STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 16, 2021)

ANTONIETTA IORIO,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2021-01558**
	:	
WASTE CONNECTIONS OF RHODE	:	
ISLAND, INC.,	:	
Defendant.	:	

DECISION

STERN, J. Before the Court is Plaintiff Antonietta Iorio's Motion for a Temporary Restraining Order and Preliminary Injunctive Relief to enjoin Defendant Waste Connections of Rhode Island, Inc. from enforcing a Confidentiality and Non-Competition Agreement. Defendant objects to the motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Facts and Travel

This matter is before the Court in a rather unconventional manner. Plaintiff Antonietta Iorio (Iorio) filed an action to enjoin her former employer, Defendant Waste Connections of Rhode Island, Inc. (WCRI), from enforcing a noncompete clause in an agreement Iorio signed in connection with her employment as a sales representative.

Iorio has been working in the solid waste disposal industry as an inside sales representative since 1987. (Hr'g Tr. 19:10-16; 20:8-11; 21:1-4, 16-19, 22-23, May 11, 2021.)[1] In March 2004,

[1] The transcripts from both hearing dates—May 11, 2021 and May 12, 2021—will be referred to as "Hr'g Tr." as the page numbers are continuous from day one through day two.

Iorio started working for Patriot Disposal, LLC (Patriot) in Johnston, Rhode Island. *Id.* at 21:18-19; 22:2-3. Patriot was owned and operated by the Vinagro family, with whom Iorio was familiar prior to her employment but became "family friends" with during her years of employment. *Id.* at 57:3-13. Iorio continued to work for the Vinagro family until Patriot was acquired by WCRI in May of 2018, following an asset purchase in an amount in excess of $80,000,000. *Id.* at 168:17-24; 288:19-22.

As part of the acquisition, WCRI retained some of Patriot's personnel: Joseph Vinagro Jr. transitioned to WCRI's District Manager and Joseph Vinagro Sr. (Vinagro Sr.) became a consultant. *Id.* at 169:11-16. On June 12, 2018, WCRI presented Iorio with an offer of employment for a Sales Supervisor position located in Johnston; the offer letter set forth a base salary, commissions based on the district's commission plan, and eligibility to earn a bonus of up to 10 percent of her base salary. (Pl.'s Ex. B.) The parties dispute whether Iorio executed this particular offer letter. Nevertheless, WCRI presented a second offer letter to Iorio for an Inside Sales Representative position, "on an 'at-will' basis," which contemplated a base salary and eligibility for the "Patriot Commission Structure and Bonus Plan with details to be provided[,]" (August Offer). (Def.'s Ex. 10A.)

On August 24, 2018, Iorio executed the August Offer. *Id.* As an inside sales representative, Iorio worked out of an office where she would interact with prospective, new, and existing customers, including those acquired in the Patriot asset purchase. (Pl.'s Ex. A.) Iorio was also "in charge of three sales reps" who would look to her for rate adjustments and assistance in setting up appointments and making sales. (Hr'g Tr. 28:19-29:10.) She gained new business through incoming calls and making calls; she also maintained and developed existing customer accounts. *Id.* at 267:20-268:15; Pl.'s Ex. A. For each customer, Iorio was to build the relationship and

business by identifying the customer's needs and to adapt the company's services offerings to fit those needs as they evolved. (Hr'g Tr. at 186:3-9; 216:15-16; Pl.'s Ex. A.) According to Iorio, she was the "face of the company" to the customers she worked with. (Hr'g Tr. 69:1.)

In her sales position, Iorio had passcode access to WCRI's internal customer portal, which contained customer information such as name, contact, address, products and services supplied, service frequency, pricing, contracts and their terms, and customer complaints. *Id.* at 60:12-61:4; 170:17-20. All employees were required to sign the Employee Handbook containing a confidentiality provision, and employees in supervising, management, or sales roles, such as Iorio, were required to sign a confidentiality and noncompete agreement. *Id.* at 172:7-13; 174:4-6; 184:4-12.

On August 24, 2018, in conjunction with the August Offer, and despite her reluctance, Iorio executed a Confidentiality and Non-Competition Agreement (CNA), which contemplated the conditions to her employment and restrictions on her post-WCRI employment activities. *Id.* at 32:16-17; Def.'s Exs. 10A, 10B, 44. The CNA's "Non-Competition" provision provided that, for a period of eighteen months, she would be restricted from providing certain services within a specific territory. (Def.'s Ex. 10B (CNA) § 4.) The restricted territory included (1) any county of a state where Iorio provided services to a WCRI Affiliate (which includes WCRI, a parent, brother-sister company, or subsidiary) during the last two years of her employment; and (2) any county of any state in which a WCRI Affiliate was located about which Iorio, during the last two years of her employment, "had access to Confidential Information relating to the [WCRI] Affiliates' current or planned operations[.]" *Id.* This provision further stated that Iorio was not to provide services on behalf of any other entity that were either (1) "the same as or similar in function or purpose to the services [Iorio] provided" to WCRI Affiliates during the last two years of her

employment or (2) "likely or probable to result in the use or disclosure of Confidential Information to a business whose products and services include products and services offered by the [WCRI] Affiliates regarding which [Iorio] had material involvement or received Confidential Information about" during the last two years of her employment.[2] *Id.*

On July 1, 2019, WCRI acquired Mega Disposal Company, and in late 2019 and early 2020 the company relocated its Johnston office to Seekonk, Massachusetts. Hr'g Tr. at 83:7-9; 89:15-20; 169:17-21. Around this time, Vinagro Sr. discontinued his consulting role with WCRI, and upon relocation to Seekonk, Iorio was no longer in charge of any sales representatives and was required to report to Joseph Pirri (Pirri), as the sales manager. *Id.* at 35:12-20; 39:15-18; 89:15-17. Iorio and Pirri were familiar with each other from Patriot, where they were co-workers until Pirri was fired; as Iorio explained, the two "didn't get along." *Id.* at 23:19-22; 39:19-21.

Around September 2019, Iorio started to ask management why she did not receive a 2018 year-end bonus, as contemplated in her August Offer. (Pl.'s Ex. H; Hr'g Tr. 36:25-37:7; 37:21-38:4.) Around the same time, Pirri announced in a sales meeting that WCRI was eliminating the inside sales position; at that time, Iorio was the only inside sales representative. (Def.'s Ex. 46; Hr'g Tr. 245:17-18.) In October 2019, WCRI's management discussed presenting Iorio with a new offer of employment as an Outside Sales Representative at a reduced salary and an overall "$18K haircut to what she [was] trending to make [that] year[.]" (Pl.'s Exs. J, K.) WCRI's Regional Vice President suggested that the company keep Iorio "as is" because "[w]ith more outside reps focused in by territory her call in commissions will scale down and become more

[2] The CNA also provides that Iorio shall not own, have a financial interest in, loan money to, or make a monetary gift to any Competing Business, with an exception for an investment of no more than 2 percent into securities of a business traded on a national securities exchange. (CNA § 4.) The CNA also contained a nonsolicitation provision that prohibited Iorio from taking part in the solicitation of WCRI's customers that Iorio called on, serviced, etc. (CNA § 6.)

typical to what we see and we can remove this obstacle[.]" (Pl.'s Ex. K.) A formal offer was never presented to Iorio. Nevertheless, for the remainder of her employment with WCRI, Iorio continued in her inside sales role, as the only inside salesperson in the Northeast Division. (Hr'g Tr. 35:21-36:1.)

There were often arguments amongst WCRI's sales personnel as to who was entitled to commissions on what accounts. *Id.* at 93:10-12; 194:18-19; 294:3-9. One of these disagreements occurred in February 2020 between an outside sales representative, Joe Morrissey, and Iorio. *Id.* at 52:2-24; 93:5-12. Iorio was under the impression that calls transferred to her were filtered through customer service who should have already determined whether the customer should be transferred to an outside representative or to Iorio. *Id.* at 92:19-93:4. A conversation about an incoming call that was transferred to Iorio turned into a heated discussion, and Morrissey, who "was very angry" and his "face was red[,]" approached Iorio, called her "a fucking thief[,]" and stated that she stole accounts from him and that it was "going to stop and it[] [was] going to stop now." *Id.* at 52:5-20. Pirri, who was also present, told Morrissey to "step back." *Id.* at 52:21-22. Iorio reported the incident to management but never heard back about any resolution. *Id.* at 161:21-25; Def.'s Ex. 43.

Shortly after this incident, in March 2020, due to WCRI accommodating COVID protocols, many employees, including Iorio, started to work from home. (Hr'g Tr. 59:4-11.) There, she continued her job functions as an inside salesperson and maintained notebooks with notes of all her daily activities, including customer and lead names, contact numbers, addresses, service needs, prices, complaints, and conversation memos. (Def.'s Exs. 19, 51-54.) She worked from her personal laptop and company cell phone. (Hr'g Tr. 59:23-60:5.) Meanwhile, in April 2020,

Vinagro Sr. started a new company in the waste disposal business called Liberty Disposal, LLC (Liberty). *Id.* at 290:11-14.

On June 24, 2020, while working from home, and despite not hearing back from management regarding the February incident with Morrissey, Iorio received an e-mail from Pirri with a new commission plan. (Def.'s Ex. 35.) The "Sales Commission Plan 2020" was only applicable to Rhode Island and to inside sales representatives, which meant that it was functionally limited to Iorio as the company's only inside salesperson. (Def.'s Ex. 36; Hr'g Tr. 200:1-7; 244:5-7.) Pursuant to the plan, Iorio was to "handle certain existing customers as assigned by management" and, in taking the incoming calls of new customers, was to "secure the new customer on the phone up to a limit of $200 in standard monthly charges[.]" (Def.'s Ex. 36.) If a new "customer['s] need exceed[ed] $200 in monthly standard charge revenue," Iorio was to refer the new customer to the outside sales representative who was assigned to the territory in which the new customer was located. *Id.* Iorio would be provided with 1870 accounts to manage; if any one of those accounts entered into a new contract over $200 a month, it was also to be transferred to an outside salesperson. (Hr'g Tr. 202:12-18.) The new plan placed other new conditions and limits on Iorio's commissions. *Id.* at 49:13-51:2. Iorio sent a copy of the new commission plan to Vinagro Sr. and later sent Vinagro Sr. a copy of a WCRI customer contract who was displeased with WCRI's service. *Id.* at 69:5-21; Def.'s Ex. 17. After delay, on August 3, 2020, Iorio signed the new commission plan. (Def.'s Ex. 7.)

