Third District Court of Appeal

State of Florida

Opinion filed October 14, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-842
Lower Tribunal No. 19-29239

Quirch Foods LLC, et al.,
Appellants,

vs.

Andrew Broce, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Maria de Jesus Santovenia, Judge.

Homer Bonner and Peter W. Homer; Perera Barnhart Alemán, Bayardo Alemán and Jorge Freddy Perera, for appellants.

Becker & Poliakoff, P.A., Kevin Markow and Jeremy C. Sahn (Ft. Lauderdale), for appellees.

Before FERNANDEZ, HENDON, and BOKOR, JJ.

FERNANDEZ, J.

In this enforcement of restrictive covenants in an employment agreement action, the employer, Quirch Foods LLC; Quirch Foods Caribbean, LLC; Quirch Foods Southeast, LLC; and Quirch Foods Management Holdco, LLC (collectively, Quirch), appeal the trial court's "Order Denying Plaintiffs' Emergency Motion for Preliminary Injunction." We reverse and remand for entry of an order granting Quirch's motion.[1]

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Quirch is a meat packing and food distribution company founded in Cuba in 1967. The Quirch family were exiled to Puerto Rico after the Castro revolution, taking the company with them, and later relocated to Miami, Florida. Quirch employs over six-hundred employees and operates in the highly competitive "center-of-the-plate" meat market with "thin margins." Quirch delivers mainly on the east coast of the United States, from Maine to Miami, but also has a strong presence in Latin America and the Caribbean. Some of its customers include independent and chain supermarkets, food service distributors, food processors and manufacturers, cruise lines, and restaurants. Quirch's main product is beef, pork,

[1] Although the non-compete periods in question which all began in September 2019 have expired, Quirch Foods is nevertheless entitled to the benefit of its full non-compete period. Anakarli Boutique, Inc. v. Ortiz, 152 So. 3d 107, 109 (Fla. 4th DCA 2014) (citing to Kverne v. Rollins Protective Servs. Co., 515 So. 2d 1320, 1321-22 (Fla. 3d DCA 1987)).

and poultry. Their sales in 2018 were over $1 billion, and their beef, pork, and poultry products totaled over $850 million in sales in 2018. Quirch has distribution centers in Miami, Orlando, Atlanta, Chicago, and Puerto Rico, as well as a new distribution facility in Illinois that it opened a few years ago. In addition, Quirch hosts “Power Buys,” which are events held during each year where customers meet Quirch employees to discuss product pricing and learn about new Quirch products. In 2018, Power Buys accounted for about a quarter of a billion dollars in sales.

Each center-of-the-plate production division is headed by a category manager for meat, pork, and poultry. These three categories were headed by the individual defendants in this case: Andrew Broce, Kevin Miller, and Jeff Slattery (collectively, the individual defendants). Broce was the category manager for meat who worked for Quirch for almost 23 years. In 2018, Broce earned close to $600,000, which put him in the top ½ percent of all Quirch employees in terms of earnings. Miller was the category manager for pork who worked for Quirch for almost 20 years. In 2018, Miller earned more than $330,000, which put him in the top 1% of all Quirch employees in terms of earnings. Slattery was the category manager for poultry who worked for Quirch for 15 years. Slattery made $100,000, which placed him in the top 2% of the company as far as earnings. These three individual defendants were among the most senior and highest paid employees at Quirch. They directed Quirch’s procurement of meat products, which account for 75-80% of Quirch’s

business. The individual defendants frequently met with Quirch's customers and developed close relationships with vendors/suppliers. They set the pricing for Quirch meat/pork/poultry products, and they determined margin and profitability for these products. They "were the face of Quirch Foods," according to Carmen Sabater, Quirch's chief financial officer. The individual defendants attended weekly sales meetings and presented at those meetings, covering such topics as new products, customer opportunities, market conditions, company strategies, and goals. They attended industry conferences and events and provided Quirch with information on market trends. Quirch attributes its success to the business relationships it has built, with both its buyers and its sellers. Quirch spent several hundred thousand dollars over a couple of years for the three individual defendants to nurture their relationships with customers through entertainment and travel expenses that Quirch paid for.

The individual defendants ran each of their categories, fostered relationships with Quirch's clients, as these relationships were crucial to their success. They had access to client emails, pricing (which they directed), profitability, margins, patterns of purchase of customers, client preferences, credit terms, lines of credit offered to customers, and new product introductions. They also had knowledge of Quirch's proprietary software, an internally developed enterprise resources system that

Quirch invested millions of dollars in. They had substantial input into the design and development of that software.

Defendant/appellee G&C Food Distributors & Brokers, Inc. (G&C) is a New York corporation doing business in Florida with its principal place of business in Syracuse, New York. Richard Chapman is G&C's president. G&C employs about four-hundred people. G&C is also in the meat distribution business and deals in "center-of-the-plate" products. Like Quirch, it delivers from Maine to Miami. In the fall of 2019, G&C opened a Miami office 2.7 miles away from Quirch's distribution center in Medley, Florida, in order to expand its sales to new territories, including Latin America.

In December 2018, Quirch received an investment from Palladium Equity Partners, LLC, a private equity group. The Quirch family remained part owners with the new set of owners, however, the Quirch family stepped down from direct control. Francisco Grande (brother-in-law of former Quirch Foods president Bill Quirch), was named president. Together with Ralph Perez (vice-president of sales), Sabater (CFO), and Anthony Schneider (director of purchasing), they took over control and management of the company.

Previously during their time at Quirch, and as a condition of the three individual defendants' continued employment, the individual defendants signed restrictive covenant agreements with Quirch, which included non-competition, non-

solicitation, and non-disclosure covenants. After Palladium invested in Quirch, the individual defendants agreed to sign the latest agreement, the Management Interest Grant Agreement (the Agreement) dated March 11, 2019. Only Quirch's most senior managers signed these agreements. The Agreement also provided the three individual defendants with stock incentives linked to Quirch's growth and expansion.

Section 5 of the Agreement contained restrictive covenants of non-compete, non-solicit, and non-disclosure. Section 5.2 "Non-Compete" of the Agreement states, in pertinent part:

> [F]or a period of twelve (12) months following the Employment Period (the "Non-Compete Period"), Participant shall not directly or indirectly acquire or hold, beneficially or otherwise, any economic, financial or other interest (whether an equity interest or otherwise) in, act as an equity holder or employee, director/manager, independent contractor or representative of, manage, control, operate, consult with or otherwise participate in (as defined below) any Person (including any division, group or franchise of a larger organization), other than the Company Group, which engages in, or engages in the management or operation of any Person that engages in, any business that competes with or otherwise engages in any aspect of the Business anywhere in the United States, the Caribbean region, Central America, and South America. For purposes of this Agreement, the term "participate in" shall mean any direct or indirect interest in any corporation, partnership, joint venture or other entity, whether as a sole proprietor, owner, stockholder, partner, joint venturer, creditor or otherwise, or rendering any direct or indirect service or assistance to any Person (whether as a director, officer, manager, supervisor, employee, agent, consultant or otherwise).
>
> The non-solicitation covenant, in Section 5.3 "Non-Solicit," of the Agreement states, in relevant part:[F]or a period of twenty four (24)

months following the Employment Period (the "Non-Solicit Period"), Participant shall not directly or indirectly through another Person (other than the Company Group) either individually or acting in concert with another Person or Persons (i) request, induce or attempt to influence any distributor, provider, payor, supplier, customer of goods or services, or other business relation of Holdco or any of its Subsidiaries to curtail, cancel or refrain from maintaining or increasing the amount or type of business such distributor, provider, payor, supplier, customer of goods or services, or other business relation is currently transacting, or may be transacting during the Non-Solicit Period, with Holdco or any of its Subsidiaries or modify its pricing or other terms of business with the Business (including by making any negative or disparaging statements or communications regarding the Company), (ii) solicit for employment or retention any Person who is, or at any time during the six (6) months prior to the termination of Participant's employment was, an officer, employee or independent contractor of or consultant to Holdco or any of its Subsidiaries, other than through general solicitations or advertisements not intended to be specifically directed at such Person, or (iii) request, induce, influence or attempt to influence any Person who is, or at any time during the six (6) months prior to the termination of Participant's employment was, an officer, employee or independent contractor of or consultant to Holdco or any of its Subsidiaries to terminate his or her employment by or services to Holdco or any of its Subsidiaries or in any way interfere with the relationship between Holdco or any of its Subsidiaries and any employee, officer or independent contractor thereof. . . .

Section 5.6 "Additional Acknowledgments" of the Agreement states, in relevant part:

In addition, Participant acknowledges that the Business of the Company Group will be conducted throughout the United States, the Caribbean region, Central America, and South America. Participant agrees and acknowledges that the restrictions contained in this Section 5 are necessary to protect the legitimate business interests of the Company Group and that the potential harm to the Company Group of the non-enforcement of any provision of this Section 5 outweighs any potential harm to Participant of its enforcement by injunction or otherwise. . . . Participant by this Agreement and is in full accord as to their necessity

> for the reasonable and proper protection of confidential and proprietary information of the Company Group now existing or to be developed in the future. Participant expressly acknowledges and agrees that each and every restraint imposed by this Agreement is reasonable with respect to subject matter, duration and geographical area.

The Agreement further contains, in Section 5.7, the following clause on equitable relief, stating in relevant part:

> In the event of the breach or a threatened breach by Participant of any of the provisions of Section 5, the Company Group would suffer material and irreparable harm and money damages may not be a sufficient or adequate remedy for any such breach and, in addition and supplementary to other rights and remedies existing in its favor whether hereunder or under any other agreement, at law or in equity, the Company shall be entitled to seek specific performance and/or injunctive or other equitable relief from a court of law or equity of competent jurisdiction in order to enforce or prevent any violations of the provisions hereof (without posting bond or other security).

In addition, Section 3.3 "Company Representations" of the Agreement states that Quirch is a registered LLC of Delaware. Section 6.6 "Governing Law" of the Agreement provides that: "This agreement shall be governed and construed in accordance with the Laws of the State of Delaware without giving effect any otherwise governing principles of conflicts of law."

On September 9, 2019, Slattery resigned. He told Quirch's president, Grande, that he was "aware of his non-compete, that he understood, and he was not worried." He told Grande he was not sure if he was moving back to Iowa or North Florida. Instead, he went to work for G&C. Broce and Miller resigned on September 13, 2019 to go work for G&C as well. Broce told Grande he planned to lead G&C's

purchasing operations. Broce received a severance offer to leave Quirch immediately, as did Miller.

Thereafter, the individual defendants worked for G&C doing the same jobs they did at Quirch. They procured meat, pork, and poultry products and worked with sales personnel. They participated in G&C's daily sales conferences calls and meetings, discussing sales, market updates, and sale strategies. The recommendations the individual defendants made included specifics about Quirch's business, such as: (1) the exact sales of products into specific territories during specific times of the year; (2) the details about Quirch Foods' arrangements with vendors and the sales of those products into designated territories; and (3) offering information about companies that G&C previously did not do business with.

G&C has at least 120 customers in Florida (fifty to sixty of which are also Quirch's customers). From the time that the individual defendants went to work for G&C, through January 23, 2020, G&C had already sold to at least 43 of those customers. Of the accounts that G&C believes it shares with Quirch and to which it has sold since the individual defendants went to work at G&C, about 65% are in Florida. Since they resigned, the individual defendants have contacted Quirch's customers: J&B Group, Halperns, and Rastelli.

During their employment with G&C, the former Quirch employees took domestic and overseas trips to discuss the international sale for beef and pork.

Quirch learned this information from a G&C food contractor that sold for G&C in Florida. On these vendor trips, the individual defendants solicited Quirch's vendors and discussed pork and how much G&C would grow the next year once the company opened export sales. The vendors were impressed with how much business Quirch did in export and thus wanted to discuss more with the individual vendors and G&C so they could work together, as the individual defendants had "the know-how." During a sales call, the individual defendants were discussing a visit to Nicaragua and the "ability to facilitate sales to Latin America because Quirch Foods employees had been involved in such matters in their 'past life.'" While the ruling on Quirch's motion for temporary injunction was pending before the trial court, G&C opened its Miami office with plans to expand to Latin American territories.

On September 13, 2019, Quirch sent letters to the three individual defendants advising them of the Agreement the individual defendants had signed. Quirch never received any responses. After receiving no response, Quirch sent demand letters to the defendants on September 17, 2019. Again, Quirch received no response, so on September 20, 2019, Quirch sent legal representation letters indicating that it was preparing to file suit against the defendants as a result of their violation of the Agreement. Thereafter, on September 30, 2019, Quirch was notified that employees Fernando Munoz, Juan Carlos Artavia, and Gustavo Paguaga (who were buyers at

Quirch and also subject to non-competition and non-solicitation restrictions) all resigned and went to work with the individual defendants at G&C. One departing employee told Quirch CFO Sabater that in order to persuade him to resign, Broce told him that G&C was paying employees at his level more than the employee made at Quirch.

After the three individuals resigned, Quirch hired a forensic expert to analyze their computers, who found that the individual defendants had obtained confidential information including customer names, profit margins, items purchased, purchasing patterns, and quantities purchased. On September 12, 2019, the day before his resignation, Broce downloaded files to his USB device that contained information about Quirch's buying goals, product figures, sales, and the company's 2019 Power Buy event in Puerto Rico. Shortly before his resignation, Miller also accessed sensitive company documents, including reports on export sales and the same 2019 Power Buy event. A few weeks before his resignation, Slattery accessed confidential company documents, including those relating to the same 2019 Power Buy event and to customer orders and quantities for various poultry products scheduled to be delivered during the latter part of 2019. Slattery then deleted 621 items/files from his computer.

On October 2, 2019, Quirch filed suit asserting breach of contract claims against the three individual defendants and a tortious interference claim against

G&C. On October 25, 2019, Quirch filed "Plaintiffs' Emergency Motion for Temporary Injunction and Supporting Memorandum of Law" seeking to enjoin the individual defendants from: a) working for G&C for a period of 12 months; b) directly or indirectly soliciting Quirch's vendors, suppliers, and customers in violation of the Agreement for a period of 24 months; c) using/disclosing Quirch's confidential information and requiring them to return the misappropriated information; d) soliciting any individuals who were Quirch's employees, officers, contractors, or consultants during the 6-month period prior to their resignation of employment and from requesting, inducing, influencing, or attempting to request, induce, influence any such employees for a period of 12 months; and e) engaging in any further unlawful, unfair, or fraudulent business practice in competition with Quirch.

The trial court scheduled the evidentiary hearing for November 13, 2019. None of the individual defendants nor anyone from G&C appeared at the hearing. Instead, all the defendants relied on their previous declarations. Quirch had one witness who testified at the hearing, its CFO Sabater. The parties each submitted proposed orders at the conclusion of the hearing.

