

Affirm and Opinion Filed October 15, 2021



**In the
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-21-00166-CV

**PAUL BRADLEY “BRAD” JOWELL, Appellant
V.
BIOTE MEDICAL, LLC, Appellee**

**On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-18668**

MEMORANDUM OPINION

Before Justices Osborne, Reichel, and Carlyle
Opinion by Justice Carlyle

This is an accelerated interlocutory appeal of the trial court’s order granting a temporary injunction against appellant Paul Bradley “Brad” Jowell, a former employee of appellee BioTE Medical, LLC. Mr. Jowell contends the temporary injunction should be dissolved because BioTE failed to satisfy the requirements for injunctive relief and the injunction is overbroad. We reverse the temporary injunction order in part and otherwise affirm the order in this memorandum opinion.

See TEX. R. APP. P. 47.4.

Background

BioTE markets and licenses hormone therapy products to physicians and clinics and provides its licensees with training and support, including access to its online “dosing site.” The licensees use BioTE’s program to prescribe custom-compounded hormone “pellets,” which are inserted into patients’ skin. BioTE’s contracted physicians and clinics are “serviced” by BioTE’s “physician liaisons,” who are independent contractors paid commissions and bonuses based on the amount of business generated.

In 2013, Mr. Jowell became a BioTE physician liaison. At that time, he signed BioTE’s “Independent Contractor Agreement,” which, among other things, defined BioTE’s “Confidential Information” and required him to “hold and safeguard” that information during and subsequent to that agreement.¹

On October 14, 2017, Mr. Jowell and BioTE executed a “Phantom Equity Rights Grant Notice and Award Agreement” (the PEA), which provided that Mr. Jowell “shall earn up to two percent (2%) in the aggregate of Net Sales Proceeds of

¹ The Independent Contractor Agreement defined “Confidential Information” as:

Information that relates to trade secrets, business strategies, pellet dosing, customers and prospects, as well as lists or information concerning customers or prospects, promotional and marketing activities or strategies, and financial information, in whole or in part, as well as information concerning the Company’s sales, sales volume, sales methods, sales proposals, customers and prospective customers, identity of patients and prospective patients, identity of prospective physicians or physician groups that could be potential licensees of new Company Licensee Offices, the Company’s sources of supply, the Company’s computer programs, system documentation, special hardware, product hardware, related software development, the Company’s manuals, formulae, processes, methods, machines, compositions, ideas, improvements, inventions or other confidential or proprietary information belonging to the Company or relating to the Company’s affairs.

a Change in Control payable to the Company or the Members of the Company upon such Change of Control . . . subject to the terms and conditions set forth herein.” If the PEA’s requirements were met, the phantom equity was to vest quarterly during the two years following a Change of Control, which was defined to include “the sale, exchange or other disposition of (whether by operation of law or otherwise), or the financing or refinancing of . . . all or substantially all (no less than seventy five percent (75%) . . .) of the Company’s assets.” The PEA also provided that upon a “Separation from Service” that is not “without Cause or by Grantee for a Good Reason” as defined in the PEA, Mr. Jowell’s phantom equity rights “will thereby be cancelled.”

Additionally, the PEA contained a confidentiality provision² and stated that Mr. Jowell agreed to restrictions on competition and solicitation “[i]n consideration for the mutual promises and undertakings in this Award Agreement and the specialized knowledge of and access to Confidential Information the Company will continue to develop and/or that Grantee will newly receive from the Company during and after the period of this Award Agreement.”³

² The PEA’s confidentiality provision required that Mr. Jowell not “misappropriate or disclose or make available to anyone for use” any of BioTE’s “Confidential Information,” “whether or not developed by Grantee,” at any time without prior written consent. The PEA’s definition of “Confidential Information” was identical to that in the Independent Contractor Agreement.

³ The PEA restricted Mr. Jowell from (1) engaging directly or indirectly in any “Competing Business” for twenty-four months following termination of the PEA for any reason; (2) engaging in direct or indirect solicitation or attempted inducement of any BioTE employees or agents for eighteen months following termination of the PEA for any reason; and (3) engaging in any direct or indirect solicitation, bid or performance of services for, sale of goods or products to, or any business with any “then current patients of

Less than two months after signing the PEA, Mr. Jowell became a “W-2 employee” of BioTE. In early 2019, he became BioTE’s vice president of business development.

Mr. Jowell resigned from BioTE on April 15, 2020. Eight months later, he filed this lawsuit against BioTE, contending he “has been denied the value and promise of his 2% interest, and the company has since attempted to repudiate the vesting of that interest, which was approximately \$6 million based upon the low end of the valuation.” He asserted claims for breach of the PEA, unjust enrichment/quantum meruit, and breach of fiduciary duty/constructive trust. He also requested a declaration that “to the extent Jowell has been accused of breaching a confidentiality agreement, nondisclosure agreement, or non-competition agreement, such breach is immaterial, untimely, or excused.”

BioTE filed a general denial answer and asserted counterclaims for breach of contract, breach of covenant not to compete, tortious interference with contract, and statutory trade-secret misappropriation. BioTE also filed a February 4, 2021 application for temporary and permanent injunctive relief.

any of the Company Group or any Company Licensee Offices” for eighteen months following termination of the PEA for any reason.

The PEA defined “Competing Business” as “[a]ny person, trust, partnership, association, corporation or other enterprise located within the further of (i) the State of Texas; or (ii) one hundred (100) air miles of any Company operated medical offices or any medical offices operated by third-party physicians or physician groups that have been licensed by the Company to provide proprietary hormone replacement therapy and natural bio-identical pellet therapy under and subject to a Management Services and License Agreement with the Company (‘Company Licensee Offices’), which sells or attempts to sell any products or services which are the same as or similar to the products and services sold by the Company through any Company Offices or any Company Licensee Offices.”

