

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 A PLACE FOR MOM,

11 Plaintiff,

12 v.

13 LISA PERKINS,

14 Defendant.

CASE NO. C20-1028-JCC

ORDER

15 This matter comes before the Court on Plaintiff's motion for a preliminary injunction
16 (Dkt. No. 11) and motions to seal (Dkt. Nos. 14, 48). Having thoroughly considered the parties'
17 briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS
18 the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 Plaintiff is a Delaware corporation, headquartered in New York, that provides referrals to
21 individuals for senior living and care facilities. (Dkt. No. 1-5 at 3.) Plaintiff is the "largest senior
22 living and care referral service company" in North America. (*Id.*) Its network includes over
23 17,000 providers of senior living and care services. (*Id.*) If a customer chooses to reside at a
24 senior living and care facility in Plaintiff's network following a referral by Plaintiff, that facility
25 pays Plaintiff. (*Id.*)

26 Defendant is a former employee of Plaintiff and a resident of Texas. (*Id.*) Plaintiff hired

Defendant in June 2015. (*Id.* at 4.) On June 19, 2015, Defendant signed an employment agreement that included a confidentiality clause, a non-solicitation clause, and a non-competition clause. (*Id.* at 4–5.) In relevant part, Defendant’s employment agreement stated the following:

Confidentiality Obligation. “I understand and agree that all Proprietary Information . . . is the Company’s sole property, including all trade secrets, patents, copyrights and other rights in connection therewith I will not use any Proprietary Information disclosed to me for my own use or for any purpose other than to carry out my Duties Except as expressly provided in this Agreement, I will not (a) publish or disclose any Proprietary Information, (b) use any Proprietary Information for any purpose including, but not limited to, selling, licensing, marketing, or otherwise distributing any Proprietary Information and (c) use any Proprietary Information in any way detrimental to the Company and its business interests. Upon termination of the Employment Period, or upon the Company’s earlier request, I will return or deliver to the Company all tangible forms of such Proprietary Information, and any other Company property in my possession or control, including but not limited to drawings, specifications, documents, records, devices, or any other original or copied material. I will not retain any copies, summaries, or notes of Proprietary Information unless expressly approved in writing by the President of the Company.

Solicitation of Employees and Company Customers. Except when I am acting for the Company's benefit, during the Employment Period, and for 12 months after my employment terminates for any reason, I will not solicit, contact, call upon, or attempt to solicit any employees or Company Customers, for the purposes of providing any products or services that may be used as a substitute for the products or services I provided while employed with the Company. This restriction applies only to any employees or Company Customers with whom I had contact or about whom I learned Proprietary Information during the last 24 months of my employment with Company. For purposes of this paragraph, "contact" means interaction between me and the employees of Company Customers which takes place to further the business relationship, or making sales to or performing services for the Company Customers.

Noncompetition. During my Employment Period with the Company and for 12 months after my employment terminates for any reason, I will not, without the Company's prior written consent, directly or indirectly work on any products or services that could be used as a substitute for any product or services being commercially developed or exploited by the Company during the last 24 months of

1 my employment with the Company and either (a) about which I learned Proprietary
 2 Information or (b) on which I worked.

3 (Id. at 4–5.)

4 While working for Plaintiff, Defendant was responsible for “establishing, fostering, and
 5 maintaining relationships with [Plaintiff’s] customers and referral sources in Texas, including
 6 hospitals, rehabilitation centers, and other healthcare providers.” (Id. at 4.) On April 17, 2020,
 7 Defendant voluntarily resigned from her employment with Plaintiff. (Dkt. No. 24 at 9.) When
 8 she resigned, Defendant allegedly told Plaintiff that she was leaving to care for her aging mother.
 9 (Dkt. No. 1-5 at 6.) Plaintiff claims it was not aware that Defendant was in fact going to work for
 10 another company. (Id.) Sometime between April and June 2020, Plaintiff learned that Defendant
 11 had accepted new employment with Senior Living Specialists, LLC, which is headquartered in
 12 Addison, Texas. (Id.) Plaintiff claims that Defendant’s new employer is Plaintiff’s direct
 13 competitor in the senior living and care referral services in Texas. (Id.)

14 After learning that Defendant was working for a direct competitor, Plaintiff allegedly
 15 reviewed Defendant’s company email and discovered that in the six weeks preceding her
 16 resignation, Defendant sent “highly-sensitive company records and trade secrets regarding
 17 [Plaintiff’s] customers, referral sources, training materials, and sales and marketing strategies” to
 18 her personal email account. (Dkt. No. 11 at 2.) Defendant asserts that she emailed herself reports
 19 containing “non-proprietary and non-confidential information to verify whether [Plaintiff] had
 20 paid her all wages owed due to an ongoing dispute about [Plaintiff’s] payment of commissions.”
 (Dkt. No. 24 at 3.)

21 At the heart of this case is Plaintiff’s allegation that Defendant is “using [Plaintiff’s]
 22 confidential, proprietary, and trade secret information for her own benefit and for the benefit of
 23 her new employer.” (Dkt. No. 1-5 at 6.) Plaintiff further alleges that Defendant is “soliciting
 24 [Plaintiff’s] referral sources for her own benefit and for the benefit of her new employer.” (Id.)
 25 As an apparent result of Defendant’s solicitation, “at least one referral source has informed
 26 [Plaintiff] that it will be working with [Defendant] now instead of [Plaintiff].” (Id.) Plaintiff thus

1 claims that Defendant's actions "interfere with [Plaintiff's] customer and referral relationships,
 2 irreparably harm and damage [Plaintiff's] business, jeopardize [Plaintiff's] confidential
 3 information and trade secrets, and put [Plaintiff] at a competitive disadvantage." (Dkt. No. 11 at
 4 2.)