On January 21, 2020, the trial court ordered the limited depositions of Broce and Chapman. On February 27, 2020, Quirch filed a Motion for Expedited Ruling. As of April 16, 2020, the trial court had not ruled on the temporary injunction

motion, so pursuant to Florida Rules of Judicial Administration 2.215(f) and 2.545(c), Quirch filed "Plaintiffs' Motion to Chief Judge for Review of Pendency of Ruling on Emergency Motion for Temporary Injunction."[2] No ruling was made in April, so on May 8, 2020, Quirch submitted a copy of the motion to the chief judge by email, copying the administrative judge. The next day, on May 9, 2020, almost six months after Quirch filed its injunction motion, the trial court entered its order denying Quirch's motion for temporary injunction. The basis for the trial court's decision was that Quirch did not establish likelihood of success on the merits because "[u]nder Delaware law, a restrictive covenant entered into after an employee's service begins is enforceable [only] if supported by new consideration in the form of a corresponding benefit or a beneficial change in employment status." The trial court relied on Radian Guaranty, Inc., v. Bolen, 18 F. Supp. 3d 635 (E.D. Pa. May 2, 2014), for its decision. This appeal followed.

Quirch raises several issues on appeal. First, Quirch agrees that the substantive law of Delaware applies because the Agreement had a choice of law provision selecting Delaware law to be applied in case of a dispute between the parties. However, it contends that Florida law governs in this case on the procedural matters.

[2] Quirch acknowledged the impact of the COVID pandemic. As of the Chief Judge's entry of Administrative Order No. 20-03, which suspended court proceedings from March 13 through March 30, 2020 due to the pandemic, a ruling on the injunction request had been pending for over four months.

Quirch further contends that it met each requirement for the trial court to grant it a temporary injunction and that the trial court completely misread the Radian opinion. In turn, defendants argue that Delaware law must be applied to Quirch's claims, as well as to the procedural matters in this case.[3]

[3] We disagree with defendants' reliance on FP UC Holdings, LLC v. Hamilton, CV 2019-1029-JRS, 2020 WL 1492783 (Del. Ch. Mar. 27, 2020) (the "Fast Pace" case), as the case is factually distinguishable. Importantly, the court in Fast Pace, found that Alabama's interest against the enforcement of non-competes materially outweighed Delaware's general interest in freedom of contract. Id. at *8-9. Thus, the court ruled that the non-compete restrictive covenants in the Grant Agreement in Fast Pace were not enforceable and ruled in favor of the employee after applying Alabama law. Here, unlike the stark difference between Alabama law and Delaware law with respect to restrictive covenants, Florida and Delaware law are very similar. Both states are strongly in favor of upholding restrictive covenants in employer/employee agreements. We find Fast Pace further inapplicable because it involved one employee who worked as a mid-level manager for approximately seven years in one of the former employer's over 100 urgent care clinics. Only one employee reported to the employee. The employee was not the face of Fast Pace. The employee incorporated his own urgent care clinic and borrowed $233,000 secured by their home to finance the business. In addition, the employer in Fast Pace required all employees to sign non-competes, unlike Quirch in the case before us. The employee in Fast Pace was working in another state at only one clinic. In the case before us, the individual defendants are working at G&C's new offices, which is 2.7 miles from Quirch headquarters. The Grant Agreement in question in Fast Pace did not define its business, unlike the case before us where Section 1.5 of the Agreements defined Quirch's "business." Furthermore, as far as the non-solicitation claims, the court in Fast Pace did not find that the employee breached his non-solicitation covenant by hiring a nurse practitioner in 2019 to work at his new urgent care clinic business, who had last worked for Fast Pace in 2016. Id. at *13. In the case before us, three Quirch employees resigned on September 30, 2019, within days of the three individual defendants' resignation and went to work for G&C where the individual defendants were working. Consequently, we decline to apply Fast Pace based on these distinguishing facts.

II. STANDARD OF REVIEW

"The standard of review of trial court orders on requests for temporary injunctions is a hybrid. To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review." Fla. High Sch. Athletic Ass'n v. Rosenberg, 117 So. 3d 825, 826 (Fla. 4th DCA 2013) (quoting Foreclosure FreeSearch, Inc. v. Sullivan, 12 So. 3d 771, 774 (Fla. 4th DCA 2009)); see also Telemundo Media, LLC v. Mintz, 194 So. 3d 434, 435 (Fla. 3d DCA 2016).

III. DISCUSSION

A. Choice of Law

The Agreement provides in Section 6.6 that the parties agreed the choice of law was Delaware. When dealing with choice of law matters, Florida adheres to a distinction between substantive and procedural matters. Siegel v. Novak, 920 So. 2d 89, 93 (Fla. 4th DCA 2006); Aerovias Nacionales De Colombia, S.A. v. Tellez, 596 So. 2d 1193, 1195 (Fla. 3d DCA 1992). Thus, Florida courts apply foreign law when dealing with the substantive issues in a case but apply the forum's law to procedural matters. Schein v. Ernst & Young, LLP, 77 So. 3d 827, 830 n.2 (Fla. 4th DCA 2012). Although the substantive issue in this case is based on Delaware law (this Court's analysis of the likelihood that Quirch will succeed on the merits), the standard for granting the temporary injunction is provided by Florida law, as the remaining

preliminary injunction factors are procedural. Under Massey v. David, 979 So. 2d 931, 936-37 (Fla. 2008), these factors are the steps that must be met in order to obtain a temporary injunction. "[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994).[4]

B. The Procedural Requirements for Obtaining a Temporary Injunction in Florida

To obtain a temporary injunction, the petitioner must satisfy a four-part test under Florida law: "(1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest." Scott v. Trotti, 283 So. 3d 340, 343 (Fla. 1st DCA 2018). Thus, to determine whether Quirch is entitled to obtain a preliminary injunction, this Court must consider whether, under Delaware law, Quirch demonstrated a substantial likelihood of success on the merits with regard to its breach of contract claims against the individual defendants. The factors giving rise to entitlement of injunctive relief must be supported by "competent, substantial evidence." Telemundo Media, LLC, 194 So. 3d at 436.

[4] Moreover, like Florida, Delaware law also adheres to the distinction between substantive and procedural matters in a choice of law context. Cabela's LLC v. Wellman, C.A. 2018-0607-TMR, 2018 WL 5309954, *7 (Del. Ch. Oct. 26, 2018).

C. Delaware Substantive Law on Restrictive Covenants

In order to enforce a restrictive covenant under Delaware law, the agreement must: (1) meet general contract law requirements, (2) be reasonable in scope and duration, (3) advance a legitimate economic interest of the party enforcing the covenant, and (4) survive a balance of the equities. Tristate Courier & Carriage, Inc. v. Berryman, C.A. 20574-NC, 2004 WL 835886, at *10 (Del. Ch. Apr. 15, 2004).

First, the Agreements the individual defendants signed satisfied Delaware's contract law requirements. There was mutual assent by both parties, and there was adequate consideration. Faw, Casson & Co. v. Cranston, 375 A.2d 463, 466 (Del. Ch. 1977). Both parties agreed to the terms and signed the Agreements. Moreover, "[i]n Delaware, employment or continued employment may serve as consideration for an at-will employee's agreement to a restrictive covenant." All Pro Maids, Inc. v. Layton, CIV.A. 058-N, 2004 WL 1878784, at *3 (Del. Ch. Aug. 10, 2004), aff'd, 880 A.2d 1047 (Del. 2005); see also Newell Rubbermaid, Inc. v. Storm, C.A. 9398-VCN, 2014 WL 1266827, at *9 (Del. Ch. Mar. 27, 2014). Furthermore, with the March 19, 2019 Agreement, the individual defendants received stock incentives in exchange for signing the restrictive covenants.

Second, under Delaware law, the Agreements were reasonable in scope and duration. Here, the individual defendants' non-compete clauses in the Agreement were for twelve months following the date of the employees' resignations, and the

non-solicitation clauses were for twenty-four months following the employees' resignations. In Delaware, courts find covenants of two years or more to be reasonable. Tristate Courier, 2004 WL 835886, at *11. Thus, the one-year non-competition and two-year non-solicitation periods are reasonable and shorter than allowed under Delaware law. Regarding the geographic restrictions, Delaware finds geographic restrictions reasonable if they relate to a region where the employer "conducts or has conducted business." Id. "In Delaware, 'the reasonableness of a covenant's scope is not determined by reference to physical distances, but by reference to the area in which a covenantee has an interest the covenants are designed to protect.'" O'Leary v. Telecom Res. Serv., LLC, 2011 WL 379300, at *5 (Del. Super. Jan. 14, 2011). Here, both Quirch and G&C acknowledged that they conducted business mainly on the east coast of the United States from Miami to Maine. Quirch had a further presence in Latin America and in the Caribbean, and G&C was trying to expand into the Latin American market. Thus, because the restriction of scope was for the region in which Quirch conducted business, the restriction was reasonable. Weichert Co. of Pennsylvania v. Young, C.A. 2223-VCL, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007). Furthermore, and importantly, the individual defendants agreed to the following term in Section 5.6 of the Agreement: "Participant expressly acknowledges and agrees that each and every

restraint imposed by this Agreement is reasonable with respect to subject matter, duration and geographical area."[5]

Third, with regard to whether the Agreements advanced a legitimate economic interest of Quirch, in Research & Trading Corporation v. Pfuhl, Civ. A. 12527, 1992 WL 345465, at *12-13 (Del. Ch. Nov. 18, 1992), Delaware recognized the protection of an employer's good-will, as well as the protection of an employer's confidential information from misuse, as a legitimate economic interest. The court stated, "this court has repeatedly enjoined former employees from dealing with the customers of their former employers with whom the employee had contact." Id. at *12. In addition, in TriState Courier, the court noted that when a "business is a competitive business and that personal contacts are critical to the success or failure of the venture," protection of an employer's confidential information is a legitimate economic interest. Tristate Courier, 2004 WL 835886, at *10.

The record reflects that the meat products industry, in which Quirch and G&C participated, is extremely competitive with very thin margins of sometimes a quarter of a cent. Customer relationships are critical, as Slattery stated in his Declaration. The individual defendants were "the face of Quirch," as Sabater testified. The

[5] Delaware courts have upheld geographical restrictions covering the entire United States. O'Leary, 2011 WL 379300, at *5 ("A national scope can be particularly necessary in today's world where so many businesses operate on a national or even global scale.").

individual defendants had access to Quirch's confidential information, which included customer lists with emails, sales, prices, profit margins, and business strategies. The forensic expert hired by Quirch to analyze the individual defendants' computers stated in his report that the individual defendants copied files with Quirch's confidential information and deleted files from their work computers the day before they resigned or shortly before, as previously discussed. The individual defendants also had access to company compensation records and used that information to induce at least one of the other employees three Quirch employees who resigned on September 30, 2019 to go work for G&C under the individual defendants' supervision.

And finally, turning to the fourth factor that Delaware considers in enforcing restrictive covenants, the Agreements the individual defendants signed survives a balance of the equities examination. The individual defendants were sophisticated businessmen who had worked for Quirch in the meat distribution industry for fifteen to twenty-three years. They had previously signed agreements to work for Quirch with restrictive covenants, so they were familiar with these types of agreements in their industry. They were among the most highly compensated employees earning in the top ½ to 2% of employee salaries at Quirch. They signed the Agreements as part of a management equity incentive plan that gave each of them stock incentives. They had access to the most confidential information at Quirch, which they took

with them after they downloaded various computer files before they resigned. At least one of them used Quirch's confidential compensation information to induce at least one of the other three employees who resigned on September 30 to leave and go work for G&C. And finally, the defendants were not fired; they left on their own free will to go work at G&C. If the restrictive covenants were not enforced, Quirch would not achieve the benefit of its bargain in entering into the Agreements. Kan-Di-Ki, LLC v. Suer, C.A. 7937-VCP, 2015 WL 4503210, at *20 (Del. Ch. July 22, 2015). Delaware courts regularly enforce these restrictive covenants. Id.; Hough Assocs., Inc. v. Hill, Civ.A. 2385-N, 2007 WL 148751, at *8 (Del. Ch. Jan. 17, 2007). Thus, because the record demonstrates the defendants violated the non-compete and non-solicit agreements, they cannot complain about the equities of the injunction.

Here, the Agreements have clearly been breached by the individual defendants. The Agreements restricted the individual defendants from working for a competing business in areas where Quirch does business and during the restricted time period stated in the Agreement. The Agreements define "Business" as:

> The distribution of food products, including, but not limited to, beef and meats, seafood, poultry, pork, deli, frozen and refrigerated products, and Hispanics frozen foods and any beverage products, to food and beverage retailers (including, but not limited to, independent and chain supermarkets), wholesalers, distributors, service industries (including, but not limited to, restaurants and cruise lines), processors, or manufacturers . . . .

G&C specializes in the distribution of beef, pork, and poultry, as does Quirch. G&C also sells to restaurants, distributors, and hotels. They also do business mainly on the east coast of the United States from Maine to Miami, which is where Quirch does most of the domestic business. G&C recently expanded to Illinois, as had Quirch. The individual defendants argued that there are differences in the two companies' operations, and thus Quirch should be denied injunctive relief. However, the Newell decision is instructive as it is a seminal decision in Delaware on restrictive covenants. The defendant in Newell similarly tried to argue that the amount of sales for which she was responsible was less than two percent of Newell's total business. She thus argued the harm was insignificant. Newell, 2014 WL 1266827 at *10. The Newell court did not accept that argument and stated that the "business is nevertheless worth $100 million and Newell is permitted to protect it." Id. Similarly, here, Quirch's business, at a minimum with respect to the individual defendants, is $850 million, and Quirch is entitled to protect it.

The individual defendants further argue that they should be allowed, while working at G&C, to conduct business with G&C's pre-existing customers, an exception to their Agreements, which is not mentioned in the Agreements. They cite Am. Homepatient, Inc. v. Collier, Civ.A 274-N, 2006 WL 1134170 (Del. Ch. Apr. 19, 2006), in support of their positions. In Collier, the parties entered into a settlement agreement to decide the issues in the original restrictive covenant

litigation they had entered. Id. at *1. However, in entering the settlement, the plaintiff employer voluntarily agreed that the former employee could work for a competitor in a limited capacity. Id. This is the distinguishing factor between Collier and the case before us. Here, the individual defendants never entered into a settlement agreement allowing them to work for a competitor of Quirch in any capacity, nor has Quirch agreed to allow them to work for G&C.

Turning to the Agreements' non-solicitation terms, Section 5.3 required the individual defendants not to solicit Quirch's distributors, providers, payors, suppliers, customers of goods or services, or other business relations of Quirch's for a period of twenty-four (24) months following the individual defendants' employment period. But after going to work for G&C, the individual defendants are doing the same work for G&C that they did for Quirch while employed with Quirch. They contacted Quirch's vendors, suppliers, and customers, including J&B Group, Halperns, and Rastelli. They discussed how much business Quirch did in their export portion and told G&C they can work with Quirch's relationships, as they have the "know-how" from when they worked for Quirch. Moreover, Section 5.3's non-solicit provision does not allow the individual defendants to "request, induce, influence or attempt to influence any Person who is, or at any time during the six (6) months prior to the termination of [the individual defendants'] employment was, an officer, employee or independent contractor of or consultant to [Quirch Foods]." The

record reflects the individual defendants are in breach of the non-solicitation terms of their Agreements, as well.

D. Remaining Procedural Factors to be Considered for Obtaining a Temporary Injunction in Florida

Having established a substantial likelihood of success on the merits because under Delaware law there was an enforceable agreement and a breach, we now turn to the remaining three factors to be considered under Florida law for Quirch to obtain a temporary injunction in this case. This Court must consider the likelihood of irreparable harm to Quirch absent the entry of an injunction, lack of an adequate remedy at law for Quirch, and that injunctive relief will serve the public interest. Trotti, 283 So. 3d at 343.

With respect to irreparable harm, Florida Statutes section 542.335, "Valid restraints of trade or commerce" applies here. Specifically, section 542.335(1)(j) provides that the "[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant." § 542.335(1)(j), Fla. Stat. (2019); see also Variable Annuity Life Ins. Co. v. Hausinger, 927 So. 2d 243, 245 (Fla. 2d DCA 2006) ("'[A] party seeking to enforce a restrictive covenant by injunction need not directly prove that the defendant's specific activities will cause irreparable injury if not enjoined.' . . . [T]he statute operates to create a presumption of irreparable injury to the employer and []

the burden shift[s] to [the employee] to establish the absence of such injury." (quoting Am. II Elecs., Inc. v. Smith, 830 So. 2d 906, 908 (Fla. 2d DCA 2002))); T.K. Comm's, Inc. v. Herman, 505 So. 2d 484, 486 (Fla. 4th DCA 1987) ("Where a covenant not to compete is violated, irreparable injury is presumed and does not have to be proven to obtain an injunction."). Thus, irreparable harm to Quirch is presumed, and Quirch does not need to prove that the defendants will cause irreparable injury. The burden then shifts to the defendants to rebut the presumption for irreparable harm. Pitney Bowes Inc. v. Acevedo, No. 08-21808-CIV, 2008 WL 2940667, at *5 (S.D. Fla. July 28, 2008). The record does not reflect that the defendants met this burden.

For example, Quirch presented competent, substantial evidence that it had legitimate business interests that needed to be protected, as previously discussed. The individual defendants had access to Quirch's confidential information, and they went to work for G&C doing the same job they did for Quirch. At G&C, they are directly competing with Quirch. The purpose of the temporary injunction is to prevent the likelihood of irreparable harm and possible injury from occurring before it happens. As the Florida Supreme Court stated in Capraro v. Lanier Business Products, Inc., 466 So. 2d 212, 213 (Fla. 1985), "Injury occasioned by [an employee's breach of a valid covenant not to compete] may fall into one or all three categories: past, ongoing, and potential." Id. Such is the case here, where the

irreparable harm to Quirch as a result of the breach of the restrictive covenants has already taken place and continues to take place. See also Allied Universal Corp. v. Given, 223 So. 3d 1040, 1044 (Fla. 3d DCA 2017) (where this Court reversed the denial of injunctive relief to former employee and held that although the employer had not begun working for the former employer's competitor, "the only focus at the preliminary injunction stage is to maintain longstanding relationships and preserve the company's goodwill."). And contrary to the individual defendant's argument that irreparable harm cannot be shown without customer losses, inability to demonstrate monetary damages does not preclude a finding of irreparable harm. Id. at 1044; see also Data Payment Sys., Inc. v. Caso, 253 So. 3d 53, 57 (Fla. 3d DCA 2018).

In addition, section 542.335(1)(g)(1), Florida Statutes (2019) states, "In determining the enforceability of a restrictive covenant, a court: shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought." Thus, in cases involving restrictive covenants, section 542.335 does not permit the court to consider individual harm in these types of cases. See also DePuy Orthopaedics, Inc. v. Waxman, 95 So. 3d 928, 940 (Fla. 1st DCA 2012). In Acevedo, 2008 WL 2940667, at *5, the court found that the employee who breached the restrictive covenant did not meet the burden of rebutting the presumption of irreparable harm even when he was terminated by his new employer and was no longer in breach of the agreement with his former

employer. Here, Quirch presented evidence that the individual defendants violated the terms of their Agreements, and the individual defendants did not establish that Quirch was not injured, thus the presumption of irreparable injury was not rebutted.

Turning to whether Quirch has an adequate remedy at law, the record demonstrates that Quirch established the unavailability of an adequate remedy at law. The individual defendants' continued breach of the restrictive covenants in the Agreements would continue to damage Quirch's goodwill and relationships with its customers/suppliers/vendors, etc. Only an injunction would prevent this damage. The Second District Court of Appeal in Hausinger, 927 So. 2d at 245, stated:

> The focus of preliminary injunctive relief is on maintaining long standing relationships and preserving the goodwill of a company built up over the course of years of doing business. . . .
>
> Plaintiff's [sic] argument that there is no irreparable harm because Plaintiff's injuries, if any, are subject to a monetary judgment, is equally without merit and has been rejected by other courts, where, as here, there is a statutory presumption of irreparable harm.

Id. (quoting N. Am. Prods. Corp. v. Moore, 196 F. Supp. 2d 1217, 1230-31 (M.D. Fla. 2002)). Moreover, as Quirch correctly contends, it is impossible to determine what Quirch's damages are as a result of the breach, thus there is no adequate remedy at law.

In considering the fourth factor, Florida courts have noted, "Public policy in Florida favors enforcement of reasonable covenants not to compete." Winmark Corp. v. Brenoby Sports, Inc., 32 F. Supp. 3d 1206, 1224 (S.D. Fla. 2014).

"[E]nforcement of a covenant not to compete protects propriety business interests and the enforcement of contracts." Id. "[T]he public has a cognizable interest in the protection and enforcement of contractual rights." Telemundo Media, LLC, 194 So. 3d at 436 (quoting Hilb Rogal & Hobbs of Fla., Inc. v. Grimmel, 48 So. 3d 957, 962 (Fla. 4th DCA 2010)). Enforcing these restrictive covenants serves the public interest because it demonstrates that courts will uphold agreements, and employers can rely on non-compete agreements to protect their legitimate business interests. Companies who provide confidential information to its employees need to know that it will be protected if an employee resigns or is terminated because the non-compete agreement will be enforced. Furthermore, enforcing restrictive covenants will also discourage employees from breaching their non-compete agreements with their former employers and from considering employment with another employer whereby they will be participating in unfair competition. In addition, "a trial court must specifically articulate an overriding public policy reason if it refuses to enforce a non-compete covenant based on public policy grounds. § 542.335(1)(i)." [6] DePuy

[6] Section 542.335(1)(i), Florida Statues (2019), states:

> No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

Orthopaedics, 95 So. 3d at 940. Here, neither the trial court nor the defendants have identified any such public policy that would "substantially outweigh the need to protect the legitimate business interest or interests" of Quirch. § 542.335(1)(i), Fla. Stat. (2019).

E. Trial Court's Error in Relying on Radian Guaranty, Inc. v. Bolen, 18 F. Supp. 3d 635 (E.D. Pa. 2014)

The trial court's order was premised on Radian Guaranty, Inc. v. Bolen, 18 F. Supp. 3d 635 (E.D. Pa. 2014) which the trial court believed to stand for the proposition that Quirch could not demonstrate a likelihood of success on the merits because the Agreements the individual defendants signed might lack consideration. The trial court stated in the order on appeal, "Under Delaware law, a restrictive covenant entered into after an employee's service begins is enforceable if supported by new consideration in the form of a corresponding benefit or a beneficial change in employment status. Radian Guaranty, Inc. v. Bolen, 18 F. Supp. 3d 635 (E.D. Pa. 2014)." This is not the holding of Radian.

First, the trial court must have cited to the wrong Radian case because the Radian case cited in the order on appeal, although based on an action by a former employer against its former employee and competitors alleging among other things a violation of a non-compete agreement, cited at 18 F. Supp. 3d 635 (Radian I), deals with issues involving failure to join indispensable parties, personal jurisdiction,

forum selection clauses, and parent-subsidiary relationships. After remand in Radian I, the case eventually was appealed again, resulting in the opinion approximately one month later in Radian Guaranty, Inc. v. Bolen, 2014 WL 2777450 (E.D. Pa. 2014) (Radian II). Radian II stands for the proposition that in the context of restrictive covenants, consideration exists where the employee is an at-will employee or where stock incentives are offered, even if the stock incentives have not vested at the time the employee leaves employment. Radian II, 2014 WL 2777450, at *5 ("[U]nder Delaware law, even though Bolen's Award of restricted stock did not vest for three years, this consideration is adequate to create an enforceable agreement."). The Radian II court granted the temporary injunction and held the opposite of what the trial court in the case before us found in its order. In Radian II, the court found that the movant established the likelihood of success on the merits. Radian II is consistent with Delaware law, where it is well-settled that employment or continued employment constitutes sufficient consideration for a restrictive covenant agreement. All Pro Maids, 2004 WL 1878784, at *3; see also Newell, 2014 WL 1266827, at *9 ("Our law permits continued employment to 'serve as consideration for an at-will employee's agreement to a restrictive covenant.'"). The Radian II court further found that stock incentives, like the ones offered to the individual defendants here, also serve as sufficient consideration for restrictive covenants. See also Newell,

2014 WL 1266827 at *1. Thus, Radian I is inapplicable to the case before us, and Radian II supports Quirch's position, not the defendants'.

IV. CONCLUSION

We conclude that the record before this Court demonstrates that Quirch established each factor necessary to obtain a preliminary injunction. Thus, the trial court erred in denying Quirch's motion for temporary injunction. Based on the foregoing reasons, we reverse the order under review and remand to the trial court for entry of an order granting Quirch's Emergency Motion for Preliminary Injunction. Allied, 223 So. 3d at 1044; Telemundo, 194 So. 3d at 436; Reliance Wholesale, Inc. v. Godfrey, 51 So. 3d 561, 566 (Fla. 3d DCA 2010). Upon entry of the injunction, the trial court shall provide Quirch with the benefit of its full non-compete period. See Anakarli Boutique, Inc. v. Ortiz, 152 So. 3d 107, 109 (Fla. 4th DCA 2014) (citing to Kverne v. Rollins Protective Servs. Co., 515 So. 2d 1320, 1321-22 (Fla. 3d DCA 1987)).

Reversed and remanded with instructions.