In its injunctive relief application, BioTE stated (1) “[s]ometime after April 15, 2020, unbeknownst to BioTE, Jowell joined Evexias Health Solutions,” a BioTE competitor which “through its brand EvexiPEL, offers the same bio-identical hormone replacement pellet therapy as BioTE,” and (2) in his new position, Mr. Jowell is “using the . . . BioTE confidential and proprietary business model, trade secrets, and training ‘know how,’ to the detriment of BioTE for the direct benefit of BioTE’s competitor.” BioTE contended “there are several types of irreparable injury that BioTE will suffer if Jowell is not preliminarily enjoined including, but not limited to: (1) damage BioTE [sic] from the use and disclosure of its confidential, proprietary, and/or trade secret information; (2) the inevitable disclosure of its confidential, proprietary, and/or trade secret information; (3) the misappropriation of its confidential, proprietary, and/or trade secret information; (4) the active solicitation of BioTE’s contracted practitioners; (5) the violation of BioTE’s restrictive covenants, including but not limited to, non-disclosure, non-competition, and non-solicitation; [and] (6) the tortious interference with contracts between BioTE and other contracted practitioners.”

Mr. Jowell’s general denial answer to BioTE’s counterclaims asserted several affirmative defenses, including that the contract provisions BioTE relies on are unenforceable because they “violate public policy” and “lacked consideration or were illusory.”

At the temporary injunction hearing, Mr. Jowell testified that in late 2020, he became national vice president of Farmakeio Outsourcing, a drug-compounding facility. He also “dually represent[s]” Farmakeio Custom Compounding (Farmakeio), a compounding pharmacy that is “one of the suppliers” of EvexiPEL hormone pellets. The managing partner of Farmakeio and Farmakeio Outsourcing is Dan DeNeui, who is also CEO of Evexias Health Solutions.

Mr. Jowell stated that soon after he began working for Farmakeio Outsourcing, he spoke at a 2020 Evexias training seminar on “front office and back office processes,” a topic on which he received training from BioTE. Additionally, in January 2021, he provided “training regarding front office and back office processes for Evexias Health Solutions.” Since October 2020, he has “called on doctors who are contracted with BioTE” and talked with about seven of them “about using pellets from Farmakeio.” He has also accompanied several EvexiPEL “practice development specialists” to sales meetings with practitioners, including a BioTE contracted practitioner. It is his position that “Farmakeio Outsourcing doesn’t compete with BioTE because Farmakeio Outsourcing sells pellets and BioTE doesn’t sell pellets.” Rather, BioTE charges a per-procedure fee and provides its custom pellets to its practitioners at no additional charge to them.

Mr. Jowell signed the PEA because BioTE’s CEO, Gary Donovitz, told him “unequivocally” that BioTE “would be sold by the end of 2018.” Mr. Jowell stated he did not receive any “new” training after signing the PEA or “get any new secrets

of the company.” During his seven years with BioTE, he (1) did not use BioTE’s secured customer database “that often” because he kept his contacts in his cell phone “[m]ost of the time,” and (2) logged into the dosing site “less than ten times,” with the last time being in 2017 or 2018. He also logged into BioTE’s password-protected “main portal” in 2019 and 2020 to “buy product” for his own use. He testified that though he did not otherwise use BioTE’s secured portals, he believes various BioTE employees used his password to access those portals during 2018 and later. When he left BioTE, he did not delete the BioTE contacts in his cell phone.

After Mr. Jowell signed the PEA, Mr. Donovanitz asked him to “run harder than you’ve ever ran for four quarters” to “increase the value of the company.” For the next two years, Mr. Jowell worked seven days a week and BioTE’s revenue “increased a lot,” but the company was not sold. Though BioTE later completed a 2019 recapitalization that Mr. Jowell believes met the PEA’s definition of a “Change of Control,” he has never been paid any amount under the PEA.

Kelly Rogala testified she has been an Evexias practice development specialist since November 2020. She was formerly a BioTE physician liaison and knew Mr. Jowell while at BioTE. She stated that when she meets with practitioners regarding the EvexiPEL method, her solicitation includes “cross solicitation” of Farmakeio products, on which she can earn commissions. In late 2020, at her request, Mr. Jowell accompanied her to several sales meetings with current and former BioTE contracted practitioners. Also, at Mr. Jowell’s request, Ms. Rogala set up a

meeting between Mr. Jowell and a BioTE contracted practitioner to whom she was promoting EvexiPEL. That practitioner later canceled the meeting.

Lisa Mikals testified she is vice president of operations for Evexias Medical Centers. She stated Mr. DeNeui is “involved in” Farmakeio, Farmakeio Outsourcing, Evexias Health Solutions, and EvexiPEL. At his suggestion, she invited Mr. Jowell to speak at a 2021 training webinar on EvexiPEL “front office/back office” procedures. She prepared and distributed a flyer inviting EvexiPEL licensed physicians and their staff members to join the “EvexiPEL 2021 FOBO Monthly Training Call” “as our Executive Vice President Brad Jowell gives us fun and simple ways to answer [front office/back office process] questions.” The flyer did not mention Farmakeio. Ms. Mikals also testified Mr. Jowell has an Evexias.com email address.

Mr. DeNeui testified he was BioTE’s CEO from 2012 to 2014. He owns a majority interest in both Farmakeio and Farmakeio Outsourcing. His wife owns 100 percent of Evexias Health Solutions, which markets “a competing method to the BioTE method of hormone pellet therapy” involving pellets Evexias regards as superior to BioTE’s. Evexias pellets are manufactured by three drug-compounding entities, including the two Farmakeio entities. Evexias’s contracted practitioners can use pellets from any of those three manufacturers. The price of the pellets is built into the per-procedure fees Evexias charges practitioners.

Mr. DeNeui testified that at the time he resigned from BioTE, he was subject to a noncompetition clause. BioTE has sued him “multiple times” for violation of that clause. BioTE’s pending litigation against him and Evexias includes a Texas federal court lawsuit “on Lanham Act and . . . RICO charges,” in which BioTE sought a 2019 preliminary injunction that was denied.

Mr. DeNeui stated that in testimony in other litigation, he has referred to the entities Evexias Health Solutions, Farmakeio, and Farmakeio Outsourcing as “a conglomerate.” The only one of those entities that employs a sales force is Evexias Health Solutions. That sales force is tasked with not only marketing EvexiPEL, but also marketing and soliciting sales for Farmakeio and Farmakeio Outsourcing. He stated that neither Farmakeio’s “pharmacist in charge” nor its pharmacy technicians have Evexias.com email addresses. He does not know whether anyone at Farmakeio other than Mr. Jowell has an Evexias.com email address.

Mr. Donovitz testified that BioTE’s advantage over its competitors is “confidential information about how do you dose and then how do you take care of any side effects or secondary responses,” which “allows the practitioners . . . to create a safety net and that they can feel comfortable using our method, rather than just buying hormones or buying pellets.” BioTE’s dosing site is password-protected.

He stated BioTE’s other confidential and proprietary information includes its business model; customer information database; marketing strategies regarding doctors and patients; system for ensuring updated compliance with government

regulations; financial information regarding BioTE's costs and "the splits that we have or the amount we get paid per procedure"; compensation schedules for liaisons and account managers; and sales strategies and training for liaisons, physicians, and office staff. That information is not given out "until contracts are signed and paid for," and employees are contractually precluded from disclosing it. He testified that though BioTE's provider charges are publicly available, competitors "wouldn't know what goes into that number" through publicly available information. He also stated BioTE does not control the market for hormone pellet therapy. According to Mr. Donovanitz, out of 260,000 providers across the country "in our specialty that we deal with," BioTE currently has about 5,100 contracted practitioners.

Mr. Donovanitz testified that while Mr. Jowell was a physician liaison, he had access to BioTE's secured main portal, through which he could access "all stuff that we created proprietary to BioTE," including the dosing site and its "continued updates." Mr. Jowell's Independent Contractor Agreement terminated when he became a W-2 employee. Mr. Donovanitz stated the PEA's restrictive covenants were designed to protect BioTE's confidential information and goodwill. He testified:

Q. Now, following the execution by Mr. Jowell of the Phantom Equity Agreement, did BioTE provide Mr. Jowell with access to new confidential information?

A. Yes, and not just because of that. I mean, because he had continued on with us in his advanced role, he had—he was in a lot of strategic meetings. He got new prospects. . . . We had new and updated trainings. He . . . had continued access to the [customer] database and everything. The marketing strategies that we were using, the commercials that we

were using. And also the financial information that was shared with him.

Q. . . . If Mr. Jowell hadn't agreed to the terms of the Phantom Equity Agreement, including the restrictive covenants in the Phantom Equity Agreement, would BioTE have allowed him to continue to get confidential information?

A. Yeah. They were not tied together. We had people who, again, didn't sign their agreements and continued on as physician liaisons.

Q. But those people were under other restrictive covenants, weren't they?

A. Correct.

Q. And Mr. Jowell, you relied on his signature and his promise to abide by all the terms in the Phantom Equity Agreement; is that correct?

A. Yes, sir.

Mr. Donovanitz stated that since Mr. Jowell resigned, BioTE has lost sales to EvexiPEL due to Mr. Jowell "using his long-term relationship with BioTE's customers, recruiting those customers to Evexias Health Solutions." Mr. Donovanitz named two such customers whose BioTE procedures have decreased and who are known to be using EvexiPEL. He stated "there's others," but "at this point we don't know all who those are." He cannot quantify the amount of harm Mr. Jowell is causing because he does not yet "know the extent of how many practitioners he's contacted . . . and how many procedures have been converted over." According to Mr. Donovanitz, the financial result to BioTE could be "catastrophic" and "threaten

the whole existence of BioTE” because Mr. Jowell “was the liaison for the largest territory that we have.”

Additionally, Mr. Donovanitz stated Mr. Jowell has disrupted BioTE’s business because BioTE’s vice president of sales “is having to fly here and fly there and undo all this” rather than “getting new practitioners and helping the practitioners that are already contracted.” He testified, “[I]t’s interfered with our contracts and we’ve had to go back and sometimes modify those contracts because of what he’s done. And we have to have all these conversations with our practitioners and so it all goes to a trust issue” He also stated,

[I]t does allow the practitioners to—to then wonder whether they are using an inferior pellet, which they’re not, but it does open the door. And they’re being given the opportunity to use those pellets, which is a violation of our [practitioner] agreement because our dosing site is not set for other people’s pellets. . . . And that’s not going to work in the long run because the patient thinks they’re getting BioTE pellets, but they’re getting somebody else’s pellets. So if there’s a problem, . . . [i]t could be damaging to our brand.

He testified he knows of “multiple” instances in which BioTE practitioners used Farmakeio pellets to treat patients and complications ensued.

In 2018, Mr. Donovanitz tried to sell BioTE to “some venture capital companies,” but “never completed the sale.” He then “decided to do a recap,” which closed in June 2019. He stated Mr. Jowell “lost the phantom equity” granted under the PEA when he left BioTE because no sale of BioTE occurred while he was there and the 2019 recapitalization did not involve an amount that would qualify it as a

Change of Control. According to Mr. Donovanitz, “That [Change of Control] did not occur and so the phantom equity piece goes away.”

On cross-examination, Mr. Donovanitz stated that with regard to “loss of good will,” he is “worried about” BioTE physicians “ceasing to be BioTE physicians” or “under reporting their procedures, or—which damages their contracts; or using [Evexias] pellets with our dosing site, which has implications for the patients, because ultimately, people believe they’re getting BioTE pellets. And that’s happened.” He also testified:

Q. . . . Do you contend that [Mr. Jowell] is disclosing non—or excuse me—disclosing BioTE’s confidential information to non-BioTE physicians?

A. I have no idea what he’s doing to non-BioTE physicians.

Q. Are you asking the Court to prevent [Mr. Jowell] from calling on non-BioTE physicians?

A. No, sir.

....

Q. Is Farmakeio competing with BioTE, in your mind, if it sells anything other than pellets?

....

A. Nutraceuticals and peptides, both of which we both have—

Additionally, Mr. Donovanitz stated BioTE practitioners are required to sign a “Master Sales Agreement” (MSA), which provides for a “termination fee” if a practitioner decides to stop using BioTE but wants to continue providing pellet therapy. The MSA states the termination fee “is intended to be a reasonable forecast of just compensation to Company of liquidated damages.”

The exhibits admitted into evidence at the hearing included, among other things, (1) the PEA; (2) Mr. Jowell's 2013 Independent Contractor Agreement; (3) the 2021 EvexiPEL flyer Ms. Mikals prepared and distributed; (4) a summary of log-in activity for BioTE's secured main portal; and (5) the MSA.

At the hearing's conclusion, the trial court granted the application for temporary injunction. Then, the following exchange occurred:

[COUNSEL FOR MR. JOWELL]: Your Honor, Dr. Donovan testified that they're not seeking to prohibit my client from soliciting non-BioTE doctors. So I just want to make sure the order reflects that he can solicit non-BioTE physicians and practices.

THE COURT: I don't think that was an issue. I think [Counsel for BioTE] acknowledged that. Isn't that right, [Counsel]?

....

[COUNSEL FOR BIOTE]: The short answer is, yes. So long as he's not disclosing BioTE's information and he's not competing with BioTE....

Two weeks later, the trial court signed the March 23, 2021 temporary injunction at issue. In the injunction, the trial court found "there is a substantial likelihood that BioTE will prevail on the merits of its claims in this matter."⁴

Additionally, the temporary injunction states:

BioTE has demonstrated that Jowell has engaged in activities in violation of the [PEA's covenant not to compete], that BioTE will suffer irreparable harm from the continued violation of the Covenant and Jowell's use, disclosure and dissemination of the confidential and proprietary information and trade secrets of BioTE, including confidential information related to BioTE's client contact information and prices. In addition, BioTE will suffer irreparable harm from the

⁴ The record shows trial is currently set for March 28, 2022.

diversion or taking away of business through unfair competition in violation of the contractual covenants in the [PEA], which Jowell himself seeks to enforce in his Plaintiff's Original Petition, for which BioTE has expended substantial time, effort and expense in cultivating and developing. BioTE will also suffer irreparable harm from the damage to its good will that Jowell was compensated to cultivate and is now using and trading upon for the benefit of BioTE's competitor to BioTE's detriment and disadvantage. Because of the uncertain nature of these damages, BioTE has no adequate remedy at law.

The temporary injunction enjoins Mr. Jowell from directly or indirectly committing the following acts:

- (1) using or disclosing BioTE's "Confidential Information"⁵;
- (2) for a period of twenty-four (24) months from the date of this Order, engaging, directly or indirectly, whether as principal or as agent, officer, director, employee, contractor, consultant, shareholder, or otherwise, alone or in association with any other person, corporation or other entity, in any Competing Business.⁶ . . .
- (3) soliciting, counseling, or attempting to induce any employee or agent of BioTE to leave the employment of, or agency with, BioTE;
- (4) soliciting, bidding for, performing any services for, selling goods or products to, or otherwise doing business with, any current certified BioTE practitioners;
- (5) inducing or attempting to induce any client or other business relationship of BioTE's to cease doing business with BioTE or in any

⁵ Unlike the PEA, the temporary injunction defines "Confidential Information" as "without limitation, any and all information related to the Therapy/Method, guidelines for the Therapy/Method program, instructional materials, conversations, negotiations, agreements, draft agreements, Company policies and procedures, arrangements and understandings (whether written or oral), trade secrets, notes, memoranda, data ideas, processes, formulas, patents, programs, computer software and other information of whatever nature in the possession of the Company that is not known or available to members of the general public." The temporary injunction also states that "Therapy Method" means "BioTE's proprietary, pellet-based, non-synthetic, bio-identical hormone treatment technology/method."

⁶ The temporary injunction's definition of "Competing Business" is identical to the PEA's.

way interfering with the relationship between any client or other business relationship of BioTE's; and

(7) [sic] destroying, deleting, altering, or modifying any document, electronic communication, audio or video file, or electronically stored information that is relevant, or otherwise could lead to the discovery of admissible information, regarding the claims make [sic] the basis of this lawsuit.

Standard of review and applicable law

The purpose of a temporary injunction is to preserve the status quo of the subject matter of a suit pending a trial on the merits. *Wimbrey v. WorldVentures Mktg., LLC*, No. 05-19-01520-CV, 2020 WL 7396007, at *2 (Tex. App.—Dallas Dec. 17, 2020, no pet.) (mem. op.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204.

The probable right to relief element does not require the applicant to show that it will prevail at trial, nor does it require the trial court to evaluate the probability that the applicant will prevail at trial. *Young Gi Kim v. Ick Soo Oh*, No. 05-19-00947-CV, 2020 WL 2315854, at *2 (Tex. App.—Dallas May 11, 2020, no pet.) (mem. op.). Rather, it requires the applicant to present enough evidence to raise a bona fide issue as to its right to ultimate relief. *Id.*; see also *Dallas Anesthesiology Assocs. v. Tex. Anesthesia Grp.*, 190 S.W.3d 891, 896–97 (Tex. App.—Dallas 2006, no pet.) (“To

establish a probable right to the relief sought, an applicant is required to allege a cause of action and offer evidence that tends to support the right to recover on the merits.”). A party proves irreparable injury for injunction purposes by proving damages would not adequately compensate the injured party or cannot be measured by any certain proper pecuniary standard. *Young Gi Kim*, 2020 WL 2315854, at *5.

The decision to grant or deny a temporary injunction lies in the sound discretion of the trial court. *E.g.*, *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). A reviewing court should reverse an order granting injunctive relief only if the trial court abused its discretion. *Butnaru*, 84 S.W.3d at 204; *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985) (trial court abuses its discretion when it acts arbitrarily or without reference to any guiding rules or principles). Our abuse-of-discretion review requires that we “view the evidence in the light most favorable to the trial court’s order, indulging every reasonable inference in its favor,” and defer to the trial court’s resolution of conflicting evidence. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.); *see also McGuire-Sobrino v. TX Cannalliance LLC*, No. 05-19-01261-CV, 2020 WL 4581649, at *6 (Tex. App.—Dallas Aug. 10, 2020, no pet.) (mem. op.) (“The trial court has broad discretion in determining whether the pleadings and evidence support a temporary injunction.”).

Analysis

Irreparable harm

In his first two issues, Mr. Jowell asserts the trial court erred by finding BioTE would suffer irreparable harm absent injunctive relief. According to Mr. Jowell, “The TI conclusorily identifies three interests as being potentially irreparably harmed: (1) BioTE’s goodwill (which is the ‘diversion’ of business away from BioTE), (2) its confidential information, and (3) the disclosure of its prices.” He contends BioTE showed no irreparable harm as to any of those interests.

As to goodwill, Mr. Jowell’s arguments are based on his stated premise in his appellate brief that “BioTE admits that its claimed loss of ‘good-will’ is simply a euphemism for the risk that Jowell will ‘divert doctors away’ from BioTE.” He contends (1) BioTE’s “claimed loss of business” is “not concrete,” as BioTE “presented no evidence of even one physician who terminated their agreement”; (2) BioTE cannot claim irreparable harm from the diversion of business because its MSA provides liquidated damages for such a loss; and (3) in BioTE’s ongoing Texas federal lawsuit described in the trial court, a federal judge “already found that BioTE’s alleged lost ‘goodwill’ and loss of sales are compensable with damages.” (citing *BioTE Med., LLC v. Jacobsen*, 406 F. Supp. 3d 575 (E.D. Tex. 2019)).

Generally, goodwill means “[a] business’s reputation, patronage, and other intangible assets that are considered when appraising the business.” *Smith v. Nerium Int’l, LLC*, No. 05-18-00617-CV, 2019 WL 3543583, at *5 (Tex. App.—Dallas Aug. 5, 2019, no pet.) (mem. op.) (quoting BLACK’S LAW DICTIONARY 703 (7th ed. 1999)). The record shows Mr. Donovitz testified the injury to goodwill at issue here

encompasses practitioners “under reporting their procedures, . . . which damages their contracts” or “using [Evexias] pellets with our dosing site, which has implications for the patients, because ultimately, people believe they’re getting BioTE pellets.” He testified as to two examples of each and stated he believes “there’s others” that have not yet been discovered. He stated those incidents have disrupted business, “go[] to a trust issue” with BioTE’s contracted practitioners, and are “damaging to our brand.”

Even assuming without deciding that the MSA’s liquidated damages clause adequately compensates BioTE for “diversion of business,” Mr. Jowell does not explain, and the record does not show, how that clause provides compensation for the other described aspects of BioTE’s claimed injury to goodwill. *See, e.g., Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 228 (Tex. App.—Fort Worth 2009, pet. denied) (“Disruption to a business can be irreparable harm. Moreover, assigning a dollar amount to such intangibles as a company’s loss of clientele, goodwill, marketing techniques, and office stability, among others, is not easy.” (citations omitted)).

Additionally, Mr. Jowell contends BioTE’s “diversion of business” allegation here is “identical” to what the federal judge in *Jacobsen* “specifically ruled was *not* irreparable harm.” According to Mr. Jowell, in that case, BioTE sought an “injunction based upon ‘loss of good-will,’ due to alleged ‘unfair competition’ that

was ‘diverting’ business away from it and to Farmakeio and Evexias—100% identical allegations to those made here.”

Jacobsen’s multiple defendants did not include Mr. Jowell. *See* 406 F. Supp. 3d at 576 n.1. The *Jacobsen* opinion stated “BioTE alleges irreparable harm in the form of lost market share,” but “only cites to testimony that Defendants signed up some of BioTE’s customers.” *Id.* at 584–85. The federal district court found, “BioTE has failed to show that monetary damages are not adequate by way of affidavits, declarations, or any other support, that shows imminent harm that is difficult to quantify.” *Id.* at 585. That court then cited a case with the parenthetical, “Proof of lost market share and lost sales alone are insufficient to establish irreparable harm.” *Id.*

Unlike in *Jacobsen*, the injury-to-goodwill allegations in the case before us go beyond diverting business, as described above. We cannot agree with Mr. Jowell that the denial of injunctive relief in *Jacobsen*—a federal Lanham Act/RICO proceeding involving different parties, allegations, and evidence—is determinative here. On this record, we conclude the trial court did not abuse its discretion by determining the evidence showed a probable, imminent, irreparable injury to BioTE’s goodwill beyond the diversion of business away from BioTE. *See Butnaru*, 84 S.W.3d at 204; *Frequent Flyer Depot*, 281 S.W.3d at 228; *see also Smith*, 2019 WL 3543583, at *15 (where evidence showed company could determine some of its damages directly due to appellants’ effort, but could not determine its damages

caused by “the ripple effect they created,” trial court reasonably concluded temporary injunction gave company more complete and efficient relief than would an attempt to calculate damages after the fact and thus company’s evidence of irreparable injury was sufficient).

As to the two other interests described, Mr. Jowell contends (1) “BioTE had no concern about Jowell disclosing its confidential information to its physicians because they already had it”; (2) Mr. Donovitz testified he “had no evidence that Jowell was disclosing any of BioTE’s confidential information to any doctors, especially non-BioTE physicians”; and (3) “BioTE’s pricing was public information.”

Regardless of whether the evidence shows “disclosures” to practitioners by Mr. Jowell, the harm described in the temporary injunction included Mr. Jowell’s “use” of “the confidential and proprietary information and trade secrets of BioTE, including confidential information related to BioTE’s client contact information and prices.” Mr. Jowell testified he generally kept his BioTE contacts in his phone rather than in the company’s secured database and did not delete those contacts when he left BioTE. He has provided Evexias training on “front office and back office processes,” a topic on which he received training from BioTE. He has “called on doctors who are contracted with BioTE” and talked with them “about using pellets from Farmakeio.” Mr. Donovitz testified that though BioTE’s provider charges are publicly available, competitors “wouldn’t know what goes into that number”

through publicly available information. He stated that due to Mr. Jowell’s activities, at least two BioTE practitioners have decreased their BioTE procedures and are known to be using EvexiPEL. He stated “there’s others,” but “at this point we don’t know all who those are.” According to Mr. Donovanitz, the financial result to BioTE could be “catastrophic” because Mr. Jowell “was the liaison for the largest territory that we have.” Additionally, he stated Mr. Jowell’s activities have “interfered with our contracts and we’ve had to go back and sometimes modify those contracts because of what he’s done. And we have to have all these conversations with our practitioners and so it all goes to a trust issue”

On this record, we conclude the trial court did not abuse its discretion by determining the evidence showed a probable, imminent, irreparable injury to BioTE from Mr. Jowell’s “use, disclosure, and dissemination” of “confidential information related to BioTE’s client contact information and prices.” *See Butnaru*, 84 S.W.3d at 204; *Sandberg v. STMicroelectronics, Inc.*, 600 S.W.3d 511, 537 (Tex. App.—Dallas 2020, pet. denied) (“Because the evidence showed Sandberg likely retained ST’s confidential information and had used or disclosed it, the trial court could find that ST was facing imminent harm, had suffered an irreparable injury, and had no adequate remedy at law.”).

Probable right of recovery

The Texas Business and Commerce Code provides:

[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains 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. “[W]hen an appeal involves an order on a temporary injunction application based on a covenant not to compete, the ultimate question of whether the covenant is enforceable under section 15.50 of the business and commerce code is not an issue for appellate review.” *Primary Health Physicians, P.A. v. Sarver*, 390 S.W.3d 662, 665 (Tex. App.—Dallas 2012, no pet.). “[T]he only issue before this court is whether the trial court abused its discretion in determining that appellants have a probable right of recovery.” *Correa v. Houston Surgical Assistant Servs., Inc.*, No. 14-12-01050-CV, 2013 WL 3958499, at *5 (Tex. App.—Houston [14th Dist.] July 30, 2013, no pet) (mem. op.).

In his third issue, Mr. Jowell contends the trial court abused its discretion by granting the temporary injunction because the PEA “is not an enforceable agreement under TBCC § 15.50.” According to Mr. Jowell, (1) “BioTE expressly argued and conceded on the record that the PEA is not enforceable because no Change of Control occurred”; (2) the PEA “is 100% illusory” because he “has no rights under the PEA until BioTE decides to allow a Change in Control”; and (3) there is no evidence the PEA was supported by “independent, new consideration.”

In support of his “concession” contention, Mr. Jowell cites BioTE’s January 24, 2021 plea to the jurisdiction in this case. In that plea, BioTE contended Mr. Jowell lacked “standing” for his breach of fiduciary duty claim because he “has never been a member of BioTE.” BioTE asserted, among other things:

12. However, Jowell has no basis to assert membership status. First, Jowell was never entitled to phantom equity in the company because the express condition precedent of a Change of Control never occurred. However, even if Jowell would have been entitled to phantom equity, the Award Agreement expressly states that it does not confer membership rights on the Grantee (i.e. Jowell).

....

16. . . . Jowell has never been a member, regardless of whether he was ever entitled to phantom equity (which Defendant contests).

According to Mr. Jowell, in those two provisions, “BioTE contend[ed] that the PEA is not enforceable by Jowell because (a) all of Jowell’s rights under the PEA are subject to a condition precedent, a ‘Change of Control,’; and (b) no ‘Change of Control’ as defined under the PEA, had occurred.” Mr. Jowell asserts, “The [trial] court must have concluded that a Change of Control had occurred, and that Jowell’s rights thereunder had vested and matured, rendering the PEA executory. This was the only path for the [trial] court to find that the PEA was enforceable”

We disagree with Mr. Jowell’s position. Though the PEA provided that a “Change of Control” was a condition precedent to the vesting of Mr. Jowell’s phantom equity rights, the record does not conclusively demonstrate that a “Change of Control” was a condition precedent to the formation of the PEA itself or that BioTE “argued and conceded” such. Nothing in BioTE’s plea to the jurisdiction is

inconsistent with its position asserted in its answer and elsewhere that because no “Change of Control” occurred, Mr. Jowell’s phantom equity rights never vested and thus no payment was due him.

