IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MARC WESLER,	§	
	§	
Plaintiff,	§	
v.	§	**CASE NO. 1:20-cv-00176**
	§	
VP RACING FUELS, LLC,	§	
	§	
Defendant.	§	

COMPLAINT

Plaintiff Marc Wesler ("Wesler" or "Plaintiff") files this his Complaint against Defendant VP Racing Fuels, LLC ("Defendant") and in support thereof alleges the following:

I.
INTRODUCTION

Wesler, after ending years of abuse and unsafe working conditions from his employer, now seeks a declaration of his rights pursuant to a contract between the parties.

II.
PARTIES

1. Plaintiff Wesler is an individual residing in Kalamazoo County, Michigan.

2. Defendant VP Racing Fuels, Inc. is a corporation organized and operating under the laws of the State of Texas with its principal place of business in Bexar, Texas. Defendant may be served with process by serving its registered agent, Susan Gray, at 7124 Richter Road, Elmendorf, Texas 78211, or anywhere else she may be found.

III.
JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), in that the parties are citizens of different states and the amount in controversy exceeds $75,000.00 exclusive of interest and costs.

4. Venue is proper in the Western District of Texas pursuant to 28 U.S.C. § 1391, in that a substantial part of the events or omissions giving rise to the claims asserted occurred in this district.

5. As a result of VP's actions, Wesler was left without a job and without the ability to get a job in his field due to the non-competition agreement in his Employment Contract. Wesler fully expected to make approximately $150,000 per year working for VP, plus receive insurance and other benefits, and instead is being told (inaccurately) that he must completely to sit out of his chosen field until September, 2021 or risk a potential breach of contract claim against him. As a direct result of these improper actions, as well as VP's failure to provide a safe working environment, Wesler, at a minimum, has been damaged in the amount of $300,000.

IV.
FACTUAL ALLEGATIONS

6. Wesler is a thirteen-year veteran of the motorsports industry.

7. On or about July 16, 2015, Wesler, a current Michigan resident, entered into an employment contract with VP ("Employment Contract"). A true and correct copy of the Employment Contract is attached as **Exhibit 1**. At the time Wesler entered into the contract, he lived in Maryland. Throughout the Employment Contract, VP defines itself as VP Racing Fuels,

Inc., as well as related companies of VP - Texas Allied Holdings, Inc., VP Transportation Co., Inc., Texas Allied Chemicals, Inc., Plastic Product Formers, Inc. and Hi Tech Properties, L.C.

8. Pursuant to the terms of the Employment Contract, Wesler was to represent VP as the Regional Manager in a certain "Marketing Territory" defined as the "Northeast US."

9. The terms of the at will Employment Contract contain a noncompete clause that states as follows:

> 6. Employee's Covenant Not to Compete.
>
> 6.1 In consideration of the premises herein, Employee agrees that during the term of his employment with Employer, Employee will not directly or indirectly, through, for or on behalf of any person, firm, joint venture, partnership, corporation or any other legal entity, own, manage, operate, control, invest in, or participate in the ownership or management of, be employed by, or otherwise conduct or engage in any business in direct competition with Employer.
>
> Employee further agrees that for a period of two (2) years following the termination of his employment and consulting agreement with Employer, Employee will not directly or indirectly, through, for or on behalf of any person, firm, joint venture, partnership, corporation or any other legal entity:
>
> > A. Solicit or accept any business from, or on behalf of any person, firm, joint venture, partnership, corporation or other legal entity which is in direct competition with Employer.
> >
> > B. Attempt to influence, persuade or induce any employee of Employer to leave employment with Employer or perform any service or provide any information to a business in competition with Employer, or in any way interfere with Employer's relationship with an employee, as Employee understands that such interference will constitute an unwarranted and unjustified interference with Employer's contract with such employee,
>
> 6.2. Employee agrees and acknowledges that this covenant not to compete is necessary for the protection of Employer, in that it furthers Employer's interest in protecting its business goodwill and its Trade Secrets.
>
> 6.3 Employee further represents to Employer that the enforcement of the restrictions contained in this Section 6 would not be unduly burdensome to him and that he has provided such a covenant to induce Employer to hire Employee. Employee further agrees that the limitations contained in this Section 6 with respect to geographic area, duration and scope of activity are reasonable. However, if any court shall determine that the geographic area, duration or scope of activity or any restriction contained in this Section is unenforceable, it is the intention of the parties that such restrictive covenant

> set forth herein shall not thereby be terminated but shall be deemed amended to the extent required to render it valid and enforceable.

