STATE OF NORTH CAROLINA JACKSON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 437
CURRENT MEDICAL SERVICES, LLC, Plaintiff, v. CURRENT DERMATOLOGY, PLLC; CURRENT PATTERSON; TRACI LONG; REBECCA MANRING; and TERESA DAVIDSON, Defendants.	**ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

1. This Order addresses Plaintiff Current Medical Services, LLC's ("CMS") motion for preliminary injunction. (ECF No. 6.) Part of the motion has been resolved through a consent injunction, filed separately. (*See* ECF No. 42.) For the following reasons, the Court **DENIES** what remains of the motion.

I. BACKGROUND

2. CMS provides staffing, billing, and related services to medical practices. Its owner is Kelly Custer. (*See* Custer Aff. ¶¶ 3, 4, ECF No. 8.8.)

3. Current Dermatology, PLLC is a former client of CMS. Its owner, Current Patterson, is a board-certified dermatologist and Custer's ex-wife. (*See* Patterson Aff. ¶¶ 2, 14, ECF No. 22.1.) The practice has three offices in western North Carolina. (*See* Compl. ¶ 4, ECF No. 3; ECF No. 23 ¶ 4.)

4. More than a decade ago, CMS and Current Dermatology entered into a staffing and services agreement, since revised. (*See* Custer Aff. ¶ 4.) In a nutshell, the agreement tasked CMS with filling most of Current Dermatology's staffing needs.

To do so, CMS hired individuals, entered into employment agreements with them, and then assigned them to work for Current Dermatology. CMS also provided support services, including billing. In return, Current Dermatology reimbursed CMS's costs and paid it a monthly fee. (*See* Servs. Agrmt. §§ 1.1, 1.2, 3.4, ECF No. 8.1.)

5. In keeping with this arrangement, CMS hired Traci Long, Rebecca Manring, and Teresa Davidson and assigned them to work with Patterson at Current Dermatology. Long and Davidson are physician assistants; Manring is a nurse practitioner. (*See* Long Aff. ¶¶ 2, 3, ECF No. 24; Davidson Aff. ¶¶ 2, 3, ECF No. 24; Manring Aff. ¶¶ 2, 3, ECF No. 24.) All three have employment agreements that restrict the use of confidential information. (*See* Pl.'s Ex. 2 §§ 1.1, 11, Ex. 3 §§ 1.1, 11, Ex. 4 §§ 1.1, 11, ECF Nos. 8.2, 8.3, 8.4.) The employment agreements for Long and Manring also include noncompete clauses. (*See* Pl.'s Ex. 2 § 10.1, Ex. 3 § 10.1.)

6. In 2018, Custer and Patterson divorced. (*See* Patterson Aff. ¶¶ 14, 15.) Lingering acrimony has led to several disputes while also complicating the relationship between CMS and Current Dermatology. At the end of 2019, Custer and Patterson negotiated an amendment to the services agreement, upping the monthly fee and extending its term from one year to six years. (*See* Pl.'s Ex. 6 §§ 1, 2, ECF No. 8.6 ["Amend. Servs. Agrmt."].) Either side may terminate the agreement for gross misconduct by giving advance written notice of 60 days and allowing the other side the opportunity to cure the breach. (Servs. Agrmt. § 2.1; Amend. Servs. Agrmt. § 3.) The amendment also left in place a clause labeled "Non-Competition" that bars each

side from soliciting employees of the other during the term of the agreement and for one year after. (*See* Servs. Agrmt. § 8.1.)

7. In June 2020, Current Dermatology sent CMS a letter terminating the services agreement with immediate effect. (*See* Custer Aff. ¶ 13; *see also* Pl.'s Ex. 7 at 1–2, ECF No. 8.7.) A day later, Long, Manring, and Davidson submitted letters terminating their employment with CMS, also effective immediately. (*See* Custer Aff. ¶ 17.) All three now work directly for Current Dermatology. (*See* Custer Aff. ¶ 17.)

8. In this lawsuit, CMS asserts a number of claims arising out of the termination of the services agreement and Current Dermatology's hiring of Long, Manring, and Davidson. These include claims that Current Dermatology breached the termination and nonsolicitation clauses in the services agreement; that Long and Manring breached the noncompete clauses in their employment agreements; and that Long, Manring, and Davidson breached their employment agreements by resigning without notice. There are other claims against Patterson and Dermatology for fraud, misappropriation of trade secrets, tortious interference with contract, and unfair or deceptive trade practices.

9. On September 1, 2020, CMS moved for a preliminary injunction. Part of the relief that CMS requested had to do with the alleged misuse of trade secrets, which the parties have resolved through a consent injunction. (*See* ECF No. 42.) This Order addresses the remaining requests for relief, centering on Current Dermatology's employment of Long, Manring, and Davidson and its early termination of the services

agreement. The motion has been fully briefed, and the Court held a hearing on November 9, 2020, at which all parties were represented by counsel.