5 On June 16, 2020, Plaintiff filed a complaint for injunctive relief and damages in King
 6 County Superior Court. (Dkt. Nos. 1 at 2, 1-5 at 1.) On June 24, 2020, Plaintiff moved for a
 7 temporary restraining order, an order to show cause, and an order for expedited discovery. (*Id.*)
 8 On June 29, 2020, the parties participated in a temporary restraining order hearing before Court
 9 Commissioner Hendry H. Judson. (*Id.*) After considering the parties' pleadings and hearing oral
 10 argument, the Superior Court found that Plaintiff had submitted sufficient evidence to
 11 demonstrate a likelihood that it will prevail on the merits of its claims. (Dkt. No. 1-2 at 4.) The
 12 Superior Court further found that Plaintiff would suffer actual and substantial injury if Defendant
 13 was not immediately enjoined pending further proceedings. (*Id.*) The Superior Court accordingly
 14 entered a temporary restraining order and scheduled a hearing to show cause for a preliminary
 15 injunction for July 17, 2020.¹ (Dkt. No. 1 at 2.)

16 Defendant removed the case on July 1, 2020, (Dkt. No. 1 at 1), and filed her answer on
 17 July 8, 2020, (Dkt. No. 10). On July 9, 2020, Plaintiff filed the instant motion for a preliminary
 18 injunction. (Dkt. No. 11.) On July 24, 2020, Defendant filed a response, (Dkt. No. 31), and sent
 19 Plaintiff her discovery responses, (*see* Dkt. Nos. 45 at 2-4; 49-1; 49-3; 49-4; 49-5; 50; 51).
 20 Defendant's responses revealed several pertinent facts, including that Defendant (1) accessed
 21 Plaintiff's Salesforce database "eleven times after she left" her position with Plaintiff, (Dkt. No.
 22 46 at 2); (2) forwarded one of Plaintiff's lead sourcing reports "containing extensive information
 23 about [Plaintiff's] referral sources, customers, and marketing efforts" to her new employer on

24
 25 ¹ On July 13, 2020, Plaintiff filed a motion to extend the Superior Court's temporary restraining
 26 order pending the Court's order on Plaintiff's motion for a preliminary injunction. (Dkt. No. 25.) On July 17, 2020, the Court granted Plaintiff's motion and extended the temporary restraining order to July 31, 2020. (Dkt. No. 29.)

1 June 19, 2020, after being served with a copy of the summons and complaint in this action, (Dkt.
 2 Nos. 45 at 2; 50 at 2); (3) “contacted twenty or more” of Plaintiff’s referral sources since ending
 3 her employment, (Dkt. No. 49-1 at 5); (4) communicated with “at least one” of Plaintiff’s
 4 employees about leaving Plaintiff’s organization and joining Senior Living Services, (Dkt. No.
 5 49-3); and (5) “stole hard copy documents and copied documents to a jump drive,” (*id.* at 6).

6 **II. DISCUSSION**

7 **A. Plaintiff’s Motion for Preliminary Injunction**

8 Federal law provides the rules for modifying a preliminary injunction entered by a state
 9 court prior to removal. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto*
 10 *Truck Drivers Loc. No. 70*, 415 U.S. 423, 437 (1974); *Pantoja v. Countrywide Home Loans, Inc.*,
 11 640 F. Supp. 2d 1177, 1183 n.5 (N.D. Cal. 2009). Those rules give a district court “wide
 12 discretion” to modify an injunction in the face of changed circumstances or new facts. *See A&M*
 13 *Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002) (quoting *Sys. Fed’n No. 91 v.*
 14 *Wright*, 364 U.S. 642, 647–48 (1961)).

15 A preliminary injunction is “an extraordinary remedy never awarded as of right.” *Garcia*
 16 *v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Winter v. Nat’l Res. Def. Council, Inc.*,
 17 555 U.S. 7, 20 (2008)). To obtain such relief, a party must “make a showing” on each of the
 18 following elements: (1) that the party will suffer irreparable harm in the absence of preliminary
 19 relief; (2) that the balance of the equities tips in favor of granting an injunction; (3) that granting
 20 an injunction is in the public interest; and (4) that the party is likely to succeed on the merits. *All.*
 21 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). What is required to
 22 “make a showing” on the fourth element depends on the strength of the party’s showing on the
 23 first three. *Id.* Thus, if a party shows that it will suffer irreparable harm, that the balance of
 24 equities tips in its favor, and that granting an injunction is in the public interest, then the party
 25 need only show that there are “serious questions on the merits.” *Id.*

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1 1. Likelihood of Success on the Merits

2 Plaintiff has demonstrated that there are at least serious questions on the merits. *See All.*
 3 *for the Wild Rockies*, 632 F.2d at 1134–35. Plaintiff relies on two theories in support of its
 4 motion. (Dkt. No. 11 at 11.) The first is that Defendant “methodically stole [Plaintiff’s]
 5 confidential information and trade secrets over the course of six weeks before quitting” and
 6 accessed Plaintiff’s Salesforce database without authorization. (*Id.*; Dkt. No. 45 at 10.) The
 7 second is that Defendant “breached her non-compete and non-solicit obligations under the
 8 Agreement by going to work for a competitor and soliciting [Plaintiff’s] referral sources.” (*Id.*;
 9 Dkt. No. 11 at 11.)