Wesler's Performance of the Employment Contract occurred primarily in Michigan[1]

10. Wesler negotiated the personal service contract while in Maryland. Wesler signed the contract while in Maryland. His performance occurred in Maryland/Delaware from July 2015 – December of 2016 and then in Kalamazoo, Michigan from January 2017 until VP wrongfully terminated him in October 2019. Wesler performed for four years, based primarily in Michigan, without any negative review or comments from VP.

Wesler was terminated for refusing to sign a release that would effectively waive his rights for any tort claims related to VP's president's actions.

11. On October 8, 2019, Wesler received a "Notification and Release of Liability" for a sales meeting occurring in Las Vegas, Nevada purporting to release VP from all manner of

[1] It is Wesler's contention that Michigan law will apply to his personal services contract despite the choice of law clause in his contract. Although Texas courts permit choice-of-law agreements and the default position is that they are enforceable, it is not uncommon for a party to overcome them. *McKissock, LLC v. Martin*, 267 F. Supp. 3d 841, 850 (W.D. Tex. 2016) (determining the parties' choice of law clause was invalid and determining that the law of the state where the employee lived and worked was the correct law to apply when determining the applicability of a non-compete agreement); *Cardoni v. Prosperity Bank*, 805 F.3d 573, 581 (5th Cir. 2015) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990) (holding parties' choice of Florida law unenforceable and applying Texas law to enforcement of noncompetition agreement).

Michigan law disfavors non-compete agreements, viewing them as restraints on commerce and only enforceable to the extent they are reasonable. Further, Michigan courts will not enforce a noncompete that attempts to completely bar an employee from the same line of business as the employer. *Coates v. Bastian Bros., Inc.*, 741 N.W.2d 539, 545 (Mich. Ct. App 2007); *N. Michigan Title Co. of Antrim-Charlevoix v. Bartlett*, No. 248751, 2005 WL 599867, at *3 (Mich. Ct. App. Mar. 15, 2005) (declaring noncompete clause prohibiting employee's employment in the same line of business is unenforceable pursuant to MCL 445.774a because it is unreasonable); *Evergreen Home Health Care, LLC v. Wilson*, No. 286893, 2009 WL 3365752, at *4 (Mich. Ct. App. Oct. 20, 2009) (holding the noncompete agreement was unreasonable because did to not "protect against the employee's gaining some unfair advantage in competition with the employer" but instead prohibited the employee from using general knowledge or skill.)

Likewise, to the extent that the court wants to review Maryland law (where the contract was negotiated and executed by Wesler) Maryland law even more strongly disfavors non-compete agreements. *Seneca One Fin., Inc. v. Bloshuk*, 214 F. Supp. 3d 457, 462 (D. Md. 2016) (finding non-compete unenforceable because it "was designed more to prevent employees from working for any competitor than to prevent employees from taking advantage of customer goodwill created while employed at employer, and provision contained no narrow tailoring as to scope of restricted activities to make nationwide scope of covenant reasonable"). *Premier Rides, Inc. v. Stepanian*, No. CV MJG-17-3443, 2018 WL 1035771, at *8 (D. Md. Feb. 23, 2018) (holding noncompete agreement restricting employee from "working for a competitor" was overbroad and unenforceable).

torts—including "personal injury and death," among other things. A true and correct copy of the proposed Release is attached as **Exhibit 2**. This was particularly concerning to Wesler because Alan Cerwick ("Cerwick"), the company owner and president had often placed employees in dangerous working environments and had repeatedly told him and other employees that Cerwick fully expected to have a fatality someday and that "we will lose someone someday, but you can't be sad."

12. For example, it was common for Cerwick to require that employees drink alcohol in large quantities at management retreats and events and Cerwick often bragged about "hazing" his employees (even using "hazing" as an agenda point for meetings).

13. As another example, Wesler was on a management trip in Mexico wherein Cerwick plied all of the managers with alcohol and then made them race vehicles, resulting in one of them flipping the vehicle and a number of the other employees getting substantially hurt. Cerwick told Wesler during that Mexico trip that he fully expected a fatality from the activities he forced his employees to do during the management retreats. He seemed pleased and proud to make such statements.

14. As another example, Cerwick required his managers, including Wesler, to take part in a white-water rafting trip in Costa Rica on a portion of a river that they later learned not been rafted for the last fifteen years because it was so dangerous. Again, Cerwick bragged after the fact that he was surprised someone did not die. (In fact, less than a year later, four American tourists did die.[2])

15. Wesler, along with other employees, often received emails from Cerwick stating that he was going to take guys out back (of the plant) to "settle it like real men" if there was a

[2] https://www.cnn.com/2018/10/22/americas/costa-rica-raft-deaths/index.html

dispute over company business. He was also present when Cerwick threatened to "take a bat" to competitors while exhibiting violent behavior.

16. For the reasons set forth above, Wesler decided that it was too dangerous to sign the release of liability. On October 14, 2019, Wesler informed VP's general counsel that he was not comfortable signing the release and that, as a result of the attempt to release future bad acts by Cerwick, he was no longer comfortable traveling with Cerwick at all. He made a formal complaint about Cerwick's dangerous behavior and his concerns about traveling with him on the same date.

17. On October 22, 2019, Wesler was informed by VP that he had "resigned" and that VP accepted that resignation. A true and correct copy of VP's "acceptance of his resignation" is attached as **Exhibit 3**.

18. Rather than fight the firing versus resignation issue, Wesler decided to move forward with finding less dangerous employment in his chosen field. In an attempt to maintain a friendly relationship with VP (as Wesler was well aware that Cerwick had threatened multiple employees that he would "bleed them dry" financially through litigation if they "left the VP team"), Wesler attempted to work with VP to define the scope of his noncompete agreement. However, VP has continuously attempted to broaden the geographical and activity scope of the agreement beyond what it says and beyond what can be enforced. A true and correct copy of the exchange between VP and Wesler's counsel attempting to define the scope and geographical nature of the Employment Contract is attached as **Exhibit 4**.

19. As a result, Wesler is left in limbo, trying to determine which employment opportunities he can accept without worrying about getting sued. Thus, Wesler seeks a declaration of his rights under the Employment Contract with this lawsuit.

20. Wesler also seeks his lost pay for being terminated after reporting the dangerous work conditions when traveling with VP's president. Wesler seeks damages in the amount of $150,000 per year plus benefits for twenty-four (24) months from the date he was terminated.

IV.
CAUSES OF ACTION

CAUSE ONE - DECLARATORY JUDGMENT

21. All prior and subsequent allegations are incorporated herein by reference.

22. A justiciable controversy exists between Wesler and VP with regard to enforceability of the noncompetition clause in the Employment Contract. Wesler seeks a declaration as follows:

a. The geographical limitation of the noncompete in the Employment Contract is undefined;

b. The geographical limitation of the noncompete in the Employment Contract should be limited to the "Northeast US", the territory serviced by Wesler;

c. Alternatively, VP's interpretation that there is no geographical limitation for the noncompete in the Employment Contract makes it overly broad and thus unenforceable;

d. The restrictive language in the Employment Contract is too indefinite to be enforceable;

e. that the non-compete in the Employment Contract is unreasonable and overly-broad as to (1) scope of activity to be restrained; (2) as to geographic area; and (3) the definition of "Marketing Territory."

f. The scope of activities restricted is unreasonable;

g. The scope of activities restricted is unreasonable in that Michigan law does not allow a company to;

h. The restraint in the Employment Contract is greater than necessary to protect VP's "legitimate business interest."

i. That VP has unclean hands, precluding enforceability of the Employment Contract;

j. The intolerable working conditions imposed by management amounted to a breach of the employee's contract and resulted in a wrong done to Wesler, making the non-competition agreement in the Employment Contract unenforceable.

CAUSE TWO – BREACH OF DUTY TO PROVIDE SAFE WORKING ENVIRONMENT

23. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint above as if fully set forth herein.

24. An employer has a nondelabable duty to provide its employees with a safe work place. VP breached that duty when it failed to restrain Cerwick from putting Wesler into dangerous and potentially life-threatening situations, when it failed to restrain Cerwick from forcing employees into performing illegal and dangerous activities such as hiring prostitutes, and engaging in unsafe mandatory extracurricular activities.

CAUSE THREE – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS / RESPONDEAT SUPERIOR

25. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint above as if fully set forth herein.

26. VP and its owner, Cerwick's oppressive and harassing and dangerous abuse of its and his positions with regard to Plaintiff were extreme, outrageous, oppressive and an abuse of its and his authority. The conduct referenced herein was so atrocious that it passed the bounds of decency and is utterly intolerable to the civilized community.

27. Defendant's conduct was intentional and reckless and the direct and proximate cause of Plaintiff's extreme emotional distress.

28. As a direct result, Plaintiff suffered damages for which he seeks compensation.

29. Plaintiff suffered severe emotion and physical distress as a result of VP and its owner, Cerwick, wrongful actions, including, but not limited to loss of self-esteem, inability to

concentrate, and anxiety. Plaintiff seeks punitive damages as a result of the intentional tort. Texas and Michigan common law recognize the tort of intentional infliction of emotional distress.

30. VP is vicariously liable for Cerwick's intentional tort under the doctrine of respondeat superior and/or is directly liable under the doctrine of ratification. The intentional torts fell within the scope of Cerwick's general authority and were made in furtherance of VP's business on management retreats, business trips, company meetings and other firm events. The torts occurred in accomplishment of the object for which Cerwick intended. Further, VP was aware of Cerwick's actions and knew enough to realize that Cerwick's conduct was extreme and outrageous. VP ratified Cerwick's conduct through its own acts, conduct, or affirmative acquiescence. Although VP possessed all material facts as to Cerwick's intentional torts, it failed to repudiate its employee's tortuous act.

CAUSE FOUR – NEGLIGENT HIRING, SUPERVISION AND RETENTION

31. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint above as if fully set forth herein.

32. Defendant VP was aware of Cerwick's behavior towards Plaintiff and other employees. Defendant VP is aware of Cerwick's past behavior toward employees. Defendant, upon information and belief, has received complaints about Cerwick's behavior from other employees. Defendant VP is aware of Plaintiff's written formal complaint of feeling unsafe traveling in a foreign company with Cerwick and the historical reasons for the lack of safety. However, rather than restrain Cerwick, Defendant VP attempted to inoculate itself from additional complaints by sending a release to attempt to gain Plaintiff's release of Cerwick's future bad acts and then fired Plaintiff when Plaintiff refused to sign it.

33. Despite repeated complaints by Wesler and others, VP failed to take action to curb Cerwick's behavior.

34. Under Texas and Michigan common law, Defendant VP owed Plaintiff the duty to use reasonable care to avoid harming him and to anticipate and guard against the "human traits" of its employees, which unregulated, were likely to harm others.

35. Defendant VP negligently and inappropriately supervised and retained Cerwick, such that it engaged in a course of conduct resulting in Cerwick committing the tort of intentional infliction of emotion distress against Plaintiff.

CAUSE FIVE – REQUEST FOR ACCOUNTING/AUDIT

36. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint above as if fully set forth herein.

37. Pursuant to TEX. R. CIV. P. 172, Wesler requests an accounting and/or audit of VP. An investigation of the calculation of the bonuses and commissions for Wesler from 2015 - 2019 (including, but not limited to, the underlying information and supporting documentation) is necessary for the purpose of justice between the parties to the suit, including, but not limited to, for the purpose of accurately determining the commission and bonuses that Wesler should have been paid from 2015-2019.

38. Accordingly, Plaintiff requests that the Court appoint a neutral auditor or auditors to calculate the commission and bonuses that Wesler should have been paid from 2015-2019 (including, but not limited to, reviewing the underlying information and supporting documentation to make the calculations) and to make report thereof to the Court as soon as possible. All costs and fees for the audit should be taxed against VP.

V.
ATTORNEYS' FEES

39. Pursuant to Texas Business and Commerce Code §15.51(c), Wesler seeks and is entitled to recover his reasonable attorneys' fees and costs incurred in connection with defending against an overbroad covenant.

40. Pursuant to Chapters 37 and 38 of the Texas Civil Practice & Remedies Code, Wesler seeks and is entitled to recover the reasonable attorneys' fees and costs incurred in connection with this lawsuit.

VI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Wesler prays that the Court grant the relief sought in this Complaint, and for all other relief to which Wesler may be justly entitled.

Respectfully submitted,

Leslye E. Moseley
David R. Clouston
State Bar No. 00787253
Leslye E. Moseley
State Bar No. 24044557

Sessions Fishman Nathan & Israel LLP
900 Jackson Street
Suite 440
Dallas, Texas 75202
Telephone: 214-741-3001
Facsimile: 214-741-3055

ATTORNEYS FOR MARC WESLER

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I have mailed by United States Postal Service the document to the following non-CMF/ECF participants:

Susan Gray, Registered Agent
7124 Richter Road
Elmendorf, Texas 78211

Leslye E. Moseley
Leslye E. Moseley