

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Irina N Beloozerova,

10 Plaintiff,

11 v.

12 Dignity Health, d/b/a St. Joseph's Hospital
13 and Medical Center, and d/b/a Barrow
Neurological Institute,

14 Defendant.
15

No. CV-18-01976-PHX-DGC

ORDER

16 Plaintiff Irina Beloozerova filed a complaint in state court against Defendant
17 Dignity Health, doing business at Barrow Neurological Institute ("BNI"), alleging
18 various claims related to Defendant's intention to terminate her employment on
19 July 1, 2018. Doc. 1-1 at 14-32. Defendant removed the action to this Court based on
20 diversity jurisdiction. Doc. 1. At a hearing on June 29, 2018, the Court granted a
21 temporary restraining order ("TRO") that prevented Defendant from taking any adverse
22 employment action against Plaintiff. Doc. 13. On July 24, 2018, the Court held an
23 evidentiary hearing on Plaintiff's motion for a preliminary injunction. Doc. 31. After
24 considering evidence submitted at the hearing and arguments made in writing and at the
25 hearing, the Court will deny the motion and dissolve the TRO.

26 **I. Background.**

27 Plaintiff is a biologist who specializes in brain physiology and has worked as a
28 researcher at BNI since 2000. Doc. 6-1 ¶¶ 3-4. The 1999 letter offering Plaintiff a job at

1 BNI stated that her employment would be “at will.” Ex. 53 at 3. BNI’s Appointments
2 and Promotions Policy (the “Policy”) states, however, that Plaintiff and others in her
3 position can eventually obtain “standing,” and describes procedures BNI must follow to
4 terminate such employees. Ex. 9 at 13-16. Plaintiff and Defendant disagree on whether
5 Plaintiff can be terminated at will or enjoys greater job protections under the Policy.

6 As a condition of her research position, Plaintiff is required to obtain external
7 funding in the form of grants from governmental or other research-funding organizations
8 to cover half of her salary, half of her fringe benefits, administrative costs,¹ and the full
9 cost of running her laboratory. Court’s Livenote Tr. dated July 24, 2018 (“Tr.”) at 54-57;
10 Doc. 6-1 ¶ 12; Doc. 12-2 at 2, ¶ 5. Plaintiff obtained such a grant from the National
11 Institutes of Health (“NIH”) during some years of her employment, but the NIH funding
12 ended in 2012. Doc. 12-2 at 3, ¶¶ 11-12. Since that time, Plaintiff’s salary and research
13 have been covered by “gap funding” provided by BNI and related entities. *Id.* “Gap
14 funding is provided, when available, and when in BNI strategic interests, if an individual
15 who has had sustained, external support should temporarily lose that funding.” Ex. 1
16 at 1. Gap funding “cannot continue indefinitely.” *Id.*

17 As of August 17, 2017, Plaintiff had not secured external funds to replace the NIH
18 grant. Doc. 12-2 at 3, ¶¶ 11-12. BNI therefore gave Plaintiff notice of its intent to
19 terminate her employment:

20 In accordance with appointments and promotions and with gap funding
21 policies, and after much deliberation, this letter shall serve as notice that
22 your employment as an Associate Professor in the Division of
23 Neurobiology will end once funds on hand to support your full-time
24 employment have been exhausted (the “Separation Date”), which is
projected to be no later than July 1, 2018.

25 Ex. 1 at 1. Plaintiff initially did not challenge this decision. Indeed, Plaintiff testified at
26 the hearing that Defendant was entitled to terminate her for this reason. *See* Tr. at 58-59.

27
28 ¹ Administrative costs are deemed to be 48.5% of all salaries on Plaintiff’s project.
See Court’s Livenote Tr. at 56-57.

1 But in December 2017, Plaintiff secured a three-year grant from the National
2 Science Foundation (“NSF”). Doc. 6-1 ¶ 19. The NSF grant totaled \$450,000, payable
3 at the rate of \$150,000 per year. Tr. at 64. Plaintiff immediately informed Defendant of
4 this award in an effort to reverse the termination decision. Doc. 6-1 ¶ 22. Dr. Ronald
5 Lukas, Vice President for Research at BNI, congratulated Plaintiff and suggested that the
6 award appeared to cover Plaintiff’s expenses through the end of 2018. Doc. 12-2 at 9.
7 But Dr. Lukas also expressed concern that additional funding would be required to
8 maintain Plaintiff’s position. *Id.* After reviewing the NSF grant, BNI’s Research
9 Oversight Committee (“ROC”) concluded that it was not sufficient to “sustain a
10 competitive research program” and that Plaintiff would be terminated as scheduled on
11 July 1, 2018. Doc. 12-2 at 3, ¶ 16. Plaintiff appealed the ROC’s decision in March 2018,
12 but Defendant affirmed the decision on May 14, 2018. Ex. 23. Plaintiff then filed this
13 action alleging breach of contract and other wrongs. Plaintiff obtained the TRO, and
14 seeks a preliminary injunction, on the basis of her breach of contract claim.

15 **II. Legal Standard.**

16 “A preliminary injunction is ‘an extraordinary remedy never awarded as of right.’”
17 *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) (quoting *Winter v. Nat.*
18 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Such an injunction “should not be
19 granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Lopez*
20 *v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original) (quoting *Mazurek*
21 *v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). The movant must “establish that
22 [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in
23 the absence of preliminary relief, that the balance of equities tips in [her] favor, and that
24 an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

25 “But if a plaintiff can only show that there are ‘serious questions going to the
26 merits’ – a lesser showing than likelihood of success on the merits – then a preliminary
27 injunction may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s favor,’
28 and the other two *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace*,

1 *Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (emphasis in original) (quoting *Alliance for the*
2 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)); *see Short v. Brown*, 893
3 F.3d 671, 675 (9th Cir. 2018). The Ninth Circuit has explained:

4 For the purposes of injunctive relief, “serious questions” refers to questions
5 which cannot be resolved one way or the other at the hearing on the
6 injunction and as to which the court perceives a need to preserve the status
7 quo lest one side prevent resolution of the questions or execution of any
8 judgment by altering the status quo. Serious questions are substantial,
9 difficult and doubtful, as to make them a fair ground for litigation and thus
10 for more deliberative investigation. Serious questions need not promise a
certainty of success, nor even present a probability of success, but must
involve a fair chance of success on the merits.

11 *Rep. of the Phil. v. Marcos*, 862 F.2d 1355, 1362 (1988) (en banc) (internal quotation
12 marks and citations omitted).

13 **III. Analysis.**

14 To prevail on her breach of contract claim, Plaintiff must show the existence of a
15 contract, its breach or anticipatory breach, and resulting damages. *Thomas v. Montelucia*
16 *Villas, LLC*, 302 P.3d 617, 621 (Ariz. 2013); *Snow v. W. Sav. & Loan Ass’n*, 730
17 P.2d 204, 210 (Ariz. 1986).

18 **A. TRO.**

19 When it issued the TRO in this case, the Court found that Plaintiff had raised
20 serious questions on her breach of contract claim: whether the Policy altered Plaintiff’s
21 at-will employment relationship, whether the Policy limited the circumstances in which
22 Defendant could terminate Plaintiff’s employment, whether Plaintiff was on probation
23 when the termination decision was made, and whether the NSF award was sufficient to
24 meet Plaintiff’s external funding requirements. Doc. 21 at 31-39. The Court found that
25 the balance of hardships tipped sharply in Plaintiff’s favor because termination would
26 interrupt her ongoing research, jeopardize her continued receipt of the NSF award, and
27 injure her professional reputation, while Defendant’s hardship would consist only of
28 continuing Plaintiff’s employment until the preliminary injunction hearing. *Id.* at 39.

1 The Court found that Plaintiff’s termination likely would cause irreparable harm by
2 damaging her professional reputation, research, and ability to attract external funding (*id.*
3 at 40), and that public policy supported issuance of the TRO given the likelihood of
4 irreparable harm (*id.*).

5 **B. Preliminary Injunction Motion.**

6 Defendant offered no new evidence or argument at the preliminary injunction
7 hearing on two of the Court’s TRO findings: that the balance of hardships tips sharply in
8 Plaintiff’s favor and that public policy favors an injunction. The Court therefore will not
9 revisit these conclusions.

10 The parties did offer new evidence and argument on the merits of Plaintiff’s
11 breach of contract claim and her assertion of irreparable harm. The Court will first
12 consider whether Plaintiff has established a likelihood of success on the merits or raised
13 serious questions.

14 **1. Existence of a Contract.**

15 Plaintiff contends that the Policy constitutes a contract that imposes restrictions on
16 Defendant’s ability to terminate her. Doc. 6 at 5-8. Defendant disagrees, asserting that
17 Plaintiff’s employment is at will. Doc. 12 at 5-8. The Arizona Employment Protection
18 Act provides:

19 The employment relationship is severable at the pleasure of either the
20 employee or the employer unless both the employee and the employer have
21 signed a written contract[.] . . . Both the employee and the employer must
22 sign this written contract, *or this written contract must be set forth in the*
23 *employment handbook or manual or any similar document distributed to*
the employee, if that document expresses the intent that it is a contract of
employment[.]

24 A.R.S. § 23-1501(A)(2) (emphasis added). The Arizona Supreme Court has explained
25 that terms establishing job security – in a formal contract, an employee handbook, or the
26 conduct of the parties – render the employment relationship “no longer at will.” *Demasse*
27 *v. ITT Corp.*, 984 P.2d 1138, 1143 (Ariz. 1999).
28

1 A company policy creates a contract “only if it discloses a promissory intent or [is]
2 one that the employee could reasonably conclude constituted a commitment by the
3 employer.” *Id.* (internal quotation marks omitted). A company can overcome an
4 inference of promissory intent by “clearly and conspicuously tell[ing] [its] employees
5 that the [policy] is not part of the employment contract and that their jobs are terminable
6 at the will of the employer with or without reason.” *Leikvold v. Valley View Cmty.*
7 *Hosp.*, 688 P.2d 170, 174 (Ariz. 1984), *superseded by statute on other grounds by* A.R.S.
8 § 23-1501; *see also* *Roberson v. Wal-Mart Stores, Inc.*, 44 P.3d 164, 169 (Ariz. Ct.
9 App. 2002) (“Disclaimers in personnel manuals that clearly and conspicuously tell
10 employees that the manual is not part of the employment contract and that their jobs are
11 terminable at will instill no reasonable expectations of job security and do not give
12 employees any reason to rely on representations in the manual.” (internal quotation
13 marks omitted)); *Ogundele v. Girl Scouts-Ariz. Cactus Pine Council, Inc.*, No.
14 CV-10-1013-PHX-GMS, 2011 WL 1770784, at *5 (D. Ariz. May 10, 2011) (same).

15 The Court concluded at the TRO hearing, and concludes again, that Plaintiff is
16 likely to prevail on her claim that the Policy amends the at-will employment agreement.
17 The Policy’s preface explains that it “describes conditions of and policies concerning
18 academic appointments and promotions of teaching, research and clinical faculty[.]”
19 Ex. 9 at 1. The Policy’s purpose “is to establish criteria and means for their enforcement
20 pertaining to initial and continuing appointments.” *Id.* at 2. Section 6 “elaborate[s]” on
21 contract letters, setting forth the “types, terms of, and restrictions on appointments.” *Id.*
22 at 13. It provides that Defendant will renew annual contracts for professors with standing
23 “except under circumstances as defined below (i.e., until retirement, resignation,
24 reinstatement of probationary status, or dismissal with cause).” *Id.* Section 6 goes on to
25 describe the situations in which an employee with standing can be terminated. *Id.*
26 at 15-16. An employee could reasonably conclude that these portions of the Policy
27 describe contractual terms and limit Defendant’s ability to terminate employees with
28 standing. A.R.S. § 23-1501(A)(2); *Demasse*, 984 P.2d at 1143.

1 Defendant contends that the Policy does not change Plaintiff's at-will status, citing
2 this single sentence: "[I]f human resource policies specifically address issues that this
3 document does not, or if there is a definitive, specific and irreconcilable conflict between
4 policies set forth in this document and human resource policies, the latter shall govern."
5 Ex. 9 at 2-3; *see* Doc. 12 at 7. Defendant then cites separate HR memoranda which state
6 that BNI employment is at-will. Exs. 21, 70, 71. As the Court noted at the TRO hearing,
7 however, this single sentence, with its oblique reference to unidentified HR policies, does
8 not "clearly and conspicuously tell employees that the manual is not part of the
9 employment contract and that their jobs are terminable at will." *Roberson*, 44
10 P.3d at 169; *see* Doc. 21 at 35-37. The Court again concludes that Plaintiff is likely to
11 prevail on her claim that the Policy altered her at-will employment contract.

12 **2. Breach of Contract.**

13 Plaintiff contends that her termination would violate the Policy's restrictions on
14 terminating professors with standing, and the parties devote much evidence and argument
15 to whether Plaintiff was on probation for having secured no external funding for several
16 years and whether Plaintiff had access to gap funding. These issues ultimately are
17 irrelevant, however, because Plaintiff expressly acknowledged during the preliminary
18 injunction hearing that her continued employment is conditioned on her obtaining
19 external funding to cover (1) half of her salary, (2) half of her fringe benefits,
20 (3) administrative costs, and (4) the full cost of running her laboratory. *See* Tr. at 54-58.
21 This acknowledgment comports with Defendant's view of the external funding
22 requirement. *See* Ex. 1 at 1 (August 2017 notice of termination stating "External Funding
23 must cover one-half of the investigator's salary and fringe benefits and the costs for
24 running their research program."); Ex. 23 at 1 (May 2018 letter stating "extramural
25 funding must cover one-half of an investigator's salary and fringe benefits and the costs
26 for running their research program."). Plaintiff also acknowledged at the hearing that
27 Defendant could terminate her if she failed to obtain such external funding. *See* Tr.
28 at 58-59, 102, 117. And she made similar statements in written communications. *See*

1 Ex. 16 at 1 (Plaintiff stated in March 2018 that Defendant probably had a right to
2 terminate her employment); Ex. 60 at 2 (Plaintiff stated in March 2018 that her continued
3 employment was conditioned upon her acquisition of “adequate external funds to cover
4 half of [her] salary and fringe benefits”); Ex. 77 (Plaintiff admitted in March 2016 that
5 “[w]ithout external funding, [she] will have [her] position at Barrow only till fall 2017”).

6 Given these admissions by Plaintiff, the Court need not determine whether
7 Plaintiff was on probation, nor attempt to delineate the precise terms of the employment
8 contract embodied in the Policy. If Plaintiff did not obtain the required external funding,
9 she agrees that Defendant could terminate her employment. The critical question,
10 therefore, is whether the NSF grant satisfied the external funding requirements. Evidence
11 presented at the preliminary injunction hearing makes it highly unlikely that Plaintiff can
12 prove she obtained the necessary funding.

13 Plaintiff claims that the NSF grant would cover the four required elements of
14 external funding: (1) half of her salary, (2) half of her fringe benefits, (3) administrative
15 costs, and (4) the full cost of running her laboratory. *See* Tr. at 54-58. But Defendant
16 placed in evidence the actual budget submitted by Plaintiff and approved by the NSF.
17 Ex. 72. The budget allocates only \$4,891 to Plaintiff’s salary, not the \$59,000 required to
18 cover half of her annual compensation. *Id.* at 1. The budget allocates only \$6,671 to
19 fringe benefits (*id.* at 1), not the \$16,000 Plaintiff testified was required (Tr. at 16).
20 \$54,000 of the budget is allocated to pay other professionals, graduate students, and
21 undergraduate students. Ex. 72 at 1. Another \$2,000 is assigned to travel, \$18,814 to
22 “other direct costs,” and \$57,124 to indirect costs, which Plaintiff identified as
23 administrative costs. *Id.* Thus, as approved by the NSF, the \$150,000 annual grant
24 allocated funds to a variety of destinations and would not meet the obligation to cover all
25 four required categories – (1) half of Plaintiff’s salary, (2) half of her fringe benefits, (3)
26 administrative costs, and (4) the full cost of her laboratory. As a result, Plaintiff could be
27 terminated by Defendant without a breach of contract.

28

1 Plaintiff claimed at the hearing that the budget approved by the NSF is not
2 binding, and that she has discretion to reallocate the funds as she chooses. She testified
3 that she could reassign the \$150,000 to (1) \$59,000 for her salary, (2) \$16,000 for her
4 fringe benefits, (3) \$57,230 for administrative costs, and (4) \$17,000 for the costs of
5 running her lab. Tr. at 54-58. For several reasons, the Court does not find this testimony
6 credible.

7 First, Plaintiff does not dispute that Exhibit 72 represents the budget she submitted
8 to the NSF to obtain the grant funding. Plaintiff initially submitted a larger budget that
9 would have totaled \$700,000 over three years, rather than \$450,000, but the NSF rejected
10 the larger proposal. Tr. at 63-64. Only when Plaintiff submitted the detailed numbers
11 contained in Exhibit 72 did she receive NSF approval for \$450,000. *Id.* at 64-65. This
12 course of events strongly suggests that the NSF approved the specific use of funds set
13 forth in Exhibit 72, not just a lump sum for Plaintiff to use as she wishes.