On August 6, 2020, Iorio, through her attorney, requested a medical leave pursuant to the Family Medical Leave Act, and on August 12, 2020, she was approved for such leave. (Def.'s Exs. 15, 32.) Once her medical leave commenced, WCRI terminated Iorio's access to the company's customer portal and disarmed her cell phone and e-mail. (Hr'g Tr. 62:11-63:3.) On August 6,

2020, Iorio's attorney sent WCRI a second letter giving WCRI notice of Iorio's intent to file a discrimination claim. (Def.'s Ex. 16.) Iorio did not return to WCRI. On November 13, 2020, Vinagro Sr. sent a letter to WCRI to inform the company that he would be offering employment to Iorio at Liberty. (Def.'s Exs. 1, 50.) That same day, WCRI responded by asserting its intent to enforce the CNA, deeming both Vinagro Sr.'s letter and Iorio's lack of participation in the return to work process after her FMLA leave as her effective resignation. (Def.'s Ex. 18.) On November 19, 2020, WCRI's Director of Human Resources issued Iorio a formal notice of termination of employment and maintained that her employment with Liberty would be a "direct violation" of the CNA. (Def.'s Ex. 32.) As a result of this notice, Iorio did not commence employment with Liberty. (Hr'g Tr. 66:7-18.) Since her termination in November 2020, Iorio has been unemployed. *Id.* at 115:18-23.

In the instant motion, Iorio requests a temporary restraining order and preliminary injunction to enjoin WCRI from enforcing the restrictive covenants of the CNA and from tortiously interfering with Iorio's future employment prospects. (Compl. at 9.) On May 11 and 12, 2021, this Court held an evidentiary hearing where both parties presented and examined witnesses and evidence.[3]

[3] Due to the extensive evidence presented and considered—through two days of hearings, witness testimony, numerous exhibits, and pre- and post-hearing briefs—the Court is treating the motion as one for a preliminary injunction. Nevertheless, "the same criteria must be established to issue either a preliminary injunction or a temporary restraining order." *City of Woonsocket v. Forte Brothers, Inc.*, 642 A.2d 1158, 1159 (R.I. 1994).

II

Whether WCRI has the Burden of Showing that the CNA is Enforceable

Iorio asserts that WCRI holds the burden to show that the CNA is enforceable. (Pl.'s Post-Hr'g Mem. Law Supp. (Pl.'s Br.) 12 (May 24, 2021).) WCRI argues that the burden shifting provision Iorio relies upon "is not applicable when Iorio is the plaintiff and WCRI is not . . . seeking to enforce the restrictive covenants." (Def.'s Closing Br. Opp'n (Def.'s Br.) 19 (May 26, 2021) (citing Tex. Bus. & Com. Code § 15.51, Procedures and Remedies in Actions to Enforce Covenants Not to Compete).)[4] WCRI's contention may be so, as, traditionally, it is the employer seeking to enforce the covenant. Nevertheless, this is not the only reason why the burden shifting provision is inapplicable under this circumstance.

Texas law generally disfavors restraints on trade and, specifically, covenants not to compete that "'impose[] upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer.'" *Cardinal Personnel, Inc. v. Schneider*, 544 S.W.2d 845, 848 (Tex. App. 1976) (quoting *Weatherford Oil Tool Company v. Campbell*, 340 S.W.2d 950, 951 (Tex. 1960)); *see also Valley Diagnostic Clinic, P.A. v. Dougherty*, 287 S.W.3d 151, 155 (Tex. App. 2009). The Texas Business and Commerce Code, § 15.51(b) provides that:

> "If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or at will, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code. . . . For the purposes of this subsection, the 'burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence."

[4] For purposes of this motion, the parties have stipulated that Texas law will apply as stated in the CNA's choice of law provision. (Pl.'s Mem. Supp. 8 n.2 (Mar. 5, 2021); Def.'s Mem. Opp'n 1 (May 6, 2021).)

Based on this language, Iorio argues that WCRI also holds this burden on Iorio's application for a preliminary injunction. However, courts have determined that § 15.51(b) of the Texas Business and Commerce Code is only applicable to final adjudications. *See Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 238 (Tex. App. 2003). In *Cardinal Health*, the Court, in considering § 15.51 application, stated that:

> "Subsection (b)'s burden-shifting provisions make no sense in the context of a temporary injunction, in which the applicant always has the burden to show entitlement to the writ. . . . Because we must presume that the Legislature intended a reasonable result, we interpret subsection (b) to apply only to final adjudications, not to the pursuit of preliminary relief." *Id.* (citations and quotations omitted).

Nevertheless, although the applicant maintains the burden of proving the elements, including "a probability of ultimate success on the merits[,]" § 15.51(b) may play a role in the analysis of an application for a preliminary injunction. *See LasikPlus of Texas, P.C. v. Mattioli*, 418 S.W.3d 210, 218 (Tex. App. 2013).

Assuming for a moment that on a final adjudication WCRI will bear the burden of demonstrating that the CNA is enforceable by showing the "existence of [a] fact is more probable than its nonexistence[,]" Iorio still bears the burden on its motion for a preliminary injunction. Tex. Bus. & Com. Code § 15.51(b). The burden of proof, as it relates to either a preliminary injunction or a final hearing on the merits, is more probable than not. The only difference is whose turn it is to tip the scale. Because Iorio must demonstrate a probability of ultimate success on the merits on its application before the Court at this juncture, this means that Iorio must establish that it is more likely than not, based on the evidence presented, that the CNA is unenforceable. Doing so would negate, at this stage, WCRI's ultimate burden of establishing that it is more likely than not that the CNA is enforceable and would serve to demonstrate Iorio's probability of success on the merits.

III

Iorio's Application for a Preliminary Injunction

"The decision to grant or to deny a preliminary injunction lies within the sound discretion of the trial justice." *City of Woonsocket v. Forte Brothers, Inc.*, 642 A.2d 1158, 1159 (R.I. 1994). In its determination of whether to grant this relief, the "hearing justice should consider and resolve 'each of the appropriate preliminary-injunction factors[.]'" *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999)). This includes a determination of

> "'whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.'" *Id.* (quoting *Iggy's Doughboys, Inc.*, 729 A.2d at 705).

A

Likelihood of Success on the Merits

To establish a likelihood of success on the merits, the movant need not establish "'a certainty of success[,]'" but rather must only "'make out a prima facie case.'" *Id.* (quoting *The Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997)). Iorio is seeking injunctive relief to enjoin WCRI from enforcing the CNA so that she may obtain other employment in the industry; Iorio argues that the restrictive covenants in the CNA are unenforceable because they are not supported by consideration, because WCRI is in breach of the employment contract, and because the CNA became void as a result of the material changes to Iorio's employment. WCRI contends that the agreement is supported by valid consideration, as Iorio received confidential information from WCRI, that the alleged breach is

inapplicable to the enforceability of the CNA, and that the material change doctrine is not recognized under Texas law.

1

Whether the CNA is Unenforceable as Lacking Consideration

Iorio argues that the only consideration for the CNA is WCRI's promise of at-will employment, which is illusory and insufficient to support a restrictive covenant under Texas law, and that she never received the consideration, such as confidential information or training. (Pl.'s Mem. Supp. (Pl.'s Mem.) 9-10 (Mar. 5, 2021).) WCRI asserts that Iorio received, during her employment, and retained, after her separation, confidential information. (Def.'s Mem. Opp'n (Def.'s Opp'n) 4-5 (May 6, 2021).) Furthermore, WCRI argues that the Covenants Not to Compete Act (the Act) "supplant[ed] the common law" with respect to the enforcement of covenants not to compete, and thus, Iorio's reliance upon common law prior to the Act's passage is misguided. (Def.'s Br. at 19, 23.)

"The enforceability of a covenant not to compete is a question of law." *Lazer Spot, Inc. v. Hiring Partners, Inc.*, 387 S.W.3d 40, 46 (Tex. App. 2012). The Act, "prevail[s] over *contrary* common law." *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 653 (Tex. 2006) (emphasis added). Under Texas law, a covenant not to compete is an unlawful restraint on trade and unenforceable unless it meets certain criteria, including that "it is ancillary to or part of an otherwise enforceable agreement[.]" Tex. Bus. & Com. Code §§ 15.50 and 15.05; *see also DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990).[5] An employee's promise not

[5] Under Texas law, "[a]n agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy unless it is reasonable." *DeSantis*, 793 S.W.2d at 681. This maxim, like many in *DeSantis*, is not contrary to the Act and is, thus, still applicable. *Id.*

to compete "cannot be a stand-alone promise"; "'like any other contract, [it] must be supported by consideration.'" *Alex Sheshunoff*, 209 S.W.3d at 651 (quoting *DeSantis*, 793 S.W.2d at 681 n.6).

"'Consideration for a noncompet[ition] that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus.'" *Lazer Spot, Inc.*, 387 S.W.3d at 46 (quoting *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 775 (Tex. 2011)); *see also Beasley v. Hub City Texas, L.P.*, No. 01-03-00287-CV, 2003 WL 22254692, at *7 (Tex. App. Sept. 29, 2003) (considering that the receipt of confidential information constitutes consideration for the noncompetition covenant). However, if the information sought to be protected is not confidential, the "agreement not to compete is [not] necessary to protect [a] legitimate business interest" and is, thus, "unreasonable and therefore unenforceable." *DeSantis*, 793 S.W.2d at 684.

If an employer fails to fulfill a promise to provide confidential information or training to an employee, the employees' agreement to refrain from competition may be lacking consideration. *See Alex Sheshunoff*, 209 S.W.3d at 650. Specifically, "[w]here an employer in an at-will employment agreement agrees to provide confidential information or other consideration to an employee, a reciprocal promise by the employee not to use the confidential information in competition with the employer may not be immediately enforceable because the employer's promise is illusory because he could terminate the employee before any confidential information is shared." *Lazer Spot, Inc.*, 387 S.W.3d at 47, n.12. Nevertheless, once the employer performs the promise by divulging confidential information or providing training, the agreement not to compete becomes non-illusory and enforceable, insofar as it "is otherwise enforceable under the Act[.]" *Alex Sheshunoff*, 209 S.W.3d at 651.

There is no dispute that Iorio's employment with WCRI was "at-will." In August 2018, Iorio, together with the CNA, received and executed the August Offer, which contemplates that she is required to sign the CNA. (Def.'s Ex. 10A.) The CNA's consideration provision states that it sets forth Iorio's "conditions of employment[,]" and those conditions include covenants not to compete or solicit. (CNA at 1, §§ 4-6.) In pertinent part, the CNA provides that:

> "[I]n consideration of [WCRI's] entrusting to [Iorio] confidential information relating to the WCI Affiliates' business, providing [Iorio] specialized training related to the WCI Affiliates' business and/or allowing [Iorio] access to customers and the ability to use and develop goodwill with them, [Iorio] agrees to and accepts the conditions of employment set forth in this Agreement." *Id.* at 1.

Thus, the CNA contemplates that WCRI will provide Iorio with confidential information, training, and the ability to use WCRI's customers and develop goodwill with them in exchange for the conditions placed upon Iorio's employment as set forth in the CNA. Although the CNA contemplates this consideration, due to Iorio's at-will employment, WCRI must have, in fact, provided to Iorio confidential information, training, or the ability to develop goodwill with WCRI's customers in order for the agreement to become non-illusory. *See Alex Sheshunoff*, 209 S.W.3d at 650.

Based on the evidence presented at the hearing, the Court finds that Iorio is unlikely to succeed on her claim that the CNA is unenforceable as lacking consideration in the form of confidential information and developing goodwill with WCRI's customers.

First, Iorio thoroughly cites to *DeSantis* to argue that Iorio poses no threat to WCRI's goodwill. (Pl.'s Br. at 22.) In *DeSantis*, the court determined that although DeSantis solicited his former employer's clients after leaving his employ, there was no evidence that DeSantis acquired the one client, out of the ten to fifteen solicited, because of goodwill he developed with that client while with his former employer. *DeSantis*, 793 S.W.2d at 683. To the contrary, Iorio stated that

she was the "face of the company[,]" and in a conversation with one of her customers, the customer expressed its displeasure with WCRI's services and told Iorio to either help or refer the customer to someone else. (Hr'g Tr. 69:1, 5-15.) Thus, Iorio gave the customer's contract to Vinagro Sr. at Liberty, the company she is seeking to join. After sharing the customer's information with Liberty, Vinagro Sr. pursued this customer, but, according to Vinagro Sr., he was not able to secure the business because Liberty did not have the requisite insurance. *Id.* at 341:13-25. Thus, Iorio used her relationship with and knowledge of that customer—that is, the goodwill she developed with that customer by being the face of the company—to provide a referral to a competing business.[6] Thus, the Court cannot agree that this situation is similar to *DeSantis* and that Iorio poses no threat to WCRI's goodwill. *DeSantis*, 793 S.W.2d at 683.

Second, Iorio received information and had access to information that was defined in the CNA as confidential and that Iorio herself considered to be confidential in the waste industry. (Hr'g Tr. 79:18-80:4.) The CNA defines confidential information as: "an item of information, or a compilation of information, in any form . . . related to the business of the WCI Affiliates that the WCI Affiliates have not made public or authorized public disclosure of, and that is not generally known to the public through proper means." (CNA § 1.) Examples of confidential information include "trade secrets, . . . customer lists, customers or clients and their needs, preferences or use patterns, products, services, contracts . . . training, . . . contract terms, . . . pricing, . . . and other proprietary matters relating to the WCI Affiliates, all of which constitute a valuable part of the assets of the WCI Affiliates which this Agreement is designed to protect." *Id.*

[6] Vinagro Sr. testified that Iorio would, at times and while employed by WCRI, tell him who some of WCRI's unhappy customers were and some of those customers are now customers of Liberty. (Hr'g Tr. 304:22-305:11.)

Iorio developed customers for WCRI by having access to customer lists and contracts, and she learned about the customers' service and product needs and preferences from the time she signed the CNA until she went on leave in August 2020. *See Alex Sheshunoff*, 209 S.W.3d at 657 (considering that assistance from the employee in developing customers for a company is a protectable business interest). Although she maintained some existing customers from Patriot, Iorio was privy to how those customers' needs changed over the course of her employment. (Hr'g Tr. 81:11-22.) In addition, Iorio also had access to the customer database WCRI acquired with the Mega Disposal acquisition, and she worked with some of these customers and learned about their needs and preferences. *Id.* at 83:7-15.

Iorio argues that WCRI cannot show that the CNA is necessary to protect its goodwill because Iorio rarely met with customers, if ever, and she merely "answer[ed] the phone to sell to small customers that were directed to her by management." (Pl.'s Br. at 22.) If the circumstances were such that WCRI had no part in furnishing customer leads to Iorio and Iorio had no access to the customer database, it would be possible that customer lists are not confidential. *See PetroChoice Holdings, LLC v. Pearce*, No. 12-20-00106-CV, 2021 WL 126591, at *4, 8 (Tex. App. Jan. 13, 2021) (considering that salesperson developed all of her own customers by her own efforts and had no access to a master list). However, incoming customer calls were diverted to Iorio from customer service, and Iorio had access to WCRI's customer database. With the leads that were furnished to her, by management or customer service, Iorio established goodwill with those customers, no matter how small the account was. Although Iorio's argument may contribute to the reasonableness of the scope of restrictions on Iorio, it does not entirely negate WCRI's business interest in protecting this information.

Iorio, as the "face of the company[,]" worked with new and existing customers to establish the goodwill and reputation of WCRI. (Hr'g Tr. 69:1; 82:17-83:15.) The notebooks Iorio created while working from home—although the hand scribed notes were "not necessarily" part of her job and she was "supposed to keep what [she did] on the laptop"—contained quotes from conversations with customers, customer names, pricing, and preferences.[7] *Id.* at 85:15-16; 86:10-16. In addition, Iorio's commission sheets listed the customers' monthly revenues and contract lengths, which allows the salesperson to know how much that customer is worth to the company and when the customer is up for a renewal, or, better yet, up for grabs by a competitor. *Id.* at 109:20-110:6.

Iorio argues that the information WCRI seeks to protect is not all that confidential, especially in light of the fact that Iorio is seeking to work for Vinagro Sr. at Liberty, who has decades of experience in the industry and knowledge of all the information that WCRI claims to be confidential. (Pl.'s Br. at 24.) True, Liberty, through Vinagro Sr., may know much of the information WCRI is claiming to be confidential. However, Vinagro Sr. does not know how the customers' needs and preferences have changed since WCRI's acquisition of Patriot or Mega Disposal's customers' needs and preferences, and, as a competitor, he can benefit from the customer relationships and goodwill Iorio built for WCRI while being paid by WCRI to do so.

Furthermore, the type of information defined as confidential in the CNA is considered confidential so long as it is treated as such and gives WCRI a market advantage. *See Rugen v. Interactive Business Systems, Inc.*, 864 S.W.2d 548, 552 (Tex. App. 1993). Indeed, for information to be considered confidential, it must carry some competitive advantage or be uniquely developed

[7] Although, individually, the Court cannot say that pricing was either confidential or uniquely developed or that Iorio knew about WCRI's internal pricing strategy, other information provided to Iorio is confidential.

and must not be easily ascertainable from the customer itself. *See Anderson Chemical Company, Inc. v. Green*, 66 S.W.3d 434, 442 (Tex. App. 2001) (considering that the information must have some element of secrecy and give holder a competitive advantage); *see also DeSantis*, 793 S.W.2d at 684 (considering where customers were readily identifiable, knowledge without competitive advantage, customer needs and pricing easily ascertainable from the customer itself, and policies and strategies not uniquely developed, the employer was not entitled to protection).

Iorio considered the information above as the type she would never give to a competitor and suggested that it could give the holder a competitive advantage or allow a competitor to compete against WCRI. (Hr'g Tr. 84:12-14; 86:24-87:7; 110:7-9.) Vinagro Sr. also expressed that he is unwilling to share his customer information with his competitors. *Id.* at 291:12-24. Certainly, any person may be able to ascertain from the brand name on a dumpster which company services that customer and subsequently call on that company. However, access to an abundance of information regarding a number of customers—including when their current contract expires, how much they pay for a container and delivery, how often the container is emptied, how and why the customer's needs have changed over time, and how much revenue that brings the company after paying out commissions—is information that not only takes time and money to develop but would also allow a competitor to acquire business at WCRI's expense. *See Rugen*, 864 S.W.2d at 552. The information to which Iorio had access, in this particular industry, serves as a competitive advantage.