II.
ANALYSIS

10. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). The plaintiff bears the burden to establish the "right to a preliminary injunction." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). Relief is warranted only when (1) the plaintiff can show a "likelihood of success on the merits of his case," and (2) the plaintiff is "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [the] plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (quoting *Ridge Cmty. Invs.*, 293 N.C. at 701, 239 S.E.2d at 574). The Court must also weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is entered. *See Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

A. Noncompete Clauses

11. The Court begins with the noncompete clauses in the employee agreements for Long and Manring. The clauses provide in relevant part that, for two years after the end of their employment, Long and Manring may not "directly or indirectly engage in or participate in providing dermatologic medicine in Jackson, Haywood,

Macon, Swain, Transylvania, Graham, Cherokee, or Clay counties in North Carolina." (Pl.'s Ex. 2 § 10.1, Ex. 3 § 10.1.)

12. North Carolina law disfavors covenants not to compete. *See VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004) (citation omitted). To be enforceable, a covenant must be: "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the employer." *Hartman v. W.H. Odell & Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994) (citation and quotation marks omitted). The burden is on CMS to prove reasonableness. *See id.*

13. Whether these covenants not to compete are designed to protect a legitimate business interest of CMS is debatable. Usually, a noncompete clause bars an employee from competing against her former employer. That is not the case here. CMS, the employer, does not practice dermatology. The clauses at issue instead bar Long and Manring from providing the kind of services performed by CMS's customer, Current Dermatology. CMS argues that these restrictions are necessary to protect its customer relationship by shielding Current Dermatology from competition by Long and Manring. (*See* Br. in Supp. 8–9, ECF No. 8; Custer Aff. ¶ 11.) Neither side, though, has cited any case addressing whether an employer may have a legitimate interest in keeping its employees from competing against its customers.[1]

[1] Of course, the question here is whether the noncompete clauses prohibit Long and Manring from working *for* Current Dermatology, not *against* it. CMS has not explained how its interest in protecting its relationship with Current Dermatology is served by a clause barring the practice from hiring Long and Manring. In theory, CMS might have an interest in

14. In any event, CMS has not carried its burden to show that the noncompete clauses are reasonably tailored to protect that interest, assuming it is legitimate. Although the clauses purport to bar Long and Manring from working in eight counties, Current Dermatology has offices in only three. Manring has never worked in the Haywood County office, and Long has not worked in that office for over five years. (*See* Manring Aff. ¶ 9; Long Aff. ¶ 11.) There is no evidence concerning how many patients Current Dermatology has in each county, much less the location of the patients treated by Long and Manring. In other words, the employment agreements purport to bar Long and Manring from providing dermatologic medicine in places they have not worked and even though they may not have relationships with any patients there.[2]

15. The clauses also prohibit any engagement or participation, "directly or indirectly," in the provision of dermatologic medicine. (*See* Pl.'s Ex. 2 § 10.1, Ex. 3

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preventing disintermediation (i.e., keeping the middleman from being cut out), but it has not advocated that interest. *See, e.g.*, *HR Staffing Consultants LLC v. Butts*, 627 F. App'x 168, 172 (3d Cir. 2015); *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1558 (11th Cir. 1983).

[2] *See, e.g.*, *Hejl v. Hood, Hargett & Assocs., Inc.*, 196 N.C. App. 299, 307, 674 S.E.2d 425, 430 (2009) ("[T]he geographic area encompasses two states regardless of whether [the employee] had any personal knowledge of [the employer's] customers in those areas."); *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 282, 530 S.E.2d 878, 882 (holding that a covenant's territory was overbroad when it prohibited the employee "from working for *all* of [the employer's] current or recent clients, regardless of where the client is located, whether he had any contact with them, or whether he even knew about them"); *Hartman*, 117 N.C. App. at 314, 450 S.E.2d at 918 (noting absence of "evidence concerning the location of the clients for whom [the employee] worked or with whom he was in contact"); *Kinston Med. Specialists, P.A. v. Bundle*, 2015 NCBC LEXIS 125, at *3 (N.C. Super. Ct. Feb. 13, 2015) (denying motion for temporary restraining order when the covenant prohibited a physician assistant from working in six counties even though she had worked in only one because it barred her from working "in a significantly broader geographic area than the area in which she worked").