14 Second, Sherri Howland, who has been in charge of grant operations at Defendant
15 for 22 years, testified that Plaintiff does have some discretion to redirect funds in an NSF
16 grant, including reallocating up to 25% of the funds and assigning additional money to
17 her compensation, but only if the reallocation does not change the goals and aims of the
18 project. Tr. at 143-44. The Court finds, however, that Plaintiff's proposed reallocation
19 likely would change the goals and aims of her project. When Plaintiff reduced her grant
20 proposal from \$700,000 to \$450,000, she explained to the NSF that she had decreased the
21 involvement of Dr. Vladimir Marlinski from six to four months and that this change
22 "necessitated reduction of the scope of Aim 1 by limiting it to the investigation of the
23 connection between PPC and PM cortex only." Ex. 72 at 5. Plaintiff's newly proposed
24 reallocation would eliminate Dr. Marlinski's participation altogether. *See* Ex. 86. If a
25 reduction in his participation by one-third would change the scope of the project, so too
26 would a complete elimination of his participation. Further, the proposed changes would
27 eliminate graduate students, decrease the budget for undergraduate students by 60%,
28 eliminate equipment costs, eliminate travel costs, cut material costs by approximately

1 46%, and reduce publication costs by 50%. *Compare* Ex. 72 at 1 (submitted proposal),
2 *with* Ex. 86 (new proposal). These changes would almost certainly change the goals and
3 aims of the project, something Plaintiff could not do without NSF approval. And
4 Plaintiff testified that she has not sought NSF approval. Tr. at 95-96.

5 Third, Dr. Lukas testified that the NSF typically does not approve using grant
6 funds for more than two months' salary of the primary investigator. Tr. at 126.
7 Plaintiff's reallocation would cover six months. Ex. 86. Ms. Howland testified that she
8 has never seen the NSF approve such a use of funds. Tr. at 143. Dr. Lukas testified that
9 Plaintiff's proposed reallocation would require NSF approval, something Plaintiff has not
10 sought even though Dr. Lukas told her to seek it. Tr. at 95-96, 126. Plaintiff did not
11 present evidence, other than her own assertion, to rebut Howland and Lukas's
12 characterization of the NSF policy.

13 Fourth, Plaintiff has not shown that her new budget would cover the full cost of
14 running her laboratory, something she admits is required for her continued employment.
15 After allocating the \$150,000 annual grant to her salary, her fringe benefits, and
16 administrative costs, only \$17,000 would be left to operate her lab. Tr. at 58. Dr. Lukas
17 testified, however, that Plaintiff's lab costs totaled \$92,350 in 2014, \$202,485 in 2015,
18 \$84,975 in 2016, and \$15,853 in 2017. *Id.* at 121-22. Plaintiff attacked Dr. Lukas's
19 personal knowledge of the costs, but did not offer any explanation beyond conclusory
20 allegations as to how \$17,000 would be enough to run her laboratory. *See id.* at 58, 84.
21 Nor did Plaintiff address evidence that she already has spent \$36,446 for her laboratory
22 in 2018. *Id.* at 124-25. In light of Plaintiff's history of substantial laboratory costs, the
23 Court concludes that she has not shown that her new reallocation would cover the cost of
24 her laboratory.

25 3. Conclusion

26 In summary, Plaintiff relies entirely on the NSF grant to save her position, but the
27 NSF-approved budget for the grant does not meet the criteria she admits are necessary.
28 And, in light of the evidence described above, the Court finds it highly unlikely that

1 Plaintiff could simply reallocate the funds as she chooses. Because Plaintiff admits that
2 Defendant may terminate her if she does not secure the required external funding, and she
3 has not shown that she has secured that funding, Plaintiff has not shown that she is likely
4 to succeed on the merits of her claim that her termination would constitute a breach of
5 contract.

6 The Court granted the TRO on the ground that Plaintiff had raised serious
7 questions, but reaches a different conclusion in light of evidence from the preliminary
8 injunction hearing. As noted above, “[s]erious questions need not promise a certainty of
9 success, nor even present a probability of success, but must involve a fair chance of
10 success on the merits.” *Rep. of the Phil.*, 862 F.2d at 1362. Because the Court finds it
11 highly unlikely that Plaintiff can prevail on her claim that the NSF grant satisfies her
12 external funding requirements, the Court concludes that she has not raised serious
13 questions on her breach of contract claim. The Court accordingly will deny Plaintiff’s
14 motion for a preliminary injunction.²

15 **IT IS ORDERED** that Plaintiff’s motion for a preliminary injunction (Doc. 6) is
16 **denied**. The TRO previously entered by the Court (Doc. 19) is **dissolved**.

17 Dated this 2nd day of August, 2018.

18
19
20 

21 _____
22 David G. Campbell
23 United States District Judge
24
25
26

27 _____
28 ² Because Plaintiff has not met her burden on the merits of her breach of contract
claim, the Court need not consider the parties’ arguments on irreparable harm. Nor will
the Court consider Defendant’s additional arguments that A.R.S. § 12-1802 bars an
injunction and that the alleged contract is too vague for injunctive relief. Doc. 30.