Next, we address together Mr. Jowell’s contentions that the PEA was illusory and lacked consideration. Mr. Jowell asserts “where an employer has made illusory promises, those are not sufficient consideration for a non-compete.” He argues (1) “BioTE’s CEO admitted that Jowell ‘received no consideration’ for the [PEA], and that the good-will and confidential information that the PEA’s restrictive covenants were in exchange for, referred to goodwill and confidential information that Jowell had already received and cultivated,” and (2) “[n]othing in the PEA obligate[d] BioTE to do anything for Jowell.”

“A trial court does not abuse its discretion when it bases its decision on conflicting evidence and there is evidence in the record that reasonably supports the decision.” *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 709 (Tex. App.—Dallas 2010, no pet.). Here, the PEA stated Mr. Jowell agreed to restrictions on competition and solicitation “[i]n consideration for the mutual promises and undertakings in this Award Agreement and the specialized knowledge of and access to Confidential Information the Company will continue to develop and/or that Grantee will newly receive from the Company during and after the period of this Award Agreement.” Mr. Jowell testified he accessed BioTE portals at least several times after signing the PEA. Additionally, Mr. Donovan stated:

Q. Now, following the execution by Mr. Jowell of the Phantom Equity Agreement, did BioTE provide Mr. Jowell with access to new confidential information?

A. Yes, and not just because of that. I mean, because he had continued on with us in his advanced role, he had—he was in a lot of strategic meetings. He got new prospects. . . . We had new and updated trainings. He . . . had continued access to the [customer] database and everything. The marketing strategies that we were using, the commercials that we were using. And also the financial information that was shared with him.

Though Mr. Donovan testified BioTE would have “allowed [Mr. Jowell] to continue to get confidential information” even without agreeing to the PEA’s provisions, he also stated those who did so “were under other restrictive covenants” and BioTE “relied on [Mr. Jowell’s] signature and his promise to abide by all the terms in the [PEA].”

On this record, we conclude the trial court did not abuse its discretion by determining BioTE had a probable right to the relief sought. *See Butnaru*, 84 S.W.3d at 204; *see also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 650 (Tex. 2006) (agreement not to disclose confidential information, though illusory when made, was enforceable once employer provided confidential information to employee); *Correa*, 2013 WL 3958499, at *8 (trial court did not abuse discretion by determining employer gave confidential information as consideration for employee’s promise not to compete, where some evidence showed information was confidential and was shared with employee).

Overbroad terms

An injunction should be broad enough to prevent a repetition of the evil sought to be corrected, but not so broad as to enjoin a defendant from lawful activities. *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 384 (Tex. App.—Dallas 2009, no pet.) “Where a party’s acts are divisible, and some acts are permissible and some are not, an injunction should not issue to restrain actions that are legal or about which there is no asserted complaint.” *Id.* (citing *Hellenic Inv., Inc. v. Kroger Co.*, 766 S.W.2d 861, 867 (Tex. App.—Houston [1st Dist.] 1989, no pet.)). Thus, the entry of an injunction that enjoins lawful as well as unlawful acts may constitute an abuse of discretion. *See Computek Comput. & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217, 221 (Tex. App.—Dallas 2005, no pet.).

In his fourth and fifth issues, Mr. Jowell asserts the trial court abused its discretion by (1) “extending the injunction for 24 months from the date of the Order, as opposed to 24 months from the date of termination of the PEA, which is the period provided for in the contract,” and (2) “enjoin[ing] activities that are unnecessary to protect BioTE’s goodwill or information.” Mr. Jowell argues “it is obvious that the PEA terminated around March 31, 2019, at the latest” because BioTE “abandoned seeking a Change of Control” at that time, which constituted a “repudiation” of the PEA. Thus, according to Mr. Jowell, “[e]ven if one were to toll the 96 days that Jowell worked for Farmakeio,” the temporary injunction “should go no further than July 5, 2021.” Additionally, he contends the temporary injunction improperly restricts him from “soliciting BioTE’s physicians for non-competing products” and

“soliciting non-BioTE physicians, which Dr. Donovitz expressly testified BioTE was not seeking to restrain Jowell from doing.”

Though the temporary injunction’s provision number (2) restrains Mr. Jowell from “engaging . . . in any Competing Business” for “a period of twenty-four (24) months from the date of this Order,” the non-solicitation restraints in provisions (3) and (4) contain no time restriction. BioTE does not explain, and the record does not show, why the temporary injunction’s non-compete and non-solicitation provisions should extend longer than the corresponding PEA restrictions, which run, respectively, for twenty-four-month and eighteen-month time periods from “termination of the [PEA] for any reason.” *See Wimbrely*, 2020 WL 7396007, at *4 (concluding injunction based solely on parties’ contract could not grant more relief than contract permitted). That said, we disagree with Mr. Jowell’s position that “the PEA terminated around March 31, 2019, at the latest.” Mr. Jowell did not assert this “abandonment or repudiation” argument in the trial court. Moreover, he cites no evidence, and we have found none, conclusively demonstrating BioTE abandoned or repudiated the PEA.

The PEA stated Mr. Jowell’s phantom equity rights would be “cancelled” upon a “Separation from Service” that did not meet certain criteria. Mr. Donovitz testified Mr. Jowell “lost the phantom equity” granted under the PEA when he left BioTE because “[a Change of Control] did not occur and so the phantom equity piece goes away.” On this record, we conclude the temporary injunction’s

provision number (2) should be limited to a time period of twenty-four months from April 15, 2020, and provisions (3) and (4) should run for eighteen months from that date.

As to the acts enjoined, the temporary injunction's provision number (4) restrains Mr. Jowell from "soliciting, bidding for, performing any services for, selling goods or products to, or otherwise doing business with, any current certified BioTE practitioners." Though that provision mirrors the PEA's solicitation restriction, we agree with Mr. Jowell that it is broader than necessary to prevent BioTE's complained-of harm. The "competing" Farmakeio products BioTE described in the trial court are pellets, nutraceuticals, and peptides. Also, Evexias markets a competing pellet therapy program. The record does not show how solicitation of BioTE practitioners regarding products or services that are not the same as or similar to those competing products and services would harm BioTE.