10 i. *Trade Secret Theft*

11 A trade secret is “information, including a formula, pattern, compilation, program,
 12 device, method, technique, or process” that “[d]erives independent economic value, actual or
 13 potential, not being generally known to, and not being readily ascertainable by proper means by,
 14 other persons who can obtain economic value from its own disclosure or use” and “[i]s a subject
 15 of efforts that are reasonable under the circumstances to maintain its secrecy.”² Wash. Rev. Code
 16 § 19.108.010(4)(a)–(b). Under Washington law, a key consideration in determining whether
 17 information has “independent economic value” is the effort and expense required to develop it.
 18 *See Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936 (Wash. 1999). Customer reports and
 19 information may rise to the level of a trade secret in certain contexts. *See, e.g., id.* at 943 (“A
 20 customer list is one of the types of information which can be a protected trade secret if it meets
 21 the criteria of the Trade Secrets Act.”); *Earthbound Corp. v. MiTek USA, Inc.*, Case No. C16-

23 2 The Court has jurisdiction over this matter and applies Washington law because Defendant’s
 24 employment agreement contained the following provision: “This Agreement will be construed
 25 under the laws of the State of Washington, without reference to is [sic] conflicts of laws
 26 provisions. Venue and jurisdiction for any action . . . shall be exclusively in an appropriate state
 court located in King County, State of Washington or the United States District Court, Western
 District of Washington.” (Dkt. No. 13-2 at 5.)

1 1150-RSM, Dkt. No. 46 at 19 (W.D. Wash. 2016) (finding that “detailed information about [the
 2 plaintiff’s] current and prospective customers . . . constitute trade secrets under the UTSA”).

3 Misappropriation means “[d]isclosure or use of a trade secret of another without express
 4 or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to
 5 know that his or her knowledge of the trade secret was . . . (B) acquired under circumstances
 6 giving rise to a duty to maintain its secrecy or limit its use.” Wash. Rev. Code
 7 § 19.108.010(2)(b)(ii)(B). Thus, misappropriation requires proof of improper acquisition,
 8 disclosure, or use. *See Wash. Rev. Code § 19.108.010(2)*. Under Washington’s Uniform Trade
 9 Secret Act, a plaintiff seeking to establish a claim of trade secret misappropriation has the burden
 10 of proving that legally protectable secrets exist. *See Ed Nowogroski Ins., Inc.*, 971 P.2d at 942;
 11 *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 674 (Wash. 1987).

12 Washington courts have recognized that trade secrets may contain elements that
 13 individually exist in the public domain but qualify as trade secrets when taken as a whole. *See*
 14 *Boeing Co.*, 738 P.2d at 675. However, general assertions of alleged trade secrets are insufficient
 15 to establish grounds for injunctive relief, particularly when contradicted by counter-affidavits.
 16 *See K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1972). As such, “whether a
 17 customer list is protected as a trade secret depends on three factual inquiries: (1) whether the list
 18 is a compilation of information; (2) whether it is valuable because it is unknown to others; and
 19 (3) whether the owner has made reasonable attempts to keep the information secret.” *Ed*
 20 *Nowogroski Ins., Inc.*, 971 P.2d at 944.

21 Here, the parties apparently do not dispute whether the documents and reports constitute
 22 a compilation of information. (*See* Dkt. Nos. 1-5 at 7, 31 at 10.) Thus, the Court’s analysis
 23 focuses on whether the documents and reports are valuable because they are unknown to others
 24 and whether Plaintiff has made reasonable attempts to keep them secret. *See Ed Nowogroski Ins.,*
 25 *Inc.*, 971 P.2d at 944.

26 //

1 In this case, Plaintiff alleges that Defendant “systematically gathered numerous
 2 documents,” including Plaintiff’s “customer lead reports, sales training materials, marketing
 3 materials, and other confidential, proprietary and trade secret information.” (See Dkt. No. 1-5 at
 4 7.) Plaintiff alleges that the stolen documents are valuable because they (1) are “not readily
 5 ascertainable from another source,” (2) are “the product of relationships that were established
 6 over time and at considerable expense,” (3) “identify [Plaintiff’s] current and potential customers
 7 and referral sources,” and (4) “include information showing where they are in the referral
 8 process, what remains to be done, and notes about progress or sales issues.” (Dkt. No. 11 at 12.)
 9 Regardless of whether Defendant retrieved this information from the Salesforce database or her
 10 company email, both systems are password-protected and limited to specific employees. (Dkt.
 11 Nos. 11 at 13; 45 at 2, 7, 10.) Thus, Plaintiff has demonstrated that the documents are valuable
 12 because they are not generally known and that it has taken reasonable steps to keep them
 13 confidential.

14 Defendant does not deny that she sent these documents and reports to her personal email;
 15 instead, she asserts that the documents and reports “do not contain any non-public information”
 16 about Plaintiff’s current customers or referral sources. (Dkt. No. 31 at 10.) But the reports are
 17 compilations of customer and business information that are otherwise not publicly accessible and
 18 therefore they may qualify as trade secrets. *See Boeing Co.*, 738 P.2d at 674; (Dkt. No. 11 at 13).
 19 Thus, although there may be public information in the reports, Defendant has not established that
 20 they cannot qualify as trade secrets.

21 Moreover, Defendant’s argument is seriously undermined by the fact that she allegedly
 22 accessed Plaintiff’s Salesforce database 11 times after ending her employment—four of those
 23 taking place after she began working for Plaintiff’s direct competitor—and forwarded one of
 24 Plaintiff’s lead sourcing reports to her new employer on the day she was served with the
 25 summons and complaint in this action. (Dkt. Nos. 45 at 2, 50 at 2.) As a threshold matter,
 26 Plaintiff’s use of a password-protected database evidences its reasonable attempts to keep its

1 materials confidential. Also, Defendant's decisions to access Plaintiff's database while employed
 2 by Plaintiff's direct competitor and to send a lead sourcing report to the competitor are relevant
 3 to the question of whether she misappropriated Plaintiff's purported trade secrets. This is
 4 particularly true where Defendant's claim that "she disclosed [the customer lead report] because
 5 she was dumbfounded that [Plaintiff] is taking the position that the reports are trade secrets,"
 6 (Dkt. No. 56 at 4), is belied by her omission of that fact in her email to her new employer, (*see*
 7 Dkt. No. 50 at 2). Thus, Defendant's actions after leaving Plaintiff's employment demonstrate
 8 both Plaintiff's reasonable attempts to keep its materials confidential and Defendant's attempts to
 9 circumvent those attempts.

