STATE OF NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 4285
RELATION INSURANCE, INC. and RELATION INSURANCE SERVICES OF NORTH CAROLINA, INC., Plaintiffs, v. PILOT RISK MANAGEMENT CONSULTING, LLC, PILOT FINANCIAL BROKERAGE, INC. d/b/a PILOT BENEFITS, KYLE SMYTHE, ROBERT CAPPS, LYNETTE KINNEY, EDWARD MILES GURLEY, SEAN KELLY, TYLER CROOKER, MICHELLE LINTHICUM, LINDA MICHELLE SNEED, TONI KING, and JOHNATHAN LANCASTER, Defendants.	**ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER comes before the Court on Plaintiffs' Emergency Motion for Preliminary Injunction. ("PI Motion" or "Motion," ECF No. 6.)

THE COURT, having considered the Motion, the briefs and other submissions of the parties, the arguments of counsel, and all applicable matters of record, CONCLUDES, in its discretion, that the Motion should be DENIED for the reasons set forth below.

PROCEDURAL BACKGROUND

1. Plaintiffs Relation Insurance, Inc.—formerly known as Ascension Insurance, Inc.—and Relation Insurance Services of North Carolina, Inc. (collectively, "Relation" or "Plaintiffs") initiated this action on 11 April 2022, asserting

multiple claims against (1) certain former employees of Relation—Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster (collectively, the "Former Employees"); (2) the company for which the Former Employees are now all employed—Pilot Risk Management Consulting, LLC ("Pilot Risk") and Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits ("Pilot Benefits") (collectively, "Pilot"); and (3) the managing members of Pilot—Kyle Smythe, Robert Capps, and Lynnette Kinney (collectively, the "Managing Members").[1] ("Complaint," ECF No. 3.)

2. Plaintiffs assert the following claims in the Complaint: (a) four breach of contract claims—one against the Former Employees for breach of confidentiality provisions in their employment agreements; two against the Former Employees for breach of non-solicitation clauses in their employment agreements; and one against Pilot and the Managing Members for breach of an 11 March 2021 Settlement Agreement; (b) two misappropriation of trade secrets claims against all Defendants—one under the Federal Defend Trade Secrets Act, U.S.C.S. § 1832 et seq., and one under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152 et. seq.; (c) an unjust enrichment claim against all Defendants; (d) two computer-related claims against the Former Employees—one for computer trespass under N.C.G.S. § 14-458 and one for violation of the Computer Fraud and Abuse Act of 1986, 18 U.S.C.S. § 1030; (e) two tortious interference claims against all Defendants—one for current "business and contractual relations" and one for "prospective economic advantage";

[1] The Former Employees, Pilot, and the Managing Members are collectively referred to as "Defendants."

and (f) a claim for unfair and deceptive trade practices ("UDTP") under N.C.G.S. § 75-1.1 et seq. against all Defendants. (ECF No. 3, at ¶¶ 154–270.)

3. Plaintiffs filed the PI Motion on 13 April 2022,[2] in which they request that this Court enter an Order prohibiting and restraining Defendants during the pendency of this litigation from

> disclosing, using, duplicating, distributing, or relying upon Plaintiffs' trade secrets or proprietary or confidential information, including but not limited to customer lists, customer contact information, and pricing and billing information; and
>
> . . . from indirectly or directly, soliciting, enticing, or inducing away from Plaintiffs, or accepting business from, any of Plaintiffs' clients or customers that were clients or customers of Plaintiffs during the restrictive periods and which Defendants dealt with, did business with, serviced, or communicated with during their employment with Plaintiffs; and
>
> . . . from telling any client or prospective client that Plaintiffs' employment agreements are unenforceable; and
>
> . . . from soliciting, encouraging, or otherwise enticing Plaintiffs' employees to quit their employment with Plaintiffs and accept employment with Defendants or any entity owned or controlled by Defendants[.]

(ECF No. 6, at pp. 3–4.)

4. Further, Plaintiffs request that the Court order Defendants to

> return all of Plaintiffs' property, including but not limited to Plaintiffs' trade secrets and confidential information, and certify under oath in a written statement filed with the Court that they have returned the same . . . and
>
> . . . preserve all data currently stored on computers over which they have possession, custody, or control, including personal digital assistants or mobile telephones, including any information stored on backup media,

[2] Plaintiffs did not move for a temporary restraining order.

> which currently stores, or which has stored, Plaintiffs' confidential information, proprietary information, or trade secrets; and
>
> . . . preserve all emails on any computer under their control, including internet mail servers, personal digital assistants, and other hardware, that was at any time related to the solicitation or contact of Plaintiffs' current or former clients or employees[.]

(*Id*. at p. 4.)

5. The Court held a hearing on the PI Motion on 10 May 2022.

6. During the hearing, the parties reached a voluntary agreement that (a) the Former Employees would return any of Relation's alleged confidential information or trade secrets and preserve all of its computer data and emails; and (b) in return, Plaintiffs would narrow the scope of the PI Motion so that it would no longer encompass the issues of misappropriation of alleged trade secrets or confidential information.