§ 10.1.) It is not clear what indirect participation in dermatologic medicine would involve, but it would certainly include more than the duties that Long and Manring perform in their roles as physician assistant and nurse practitioner. Our appellate courts have held that "restrictive covenants are unenforceable where they prohibit the employee from engaging in future work that is distinct from the duties actually performed by the employee." *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656, 670 S.E.2d 321, 327 (2009); *see also Akzo Nobel Coatings Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *31–32 (N.C. Super. Ct. Nov. 3, 2011) ("North Carolina courts have refused to enforce noncompetition clauses using the terms 'directly or indirectly.' " (collecting cases)).

16. Although the two-year time period is not unreasonable on its face, time and territory are viewed in tandem. *See Farr Assocs.*, 138 N.C. App. at 280, 530 S.E.2d at 881. Given the medical nature of the occupation, the two-year restriction is not short enough to offset or mitigate the breadth of the territorial restriction and the scope of job duties rendered off limits. *See Kinston Med. Specialists*, 2015 NCBC LEXIS 125, at *4.

17. For these reasons, the Court concludes that CMS has not carried its burden to show that it is likely to succeed on the merits of the claim. *See VisionAir*, 167 N.C. App. at 509, 606 S.E.2d at 363. This does not necessarily mean that the noncompete clauses are overbroad and unreasonable as a matter of law. After discovery, CMS may be able to marshal additional evidence to support its claim. But it is not entitled to a preliminary injunction.

B. Nonsolicitation of Employees

18. CMS argues that Current Dermatology breached the "Non-Competition" clause in the services agreement by soliciting and hiring Long, Manring, and Davidson. This clause has several parts. Relevant here is the prohibition against solicitation of employees: for the duration of the agreement plus one year, CMS and Current Dermatology may not "induce, encourage, solicit, offer or arrange for the employment or engagement by himself or any other person, organization or entity of any present or former employee, officer, director, agent or representative of the other or attempt to engage them in any employment relationship or other business engagement." (Servs. Agrmt. § 8.1.)

19. A restriction against soliciting employees is a contract in restraint of trade and must be "carefully scrutinize[d] for reasonableness." *Sandhills Home Care, L.L.C. v. Companion Home Care – Unimed, Inc.*, 2016 NCBC LEXIS 61, at *35–36 (N.C. Super. Ct. Aug. 1, 2016) (citation omitted). It "is subject to the same requirements as other restrictive covenants." *Id.* at *36 (citation omitted).

20. Again, CMS has the burden to show that the restriction is reasonably tailored to protect its legitimate business interests, but it hasn't made the case. (*See* Br. in Supp. 6.) Typically, the purpose of a restriction against soliciting employees is to protect the employer's customer relationships and confidential information. CMS doesn't say, even generally, whether the nonsolicitation clause serves those interests or any other. Indeed, it seems that Long, Manring, and Davidson had relationships with Current Dermatology's patients—not CMS's customers. Even giving CMS the

benefit of the doubt, the clause is not obviously reasonable in scope. Broadly written, the clause covers not only current employees but also every former employee of CMS. *See Superior Performers, Inc. v. Meaike*, No. 1:13CV1149, 2014 U.S. Dist. LEXIS 50302, at *41–42 (M.D.N.C. Apr. 11, 2014) (concluding restriction was reasonable when limited to solicitation of current employees); *see also Ameritox, Ltd. v. Savelich*, 92 F. Supp. 3d 389, 400 (D. Md. 2015) (concluding that nonsolicitation clause was "not narrowly tailored" (applying Maryland law)).

21. Nor has CMS shown irreparable harm. All CMS argues in its brief is that it has been "deprived of the benefit of its bargains." (Br. in Supp. 16.) But money damages are adequate to compensate for the loss of income from the services agreement, which includes quantifiable fees derived from assigning Long, Manring, and Davidson as staff to Current Dermatology.

22. CMS has not identified any additional, irreparable harm. It has not pointed to any competitive harm, for example, because Long, Manring, and Davidson do not compete against it. It is not even clear whether CMS could have reassigned the three employees to any other medical practice after Current Dermatology terminated the services agreement. The Court is not convinced that the harm from soliciting idle employees to work in noncompetitive positions is irreparable. *See, e.g.*, *Larweth v. Magellan Health, Inc.*, 398 F. Supp. 3d 1281, 1292 (M.D. Fla. July 31, 2019) (concluding there was no irreparable harm from solicitation of employees when the employees did not go on to compete against the former employer); *In re Document Techs. Litig.*, 275 F. Supp. 3d 454, 469 (S.D.N.Y. 2017) (concluding plaintiff failed to

show irreparable harm as to breach of a nonsolicitation clause when plaintiff only offered "unsubstantiated testimony, disconnected from proof" that the company had experienced harm to its goodwill).

23. The absence of evidence is especially notable given that Long, Manring, and Davidson left their employment over four months ago. Any irreparable harm would be manifest by now. Furthermore, a preliminary injunction is prospective in nature. CMS must show ongoing irreparable harm, but without a threat of future competition from these employees, the damage from their departures is likely done. And CMS has provided no evidence that Current Dermatology solicited any other employee or is likely to do so. The evidence does not support a reasonable expectation that the wrong will be repeated. *See A.E.P. Indus.*, 308 N.C. at 407, 302 S.E.2d at 763 (observing that a preliminary injunction is warranted only when there is evidence of an injury that is of "continuous and frequent recurrence" (citation and quotation marks omitted)); *see also Arjo, Inc. v. Handicare USA, Inc.*, No. 18 C 2554, 2018 U.S. Dist. LEXIS 183037, at *28–29 (N.D. Ill. Oct. 25, 2018) (denying preliminary injunction for breach of restrictive covenant on the ground that "the damage is done" and no continued irreparable harm was likely (citation and quotation marks omitted)); *Traffic Tech, Inc. v. Kreiter*, No. 14-cv-7528, 2015 U.S. Dist. LEXIS 169248, at *50–53 (N.D. Ill. Dec. 18, 2015) (similar).

24. At bottom, the argument and evidence presented by CMS is too meager to warrant extraordinary relief. The Court concludes that CMS has not carried its burden.

C. Improper Termination

25. When Current Dermatology terminated the services agreement, it did so without advance notice. CMS claims that Current Dermatology had no valid reason to terminate the services agreement, failed to give adequate notice, and failed to allow a chance to cure any breach.[3] (*See* Compl. ¶¶ 43, 47, 55, 63; *see also* Servs. Agrmt. § 2.1; Amend. Servs. Agrmt. § 3.)

26. Even if CMS can show a likelihood of success on this claim, it has not made even a passing attempt to show irreparable harm. (*See* Br. in Supp. 16.) Ordinarily, money damages are adequate to compensate for early or improper termination of a contract. *See, e.g.*, *Presidential Hosp., LLC v. Wyndham Hotel Grp., LLC*, No. CIV 17-0981, 2018 U.S. Dist. LEXIS 92500, at *46–47, 51 n.13 (D.N.M. June 2, 2018); *Alt. Med. & Pharm., Inc. v. Express Scripts, Inc.*, 2014 U.S. Dist. LEXIS 142424, at *22–23 (E.D. Mo. Oct. 7, 2014); *Weston Servs., Inc. v. NUS Corp.*, 1991 U.S. Dist. LEXIS 2828, at *15–16 (E.D. Pa. Mar. 11, 1991). Here, the terms of the services agreement appear to provide a ready measure of CMS's damages. (*See, e.g.*, Servs. Agrmt. § 5.1; Amend. Servs. Agrmt. § 2.) CMS has not shown otherwise.

27. Although CMS offers no argument in its brief, Custer's affidavit states that the company has lost other employees, damaging its "ability to continue operations." (Custer Aff. ¶ 31.) If the early termination of the services agreement truly threatened to put CMS out of business, that might be enough to show a risk of irreparable harm.

[3] CMS also claims that Long, Manring, and Davidson breached the termination provisions in their employment agreements. It has not cited those claims as a basis for its motion for preliminary injunction.

Custer's conclusory statement does not come close to satisfying CMS's burden, however. *Town of Knightdale v. Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989) ("[P]laintiff's conclusory allegation of irreparable harm was insufficient to allow the trial court to weigh the equities and thereby determine in its sound discretion whether an interlocutory injunction should be issued or refused."); *Ford v. Jurgens*, 2020 NCBC LEXIS 60, at *8 (N.C. Super. Ct. May 6, 2020) (rejecting conclusory allegations of irreparable harm).

28. CMS appears to have a "full, complete and adequate remedy at law." *Bd. of Light & Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980) (citations omitted). There is no basis to grant injunctive relief.

D. Other Claims

29. CMS has not explained how its other claims—tortious interference with contract, fraud, and unfair and deceptive trade practices—support the request for an injunction. Granting a preliminary injunction "requires a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015).

30. Nor has CMS offered any evidence of irreparable harm related to these claims, each of which is regularly and adequately compensated by money damages. *See, e.g.*, *Carolina Overall Corp. v. E. Carolina Linen Supply, Inc.*, 8 N.C. App. 528, 531–32, 174 S.E.2d 659, 661 (1970); *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*,

222 N.C. App. 834, 841, 733 S.E.2d 162, 169 (2012); N.C.G.S. § 75-16. Accordingly, there are no grounds for an injunction on these claims.

III.
CONCLUSION

31. With the exception of the consent injunction entered by separate order, the Court **DENIES** CMS's motion for preliminary injunction.

SO ORDERED, this the 30th day of November, 2020.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases