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Pursuant to Fed. R. Civ. P. 65 and Local Rule 7.01(a), Plaintiff TBA Global, LLC (“TBA”) respectfully submits this memorandum of law in support of both its motion for a temporary restraining order and its motion for a preliminary injunction against defendants Kevin Underwood, David Kenyon (“Kenyon”), Amy Manzanares (“Manzanares”) and Kent Underwood. TBA seeks orders ensuring that these defendants abide by non-solicitation agreements entered into with TBA.

PRELIMINARY STATEMENT

This case concerns the effort by TBA’s competitor, LEO Events, LLC (“LEO”), and its senior executives, to attempt to misappropriate TBA clients, customers and business relationships as well as confidential and proprietary TBA information through the disregard of existing non-solicitation agreements (the “TBA Agreements”) that some of these executives have with TBA. While TBA has made every effort to safeguard its rights under the TBA Agreements, there have already been breaches of the TBA Agreements and a significant likelihood of continued breaching and related tortious misconduct exists. TBA has been left with no recourse but to seek all available remedies including injunctive relief and monetary damages through the filing of this action.

TBA respectfully seeks a temporary restraining order and preliminary injunction to prohibit the LEO executives from soliciting TBA clients, customers and business relationships, hiring TBA employees and using TBA Confidential information. TBA is likely to succeed on the merits as LEO executives have already breached the TBA Agreements (a) by hiring away long-time senior TBA employees to create LEO’s Nashville office and (b) through direct and indirect communications for the purpose of procuring work with TBA clients, such as Walmart, State Farm and Software AG. Such disregard of the TBA Agreements constitutes and threatens irreparable harm to TBA through the depletion of its employee and customer bases.

Pursuant to the TBA Agreements, TBA is entitled to injunctive relief requiring the LEO executives to comply with clear-cut and enforceable provisions to which they freely and voluntarily agreed. Such relief would require the LEO executives subject to TBA Agreements: (1) not to directly or indirectly solicit or assist others to solicit TBA's clients, customers or business relationships for the purpose of procuring business other than for TBA; (2) not to directly or indirectly on their own behalf or on behalf of others solicit, attempt to hire or hire any person employed by TBA to work for LEO; (3) not to use or disclose any TBA proprietary or Confidential Information, as defined in their TBA Agreements, for the benefit of LEO or any other individual or entity; and (4) to return to TBA any and all TBA Confidential Information and other property unlawfully in their possession, custody or control, including any and all copies thereof.

BACKGROUND

A. TBA's Business & Confidential Information

TBA is a live events marketing agency, with several offices in the United States and Canada including one in Tennessee. Affidavit of Paula Balzer ("Balzer Aff.") ¶ 3. TBA plans and produces live event programs, meeting services and marketing presentations for leading companies and branded products. Examples of major TBA clients include: ExxonMobil, Walmart, State Farm Insurance, R.J. Reynolds, Bank of America, Volkswagen, Realogy and Century 21 Real Estate. *Id.*

TBA has planned and organized some of the largest corporate events in the United States. Over the last five years, for example, it has produced and administered over ten major Walmart meetings. *Id.* ¶ 5. In 2012, TBA was responsible for administering each of Walmart's major events, including a year beginning meeting in the first part of the year, the annual shareholders'

meeting (attracting over 17,000 people) in the middle of the year and a holiday meeting toward the latter part of the year. *Id.*

The services that TBA provides to clients are unique. TBA's unique capabilities and experience include knowledge of its customers and customer businesses. *Id.* ¶ 6. TBA devotes substantial resources, including financial expenditures, intellectual property, and commitment of personnel with unique skill sets, to cultivating and developing business relationships with clients and prospective clients. *Id.* ¶ 7. TBA provides its clients with original, innovative content, designed specifically for each particular client. *Id.* ¶ 8. Knowledge of the customer is critical to the live events marketing industry. *Id.* TBA and its executives devote substantial time and resources to understanding the client's business and the client's preferences, and establishing and building customer goodwill through a track record of performance and positive client communications. *Id.* ¶ 9.

B. Kent Underwood, Kevin Brewer And Cindy Brewer Form TBA Competitor, LEO

Over the years, TBA has partnered with others to assist in the production and staging of live event programs, such as those it has done for Walmart. *Id.* ¶ 10. Defendant LEO Events, LLC ("LEO") – in its current form and through one of its predecessors, Quiddity Entertainment, LLC ("Quiddity") – is one of the main partners TBA worked with on these programs. *Id.* Between September 2011 and the middle of March 2013, LEO/Quiddity garnered over \$650,000 in fees from work generated through TBA for clients such as ExxonMobil, Walmart and State Farm. *Id.* Defendant Kent Underwood, who was the principal of Quiddity and a co-founder of LEO, has been involved in several TBA-administered events over the past five years. *Id.*

During 2012, Kent Underwood joined with defendants Kevin Brewer and Cindy Brewer (collectively, "the Brewers") to form LEO by combining Quiddity with a company run by the

