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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

MADELINE JOHNSTON,

Plaintiff/Counter-Defendant,

vs.

Case No.: 16-2022-CA-6522
Division: CV-C

CORTELLO SALON, INC.

Defendant/Counter-Plaintiff.
_____/

ORDER DENYING DEFENDANT/COUNTER-PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This Cause came before the Court on the Motion for Temporary Injunction filed by Defendant/Counter-Plaintiff Cortello Salon, Inc. ("Cortello") to restrain Plaintiff/Counter-Defendant Madeline Johnston ("Johnston."). Having heard the evidence presented by the parties and reviewed the arguments and memoranda submitted in conjunction with Cortello's motion, this Court denies the Motion for the following reasons:

I. CORTELLO DID NOT PROVE A LIKLIHOOD OF SUCCESS ON THE MERITS.

A non-compete plaintiff need not prove harm in order to obtain a preliminary injunction because Section 542.335(1)(j) creates a presumption of irreparable injury. However, the presumption is not irrebuttable, and a non-compete defendant may successfully rebut the presumption by demonstrating the absence of harm. *Variable Annuity Life Ins. Co. v. Hausinger*, 927 So. 2d 243, 245 (Fla. 2d DCA 2006); *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 939 (Fla. 1st DCA 2012). The harm contemplated by the statute is unfair competition, and if the defendant is no longer competing, no harm exists. *Evans v. Generic Sol. Eng'g, LLC*, 178 So. 3d

114, 117 (Fla. 5th DCA 2015) (denying temporary injunction where neither an exclusive contract with customers existed and there was no reasonable expectation that the clients would return.)

The evidence at the injunction hearing regarding harm is similar to that presented in *Colucci v. Kar Kare Auto. Grp., Inc.*, 918 So. 2d 431, 440 (Fla. 4th DCA 2006), in which the appellate court found that "Colucci rebutted Kar Kare's claim of irreparable harm, one of the necessary elements of a cause of action for a temporary injunction" when it did not identify specific customers that it lost because of the defendant's competition. While Johnston did testify that she had provided services to a number of Cortello's former customers, Hr'g. Tr. at 83:10-83:14, Courtney Costello testified that Cortello raised its prices in the fall of 2022, increasing from $45 for a men's haircut to $90 for the same service. Hr'g Tr. at 33:10-33:13; 33:21-33:5; 36:1-36:12; 36:20-37:1. Substantial evidence from actual former customers established that the increase in Cortello's rates was the reason they no longer patronize Cortello. Hr'g Tr. at 64:19-65:8; 68:17-68:21; 73:3-73:9; 74:8-74:11; 79:13-79:17; 80:23-80:25; Hadfield Aff. at ¶ ¶ 4-5 (Dkt. 24); Montgomery Aff. at ¶ ¶ 3-4 (Dkt. 23); Kennedy Aff. at ¶ ¶.5-6 (Dkt. 22); Morris Aff. at ¶ 9 (Dkt. 20); Edgar Aff. at ¶ 3 (Dkt. 19); Hamilton Aff. at ¶ ¶ 5, 7 (Dkt. 18); Canada Aff. at ¶ ¶ 6-7 (Dkt. 17).[1] Cortello's inability to identify any specific customers who were lost due to Johnston's leaving (rather than Cortello's price increase) is similar to the plaintiff's inability in Colucci to establish harm sufficient to support an injunction.

As the Florida Supreme Court recently explained, it is not enough for a non-compete plaintiff to simply articulate the existence of a legitimate business interest, but instead a plaintiff must establish that a defendant will unfairly compete through the use of a protected legitimate

[1] Affidavits are admissible for purposes of a temporary noncompete injunction hearing and therefore properly before the Court for consideration. *Bee Line Entertainment Partners v. State of Florida*, 791 So. 2d 1197 (Fla. 5th DCA 2001); *see also Kephart v. Hair Returns*, 685 So. 2d 959, 960 (Fla. 4th DCA 1996) (relying on affidavits rather than live testimony to support injunction).

business interest. *White v. Mederi Caretenders Visiting Services of Se. Florida, LLC*, 226 So. 3d 774, 785 (Fla. 2017) ("For an employer to be entitled to protection, '*there must be special facts present* over and above ordinary competition' such that, absent a non-competition agreement, 'the employee would gain *an unfair advantage* in future competition with the employer.'" *Passalacqua v. Naviant, Inc*., 844 So.2d 792, 795 (Fla. 4th DCA 2003) (quoting *Hapney v. Cent. Garage, Inc*., 579 So. 2d 127, 130 (Fla. 2d DCA 1991). (emphasis in original)

A. Johnston is not competing with Cortello

The Fourth DCA discussed this issue in *USI Ins. Servs. of Fla. Inc. v. Pettineo*, 987 So. 2d 763, 766-67 (Fla. 4th DCA 2008), in which a seller of a business sought to service customers at a dollar value less than the buyer had elected to continue servicing. The *Pettineo* court reversed the denial of an injunction, rejecting the assertion that the defendant "no longer operates in the pertinent 'line of business'" but only upon noting that the result would be different if the non-compete agreement involved an employee rather than the seller of a business:

> We emphasize the important distinction between a non-compete provision in an asset purchase agreement and one that is incidental to an employment agreement. In the former, the non-compete provision is part and parcel of the sale of the business. In the latter, it is an incidental condition of employment. *See Kroner v. Singer Asset Fin. Co*., 814 So. 2d 454, 456 (Fla. 4th DCA 2001). As a purchaser of the assets and goodwill of a business, the buyer has a legitimate business interest in preventing the seller from servicing even former clients who are currently not seeking a policy large enough to meet the new minimum dollar amount established by the buyer. *W. Shore Rest. Corp. v. Turk*, 101 So. 2d 123, 128 (Fla. 1958) (The "purchaser of the good will of a business and its goods is entitled not only to the protection of customers and patrons, but to enter the field of competition unhampered by the adverse influence of the seller." (*quoting Wilson v. Pigue*, 151 Fla. 734, 10 So. 2d 561, 563 (Fla. 1942) (*en banc*)).

Id. An injunction may only be issued to protect against unfair competition and cannot be issued if parties are not truly competitors. Merchants who sell the same type of product but at significantly

different price points are not competitive with one another. *Malletier v. Burlington Coat Factory Warehouse Corp.,* No. 04 CV 2644 (RMB), 2006 WL 1424381, at *6 (S.D.N.Y. May 23, 2006), *aff'd and remanded*, 217 F. App'x 1 (2d Cir. 2007);[2] *see also Momentum Luggage & Leisure Bags v. Jansport*, 2001 WL 830667, at *10 (S.D.N.Y. 2001) (noting that defendant's luggage sold at a lower price point at discount stores did not compete with "high-end designer luggage.")

In *Victoria's Secret Stores, Inc. v. May Dept. Stores Co.*, 157 S.W.3d 256, 261 (Mo. App. 2004), the Missouri appellate court, applying a standard similar to Florida's, denied relief when "[t]he targeted customer profiles of the two companies are completely different," resulting in sales to "essentially different groups of customers." The court found that Victoria's Secret targeted women in their twenties who preferred brand loyalty over low prices, while May's, in contrast, sought women between the ages of forty and fifty who prioritized competitive pricing over brand loyalty. *Id.* at 259-60; *see, e.g., Wolf v. James G. Barrie, P.A.*, 858 So. 2d 1083, 1085 (Fla. 2d DCA 2003) (holding that "[i]f the employer is not a like business, it has no legitimate interest in protecting against competition in that business.").

[2] "The products (handbags) at issue are not in competitive proximity because Plaintiff principally 'markets its handbags through exclusive, upscale department and specialty stores to an 'A-list' celebrity clientele,' while Defendant 'focuses its retail marketing efforts on price-conscious consumers.' *See* Decision and Order, at *6 ('The two handbags do not compete in the same price/retail arenas.'). The parties' handbags are not sold in the same stores; they have vastly different price-points; and they target wholly different clienteles. (*See* Def. Br. at 2 ('BCF's handbags are sold and displayed only in BCF stores, an off-price retailer who focuses its marketing on price-conscious consumers. The price tag attached to the BCF handbags displays a price of $29.98 as did BCF's website on which the handbags were sold. In contrast, [Plaintiff's] handbags are displayed and sold only in [Plaintiff's] upscale stores and in-store boutiques in high-end, exclusive department and specialty retail stores. [Plaintiff's] handbags are priced considerably higher ($360 to $3,950).')); *see also Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F.Supp.2d 305, 317 (S.D.N.Y.2000) ('While Paco Sport chooses inexpensive retail outlets in urban neighborhoods, Paco Rabanne sells its products through exclusive, upscale department and specialty stores. Paco Sport's products are also significantly cheaper than Paco Rabanne's products. Furthermore, the products differ in their style and image.... These disparities in target clientele, style, image, and price also exist between Paco Rabanne's clothing and Paco Sport's products. Accordingly, there is a large competitive distance between the companies' clothing.'). *Malletier*, at *6.

Costello testified that the salon previously charged forty-five dollars ($45.00) for a man's haircut. Hr'g Tr. at 36:22-37:1. She testified that the cost for a haircut increased at the salon, and after the price change in early November 2022, the stylists charge ninety dollars ($90.00) for a men's haircut. Hr'g Tr. at 36:1-36:16. When Cortello changed its pricing model and thereby significantly increased the price of its services, it removed itself from the competitive marketplace of Jacksonville Beach area salons. The evidence at the hearing established that numerous former Cortello clients left Cortello Salon because of the price increase. Hr'g Tr. at 64:19-65:8; 68:17-68:21; 73:3-73:9; 74:8-74:11; 79:13-79:17; 80:23-80:25; Hadfield Aff. at ¶ ¶ 4-5 (Dkt. 24); Montgomery Aff. at ¶ ¶ 3-4 (Dkt. 23); Kennedy Aff. at ¶ ¶.5-6 (Dkt. 22); Morris Aff. at ¶ 9 (Dkt. 20); Edgar Aff. at ¶ 3 (Dkt. 19); Hamilton Aff. at ¶ ¶ 5, 7 (Dkt. 18); Canada Aff. at ¶ ¶ 6-7 (Dkt. 17). Additional evidence shows that no other salon in the Jacksonville Beach area (a) prices its services as expensively as Cortello, or (b) prices its services on an hourly basis, or, stated otherwise, based on the time it takes for a service to be performed. Hr'g Tr. at 70:13-70:25; 73:10-73:15.

Johnston testified that she left Cortello when Cortello insisted that she increase her prices to a level that she knew her customers would not pay. Hr'g Tr. at 50:9-50:17. Johnston testified that had she remained at Cortello, she would have lost all of her clients and as a result, she would not have been able to fill her schedule enough to sustain her career and make a livelihood. Hr'g Tr. at 50:18-51:12 Johnston testified that both Cortello Director of Operations Natalie McHenry and Cortello owner Courtney Costello discussed the price change and would not permit her to maintain her existing prices. Hr'g Tr. at 47:18-48:15; 56:8-56:18. She testified that when she submitted the handwritten requested prices, McHenry told her that they were too low and that Johnston was required to charge at least $85 per hour for her services, including the simplest

service of a men's haircut, in order for Cortello to break even on its pricing. Hr'g Tr. at 49:6-49:14. She testified that she continued to discuss the pricing concerns with Costello after submitting the desired prices in Cortello's exhibit 4, and that Costello would not permit her to continue charging the existing prices. Hr'g Tr. at 56:8-56:18. Even though Costello appeared and testified at the hearing that Johnston could allegedly set her own prices, she never rebutted Johnston's testimony regarding their conversations regarding the pricing, and did not contradict the testimony offered at the hearing that Johnston would not be able to keep her prices and stay employed at Cortello.[3]

Johnston testified that she was required to raise her rates to reflect Defendant's new pricing model and that the new prices were a floor, not a ceiling. Costello did not dispute that there was a significant price increase under the new pricing model and that stylists could only charge less than $90 for a men's haircut if the stylist was able to perform the haircut in less than one hour.[4] Hr'g Tr. at 33:10-33:13; 33:21-33:5; 36:20-37:1. Other witnesses also testified to the significant price increase. Hr'g Tr. at 67:23-68:5; 79:18-79:20; 80:23-80:25. It is clear based on the evidence presented that Johnston was only permitted to select prices within the new pricing model, which was based on the time spent performing the service, and that the hourly rates provided by Cortello were a floor for pricing. Hr'g Tr. at 41:21-41:25; 44:4-44:7. Other stylists who worked for Cortello varied their prices, but they only did so within Defendant's new hourly pricing structure. Hr'g Tr. at 49:6-49:14; Johnston's Hrg Ex. 1. The evidence at the hearing supported Johnston's testimony

[3] While Natalie McHenry did testify after the parties closed their presentations, at the suggestion of the Court, and over the objection of Johnston's attorney, such testimony cannot be used to support a finding of fact. *See*. *DiGiovanni v. Deutsche Bank National Trust Company*, 226 So. 3d 984, 988 (Fla. 2d DCA 2017) (where plaintiff had the burden of proof in a foreclosure case and failed to present documentary evidence to prove it had standing to foreclose, the trial court's invitation to plaintiff to reopen its case to admit the document establishing standing was reversible error.)
[4] Ms. Costello also testified that even if a service took less time than anticipated that the client was still charged the full price of the service based on anticipated time, with a one hour minimum. Hr'g Tr. at 36:1-36:12; Johnston's Hr'g Ex. 1. Cortello's website clearly reveals that a simple haircut would take a minimum of one hour, and the prices for most of the stylists were $90 for an hour of work. One stylist had previously charged the $90 hourly rate, but later lowered her rate to $75 an hour. *Compare* Plaintiff's Hr'g Ex. 1 *with* Plaintiff's Hr'g Ex. 2.

that she left employment with Cortello because of Cortello's price increase and that a substantial number of Johnston's clients would not continue to patronize Cortello under the increased pricing.

B. Cortello has not established the existence of a legitimate business interest based on training.

As to the alleged protectible business interest of training, Cortello presented evidence only that it provided on-the-job training to Johnston. To constitute a protectible legitimate business interest, training must be extraordinary or specialized, and simple on the job training of the type that was afforded to Johnston is simply insufficient to support the enforcement of a noncompete agreement. *Dyer v. Pioneer Concepts, Inc.,* 667 So. 2d 961, 964 (Fla. 2d DCA 1996), *citing Hapney v. Cent. Garage, Inc.*, 579 So.2d 127, 132 (Fla. 2d DCA 1991) ("In order for training to be a protectible business interest, it must be extraordinary" and "exceed[] 'what is usual, regular, common, or customary in the industry in which the employee is employed.'")

Before working as a stylist for Cortello, Johnston already completed a 1200-hour course in hair styling at a high-end school. Hr'g Tr. at 52:15-52:25; 74:18-74:22. She had already completed all state licensing requirements to work as a hair stylist. Hr'g Tr. at 52:15-52:25. She was able and qualified to perform all of her job duties as a hair stylist upon being hired by Cortello. Cortello required an additional 300 hours of on-the-job training in its own blow dry bar among other areas of the salon. Hr'g Tr. at 19:2-19:15. The significance of Cortello's training program to support an alleged legitimate business interest based on training is undermined by multiple facts testified to at the preliminary injunction hearing. Johnston was not paid during instructional time in the training program, which occurred during an unknown amount of the 300-hour program. Hr'g Tr. at 39:10-39:14. For another portion of the training program, Johnston was required only to work at the salon's blow dry bar, performing blow dry services that she already was able to perform based on her training at Aveda. Hr'g Tr. at 39:15-39:25; 74:18-74:22. While the blow-dry bar

training may have been relevant at some point, Cortello no longer utilizes the blow-dry bar. Hr'g Tr. at 40:1-40:3. The entire time she was in training, Johnston worked for Cortello, evidencing that Cortello's training was not necessary to hone Johnston's skills to a level necessary to perform services. Hr'g Tr. at 53:5-53:9. Cortello no longer offers the training program, undermining the strength of training provided by the internal program and undermining testimony that Cortello developed substantial client relationships because of the program. Hr'g Tr. at 22:13-22:17; 40:1-40:3. Finally, testimony was offered from one non-party witness that the training program was not the reason Johnston was a talented stylist. Hr'g Tr. at 74:8-74:17. Instead, it was clear to non-party witnesses who had previously patronized Cortello that Johnston's skill was acquired from her Aveda training and her own research, rather than her training from Cortello. Hr'g Tr. at 74:18-74:22.

II. MONETARY DAMAGES ARE AN ADEQUATE REMEDY AT LAW IF CORTELLO SUCCEEDS ON THE MERITS

Only if Cortello first presents a prima facie case that Johnston violated her non-compete agreement does the burden shift to Johnston to rebut the presumption of irreparable injury under section 542.335(1)(j), Fla. Stat. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 939 (Fla. 1st DCA 2012). Presumed irreparable injury based on training can be rebutted by showing that the training provided was generic. *Passalacqua v. Naviant, Inc.*, 844 So. 792, 796-97 (Fla. 4th DCA 2003). If damage to Cortello is not attributable to Johnston's alleged breach, Johnston cannot be held liable for any harm. *Crom, LLC v. Preload, LLC*, 380 F. Supp. 3d 1190, 1207-08 (N.D. Fla. 2019) (holding that speculation that competition occurred through use of confidential information not sufficient to find violation); *One Hour Air Conditioning Franchising, LLC v. Dallas Unique Indoor Comfort, Ltd.*, 2015 WL 9684920, at *6 (M.D. Fla. Nov. 13, 2015) (denying injunctive relief on defendant's breach of contract claim where breach did not result in damages to plaintiff).

Cortello failed to establish its *prima facie* case as to entitle it to a presumption of irreparable injury. There is evidence that a large number of clients who left Cortello did so because of Cortello's price model change and resulting increase in the price of services, rather than because of any competition by Johnston. Any harm incurred by Cortello is the result of its own price increase which resulted in its customers being priced out of Cortello's services, rather than any unfair competition by Johnston and therefore Cortello has not suffered irreparable injury because of Johnston's actions.

WHEREFORE, Cortello Salon, Inc.'s Motion for Temporary Injunction is DENIED.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 15th day of February, 2023.

HONORABLE ROBERT M. DEES
Circuit Court Judge

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