10 Defendant also claims that she emailed herself these reports to verify the accuracy of her
 11 commission payments. (*See* Dkt. No. 31 at 6–7.) But Defendant's argument, even if credited by
 12 the Court, does not explain why Defendant also took (1) training materials that discuss Plaintiff's
 13 strategies for increasing referrals, leads, and customer move-ins; (2) sales and marketing
 14 documents, pitch checklists for certain services, and marketing tips and cheat sheets; and (3) a
 15 report detailing quota progress for Defendant's team in Texas. (Dkt. Nos. 11 at 14, 18 at 2–4.)
 16 Further, it does not explain Defendant's decision to send a customer lead report to her new
 17 employer on the same day she was served with the summons and complaint. As discussed above,
 18 Plaintiff has established that the documents at issue derive value from being kept secret, that
 19 Plaintiff took reasonable efforts to maintain their secrecy, and that Defendant circumvented those
 20 reasonable efforts when she sent the documents to herself. Defendant's alleged intent in sending
 21 the documents to herself does not strip the documents of trade secret protection or excuse
 22 Defendant's decision to send the reports to her new employer.

23 Finally, Defendant denies that she was ever told the reports were confidential. (Dkt. No.
 24 31 at 10.) In support of her argument, Defendant points to the fact that Plaintiff "mass emailed
 25 the reports as attachments on a company email listserv." (Dkt. No. 11 at 10.) But, again, the
 26 documents were valuable because they were secret, and Plaintiff took reasonable steps in

1 maintaining that secrecy. The fact that Plaintiff distributed those documents to its own
 2 employees does not demonstrate that the documents could therefore be shared with the public or
 3 with Plaintiff's direct competitors. (*Id.* at 12–13.)

4 Thus, Plaintiff has established serious questions on the merits of its claim that Defendant
 5 misappropriated Plaintiff's protectible trade secrets when she emailed documents and reports to
 6 herself prior to resigning and when she accessed Plaintiff's Salesforce database without
 7 authorization. See *Cottrell*, 632 F.3d at 1134–35.

8 *ii. Violations of the Employment Agreement*

9 Plaintiff also claims that Defendant breached the non-compete and non-solicit clauses of
 10 her employment agreement by accepting employment with Plaintiff's direct competitor and by
 11 engaging Plaintiff's customers. Each allegation is discussed in turn.

12 a. Non-Compete Clause

13 In Washington, non-compete agreements are presumptively unenforceable unless they
 14 satisfy three statutory requirements. *See Wash. Rev. Code. § 49.62.020*. First, the terms of the
 15 non-compete agreement must be disclosed no later than when the offer is accepted. *Wash. Rev.*
 16 *Code § 49.62.020(1)(a)(i)*. Second, the employee's earnings must exceed \$100,000 per year.
 17 *Wash. Rev. Code § 49.62.020(1)(b)*. Third, the employee cannot have been laid off. *Wash. Rev.*
 18 *Code § 49.62.020(1)(c)*.

19 Even if these requirements are satisfied, the court must still consider whether enforcing
 20 the non-compete agreement is reasonable. *Wood v. May*, 438 P.2d 587, 590 (1968). “The
 21 determination of whether a covenant is reasonable is a question of law.” *Emerick v. Cardiac*
 22 *Study Ctr., Inc.*, P.S., 357 P.3d 696, 701 (Wash. Ct. App. 2015) (citing *Alexander & Alexander,*
 23 *Inc. v. Wohlman*, 578 P.2d 530, 538 (Wash. Ct. App. 1978)). To determine reasonableness, the
 24 court considers (1) whether the restraint is necessary to protect the employer's business, (2)
 25 whether it imposes on the employee any greater restraint than is reasonably necessary to secure
 26 the employer's interests, and (3) whether enforcing the covenant would offend public policy. *See*

id. at 701.

1. *Statutory Requirements*

Here, the parties agree that the second and third requirements of Wash. Rev. Code § 49.62.020 are satisfied, but dispute whether the first requirement is met. (See Dkt. Nos. 11 at 15, 31 at 13–14.) Defendant claims she received and accepted a verbal offer on June 18, 2015. (Dkt. No. 31 at 14.) When the alleged verbal offer was extended, the regional sales director purportedly told Defendant that Plaintiff “would not require her to sign a noncompete and then pressured [Defendant] to give notice at her current employer.” (Dkt. Nos. 28-1 at 3–4; 31 at 14.)

The Court makes no finding as to whether a verbal offer was in fact extended because any verbal offer would have been superseded by the terms of the written job offer. *See A Place for Mom, Inc. v. Leonhardt*, Case No. C06-0457-MJP, Dkt. No. 52 at 3 (W.D. Wash. 2006) (“Defendant’s argument that the non-compete agreement is not supported by consideration as it was not revealed to him until after he had accepted Plaintiff’s job offer is completely contradicted by the fact that he signed the Agreement on the same day that he signed the acceptance of the job offer (which also stated that employment was contingent on him signing the non-compete agreement).”). Furthermore, the record demonstrates that Plaintiff’s job offer process did not begin until June 19, 2015, and that Defendant signed the non-compete agreement when she officially accepted Plaintiff’s offer of employment on June 21, 2015. (See Dkt. Nos. 12 at 3; 13 at 3; 13-1; 13-2; 45 at 4); (*see also* Dkt. No. 49-5 at 2) (in an email dated June 22, 2015, Defendant stated that she “officially accepted and returned all documents to HR yesterday evening”). Thus, the record establishes that Plaintiff’s non-compete agreement was provided at the time Defendant accepted Plaintiff’s offer of employment. Therefore, the non-compete agreement complies with the requirements set forth in Wash. Rev. Code. § 49.62.020.

2. Reasonableness

Having determined that the non-compete clause is valid under the statute, the Court now turns to whether enforcing Plaintiff's non-compete agreement is reasonable using a three-prong

test: necessity, scope, and public policy. See *Emerick*, 357 P.3d at 701.

a. *Necessity*

First, the Court considers whether the restraint is necessary to protect Plaintiff's business.

See id. “Washington provides broad protection to tangible and intangible business interests and goodwill.” *Amazon.com, Inc. v. Moyer*, 417 F. Supp. 3d 1388, 1396 (W.D. Wash. 2019) (citing *Oberto Sausage Co. v. JBS S.A.*, Case No. C10-2033-RSL, Dkt. No. 36 at 9 (W.D. Wash. 2011) (noting that employer not only “has a legitimate interest in protecting its confidential information” but also “in avoiding unfair competition” based upon confidential information learned during the scope of employment); *Knight, Vale & Gregory v. McDaniel*, 680 P.2d 448, 452 (Wash. Ct. App. 1984) (employer had “legitimate business interest in maintaining [its] large and profitable clientele” especially where employee had gained “extensive, valuable knowledge of the clients’ business and internal operations and develop[ed] a close, familiar working relationship with the client”); *Nw. Mobile Servs., L.L.C. v. Schryver Med. Sales & Mktg., Inc.*, Case No. C06-5227-RBL, Dkt. No. 25 at 3 (W.D. Wash. 2006) (noting “protectable interests include customer lists and relationships”)). In other words, “the law in Washington is clear that an employer has a legitimate interest in protecting its existing client base and in prohibiting the employee from taking its clients.” *Emerick*, 357 P.3d at 722 (internal citations and quotation marks omitted). Therefore, to show necessity, a plaintiff must demonstrate that a protectable interest exists and that the defendant could pose a threat to that interest if not adequately restrained. *See id.* at 723.

Here, Plaintiff has met its burden under the necessity prong. (See Dkt. No. 45 at 2.) By the nature of her position, Defendant necessarily became familiar with Plaintiff's customers, referral sources, training materials, and sales and marketing strategies. (Dkt. No. 11 at 2.) But even setting aside the nature of Defendant's work, the necessity of the non-compete is further demonstrated by the ways that Defendant has unjustly harmed Plaintiff's legitimate interests after leaving to work for Plaintiff's competitor. Plaintiff required Defendant to sign a

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1 noncompete because Plaintiff feared that if Defendant left for a competitor, Defendant would be
 2 able to use the information she learned while working with Plaintiff to harm Plaintiff's business.
 3 That fear was apparently warranted. For when Defendant left to work for Plaintiff's direct
 4 competitor, she sent herself confidential documents and reports, improperly accessed Plaintiff's
 5 Salesforce database, and provided sensitive information to her new employer.

6 Moreover, Plaintiff has presented evidence that it has in fact lost at least one referral
 7 source and that Defendant solicited at least 20 more. (Dkt. No. 49-1 at 5.) Thus, there is evidence
 8 that Defendant impermissibly interfered with Plaintiff's legitimate business interests and that
 9 Plaintiff has suffered actual competition or damages resulting therefrom. *See Emerick*, 357 P.3d
 10 at 723. Therefore, the Court has little difficulty finding that the non-compete agreement is
 11 necessary to protect Plaintiff's business interests. *See Nw. Mobile Servs., L.L.C.*, Case No. C06-
 12 5227-RBL, Dkt. No. 25 at 3.

13 *b. Scope*

14 Next, the Court determines whether the non-compete "imposes on the employee any
 15 greater restraint than is reasonably necessary to secure the employer's interests." *Emerick*, 357
 16 P.3d at 701. The Court's inquiry is guided by the scope of the non-compete as drafted. *See id.*
 17 (considering the reasonableness "of the noncompete covenant as written as opposed to whether
 18 and how much the employer experiences actual harm and competition").

19 The Court reviews both the duration and geographic limitation of the non-compete
 20 agreement. First, the duration of the agreement is 12 months, which complies with Wash. Rev.
 21 Code § 49.62.020. However, Defendant claims that the duration is nonetheless unreasonable and
 22 excessive because the "information [in the lead reports] is stale because, due to the nature of the
 23 industry, [Plaintiff] is generally able to place a family in a home in approximately one month."
 24 (Dkt. Nos. 28-1 at 5–6, 31 at 11.) While this may be the case, Defendant fails to acknowledge
 25 that referral sources do not become stale once a family is placed in a facility. Defendant herself
 26 describes referral sources as "discharge managers, care workers, social workers, and other

1 employees at hospitals, rehabilitation, and other healthcare providers.” (Dkt. No. 31 at 19.) Thus,
 2 relationships with referral sources represent a valuable and ongoing source of business for
 3 Plaintiff, and their value supports the reasonableness of the current agreement.

4 Next, Defendant agreed to refrain from “directly or indirectly work[ing] on any products
 5 or services that could be used as a substitute for any products or services being commercially
 6 developed or exploited by [Plaintiff] during the last 24 months of [Defendant’s] employment
 7 with [Plaintiff] and either (a) about which I learned Proprietary Information or (b) on which I
 8 worked.” (Dkt. No. 13-2 at 4.) Notably, Plaintiff seeks to enforce this provision for the entire
 9 state of Texas. (Dkt. No. 11-1 at 5.) Yet when Defendant resigned, she was “responsible for
 10 managing 37 of [Plaintiff’s] referral accounts in the greater Dallas/Fort Worth area.” (Dkt. No.
 11 11 at 7.)

12 The Court finds that under the facts presented Plaintiff is entitled to injunctive relief in
 13 the Dallas and Fort Worth markets because, since Defendant left the company, “Plaintiff does
 14 not have a local Healthcare Account Executive currently in Dallas/Fort Worth.” (Dkt. No. 45 at
 15 12.) And, according to Plaintiff, “[w]ithout a local presence in that market, [Plaintiff] is
 16 particularly vulnerable to [Defendant’s] improper solicitation of [Plaintiff’s] customers and
 17 referral sources.” (*Id.*) Given Defendant’s discrete and identifiable sales territories, prohibiting
 18 her from working anywhere in Texas as opposed to those territories alone is essentially “a
 19 general restriction on competition, not a reasonable restriction on unfair competition.”

20 *Amazon.com, Inc.*, 417 F. Supp. 3d at 1398.

21 Finally, because Defendant is based in Texas, restraining her ability to work anywhere in
 22 that state is likely to burden her ability to earn a livelihood in excess of what is necessary to
 23 protect Plaintiff’s legitimate business interests. *See Wood*, 438 P.2d at 590 (affirming decision to
 24 not enforce a non-compete as written because it encompassed 22 counties and thus “was both
 25 unduly harsh . . . in curtailing [the defendant’s] legitimate efforts to earn a livelihood and
 26 unnecessary for the protection of the legitimate interests of [the defendant’s former employer].”).

1 Thus, Plaintiff has established serious questions going to the merits as to the enforceability of the
2 non-compete agreement within the Dallas and Fort Worth areas. The parties may address
3 whether the non-compete agreement is enforceable beyond that area when litigating the merits of
4 Plaintiff's claims based on the non-compete agreement.

c. Public Policy

Finally, the Court determines whether enforcing the non-compete agreement would offend public policy. *See Emerick*, 357 P.3d at 701. On this issue, although Plaintiff does operate within the “service” industry in some sense, “it is also unquestionably a profit-seeking business enterprise” and “the public interest is not implicated in any significant way in the dispute between these parties.” *Leonhardt*, Case No. C06-457-MJP, Dkt. No. 52 at 7. Thus, precluding Defendant from competing with Plaintiff’s business interests is not likely to offend public policy.

12 In sum, the non-compete agreement complies with statutory and common law
13 requirements. See Wash. Rev. Code. § 49.62.020; *Emerick*, 357 P.3d at 701. Thus, Plaintiff has
14 identified serious questions going to the merits of its claim that Defendant has breached her non-
15 compete agreement.

b. Non-Solicitation Clause

17 Next, the Court turns to Plaintiff’s claim that Defendant has breached the non-solicitation
18 clause of her employment agreement. (Dkt. No 11 at 11.) In Washington, the non-compete
19 statute explicitly excludes non-solicitation agreements from its strict enforceability requirements.
20 *See Wash. Rev. Code § 49.62.010(4).* The statute defines a non-solicitation clause as “an
21 agreement between an employer and employee that prohibits solicitation by an employee, upon
22 termination of employment: (a) [o]f any employee of the employer to leave the employer; or (b)
23 of any customer of the employer to cease or reduce the extent to which it is doing business with
24 the employer.” Wash. Rev. Code § 49.62.010(5).

25 Defendant raises two arguments against enforcement of the non-solicitation clause of her
26 employment agreement. First, Defendant claims that the non-solicitation clause is actually a non-

1 compete clause misleadingly captioned as a non-solicitation clause. (Dkt. No. 31 at 14.) But
 2 Defendant's argument is wholly contradicted by both the unambiguous title of the section,
 3 **"Solicitation of Employees and Company Customers,"** and the fact that the non-solicitation
 4 clause prohibits the exact conduct that is exempted from the requirements of Wash. Rev. Code §
 5 49.62.020. *See* Wash. Rev. Code § 49.62.020(4), (5); (Dkt. No. 31 at 3–4). Thus, Defendant's
 6 first argument fails.

7 Second, Defendant argues the non-solicitation clause is ambiguous and must therefore be
 8 construed against Plaintiff. (Dkt. No. 31 at 18.) The ambiguity allegedly hinges on whether
 9 "referral groups ('Company Customers') *and their representatives*" encompasses "referral
 10 sources." (*Id.* at 17–18) (emphasis added). Specifically, Defendant argues that individuals
 11 ("discharge managers, care workers, social workers, and other employees at hospitals") cannot
 12 be classified as "referral groups," and therefore her conduct was not improper. (*Id.*) But
 13 Defendant is simply creating ambiguity where the meaning is plain: Defendant agreed to not
 14 solicit other employees or representatives of referral groups—*i.e.*, referral sources. (Dkt. No. 11
 15 at 6.) Tellingly, at no point in her otherwise elaborate analysis does Defendant mention that the
 16 language expressly includes "referral groups . . . and their representatives." (*See* Dkt. No. 31 at
 17 17–19.) Yet this language is critical to understanding the intent of the parties, and its presence
 18 assures the Court that the non-solicitation agreement is not ambiguous. Thus, Defendant's
 19 second argument also fails. Therefore, as the non-solicitation clause of Defendant's employment
 20 agreement falls within the statutory definition of non-solicit agreements and the record shows
 21 that Defendant has in fact solicited Plaintiff's referral sources, Plaintiff has demonstrated a
 22 serious question on the merits of its claim that Defendant breached the non-solicitation clause.

23 In sum, Plaintiff has demonstrated, at the very least, serious questions on the merits of its
 24 trade secret misappropriation claim based on Defendant's alleged misappropriation of Plaintiff's
 25 confidential documents and reports during and after her employment and on the merits of its
 26 breach of contract claims based on Defendant's alleged employment by Plaintiff's direct

1 competitor and solicitation of Plaintiff's referral sources. *See Cottrell*, 632 F.2d at 1135.

2 2. Irreparable Harm

3 Next, to obtain a preliminary injunction, a plaintiff must show that it is likely to suffer
 4 irreparable harm in the absence of injunctive relief. *Winter*, 555 U.S. at 20. Defendant argues that
 5 Plaintiff has not demonstrated a likelihood of irreparable harm, pointing to five interdependent
 6 reasons. (See Dkt. No. 31 at 22–24.) Ultimately, none of Defendant's arguments are persuasive
 7 because “[t]he potential to lose customers, employees, goodwill, and revenue ‘certainly
 8 support[s]’ a finding of the possibility of irreparable harm.” *Navigant Consulting, Inc. v.*
 9 *Milliman, Inc.*, Case No. C18-1154-JLR, Dkt. No. 15 at 7 (W.D. Wash. 2018) (quoting *Stuhlbarg*
 10 *Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001)). And here, Plaintiff
 11 has presented evidence that it has already lost one referral source due to Defendant's solicitation
 12 efforts and that Defendant has already received “nine patient referrals from at least four other
 13 [Plaintiff] referral sources she serviced.” (Dkt. Nos. 11 at 18, 45 at 11.) Moreover, without a
 14 clear picture of all that was taken and what may still be in Defendant's possession, Plaintiff is
 15 unable to take effective steps to protect its business. *See Earthbound Corp.*, Case No. C16-1150-
 16 RSM, Dkt. No. 46 at 20. Thus, the Court concludes that Plaintiff has demonstrated a likelihood
 17 of irreparable harm that merits injunctive relief.

18 3. Balance of the Equities

19 A plaintiff must also show that the balance of equities tips in its favor. *Winter*, 555 U.S.
 20 at 20. Plaintiff has met that burden here. First, Defendant will not be unduly burdened by an
 21 injunction. *See, e.g., Labriola*, 100 P.3d at 800 (J. Madsen, concurring) (noting that a non-
 22 compete agreement was unreasonable because it entirely barred the employee from working in
 23 his field of expertise even though he took no unfair advantage of his former employer). Indeed,
 24 Defendant may still work in similar, non-competing industries for the duration of any injunction.
 25 Thus, the terms of the preliminary injunction are not unduly burdensome to Defendant and
 26 reflect Plaintiff's need to secure a protectible interest pending the resolution of this case. *See*

1 *Leonhardt*, Case No. C06-0457-MJP, Dkt. No. 52 at 5 (“Plaintiff has the right to prevent
 2 Defendant from making use of any proprietary information he learned during his employment.”).

3 Additionally, Defendant points to the size of Plaintiff’s business and boldly suggests that
 4 “there is no evidence that any loss [Plaintiff] might sustain would be of note.” (Dkt. No. 31 at
 5 25.) However substantial Plaintiff’s market share may be, it still does not excuse the harm
 6 Defendant has caused, and may continue to cause, absent injunctive relief. Therefore, the balance
 7 of equities tips in favor of Plaintiff.

8 4. Public Interest

9 Lastly, a plaintiff must show that an injunction is in the public interest. *Winter*, 555 U.S.
 10 at 20. On balance, the public interest is benefitted through the enforcement of contractual
 11 provisions that aim to protect a company’s investment in its development of trade secrets and
 12 customer relationships. *See Earthbound Corp.*, Case No. C16-1150-RSM, Dkt. No. 46 at 21
 13 (“Theft of trade secrets, and allowing the thieves to retain and use the confidential information
 14 they purloined, undermines business development and stability; preventing such conduct is in the
 15 public’s interest.”). Thus, to the extent that the public interest is implicated in this case, it would
 16 be furthered by an injunction restricting Defendant from continuing to use the trade secrets she
 17 allegedly misappropriated.

18 In sum, Plaintiff has demonstrated serious questions going to the merits of the case, that it
 19 will suffer irreparable harm absent an injunction, that the balance of equities tips in its favor, and
 20 that granting an injunction is in the public interest. Therefore, a preliminary injunction is
 21 appropriate in this case. *See Cottrell*, 632 F.3d at 1134–35.

22 B. **Defendant’s Surreply**

23 On July 28, 2020, the Court granted Defendant leave to file a surreply to address
 24 arguments Plaintiff raised in its reply brief. (Dkt. No. 53.) Defendant filed its surreply on July
 25 29, 2020, (Dkt. No. 56), and Plaintiff responded to the surreply on July 30, 2020, (Dkt. No. 59).

26 Defendant first argues that Plaintiff improperly withheld discovery materials regarding

1 Defendant's post-resignation access of Plaintiff's Salesforce database and that Plaintiff has not
 2 demonstrated that the Salesforce database is a trade secret Defendant could have
 3 misappropriated. (Dkt. No. 56 at 2.) But Defendant's discovery requests sought documents
 4 related to "computer forensic work, investigation, examination, or analysis." (See Dkt. No. 59 at
 5 3.) No such investigation occurred here. Rather, Plaintiff was not notified of the need to check
 6 the login history of its Salesforce database until Defendant disclosed her unauthorized access in
 7 her July 24, 2020 discovery responses. (See *id.* at 2–3.) And, contrary to Defendant's assertion,
 8 her unauthorized access of the Salesforce database may constitute an improper acquisition of the
 9 material therein, regardless of whether she downloaded or exported material. *See Wash. Rev.*
 10 *Code* § 19.108.010(2); (Dkt. No. 56 at 2.) Thus, Defendant's unauthorized access of Plaintiff's
 11 Salesforce database may in fact be a viable ground for Plaintiff's trade secret misappropriation
 12 claims. Moreover, Plaintiff raised this argument as soon as was practicable following
 13 Defendant's discovery disclosures, and any minimal prejudice Defendant may have suffered
 14 from arguments arising from her disclosures was obviated by her opportunity to respond in her
 15 her surreply.

16 Next, Defendant argues that Plaintiff has not sufficiently shown that Defendant
 17 committed a crime under Texas law. (See Dkt. No. 56 at 2–3.) Defendant's argument is
 18 irrelevant because Plaintiff is not bringing any claim against Defendant arising under the cited
 19 provisions of Texas law. (See generally Dkt. Nos. 1–5, 11.)