7. On 13 May 2022, the parties filed a Stipulation Regarding Plaintiffs' Motion for Preliminary Injunction, memorializing the terms of their agreement at the hearing. ("Stipulation," ECF No. 94.) The terms of the parties' Stipulation are incorporated herein by reference.

8. As a result of the parties' Stipulation, the only remaining issue to be resolved by the Court in connection with the PI Motion is whether the Former Employees should be preliminarily enjoined from committing any acts in violation of the non-solicitation clauses in their employment agreements.

9. The PI Motion is now ripe for resolution.

FACTUAL BACKGROUND

10. The Court makes the following findings of fact, which are made solely for the purpose of resolving the PI Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at trial on the merits.").

11. Relation serves as an "independent insurance agenc[y] and broker[ ] engaged in the business of the sale, marketing and provision of various insurance products and services to individuals and institutional, governmental and business clients[.]" (ECF No. 5.9, at p. 1.) Relation acts as the "Broker of Record" ("BOR") for its clients, which is a term of art in the insurance industry "used to establish and/or identify a relationship between an insurance broker and a policyholder to the insurance company." (Aff. of Cooper,[3] ECF No. 7.1, at ¶ 4.)

12. The origins of this dispute can be traced to 12 February 2020, when Smythe, who at that time was employed by Relation, formed Pilot Risk, a direct competitor of Relation. (ECF No. 7.1, at ¶¶ 21–22.) Smythe's formation of this competing entity was the subject of a prior lawsuit, *Relation Insurance, Inc. v. Kyle Smythe*, Case No. 20-CVS-4168, filed on 16 March 2020 in Guilford County Superior Court (the "Smythe Lawsuit"), in which Relation brought claims against Smythe for breach of his employment agreement, tortious interference, and UDTP. (*Id.* at ¶ 24.)

[3] Jonathan Cooper is the President of the Eastern Region for Relation. (ECF No. 7.1, at ¶ 2.)

13. On 4 September 2020, upon the defendant's motion to dismiss the Smythe Lawsuit, the Honorable Susan E. Bray entered an order dismissing all of Relation's claims except for the breach of employment agreement claim. (ECF No. 33.) Although Judge Bray declined to dismiss the breach of employment agreement claim in its entirety, she stated the following in her order:

> The Court notes that Defendant Smythe correctly contends that the definitions contained in the Agreement and the use of certain terms at Paragraph 3(a) (specifically, the "Ascension Group"), Paragraph 3(d) (specifically, (i) "Insurance Offices," (ii) "Client," (iii) "Prospective Client," (iv) "Confidential Information[,]" (vi) "Person," and (vii) ["]Material Contact"), Paragraph 4(b) (specifically, "directly or indirectly," "participate (in any manner) in any business" and the "Ascension Group"), Paragraph 7 (specifically, "Confidential Information") and Paragraph 10 (specifically, "Confidential Information," "directly or indirectly," "any member of the Ascension Group,["] "Client," "Insurance Products or Insurance Services," "indirectly" and "Material Contact[ ]"), are too broadly written and are invalid and unenforceable. Therefore, Paragraphs 4(b), 10(a) and 10(c) of the Agreement are unreasonable as a matter of law and no valid contract existed based on Paragraphs 4(b), 10(a) and 10(c) of the Agreement. Nevertheless, Plaintiffs have sufficiently alleged in Count I of the [c]omplaint a breach of contract under the last sentence of Paragraph 4(a) of the Agreement. Therefore, the Motion to Dismiss Count I of the [c]omplaint is DENIED.

(ECF No. 33, at pp. 2–3; referring to "Smythe's Employment Agreement," ECF No. 30, at p. 22–35.)

14. The Smythe Lawsuit was subsequently resolved in March 2021 through a settlement agreement (the "Settlement Agreement") that was entered between Relation, Smythe, Capps, Kinney, and Pilot. (ECF No. 7.1, at ¶ 25; ECF No. 34.) Per the terms of the Settlement Agreement, Pilot agreed to: (a) pay Relation a nominal amount of money; (b) not solicit customers of Relation through 31 May 2021; (c) not

solicit employees of Relation through 31 March 2021; (d) not disclose or use any of Relation's confidential information through 4 March 2022; and (e) not disclose or use any of Relation's trade secrets "for so long as the information qualifies as a trade secret under North Carolina law." (ECF No. 34, at § 3(a)–(d).) In consideration of these terms, the parties agreed to dismiss with prejudice all claims and counterclaims in the Smythe Lawsuit, and Relation and Pilot agreed to "release and discharge" each other and their employees from "all claims, demands, actions, causes of action, suits, damages, losses, and expenses, whether known or unknown, of any and every nature whatsoever, as a result of actions or omissions occurring through the execution date of this [Settlement] Agreement." (*Id.* at §§ 4–6.)

15. Like Smythe, the Former Employees also previously worked for Relation as either "Producers" or "Account Managers,"[4] and each of them executed employment agreements with Relation (the "Employment Agreements"). (ECF No. 7.1, at ¶¶ 7, 11; *see* ECF Nos. 5.9–5.15.)

