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United States District Court, N.D. New York.

ADECCO USA, INC., ADO STAFFING, INC., Plaintiffs,
v.
STAFFWORKS, INC., ANITA VITULLO, KAREN WALSER, VICKI RODABAUGH, DEBROAH ROHDE, MAURICA GLORIA, BRIANNA FLINT, TAYLER FRAVEL, KAREN STANDFORD, Defendants.

6:20-CV-744 (MAD/TWD)
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MEMORANDUM-DECISION AND ORDER

Mae A. D'Agostino U.S. District Judge

I. INTRODUCTION

***1** Plaintiffs commenced this action alleging various violations of state and federal laws against Defendants Staffworks, Inc. and Anita Vitullo, and Defendants Karen Walser, Vicki Rodabaugh, Deborah Rohde, Maurica Gloria, Brianna Flint, Tayler Fravel, and Karen Standford (the "Former Employees"). *See* Dkt. No. 1 at 1. The complaint alleges breach of contract, tortious interference with contract, tortious interference with business relationships/prospective economic advantage, actual and threatened trade secret misappropriation under federal and state law, conversion, and trademark infringement and unfair competition under the Lanham Act. *See id.* at ¶¶ 1, 111-161. On July 2, 2020, Plaintiffs filed a motion for a temporary restraining order or preliminary injunction. *See* Dkt. No. 13. The Court denied Plaintiffs' motion for a temporary restraining order and scheduled an evidentiary hearing. *See* Dkt. No. 14. An evidentiary hearing was conducted over the course of three days. *See* Dkt. Nos. 59, 63, 66. For the following reasons, Plaintiffs' motion is granted in part and denied in part.

II. BACKGROUND

The Former Employees were hired by Plaintiffs at various times, beginning as early as 1996 and as recently as 2019. *See* Dkt. No. 1 at ¶¶ 25-32. Prior to beginning their employment at Adecco, each of the Former Employees signed an employment agreement which contained non-compete, non-solicitation, and non-disclosure agreements. *See id.* at ¶¶ 36-45. On May 12, 2020, Defendants Walser and Rodabaugh were told that their positions at Adecco were being eliminated as the result of a corporate reorganization and that they were being terminated. *See* Dkt. No. 68 at 58, 226. While Defendant Walser was cleaning out her office on May 13, 2020, she drilled a hole into two filing cabinets in her office. *See* Dkt. No. 1 at ¶ 58. Plaintiffs allege that Defendant Walser removed personnel files and other confidential information. *See id.* Defendant Walser claims that she removed only personal effects and her own personnel records. *See* Dkt. No. 68-1 at 205.

On May 29, 2020, Defendant Standford was furloughed. Although told of their termination in May, Defendants Walser's and Rodabaugh's last day was June 1, 2020. *See* Dkt. No. 1 at ¶ 60. On the afternoon of Defendant Walser's last day, she forwarded to herself and her husband an email with multiple documents containing Adecco client and business information. *See id.* at ¶¶ 61-62. The same day, Defendants Rodabaugh and Walser executed severance agreements with Adecco. *See id.* at ¶ 64. Two days later, Defendant Walser revoked her severance agreement. *See id.*

Although Defendant Walser was still employed by Adecco on June 1, 2020, she began working for Staffworks that same day. *See* Dkt. No. 68-1 at 161. Within a week of hiring Defendant Walser, Staffworks hired Defendants Rodabaugh and Standford. *See* Dkt. No. 1 at ¶ 67. On June 9, 2020, Defendants Gloria and Flint resigned effective immediately and soon thereafter began working for Staffworks. *See id.* at ¶¶ 71-72. Defendant Rohde resigned effective immediately on June 12, 2020, and began working for Staffworks on June 15, 2020. *See* Dkt. No. 68-2 at 170. Defendant Fravel was interviewed by Staffworks on June 17, 2020, and got an offer of employment on June 19, 2020. *See id.* at 184. However, Defendant Fravel did not resign from Adecco until June 24, 2020, when her maternity leave expired. *See id.*

***2** Plaintiffs allege that there were a variety of communications between the Former Employees and Adecco's clients and employees. These communications serve as the basis for a number of Plaintiffs' causes of action.

III. DISCUSSION

A. Standard of Review

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005) (citation omitted). "A decision to grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 78 (2d Cir. 1994) (citation omitted).

A party seeking a preliminary injunction must establish " 'a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party.' " *Allied Office Supplies, Inc. v. Lewandowski*, 261 F. Supp. 2d 107, 108 (D. Conn. 2003) (quoting *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003)).

The Supreme Court has observed that the decision of whether to award preliminary injunctive relief is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Consonant with this view, the Second Circuit has held that a district court may consider hearsay evidence when deciding whether to grant preliminary injunctive relief. *See* *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010). Therefore, the strict standards for affidavits under the Federal Rules of Evidence and in support of summary judgment under Rule 56(c)(4) of the Federal Rules of Civil Procedure requiring that an affidavit be made on personal knowledge are not expressly applicable to affidavits in support of preliminary injunctions. *See* *Mullins v. City of New York*, 634 F. Supp. 2d 373, 384 (S.D.N.Y. 2009) (citations omitted). Nevertheless, courts have wide discretion to assess the affidavit's credibility and generally consider affidavits made on information and belief to be insufficient for a preliminary injunction. *See* 11A Charles Alan Wright et al., Federal Practice and Procedure § 2949 (2d ed. 1995); *Mullins*, 634 F. Supp. 2d at 373, 385, 390 n.115 (declining to fully credit the "defendants' hearsay affidavit" and noting that while the court "may consider hearsay evidence in a preliminary injunction hearing ..., a court may weigh evidence based on whether such evidence would be admissible under the Federal Rules of Evidence").

Even if the plaintiff demonstrates irreparable harm and a likelihood of success on the merits the remedy of preliminary injunctive relief may still be withheld if equity so requires. "An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) (citation omitted).

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B. Irreparable Harm

***3** Since "[i]rreparable harm is the single most important prerequisite for the issuance of a preliminary injunction[,] ... the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (quotations and citations omitted); *see also JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 Fed. Appx. 31, 33 (2d Cir. 2015) (holding that since irreparable harm "is the *sine qua non* for preliminary injunctive relief[,] ... the moving party must first demonstrate that irreparable harm would be 'likely' in the absence of a preliminary injunction before the other requirements for the issuance of a preliminary injunction will be considered") (quotations and citations omitted); *Coscarelli v. ESquared Hosp. LLC*, 364 F. Supp. 3d 207, 221 (S.D.N.Y. 2019) ("[I]f a party fails to show irreparable harm, a court need not even address the remaining elements" of the preliminary injunction standard).

"Irreparable harm is defined as certain and imminent harm for which a monetary award does not adequately compensate[,] ... [and] exists where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Allstate Ins. Co. v. Harvey Family Chiropractic*, 677 Fed. Appx. 716, 718 (2d Cir. 2017) (quotations and citations omitted); *see also WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012) (holding that irreparable harm is "harm to the plaintiff's legal interests that could not be remedied after a final adjudication").

"Harm may be irreparable where the loss is difficult to replace or measure, or where plaintiffs should not be expected to suffer the loss." *WPIX*, 691 F.3d at 285; *accord Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). Thus, unless the movant demonstrates "an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages[,] ... a motion for a preliminary injunction should be denied." *Rodriguez*, 175 F.3d at 234 (quotations and citation omitted); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (holding that before a court may grant injunctive relief, the plaintiff must demonstrate, among other things, "that remedies available at law, such as monetary damages, are inadequate to compensate for [its] injury").

In the trade secret and loss of business context, courts have found that irreparable harm can result where the business relationship would otherwise have produced an indeterminate amount of business in years to come. *See Free Country Ltd. v. Drennen*, 235 F. Supp. 3d 559, 568 (S.D.N.Y. 2016) (citing cases). "As the Court of Appeals for the Second Circuit has recognized, it is 'very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come.' " *Marsh USA Inc. v. Karasaki*, No. 08-CV-4195, 2008 WL 4778239, *14 (S.D.N.Y. Oct. 30, 2008) (quoting *Ticor Title Ins. Co.*, 173 F.3d at 69). Where there is no allegation concerning an ongoing/indeterminate loss, however, courts regularly find that money damages are sufficient and decline to award injunctive relief. *See id.*; *Liberty Power Corp., LLC v. Katz*, No. 10-CV-1938, 2011 WL 256216, *7 (E.D.N.Y. Jan. 26, 2011) (finding that harm was not irreparable where the plaintiff alleged that the defendant's misappropriation would result in lost contracts with a "finite– albeit large– number of customers"). Furthermore, the Second Circuit has suggested that a provision in an employment contract which concedes that in the event of breach, the non-breaching party will be irreparably harmed, might constitute an admission that the plaintiff has suffered irreparable harm. *See Ticor Title Ins. Co.*, 173 F.3d at 69.