The CNA—and more importantly the law—requires that the confidential information is such that WCRI has "not made public or authorized public disclosure of, and that is not generally known to the public through proper means." (CNA § 1.) Information that is "necessarily known to all persons in the trade" is not confidential. *Crouch v. Swing Machinery Co.,* 468 S.W.2d 604,

606 (Tex. App. 1971) ("What is known to all cannot be converted into confidential information worthy of equitable protection by merely whispering into the ear of even the most highly trusted employee.") For example, information that is freely shared with non-employees or persons who are not subject to confidentiality agreements is not confidential. *See Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 888 (Tex. App. 2003) (considering that sales recruits were allowed on "sales calls to observe customers, sales techniques, sales materials and pricing information" and were not required to sign confidentiality agreement and national sales meetings were open to competitors). Plainly, information must be treated as confidential to be considered as such. *Id.* For instance, information obtained about customers by virtue of employment and not freely disseminated is confidential. *Crouch*, 468 S.W.2d at 606. The element of secrecy is similar to that required for the protection of a trade secret. *See Rugen*, 864 S.W.2d at 552. The information must not be "generally known or readily ascertainable by independent investigation." *Id.* Particularly, "[w]hen an effort is made to keep *material important to a particular business* from competitors," it is not readily ascertainable by proper means. *Id.* (Emphasis added).

WCRI maintained both procedural and physical barriers in an attempt to maintain the secrecy of the information defined as confidential in the CNA. WCRI required all employees to sign the Employee Handbook, which contained a confidentiality provision. (Hr'g Tr. 174:4-6.) In addition, WCRI required persons in certain positions, such as those in supervising, management, or sales positions, to execute a Confidentiality and Non-Competition Agreement. *Id.* at 184:4-12. The company database, or customer portal, was accessible only with the proper passcode credentials, which WCRI maintained control over in order to limit or cut off access as it desired, as was done when Iorio went on medical leave. *Id.* at 171:2-3. The company does not allow people

to roam the building, guests must check in at the front desk, and there are filing cabinets and locked doors. *Id.* at 170:21-171:5.

Iorio executed both the Employee Handbook and the CNA; she was granted access to the company's customer portal with login credentials and only had access to the information needed to perform her job functions; she became privy to information about customers by virtue of her employment; and she never saw the commission figures of outside sales representatives. *See Crouch*, 468 S.W.2d at 606; *see also* Hr'g Tr. 48:17-18. These protocols were designed to maintain the secrecy of information and ensure the information was not publicly available through proper means or easily ascertainable by an independent investigation. Indeed, a competitor may be able to call a customer and obtain some information about the price and contract term; however, a conglomerate or compilation of this information relating to numerous customers, including the goodwill in WCRI that has been built over time, is not easily ascertainable and not generally available. Importantly, efforts to protect the information at WCRI were made because the type of material Iorio had access to as a sales representative is important to compete in the waste industry. All witnesses who testified at the hearing recognized this concept, including Iorio.

Based on the nature of the information Iorio learned and could access, the competitive advantage that may be derived from the information, and WCRI's efforts to maintain the secrecy of the information, the Court finds that Iorio has not shown a reasonable probability of success on the merits of her claim that her agreement to not compete is lacking consideration and, thus, unenforceable.

2

Whether the CNA was Voided by Material Changes in Iorio's Employment

Iorio argues that the changes in her job title, responsibilities, compensation, and location voided the CNA pursuant to the material change doctrine. (Pl.'s Mem. at 11.) WCRI contends that Iorio's reliance on Massachusetts law is misplaced because Texas does not recognize this doctrine, and, even if did, it is inapplicable in this case as rescission requires mutual assent and the CNA expressly provides that it survives notwithstanding these changes. (Def.'s Opp'n at 6-7.)

Under Texas law, "[i]n employment at will situations, either party may impose modifications to the employment terms as a condition of continued employment." *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986) (citing *L.G. Balfour Co. v. Brown*, 110 S.W.2d 104, 107 (Tex. App. 1937)). "If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law." *Id.*; *see also Apple Chevrolet-Oldsmobile, Inc. v. Hatthorn*, No. 01-88-00702-CV, 1989 WL 31991, at *1 (Tex. App. Apr. 6, 1989) (an "employee will waive the default and affirm the contract as modified if he continues to accept employment, even under protest").

WCRI made prospective changes to Iorio's job title, duties, and work location, and, aware of these modifications, Iorio continued to work for WCRI. Thus, as a matter of law, by continuing to work for WCRI, Iorio waived her claim that these material changes in her employment were unacceptable. In addition, the CNA states that it "will survive the expiration or termination of [Iorio's] employment with [WCRI] . . . and shall, likewise, continue to apply and be valid notwithstanding any change in [Iorio's] *duties, responsibilities, position, or title*." (CNA § 17) (emphasis added). Thus, by agreeing to the CNA and the survival provision therein, the changes in Iorio's title, duties, and location did not alter the enforceability of the CNA.

In addition, as Iorio was an at-will employee, WCRI was able to modify the terms of Iorio's employment as a condition to her continued employment. *Hathaway*, 711 S.W.2d at 229. WCRI was also free to modify Iorio's commission structure as a condition of her continued employment with the company. Iorio went on leave days after signing the new commission plan, which she considered would have a dire impact on her overall compensation. Although it appears that Iorio did not accept the terms or continue to work for WCRI under the new commission terms, there is no evidence before the Court that the new plan would have any effect on Iorio's compensation because she never received any commissions under the new plan. While the new commission plan placed certain limits on the size of the sales Iorio could make, it did not place limits on the quantity of sales that she could make. In addition, there was no evidence presented that the majority of Iorio's sales under her original commission plan were greater than $200, such that the effect of these limits could be quantified, or that the 1870 accounts she was to be given to manage were junk accounts, such that they would be unlikely to bring any benefit to Iorio.

Even if Texas law supported the material change doctrine, which under these circumstances the Court cannot find that it does, the Court is unable to determine with the evidence presented that the change in Iorio's commission structure was likely material. In concert with Iorio's at-will employment, knowledge of the modifications, continued employment, and agreement to the CNA, which contemplated its applicability across changes in her duties and title, Iorio has not demonstrated a reasonable probability of success on the claim that material changes voided the CNA.

3

Whether WCRI Breached the Employment Contract, Rendering the CNA Unenforceable

Iorio argues that WCRI's failure to pay her a bonus, to which she was entitled, was a breach of the employment agreement and renders the CNA unenforceable. (Pl.'s Br. at 28-31.) WCRI asserts that Iorio was not guaranteed a bonus, and that even if she were, this would not excuse her obligations under the CNA as there is no evidence such breach is material, that compensation is not part of the CNA, and that the CNA covenants are independent of and enforceable apart from Iorio's bonus, if one was ever owed. (Def.'s Br. 27-28.)

"It is well settled that a former employer cannot enforce a negative covenant not to compete in a contract of employment by injunction where it has breached that contract." *Professional Beauty Products, Inc. v. Jay*, 463 S.W.2d 288, 290 (Tex. App. 1970) (citing *Langdon v. Progress Laundry & Cleaning Company*, 105 S.W.2d 346 (Tex. App. 1937); *SCM Corp. v. Triplett Co.*, 399 S.W.2d 583 (Tex. App. 1966); *Vaughan v. Kizer*, 400 S.W.2d 586 (Tex. App. 1966)). Courts have also repeatedly held that failure to pay compensation amounts to a breach or inequitable conduct, such that the employer was not entitled to enforce a noncompete by an injunction. *See id.*

For instance, in *Professional Beauty Products*, a salesman signed an agreement that, after his employment, he would not compete in any manner with his former employer, Professional, for one year. *Id.* at 289. The salesman was given a territory and a list of customers in that territory, and it was understood that he was to receive the commissions on all sales to those customers. *Id.* Professional established a company that started selling to the salesman's customers, which affected his earnings and potential earnings. *Id.* The Court determined that Professional's conduct was contrary to the parties' agreement, resulted in the salesman's reduced sales and commissions, rendered Professional without clean hands, and precluded Professional from obtaining an

injunction to enforce the noncompete and enjoin the salesman from working for a competing company. *Id.* at 290.

In *Vaughan*, an insurance claims adjuster signed a noncompete in conjunction with his employment, where he received a salary, bonus, and reimbursement for expenses. *Vaughan*, 400 S.W.2d at 588-89. The employer started to reduce the adjuster's expense account, at which point the adjuster terminated his employment and filed an action requesting a declaration that the noncompete was void. *Id.* The former employer filed a counterclaim seeking an injunction to enforce the noncompete. *Id.* The court stated that

> "an otherwise valid agreement by an employee not to compete with his employer after termination of employment, may not be enforced by injunction, by the employer, where the employer has been guilty of a breach of the employer's obligations under the contract or other inequitable conduct. He who comes into equity must come with clean hands, and a complainant's wrongful conduct in a matter or transaction with respect to which he seeks injunctive relief, precludes him from obtaining such relief." *Id.* at 589-90.

The court determined that the reduction of the expense account was "such wrongful conduct as to render [the former employer] without clean hands, and preclude[d] him from obtaining injunctive relief against [his former employee] in a court of equity." *Id.* at 590.

Similarly, in *Langdon*, the court determined that the former employer breached the employment contract by "materially reducing the compensation called for [therein.]" *Langdon*, 105 S.W.2d at 347. The court reasoned that the breach was deliberate and without consent, changed the agreed-to contract consideration, and rendered the former employee "at liberty to declare the contract at an end, and act independent of any of its provisions." *Id.* On the other hand, in the absence of evidence that commissions were earned yet were withheld, a party is unlikely to succeed on its claim that the employer breached the contract and the noncompete covenants are, thus, unenforceable. *See Middagh v. Tiller-Smith Co., Inc.*, 518 S.W.2d 589, 592 (Tex. App. 1975).

In the instant matter, Iorio signed the August Offer along with the CNA. The August Offer was for an Inside Sales Representative position, for a base salary of $67,600, and the bonus structure stated: "You will be eligible for the Patriot Commission Structure and Bonus Plan with details to be provided to you." (Def.'s Ex. 10A.) Iorio was paid commissions under this plan but never received a bonus. (Hr'g Tr. 34:16-35:1.) Besides a new commission plan that Iorio executed in August 2020, the parties did not otherwise agree to change this pay structure at any point in her employment. *Id.* at 181:13-22.

The evidence demonstrated that (1) Iorio asked about the 2018 year-end bonus; (2) Robert McReynolds (McReynolds), the Division Vice President, assumed Iorio thought she was entitled to one because she was in a sales leadership role from June 2018 until they flipped her to an inside sales rep in September 2018; (3) management discussed the situation with Iorio and "explained to her that she clearly benefitted by the second agreement when she went on the Patriot commission plan"; and (4) management pointed out that the August Offer for the inside sales position stated that Iorio would "be eligible for the patriot commission and bonus plan which will be provided to you later" but no plan was provided to her. (Pl.'s Exs. H, N.) In addition, management stated that "either it was understood she would continue to earn the 10%, or we messed up creating the offer letter for the ISS position." *Id.* at Ex. N.

Contrary to McReynolds' assumption, it was not because Iorio was in a sales leadership role from June 1, 2018 through August 24, 2018—between the first and second offer letters—that she thought she was entitled to a bonus. Iorio thought she was entitled to a bonus because it was part of the terms of the August Offer, which she accepted and under which she remained until August 3, 2020. Although management—in response to Iorio's inquiry as to why she did not receive a year-end bonus for 2018—"explained to her [or rather tried to convince her] that she

clearly benefitted by the second agreement when she went on the Patriot commission plan[,]" this does not mean WCRI did not offer her one and did not owe her one; Iorio accepted those terms of employment, including the bonus. *Id.* In addition, management never provided Iorio with the new bonus structure and so, according to management, "it was understood she would continue to earn the 10%, or we messed up creating the offer letter for the [Inside Sales] position." *Id.* Management did not tell Iorio that they messed up, and, frankly, by the time they realized the mistake—if it was indeed a mistake—it was too late.

McReynolds' conflicting statements are telling: first, the e-mail states that Iorio was in a sales management role until they "flipped her" to inside sales; and, then, he testified that she was not entitled to this 10 percent bonus because she never signed the first offer letter for the sales management role, but "[i]f she would have signed the offer letter and we had it, she *probably* would be paid." (Hr'g Tr. 193:6-10; 224:23-225:3.) (emphasis added). Whether she signed it or not, all parties were acting under those terms until Iorio signed the August Offer. Because Iorio "probably would [have been] paid" had she signed the first offer letter, it is more likely than not that Iorio was entitled to a bonus under this plan. *Id.* at 193:6-10.

Iorio signed the August Offer, which provided that she would be paid a bonus with details to be provided. However, no details were provided. Meanwhile, she was working under all other provisions of the former Patriot commission and bonus plan—which included the 10 percent bonus—and it was "understood" that she would "continue" to receive that bonus. (Pl.'s Ex. N.) By the time WCRI realized that the bonus term in the August Offer may have been an error, which was in 2019, it was too late to change Iorio's 2018 year-end bonus. Thus, Iorio established a

likelihood of success that she was entitled to a bonus under the agreement and that WCRI failed to pay her that bonus.[8]

WCRI argues that Iorio must also establish that such breach was material, yet she offered no evidence to this effect. (Def.'s Br. at 28.) However, in light of the aforementioned cases, and the showing that Iorio is more probable than not to have been entitled to a bonus, the failure to pay an employee compensation, for which he or she contracted and performed, constitutes a material breach or is otherwise so inequitable that an employer cannot enforce a noncompete. *See Professional Beauty Products, Inc.*, 463 S.W.2d at 290; *see also Vaughan*, 400 S.W.2d at 589-90; *Langdon*, 105 S.W.2d at 347.

WCRI also seems to argue that the August Offer, including the compensation provisions, which Iorio signed along with the CNA is not the "otherwise enforceable agreement" to which the noncompete covenants are ancillary; through this, WCRI suggests that if the employment contract is unenforceable, it would have no effect on the CNA's enforceability. (*See* Def.'s Br. at 28.) Section 15.50 provides that one criterion for enforceability of a covenant not to compete is that it need be "ancillary to or part of an otherwise enforceable agreement[.]" Tex. Bus. & Com. Code § 15.50(a). However, "[t]he enforceability of [a] covenant should not be decided on 'overly technical disputes' of defining whether the covenant is ancillary to an agreement." *Marsh USA Inc.*, 354 S.W.3d at 777. Section 15.51(b) suggests that an employment contract for personal services is the contract to which the covenant is ancillary. Tex. Bus. & Com. Code § 15.51(b)

[8] The circumstances surrounding the year-end bonus are different from the other changes in Iorio's employment, such as the changes in her job title, responsibilities, location, and commissions, because those changes were prospective and impliedly agreed to by Iorio's continued employment with the company. On the other hand, concerning the bonus, there was no mutual assent to change this term prior to the bonus's applicability, which was at the end of 2018, and Iorio did not otherwise know of a change and continue to work like she did with the other changes.

("[i]f the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services").

Here, the August Offer and CNA were presented to Iorio together, the offer references the CNA, and the offer clearly does not provide all the terms of Iorio's employment, as the CNA states that it sets forth the conditions of Iorio's employment. The CNA provides that "in consideration of" WCRI providing Iorio with confidential information and the ability to develop goodwill therewith, "[Iorio] agrees to and accepts the *conditions of employment* set forth in this Agreement." (CNA at 1) (emphasis added). The CNA, thus, is ancillary[9] to, within the plain meaning of that term, the employment agreement.

WCRI argues that to excuse her performance, Iorio must show that the covenants, that is the bonus provision and noncompete provisions, are mutually dependent and that she failed to provide evidence to that effect. (Def.'s Br. at 28.) It is true that in order for the breach of one covenant to excuse performance of another, the covenants must be mutually dependent promises. *See John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 86 (Tex. App. 1996). "Where each covenant is such an indispensable part of what both parties intended that the contract would not have been made without the covenant, they are mutual conditions and dependent, in the absence of clear indications to the contrary." *Id.* Courts look to the intent of the parties at the time of formation, which may be found in the contract language itself; however, "[i]f the intent of the parties is unclear, the court will presume the promises are dependent rather than independent." *Id.*

[9] Ancillary means "[s]upplementary; subordinate[,]" *Ancillary*, Black's Law Dictionary 109 (11th ed. 2019); "subordinate, subsidiary . . . related . . . supplementary . . . [or] subordinate or auxiliary to a primary or principal legal document[,]" *Ancillary*, Webster's Third New International Dictionary 80 (1971).

For instance, the unclean hands doctrine provides that a former employer cannot enforce a noncompete in an employment contract with an injunction if it has materially breached the contract; however, where a noncompete provision states "that it will be construed independently of other clauses in the employment agreement, the unclean hands doctrine does not apply." *Yoakum v. Eagle USA Air Freight, Inc.*, No. 01-98-01335-CV, 1999 WL 568975, at *3 (Tex. App. Aug. 5, 1999) (citing *French v. Community Broadcasting of Coastal Bend, Inc.*, 766 S.W.2d 330, 334 (Tex. App. 1989)). In that circumstance, the parties' intent would be clear that the covenant not to compete is independent.

WCRI quotes *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707, 708 (Tex. 1982) for the rule that "when a covenant goes only to part of the consideration on both sides and a breach may be compensated for in damages, it is to be regarded as an independent covenant, unless this is contrary to the expressed intent of the parties." *Hanks*, 644 S.W.2d at 708 (internal quotation omitted). The noncompete covenants in *Hanks* were agreed to in connection with a business acquisition and restricted the former business owner from competing for five years. *Id.* The court determined that the noncompete covenant was not connected to the buyer's obligations to pay for the business assets, and, rather, the parties' intent—by bargaining for and assigning a value to the covenant not to compete—was that the covenant was independent, as only going to part of the contract. *Id.* *Hanks* and the instant matter are not synonymous.

In the instant case, there is no statement in the noncompete provision suggesting that it is independent of all other clauses, such as an assignment of value specifically and separately for the covenant not to compete. Whereas the CNA made clear its intention that the noncompete provisions were applicable regardless of, and so independent of, Iorio's duties, responsibilities, position, or title, it is not so clear that the noncompete provisions are independent of Iorio's

compensation. The fact that the CNA assigned certain covenants as independent from the noncompete provisions but not others infers that the Court must give other covenants a different effect. Insofar as WCRI argues that the integration clause in the CNA is controlling and compensation goes unmentioned in the CNA, the Court is unconvinced. (Def.'s Br. at 28.) Certainly, Iorio would not have entered any noncompete but for her employment, and it is axiomatic that compensation is indispensable for employment. In addition, Iorio made clear her intention that compensation was indispensable to the CNA, such that the CNA would not have been executed without favorable compensation terms. (Pl.'s Exs. F, G (expressing Iorio's concerns between compensation and signing the noncompete).)

Furthermore, Iorio's compensation plan is directly related to WCRI's legitimate business interests. *See Marsh USA Inc.*, 354 S.W.3d at 777 (recognizing a company created nexus between an employee's personal interests and the company's business interests). Iorio's compensation, with respect to commissions and bonuses, is driven by performance; that is, the more sales made, the greater her compensation. (Hr'g Tr. 238:21-25.) According to McReynolds, WCRI's "intent is never to hurt an employee and bring them backwards"; neither was it the case for Iorio because "her success [wa]s [WCRI's] success." *Id.* at 195:5-10. Iorio's success was based on how well she utilized the proprietary information furnished to her by WCRI. In order to build the goodwill for the company, Iorio was given access to confidential information, including WCRI's customer base. Iorio utilized the information to build relationships and make sales, which made money for both her and WCRI. WCRI is looking to protect its customer relationships and the goodwill it has gained with its customer base due to Iorio's efforts while employed.

Iorio's compensation, based on her sales performance—which was based on her maximizing the use of WCRI's confidential information and building customer relationships with

it—was directly related to the goodwill WCRI seeks to protect; namely, the company gave her compensation, based on sales made from those customer relationships and confidential information, as incentive to build greater goodwill and bring in more sales. Because they gave her access to the customer relationships and confidential information for her to do her job and incentive through compensation for her to do her job well—the compensation which was based on her performing well with these tools—and wished to protect the relationships and information with conditions to Iorio's employment, WCRI made her compensation dependent upon the restrictive covenants, and vice versa. The more sales Iorio made and the more customer relationships she built, the greater the need for WCRI to protect its goodwill and the information used to build that goodwill. Functionally, the exchange was: we will give you the tools to do your job well; you will be compensated based on how well you do, because the better you do, the better we do; in exchange for these tools, you cannot use them against us for a specified period of time. Compensation does not need to be mentioned in the CNA for it to be impliedly intertwined with and indispensable from the covenants not to compete. Thus, the Court is not convinced that the compensation and noncompete covenants were independent. Rather, it seems more likely that the clauses were mutually dependent.

Nevertheless, "an alleged breach of an agreement does not automatically entitle the plaintiff to a temporary injunction pending trial; . . . temporary injunctions require specific matters be demonstrated by the applicant, including a probable right to the relief sought and probable, imminent, and irreparable injury in the interim." *LasikPlus of Texas, P.C.*, 418 S.W.3d at 222.

4

Whether the Noncompete Clause is Reasonable in Scope

Iorio asserts that in the event the Court finds that the covenants not to compete are enforceable, the terms of the noncompete are unreasonable and should be reformed. (Pl.'s Mem. at 15; Pl.'s Br. at 35.) Section 15.50 requires that the "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Tex. Bus. & Com. Code § 15.50(a). "If the trial court determines that any particular provision is unreasonable or overbroad, the trial court has the authority to reform the Agreement and enforce it by injunction with reasonable limitations." *Marsh USA Inc.*, 354 S.W.3d at 778 (citing Tex. Bus. & Com. Code § 15.51(c)).

Iorio argues that the restrictions are greater than required to protect the legitimate business interests of WCRI because (1) Iorio is seeking to go work for her former boss, Vinagro Sr., who is not subject to a noncompete with WCRI; (2) Iorio has not worked for WCRI since August 2020 when she took her leave of absence; and (3) she is only seeking to go back to the RI market where she has not worked for WCRI since July 2019. In addition, Iorio asserts that if Vinagro Sr. is able to open a competing business in RI, with his abundant knowledge of the industry, there can be no harm to WCRI's legitimate business interests in Iorio working for him in RI.

WCRI argues that the covenants are reasonable in time (only lasting eighteen months), in geographic scope (only limiting Iorio from the territory in which she worked during her last two years of employment), and in scope of activities (only prohibiting Iorio from working in similar capacities and business lines that she worked with WCRI). (Def.'s Opp'n at 4.)

a

Limitations on Time

WCRI argues that the eighteen-month restriction is reasonable because, under Texas law, courts have found two years to be reasonable and that Iorio's retention of information supports a broader restriction. (Def.'s Br. at 20; Def.'s Opp'n at 4 (citing *Alex Sheshunoff*, 209 S.W.3d at 657 (enforcing covenant prohibiting employee from selling competing product for two years); *Gallagher Healthcare Insurance Services v. Vogelsang*, 312 S.W.3d 640, 655 (Tex. App. 2009) (upholding two-year restrictive covenant)).) Iorio suggests that WCRI is taking the position that she is prohibited beyond the eighteen-month period, until October 2023. (Pl.'s Br. at 1.)

Indeed, under Texas law, "'[t]wo to five years has repeatedly been held as a reasonable time in a noncompetition agreement.'" *Central States Logistics, Inc. v. BOC Trucking, LLC*, 573 S.W.3d 269, 276 (Tex. App. 2018) (quoting *Gallagher Healthcare Insurance Services*, 312 S.W.3d at 655). However, "[a] covenant not to compete that extends for an indeterminable amount of time is not reasonable and, as a result, is not enforceable." *Id.* at 277 (citing *Cardinal Personnel, Inc.*, 544 S.W.2d at 847). In addition, if a former employee would not be able to ascertain the expiration of the time restriction, the restriction is likely unreasonable. *Central States Logistics, Inc.*, 573 S.W.3d at 277.

For example, in *Cardinal*, the court determined that a covenant with an indeterminable time period was "not susceptible to reformation[.]" *Cardinal Personnel, Inc.*, 544 S.W.2d at 847. There, the noncompete contained a provision that the six-month restriction, rather than starting to run upon termination of employment, would start to run when the employee ceases to be in violation of the agreement, "whether voluntarily or by injunction." *Id.* The court reasoned that the time restriction could not be ascertained until a court invoked and exercised its equity powers to

enjoin a violation of the agreement resulting in an injunction that would expire well after the six-month restriction and that this result was inconsistent with the six-month restriction, which "would not be anticipated by the ordinary employee entering into such an agreement." *Id.* The court held the restriction to be "void as contrary to public policy." *Id.* at 847.

Similarly, in *Central States Logistics*, the court determined that there was "no discernable method for [the defendant] to know when the two-year time period has expired" because the restriction lasted for two years after defendant's last contact with any client, not just the clients defendant serviced. *Central States Logistics, Inc.*, 573 S.W.3d at 277. Because the defendant would not know the identities of the company's clients, besides the clients he himself serviced, the defendant would not be able to ascertain the expiration of the two-year time restriction, and, thus, the restriction was unenforceable. *Id.*

In the instant case, there are post-employment, eighteen-month time restrictions in various covenants and a tolling provision. Specifically, the "Tolling" provision states that "[i]f [Iorio] fails to comply with a timed restriction in this Agreement, the time period for that will be extended by one day for each day [Iorio] is found to have violated the restriction, up to a maximum of eighteen (18) months." (CNA § 18.) Because the time restriction could be extended for each day Iorio is "*found* to have violated the restriction," this time restriction, like *Cardinal*, is likely indeterminable, and like *Central States Logistics*, is likely unascertainable by Iorio, and, thus, not reasonable or enforceable as written. *Cardinal*, 544 S.W.2d at 847; *Central States Logistics, Inc.*, 573 S.W.3d at 277; (CNA § 18) (emphasis added).

First, there are no discernable standards as to by whom, how, or under what discretion Iorio could be "found to have violated" the noncompete, making the standards even less clear than those in *Cardinal* that provided that the clock would begin to run when the court enjoined the conduct.

See Cardinal, 544 S.W.2d at 847; (CNA § 18). Second, an injunction that expires up to eighteen months beyond an eighteen-month restriction "would not be anticipated by the ordinary employee entering into such an agreement." *Cardinal*, 544 S.W.2d at 847. Finally, based on the lack of standards, Iorio herself would likely not be able to ascertain the true expiration of the eighteen-month time restriction. *See Central States Logistics, Inc.*, 573 S.W.3d at 277.

For example, WCRI states that Iorio's retention of a confidential account information sheet supports a broader timeframe than the eighteen months. However, without standards as to who will be making the determination of whether that account information sheet is confidential, what process will be used, and what amount of discretion that decision maker holds in making that determination, Iorio is left in the dark as to how or when days will be tacked on to the eighteen-month restriction.

In addition, the tolling provision is unclear as to what the added time tacks on to. The provision states, "[i]f [Iorio] fails to comply with a timed restriction in this Agreement, the time period for *that* will be extended . . . ." (CNA § 18) (emphasis added). The lack of explanation as to what "that" refers to, whether it's the activity that is considered a violation or the provision as a whole, leaves the time restriction unreasonably open for an interpretation that could be unascertainable by Iorio herself and that could extend well beyond the time frame necessary to protect WCRI's legitimate business interests.

Thus, Iorio is likely to succeed on the merits of her claim that the time restriction along with the tolling provision is unreasonable and greater than necessary to protect WCRI's interests.

b

Geographic Scope

"[W]hat constitutes a reasonable area generally is considered to be the territory in which the employee worked while in the employment of his employer." *Zep Manufacturing Co. v. Harthcock*, 824 S.W.2d 654, 660 (Tex. App. 1992). However, a future potential market or market of interest where an employer does not currently operate cannot be included in a reasonable geographical limitation because "Texas law . . . mandate[s] that a geographical limitation cannot impose a greater restraint than is necessary to protect the goodwill or other business interest of the employer." *Cobb v. Caye Publishing Group, Inc.*, 322 S.W.3d 780, 785 (Tex. App. 2010). In addition, "the breadth of enforceable geographical restrictions in covenants not to compete must depend on the nature and extent of the employer's business and the degree of the employee's involvement in that business." *AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319, 335 (Tex. App. 2014) (citing *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 793 (Tex. App. 2001)).

For example, a salesperson's territory with a former employer is a reasonable restriction; however, geographic restrictions on territories outside of this area are likely not reasonable. *See Morrell Masonry Supply, Inc. v. Coddou*, No. 01-13-00446-CV, 2014 WL 1778285, at *4 (Tex. App. May 1, 2014) (considering a statewide restriction too broad to be enforceable when the salesperson's territory consisted of two cities and reforming to confine the restriction to the two cities). Also, a covenant that restricts competition to a particular client base "is an acceptable substitute for a geographic limitation[.]" *See Salas v. Chris Christensen Systems, Inc.*, No. 10–11–00107–CV, 2011 WL 4089999, *19 (Tex. App. Sept. 14, 2011).

In the instant case, the CNA restricts Iorio from "any county of any state in which [she] provided services to any WCI Affiliate, or about which [she] had access to Confidential

Information relating to the WCI Affiliates' current or planned operations in such county," during the last two years of her employment. (CNA § 4.) Iorio worked in Johnston, RI from June 2018 through July 2019 and was then moved to Seekonk, MA, where she was located until she went on leave in August 2020 and then terminated in November 2020. However, counties relative to WCRI's current and planned operations are inapplicable to Iorio because both Iorio and McReynolds testified as to what type of information Iorio could access and it did not include information about WCRI's current or planned operations. For instance, although Iorio had access to pricing, she was not privy to the pricing strategy or the company's future pricing plans. (Hr'g Tr. 61:14-19.)

The geographic restriction is reasonable as it applies to Iorio because it is limited to the counties in which Iorio worked for WCRI in the last two years of her employment, namely the counties of the states in which Johnston, RI and Seekonk, MA are located.

c

Scope of Activity

WCRI argues that the restrictions on Iorio's activities are reasonable in scope because they only prohibit her from working in similar capacities and business lines as she worked for WCRI.

Industry wide exclusions, or otherwise precluding a person's ability to work in an industry, are generally unreasonable and unenforceable. *See John R. Ray & Sons, Inc.*, 923 S.W.2d at 83 (provision providing that employee "would not engage in or have an interest in any business that sold insurance policies or engaged in the insurance agency business" was unreasonable). "[N]oncompete agreements barring an employee from working for a competitor in *any* capacity are invalid." *Accruent, LLC v. Short*, No. 1:17-CV-858-RP, 2018 WL 297614, *6 (W.D. Tex. Jan. 4, 2018). However, precluding a person from an industry within the same line of

business in which the person was employed is not unreasonable. *See Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 119 (Tex. App. 1999). For example, a restriction on a former vice president who was responsible for consulting in the energy market restraining him from working for oil and gas consulting firms was not unreasonable, as it was not an industry-wide restriction but rather tailored to competitive consulting companies. *Id.*

In the instant matter, the CNA provides that Iorio shall not provide services on behalf of any other entity (1) "that are the same as or similar in function or purpose to the services [Iorio] provided" to WCRI Affiliates during the last two years of her employment, "*or*" (2) that are "likely or probable to result in the use or disclosure of Confidential Information to a business whose products and services include products and services offered by the [WCRI] Affiliates regarding which [Iorio] had material involvement or received Confidential Information about" during the last two years of her employment (all of which are Competing Products and Services and/or Competing Business). (CNA § 4) (emphasis added).

Due to the conjunction "or," the CNA functionally precludes Iorio not just from working in the solid waste disposal industry as a salesperson but, as written, precludes Iorio from working as a salesperson in general. *Id.* Because restrictions must "not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee[,]" the restriction that Iorio may not provide a service for any other entity that is the same as or similar in function or purpose to the service she provided to WCRI is unreasonable. Tex. Bus. & Com. Code § 15.50. Iorio was a sales representative; thus, she provided WCRI with a service: sales. Precluding Iorio from providing a sales service in general, even outside of the solid waste industry, would not serve to protect WCRI's confidential information or any competitive advantage that information provides to WCRI. In addition, Iorio cannot be precluded from working for a competitor in general

or in the waste industry as a whole. If WCRI's confidential information or goodwill cannot be used to Iorio's benefit or WCRI's detriment, the Court cannot see how precluding Iorio from working in a sales capacity in general, for a competitor in general, or in the waste industry in its entirety would protect WCRI's business interests. A combination of these restrictions may be permissible; however, as the restriction on Iorio's post-employment activities is currently written, it is unreasonable.

Lastly, "a covenant not to compete that extends to clients with whom a salesman had no dealings during his employment is unenforceable." *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 298 (Tex. App. 2004) (looking to the covenants to determine if they extend beyond the customer with which the salesperson had dealings); *see also Accruent*, 2018 WL 297614, *5 (considering that a former employee's post-employment restrictions cannot extend to clients with whom the employee never had a relationship if the employer's interest in the noncompetition is derived from the former employee's relationships with the customers).

WCRI suggests that it does not interpret the nonsolicitation agreement as extending beyond the "clients with whom Iorio actually worked." (Def.'s Br. at 25.) In part, the Court disagrees with WCRI's interpretation. The nonsolicitation provision extends to those customers whom Iorio "supervised others who called on" and "received Confidential Information about" in the last two years of her employment. Because these terms may reach beyond those customers with whom Iorio actually had dealings, it is greater in scope than necessary to protect WCRI's business interests, which in large part are its customer relationships. (Hr'g Tr. at 215:20-25; 216:8-21.)

5

Whether Iorio is Likely to Succeed on the Merits of the Tortious Interference Claim

Iorio argues that WCRI must be immediately enjoined from continuing to tortiously interfere with her prospective employment opportunity with Liberty. (Pl.'s Mem. at 12.) Iorio also uses the tortious interference claim as her basis for irreparable harm. WCRI contends that Iorio cannot establish a likelihood of success on the merits of a tortious interference claim because she consented to every action taken by WCRI to assert its rights under the CNA. (Def.'s Mem. at 1, 7; Def.'s Br. at 29.) Specifically, WCRI states that Iorio agreed to the Notice provision of the CNA, which allows WCRI to give notice to any party of the existence of the CNA and WCRI's opinion of its applicability, all of which negate the intent element of a tortious interference claim. (Def.'s Mem. at 7.)

The elements of a claim for intentional interference with prospective contractual relations are "'(1) the existence of a business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff.'" *Avilla v. Newport Grand Jai Alai LLC*, 935 A.2d 91, 98 (R.I. 2007) (quoting *L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202, 207 (R.I. 1997)).[10] Further, this claim requires a "showing [of] an 'intentional and improper' act of interference, not merely an intentional act of interference."[11] *Id.*

[10] In the instant case, there is no dispute that (1) an expected business relationship existed between Iorio and Liberty, (2) WCRI knew about that expected business relationship because Vinagro Sr. wrote to WCRI providing notice of the offer of employment made to Iorio, (3) WCRI's interference with Iorio's expected employment with Liberty caused her to not be employed by Liberty, and (4) because Iorio was not employed by Liberty, she remains unemployed, causing her alleged damages.

[11] "In making this determination, we consider '(1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interest with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of the social interests in protecting freedom of action of the

(quoting Restatement (Second) *Torts* § 766B, cmt. d at 22 (1979)). There must "be something 'illegal' about the means employed." *Id.* at 99 (quoting *Tom's Foods v. Carn*, 896 So.2d 443, 458 (Ala. 2004)). Otherwise, a "bona fide claim" may be properly asserted.[12] *Belliveau Building Corp.*, 763 A.2d at 629 (quoting Restatement (Second) *Torts* § 773 at 52). That is, a "good-faith assertion of a colorable property interest, when properly communicated by appropriate means . . . is privileged and constitutes a defense to a claim of tortious interference with contract" or prospective contractual relations. *Id.* at 629.

Under the terms of the CNA, Iorio agreed to allow WCRI to assert its rights to enforce the CNA, including notifying a party, such as Liberty, of the agreement with Iorio and providing an opinion as to its applicability. The Notice provision states that:

> "[Iorio] acknowledges and agrees that [WCRI] may elect to provide another party notice of this Agreement and an opinion about its applicability. While [Iorio] may reserve the right to also communicate his or her disagreement with such an opinion if [Iorio] so disagrees, [Iorio] recognizes [WCRI's] legitimate business interest in expressing its opinion and consents to it doing so if it believes such is necessary. [Iorio] agrees that . . . she will not assert any claim that such conduct is legally actionable interference or otherwise impermissible regardless of whether or not this Agreement is later found to be enforceable in whole or in part." (CNA § 19.)

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actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship.'" *Avilla*, 935 A.2d at 98 (quoting *Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 628 n.3 (R.I. 2000)).

[12] A bona fide claim is:

> "'One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another *does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.*'" *Id.* (quoting Restatement (Second) *Torts* § 773 at 52) (emphasis in original).

In response to learning about Liberty's offer to Iorio, WCRI issued Iorio letters asserting WCRI's intent to protect its interest under the CNA by taking legal action if Iorio were to accept the offer of employment with Liberty. (Def.'s Exs. 18, 32.) There was no evidence presented that WCRI's assertion was improper, unlawful, or anything other than a bona fide claim. Rather, WCRI did exactly what Iorio agreed it could do, notify Liberty and Iorio of the agreement and WCRI's opinion of its applicability. As a result, Iorio has not demonstrated a likelihood of success on the tortious interference claim.

B

Irreparable Harm

"The moving party seeking a preliminary injunction must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." *Fund for Community Progress*, 695 A.2d at 521. Generally, "a complaint relating to lost income is, in its essence, a claim for money damages. It is axiomatic in equity law that a claim for monetary damages will ordinarily not invite injunctive relief, as there is an adequate remedy at law." *In re State Employees' Unions*, 587 A.2d 919, 926 (R.I. 1991) (claim of loss of ten days' pay is compensable in money damages and, thus, not appropriate for injunctive relief).

At the hearing, Iorio asserted that she has suffered mental anguish from the harassing behavior she endured while employed. (Hr'g Tr. at 114:9-17.) Although the Court recognizes that mental anguish is harm and can certainly be irreparable; the mental anguish is not due to the enforcement of the noncompete but to the harassing behavior Iorio endured while employed and is, thus, not applicable for purposes of the current application for a preliminary injunction.

Iorio argues that her prolonged period of unemployment and whether the Liberty employment opportunity will remain available are also forms of irreparable harm that justify injunctive relief. (Pl.'s Mem. at 12-13.) WCRI asserts that Iorio's harm is not irreparable because it is quantifiable and compensable by money damages. (Def.'s Br. at 31.) Certainly, if the loss of an opportunity with a specific employer could be a basis for irreparable injury due to enforcement of a noncompete, an employer could rarely—if at all—defend an agreement not to compete against a negative injunction. The very purpose of the noncompete is to restrict a former employee's ability to work for a competitor at the former employer's expense. Thus, loss of an employment opportunity with Liberty cannot alone form a basis for irreparable harm.

In addition, harm cannot simply become irreparable because a person sees no end in sight and more so when the irreparability is partially self-inflicted. Iorio argues that her prolonged period of unemployment and not knowing whether the Liberty opportunity would be available in the future is harm that is irreparable. However, Iorio conceded that she has taken no measures to find other employment opportunities. (Hr'g Tr. 115:1-10.)

Irreparable harm does not mean that the damages cannot be adequately measured because the one who had control over the steering wheel chose to allow the wheels to continue to turn. Rather, harm is irreparable where making a person whole cannot be adequately measured. *See Fund for Community Progress*, 695 A.2d at 521. For example, a loss of goodwill is irreparable because it is difficult, if not impossible, to quantify how much damage was done to a company's reputation and how much it will take to change the consumer's mind and win back the consumer's confidence.

Iorio asserts that the basis for her irreparable injury is the tortious interference WCRI has imposed on her by blocking her employment opportunity with Liberty in an industry where she

has worked since 1987. Iorio quotes *L.A. Ray Realty* for the proposition that: "[D]amages for interference with prospective relations include '(1) the pecuniary loss of the benefits of the prospective relation and (2) consequential losses for which the interference is a legal cause.'" (Pl.'s Mem. at 13 (quoting *L.A. Ray Realty*, 698 A.2d at 207).) However, pecuniary and consequential losses are compensable with money damages and, thus, do not form the basis of irreparable harm. *See In re State Employees' Unions*, 587 A.2d at 926.

Loss of an employment opportunity with Liberty, or rather, "forcing [her] to sit out of the profession in which she has worked since 1987[,]" equates to a loss of income for Iorio and, if improperly withheld, can be compensated with money. (Pl.'s Mem. at 12.) The Court is sympathetic that the CNA has forced Iorio to sit out as a salesperson in an industry where she has spent decades. However, her loss of income is quantifiable, and as a claim for money damages, there is an adequate remedy at law. Thus, Iorio has not demonstrated she will suffer irreparable harm in the absence of a preliminary injunction.

C

Balance of the Hardships

The movant must establish that the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor. The trial justice must "consider the equities of the case by examining the hardship to the moving party if the injunction is denied, [and] the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Community Progress*, 695 A.2d at 521. Noncompete provisions are designed to protect the legitimate business interests of an employer; thus, the hardship to WCRI's legitimate business interests created by granting an injunction must be balanced with the hardship to Iorio if the injunction is denied.

Iorio argues that in balancing the equities, she would suffer grave harm compared to WCRI because she is being refrained from working in the only profession and industry that she has worked in over thirty years, and the pandemic has made employment opportunities scarce. In addition, Iorio asserts that because she was demoted, harassed, and terminated, under Texas law, "equity may deny enforcement of the covenant if the employer acts arbitrarily and unreasonably in discharging the employee." (Pl.'s Mem. at 14 (quoting *Security Services, Inc. v. Priest*, 507 S.W.2d 592, 595 (Tex. App. 1974)).)

WCRI contends that its legitimate business interests weigh in favor of enforcing the covenants and that its harm is imminent and irreparable because Iorio retained and shared information with a competitor concerning the identities of WCRI's customers, services provided to them, and prices. (Def.'s Opp'n at 10-11; Def.'s Br. at 32-33.) WCRI asserts that the hardship to its business interests is actual because Iorio has already shared confidential information with Liberty, which resulted in loss of business, and it is at risk of further harm to its customer relationships and compromise to its confidential information. (Def.'s Opp'n at 11.) WCRI also maintains that Iorio was not terminated from her employment, and the public interest weighs in favor of denying her relief. (Def.'s Br. at 34.)

In *Security Services, Inc.*, the court determined that the employer's requested preliminary injunction was rightfully denied because the trial court could have inferred that the employer took advantage of its contractual right to terminate at-will, used the employee to attract the customers of the employee's former employer, and after obtaining the benefit from the employee's contacts with those customers, discharged him without reasonable cause after a short period of employment. *Security Services, Inc.*, 507 S.W.2d at 595. Thus, the hardship to the employee by restricting him

for one year from pursuing the only business he knew in the area where he was known was unwarranted. *Id.*

In comparison to *Security Services, Inc.*, however, WCRI did not use Iorio to attract Patriot's customers. Rather, pursuant to an asset purchase, WCRI purchased Patriot's customer information. (Hr'g Tr. 320:7-13.) Although Iorio has spent decades in the waste industry as a sales representative, she also spent approximately fifteen of those years at Patriot prior to it being acquired by WCRI. By offering Iorio employment and Iorio accepting the position, WCRI rightfully utilized Iorio's skills and knowledge as it related to her job functions and duties as a sales representative for Patriot for fifteen years and then for WCRI for a little over two years. WCRI purchased the information that Iorio relied upon to do her job for the past seventeen years of her career. Insofar as that information was confidential, the fact that Iorio was privy to the information while working for Patriot is of no event. Employing Iorio at-will and utilizing the information she retained from Patriot in order to build goodwill for WCRI does not amount to hardship for Iorio, as was found in *Security Services, Inc*.

Importantly, it is a well-established "principle that equitable relief is limited to situations in which the party seeking this remedy presents itself to the court with 'clean hands.'" *Sloat v. City of Newport ex rel. Sitrin*, 19 A.3d 1217, 1222 (R.I. 2011) (internal quotation omitted). During Iorio's employment, she shared confidential information with Vinagro Sr., while he was an owner of the competing company Liberty, including a customer contract, names of customers that were unhappy with WCRI's services, and commission sheets that list customer names, renewal dates, revenue, and commission figures. By conferring with Vinagro Sr. on unhappy customers, as she directly learned of the customers' dissatisfaction from the customers themselves, she used the goodwill that she built with those customers for WCRI and while employed by WCRI to WCRI's

detriment. Vinagro Sr. testified that he works with some of those referred customers to this day. After the termination of her employment with WCRI, Iorio retained WCRI property and confidential information, including the company cell phone, customer account sheets, and the notebooks that contained memos from her conversations with customers. Thus, the Court cannot say that Iorio is seeking relief with clean hands.

Although noncompetition agreements are not to serve as total restraints on competition, they are designed to protect WCRI's legitimate business interests, such as its customer relationships that its employees build on behalf of the company, and are permitted only insofar as they fulfill that task. Allowing Iorio to compete with WCRI using the information that she gained as a result of her employment with WCRI has posed and could further pose a hardship to WCRI's customer relationships.

On the other hand, absent an injunction that would enjoin WCRI from enforcing the noncompete, Iorio would be somewhat limited in her employment prospects in the only position and industry she has worked in for several decades. However, although Liberty presented Iorio with an actual job offer, and other prospects may be speculative or may even seem illusive due to the pandemic, Iorio has not made an effort to find other employment in the waste industry or elsewhere, the evidence of which may have shed some light on the extent of this hardship. In addition, although the hardship currently is that she cannot go work for the one employer she would like to join, contrary to Iorio's argument, Iorio is not being completely restrained from employment with no detriment to WCRI. Indeed, just as the freedom to work and pursue a chosen occupation is a recognized liberty, so too is the freedom to contract. Iorio agreed to the restrictions, albeit under certain expectations, and the hardship must be weighed accordingly.

WCRI quotes *CVS Pharmacy, Inc. v. Lavin*, 384 F. Supp. 3d 227, 238 (D.R.I. 2019), where the court determined that "the public has a strong interest in preserving the integrity of contracts and protecting confidential business information from competitors." *CVS Pharmacy, Inc.*, 384 F. Supp. 3d at 238. Whereas restrictions and protections may encourage innovation, our Supreme Court has determined, however, that overbroad restrictions "destroy free enterprise and the wholesome benefits which fair and honest competition creates." *Rego Displays, Inc. v. Fournier*, 119 R.I. 469, 477, 379 A.2d 1098, 1103 (1977) (quoting *United Board & Carton Corp. v. Britting*, 164 A.2d 824, 833 (N.J. Super. Ct. Ch. Div. 1959), *aff'd*, 160 A.2d 660 (App. Div. 1960)). Neither party has presented a compelling argument relative to the public interest in denying or granting the requested relief that would tip the scale. As such, balancing the equities does not assist Iorio in her effort to obtain a preliminary injunction.

D

Status Quo

Iorio did not address the status quo element. WCRI argues that the status quo is maintaining the enforceability of the CNA. The status quo is "the last peaceable status prior to the controversy." *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977). As is evident from Iorio coming to the Court to declare the CNA unenforceable, the last peaceable status is the CNA in its effective state. Because the requested relief would disrupt, rather than maintain, the status quo, Iorio has not demonstrated to the Court that this element favors an injunction.

Furthermore, an injunction that would render the CNA unenforceable, as requested in the Declaratory Judgment Count, would be akin to granting Iorio the ultimate relief sought. Our Supreme Court has expressed its "disfavor [of] preliminary relief that is essentially identical to the

ultimate relief sought[.]" *King v. Grand Chapter of Rhode Island Order of Eastern Star*, 919 A.2d 991, 1001 (R.I. 2007).

IV

Conclusion

Although Iorio has demonstrated a likelihood of success on the merits of her claims that WCRI breached the employment contract and that the restrictions are unreasonable in terms of the breadth of time and scope of activities, she has not demonstrated that the other factors—notably, irreparable harm—favor granting the requested relief. Based on the foregoing, the Court denies Iorio's application for a preliminary injunction.

However, the Court is cognizant of the rights at stake if the CNA is ultimately held to be unenforceable or unreasonable. Rule 42(b) of the Superior Court Rules of Civil Procedure allows this Court, "in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any claim [or number of claims] . . . or of any separate issue . . . or issues." The Court finds that it would serve all of the stated purposes of the rule to order a separate and expedited schedule for trial on Iorio's declaratory judgment claim.

Counsel shall prepare an appropriate order for entry. In addition, counsel shall meet and confer on a scheduling order that is consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Antonietta Iorio v. Waste Connections of Rhode Island, Inc.**
CASE NO:	**PC-2021-01558**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 16, 2021**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**William M. Dolan, Esq.** **William K. Wray, Jr., Esq.**
For Defendant:	**Mark W. Freel, Esq.** **David M. Gregory, Esq.**