16. The seven Employment Agreements at issue that were entered into between Relation and the Former Employees can be classified into two primary categories—those for Producers ("Producer Agreements") and those for Account Managers ("Invention, Confidentiality and Non-Solicitation Agreements"; hereinafter referred to as "Account Manager Agreements"). (*See* ECF Nos. 5.9–15.)

[4] Producers "are individuals licensed to sell, service, and negotiate insurance policies." (ECF No. 7.1, at ¶ 8.) Account managers "work closely with producers and provide support to producers and the applicable clients to which the account managers are assigned." (*Id.* at ¶ 9.)

All of the Employment Agreements contained non-solicitation clauses (the "Non-Solicitation Clauses"). (*Id.*)

17. As an example, Section 8 of Lancaster's Producer Agreement[5] provides, in pertinent part, as follows:

> For a period of twenty-four (24) months (the "Restriction Period") after termination of Producer's employment for any reason:
>
> (a) Producer will not, either directly or indirectly, except on behalf of the Company, (i) solicit, or attempt to solicit the insurance or employee benefit plan business of any Client or Prospective Client . . . [or] (ii) induce Clients or Prospective Clients to terminate, cancel, not renew or not place business with the Company or with any other member of the Ascension Group . . . .
>
> The foregoing restrictions in this paragraph shall apply only to those Clients or Prospective Clients with whom Producer had material contact or about whom Producer obtained Confidential Information during the last twelve (12) months of Producer's employment with the Company. In this Agreement, "material contact" means interaction between Producer and a Client or Prospective Client that was intended to further the business relationship of the Company or any other member of the Ascension Group with, or the sale of products or the performance of services by the Company or any other member of the Ascension Group for, such Client or Prospective Client, including, but not limited to, the sale, provision or placement of any Insurance Product or Insurance Service, the issuance of a firm price quote, marketing presentations, or the drafting and negotiation of any contractual agreement; and
>
> (b) Producer will not, either on Producer's own account or on behalf of any individual or entity, recruit or solicit for employment, attempt to recruit or solicit for employment, or induce or endeavor to cause to leave employment of the Company or any other member of the Ascension Group any employee of the Company or of any other member of the Ascension Group (i) with whom Producer came into contact during Producer's last twelve (12) months of employment with the Company, or about whom Producer obtained Confidential

[5] While not all of the Non-Solicitation Clauses in the Producer Agreements at issue are completely identical, they are all substantially similar. (*See* ECF Nos. 5.9–12.) Any significant differences are noted herein.

> Information during Producer's employment with the Company, and (ii) who is known by Producer at the time of such recruitment, solicitation, inducement, endeavor or attempt to then be employed by the Company or any other member of the Ascension Group.

("Lancaster's Producer Agreement," ECF No. 5.12, at § 8(a)–(b).)

18. For purposes of all the Employment Agreements, the "Company" is defined as Relation, and the "Ascension Group" is defined to include Relation and its "affiliates" and "subsidiaries"—although, no identifying list of these affiliates or subsidiaries is provided. (*See, e.g.*, ECF No. 5.9–15, at p. 1.)[6]

19. Furthermore, Lancaster's Producer Agreement contains, among others, the following definitions:

a. "Client," "Insurance Products," and "Insurance Services":

> "Client" means any group, company or other entity, or individual to or from whom: (A) the Company has actually sold, provided or placed any insurance products including but not limited to insurance policies, bonds, employee benefit plans, or other insuring agreements or programs ("Insurance Products"); or (B) the Company is rendering any services, including, but not limited to, claims management, program administration, loss prevention, or other consulting services ("Insurance Services"); where such Insurance Products are still then in effect with (or Insurance Services are still then being provided to) such group, company or any other entity, or individual or an ongoing business relationship then exists with the Company.

(*Id.* at § 1(d)(i).)[7]

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[6] At the 10 May 2022 hearing, counsel for Plaintiffs conceded that there is nothing in the current record that specifically identifies all of the various entities that make up the Ascension Group.

[7] The definition of "Client" is the same in Kelly's Producer Agreement. (*See* ECF No. 5.11, at § 1(d)(i).) However, in Gurley and Crooker's Producer Agreements, "Client" is defined to also include clients of "any other member of the Ascension Group." (ECF No. 5.9, at § 3(d)(ii); ECF No. 5.10, at § 2(d)(i).)

b. "Prospective Client" and "Material efforts":

> "Prospective Client" means any group, company, other entity or individual to whom the Company has made material efforts toward providing Insurance Products or Insurance Services offered by the Company, without regard to whether a binding agreement has been entered into with such group, company or other entity, or individual. "Material efforts" include, but are not limited to, the issuance of a firm price quote, marketing presentations, or drafting and negotiations of any contractual agreement, where such efforts create a reasonable possibility of the Company doing business with such group, company or other entity, or individual.

(*Id.* at § 1(d)(ii).)[8]

c. "Confidential Information":

> "Confidential Information" shall mean all information of a confidential or proprietary nature (whether or not specifically labeled or identified as "confidential" or "proprietary"), in any form or medium, that relates to or results from business, historical or projected financial results, budgets, strategies, know-how, sales products, services, research or development, acquisitions, acquisitions under consideration or acquisition targets, divestitures or divestitures under consideration, or trade secrets of the Company or of any other member of the Ascension Group. Confidential Information includes, but is not limited to, (i) the Company's programs, analyses, sales and marketing strategies, marketing and promotional plans and practices, pricing, rate structures and profit margins, (ii) Clients and Prospective Clients of the Company, including, without limitation, Client and Prospective Client lists, the following information regarding Clients and Prospective Clients: identifying information, risk characteristics and requirements, identity and preferences of key personnel, loss and claims histories, financial data and performance, payroll, policy and contract renewal and expiration dates and data, policy terms, conditions and rates, underwriting data, and specialized needs, and the confidential information of Clients and Prospective Clients, (iii) information about and personnel files of employees of the Company or any other member of the Ascension Group, former employees of the Company or any other member of the Ascension Group, prospective employees of the Company

[8] The definition of "Prospective Client" is the same in Kelly's Producer Agreement. (*See* ECF No. 5.11, at § 1(d)(ii).) However, in Gurley and Crooker's Producer Agreements, "Prospective Client" is defined to also include prospective clients of "any other member of the Ascension Group." (ECF No. 5.9, at § 3(d)(iii); ECF No. 5.10, at § 2(d)(ii).)

> or any other member of the Ascension Group, or independent contractors, suppliers, or distributors of the Company or any other member of the Ascension Group, or other third parties with whom the Company or any other member of the Ascension Group has or had contractual relationships, and (iii) [sic] any other information developed or used by the Company or the Ascension Group that is not known generally to the public and that gives the Company or any member of the Ascension Group an advantage in the marketplace, as well as all notes, memoranda, compilation reports and other documents prepared by Producer or other employees of Company or any member of the Ascension Group containing any such information.

(*Id*. at § 4(a).)

20. As another example, Section 4(b) of Defendant Linthicum's Account Manager Agreement[9] provides, in pertinent part:

> (b) Employee agrees that . . . for a period of twelve (12) months (the "Restrictive Period") after termination of Employee's employment for any reason or by any means, whether initiated by Employee or the Company, Employee will not, either directly or indirectly:
>
> (i) (A) solicit or attempt to solicit the insurance or employee benefit plan business of any Client for the purpose of selling to, negotiating with, providing Insurance Products or Insurance Services to, diverting, accepting the business of, or underwriting for any such Client any Insurance Product, any Insurance Service, or any other product or service of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company,
>
> (B) solicit, or attempt to solicit the insurance or employee benefit plan business of any Prospective Client for the purpose of selling to, negotiating with, providing Insurance Products or Insurance Services to, diverting, accepting the business of, or underwriting for any such Prospective Client any Insurance Product, any Insurance Service, or any

[9] Although the Non-Solicitation Clauses in the Account Manager Agreements at issue are not completely identical, they are substantially similar and contain the same defined terms. (*See* ECF Nos. 5.13–15.)

other product or service of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company,

(C) induce Clients to terminate, cancel, not renew or not place business with the Company or any other member of the Ascension Group, [or]

(D) induce Prospective Clients to terminate, cancel, not renew or not place business with the Company or any other member of the Ascension Group[.]

. . .

The foregoing restrictions in this paragraph shall apply only to those Clients or Prospective Clients with whom Employee had material contact or about whom Employee obtained Confidential Information during the last twelve (12) months of Employee's employment with the Company. Furthermore, for the purposes of this Section 4(b)(i), Insurance Products, Insurance Services and any other product or service sold or provided by the Company or other member of the Ascension Group shall be limited to those of the type sold or provided by Employee during the last twelve (12) months of Employee's employment with the Company or other member of the Ascension Group. In this Agreement, "material contact" means interaction between Employee and a Client or Prospective Client that was intended to further the business relationship of the Company, or of any other member of the Ascension Group, with, or the sale of products or the performance of services by the Company, or by any other member of the Ascension Group, for, such Client or Prospective Client; and

(ii) Employee will not, either on Employee's own account or on behalf of any person, organization or entity, recruit or solicit for employment, attempt to recruit or solicit for employment, or induce or endeavor to cause to leave employment of the Company or of any other member of the Ascension Group any employee of the Company or of any other member of the Ascension Group (A) with whom Employee came into contact during Employee's last twelve (12) months of employment with the Company or other member of the Ascension Group, or about whom Employee obtained Confidential Information during Employee's last twelve (12) months of employment with the Company or

> other member of the Ascension Group, and (B) who is known by Employee at the time of such recruitment, solicitation, inducement, endeavor or attempt to then be employed by the Company or any other member of the Ascension Group.

("Linthicum's Account Manager Agreement," ECF No. 5.14, at § 4(b).)

21. Linthicum's Account Manager Agreement contains the following defined terms:

a. "Client," "Insurance Products," and "Insurance Services":

> "Client" any group, company, nonprofit organization, educational institution, organization, association or other entity, or individual to or for whom: (A) the Company or any other member of the Ascension Group has actually sold, provided or placed any insurance products, including, but not limited to, insurance policies, bonds, health, accident or athletic insurance plans or programs, dental, vision or life insurance plans or programs, employee benefit plans, or other insuring agreements or programs ("Insurance Products"); or (B) the Company or any member of the Ascension Group is rendering any services, including, but not limited to, claims management, claims administration, enrollment services, program administration, loss prevention, consulting services, or third-party administration services ("Insurance Services"); where such Insurance Products are still then in effect with (or Insurance Services are still then being provided to) such group, company, nonprofit organization, educational institution, organization, association or other entity, or individual or an ongoing business relationship then exists with the Company or other member of the Ascension Group.

(*Id*. at § 3(a)(i).)

b. "Prospective Client":

> "Prospective Client" means any group, company, nonprofit organization, educational institution, organization, association or other entity, or individual to whom the Company or any other member of the Ascension Group has made material efforts (as defined below) toward providing any Insurance Products or Insurance Services offered by the Company or other member of the Ascension Group, without regard to whether a binding agreement has been entered into with such group, company, nonprofit organization, educational institution, organization,

association or other entity, or individual. "Material efforts" include, but are not limited to, the issuance of a firm price quote, marketing presentations, or drafting and negotiation of any contractual agreement, where such efforts create a reasonable possibility of the Company or other member of the Ascension Group doing business with such group, company, nonprofit organization, educational institution, organization, association or other entity, or individual.

(*Id*. at § 3(a)(ii).)

c. "Confidential Information":

"Confidential Information" shall mean all information of a confidential or proprietary nature (whether or not specifically labeled or identified as "confidential" or "proprietary"), in any forum or medium, that relates to or results from the business, historical or projected financial results, budgets, strategies, know-how, sales products, services, research or development, acquisitions, acquisitions under consideration or acquisition targets, divestitures or divestitures under consideration, or trade secrets of the Company or of any other member of the Ascension Group. Confidential Information includes, but is not limited to, (i) the Company's and other Ascension Group member's programs, analyses, sales and marketing strategies, marketing and promotional plans and practices, pricing, rate structures and profit margins, (ii) Clients and Prospective Clients of the Company and other members of the Ascension Group, including, without limitation, Client and Prospective Client lists, the following information regarding Clients and Prospective Clients: identifying information, risk characteristics and requirements, identity and preferences of key personnel, loss and claims histories, financial data and performance, payroll, employee information, policy and contract renewal and expiration dates and data, policy terms, conditions and rates, underwriting data, and specialized needs, and the confidential information of Clients and Prospective Clients, (iii) information about and personnel files of employees of the Company or any other member of the Ascension Group, former employees of the Company or any other member of the Ascension Group, prospective employees of the Company or any other member of the Ascension Group, or independent contractors, suppliers, or distributors of the Company or any other member of the Ascension Group, or other third parties with whom the Company or any member of the Ascension Group has or had contractual relationships, and (iii) [sic] any other information developed or used by the Company or the Ascension Group that is not known generally to the public and that gives the Company or any member of the Ascension Group an advantage in the marketplace, as well as all

> notes[,] memoranda, compilations[,] reports and other documents prepared by Employee or other employees of Company or any member of the Ascension Group containing any such information.

(*Id*. at § 3(b).)

22. The Former Employees now all work at Pilot, "performing comparable, if not identical, roles . . . that they performed at Relation." (ECF No. 7.1, at ¶ 28.)

23. In support of their PI Motion, Plaintiffs have submitted affidavit testimony and exhibits suggesting that, despite the Non-Solicitation Clauses detailed above, the Former Employees have solicited—and continue to solicit—Relation's clients and employees for the benefit of Pilot. (*See, e.g.*, Exs. B–H, P–EE to Complaint, ECF Nos. 5.2–8, 5.16–31; Aff. of Perkins, ECF No. 7.3, at ¶¶ 4–18; Aff. of Zewalk,[10] ECF No. 7.4, at ¶¶ 4–7; Aff. of Toran,[11] ECF No. 7.2, at ¶¶ 4–5; Supp. Aff. of Cooper, ECF No. 89, at ¶¶ 7–9.) For example, Kathy Perkins, an Employee Benefits Consultant for Relation, learned on 10 March 2022 that Lancaster had sent forms to a Relation client—unprompted—in an attempt to move the client's business to Pilot. (ECF No. 7.3, at ¶ 14–17.)

24. While Defendants deny that the Former Employees have improperly solicited Relation's clients and customers, Crooker admits that he "does not know which of [his] clients [he] called after leaving Relation and which ones called [him]" (Aff. of Crooker, ECF No. 74, at ¶ 44); Linthicum concedes that "several account

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[10] Zewalk is the Chief Operating Officer for Relation. (ECF No. 7.4, at ¶ 2.)

[11] Toran is the Senior Vice President of Information Technology for Relation. (ECF No. 7.2, at ¶ 2.)

managers on [her] former team at Relation asked [her] to keep them in mind if Pilot Risk needed to hire additional employees" (Aff. of Linthicum, ECF No. 64, at ¶ 19); multiple Former Employees admit that they reached out to Relation's clients to let them know they were leaving Relation (Aff. of Gurley, ECF No. 67, at ¶ 29; Aff. of Kelly, ECF No. 81, at ¶ 41; Aff. of Lancaster, ECF No. 35, at ¶ 57); and all the Former Employees state that they believed their Employment Agreements were—and continue to be—unenforceable (Aff. of King, ECF No. 78, at ¶ 48; Aff. of Sneed, ECF No. 52, at ¶ 14; Aff. of Lancaster, ECF No. 35, at ¶ 58; Aff. of Linthicum, ECF No. 64, at ¶ 37; Aff. of Gurley, ECF No. 67, at ¶ 43; Aff. of Crooker, ECF No. 74, at ¶ 45; Aff. of Kelly, ECF No. 81, at ¶ 53).

STANDARD OF REVIEW

25. A preliminary injunction

> is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a 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 a plaintiff's rights during the course of litigation.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401 (1983) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *see also* N.C.G.S. § 1A-1, Rule 65; N.C.G.S. § 1-485.

26. A preliminary injunction "should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending." *Bd. of Provincial Elders v. Jones*, 273

N.C. 174, 182 (1968); *accord Cty. of Johnston v. City of Wilson*, 136 N.C. App 775, 780 (2000) (noting that a court should weigh "the advantages and disadvantages to the parties" in deciding whether to issue a preliminary injunction).

27. The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after careful balancing of the equities[,]" *A.E.P. Indus., Inc.*, 308 N.C. at 400 (quoting *School*, 299 N.C. at 357–58), but it cannot be issued "unless the movant carries the burden of persuasion as to each of these prerequisites[,]" *Air Cleaning Equip., Inc. v. Clemens*, 2016 NCBC LEXIS 199, at *17 (N.C. Super. Ct. Apr. 29, 2016) (citing *Pruitt v. Williams*, 288 N.C. 368, 372 (1975)).

ANALYSIS

28. At the outset, it is helpful to reiterate the limited issue currently before the Court. As noted above, the parties have entered into a stipulation regarding Defendants' alleged improper use of Plaintiffs' trade secrets and confidential information such that Plaintiffs are no longer asking the court to preliminarily enjoin such conduct. Moreover, Plaintiffs have also made clear that they are not asking the Court to enter preliminary injunctive relief as to non-competition covenants contained in the Employment Agreements. Instead, Plaintiffs are now seeking a preliminary injunction solely to enforce the Non-Solicitation Clauses in the Employment Agreements against the Former Employees.[12]

[12] Although Plaintiffs contend in their Complaint that Pilot and the Managing Members have breached various provisions of the Settlement Agreement by engaging in certain conduct that was prohibited thereunder, Plaintiffs concede that they are not entitled to preliminary injunctive relief as to those alleged breaches given that the time periods for which those restrictions were in effect have all expired. (*See* ECF No. 34, at § 3.)

29. Our Supreme Court has stated that "[w]here a preliminary injunction is sought to enforce a [restrictive covenant] in an employment contract . . . the [restrictive covenant] itself must be valid and enforceable in order for the employer to be able to show the requisite likelihood of success on the merits." *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227–28 (1990) (citation omitted).

> Determination of the enforceability of [a restrictive covenant], in turn, rests on the likelihood that the plaintiff will be able to show that the [restrictive] covenant is (1) in writing; (2) reasonable as to terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy.

Id. at 228 (citations omitted); *see also United Labs., Inc., v. Kuykendall*, 322 N.C. 643, 649–50 (1988). Such restrictive employment covenants "are not viewed favorably by modern law," *Farr Assoc. v. Baskin*, 138 N.C. App. 276, 279 (2000), and will only be enforced if "reasonably necessary for the protection of a legitimate business interest." *Triangle Leasing Co.*, 327 N.C. at 229; *see also United Labs, Inc.*, 322 N.C. at 649–50.

30. This Court has noted, however, that non-solicitation clauses are "more easily enforced" than non-competition clauses, despite sharing the same elements. *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *30–31 (N.C. Super. Ct. Nov. 3, 2011) (explaining that non-solicitation clauses are "generally more tailored and less onerous on an employees' ability to earn a living"); *see, e.g., Triangle Leasing Co.*, 327 N.C. at 226–27 (holding that a non-solicitation clause was reasonable where "the pertinent clause of the contract does not prohibit all competition by [defendant] throughout North Carolina, but rather merely restrains

him from soliciting the business of plaintiff's known customers in areas in which the company operates.")

31. It is well established that "[t]he party who seeks enforcement of the [restrictive] covenant has the burden of proving the reasonableness of the agreement." *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655 (2009). "The reasonableness of a [restrictive] covenant is a matter of law for the Court to decide." *Id*.

32. Preliminarily, Plaintiffs have established that the Non-Solicitation Clauses meet three of the above-quoted requirements—that is, they are in writing, were part of the Former Employees' contracts for employment, and were based on valuable consideration. *See Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 597 (2006) ("[T]he offer of new employment constitutes valuable consideration supporting a restrictive covenant in the employment contract."). Indeed, in their brief in opposition to the PI Motion, Defendants have not challenged the validity of the Non-Solicitation Clauses on these grounds. Accordingly, this Court's inquiry must focus on the two remaining requirements—namely, whether the covenants are "reasonable as to terms, time, and territory," and whether they are against public policy (*i.e.*, whether they are designed to protect a legitimate business interest of the employer). *See Farr Assocs., Inc.*, 138 N.C. at 279.

33. Plaintiffs contend, *inter alia*, that the Non-Solicitation Clauses are reasonable because they are limited to the non-solicitation of clients with whom the Former Employees had "Material Contact." *See Wade S. Dunbar Ins. Agency, Inc. v.*

Barber, 147 N.C. App. 463, 469 (2001) (upholding client-based restriction that precluded defendant from contacting prospective customers with whom the defendant had contact during his employment). Further, Plaintiffs argue that their customer relationships and client goodwill are legitimate business interests that are properly the subject of these types of restrictive covenants. *See United Labs, Inc.*, 322 N.C. at 651 ("[P]rotection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer.").

34. In response, Defendants make two arguments. First, they contend that, as a result of Judge Bray's Order, Plaintiffs are collaterally estopped from "relitigating the enforceability of the subject provisions" of the Employment Agreements, which they argue are similar—if not identical—to the provisions that were at issue in the Smythe Lawsuit. (ECF No. 86, at pp. 3–6.) Second, Defendants argue that regardless of whether collateral estoppel applies to Judge Bray's order, Judge Bray was correct in her ruling that the Non-Solicitation Clauses are unreasonably overbroad, principally because the restrictions apply to every client, prospective client, or employee of "any [ ] member of the Ascension Group," which they contend would make it impossible for the Former Employees to identify who they are foreclosed from soliciting. (*Id.* at p. 9.)

35. Even assuming, without deciding, that Judge Bray's order does not have collateral estoppel effect under these circumstances, the Court concludes—based on

its own independent analysis—that Plaintiffs have failed to show a likelihood of success on the merits as to the enforceability of the Non-Solicitation Clauses.

36. Here, the Non-Solicitation Clauses preclude the Former Employees from (a) soliciting "Clients" or "Prospective Clients" of Relation "with whom [the Former Employees] had material contact or about whom [the Former Employees] obtained Confidential Information during the last (12) months" (hereinafter, the "Customers Restriction"); and (b) soliciting employees of Relation "or any other member of the Ascension Group" that the Former Employees "came into contact [with] during Employee's last (12) months of employment . . . or about whom [the Former Employees] obtained Confidential Information" and "who [are] known by [the Former Employees] at the time of such . . . solicitation . . . to then be employed by [Relation] or any other member of the Ascension Group" (hereinafter, the "Employees Restriction"). (*See, e.g.*, ECF No. 5.12, at § 8(a); ECF No. 5.14, at § 4(b).)

37. The Court deems the decision in *Wells Fargo Ins. Servs. USA v. Link*, 2018 NCBC LEXIS 42 (N.C. Super. Ct. May 8, 2018), *aff'd per curiam*, 372 N.C. 261 (2019), to be particularly instructive.

38. In *Link*, this Court similarly addressed the reasonableness of non-solicitation clauses that (a) prohibited defendants from soliciting "the Company's clients, customers, or prospective customers with whom they had Material Contact and/or regarding whom they received Confidential Information"; and (b) prohibited defendants from soliciting "any employee . . . of the Company[.]" 2018 NCBC LEXIS 42, at *11–23, *26–30. The defendants—both former employees of Wells Fargo

Insurance Services USA, Inc. ("Wells Fargo")—argued that the terms "the Company" and "Confidential Information" were "defined so broadly in the Employment Agreement" that they made the non-solicitation clauses overbroad and unreasonable. *Id*. at **14, 27.

39. Notably, the employment agreements at issue in *Link* defined "Confidential Information" to include the "names, addresses, and contact information of the Company's customers and prospective customers" as well as "information relating to the Company's . . . employees"; "Material Contact" to mean "interaction between [the defendants] and the customer, client, or prospective customer"; and

> "the Company" to include not only Wells Fargo Insurance Services, but also its "past, present, and future parent companies, subsidiaries, predecessors, successors, affiliates, and acquisitions. The Employment Agreement does not identify the subsidiary and affiliate companies, but according to publicly available data from Wells Fargo, it is a vast organization with many affiliate companies.

Id. at **5, 14.

40. In assessing the reasonableness of the restriction on the solicitation of customers, this Court acknowledged that the inclusion of such a limitation on the solicitation of customers of Wells Fargo's affiliate companies with whom the former employees *had contact* within the last year of their employment "does not necessarily render the restriction overbroad and unreasonable." *Id*. at 16. Accordingly, this Court stated that "[i]f [the defendants] had significant interactions with customers or prospective customers of affiliate companies of Wells Fargo, Wells Fargo may have a legitimate interest in restricting them from soliciting those customers." *Id*.

41. Nevertheless, this Court pointed out that the defendants were "not only prohibited from soliciting Wells Fargo customers with whom they had 'Material Contact', but also from soliciting customers and prospective customers about whom they received 'Confidential Information.' " *Id*. This Court explained that

> [a]rguably, the clause prohibits solicitation of customers or prospective customers of Wells Fargo-affiliate companies whose name, address, or other contact information was shown (purposely or inadvertently) to [the defendants] during their employment, whether or not that customer or prospective customer had any dealings with Wells Fargo's insurance division or with the [defendants].

Id. at *19.

42. Further, in analyzing the reasonableness of the restrictions on the solicitation of Wells Fargo's employees, this Court stated:

> Plaintiff has not alleged any facts that would support a legitimate business interest in restricting [defendants] from soliciting employees working for Wells Fargo's affiliate companies in any segment of the banking, investment, or insurance industries. It is highly unlikely that the vast majority of these employees would have any involvement or contact with Wells Fargo's commercial insurance customers.

Id. at *29.

43. Therefore, this Court found the non-solicitation clauses at issue in *Link* to be unreasonable and unenforceable as a matter of law. *Id*. at **26, 29–30. *See also Medical Staffing Network, Inc.*, 194 N.C. App. at 656–57 (holding that a non-solicitation clause prohibiting the solicitation of clients and employees of "an unrestricted and undefined set of [plaintiff's] affiliated companies that engage in business distinct from the . . . business in which [defendant] had been employed" did not protect "any legitimate business interest" and therefore was unenforceable).

44. The Court reaches a similar conclusion with respect to the Non-Solicitation Clauses at issue here.

45. First, with respect to the Customers Restriction, the Former Employees are not only prohibited from soliciting the clients or prospective clients "with whom [they] had material contact," but also "about whom [they] obtained Confidential Information." The definition of "Confidential Information" includes identifying information of "Clients" and "Prospective Clients." In effect, the Customers Restriction could apply to preclude the Former Employees from soliciting clients or prospective clients of Relation with whom they were shown contact information, but never actually had any contact.[13] Such restrictions fail as unnecessary to protect the legitimate business interests of the employer. *See Link*, 2018 NCBC LEXIS 42, at *19; *see also Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar*, 264 N.C. App. 260, 272 (2019) (holding that non-solicitation clause in employment agreement was unreasonable where it foreclosed solicitation of potential clients "with whom [former employee] had no relationship"); *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **33 (N.C. Super. Ct. Nov. 3, 2011) ("Generally, covenants which seek to restrict a former employee from competing with future or prospective customers with whom they had no personal contact during employment fail as unnecessary to protect the legitimate business interests of the employer.");

[13] The Court notes that five of the seven Employment Agreements go even further to restrict solicitation of clients and prospective clients of Relation and "any other member of the Ascension Group." Thus, in these instances, the Former Employees could even be foreclosed from soliciting customers of one of Plaintiffs' unnamed affiliates or subsidiaries—even if they never had any contact with such customers.

Laboratory Corp. of America Holdings v. Kearns, 84 F. Supp. 3d 447, 459 (M.D.N.C. 2015) ("In North Carolina, covenants prohibiting competition for a former employer's customers are only enforceable when they prohibit the employee from contacting customers with whom the employee actually had contact during his former employment.")

46. Second, with regard to the Employees Restriction, the Former Employees are similarly not only prohibited from soliciting employees "with whom [they] had material contact," but also "about whom [they] obtained Confidential Information." The definition of "Confidential Information" includes "information about and personnel files of employees." Further, the Employees Restriction does not only apply to employees of Relation, but also to employees of "any other member of the Ascension Group." Plaintiffs argue that the Employees Restriction is tailored to only restrict the solicitation of employees that are "known by [the Former Employees] at the time of such . . . solicitation . . . to then be employed by the Company or any other member of the Ascension Group." Nevertheless, as noted above, the Employment Agreements do not identify the members of the Ascension Group. In effect, the Employees Restriction would foreclose the solicitation of an employee of any of Plaintiffs' unnamed affiliate companies, potentially precluding solicitation of employees who are engaged in business activities wholly distinct from those as to which the Former Employees had been engaged. Again, such broad restrictions have been found to be unenforceable in that they do not protect the legitimate business

interests of the employer. *See Link*, 2018 NCBC LEXIS 42, at *26–30; *Medical Staffing Network, Inc.*, 194 N.C. App. at 656–57.

47. Accordingly, the Court concludes that Plaintiffs have not established a likelihood of success on their breach of contract claims pertaining to the Non-Solicitation Clauses. *See Triangle Leasing Co.*, 327 N.C. at 227–28 (stating that to obtain a preliminary injunction enforcing a restrictive covenant in an employment contract, "the [restrictive covenant] itself must be valid and enforceable in order for the employer to be able to show the requisite likelihood of success on the merits.").[14]

CONCLUSION

THEREFORE, IT IS ORDERED, as follows:

1. Plaintiffs' PI Motion to enforce the Non-Solicitation Clauses in the Employment Agreements against the Former Employees is DENIED; and
2. The parties shall comply in all respects with the terms set forth in the Stipulation (ECF No. 94), which are incorporated herein by reference.

SO ORDERED, this the 25th day of May, 2022.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

[14] As a result, the Court need not decide whether Plaintiffs have shown irreparable harm.