Brewers, known as Destination King, Inc. *Id.* ¶ 11. LEO issued a press release announcing its creation on August 8, 2012, introducing the new company as “an events management group based in Memphis with offices in Chattanooga, Tennessee and Myrtle Beach, South Carolina.” *Id.*, Exh. A. The LEO press release underscored that LEO intended to compete for major event marketing business: “Although regionally based, LEO is able to handle events in any market and around the globe.” *Id.* LEO also intended to expand its operations and scope—“four new employees were hired in preparation for the new entity” and “future plans include expansion into other markets.” *Id.* ¶12. The press release further stated that: “LEO hopes to grow the average number of client events annually from 350 to more than 500” and that “various services will be added or expanded in each market to allow for larger events.” *Id.*

On December 4, 2012, LEO issued a second press release, announcing the opening of a Nashville office with the hiring of defendants Kevin Underwood and Kenyon, both of whom were long-time TBA executives resident in TBA’s Tennessee office. *Id.* ¶ 13, Exh. B. LEO’s December 4th press release identified Kevin Underwood as having “spent more than 20 years managing TBA’s Nashville office” and it stated that “Kenyon spent 13 years at TBA’s Nashville office, overseeing production for hundreds of events annually for the company, including the annual Walmart shareholders’ meeting and distributors’ conferences for ExxonMobil.” *Id.*, Exh. B.

In the December 4th press release, Kevin Brewer characterized the hiring of Kevin Underwood and Kenyon as “a great step for LEO as a company,” explaining that “by bringing on Kevin and David, we now have two people on board with years of incredible experience in the ways we wish to grow LEO in the near future.” *Id.* Defendant Cindy Brewer echoed that Kevin Underwood and Kenyon were hired so that LEO had the experience and expertise to compete

nationally. *Id.* She stated: “This is an amazing opportunity For LEO, we gain the creative and technical expertise of two highly seasoned individuals,” who will “join a firm that’s positioned for national growth.” *Id.*

Kevin Underwood, Kenyon and defendant Manzanares all resigned from TBA in October/November 2012 timeframe. *Id.* ¶ 15. Each of Kevin Underwood, Kenyon and Manzanares played leading roles in the managing and servicing of major TBA clients including but not limited to Walmart, ExxonMobil, State Farm, Realogy, Software AG, Bank of America, IBM and Volkswagen. *Id.* Kevin Underwood was a senior vice president at TBA, Kenyon functioned as senior vice president of production and Manzanares as vice president for client services. *Id.*

C. Kevin Underwood, Kenyon, Manzanares And Kent Underwood Agreed To Abide By TBA Agreements

As a matter of policy and practice, TBA requires its executives and major independent contractors—particularly those responsible for sales, client relationships, creative, managers and personnel involved in revenue generation—to execute TBA Agreements. *Id.* ¶ 16. The TBA Agreement is a non-solicitation agreement that is customary in the event marketing industry, and that is essential to TBA’s protection of its intellectual property, confidential and proprietary information, customer relationships and good will. *Id.*

Each of Kevin Underwood, Kenyon and Manzanares, as TBA executives, as well as Kent Underwood, as a major TBA independent contractor, signed, executed and agreed to TBA Agreements. *Id.* ¶ 17, Exhs. C-F. Kevin Underwood, Kenyon and Manzanares each represented and warranted in these Agreements that they “freely and voluntarily entered into th[e] Agreement,” that they had “read and understood each and every provision” and they were “free

to obtain advice from legal counsel of choice, if necessary and desired, in order to interpret any and all provisions of th[e] Agreement.” *Id.* Exhs. C-E, §§ (j).

The TBA Agreements are specifically designed to protect TBA’s trade secrets and proprietary confidential information and to safeguard business relationships and customer goodwill that were developed and financed by TBA. *Id.* ¶ 18. Each of Kevin Underwood, Kenyon and Manzanares, during their many years of employment with TBA, as well as Kent Underwood, through his many engagements as a TBA independent contractor, had access to confidential and proprietary TBA information including that which was associated with TBA’s clients, prospective clients and business relationships. *Id.* The TBA Agreements define “Confidential Information” as including TBA’s “trade secrets, client and business relationships, systems, procedures, manuals, confidential reports, lists of customers and suppliers, the nature and types of services rendered by [TBA], pricing policies of [TBA] and [TBA]’s methods of doing business.” *Id.* Exhs. C, D, E at 1.²

The TBA Agreements agreed to by Kevin Underwood, Kenyon and Manzanares expressly prohibit the use of TBA’s “Confidential Information” for purposes outside of TBA-related work. The “Confidential Information” provision states: “Employee further agrees that Employee will not . . . reveal or disclose, sell, use, lecture upon, publish or otherwise disclose to any third party any Confidential Information or proprietary information of [TBA] or authorize anyone else to do these things at any time either during or subsequent to Employee’s employment with [TBA].” *Id.* Exhs. C, D, E at §§ (e). The “Confidential Information” provision emphasizes that: “[t]his subparagraph shall continue in full force and effect after

² This definition is quoted from the TBA Agreements entered into by each of Kevin Underwood, Kenyon and Manzanares. The definition in Kent Underwood’s agreement is worded slightly differently but is substantially the same. Balzer Aff. Exh. F at 4.

termination of Employee's relationship with [TBA]." *Id.* Kent Underwood's agreement also prohibits him from "divulg[ing] or utiliz[ing] . . . except in connection with the performance of the Contracted Project, any such confidential or proprietary information." *Id.* Exh. F. at 4. Kent Underwood's obligation not to utilize and divulge this critical TBA Confidential Information applies "in any manner at any time." *Id.*

The "Non-Solicitation of Customers" provision and the "Non-Solicitation of Employees" provision in the TBA Agreements establish a reasonable and fixed period of two years after termination of the employee's employment with TBA during which a former executive or independent contractor may not exploit access to confidential and proprietary TBA information and customer relationships by communicating with TBA's customers or business relationships or by hiring away other TBA employees. *Id.* ¶ 22. Non-solicitation restrictions of two years are commonplace, reasonable and customary for live events marketing businesses. *Id.* Each of Kevin Underwood, Kenyon and Manzanares, as TBA executives, and Kent Underwood, as a major TBA independent contractor, agreed to these non-solicitation provisions.

The Non-Solicitation of Customers provision agreed to by Kevin Underwood, Kenyon and Manzanares states in relevant part that: "for the duration of the Employee's employment relationship with [TBA], and for a period of two (2) years after termination of Employee's employment relationship with [TBA] . . . Employee will not, directly or indirectly, communicate with clients or customers of [TBA] or pursue business relationships developed while employed by [TBA]." *Id.* Exhs. C, E, §§ (c); Exh. D at 2. The Non-Solicitation of Customers provision defines "communication" as "communication in a manner which is used to procure business by Employee or communication which would alter the business relationships of such customers or clients with [TBA] in a negative way." *Id.* Exhs. C, E, §§ (c); Exh. D at 2. Furthermore, the

provision states that “this prohibition includes assisting or supervising any other person to solicit or secure a business relationship with a client or customer of [TBA].” *Id.* Exhs. C, E, §§ (c); Exh. D at 2. In addition, Kevin Underwood and Manzanares were expressly given the option of listing customers to be excluded from this provision, but chose not to. *Id.* Exhs. C, E §§ (c).

The Non-Solicitation of Customers prohibition, as applied to Kevin Underwood extends through and until November 1, 2014; as applied to David Kenyon extends through and until October 29, 2014; and as applied to Amy Manzanares extends through and until November 16, 2014, as they terminated their employment relationships with TBA on November 1, 2012, October 29, 2012 and November 16, 2012, respectively. *Id.* ¶ 24.

Kent Underwood also executed a TBA Agreement in connection with work he was doing for a TBA client, Realogy, in which the final date of the “Contract Period” was March 24, 2011. *Id.*, Exh. F at 1. As part of his TBA Agreement, Kent Underwood agreed to a Non-Solicitation of Customers provision under which he “agree[d] that during the Contract Period, and for a period of two (2) years after the final date of the Contract Period, [he] will not, either directly or indirectly, on [his] own behalf or on behalf of others, solicit any of the clients, customers or prospects of TBA, or pursue business relationships developed while engaged in performance of the Contracted Project, except as specified and agreed to in writing by TBA.” *Id.* Exh. F at 4-5. Kent Underwood did not list any exceptions to the Non-Solicitation of Customers prohibition. *Id.* ¶ 25, Exh. F.

Each of Kevin Underwood, Kenyon and Manzanares, as TBA executives, also agreed to Non-Solicitation of Employees provisions. *Id.* ¶ 26. Pursuant to their TBA Agreements, Kevin Underwood, Kenyon and Manzanares agreed in their Non-Solicitation of Employees provisions: “that for the duration of the Employee’s employment relationship with [TBA], and for a period

of two (2) years after the termination of such employment relationship . . . Employee will not, directly or indirectly, on Employee's own behalf or on behalf of others, solicit, attempt to hire, or hire any person employed by [TBA] to work for Employee or for another entity, firm, corporation or individual." *Id.*, Exhs. C-E, § (d).

Similarly, Kent Underwood agreed in his Non-Solicitation of Employees provision that "during the Contract Period, and for a period of two (2) years after the final date of the Contract Period, [he] will not, either directly or indirectly, on [his] own behalf or on the behalf of others, solicit, attempt to hire or hire any person employed by TBA to work for [him] or for another entity, firm corporation or individual." *Id.* Exh. F at 5.

Furthermore, each of Kevin Underwood, Kenyon and Manzanares and Kent Underwood agreed "that any breaches of this Agreement cannot be remedied solely by money damages, and that in addition to any other remedies [TBA] may have, [TBA] is entitled to obtain injunctive relief against [the Employee or Contractor]." *Id.*, Exhs. C § (h), Exhs. D, E § (i), Exh. F at 5.

TBA's Non-Solicitation provisions do not restrict competition during the two year period; they are limited to non-solicitation of TBA clients, customers, prospective customers or business relationships and to non-solicitation of TBA employees. *Id.* ¶ 29. They do not prohibit an employee from working for another company in the live events marketing field after termination of employment with TBA, and do not preclude solicitation of work from companies that were not clients or prospective clients of TBA. *Id.* ¶ 27.

D. Kent Underwood, Kevin Underwood, Kenyon And Manzanares Breached Their TBA Agreements

Kent Underwood breached his TBA Agreement by soliciting, attempting to hire or hiring Kevin Underwood, Kenyon and Manzanares to work for LEO during the two-year non-solicitation period. *Id.* ¶ 30. Kevin Underwood, Kenyon and Manzanares similarly breached

their TBA Agreements by soliciting, attempting to hire or hiring each other to work for LEO while they were still employed by TBA. *Id.* ¶ 31.

Kent Underwood, Kevin Underwood, Kenyon and Manzanares are also not abiding by the TBA Agreements in that they are communicating with and soliciting TBA clients, customers and business relationships to procure business for LEO itself or for LEO in partnership or in conjunction with others that compete with TBA. *Id.* ¶ 34. They are doing so with the benefit and unfair advantage of having TBA proprietary and Confidential Information at their disposal.

First, at the end of 2012, after LEO had hired Kevin Underwood, Kenyon and Manzanares, LEO participated in a bid by a TBA competitor, Proscenium Events, LLC (“Proscenium”) of New York City to secure work from Walmart in connection with Walmart’s Year Beginning Meeting to be held in March 2013. *Id.* ¶ 35. Kenyon did considerable work on Walmart events while at TBA and Kent Underwood had worked on each of the three major Walmart events that TBA was administering during 2012. *Id.* It is likely that LEO and its predecessor Quiddity have participated in other bids with Proscenium for the purpose of securing work from TBA clients, customers or business relationships notwithstanding the Non-Solicitation of Customers restrictions in the TBA Agreements.

Second, State Farm is one of TBA’s longstanding and major clients. It has been a TBA client since 1996. *Id.* ¶ 36. Both Kevin Underwood and Kenyon did considerable work at TBA on State Farm projects and Kent Underwood had served as a TBA independent contractor on State Farm programs, including most recently, the State Farm Final Night Event. Nonetheless, at the beginning of 2013 LEO communicated with State Farm about submitting a proposal to State Farm in connection with State Farm’s 2014 Sales Exchange. *Id.*

Third, for many years, TBA has provided event services for Software AG, and, while at TBA, defendant Manzanares was deeply involved with Software AG business. TBA bid for two 2013 programs from Software AG: the 2013 ProcessWorld Conference and the 2013 Chairman's Club Incentive Program. *Id.* ¶ 37. In early 2013, TBA learned that it had not been awarded these programs from its long-time client and that LEO employees including Manzanares had been contracted to participate in the management of those programs. *Id.* LEO obtained that work even though Manzanares is expressly prohibited in her TBA Agreement from directly or indirectly communicating with TBA clients and from assisting or supervising any other person to solicit or secure a business relationship with a TBA client or customer. *Id.* Manzanares and others from LEO did so in connection with the 2013 Software AG programs. *Id.*

Fourth, on January 25, 2013, Manzanares initiated an email exchange with defendants Kevin Brewer, Kent Underwood and Kevin Underwood. By accident, Manzanares sent her email to Kevin Underwood's TBA email address. *Id.* ¶ 38, Exh. I. In the email, Manzanares was seeking approval for herself, Kenyon and Kevin Underwood to travel to Chicago on a business trip. Part of the trip, she explained, was so that Kevin Underwood could "meet with some old clients in the area." *Id.* Kevin Underwood spent twenty years at TBA before joining LEO. *Id.* ¶ 13. The "old clients" are undoubtedly those he worked with while at TBA.

E. TBA Has Diligently Attempted To Protect Its Rights Under The TBA Agreements

TBA has been diligent in its efforts to protect and safeguard its rights under the TBA Agreements. *Id.* ¶ 32, 40. For example, on November 2, 2012, immediately after learning that Kevin Underwood was leaving TBA and that he might be joining LEO, TBA's counsel wrote to Kevin Underwood to remind him of his obligations under the TBA Agreement, attaching a copy of the TBA Agreement. *Id.* ¶ 32, Exh. G.

Former counsel for defendant LEO³ responded to TBA's counsel's letter on November 20, 2012. *Id.* ¶ 33, Exh. H. LEO's counsel wrote that: "LEO has instructed Mr. Underwood that he is not to engage in any conduct on LEO's behalf that would constitute a violation of the [TBA] Agreement, unless expressly authorized by TBA." *Id.* He further represented that "LEO has also informed Mr. Underwood that he is not to solicit any of the customers that he serviced on behalf of TBA and is not to assist others at LEO in soliciting such customers." *Id.*

On Friday March 8, 2013, Paula Balzer, TBA's CEO, met with defendants Kent Underwood and Kevin Brewer in an effort to try and resolve defendants' breaches of the non-solicitation agreements. *Id.* ¶ 40. She memorialized the conversation in a letter she sent to Kent Underwood and Kevin Brewer the next day, March 9, 2013, and asked for a response by close of business on Monday, March 11, 2013. *Id.* Kevin Brewer responded late in the day on March 11, 2013 and stated that LEO would respond by close of business on Wednesday, March 13, 2013. *Id.* He did not respond until the morning of March 14, 2013, confirming that LEO was declining TBA's offer to resolve the dispute. *Id.*

³ This November 2012 letter was from Justin Page at BASS, BERRY & SIMS. Since that time, BASS, BERRY & SIMS has not corresponded on behalf of LEO or any other Defendant, who have been discussing these matters directly with TBA. Further, according to BASS, BERRY & SIMS' website, Mr. Page no longer is an attorney there and no other attorney was identified in the November 2012 letter nor has any other attorney contacted TBA. Accordingly, TBA assumes that BASS, BERRY & SIMS is no longer counsel for the Defendants against whom the temporary restraining order and preliminary injunction are sought and is serving its papers directly on the Defendants.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IS NEEDED TO SAFEGUARD THE RIGHTS OF TBA UNDER THE TBA AGREEMENTS

In determining whether preliminary injunctive relief is appropriate, courts must consider and balance four factors: (A) whether the movant has a substantial likelihood of success on the merits; (B) whether there is a threat of irreparable harm to the movant; (C) whether the injunction would cause substantial harm to others; and (D) whether the public interest will be served by the injunction. *See Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012).

“Though none of the four factors is to be deemed conclusive on its own, each need not be viewed in isolation from the others.” *Blue Cross & Blue Shield Mut. of Oh. v. Blue Cross & Blue Shield Assn.*, 110 F.3d 318, 334 (6th Cir. 1997). These four “factors are not prerequisites to issuing an injunction but factors to be balanced” against each other. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347-48 (6th Cir. 1998) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). A court “is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue.” *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007).

TBA is entitled to injunctive relief because: (A) TBA will likely succeed on the merits in that the non-solicitation provisions are reasonable and enforceable and the defendants have already breached those provisions, (B) the injunction is necessary to save TBA from the risk of irreparable harm of loss of customer goodwill and other injuries caused by unfair competition, (C) the injunction sought will not harm others as it has no significant impact on third parties, and (D) the injunction requiring defendants to abide by their contractual obligations would serve the public interest in promoting stability and certainty in business and employment relationships.

Moreover, injunctive relief is specifically authorized by T.C.A. § 47-25-1703 for misappropriation of trade secrets.

A. TBA Is Likely To Succeed On The Merits Of Its Claims

“In general, the likelihood of success that need be shown will vary inversely with the degree of injury the [movant] will suffer absent an injunction” *Roth v. Commonwealth Bank*, 583 F.2d 527, 538 (6th Cir. 1978). When assessing the prospects of the TBA’s ultimate success, the Court must determine, “not that [TBA] certainly has a right, but that [it] has a fair question to raise as to the existence of such a right.” *Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974); *Riverside Park Realty Co. v. F.D.I.C.*, 465 F. Supp. 305, 310 (M.D. Tenn. 1978). Here, there is little doubt that that Kevin Underwood, Kenyon, Manzanares and Kent Underwood have breached and are continuing to breach their TBA Agreements.

1. TBA Is Likely To Succeed Because The TBA Agreements Are Reasonable And Enforceable As They Are Limited in Scope And Duration.

Kent Underwood, Kenyon and Manzanares agreed that their TBA Agreements would be governed by Delaware law. Balzer Aff. Exhs. D-F. Kevin Underwood agreed that his TBA Agreement would be governed by Tennessee Law. Balzer Aff. Exh. C. There is no conflict of laws between Delaware and Tennessee law on the issues before the Court, and under either Delaware or Tennessee law TBA is likely to succeed on its claims because the TBA Agreements are reasonable and enforceable as they are limited in scope and duration.

In general, employment agreements are enforceable when they are supported by adequate consideration. *Research & Trading Corp. v. Pfuhl*, No. Civ. A. 12527, 1992 WL 345465, at *9 (Del. Ch. Nov. 18, 1992); *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984). Continued employment constitutes adequate consideration. *Research & Trading Corp.*,

1992 WL 345465, at *9; *Cent. Adjustment Bureau*, 678 S.W.2d at 35 (continued employment of two years after signing the agreement is sufficient consideration for restrictive covenant). Kevin Underwood, Kenyon and Manzanares were each employed for seven or more years after signing the TBA Agreements. *See* Balzer Aff. Exhs. C-E. Their continued employment constitutes adequate consideration to support the covenants in the TBA Agreements. Likewise, Kent Underwood engaged in continued work with TBA since signing his TBA Agreement in 2011. *Id.* ¶ 10.

Moreover, the non-solicitation provisions are enforceable because they are reasonable in scope and duration, and advance a legitimate business interest of the employer. *See Weichert Co. v. Young*, No. Civ. A. 2223-VCL, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 644, 647 (Tenn. Ct. App. 1999). Both Delaware and Tennessee law provide that covenants of two-years' duration are reasonable. *Weichert Co.*, 2007 WL 4372823, at *3; *accord Tri-State Courier & Carriage, Inc. v. Berryman*, No. C.A. 20574-NC, 2004 WL 835886, at *11 (Del. Ch. Apr. 15, 2004); *Copi of Delaware, Inc. v. Kelly*, No. Civ. A. 14529, 1996 WL 633302, at *5 (Del. Ch. Oct. 25, 1996), *aff'd sub nom.*, *Smart Bus. Sys., Inc. v. Copi of Delaware, Inc.*, 707 A.2d 767 (Del. 1998); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 648 (Tenn. Ct. App. 1999). Indeed, non-solicitation restrictions of two years are commonplace, reasonable and customary for live events marketing businesses. Balzer Aff. ¶ 23.

The non-solicitation restrictions are limited in scope. These are not non-competition provisions; the LEO employees are currently free to compete with TBA for work from thousands of companies in the United States. What they are restricted from doing during the reasonable two-year non-solicitation period is seeking and soliciting business from TBA

clients, customers or business relationships and hiring away other TBA employees. Whether analyzed under Delaware or Tennessee law, such specific restrictions are reasonable because they are limited in scope and duration.

In assessing enforceability, Tennessee courts have broken down the analysis into specific factors. These include examination as to: (1) “the consideration supporting the agreements;” (2) “the threatened danger to the employer in the absence of such an agreement;” (3) “the economic hardship imposed on the employee by such a covenant;” and (4) “whether or not such a covenant should be inimical to public interest.” *Vantage Tech., LLC*, 17 S.W.3d at 644. As has been already demonstrated, there clearly is sufficient consideration through the defendants’ continued employment. And, in balancing factors (2) through (4), the threshold question is “whether the employer has a legitimate business interest, *i.e.*, one that is properly protectable by a non-competition covenant.” *Id.*

Both Delaware and Tennessee law recognize an employer’s legitimate business interest in trade secrets or confidential information and valuable client relationships developed by the employee on behalf of the employer. *Tri-State*, 2004 WL 835886, at *10 (goodwill of clients and confidential information “have long been recognized as legitimate economic interests of a former employer,” especially in a business where “personal contacts are critical.”); *Vantage Tech., LLC*, 17 S.W.3d at 644 (Tenn. Ct. App. 1999). Thus, TBA is entitled to the protections afforded by the non-solicitation provisions because it has a legitimate business interest in “the goodwill created by its sales representatives and other employees, which is vulnerable to misappropriation if the employer’s former employees are allowed to solicit its customers shortly after changing jobs.” *Research & Trading Corp.*, 1992 WL 345465, at **12-13.

The TBA Agreements are designed primarily to protect TBA's trade secrets and proprietary confidential information and to safeguard business relationships and customer goodwill that were developed and financed by TBA. Balzer Aff. ¶ 18. Each of Kevin Underwood, Kenyon and Manzanares, during their many years of employment with TBA, as well as Kent Underwood, through his many engagements as a TBA independent contractor, had access to confidential and proprietary TBA information including that which was associated with TBA's clients, prospective clients and business relationships. *Id.* TBA would be hurt competitively if LEO and the individual defendants were able to exploit TBA's customer base and use TBA's trade secrets and confidential information to unfairly compete with TBA. Pursuant to the TBA Agreements, none of these defendants may ever use Confidential Information they had access to at TBA.

A key part of TBA's success is its unique capabilities and experience, as well as the application of those to understanding a particular client's business, methods and needs. Knowledge of the customer is critical to the live events marketing industry. *Id.* ¶ 8. TBA has expended considerable resources (time, personnel, money and ingenuity) in order to gain that knowledge and cultivate personalized and individualized relationships with clients that generate goodwill. *Id.* ¶ 6-7. Thus, TBA's continued success depends upon the protection of its investment in its client relationships by means of enforcing the TBA Agreements.

In balancing TBA's legitimate interest in protecting customer goodwill against any interests the defendants may have, Tennessee courts have expressly held that the investment of an employer in developing customer relationships and in gathering valuable customer information outweighs the former employee's interest in "that which does not belong to him." *Vantage Tech., LLC*, 17 S.W.3d at 647. The Tennessee courts have done so because there is a

reluctance to protect an individual “from the consequences of [his or] her own actions,” especially when given clear notice of the possible consequences. *Dabora, Inc. v. Kline*, 884 S.W.2d 475, 479 (Tenn. Ct. App. 1994) (finding that the “financial hardship to the employee [did not] outweigh[] the employer’s right to be free of unfair competition”).

By choice, Kevin Underwood, Kenyon, Manzanares and Kent Underwood assumed the consequences of entering into the TBA Agreements. They freely and voluntarily entered into their TBA Agreements. As stated in their TBA Agreements, Kevin Underwood, Kenyon and Manzanares were “free to obtain advice from legal counsel of choice” before signing “in order to interpret any and all provisions of th[e] Agreement.” Balzer Aff. Exhs. C § (i), D, E § (j). And Kevin Underwood and Manzanares were afforded the explicit right to exempt particular clients, customers or business relationships from the “Non-Solicitation of Customers” provision. Balzer Aff. Exhs. C, E § (c). They opted not to do so and cannot now claim to have a right to be exempt from that provision, especially not a right that trumps TBA’s legitimate interest to protect the investment and resources it has devoted to generating customer goodwill.

Finally, defendants cannot credibly claim harm to the public interest in ensuring that they abide by the TBA Agreements, which were freely agreed to, and at least in some cases, even with the opportunity to consult with counsel. Under such circumstances, Tennessee courts do not afford much weight to the public interest factor when assessing the enforceability of restrictive covenants. *See Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 647 (Tenn. Ct. App. 1999) (even though “[a]ny restraint on competition has the potential to increase the cost of what are already expensive health care services” the public interest “do not preclude enforcement of the non-competition covenant”); *Dabora, Inc.*, 884 S.W.2d at 479 (noting that the question of the public interest was not a relevant factor).

In short, under either Delaware or Tennessee law, the TBA Agreements are enforceable as they are reasonable in scope and duration, serve to protect TBA's legitimate interest in safeguarding customer goodwill and TBA's Confidential Information, cannot be overcome by any claims of greater defendants' interests inasmuch as the agreements were entered into freely and voluntarily, and are not offensive to the public interest.

2. TBA Is Likely To Succeed On The Merits Because There Have Already Been Several Violations Under The TBA Agreements.

TBA is also likely to succeed on the merits because defendants have already breached the Agreements.

Kent Underwood breached the Non-Solicitation of Employees provision in his TBA Agreement when LEO hired Kevin Underwood, Kenyon and Manzanaras as of November 2012 to create its Nashville office. Kent Underwood's TBA Agreement explicitly provides that, during the two year non-solicitation period, he would "not, either directly or indirectly, on [his] behalf or on the behalf of others, solicit, attempt to hire or hire any person employed by TBA to work for [him] or another entity, firm, corporation or individual." Defendants have no defense to that breach and there is a need to ensure that no additional breaches of this provision occur. In sum, it is fair to say that Defendants gutted TBA's Nashville office, in violation of the TBA Agreements.

Likewise, in the short time that Kevin Underwood, Kenyon and Manzanaras have been with LEO, there have been at least four situations demonstrating breach of the Non-Solicitation of Customers provision. These include: (1) LEO's partnership with and participation in Proscenium's bid to seek 2013 business from Walmart at the end of 2012 in express violation of the TBA Agreements and even though Kent Underwood and Kenyon had worked over the years on many Walmart meetings administered by TBA (Balzer Aff. ¶ 35); (2) LEO's communications

with State Farm in 2013 about the State Farm 2014 Sales Exchange Program notwithstanding that both Kevin Underwood and Kenyon did considerable work for State Farm while at TBA (*id.* ¶ 36); (3) LEO's involvement through Manzanares in securing work on 2013 Software AG programs even though Manzanares was deeply involved in Software AG work at TBA (*id.* ¶ 37); and (4) the "trip to Chicago" in February 2013 during which Kevin Underwood aimed to meet with "old clients," undoubtedly those he worked with while at TBA (*id.* ¶ 38).

B. TBA Will Suffer Irreparable Harm If An Injunction Does Not Issue

TBA faces a "risk of irreparable harm in the absence of an injunction." *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 421 (6th Cir. 2004).

First, defendants have already conceded in their TBA Agreements that "any breaches of this Agreement cannot be remedied solely by monetary damages, and that . . . TBA is entitled to obtain injunctive relief." Balzer Aff. Exhs. C § (h), Exhs. D, E §§ (i), Exh. F at 5.

Second, courts in this district have held that "[t]he loss of customer goodwill and injuries that are a consequence of unfair competition are difficult to compute and can constitute irreparable harm." *AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379, 390 (M.D. Tenn. 1993) (granting preliminary injunction); *see also Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992); *King & Ballow v. MaineToday Media, Inc.*, No. 3:12-CV-660, 2012 WL 4793559, at *3 (M.D. Tenn. Oct. 9, 2012) ("The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.").

Third, unless the TBA Agreements are enforced, TBA is at risk of losing some of its most important clients. By hiring away long-time employees who formed the core of TBA's Nashville office, LEO will be able to exploit the business relationships and goodwill established at TBA's substantial time and expense. Kevin Underwood, Kenyon and Manzanares had access to TBA's Confidential Information for decades. Kevin Underwood "spent more than 20 years

managing TBA's Nashville office." Balzer Exh. A. Kenyon and Manzanares were each employed by TBA for twelve years. Over the years, these employees developed close relationships with and valuable knowledge of some of TBA's most prominent and substantial clients, such as, Walmart, ExxonMobil, State Farm, Bank of America, IBM and Volkswagen. Kevin Underwood, Kenyon and Manzanares were thus poised and armed with these client relationships and goodwill to erode TBA's customer base.

TBA has already suffered irreparable harm from lost business. Without a temporary restraining order and preliminary injunction, LEO will continue to exploit this unfair advantage and will continue to cause irreparable harm as it steals more customers away from TBA. TBA has a legitimate interest in protecting the goodwill inherent in long-term customer relationships. TBA also has a legitimate interest in safeguarding the Confidential Information and personnel it has trained in order to develop that goodwill with clients. As a consequence, TBA would suffer great harm if LEO were allowed to steal away more employees and use TBA's Confidential Information in an effort to steal away TBA's clients.

C. Balancing The Equities Favors TBA And There Is No Harm To Others

When considering the equities, the balance tips heavily in favor of the injunction that TBA seeks. The only possible harm to third-parties would be to customers, and the Sixth Circuit holds that potential harm to customers who would still be able to obtain services elsewhere does not weigh against issuing a preliminary injunction. *Certified Restoration*, 511 F.3d at 551.

Moreover, the injunction TBA seeks will not harm anyone. It will do nothing more than resolve the dispute between TBA and LEO in a manner consistent with the law as declared by this Court. And it will relieve TBA of a cost burden that it should not be required to bear. As long as LEO, through the individual defendants, is soliciting TBA clients and employees in contravention of the TBA Agreements and gaining unfair advantage from the use of TBA's

Confidential Information, TBA will continue to suffer irreparable harm. The requested injunction is necessary to prevent this harm while the dispute between the parties is being resolved by this Court.

D. The Public Interest Will Be Served By The Injunction

Issuing the requested injunction will serve the public interest in enforcing contractual duties. *Certified Restoration*, 511 F.3d at 551. “Preserving the sanctity of the parties’ contractual obligations promotes stability and certainty in business and employment relationships.” *AmeriGas Propane, Inc.*, 844 F. Supp. at 390 (issuing preliminary injunction in a breach of noncompetition agreement case).

Accordingly, the court should enforce the TBA Agreements and grant the injunctive relief that Kent Underwood, Kevin Underwood, Kenyon and Manzanares agreed was reasonable under these circumstances.

II. FOR THE SAME REASONS, A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED

For the same reasons the Court should issue a preliminary injunction, the Court should issue a temporary restraining order pending a hearing on the preliminary injunction. “The entry of a temporary restraining order is within the discretion of the district court judge.” *Con-Way Southern Exp., Inc. v. Hewlett*, 758 F. Supp. 464, 465 (M.D. Tenn. 1991) (citing *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 201 (6th Cir. 1989)). “In deciding whether such an order is appropriate, the Court must consider whether the moving party will suffer irreparable harm without the order, and whether that party has a reasonable chance of ultimately prevailing on the merits.” *Id.* “The Court may also weigh the potential harm that an injunction would cause to the opposing party, and where the public interest lies.” *Id.*

Absent a temporary restraining order, TBA is likely to suffer irreparable harm before the Court can schedule a hearing on the preliminary injunction and notice to and an appearance on behalf of Defendants can be accomplished. Any potential harm to Defendants is far outweighed by the potential harm to TBA and the public interest would be served by granting the temporary restraining order.

III. TBA HAS ATTEMPTED TO RESOLVE THE DISPUTE BUT HAS BEEN FORCED TO RESORT TO LEGAL ACTION; NOMINAL BOND

TBA has attempted on several occasions to resolve this dispute with LEO. Balzer Aff. ¶¶ 32, 40, Exh. G. However, TBA's efforts have been unsuccessful and it is left with no recourse but to seek all available remedies including injunctive relief and monetary damages through the filing of this action. Pursuant to the non-solicitation agreements, TBA is entitled to injunctive relief requiring the LEO executives to comply with clear-cut and enforceable provisions to which they freely and voluntarily agreed.

TBA requests that the court exercise its discretion in determining the security requirement under Rule 65(c) and either not require a security bond or require the posting of only a nominal bond, \$5,000, in this case. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("the district court possesses discretion over whether to require the posting of security"). TBA believes no bond or only a nominal bond is appropriate in this case given that TBA is seeking only to enforce the terms of reasonable contractual obligations that have already been breached by Defendants.

CONCLUSION

TBA requests that the Court issue a temporary restraining order, pending a hearing on the preliminary injunction, enjoining and restraining Kevin Underwood, David Kenyon, Amy Manzanares and Kent Underwood as follows:

- 1) From directly or indirectly soliciting or assisting others to solicit TBA's clients, customers or business relationships for the purpose of procuring business other than for TBA;
- 2) From directly or indirectly, on their own behalf or on behalf of others, soliciting, attempting to hire or hiring any person employed by TBA to work for LEO; and
- 3) From using or disclosing any TBA proprietary or Confidential Information, as defined in their TBA Agreements, for the benefit of LEO or any other individual or entity.

TBA further requests that the Court, after giving Defendants an opportunity to respond and for a hearing, issue a preliminary injunction requiring Kevin Underwood, David Kenyon, Amy Manzanares and Kent Underwood:

- 1) not to directly or indirectly solicit or assist others to solicit TBA's clients, customers or business relationships for the purpose of procuring business other than for TBA;
- 2) not to directly or indirectly on their own behalf or on behalf of others solicit, attempt to hire or hire any person employed by TBA to work for LEO;
- 3) not to use or disclose any TBA proprietary or Confidential Information, as defined in their TBA Agreements, for the benefit of LEO or any other individual or entity; and
- 4) to return to TBA any and all TBA Confidential Information and other property unlawfully in their possession, custody or control, including any and all copies thereof.

TBA respectfully requests that the Court set a hearing on its motions for injunctive relief as soon as possible to mitigate further risk of harm.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be served via process server along with the summons and complaint.



John L. Farringer IV