Additionally, Mr. Jowell asserts that the temporary injunction's provision number (2) restrains him from "calling on . . . anyone within 100 miles of any BioTE physician anywhere around the world" and thus restricts him "from soliciting non-BioTE physicians." Though that provision also mirrors the PEA, counsel for BioTE stated at the hearing that "[s]o long as [Mr. Jowell's] not disclosing BioTE's information and he's not competing with BioTE," he can "solicit non-BioTE physicians and practices." BioTE cites no evidence, and we have found none, demonstrating BioTE would be harmed by Mr. Jowell soliciting non-BioTE

practitioners as to non-competing products and services that are not the same as or similar to BioTE's. On this record, we conclude the temporary injunction is overbroad to the extent it restricts Mr. Jowell from soliciting BioTE practitioners or non-BioTE practitioners regarding non-competing products and services that are not the same as or similar to BioTE's pellets, pellet therapy program, nutraceuticals, or peptides.

Rule 683 compliance

Texas Rule of Civil Procedure 683 requires every order granting a temporary injunction to state the reasons for its issuance, be specific in terms, and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. TEX. R. CIV. P. 683. The purpose of the rule is to ensure that parties are adequately informed of the acts they are enjoined from doing and why they are enjoined from doing them. *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744 (Tex. App.—Dallas 2011, no pet.). “An injunction must be as definite, clear, and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing.” *Comptek*, 156 S.W.3d at 220–21.

In his sixth issue, Mr. Jowell contends the temporary injunction violates rule 683 because it (1) does not meet section 15.50's requirements; (2) does not set forth “actually threatened imminent harm” and “show why the harm is irreparable”;

(3) “does not list the people Jowell may not solicit for business or why,” but instead “relates to an undefined 100-mile circumference around any BioTE physician anywhere in the country”; (4) “does not list or sufficiently identify the confidential information that Jowell may not disclose,” because it uses the term “is not limited to”; (5) “does not sufficiently list or describe what constitutes a ‘Competing Business’ because the term “same as or similar to” is “so imprecise and subject to interpretation that it fails to clearly state what activities it prohibits”; and (6) “fails to specifically and in reasonable detail identify ‘the act or acts to be restrained’” because the term “working with” has “no real meaning or limitation in scope.” The first three of those complaints have already been addressed in our analysis above. We address the remaining three in turn.

Unlike the PEA, the temporary injunction defines “Confidential Information” as including a specified list of items “without limitation.” We agree with Mr. Jowell that the open-ended term “without limitation” renders this definition impermissibly vague. *See Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254, 266 (Tex. App.—Houston [14th Dist.] 2017, no pet.). That term should be deleted.

As to the remaining complained-of provisions, the term “working with” does not appear in the temporary injunction. The term “same as or similar to,” which is used to define “Competing Business,” appeared in both the Independent Contractor Agreement and the PEA. The record does not show its meaning was questioned or challenged in those agreements. Moreover, that term “already ha[s] been applied

routinely by courts without difficulty in different areas of the law.” *City of Houston v. Houston Prof’l Fire Fighters’ Ass’n, Local 341*, 626 S.W.3d 1, 18 (Tex. App.—Houston [14th Dist.] 2021, pet. filed) (concluding statutory term “same or similar” is “not too subjective and amorphous” as to preclude meaningful application). Mr. Jowell cites no authority, and we have found none, to support his position that it is “so imprecise and subject to interpretation” that it violates rule 683.

“Rulings on numerous objections”

In his seventh issue, Mr. Jowell contends “[t]he [trial] court’s rulings on numerous objections were erroneous and constituted harmful error that materially affected the record and basis for its decision.” Instead of describing those alleged errors and providing argument and authority in his appellate brief, Mr. Jowell cites to a thirteen-page table in his brief’s appendix. The table contains no citations to authority and does not comply with appellate form requirements. *See* TEX. R. APP. P. 38.1(i), 9.4(i)(2)(B). We conclude Mr. Jowell’s seventh issue presents nothing for this Court’s review.

* * *

We modify the temporary injunction to (i) state that the restrictions in provision number (2) are for a period of twenty-four months from April 15, 2020, and the restrictions in provisions (3) and (4) are for a period of eighteen months from that same date; (ii) delete the term “without limitation” from the definition of “Confidential Information”; and (iii) add a provision that, notwithstanding the

language in any other provision, Mr. Jowell is not restrained from soliciting BioTE practitioners and non-BioTE practitioners in any location regarding non-competing products and services that are not the same as or similar to BioTE's pellets, Therapy/Method program, nutraceuticals, or peptides.

We affirm the temporary injunction as modified.

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/Cory L. Carlyle/

CORY L. CARLYLE

JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

PAUL BRADLEY “BRAD”
JOWELL, Appellant

No. 05-21-00166-CV V.

BIOTE MEDICAL, LLC, Appellee

On Appeal from the 192nd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-20-18668.
Opinion delivered by Justice Carlyle.
Justices Osborne and Reichel
participating.

In accordance with this Court’s opinion of this date, we **MODIFY** the trial court’s temporary injunction order to (i) state that the restrictions in provision number (2) are for a period of twenty-four months from April 15, 2020, and the restrictions in provisions (3) and (4) are for a period of eighteen months from that same date; (ii) delete the term “without limitation” from the definition of “Confidential Information”; and (iii) add a provision that, notwithstanding the language in any other provision, appellant Paul Bradley “Brad” Jowell is not restrained from soliciting BioTE practitioners and non-BioTE practitioners in any location regarding non-competing products and services that are not the same as or similar to BioTE’s pellets, Therapy/Method program, nutraceuticals, or peptides.

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 15th day of October, 2021.