***4** Such provisions exist in some of the employment agreements here. Because Plaintiffs stand to lose client relationships to Defendants if they are not enjoined, the degree to which Plaintiffs will be harmed is not readily determinable. Plaintiffs allege that they have and will continue to suffer loss of business and goodwill with their customers absent an injunction. *See* Dkt. No. 14 at 28-29. Specifically, Plaintiffs argue that courts generally find irreparable harm exists where former employees breach non-compete, non-solicitation, or non-disclosure agreements. *See id.* at 28. Plaintiffs also argued that where there is misappropriation of trade secrets or confidential information, irreparable harm is typically found as well. *See id.*

Defendants, however, argue that because money damages are available, the Court cannot find irreparable harm. *See* Dkt. No. 28 at 20-21. It is true that the damages which Plaintiffs have already suffered are readily determinable and, to some extent, a portion of future damages could be readily determinable as the covenant covers one year, the number of clients are readily ascertainable, and the cost of services are readily available. However, there remains an indeterminate amount of damages for the loss of client relationships that would produce profits for an

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indeterminate amount of time beyond the restricted period for which damages could not be ascertained with any degree of certainty. *See* Veramark Techs. Inc. v. Bouk, 10 F. Supp. 3d 395, 400 (W.D.N.Y. 2014) ("Because it is very difficult to calculate monetary damages in the event of the loss of a client relationship 'that would produce an indeterminate amount of business in years to come,' the violation of an enforceable non-compete constitutes irreparable harm") (quoting *Ticor Title Ins. Co.*, 173 F.3d at 69). A similar harm would flow if Defendants were to solicit employees of Adecco. Therefore, Plaintiffs have successfully demonstrated such irreparable injury as to warrant preliminary injunctive relief.

C. Likelihood of Success on the Merits[1]

1. Breach of Contract

Here, Plaintiff seeks enforcement of non-compete, non-solicitation, and confidentiality/non-disclosure covenants. *See* Dkt. No. 13 at 3; Dkt. No. 14 at 28.

Under New York law, a party asserting a breach of contract claim must allege the following elements: (i) the existence of a contract; (ii) adequate performance of the contract by the plaintiff; (iii) breach by the other party; and (iv) damages suffered as a result of the breach. *See* *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996) (citation omitted); *see also* *Wolff v. Rare Medium, Inc.*, 171 F. Supp. 2d 354, 357-58 (S.D.N.Y. 2001) (citation omitted). "In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issue." *Wolff*, 171 F. Supp. 2d at 358 (citation omitted). "Often, in the context of an application for a preliminary injunction on a restrictive covenant, the evaluations of irreparable harm and likelihood of success are intertwined." *Id.* (citation omitted).

Here, Defendants argue that the restrictive covenants which Plaintiffs seek to enforce are overly broad and that Defendants were released from those covenants when they were either terminated or constructively terminated by Plaintiffs. *See* Dkt. No. 28 at 21-24. Plaintiffs, however, argue that the restrictive covenants are enforceable.[2] *See* Dkt. No. 14 at 16.

a. Restrictive Covenants

***5** "The issue of whether a restrictive covenant not to compete is enforceable by way of an injunction depends in the first place upon whether the covenant is reasonable in time and geographic area." *Ticor Title Ins. Co.*, 173 F.3d at 69 (citing *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307 (1976)). "In this equation, courts must weigh the need to protect the employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood, a result strongly disfavored by public policy in New York." *Id.* (citing *Reed, Roberts Assocs.*, 40 N.Y.2d at 307). " 'A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.' " *Poller v. BioScrip, Inc.*, 974 F. Supp. 2d 204, 215 (S.D.N.Y. 2013) (quoting *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89 (1999)) (emphasis in original). "With respect to the first prong of this reasonableness analysis, an employer's 'legitimate' interests include: (1) the protection of trade secrets; (2) where the employer is exposed to 'special harm' due to the 'unique' nature of an employee's services; or (3) the goodwill of an employer's business." *Id.* (citation omitted).

Defendants argue that the restrictive covenants cannot be enforced because Plaintiffs cannot demonstrate a "continued willingness" to employ the Former Employees. *See* Dkt. No. 28 at 22. A non-compete agreement is unenforceable under New York law where the termination of employment is involuntary and without cause. *See* *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84, 89 (1979); *see also* *Stanacard, LLC v. Rubard, LLC*, No. 12-cv-5176, 2016 WL 462508, *23 (S.D.N.Y. Feb. 3, 2016) (same).

"Enforcing a non-competition provision when the employee has been discharged without cause 'would be "unconscionable" because it would destroy the mutuality of obligation on which a covenant not to compete is based.' " *Arakelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (quoting *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 529-30 (2d Cir. 2006)). This rationale applies with equal force to covenants not to solicit a former employer's clients and employees; solicitation is simply a form of competition. *Id.* (citing *Nisselson v. DeWitt Stern Group, Inc. (In re UFG Int'l)*, 225 B.R. 51, 55-56 (S.D.N.Y. 1998)).

Here, Plaintiffs admit that Defendants Walser and

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Rodabaugh were involuntarily terminated. *See* Dkt. No. 68-2 at 187. The evidence indicates that Defendants Walser and Rodabaugh were terminated without cause. *See* Dkt. No. 68 at 92. Therefore, the non-compete and non-solicitation agreements cannot be enforced against them.[3] *See Arakelian*, 745 F. Supp. 2d at 41 (citing cases). With respect to the remaining Former Employees, Defendants argue that they were constructively discharged such that the restrictive covenants are unenforceable. *See* Dkt. No. 28 at 23.

b. Constructive Discharge

"New York courts have concluded that, when an employment contract is for a specified term, an employer's unjustifiable reduction of an employee's rank or salary, or material change in duties may constitute an involuntary termination and also a breach of the employment agreement which renders restrictive covenants unenforceable." *IDG USA, LLC v. Schupp*, No. 10-CV-75S 2010 WL 3260046, *13 (W.D.N.Y. Aug. 18, 2010) (collecting cases), *vacated on other grounds*, 416 Fed. Appx. 86 (2d Cir. 2011). "In determining whether an employee has been involuntarily terminated, New York courts have employed the constructive discharge test from federal employment discrimination law." *Id.* (citing Morris, 7 N.Y.3d at 621-22 (other citation omitted)).

***6** "An employee is constructively discharged when his employer, rather than discharging him directly, intentionally creates a work atmosphere so intolerable that he is forced to quit involuntarily." *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2d Cir. 2003) (citing *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 161 (2d Cir. 1998)). "[W]orking conditions are intolerable when, viewed as a whole, they are 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' " *Id.* at 152 (quoting *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996)). "An employee need not show that an employer acted with the specific intent to cause the employee to resign; rather, she need only show that the employer's actions were 'deliberate and not merely negligent or ineffective.' " *Bader v. Special Metals Corp.*, 985 F. Supp. 2d 291, 310 (N.D.N.Y. 2013) (quoting *Petrosino v. Bell Atl.*, 385 F.3d 210, 229-30 (2d Cir. 2004)); *see also Farren v. Shaw Envtl., Inc.*, 852 F. Supp. 2d 352, 362 (W.D.N.Y. 2012) ("If a plaintiff cannot show specific intent on the part of the employer, he or she is required to at least demonstrate that an employer[']s actions were deliberate, not merely negligent or ineffective").

"Under federal law, diminished pay may constitute a constructive discharge." *Schupp*, 2010 WL 3260046, at *14 (citing *Kirsch*, 148 F.3d at 157-58, 161-62) (other citation omitted). "But a reduction in pay, without additional evidence of malicious intent, is insufficient." *Id.* (citing *Butts v. N.Y. City Dep't of Hous. Preservation & Dev.*, No. 00–CV–6307, 2007 WL 259937, *20 (S.D.N.Y. Jan. 29, 2007)). "Moreover, when a plaintiff continues in a position after occurrence of the conduct allegedly designed to force him to resign, it undermines any claim that the working conditions were intolerable." *Id.* (citing *Butts*, 2007 WL 259937, at *20).

It is undisputed that Defendant Standford was furloughed. *See* Dkt. No. 68-2 at 187. However, the Second Circuit has held that where an employee maintains an employment relationship with an employer, the constructive discharge standard may not apply. *See Ramey v. Dist. 141, Intern. Ass'n of Machinists and Aerospace Workers*, 362 Fed. Appx. 212, 215 (2d Cir. 2010). Here, although Defendant Standford was furloughed, an employment relationship continued until she voluntarily resigned. Therefore, the Court finds that Defendant Standford was not constructively discharged.

Defendants Rohde, Gloria, Flint, and Fravel each suffered a reduction in their salaries. *See* Dkt. No. 68-2 at 83, 130, 168-69, 179. Defendant Rohde's argument that she was constructively discharged is based solely on the fact that she suffered a ten percent pay cut. *See* Dkt. No. 68-2 at 168-69. As discussed above, "a reduction in pay, without additional evidence of malicious intent, is insufficient." *Schupp*, 2010 WL 3260046, at *14. Defendant Rohde has not provided any evidence of actions taken by Adecco which were done with malicious intent or otherwise done to create an intolerable work environment. Thus, the Court finds that Defendant Rohde was not constructively discharged.

Defendants Gloria and Flint both testified that, in addition to the salary reduction, the working environment at Adecco became chaotic and stressful following the termination of the upper-level managers. *See* Dkt. No. 68-2 at 86-87, 130-31. Defendant Flint testified that the environment was so stressful for her that she sought mental health treatment. *See id.* at 130-31.

"Every job has its frustrations, challenges, and

disappointments; these inhere in the nature of work." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083 (3d Cir. 1992) (quoting Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985)). "An employee is protected from a calculated effort to pressure her into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by her co-workers. She is not, however, guaranteed a working environment free of stress." *Id.* (quoting Bristow, 770 F.2d at 1255).

***7** Although the conditions at Adecco following the termination of multiple upper level managers during an international pandemic likely were stressful, these conditions were not imposed in order to force any Defendant to resign or create an intolerable work environment. Even these conditions, when combined with the ten percent pay cut, do not constitute constructive discharge.

" 'To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.' " Henry v. NYC Health & Hosp. Corp., 18 F. Supp. 3d 396, 404 (S.D.N.Y. 2014) (quoting Mathirampuzha v. Potter, 548 F.3d 70, 78 (2d Cir. 2008)). " 'Such a change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to the particular situation.' " *Id.* (quoting Lawrence v. Nyack Emergency Physicians, P.C., 659 F. Supp. 2d 584, 594 (S.D.N.Y. 2009)) (quotations omitted).

Here, Defendant Gloria testified that she was required to take on additional job duties. *See* Dkt. No. 68-2 at 83-84. Defendant Gloria was not demoted and did not suffer diminished responsibilities. In fact, Defendant Gloria was promoted. *See* *id.* at 82. Thus, apart from her pay cut – which, seemingly, applied across the board in the region at issue – Defendant Gloria did not suffer any changes which could support her argument that she was constructively discharged.

Finally, Defendant Fravel testified that she began looking for another job long before she suffered a pay cut. *See* Dkt. No. 68-2 at 178. Defendant Fravel indicated that she was interviewing for other positions as early as September 2019. *See id.* Therefore, Defendant Fravel cannot now argue that she left her job with Adecco only because it was so intolerable that she was forced to quit. Accordingly, the Court finds that Defendants Rohde, Gloria, Flint, and Fravel were not constructively discharged.

c. Covenant Protects a Legitimate Business Interest

"Only after determining that a restrictive covenant would serve to protect against such unfair and illegal conduct and not merely to insulate the employer from competition, does the reasonableness of the covenant in terms of its time, space or scope, or the oppressiveness of its operation become an issue." Am. Inst. of Chem. Eng'rs v. Reber-Friel Co., 682 F.2d 382, 386-87 (2d Cir. 1982). Thus, the Court must assess whether Adecco has a legitimate business interest necessary to sustain each of the restrictive covenants. Here, Plaintiffs argue that the restrictive covenants are necessary to protect Adecco's goodwill with current customers and to safeguard confidential information. *See* Dkt. No. 14 at 18-19.

The desire of a business to protect its "goodwill that it has fostered with customers constitutes a legitimate business interest." Poller, 974 F. Supp. 2d at 220 (quoting Kelly v. Evolution Mkts., Inc., 626 F. Supp. 2d 364, 372 (S.D.N.Y. 2009)). "In many ways, 'the goodwill of a salesman's relationship with the customer is to a degree an assent of the employer.' " *Id.* (quoting Ecolab, Inc. v. K. P. Laundry Mach. Inc., 656 F. Supp. 894, 899 (S.D.N.Y. 1987)). "For example, even where the goodwill is developed by the salesperson, that development 'is done for the benefit of the employer under a duty of loyalty and in return for compensation paid to the salesman by the employer.' " *Id.* (quoting Ecolab, Inc., 656 F. Supp. at 899)). "Where ... the salesperson develops continuous relationships over the course of working for an organization, those longstanding relationships 'can be reasonably viewed as legitimate property interests of the employer which are entitled to contractual protection so long as the protective contracts are of reasonable scope.' " *Id.* (quoting Ecolab, Inc., 656 F. Supp. at 899)).

***8** Here, Plaintiffs have a legitimate business interest in protecting the goodwill it has fostered with its customers through the Former Employees. The protection of these relationships is especially true in light of the testimony of the Former Employees that the staffing industry is all about relationships with clients. *See* Dkt. No. 68-2 at 102. Accordingly, the Court finds that the restrictive covenants as to Defendants Standford, Rohde, Gloria, Flint, and Fravel protect legitimate business interests which are "entitled to contractual protection so long as the

protective contracts are of reasonable scope." Poller, 974 F. Supp. 2d at 220. Thus, the Court will turn to an examination of each agreement to determine reasonableness.

d. Non-Compete Agreements

i. Defendants Standford and Rohde

Defendant Standford's employment agreement provides the following:

> For a period of twelve months immediately following termination[ ] of my employment, I will not compete against Adecco or associate myself with any Adecco competitor as an employee, owner, partner, stockholder, investor, agent, or consultant. These restrictions apply to any market area in which I worked or had responsibility for during the last one and a half years of my employment with Adecco.

See Plaintiffs' Exhibit ("P. Ex.") 2 at 1.

Defendant Rohde's employment agreement provides the following;

> Except to the limited extent provided by an applicable state law, for a period of twelve months immediately following termination of my employment, I will not compete against Adecco or associate myself with any Adecco competitor as a colleague, owner, partner, stockholder, inventor, agent or consultant. These restrictions apply to any market in which I worked or had responsibility for during the last year of my employment with Adecco.

See P. Ex. 8 at 1.

The non-compete agreements, which prohibit working for a competitor for the year immediately following termination of employment, are reasonable with respect to the time limitation. *See* Poller, 974 F. Supp. 2d at 220 (collecting cases). Additionally, because the restrictive covenant is limited in geographic scope to the area in which Defendants Standford and Rohde performed work for Adecco, the restriction is reasonable. *See* Konica Minolta Business Solutions, U.S.A., Inc. v. Lowery Corporation, No. 15-11254, 2020 WL 3791601, *6 (E.D. Mich. July 7, 2020) (citing Poller, 974 F. Supp. 2d at 220-21)).

Having found that the restriction is related to a legitimate business interest – protecting goodwill – and finding the agreement reasonable in scope, the Court finds that the non-compete agreements made between Plaintiffs and Defendants Standford and Rohde will likely be enforceable.

ii. Defendants Flint, Gloria, and Fravel

Defendants Flint, Gloria, and Fravel's employment agreements provide the following:

> As used herein, the term "Market Area" shall mean the 50 mile radius of Company office(s) to which Colleague is assigned, the territory to which Colleague is assigned to work, and/or in which Colleague will have responsibilities involving any business matter. During Colleague's employment with Company and for a period of twelve (12) months thereafter, whatever the reason for Colleague's termination of employment, unless Colleague receives Company's advance written waiver as described herein, Colleague shall not, either directly or indirectly, either on Colleague's own behalf or on behalf of another person or entity, engage in or assist others in the following activities:
>
> ...

> Within the Market Area, entering into, engaging in, being employed by, consulting or rendering services for, any business which competes with, or is similar to, Company's business at the time of Colleague's separation from employment with Company, in a capacity performing functions similar to those performed or managed by Colleague while employed by Company.

***9** *See* Dkt. No. 10 at 2-3; Dkt. No. 11 at 2-3; Dkt. No. 12 at 2-3.

Similar to the previous non-compete agreements, the agreements of Defendants Flint, Gloria, and Fravel are limited in time to a period of one year immediately following termination of their employment with Adecco. *See id.* Therefore, these agreements are reasonable in time. *See* Poller, 974 F. Supp. 2d at 220. However, the geographic limitations on these agreements are broader than the previous agreements. To the extent that the agreements bar Defendants Flint, Gloria, and Fravel from working within the same geographic area in which they performed duties for Adecco, the agreements are reasonable. *See* *Konica Minolta Bus. Solutions*, 2020 WL 3791601, at *6. However, the geographical limitation which prevents Defendants from doing business within a fifty mile radius of the office to which they were assigned is greater than necessary to protect any legitimate business interest that Adecco might have. This limitation is overbroad because it could prevent Defendants from doing business with clients whom she did not encounter during her time at Adecco. *See Solomon Agency Corp. v. Choi*, No. 16-CV-0353, 2016 WL 32557006, *6 (E.D.N.Y. May 16, 2016) (collecting cases).

While the agreements are overbroad with respect to the fifty mile radius limitation, the Court finds that the remainder of the non-compete agreements are reasonable and will disregard the overbroad portion. *See* *Unisource Worldwide, Inc. v. Valenti*, 196 F. Supp. 2d 269, 277 (E.D.N.Y. 2002) ("If a court finds a limitation to be unreasonable, it can 'blue pencil' the covenant to restrict the term to a reasonable geographic limitation, and grant partial enforcement for the overly broad restrictive covenant") (citing *BDO Seidman*, 93 N.Y.2d at 394).

"Under New York law, a restrictive covenant may be partially enforced if the employer can demonstrate 'an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing[.]' " *Marsh USA Inc.*, 2008 WL 4778239, at *21 (quoting *BDO Seidman*, 712 N.Y.2d at 394; *see also* *Karpinski v. Ingrasci*, 268 N.E.2d 751 (1971)). "Whether to partially enforce an overly broad non-compete agreement is left to the discretion of the court based upon a case specific analysis." *Veramark Techs. Inc.*, 10 F. Supp. 3d at 407 (citing *Brown & Brown*, 980 N.Y.S.2d at 640 (quoting *BDO Seidman*, 93 N.Y.2d at 394))).

As the Court described above, these agreements are consistent with reasonable standards of fair dealing and are intended to protect a legitimate business interest. Further, there is no evidence of overreaching or coercive use of dominant bargaining power. The Former Employees were permitted to ask questions, consult an attorney, and negotiate the terms of the agreement. *See* Dkt. No. 68 at 45; Dkt. No. 68-2 at 62-63, 95-96, 125-26, 145, 166, 174, 176, 186. Defendants decision not to take advantage of that opportunity does mean that Adecco overreached or coerced Defendants into signing the agreement. Accordingly, the Court finds that partial enforcement of the agreement is appropriate.

***10** Having found that the restriction is related to a legitimate business interest – protecting goodwill – and finding the agreements reasonable, in part, the Court finds that the non-compete agreements made between Plaintiffs and Defendants Flint, Gloria, and Fravel will likely be enforceable in part.[4]

e. Non-Solicitation Agreements[5]

In evaluating whether a non-solicitation agreement is enforceable, a court must apply the same test used to evaluate non-compete agreements. *See* *Mercer Health & Benefits LLC v. DiGregorio*, 307 F. Supp. 3d 326, 348-49 (S.D.N.Y. 2018). "[C]ovenants prohibiting former employees from recruiting workers of a former employer do not violate public policy *per se*." *See* Kelly, 626 F. Supp. 2d at 374 (citing *Veraldi v. Am. Analytical Labs*, 271 A.D.2d 599 (N.Y. App. Div. 2000); *Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F. Supp. 2d 478, 482 (S.D.N.Y. 2001)).

In evaluating non-solicitation of co-workers, or non-recruitment agreements, courts are to apply the same three-prong test as is applied to other restrictive covenants. *See* *MasterCard Int'l Inc. v. Nike, Inc.*, 164 F. Supp. 3d 592, 600 (S.D.N.Y. 2016). " '[W]here an

employer's business is conducted worldwide to a global customer base, "the lack of a geographic restriction is necessary."" Id. at 601 (quoting Reed Elsevier Inc v. TransUnion Holding Co., No. 13-cv-8739, 2014 WL 97317, *7 (S.D.N.Y. Jan. 8, 2014) (other quotation omitted)). Additionally, "New York courts have upheld as reasonable one year and two year non-solicitation provisions[.]" *Id.* (collecting cases).

Here, Plaintiffs argue that the non-solicitation of clients agreement protects Adecco's legitimate business interest to preserve goodwill with customers, prevent unfair conduct or "commercial piracy," and to safeguard confidential information. *See* Dkt. No. 14 at 18-19. Certainly, a restriction on soliciting Adecco clients serves to protect Adecco's goodwill with customers and to prevent unfair competition. With respect to the non-solicitation of Adecco employees, Plaintiffs argue that these clauses are necessary to protect its investment in its employee and the confidential information which is entrusted to them. *See id.* at 20. The Court finds that the agreement as to non-solicitation of Adecco employees, or the non-recruitment provision, serves Adecco's legitimate business interest in protecting confidential information.

i. Defendant Standford

With respect to the non-solicitation agreement, Defendant Standford's employment agreement provides that "[w]hile working for Adecco and during the twelve months immediately following my termination of employment, I will not directly or indirectly solicit any of Adecco's customers or employees for a competing business." *See* P. Ex. 2 at 1.

The restriction is reasonable with respect to the time limit as it applies for only one year following the termination of her employment. *See* DiGregorio, 307 F. Supp. 3d at 349 (noting that limitations of one year and longer are routinely found to be reasonable). However, the restriction does not include a limitation with respect to whom Defendant may contact, but rather includes a blanket prohibition against soliciting any customer of Adecco. This portion of the provision is overbroad. The provision is reasonable to the extent that it applies to Defendant Standford's solicitation of Adecco customers with whom Defendant Standford may have had contact or obtained confidential information about. *See id.* For the same reasons described above, partial enforcement of the non-solicitation clause is appropriate in this case.

***11** The non-solicitation of Adecco employees clause is similarly limited to the twelve months immediately following termination of employment with Adecco and, therefore, is reasonable in duration. Additionally, the Court finds that the scope of the agreement is narrowly defined to protect Adecco's legitimate business interest. *See MasterCard Int'l*, 164 F. Supp. at 599-602 (finding enforceable a clause which prohibits " 'directly or indirectly, solicit[ing], induc[ing], recruit[ing], or encourag[ing] any other employee, agent, consultant or representative to leave the service of [MasterCard] for any reason ...' for a period of 24 months (Dennings) or 12 months (Fusselman) following termination of their employment").

ii. Defendant Rohde

With respect to the non-solicitation agreement, Defendant Rohde's employment agreement provides as follows:

> While working for Adecco and during the twelve months immediately following my termination of employment, I will not directly or indirectly solicit any of Adecco's customers or Associates (provided I have reason to know they are Adecco employees) for a competing business.
>
> I acknowledge that each and every Adecco colleague provides a competitive value and advantage to Adecco based upon many factors, including but not limited to knowledge of Adecco's business strategy, procedures, relationships and plans. While working for Adecco and during the seven months immediately following my termination of employment, I will not directly or indirectly solicit any of Adecco's colleagues.

See P. Ex. 8 at 1.

This agreement is also reasonable in time as it only applies to the twelve month period immediately following the termination of Defendant Rohde's employment with Adecco. However, similar to Defendant Standford's agreement, this non-solicitation agreement is a blanket prohibition on contacting all Adecco customers, regardless of whether Defendant Rohde had contact with or had access to confidential information about the customer. This portion of the agreement is overbroad. *See* DiGregorio, 307 F. Supp. 3d at 349. However, the agreement may be enforced to the extent that it prohibits

solicitation of customers and associates with whom Defendant Rohde had contact or obtained confidential information about. With respect to the non-solicitation of Adecco employees provision, for the reasons described above, the Court finds that the clause will likely be enforceable.

iii. Defendants Flint, Gloria, and Fravel

With respect to the non-solicitation agreements, Defendants Flint, Gloria, and Fravel's employment agreements provide the following:

> As used herein, the term "Market Area" shall mean the 50 mile radius of Company office(s) to which Colleague is assigned, the territory to which Colleague is assigned to work, and/or in which Colleague will have responsibilities involving any business matter. During Colleague's employment with Company and for a period of twelve (12) months thereafter, whatever the reason for Colleague's termination of employment, unless Colleague receives Company's advance written waiver as described herein, Colleague shall not, either directly or indirectly, either on Colleague's own behalf or on behalf of another person or entity, engage in or assist others in the following activities:
>
> ...
>
> Soliciting, hiring, recruiting, or attempting to recruit any person employed by or contracted with Company of whom Colleague became aware through Colleague's employment with Company, at any time during the lesser of the twelve (12) months immediately prior to Colleague's termination of employment with Company or the term of Colleague's employment;
>
> Soliciting, contacting, calling upon, or attempting to call upon, for or on behalf of any business which competes with Company, any established or prospective Company's client(s) (s)he served or solicited while employed by Company, or any Company's client(s) which were served by Company in the Market Area of which Colleague had access to Confidential Information, at any time during the lesser of the twelve (12) months immediately prior to Colleague's termination of employment with Company or the term of Colleague's employment.
>
> ***12** For purposes of this Section, "Soliciting" shall include, but is not limited to, direct and indirect solicitations made through social-networking platforms.

See Dkt. No. 10 at 2-3; Dkt. No. 11 at 2-3; Dkt. No. 12 at 2-3.

This agreement is reasonable in time and scope. The limitation is for a period of only twelve months immediately following termination. Additionally, the restriction limits the solicitation of customers or prospective customers that Defendants either directly served or had access to confidential information about. Accordingly, the Court finds that the non-solicitation of customers agreements of Defendants Flint, Gloria, and Fravel will likely be enforceable. *See* DiGregorio, 307 F. Supp. 3d at 349. With respect to the non-solicitation of Adecco employees provision, for the reasons described above, the Court finds that the clause will likely be enforceable.

f. Undue Hardship

"Even where a company's interests are legitimate and reasonably protected by a restrictive covenant, courts will decline to enforce restrictive covenants where they impose an undue hardship or are deleterious to public policy[.]" *Poller*, 974 F. Supp. 2d at 222. "New York courts have routinely found that an individual does not suffer undue hardship where a restrictive covenant merely prohibits him from soliciting his former employer's clients for a reasonably defined period of time." *DiGregorio*, 307 F. Supp. 3d at 351 (collecting cases).

Defendants do not argue that the restrictive covenants are unduly burdensome except to say that enforcement of the clauses would render some Defendants unable to earn a living. *See* Dkt. No. 28 at 32. All of the agreements only apply for the year immediately following termination of employment with Adecco. Further, with respect to the non-compete agreements, the Court found that they are enforceable to the extent that they bar working for a competitor within the geographic area in which Defendant performed work or had responsibility during their employment with Adecco. These agreements do not prevent Defendants from working in the staffing industry in neighboring regions or working outside the staffing industry for the term of the agreement. Thus, ordinarily, the Court would find that the non-compete agreements do no present an undue hardship on Defendants. However, for the reasons which the Court describes in greater detail

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below, enforcing the non-compete agreements would cause Defendants Standford, Rohde, Flint, Gloria, and Fravel to lose their jobs in a time when the COVID-19 pandemic has wreaked havoc on the economy. Enforcing the non-compete agreements would be greater than necessary to protect Adecco's legitimate business interest, which would be protected through the enforcement of the non-solicitation agreements. Enforcement of the non-solicitation clauses protects the needs of the employer without resulting in a loss of livelihood for Defendants. *See* Ticor Title Ins. Co., 173 F.3d at 69 (citing Reed, Roberts Assocs., 40 N.Y.2d at 307) ("In this equation, courts must weigh the need to protect the employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood, a result strongly disfavored by public policy in New York").

***13** With respect to the non-solicitation agreements, the Court found that those agreements apply only to Adecco clients or prospective clients with whom Defendants worked or had access to confidential information about. These clauses do not prevent Defendants from soliciting organizations that were never Adecco clients, or even Adecco clients so long as the Defendant never worked with that client or had access to confidential information about that client during their employment with Adecco. Thus, given the reasonable temporal limitations, Defendants' ability to work in the staffing industry in neighboring regions, and the Court's reading of the non-solicitation clause as limited to those clients with whom Defendants worked with or had access to confidential information about while employed by Adecco, the restrictive covenants do not impose an undue hardship on Defendants Standford, Rohde, Flint, Gloria, and Fravel. *See* Poller, 974 F. Supp. 2d at 222 ("Thus, given its reasonable temporal limitations, Poller's ability to sell IVIG in neighboring geographic areas, and the Court's reading of the non-solicitation clause as limited to those clients with which Poller developed a relationship exclusively during her time at BioScrip, the RCA does not impose an undue hardship on Poller"). Further, the agreement regarding non-solicitation of Adecco employees is so limited in duration that the Court finds it does not impose an undue hardship. *See* Mastercard Int'l, 164 F. Supp. 3d at 602.

g. Non-Disclosure Agreements

Here, Defendants do not contest the enforceability of the non-disclosure agreements. *See* Dkt. No. 28. Accordingly, the Court will examine only whether Plaintiffs will likely be able to demonstrate that Defendants violated those agreements. In evaluating Plaintiffs' likelihood of success on this claim, the Court will consider only whether information is confidential for the purposes of the non-disclosure agreements. The Court will not make a determination as to whether this information constitutes trade secrets for the purposes of this claim. The trade secrets claim will be examined in great detail below.

i. Defendants Walser and Standford

With respect to the non-disclosure agreements, Defendants Wasler and Standford's employment agreements provide the following:

> Unless required by my job at Adecco, I will never disclosure, use, copy or retain any confidential business information or trade secrets belonging to Adecco, Adecco's Franchisees, Adecco's customers or Adecco's suppliers. This confidential information includes, but is not limited to, methods of operation and/or doing business, salary and benefit information and other data regarding Adecco's employees, price lists, sales and recruiting techniques, promotional methods and information, names and lists of clients, prospective clients, and/or employees, the nature and content of client contracts and records, policy and procedures manuals, training methods and manuals, customized computer software, and other information not generally known to the public.

See P. Ex. 1 at 1; P. Ex. 2 at 1.

With respect to Defendant Walser, it is clear that she sent certain documents to herself and her husband for the

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purposes of retaining them once she learned of her termination. *See* Dkt. No. 68-1 at 161. These documents included a KPI report, which includes information such as client names, how much each client was billed, and Adecco's markup. *See* Dkt. No. 68 at 218. The emailed documents also included information such as salesperson rankings, pending client proposals, and new sales. *See id.* at 74-75, 78-79. This information, which relates directly the inner workings of Adecco, the pursuit of new clients, and the effectiveness of its sales staff, constitutes confidential information such that it would likely fall under the non-disclosure agreement. Defendant Walser freely admits that she sent this information to herself and an individual who was not employed by Adecco. *See* Dkt. No. 68-1 at 161. Thus, Plaintiff likely can establish that Defendant Walser violated her non-disclosure agreement.

With respect to Defendant Standford, the only allegation against her regarding her non-disclosure agreement is that she failed to return her Adecco issued laptop, which Plaintiffs maintain contains confidential information. *See* Dkt. No. 14 at 17. It is uncontested that Defendant Standford has not returned her Adecco issued technology to Adecco. *See* Dkt. No. 68-2 at 117. However, Plaintiffs have not explained what is contained within the laptops which they maintain is confidential.[6] Thus, Plaintiffs cannot establish that Defendant Standford breached the non-disclosure agreement by retaining any confidential information. Alternatively, Plaintiffs make a broad allegation that all of the Former Employees used confidential information to undercut pricing with Felix Schoeller, a prior client of Adecco. *See* Dkt. No. 14 at 23. Although Defendant Standford has admitted to interacting with Felix Schoeller during the course of her work with Staffworks, Plaintiffs have not explained what confidential information Defendant Standford used to undercut Adecco's pricing. Accordingly, Plaintiffs have failed to demonstrate likelihood of success of this claim as to Defendant Standford.

ii. Defendants Rodabaugh and Rohde

***14** With respect to the non-disclosure agreements, Defendants Rodabaugh's and Rohde's employment agreements provide as follows:

> Unless required by my job at Adecco, I will never disclose, use, copy or retain any confidential business information or trade secret belonging to Adecco (or its parent, affiliates, or predecessors), Adecco's Franchisees, Adecco's customers or Adecco suppliers. This confidential information includes, but is not limited to, methods of operation and/or doing business, salary and benefit information, and other data regarding Adecco's colleagues or Associates, price lists, sales and recruiting techniques, promotional methods and information, names and lists of clients, prospective clients, and/or colleagues, the nature and content of client contracts and records, policy and procedures manuals, training methods and manuals, customized computer software, and other information not generally known to the public.

See P. Ex. 8 at 1; P. Ex. 9 at 1.

Plaintiffs repeat the same allegations with respect to retention of Adecco issued laptops which contain confidential information as the basis for their claim against Defendants Rodabaugh and Rohde. *See* Dkt. No. 14 at 23. Plaintiffs also allege that Defendant Rohde stole copies of confidential customer contracts from the Elmira-Corning office. *See id.*

It is also uncontested that Defendants Rodabaugh and Rohde have not returned the laptops to Adecco. However, as discussed above, Plaintiffs have failed to allege what information contained within the laptops could be deemed confidential. Thus, Plaintiffs have failed to demonstrate a likelihood of success for this claim as against Defendant Rodabaugh. With respect to the allegation that Defendant Rohde stole confidential contracts from the Elmira-Corning office, Defendant Rohde denies that this occurred. *See* Dkt. No. 68-2 at 169. In fact, the record suggests that the contracts were destroyed months before this incident in response to a directive from Adecco Corporate. *See id.* at 72-73. Accordingly, the Court finds that Plaintiffs have failed to demonstrate a likelihood of success on this claim as against Defendant Rohde.

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iii. Defendants Flint, Gloria, and Fravel

With respect to the non-disclosure agreements, Defendants Flint's, Gloria's, and Fravel's employment agreements provides the following:

> Confidential Information includes, but is not limited to, trade secrets, know how, research and development software, systems, databases, inventions, processes, technology, designs, and other intellectual property, information regarding the procedures, sales, marketing, pricing and costs, operations, training, finances, investments, profits, products, services, clients, personnel, compensation, recruiting, organization, plans, objectives and strategies, and supplies of the Adecco Group, client and candidate preferences, experiences, requirements, course of dealing and purchasing patterns, as well as the name, address, contact persons or requirements of any existing and/or prospective client, consultatnt or employee including such information contained in Colleague's social networking accounts, concerning the past, current or future business activities and operations of the Adecco Group and any other information designated as confidential in the applicable Adecco Group's policies (collectively referred to as "Confidential Information"). Confidential Information also includes all information with respect to the products, services, business or affairs of the Adecco Group's clients which is in any way acquired during or by reason of Colleague's association with such clients during Colleague's employment. Confidential Information also includes "personal health information" and "personally identifiable information" or "personal data" and all other data protected by applicable laws and regulations relating to or impacting the processing of personal data ("Data Protection Law") applicable to the Adecco Group and/or its clients' employees, contractors or candidates.
>
> ***15** ...
>
> Colleague shall refrain from directly or indirectly disclosing to any third party, or using for any purpose other than for the direct benefit for the Adecco Group, any Confidential Information during his or her employ and for the maximum period permitted by law thereafter.

See Dkt. No. 10 at 1-2; Dkt. No. 11 at 1-2; Dkt. No. 12 at 1-2.

With respect to Defendants Gloria and Flint, Plaintiffs make the same allegations that these Defendants stole copies of confidential contracts and did not return Adecco issued laptops which contained confidential information. *See* Dkt. No. 14 at 23. For the same reasons the Court discussed above, Plaintiffs have failed to prove likelihood of success as to this claim as against Defendants Gloria and Flint.

Plaintiffs' only allegation against Defendant Fravel under this claim is that she used confidential information to undercut Adecco's prices in order to steal the business of Felix Schoeller. *See id.* However, there is no evidence that Defendant Fravel was involved in any interactions with Felix Schoeller. *See* Dkt. No. 68-2 at 183-18. Accordingly, Plaintiffs have failed to demonstrate likelihood of success as to this claim against Defendant Fravel.

2. Tortious Interference with Contract

"[U]nder New York law, '[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.' " Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C., 455 Fed. Appx. 102, 104 (2d Cir. 2012) (quoting Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996)).

Plaintiffs bring this claim against Defendants Staffworks, Vitullo, Walser, Rodabaugh, and Standford. *See* Dkt. No. 1 at ¶ 123. Specifically, Plaintiffs allege that these Defendants intentionally interfered with contracts between Adecco and the Former Employees and other customers. *See id.* at ¶¶ 124-29. In response, Defendants argue that this claim must fail because the restrictive covenants in the Former Employees' employment agreements are unenforceable. *See* Dkt. No. 28 at 29. Defendants also argue that the facts upon which Plaintiffs rely in bringing this claim are incorrect – that the Former Employees left Adecco without communicating with anyone at Staffworks and that the Former Employees did not sabotage payroll, steal confidential information, or make false statements about Adecco to Adecco's customers. *See id.* Finally, Defendants argue that there is no evidence that Defendants Staffworks, Vitullo, Walser, Rodabaugh, or Standford engaged in the intentional procurement of the third party's breach. *See id.*

a. Employment Agreements of the Former Employees

Plaintiffs argue that Defendants Staffworks, Walser, Rodabaugh, and Standford employed the Former Employees in capacities that would violate the non-compete and non-solicitation clauses of their employment agreements. *See* Dkt. No. 1 at ¶ 127. Plaintiffs allege that Defendants Walser, Rodabaugh, Standford, and Staffworks intentionally induced numerous breaches of the Former Employees' agreements with Adecco, but Plaintiffs fail to provide any specific examples of such inducements. *See* Dkt. No. 14 at 24.

***16** Initially, the Court notes that, for the reasons described above, the restrictive covenants are enforceable in part. Additionally, the record indicates that Staffworks and all of the Former Employees were aware of the restrictive covenants in the employment agreements. *See* Dkt. No. 68-1 at 78, 133-34, 166, 189, 223, 230-31; Dkt. No. 68-2 at 10, 37, 54, 82, 100, 126, 129, 173, 175-76.

Defendants Rohde, Gloria, Flint, and Fravel admitted to violating the non-compete clauses of their employment agreements. Defendants Gloria, Flint, and Fravel work for Staffworks in the same geographic region in which they worked while they were employed by Adecco. *See* Dkt. No. 68-2 at 68, 182. Defendants Gloria, Rohde, Flint, and Fravel also admitted to working with clients with whom they worked while employed by Adecco. *See id.* at 68, 139, 171, 182-83. However, contrary to Plaintiffs' allegations, there is no indication that Defendants Rohde, Gloria, Flint, and Fravel left jobs with Adecco following inducement from the other Defendants. *See id.* at 69, 131-32, 138, 169, 171, 187. Additionally, although there is evidence that Defendants Rohde, Flint, Fravel, and Gloria violated the non-solicitation agreements, there is no indication that their breach was intentionally procured by Defendants Staffworks, Walser, Rodabaugh, or Standford. Accordingly, the Court finds that Plaintiffs have failed to demonstrate likelihood of success as to this portion of their claim.

b. Contracts with Adecco Clients

With respect to the knowledge requirement for this claim, Plaintiffs argue that the Former Employees and Staffworks were aware of Adecco's contracts with the following companies and associates: Felix Schoeller, Boral, PSA Cleaning, Corning, Inc., Kilian Manufacturing, Pactiv, Tessy, and twenty-eight Adecco associates who were placed at Boral. *See* Dkt. No. 14 at 24.

Plaintiffs further claim that the Former Employees and Staffworks wrongfully interfered with those relations by taking Adecco's contracts with clients, sabotaging payroll, misusing confidential information to undercut pricing, "hijacking" the Adecco Elmira-Corning Facebook page, and making false or misleading statements about Adecco. *See id.* at 24-25. Defendant Vitullo testified that there were discussions about clients who might be willing to transition from Adecco to Staffworks, possibly indicating their intention to target certain clients. *See* Dkt. No. 68-2 at 16-17. The clients discussed at that time included Felix Schoeller, Boral, and Tessy Plastics. *See id.* at 17.

Although Plaintiffs allege that Defendants interfered with their contracts with PSA Cleaning, Kilian Manufacturing, Pactiv, and Corning, Inc., the evidence indicates that these companies have not contracted with Staffworks. *See* Dkt. No. 68-1 at 49-50, 203; Dkt. No. 68-2 at 53; Defendants' Exhibits ("D. Exs.") 13, 14. With respect to Felix Schoeller, Boral, and Tessy Plastics, the evidence indicates that those companies altered their agreements with Adecco as a result of dissatisfaction with Adecco's performance and not as a result of inducement by Defendants.

Bradley Clements, Vice President of Operations for Felix Schoeller, submitted two declarations in which he affirmed that Felix Schoeller terminated its contract with Adecco due to poor customer service. *See* D. Exs. 26, 28. The record also contains evidence that Boral altered its contractual relationship with Adecco because of customer service issues. *See* Dkt. No. 68-1 at 20; D. Ex. 16. Notably, an email from the Senior Plant Manager for Boral indicates that Boral initiated contact with Staffworks. See D. Ex. 16. Finally, the Director of Human Resources for Tessy Plastics submitted a sworn declaration in which she states that Tessy altered their agreement with Adecco because of "poor customer service and overall dissatisfaction with Adecco." *See* D. Ex. 34 at 2.

***17** Contrary to Plaintiffs' allegations, the evidence before the Court establishes that Adecco's contractual relationships with the clients listed in the complaint have either remained the same or were altered because of customer dissatisfaction with Adecco. There is no evidence that Defendants willfully induced any breach of contract by Adecco's clients.

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3. Tortious Interference with Business Relationships/Prospective Economic Advantage

"In order to state a claim for tortious interference with prospective economic advantage, a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." Purgess v. Sharrock, 33 F.3d 134, 141 (2d Cir. 1994) (citing Burba v. Rochester Gas & Elec. Corp., 528 N.Y.S.2d 241 (4th Dept. 1988); *see also* PPX Enterprises, Inc. v. Audio Fidelity Enterprises, Inc., 818 F.2d 266, 269 (2d Cir. 1987)). This claim may be pled as an alterative to a tortious interference with contract claim, in the event that a court finds that the contract at issue is unenforceable. *See* AIM Int'l Trading, L.L.C. v. Valcucine S.p.A., No. 02-CV-1363, 2003 WL 21203503, *7 (S.D.N.Y. May 22, 2003).

As discussed above, the evidence before the Court indicates that the business relationship of Adecco and the customers at issue have either remained the same or were altered as a result of dissatisfaction with Adecco. As such, this claim will likely also fail because there is no evidence before the Court demonstrating that Defendants acted with the sole purpose of harming Plaintiffs or that they used dishonest, unfair, or improper means.

4. Actual and Threatened Trade Secret Misappropriation Under Federal and State Law

"To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." N. Atl. Instruments, Inc. v. Haber, 188 F.3d 38, 43-44 (2d Cir. 1999) (citations omitted). "[A] trade secret is 'any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it.' " Id. at 44 (quotation and other citation omitted). In determining whether information constitutes a trade secret, New York courts have considered the following factors:

> "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Id. (quoting Ashland Mgmt. Inc. v. Janien, 82 N.Y.2d 395, 407 (1993)).

Here, Plaintiffs allege the following sixteen types of information which they believe constitute trade secrets:

> lists and reports identifying existing and/or prospective clients, candidates, and colleagues; company-wide, market-by-market, industry, and client and colleague profitability, margin, cost, pricing, and related financial information, metrics, trends, and analyses; KPI reports; aggregated data regarding client visits, client proposals, client wins, "Effectiveness" ratio (new clients/visits), breakdown of total business activity, and new clients billed; client and candidate placement and status information; compensation, commission, and bonus plans, structures, and methodologies; company-wide, market-by-market, industry, and client and colleague strategy, growth, opportunity, and target information; marketing plans and projections; creative client, consultant, and supplier service arrangements, structures, pricing, profiles, and terms and conditions; the identities of key client decision-makers; client and decisionmaker specialized needs, preferences, and requirements; colleague performance and evaluation information; databases containing unique and non-public candidate resumes and job orders, descriptions, and compensation information; personnel files;

> approaches for capturing, analyzing, and effectively utilizing information for existing and potential clients, candidates, associates, and colleagues; and strategies for recruiting, vetting, and placing candidates and associates across a wide range of clients, industries, markets, and positions.

***18** *See* Dkt. No. at ¶ 138. All of the items on this list fall into one of the following categories: client information and pricing, business analytics, or marketing and recruiting strategies.

a. Client Information and Pricing

The information in this category, which Plaintiffs allege constitute trade secrets, include client names, the names of key decision makers for clients, client needs, workers compensation information, and pricing. *See id.*

It is well established that " '[a] customer list developed by a business through substantial effort and kept in confidence may be treated as a trade secret and protected at the owner's instance against disclosure to a competitor, provided the information it contains is not otherwise readily ascertainable.' " *Haber*, 188 F.3d at 44 (citing cases); *see also* *Defiance Button Machine Co. v. C & C Metal Products Corp.*, 759 F.2d 1053, 1063 (2d Cir.1985). " 'The question of whether or not a customer list is a trade secret is generally a question of fact.' " *Haber*, 188 F.3d at 44 (quoting *A.F.A. Tours, Inc. v. Whitchurch*, 937 F. 2d 82, 89 (2d Cir. 1991) (other citations omitted)).

"Generally however, the *sine qua non* of whether a customer list constitutes a trade secret lies in whether 'the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products,' or, by contrast, 'the customers are not known in the trade or are discoverable only by extraordinary efforts and the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money." *Poller*, 974 F. Supp. 2d at 216 (quoting *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 392 (1972)). "Whereas the former circumstance will not support trade secret protection, in the latter situation, 'courts have not hesitated to protect customer lists and files as trade secrets.' " *Id.* (citing *Leo Silfen Inc.*, 29 N.Y.2d at 392 (other citations omitted)).

Here, potential clients and their needs can be easily ascertained without extraordinary efforts. The record indicates that the market for the staffing industry is small in this area and that companies seeking the services of groups such as Adecco and Staffworks do not typically keep their needs secret. *See* Dkt. No. 68-2 at 102. In fact, there was testimony that clients often provide not only their needs, but will share pricing bids from other staffing companies. *See id.* at 111, 150-51, 165. Additionally, although Plaintiffs provided evidence of the security measures in place to protect the information, it seems that client names, key contacts at clients, and client needs were widely known at most levels of the business. Certainly, information about potential clients and who within their organizations have significant sway is valuable information to any staffing company who attempt to solicit business. However, because this type of information is so widely known, not only within the organization but to other staffing companies in the area, the Court finds that in these circumstances customer names, contact information, and needs are not trade secrets.

"Data relating to pricing can constitute a trade secret under some circumstances." *Drennen*, 235 F. Supp. 3d at 566-67 (citing *In re Dana Corp.*, 574 F.3d 129, 152 (2d Cir. 2009)); *cf.* *Gemmy Indus. Corp. v. Chrisha Creations Ltd.*, No. 04 Civ. 1074, 2004 WL 1406075, at *12 (S.D.N.Y. June 23, 2004) ("Price lists, product samples and 'marketing plans' are all items that are not, as a matter of law, protected as trade secrets") (citations omitted), *vacated and remanded on other grounds*, 452 F.3d 1353 (Fed. Cir. 2006). "However, this is generally where a company uses some type of proprietary formula that gives it a unique advantage, such as a complex pricing or trading algorithm in a financial business." *Id.* at 567 (citing *Saks Inc. v. Attachmate Corp.*, No. 14 CIV. 4902, 2015 WL 1841136, *18 (S.D.N.Y. Apr. 17, 2015); *Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F. Supp. 2d 525, 537-38 (S.D.N.Y. 2004)).

***19** Here, Adecco's pricing is not based on some sort of complex model or algorithm which gives it a unique advantage over its competitors. Rather, as Adecco's

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Senior Vice President testified, pricing is based on information given to them by the client and a markup necessary to ensure Adecco's profitability. *See* Dkt. No. 68 at 26-27. Although Adecco claims that this information is proprietary, it is information provided by the client. As mentioned above, that information is frequently shared with Adecco's competitors when a client is soliciting bids. *See id.* at 111, 150-51, 165. Further, there is no indication that Adecco invested years of effort and a large amount of resources to compile the information. Rather, it seems that Adecco takes the information provided by the client, adds a markup for themselves, and that determines their pricing bid. Although this information and process may be confidential, it does not rise to the level of a trade secret.

b. Business Analytics

Under this category the Court considers information such as Adecco's profitability, new and prospective clients, business activities, and compensation structures. *See* Dkt. No. 1 at ¶ 138.

Courts have found that information such as a company's operating practices and methods, business opportunity, and analysis of the business' strengths and weakness may be considered confidential information. *See* *Am. Bldg. Maint. Co. v. ACME Prop. Servs.*, 515 F. Supp. 2d 298, 309 (N.D.N.Y. 2007) (citing *Churchill Communications Corp. v. Demyanovich*, 668 F. Supp. 207, 212 (S.D.N.Y. 1987); *Business Intelligence Servs., Inc. v. Hudson*, 580 F. Supp. 1068, 1072 (S.D.N.Y. 1984); *Giffords Oil Co. v. Wild*, 106 A.D.2d 610, 611 (2d Dep't. 1984)). However, information relating to a business' underlying mechanics, such as the prices of materials and costs of manufacturing, are not trade secrets because "any seller's publicly-available prices signal to competitors some information about the underlying mechanics of the seller's pricing structure." *Free Country*, 235 F. Supp. 3d at 567 (citing *Silipos, Inc. v. Bickel*, No. 1:06–CV–02205, 2006 WL 2265055, *4-5 (S.D.N.Y. Aug. 8, 2006); *Prod. Res. Grp., L.L.C. v. Oberman*, No. 03 CIV. 5366, 2003 WL 22350939, *14 (S.D.N.Y. Aug. 27, 2003)). Trade secrets do not include secret business information such as a single bid for a contract or the salary of certain employees. *See* *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 297-98 (2d Cir. 1986) (quoting *See* *Eagle Comtronics, Inc. v. Pico, Inc.*, 89 A.D.2d 803, 803 (1982); 1 Milgrim, *Milgrim on Trade Secrets*, § 2.01, at 2-3 n. 2 (1985); *see also* *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 222 n.2 (2nd Cir. 1971)).

Although information as to Adecco's profitability and business activities may not be well known outside of the business, information such as this is not the type that would be particularly valuable to a competitor. *See* *Lehman*, 783 F.2d at 297-98. Rather, this information seems to be confidential information about the inner workings of Adecco.[7] Accordingly, the Court finds that this information does not constitute trade secrets.

c. Marketing and Recruiting Strategies

Finally, in this category, the Court considers information such as marketing plans and projections, databases containing candidate information, and strategies for recruiting and placing associates. *See Dkt.* No. at ¶ 138.

Plaintiffs cite to *Modis, Inc. v. Adam Viet*, No. 15-CV-110, 2015 WL 12862929 (S.D. Iowa June 5, 2015), for the proposition that databases which contain recruiting information are trade secrets. *See* Dkt. No. 70 at 3. However, *Modis* is distinguishable from the circumstances of this case. In *Modis*, the evidence indicated that the staffing agency did most of their recruitment through the database and stored various sorts of information from contact information of candidates to their hobbies to all emails between candidates and customers. *See id.* at *3. Here, the record indicates that recruitment of candidates was done through a variety of means including Facebook, Indeed, Monster, LinkedIn, word of mouth, referrals, applications through company websites, and job fairs. *See* Dkt. No. 68-2 at 7, 25, 56, 83, 102, 129, 137. Additionally, although Adecco's database, "Bullhorn," stores information on candidates, Plaintiffs have failed to provide specific examples of the type of information stored which could constitute trade secrets.

***20** Plaintiffs have not provided evidence of any specific marketing or recruiting strategies that are used at Adecco. Rather, the record indicates that Adecco utilizes standard recruitment techniques common to the staffing industry. These strategies include finding candidates on social networking and job sites, by word of mouth and referrals, job fairs, and through applications on company websites. *See* Dkt. No. 68-2 at 7, 25, 56, 83, 102, 129, 137. Because these strategies are generally known and commonly used

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in the staffing industry, information regarding these techniques are not trade secrets. *See* In re Parmalat Sec. Litig., 258 F.R.D. 236, 255 (S.D.N.Y. 2009) (holding that marketing and sales plans are not considered trade secrets where those plans are commonly known in the industries).

Because the Court finds that none of the information advanced by Plaintiffs constitutes trade secrets, the Court need not evaluate whether any Defendant willfully misappropriated that information. Accordingly, the Court finds that Plaintiffs have failed to demonstrate likelihood of success as to this claim.

5. Conversion

"To establish a cause of action to recover damages for conversion, 'the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question—to the exclusion of the plaintiff's right.' " *Lapp Insulators LLC v. Gemignani*, No. 09-cv-0694, 2011 WL 1198648, *12 (W.D.N.Y. Mar. 9, 2011) (quotation omitted). New York courts have held that the unauthorized dominion over "[e]lectronic information suffices" to state a claim for conversion. *Clark St. Wine & Spirits v. Emporos Sys. Corp.*, 754 F. Supp. 2d 474, 484 (E.D.N.Y. 2010); *see also* *Lapp Insulators*, 2011 WL 1198648, at *13.

Plaintiffs allege that Defendants converted Adecco property including the Elmira-Corning Facebook page and documents stored in Adecco offices. *See* Dkt. No. 1 at ¶¶ 150-51. In their motion for a preliminary injunction, Plaintiffs also include the eleven Adecco-issued devices that Defendants failed to return and alleged theft of Adecco merchandise. *See* Dkt. No. 14 at 27-28. However, because neither the computers nor the theft of Adecco merchandise were part of the allegations for this claim in the complaint, the Court will only consider whether Defendants converted the Facebook page and documents mentioned by Plaintiffs in the complaint.

The complaint references the hard copies of Adecco's contracts with its clients that were allegedly stolen out of the Syracuse office. *See* Dkt. No. 1 at ¶¶ 150-51. Plaintiffs allege that Defendants Rodabaugh, Rohde, Gloria, and Flint stole these contracts. *See* Dkt. No. 14 at 13. At the hearing, Defendants Rodabaugh, Rohde, Gloria, and Flint denied taking the contracts. *See* Dkt. No. 68-2 at 58, 72-74, 161-62, 169. Contrary to Plaintiffs' allegations, it seems that the contracts were destroyed prior to the events at issue in this case in response to a directive from Adecco Corporate. *See id.* at 72-73.

Plaintiffs also allege that Defendants converted the Elmira-Corning Adecco Facebook page by refusing to turn over control of the Facebook page and its account credentials. *See* Dkt. No. 14 at 28. However, Defendant Gloria testified that there were not specific account credentials for the Adecco Facebook page because it was directly linked to her personal Facebook account. *See* Dkt. No. 68-2 at 76. Defendant Gloria also testified that multiple people had administrative access to the Facebook page after she left Adecco. *See id.* at 75-76. Plaintiffs have characterized Defendants' conduct with respect to the Facebook page as hijacking, however, the evidence is not clear as to whether the Elmira-Corning Adecco Facebook page still exists and who has access to it. Thus, at present, it is unclear whether any Defendant exercised unlawful dominion over the Adecco Facebook page to the exclusion of Adecco. Accordingly, the Court finds that Plaintiffs have not established likelihood of success with respect to this claim.

D. Balance of Hardships

***21** Before issuing a preliminary injunction, "a court must consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance of hardships tips in the plaintiff's favor." *Salinger*, 607 F.3d at 80 (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *eBay Inc.*, 547 U.S. at 391). " 'Balancing the equities may weigh against enforcement 'where the interests the employer seeks to protect are ephemeral in contrast to the grave harm to the employee resulting from enforcement.' " *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-CV-4819, 2018 WL 6786338, *27 (S.D.N.Y. Oct. 25, 2018) (quoting *Sensus USA, Inc. v. Franklin*, No. 15-742, 2016 WL 1466488, *8 (D. Del. Apr. 14, 2016) (other citation omitted)).

Here, Plaintiffs have already suffered loss of business and goodwill as a result of Defendants' non-compliance with their restrictive covenants. Absent an injunction, Plaintiffs will likely continue to suffer harm to its goodwill with longstanding clients. In ordinary circumstances, the equities might weigh in Plaintiffs' favor. *See* *Testing Servs., N.A. v. Pennisi*, 443 F. Supp. 3d 303, 346-47 (E.D.N.Y. 2020) (collecting cases). However,

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enforcement of the non-compete agreements will force Defendants Standford, Rohde, Gloria, Flint, and Fravel out of work in a time when the COVID-19 pandemic has made employment opportunities scarce. *See* *Schuylkill Valley Sports, Inc. v. Corporate Images Co.*, No. 20-CV-2332, 2020 WL 3167636, *17 (E.D. Pa. June 15, 2020) (noting that "[i]n light of the coronavirus pandemic and closing of non-essential businesses, employment opportunities were limited"); *Centimark Corp. v. Tect Am. Corp.*, No. 08-CV-7323, 2010 WL 11606646, *8 (N.D. Ill. Apr. 6, 2010) (finding harm to business if contracts were not enforced is "drastically outweighed" by the harm to the defendant because he would be left without a job and unable to support his family).

Accordingly, the Court will issue an injunction enforcing the non-solicitation agreements for Defendants Standford, Rohde, Gloria, Flint, and Fravel to the extent that they are not permitted to solicit any Adecco clients with whom they worked or had access to confidential information about during the last year of their employment with Adecco. The Court will not issue an injunction enforcing the non-compete agreements. "This result is consistent with New York court's practice of enforcing restrictive covenants only to the extent necessary to protect the employer's legitimate interests[.]" *Johnson Controls, Inc.*, 323 F. Supp. 2d at 540 (citing *BDO Seidman*, 93 N.Y.2d at 394). Enforcement of the non-solicitation clauses will prevent any further damage to Plaintiffs and unfair competition during the pendency of this litigation, but will not deprive Defendants of their livelihoods in a time when finding alternative employment would be extremely difficult.

IV. CONCLUSION

After careful review of the record, the parties' arguments, and the applicable law, the Court hereby

ORDERS that Plaintiffs' motion to for a preliminary injunction (Dkt. No. 13) is **GRANTED in part**; and the Court further

ORDERS that Defendants Standford, Rohde, Gloria, Flint, and Fravel shall be prohibited from soliciting or attempting to solicit any established Adecco client with whom they worked or had access to confidential information about during the last year of her employment with Adecco for a period of one year immediately following termination of employment with Adecco; and the Court further

***22 ORDERS** that, seeing no request from either party, Plaintiffs are not required to post a bond or undertaking as security for granting the above-mentioned preliminary injunction at this time; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 7028872

Footnotes

1 In their motion, Plaintiffs only raise arguments regarding their breach of contract, tortious interference, trade secret misappropriation, and conversion causes of action. *See* Dkt. No. 14 at 16. As such, the Court will limit its discussion to those causes of action.

2 Although some of the employment agreements include a choice of law provision which designates Florida as the governing law, the parties agree that New York law should be applied to the contracts in this case. *See* Dkt. No. 68 at 3. Even absent such an agreement, the Court would likely apply New York law in light of the holding of the New York Court of Appeals in *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 367 (2015) (holding "that applying Florida law on restrictive covenants related to the non-solicitation of customers by a former employee would violate the public policy of this state"). Therefore, the Court will apply New York state law when analyzing the restrictive covenants in this case.

3 Plaintiffs, citing *Experian Mark. Sol., Inc. v. Lehman*, No. 15-CV-476, 2015 WL 3796240, *8 (W.D. Mich. June 18,

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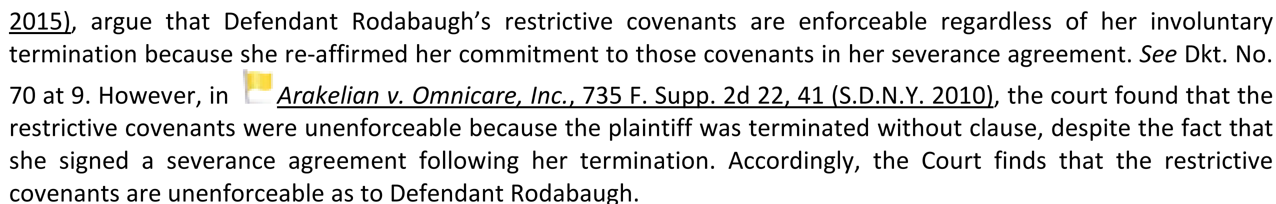
2015), argue that Defendant Rodabaugh's restrictive covenants are enforceable regardless of her involuntary termination because she re-affirmed her commitment to those covenants in her severance agreement. *See* Dkt. No. 70 at 9. However, in  *Arakelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010), the court found that the restrictive covenants were unenforceable because the plaintiff was terminated without clause, despite the fact that she signed a severance agreement following her termination. Accordingly, the Court finds that the restrictive covenants are unenforceable as to Defendant Rodabaugh.

4 The agreement will likely be enforceable except for the restriction which prohibits Defendants Flint, Gloria, and Fravel from working within fifty miles of the Adecco office(s) to which they were assigned.

5 In this matter there are two separate non-solicitation clauses at issue: non-solicitation of Adecco clients and non-solicitation of Adecco employees.

6 All electronic devices belonging to Adecco that have not been returned by Defendants, have been turned over to Defendants' counsel, thereby depriving the Former Employees from access to any confidential information. At this time, the Court will not issue any discovery orders with respect to those devices. The parties should consult the assigned Magistrate Judge on this issue during the course of discovery.

7 Although Plaintiffs cited to numerous cases in their supplemental briefing, the cases focus on the client information and pricing category and the marketing and recruiting strategy category. *See* Dkt. No. 70 at 2-3. Neither party has provided the court with authority which finds that information as to a company's profitability and internal business workings are trade secrets.

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