive relief, Section 26 of the Employment Agreement provides that any arbitration "arising out of, relating to, or concerning" the Agreement, shall be held in Dallas, Texas. Employment Agreement ¶ 14. Thus, all of the proceedings initiated by DG are filed in accordance with the parties' arbitration agreement, the rules selected by the parties to govern their arbitration, and the forum selection clause.

B. *Ex Parte* Relief

Pursuant to Rule 65(b), a party seeking *ex parte* relief must demonstrate: (i) immediate and irreparable harm will result before the opposition may be heard in response; and (ii) the efforts on the part of the movant's attorney to give notice to the opposition and the reasons why it should not be required. FED. R. CIV. P. 65(b).

C. Mr. Boring's Restrictive Covenants are Valid and Enforceable

To demonstrate a substantial likelihood of success on the merits, DG "need not prove its case with absolute certainty." *Nexstar Broad. Grp., Inc. v. Lammers*, No. 3:08-cv-0953-K, 2008 WL 2620098, at *4 (N.D. Tex. June 27, 2008). Instead, a "reasonable probability of success, not

an overwhelming likelihood, is all that need be shown for preliminary injunctive relief." *Id.* This standard easily is satisfied with respect to Mr. Boring's Non-Solicitation Provision, Non-Disclosure Provision, and Anti-Piracy Provision.

1. Mr. Boring's Narrowly-Defined Non-Solicitation Provision

The agreement between DG and Mr. Boring is governed by Texas law. *See* Employment Agreement ¶ 9 ("This Agreement shall in all respects be subject to, and governed by, the laws of the State of Texas."). Texas recognizes and enforces valid non-solicitation agreements between parties because such agreements "increase efficiency in industry by encouraging employers to entrust confidential information and important client relationships to key employees." *Marsh USA Inc. v. Cook*, No. 09-0558, 2011 WL 6378834, at *3 (Tex. Dec. 16, 2011).

Texas courts will enforce a non-solicitation agreement if "it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the employer." *Salas v. Chris Christensen Sys., Inc.*, No. 10-11-00107-cv, 2011 WL 4089999, at *18 (Tex. App.–Waco Sept. 14, 2011, no pet.); TEX. BUS. & COM. C. § 15.50(a).

The threshold inquiries are (1) whether there is an "otherwise enforceable agreement" between the parties and (2) whether the covenant is "ancillary to or part of" that agreement. *See Marsh*, 2011 WL 6378834, at *5. Here, an otherwise enforceable agreement exists. Where an employer promises to provide the employee with confidential information, and then provides such information, an enforceable agreement is made. *See Sheshunoff Mgmt. Serv., LP v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006) (concluding an enforceable agreement was made when the employer "provided confidential information and specialized training as promised to [the employee], and [the employee] promised in return to preserve the confidences of his

employer"). Mr. Boring agreed not to solicit DG's customers in exchange for DG providing Mr. Boring with "the consideration set forth herein," which includes DG's Confidential Information and trade secrets. DG thereafter exposed and entrusted Mr. Boring with additional Confidential Information, including but not limited to, competitive counter-selling strategies, and competitive analysis for Detroit-area agencies. Compl. ¶ 12. As a result, an otherwise enforceable agreement was made between DG and Mr. Boring. *See Sheshunoff*, 209 S.W.3d at 655.

Additionally, the non-solicitation covenant is ancillary to and part of the agreement. The Texas Supreme Court has explained that consideration reasonably related to a restrictive covenant, "such as trade secrets, confidential information or goodwill," satisfies this requirement. *Marsh*, 2011 WL 6378834, at *9 (concluding that restrictive covenant was ancillary to enforceable agreement where consideration provided was "reasonably related" to protection of employer's business goodwill). Here, the consideration provided, DG's confidential information and the development of Mr. Boring's relationships with DG's Detroit-area customers, "gives rise" and is "reasonably related" to a protectable interest, namely DG's interest in maintaining its trade secrets, confidential information, and business goodwill. Thus, the non-solicitation provision is ancillary to and part of an otherwise enforceable agreement. *See id.*

The non-solicitation covenant also is reasonable as to time, geographic breadth, and scope of restricted activities. The requirement of a durational limit is easily met, as Mr. Boring is prohibited from contacting customers or potential customers for a period of 12 months from the termination of his employment with DG.[1] In terms of territorial coverage, courts have

[1] *See, e.g., Drummond American, LLC v. Share Corp.*, 692 F. Supp. 2d 650, 655 (E.D. Tex. 2010) (upholding two-year restriction on solicitation of employer's customers); *Salas*, 2011 WL 4089999, at *19 (upholding five-year restriction on solicitation of employer's customers); *Gallagher Healthcare Ins. Serv. v. Vogelsang*, 312 S.W.3d 640, 655 (Tex. App.–Houston [1st

repeatedly concluded no geographic limitation is necessary where non-solicitation covenants pertain to only those clients with whom the employee had business dealings during the term of the agreement. *Drummond American, LLC*, 692 F. Supp. 2d at 655; *Vogelsang*, 312 S.W.3d at 654. Here, the non-solicitation covenant in the Employment Agreement specifically pertains only to those customers or potential customers of DG that Mr. Boring dealt with directly – *i.e.*, those contacted or serviced by him during the two years before his employment terminated.

Finally, the non-solicitation clause prohibits a reasonable scope of activities. Courts have held that prohibiting the solicitation and diversion of clients is reasonable, as is prohibiting the contacting of clients.[2] The non-solicitation clause in the Employment Agreement restricts Mr. Boring from contacting any customer or potential customer with whom or which Mr. Boring had dealt within the last two years of his employment with DG. Thus, Mr. Boring only is precluded from contacting, directly or indirectly through others, customers or potential customers, with respect to the specific services Mr. Boring offered and sold on behalf of DG.

Accordingly, the Court should restrain Mr. Boring from contacting, or assisting others in contacting, DG's customers or potential customers for the purpose of inducing them to procure from Extreme Reach services for digital advertising.

2. Mr. Boring's Agreement Not to Misuse or Disclose DG's Confidential Information

Non-disclosure covenants "prevent the disclosure of confidential information and trade secrets. *In re Marketing Investors Corp.*, 80 S.W.3d 44, 47 (Tex. App.–Dallas 1998, no pet.).

Dist.] 2009, no pet.) (concluding two-year restraint on solicitation of employer's clients was reasonable).

[2] *Johnson Serv. Grp., Inc. v. France*, 763 F. Supp. 2d 819, 826 (N.D. Tex. 2011) (covenant not to "solicit" customers or potential customers found reasonable); *Salas*, 2011 WL 4089999, at *18-19 (prohibition from "directly or indirectly interfer[ing] with, or endeavor[ing] to entice away" clients or accounts held reasonable); *Vogelsang*, 312 S.W.3d at 654 (covenant not to "solicit, place, market, accept, aid, counsel, or consult" any of employer's clients found reasonable).

Breach of non-disclosure covenants are analyzed the same way as any other contractual breach. *Id.* at 48. To recover for breach of the non-disclosure agreement, the plaintiff must show: (1) the existence of a valid contract; (2) the plaintiff performed under the contract; (3) the defendant breached the contract; and (4) the plaintiff suffered damages as a result of defendant's breach. *Expro Americas, LLC v. Sanguine Gas Exploration, LLC*, No. 14-10-00707-cv, 2011 WL 5098590, at *2 (Tex. App.–Houston [14th Dist.] Oct. 27, 2011, no pet.).

Here, DG and Mr. Boring entered into a valid Employment Agreement. DG agreed "to provide and shall provide [Mr. Boring] Confidential Information and materials to him/her as a result of his/her signing this Agreement." Employment Agreement ¶ 2. DG subsequently provided such information to Mr. Boring, including but not limited to, DG's business and pricing plans and strategies, senior personnel contacts at advertisers, competitive information regarding DG's customers, and strategic plans for developing advantages over its competitors.

DG is now at risk of having Mr. Boring disclose the above confidential information to, or use the information for the benefit of, Extreme Reach, which directly competes with DG. This harm is particularly likely to occur in light of the recent facts DG has uncovered since Mr. Boring's resignation from DG. If Mr. Boring entices one significant customer to follow him to Extreme Reach, DG potentially will be facing the loss of significant future revenue, damages that would be exceedingly difficult if not impossible to calculate, and perhaps not recoverable at all from an individual employee.

Accordingly, the Court should enjoin Mr. Boring from using or disclosing Confidential Information, as defined in the Employment Agreement, in violation of the non-disclosure covenant in such Agreement.

D. DG Will Suffer Irreparable Harm Absent an Injunction

"Under Fifth Circuit law, an injury is irreparable if there is no remedy at law, such as monetary damages." *Allied Home Mortg. Corp. v. Donovan*, No. H-11-3684, at *2 (S.D. Tex. Nov. 15, 2011) (*citing Janvey*, 647 F.3d at 600, and *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Equatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985)). Under Texas law, the "loss of business information by dissemination by ex-employees is a particularly acute injury not susceptible to purely financial compensation." *Courtroom Sci., Inc. v. Andrews*, No. 3:09-cv-251-O, 2009 WL 1313274, at *14 (N.D. Tex. May 11, 2009); *see also Propath Serv., LLP v. Ameripath, Inc.*, No. 3:04-cv-1912-P, 2004 WL 2389214, at *7 (N.D. Tex. Oct. 21, 2004) (burden of proving irreparable injury met where there was a risk that employer's "client lists, trade secrets and other highly confidential information" would be disclosed).

DG will suffer significant irreparable harm if Mr. Boring is permitted to breach the Employment Agreement until the disputes between the parties can be finally resolved through arbitration, and the balance of hardships weighs heavily in favor of the issuance of a temporary restraining order and preliminary injunctive relief. Mr. Boring was the only sales-dedicated person in DG's Detroit office. By resigning his position at DG to immediately take a comparable position at one of DG's few direct competitors, Mr. Boring presents an enormous threat to DG's revenues and customer base. In addition to the potential for direct diversion of actual and potential customers, Mr. Boring has the ability to inflict incalculable long-term competitive harm on DG, because he will exploit (or at least draw upon) his near-daily exposure to DG's most competitive-valuable information for Extreme Reach's competitive benefit. The potential repercussions of such conduct are incalculable.

E. The Enormous Harm to DG Outweighs Any Inconvenience to Mr. Boring

Furthermore, this significant harm threatened by Mr. Boring's breaches – including the potential loss of GM and Chrysler, DG's top Detriot-area advertisers – far outweighs the inconvenience to Mr. Boring of having to comply with his restrictive covenants. In comparable employment situations, district courts have found that the harm to the employer significantly outweighs any harm to the employee. *See, e.g., Lammers*, 2008 WL 2620098, at *4 (concluding that harm resulting from preliminary injunction to employer outweighed any "minimal" harm that employee would experience); *Evans Consoles, Inc. v. Hoffman Video Sys.*, No. 3:01-CV-1333-P, 2001 WL 36238982, at *10 (N.D. Tex. Dec. 6, 2001) (harm to employee's activities outweighed by harm to employer "in terms of lost customer goodwill and business").

Marketplace injuries such as lost clients and business opportunities, and disclosure of confidential information, are difficult, if not impossible, to undo. On the other hand, briefly restraining Mr. Boring from directly competing with DG and soliciting its clients, and from using or disclosing DG's confidential information for the benefit of a competitor, until this dispute can be finally resolved through arbitration, imposes only a minimal burden on him particularly since DG is willing to expedite the parties' Arbitration. Thus, the balance of conveniences weighs strongly in favor of ordering a temporary restraining order and preliminary injunction.[3]

DG has no adequate remedy at law to prevent Mr. Boring's violation of the non-solicitation, non-disclosure, and anti-piracy covenants in the Employment Agreement pending

[3] Moreover, Mr. Boring has expressly acknowledged and agreed that injunctive relief is the appropriate remedy in the event of a breach or threatened breach pending final resolution in arbitration. Section 14 of the Employment Agreement provides that "[DG] shall be entitled to seek injunctive relief in any court of competent jurisdiction to prevent any continuation of any violation of Section 2, 4, 5 and 7 of this Agreement."

final resolution of their disputes in arbitration. Accordingly, interim injunctive relief is necessary to protect DG's legitimate business interests.

F. The Grant of an Injunction Will Not Disserve the Public Interest

The Texas Supreme Court has expressly recognized that enforcement of restrictive covenants furthers Texas's public policy of "increas[ing] efficiency in industry by encouraging employers to entrust confidential information and important client relationships to key employees" and "incentiviz[ing] employers to develop goodwill by making them less reluctant to invest significant resources in developing goodwill that an employee could otherwise immediately take and use against them in business." *Marsh*, 2011 WL 6378834, at *3. As such, the enforcement of Mr. Boring's restrictive covenants will not disserve the public interest. *See Transperfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 758 (S.D. Tex. 2009) ("Texas has clarified the public interest through its non-compete statute, and, under that statute, enforcing reasonable non-compete agreements is within the public interest.").

G. Request for *Ex Parte* Relief

For the reasons stated above, DG will suffer irreparable harm if the covenants in Mr. Boring's Employment Agreement are not enforced immediately pending arbitration. Most significantly, DG has learned that, on January 25, 2012, Mr. Boring directly solicited GM's advertising agency to move GM's advertising business from DG to Extreme Reach, in violation of the non-solicitation provision of the Employment Agreement. If DG loses GM as a customer it will cause permanent and irreparable harm to DG, including potentially threatening the continued existence of DG's Detroit office.

As a result, DG requests an ***immediate*** temporary restraining order enforcing the non-solicitation provision of Mr. Boring's Employment Agreement, including preventing Mr. Boring

from continuing to solicit GM to move its advertising business from DG to Extreme Reach. DG requests that the Court immediately enter a temporary restraining order.

IV

CONCLUSION

For the foregoing reasons, and the reasons to be stated in any reply brief and at the hearing on this matter, DG's Motion should be granted, and the Court should enter an ORDER:

(i) immediately restraining Mr. Boring for a period of fourteen days from violating the covenants of the Employment Agreement, including immediately terminating any contact with customers or potential customers of DG with which Mr. Boring had contact in the two years prior to his termination from DG, including GM;

(ii) setting a hearing on DG's request for a preliminary injunction before the expiration of fourteen days after the entry of the ORDER; and

(iii) providing DG with further relief the Court deems necessary.

Respectfully submitted this 1st day of February, 2012.

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Attorneys for Plaintiff Digital Generation, Inc. f/k/a DG FastChannel, Inc.

CERTIFICATE OF CONFERENCE

The undersigned attests that prior to filing the foregoing Motion for *ex parte* relief counsel for DG attempted to contact Mr. Boring at his last known phone number. Counsel for DG was unable to reach Mr. Boring. Counsel for DG will continue attempting to contact Mr. Boring.

//s// Keith M. Aurzada
Keith M. Aurzada

CERTIFICATE OF SERVICE

The undersigned hereby states that on the 1st day of February, 2012, a true and correct copy of the foregoing instrument was served on Mr. Boring at his last known address *via* personal delivery.

//s// Keith M. Aurzada
Keith M. Aurzada