20 Defendant next contends that Plaintiff has miscited several cases concerning whether
 21 under Washington law an unenforceable provision of a contract may be stricken and the
 22 remainder of the contract enforced. (See Dkt. No. 56 at 3.) But the question before the Court is
 23 whether Plaintiff has demonstrated its need for injunctive relief, including whether serious
 24 questions exist on the merits of its contractual claims against Defendant, not whether the Court
 25 can enforce the agreements themselves "as to time and area" or otherwise reform the contracts.
 26 (See *id.*) And, as discussed above, Plaintiff has provided sufficient evidence to raise serious

1 questions on the merits of Defendant's breach of her employment agreement, including the non-
 2 compete and non-solicitation clauses. *See supra* Section II.A.1.

3 Defendant also argues that Plaintiff has not established that its customer lead reports
 4 constitute protectible trade secrets or, if they do, that Plaintiff has now waived that protection by
 5 publicly filing that information. (*See* Dkt. No. 56 at 3–4.) But, contrary to Defendant's claim,
 6 Plaintiff has sufficiently identified the confidential information it alleges Defendant is using to
 7 unfairly compete with Plaintiff. *See supra* Section II.A.1.i. And Defendant has failed to establish
 8 that Plaintiff has in fact waived any trade secret protections it is entitled to via its public filings in
 9 this case. Therefore, the Court remains satisfied that Plaintiff has established serious questions
 10 going to the merits of its trade secret claims. *See supra* Section II.A.1.i.

11 **C. Security**

12 “The court may issue a preliminary injunction or a temporary restraining order only if the
 13 movant gives security in an amount that the court considers proper to pay the costs and damages
 14 sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P.
 15 65(c). “Despite [this] seemingly mandatory language, Rule 65(c) invests the district court with
 16 discretion as to the amount of security required, *if any.*” *Johnson v. Couturier*, 572 F.3d 1067,
 17 1086 (9th Cir. 2009) (internal quotations omitted).

18 Here, Plaintiff previously posted a bond of \$40,000 with the King County Superior
 19 following that court's issuance of the temporary restraining order. (*See* Dkt. Nos. 1-2 at 5, 5-1 at
 20 196–99; *see also* Dkt. No. 13-2 at 5) (agreement's injunctive relief, stating, “I agree that the
 21 company will be entitled to seek extraordinary relief in court, including . . . preliminary
 22 injunctions . . . without the necessity of posting a bond or other security”). Given Plaintiff's
 23 posting of a bond with the King County Superior Court and its strong showings on each of the
 24 elements necessary to obtain a preliminary injunction, *see supra* Sections II.A.1–4., the Court
 25 exercises its discretion and declines to require Plaintiff to post an additional bond.

26 //

1 **D. Plaintiff's Motions to Seal**

2 Plaintiff moves to maintain under seal several exhibits submitted in support of its motion
 3 for a preliminary injunction. (Dkt. Nos. 14, 48.) Defendant does not oppose the motions. (See
 4 Dkt. Nos. 14 at 2, 48 at 2.)

5 “There is a strong presumption of public access to the court’s files.” W.D. Wash. Local
 6 Civ. R. 5(g). This presumption applies particularly to “dispositive pleadings,” which includes
 7 exhibits attached to such pleadings. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172,
 8 1179 (9th Cir. 2006). To overcome this presumption, there must be a “compelling reason” for
 9 sealing that is “sufficient to outweigh the public’s interest in disclosure.” *Id.*; *see Center for Auto*
 10 *Safety v. Chrysler Group, LLP*, 809 F.3d 1092, 1101–03 (9th Cir. 2016) (concluding that
 11 compelling reason standard applied to request to seal documents filed in support of motion for
 12 preliminary injunction). “[T]he ‘compelling reasons’ standard does not require the court to find
 13 an infringement of trade secrets if the material at issue is disclosed. Rather, it only requires that
 14 disclosure ‘might become a vehicle for improper purposes,’ including the ‘release of trade
 15 secrets.’” *PTP OneClick, LLC v. Avalara, Inc.*, Case No. C19-0640-JLR, Dkt. No. 87 at 8 (W.D.
 16 Wash. 2019) (quoting *Kamakana*, 447 F.3d at 1179)).

17 Here, the exhibits at issue contain Plaintiff’s purported trade secrets, the disclosure of
 18 which could cause Plaintiff substantial economic and competitive harm. (See Dkt. Nos. 14 at 1,
 19 5; 18 at 4–5; 48 at 2, 4–5.) Thus, maintaining the exhibits under seal is necessary to prevent the
 20 Court’s files from being used for an improper purpose and to avoid the irreparable harm to
 21 Plaintiff discussed above. *See PTP OneClick, LLC*, Case No. C19-0640-JLR, Dkt. No. 87 at 8;
 22 *supra* Section II.A.1.ii. Accordingly, the Court finds that Plaintiff has demonstrated compelling
 23 reasons to maintain the exhibits under seal and GRANTS Plaintiff’s motions to seal (Dkt. Nos.
 24 14, 48).

25 **III. CONCLUSION**

26 For the foregoing reasons, the Court hereby GRANTS Plaintiff’s motion for a

1 preliminary injunction (Dkt. No. 11) and GRANTS Plaintiff's motions to seal (Dkt. No. 14, 48).

2 The Court FINDS that Plaintiff is not required to post an additional bond. The Clerk is
3 DIRECTED to maintain Docket Numbers 16, 17, 19, 20, 21, 22, 23, 50, and 51 under seal until
4 further order of the Court. Defendant is hereby ORDERED to refrain from the following:

- 5 (1) Using or disclosing any of Plaintiff's confidential information and trade secrets;
- 6 (2) Performing lead generation, customer referrals, or any other senior living and care
referral services in Dallas and Fort Worth; and
- 7 (3) Soliciting, attempting to solicit, or contacting for purposes of providing senior
living and care referral services, any referral sources or current or potential
customers of Plaintiff.

11 DATED this 31st day of July 2020.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE