STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 39534
CTS METROLINA, LLC, Plaintiff, v. DUSTIN BERASTAIN, TIMOTHY MOREAU, and INKWELL EMERGENCY RESPONSE, LLC, Defendants.	**ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

1. **THIS MATTER** is before the Court on Plaintiff's Motion for Preliminary Injunction (the "Motion") filed pursuant to Rule 65 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (ECF No. 6).

2. Plaintiff CTS Metrolina, LLC ("CTS Metrolina") moves for an order prohibiting Defendants Dustin Berastain ("Berastain") and Timothy Moreau ("Moreau") from violating restrictive covenants that resulted from the sale of the assets of Berastain and Moreau's business, Metrolina Restoration ("Restoration") to CTS Metrolina in March 2022.

3. Having considered the Motion, the affidavits filed in support of and in opposition to the Motion, the related briefing, the Verified Complaint and exhibits, and the arguments of counsel at a hearing on the Motion held 11 January 2024, the

Court **FINDS** and **CONCLUDES**, solely for the narrow purposes of the Motion,[1] as follows:

FINDINGS OF FACT[2]

A. Procedural History

4. Plaintiff instituted this action by filing the Verified Complaint on 15 December 2023. (Verified Compl. ["Ver. Compl."], ECF No. 3.) The Verified Complaint purports to allege claims against Berastain and Moreau for breach of certain restrictive covenants, as well as for breach of fiduciary duty / constructive fraud. It also purports to allege claims for tortious interference with contract / prospective economic advantage and misappropriation of trade secrets against all Defendants. (*See generally* Ver. Compl.)

5. The case was designated as a complex business case on 18 December 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

6. Plaintiff filed its Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction on 19 December 2023. To address the request for a TRO, the Court held a hearing on 22 December 2023. (*See* Not. of Hr'g., ECF No. 9.) On 24

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[1]It is well-settled that neither findings of fact nor conclusions of law made during a temporary injunction proceeding are binding upon the Court at a trial on the merits. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (citing *Huggins v. Wake Cnty. Bd. of Educ.*, 272 N.C. 33, 40-41 (1967)).

[2]To the extent any finding of fact is more appropriately characterized as a conclusion of law or vice-versa, it should be reclassified. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

December 2023, the Court entered an order granting in part Plaintiff's Motion for TRO. (TRO, ECF No. 11.) On 2 January 2024, the Court granted a consent motion extending the TRO until 8:00 A.M. on 13 January 2024. (ECF No. 16.) On 12 January 2024, the parties stipulated to extend the TRO until 8:00 AM on 20 January 2024. (ECF No. 32.)

7. On 11 January 2024, the Court held a hearing on Plaintiff's Motion for Preliminary Injunction, at which all parties were represented by counsel. (Not. of Hr'g., ECF No. 17.) The Motion is now ripe for disposition.

B. The Asset Purchase and Restrictive Covenant Agreements

8. Plaintiff CTS Metrolina is a Louisiana limited liability company that provides emergency property restoration and repair services to owners of commercial and rental properties. (Ver. Compl. ¶¶ 4, 11.) It is an indirect, wholly-owned subsidiary of Continuum Restoration Holdings, LLC ("Continuum"), also a Louisiana company. (Ver. Compl. ¶ 4.)

9. In March 2022, CTS Metrolina purchased the assets of Metrolina Restoration, LLC ("Restoration"), a North Carolina limited liability company owned and operated by Defendants Berastain and Moreau. (Ver. Compl. ¶ 13; Aff. of Timothy Moreau ("Moreau Aff.") ¶ 22, ECF No. 22; Aff. of Dustin Berastain ("Berastain Aff.") ¶ 22, ECF No. 21.) In the transaction, CTS Metrolina acquired Restoration's assets, including its intellectual property and trade secrets, accounts, relationships, and employment contracts. (Ver. Compl. ¶ 14.) In exchange, Berastain and Moreau received $3.6 million and were granted minority, non-voting interests in

CTS Metrolina. (Ver. Compl. ¶ 17.) They were also promised an Earnout Payment and a true up of working capital. (Asset Purchase Agreement ["APA"], Sections 2.1-2.2, Exhibit B, ECF No. 3, Ex. 3.) In addition, as part of the deal, Berastain and Moreau were offered positions as co-presidents of CTS Metrolina. Both accepted the positions and signed employment agreements with CTS Metrolina. (Ver. Compl. ¶ 15; Moreau Aff. ¶ 24; Berastain Aff. ¶ 24.)

10. Also as a condition of the deal, both Berastain and Moreau were required to agree to the terms of a Confidentiality and Protective Covenant Agreement (the "Restrictive Covenant Agreement") that includes noncompetition, nonsolicitation, and confidentiality provisions. (Ver. Compl. ¶ 16; Moreau Aff. ¶ 25; Berastain Aff. ¶ 25.) Copies of the Restrictive Covenant Agreements for Moreau and Berastain are appended to the Complaint, ECF No. 3.

11. The noncompetition provisions in the Restrictive Covenant Agreement prohibit Berastain and Moreau from:

> directly or indirectly through the use of others: (a) [e]ngag[ing] in or assist[ing] any other Person[3] in engaging in the Business[4] in the Territory . . . in a capacity that is substantially similar to the capacity in which [Berastain or Moreau]

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[3] "Person" means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association, or other entity. (Restrictive Covenant Agreement, Section 4(i).)

[4] "Business" means the business, practices and operations of Seller, as conducted and as proposed to be conducted as of the date of this Agreement and as conducted as of the Closing Date and during the Restricted Period, which includes, without limitation, the provision of disaster recovery, mitigation, and restoration services primarily to owners of damaged or otherwise affected residential and commercial structures in the eastern United States, based out of North Carolina. For the sake of clarity, the "Business" does not include the post-remediation construction activities of Affinity Construction, LLC, which is owned in part by Owner. (Restrictive Covenant Agreement, Section 4(b).)

> served [Restoration] within the 12-month period preceding the Closing;"[5] (b) [p]rovid[ing] or perform[ing] services or duties to any Person in the Business in the Territory . . . that are the same or substantially similar to those services or duties provided by [Berastain or Moreau] to [Restoration] anytime during the 12-month period preceding the Closing; or (c) [h]aving an active interest in any Person that engages in the Business in the Territory, including as a partner, shareholder, member, employee, principal, agent, trustee or consultant" except that [Berastain or Moreau] may own, solely as a passive investment, securities of any Person traded on any national securities exchange if [Berastain or Moreau] is not a controlling Person . . . and does not, directly or indirectly, own five percent (5%) or more of any class of securities of such Person.

(Restrictive Covenant Agreement, Sections 3.1(a)–(c).)

12. The restrictions are applicable to a Territory defined to be the greatest of the following severable geographic area(s): (i) the United States; (ii) the states in which either Restoration or CTS Metrolina "conducted, promoted, managed, developed, or engaged in the Business" within the twelve-month period prior to the Closing; (iii) the geographic territory(ies) in which Berastain or Moreau had a job responsibility for conducting, promoting, managing, developing or engaging in the Business during the twelve-month period prior to the Closing Date; and (d) the area within a 100-mile radius of CTS Metrolina's business office located at 1806 Lane Street, Kannapolis, North Carolina 28083. (Restrictive Covenant Agreement, Section 4(m); Ver. Compl. ¶ 41.) The "Restricted Period" is five years from the Closing Date, until approximately March 2027. (Restrictive Covenant Agreement, Section 4(k); Ver. Compl. ¶ 41.)

[5] "Closing" means the Closing of the transactions contemplated by the APA according to its terms. (Restrictive Covenant Agreement, Section 4(c).)

13. The Confidentiality and Nondisclosure section in the Restrictive Covenant Agreement requires that Berastain and Moreau (1) treat all Proprietary Information as confidential "and to not directly or indirectly through others disclose, publish, communicate, or make available Proprietary Information, or allow it to be disclosed, published communicated or made available, in whole or part, to any entity or person whatsoever;" and (2) not access, use, copy, or remove any Proprietary Information.[6] (Restrictive Covenant Agreement, Section 2(a)–(b).)

C. Berastain and Moreau End Employment with CTS Metrolina

14. Berstain and Moreau managed and operated CTS Metrolina on a day-to-day basis, entered into agreements on behalf of CTS Metrolina, managed relationships with subcontractors and vendors, expanded CTS Metrolina's business, and awarded commissions to CTS Metrolina employees who brought in new accounts. (Ver. Compl. ¶ 31.)

15. Plaintiff contends that about a year after the acquisition, Berastain and Moreau became disgruntled and "disengaged from their work." (Ver. Compl. ¶ 42.) Berastain and Moreau allege that their dissatisfaction resulted from the fact that between October 2022 and April 2023, Continuum withdrew money from CTS Metrolina's accounts on several occasions to pay debts owed by Continuum. (Moreau

[6] A lengthy definition of Proprietary Information is included at Section 4(j) of the Restrictive Covenant Agreement. Among other things, it includes: (1) customer purchasing or ordering histories, specifications and preferences, and pricing; (2) the terms and conditions of suppliers, vendors, consultants, or contractors; (3) the terms of employees; (4) information relating to technology platforms; (5) market plans and the associated business development strategies; (6) research and development information; (7) information provided by any third party on a confidential basis; (8) financial information; (9) trade secrets; and (10) Intellectual Property. (Restrictive Covenant Agreement, Section 4(j).)

Aff. ¶¶ 35-45; Berastain Aff. ¶¶ 35-45.) They allege that these withdrawals created a cash shortage that left CTS Metrolina unable to pay its bills. (Moreau Aff. ¶¶ 57-58; Berastain Aff. ¶¶ 57-58.)

16. On 15 September 2023, Berastain sent an email to CTS Metrolina's subcontractors and vendors stating that CTS Metrolina "was in a 'financial crisis' and 'unable to meet [CTS Metrolina's] financial obligations, including honoring [CTS Metrolina's] net30 agreements.' " (Ver. Compl. ¶ 46.) Berastain contends that the vendors responded positively to the correspondence and appreciated his transparency. (Berastain Aff. ¶¶ 60-61.) CTS Metrolina, however, contends that Berastain's email "harmed CTS Metrolina's reputation and its ability to do business with its subcontractors and vendors, and some subcontractors and vendors severed ties with CTS Metrolina." (Ver. Compl. ¶ 47.)

17. As a result of "broken promises and failure to make [] promised capital contributions," at some point in summer 2023, Berastain and Moreau filed a lawsuit against CTS Metrolina in Cabarrus County, Superior Court (23 CVS 2124) seeking to invalidate the acquisition. (Ver. Compl. ¶ 44; Moreau Aff. ¶ 56; Berastain Aff. ¶ 56.) Berastain and Moreau contend that promises regarding capital infusions that CTS Metrolina made to induce them to sell Restoration's assets were false. (Moreau Aff. ¶¶ 32, 54; Berastain Aff. ¶¶ 32, 54.) They further contend that, pursuant to the APA, they are owed an Earnout Payment for 2022, as well as a working capital true up. (Moreau Aff. ¶¶ 46-47; Berastain Aff. ¶¶ 46-47.) The Cabarrus County lawsuit

was ultimately stayed pending arbitration of the claims. (*See* Order entered 6 October 2023, ECF No. 35.)[7]

18. CTS Metrolina terminated Berastain on 10 October 2023. (Ver. Compl. ¶ 49.) While CTS Metrolina asserts that Berastain's termination was for cause and resulted from the email he sent to CTS Metrolina's subcontractors and vendors, (Ver. Compl. ¶ 49), Berastain contends that he was terminated in retaliation for filing the Cabarrus County lawsuit, (Berastain Aff. ¶ 69). Following Berastain's termination, Moreau and Ryan Brandon, another employee of CTS Metrolina, resigned. (Ver. Compl. ¶¶ 50-51.)

19. After Berastain and Moreau's separation from employment, CTS Metrolina attempted to image the laptops Berastain and Moreau had used at work to ensure that none of its proprietary information remained on their computers. (Ver. Compl. ¶ 53.) Moreau complied with this request, but Berastain claimed that he had thrown his laptop in the trash when he was on vacation in New Jersey, and it was no longer available. (Ver. Compl. ¶¶ 54-55; Berastain Aff. ¶ 67.)

D. Berastain and Moreau Invest in IER Holdings, LLC

20. Around the time they left CTS Metrolina, both Berastain and Moreau invested in IER Holdings, LLC ("IER Holdings"). (Moreau Aff. ¶¶ 69-70; Berastain Aff. ¶¶ 71-72.) The extent of their investment is unclear; however, by 26 October 2023, approximately two weeks after Berastain and Moreau's departure from CTS

[7] Counsel for Defendants Moreau and Berastain handed up the Order without objection during oral argument on the Motion. (11 January 2024 Hearing Tr. ["Tr."] 29:15-19, ECF No. 36.)

Metrolina, IER Holdings formed Inkwell Emergency Response, LLC ("Inkwell"), a Wyoming LLC that competes with CTS Metrolina in the emergency restoration services industry. Inkwell is named as a defendant in this action. (Ver. Compl. ¶¶ 8, 56, Ex. 1.) Neither Berastain nor Moreau is an executive or employee of Inkwell. (Aff. of Chakyra Cherry ["Cherry Aff."] ¶¶ 14-15, ECF No. 10.)

21. CTS Metrolina serves as a general contractor and uses the software "iRestore," commonly used in the industry, to manage subcontractors, track jobs, and communicate with vendors. (Ver. Compl. ¶¶ 11-12; Aff. of Ryan Smith ["Smith Aff."] ¶ 6, ECF No. 23.) When CTS Metrolina receives a job from a customer, it posts the project information on iRestore, designates a subcontractor to perform the work for that job, and has iRestore generate a job confirmation email that is sent to the designated subcontractor. (Ver. Compl. ¶ 12.)

22. Rytech Restoration ("Rytech") is one of CTS Metrolina's subcontractors. (Ver. Compl. ¶ 58.) On 1 December 2023, Rytech forwarded a job confirmation it received from iRestore to CTS Metrolina. (Ver. Compl. ¶ 60.) The email indicated that the job was for American Homes 4 Rent ("AH4R"). (Ver. Compl. ¶ 61.) Although AH4R is one of CTS Metrolina's largest clients, CTS Metrolina did not recognize this particular job. (Ver. Compl. ¶¶ 59, 62.) The job was created by former CTS Metrolina employee Ryan Brandon. (Ver. Compl. ¶ 61.)

23. CTS Metrolina investigated the email from its subcontractor and determined that it had been misdirected. In fact, the job was generated in iRestore by Inkwell, not CTS Metrolina. (Ver. Compl. ¶¶ 62-64.) While investigating, CTS

Metrolina was informed by someone at iRestore that Berastain and Moreau were "involved" with Inkwell.[8] (Ver. Compl. ¶ 64.) In addition, an officer of CTS Metrolina's parent company met with a representative of one of CTS Metrolina's largest customers, who told her that Berastain had contacted the customer to say, "we're back up and running."[9] (Aff. of Erin Pinter ¶¶ 2, 4, ECF No. 7.1.)

24. Chakyra Cherry ("Cherry") worked for Berastain and Moreau as an employee of Restoration from 2020 until March 2022. (Cherry Aff. ¶ 6.) Following CTS Metrolina's acquisition of Restoration, Cherry was employed by CTS Metrolina as its Director of Operations. (Cherry Aff. ¶ 9.) By November 2023, Cherry had resigned from CTS Metrolina and was employed as the Director of Operations for Inkwell. (Cherry Aff. ¶ 11.) Cherry works alongside Ryan Brandon and Aleciya Rucker, also former employees of CTS Metrolina. (Cherry Aff. ¶ 13.) Unlike Berastain and Moreau, however, none of them, (Cherry, Brandon, or Rucker), is bound by a Restrictive Covenant Agreement. (Cherry Aff. ¶¶ 13, 30.)

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[8] Ryan Smith, the founder and co-owner of iRestore, testified that he did not make this statement. He does not believe that anyone at iRestore made this statement because, in his opinion, "[n]o employee of iRestore would have knowledge of the ownership of Inkwell." (Smith Aff. ¶¶ 19-20.) However, Andrew Vana, Executive Vice President of Plaintiff's parent company and the individual who spoke with Smith, recounted the conversation in a contemporaneous email in which he stated that Smth told him that Berastain and Moreau were "involved" with Inkwill. (Aff. of Andrew Vana, Ex. A, ECF No. 28.) The Court gives credence to the contemporaneous account of the conversation.

[9] Berastain denies making this statement, but neither he nor Moreau deny that it was their intent, through IER Holdings, "to continue in their livelihood." (Tr. 45:4-5.) In response to the Court's questions their counsel conceded, "It's likely that they set [Inkwell] up; I'm not arguing that they didn't." (Tr. 46:4-5.) When asked if there were other owners of Inkwell, counsel for Berastain and Moreau responded, "Just my two, that's it." (Tr. 49:3-4.)

25. With respect to the job for AH4R, Cherry contends that she personally procured the job for Inkwell through her "personal connections, relationships, and experiences cultivated during [her] time in the restoration industry." (Cherry Aff. ¶ 20.) The job was located in Schertz, Texas, a suburb of San Antonio. (Cherry Aff. ¶ 25.)

26. At the hearing, CTS Metrolina limited its request for relief to its claims for breach of the restrictive covenants. (Tr. 4:11-16.)

CONCLUSIONS OF LAW

A. Jurisdiction

27. Defendants assert that this Court does not have jurisdiction because the parties agreed to arbitrate claims related to the Restrictive Covenant Agreement. (Defs.' Mem. of Law Opp. Pl.'s Mot. Prelim. Injunc. ["Defs.' Br. Opp."] 5-7, ECF No. 20.) While the APA (Section 8.8) and both individual defendants' employment agreements (Section 9) contain arbitration provisions, Section 3.3 of the Restrictive Covenant Agreement, titled "Nonexclusive Remedies for Breach," specifies that if either Berastain or Moreau breaches any restrictive covenant, CTS Metrolina shall have the right "to seek to have such provision specifically enforced by any court having jurisdiction, it being acknowledged and agreed that any such breach may cause irreparable injury to [CTS Metrolina] and that money damages may not provide an adequate remedy[.]"

28. The Court construes this specific provision, found within the Restrictive Covenant Agreement itself, to control the parties' rights with respect to breach of the

Restrictive Covenant Agreement. "When general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specific." *Dev. Enters. of Raleigh v. Ortiz*, 86 N.C. App. 191, 194 (1987) (citing *Woods-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 738 (1974)). Indeed, Defendants' contrary construction would give effect only to the arbitration provision and would read Section 3.3(a) out of the Agreement, a result that is contrary to basic principles of contract construction. "A contract must be considered as a whole, considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction." *Id.* at 194 (citing *State v. Corl*, 58 N.C. App. 107, 111 (1982)).

29. Defendants next contend that because the Cabarrus County lawsuit was merely stayed and not dismissed when the case was ordered to arbitration, Plaintiff should be required to seek injunctive relief in the Cabarrus County Superior Court and not here. (Defs.' Br. Opp. 6-7.) However, for the prior action pending doctrine to abate this action, the prior action must be "between the same parties for the same subject matter in a court within the state having like jurisdiction[.]" *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 591 (2016) (quoting *Eways v. Governor's Island*, 326 N.C. 552, 558 (1990)). "The doctrine applies where the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded." *Id.* at 591 (quoting *Jessee v. Jessee*, 212 N.C. App. 426, 438 (2011) (cleaned up)).

30. The Cabarrus County lawsuit was brought by Berastain and Moreau against CTS Metrolina, its parent, and its affiliated companies (Continuum Restoration Holdings, LLC, Continuum Restoration Services, LLC, Continuum Total Solutions, LLC, and RobCap CTS Operating, LLC). In it, Berastain and Moreau demand recission of the APA. (Moreau Aff. ¶ 56; Berastain Aff. ¶ 56; Ver. Compl. ¶ 2.) Breach of the Restrictive Covenant Agreement is not alleged. Comparing this case with the Cabarrus County case nets few similarities. The two actions involve different parties, issues, and relief. Accordingly, the Court concludes that the prior action pending doctrine does not apply, and this Court has jurisdiction over the parties and the subject matter of this action.

B. Prior Breach of Contract By CTS Metrolina

31. Berastain and Moreau argue that they are relieved from their obligations under the Restrictive Covenant Agreement because CTS Metrolina breached the APA by not paying them the Earnout Payment or the working capital true up. (Defs.' Br. Opp. 7.) The assertion of this affirmative defense shifts the burden of proof onto Defendants. *Ray Lackey Enters. v. Vill. Inn Lakeside, Inc.*, 2015 NCBC LEXIS 35, *13 (N.C. Super. Ct. April 2, 2015) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("the burdens at the preliminary injunction stage track the burdens at trial")).

32. In general, if either party to a bilateral contract commits a material breach of the contract, the other party is excused from further performance. *Millis Constr. Co v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 512 (1987). A material

breach is "one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220 (2015).

33. "Whether a failure to perform a contractual obligation is so material as to discharge the other parties to the contract from future performance of their obligations thereunder is a question of fact[.]" *Combined Ins. Co. v. McDonald*, 36 N.C. App. 179, 184 (1978).

34. Here, it is undisputed that, as a result of the APA, Berastain and Moreau received $3.6 million, an equity stake in CTS Metrolina, and offers of employment. They were also promised an Earnout Payment, which they believe totaled $209,674.07, and a working capital true up. Berastain and Moreau argue that they did not receive the latter two payments, despite initially demanding them. (21 Apr. 2023 Demand Letter, ECF No. 35.)[10] However, one week after Berastain and Moreau made this demand, they reversed course and revoked it. Instead, they demanded that the APA be rescinded and Restoration's assets returned. (28 Apr. 2023 Demand Letter, ECF No. 35.) Plaintiff admits that it has not remitted the Earnout Payment or the working capital true up pending resolution of the parties' dispute. Particularly under these circumstances, the Court cannot conclude that there has been a material breach going "to the very heart" of the APA sufficient to

[10] Plaintiff's counsel handed up the 21 April 2023 Demand Letter and the 28 April 2023 Demand Letter (referenced below) at the hearing on the Motion. Counsel for Berastain and Moreau initially objected but withdrew the objection. Counsel for Inkwell did not object. (Tr. 19:8-11; 22:1-7.)

excuse Defendants from their obligation to comply with the restrictive covenants at issue.

C. Preliminary Injunction

35. Plaintiff seeks a preliminary injunction to stop Berastain and Moreau. and those persons in active concert or participation with them, including Inkwell, from violating the Restrictive Covenant Agreement. 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 (1977). The Plaintiff bears the burden to show: (1) a likelihood of success on the merits, and (2) that it 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 plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983); *see also Pruitt v. Williams*, 288 N.C. 368, 372 (1975) ("The burden is on the plaintiffs to establish their right to a preliminary injunction."); N.C.G.S. § 1-485.

36. Likelihood of success means a "reasonable likelihood[.]" *A.E.P. Indus., Inc.*, 308 N.C. at 404. Irreparable injury is not necessarily injury that is "beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Id.* at 407 (emphasis omitted).

37. While irreparable injury must be "real and immediate," *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586 (2002), our courts have

recognized that the indeterminate nature of damages such as lost goodwill and threatened loss of market share may constitute irreparable harm. *See e.g.*, *Bayer CropScience LP v. Chemtura Corp.,* 2012 NCBC LEXIS 43, *24 (N.C. Super. Ct. July 13, 2012) (citing cases).

38. Furthermore, when deciding whether to afford preliminary injunctive relief, the Court must balance the potential harm the plaintiff will suffer if no injunction is entered against the potential harm to the defendants if an injunction is entered. *See Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 694 (1976) ("A court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction."); *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 23, at **12-13 (N.C. Super Ct. Mar. 15, 2017) ("[T]he trial court must 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." (citing *Williams v. Greene*, 36 N.C. App. 80, 86 (1978))).

39. Ultimately, the decision to grant or deny a preliminary injunction rests in the discretion of the court. *Lambe v. Smith*, 11 N.C. App. 580, 583 (1971).

D. Restrictive Covenants in the Context of Sale of Business

40. A covenant that arises from the sale of a business (where it is apparent that the purchaser has a legitimate interest in protecting the assets just purchased) is subject to a different level of scrutiny than the typical employment covenant (where the business interest to be protected may not be as readily apparent). *See e.g., Keith v. Day*, 81 N.C. App. 185, 193 (1986) ("We recognize the distinction between covenants

not to compete in connection with the sale of a business and covenants not to compete in connection with a contract of employment. The latter are more closely scrutinized than the former."); *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **30 (N.C. Super. Ct. Nov. 3, 2011) ("Non-compete covenants which accompany the sale of a business generally are afforded more latitude than covenants ancillary to employment contracts.").

41. The assets of a business include its trade secrets or other proprietary and confidential information, as well as its other intangibles, such as goodwill with customers, suppliers, and other third parties. When these assets are sold, the buyer has a legitimate interest in protecting its purchase and may do so through restrictive covenants. *See, e.g., Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 663 (1968) ("The modern rule permitting the sale of good will recognizes that one who, by his skill and industry, builds up a business, acquires a property right in the good will of his patrons and that this property is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time[.]" (internal quotation marks and citation omitted)).

42. However, even in the context of the sale of a business, whether a noncompete is enforceable turns on whether the restraint on trade is no more restrictive than necessary to protect the legitimate business interests implicated. *See e.g.*, *Carlson Env't Consultants, PC v. Slayton*, 2017 U.S. Dist. LEXIS 154191, at *20-

26 (W.D.N.C. Sept. 1, 2017) (analyzing noncompete signed in consideration of employment that also arose from the sale of a business).

43. Our Supreme Court has stated that it "will enforce a covenant not to compete made in connection with the sale of a business '(1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public.' " *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 698 (2016) (quoting *Jewel Box Stores Corp.*, 272 N.C. at 662-63). Ultimately, "[t]he reasonableness of a restraining covenant is a matter of law for the court to decide." *Jewel Box Stores Corp.*, 272 N.C. at 663.

44. Defendants contend that a five-year time restriction in a noncompetition covenant is the outer boundary for reasonableness in North Carolina. They argue that this covenant extends for six years because it contains a "look-back period" that includes the year preceding the Closing. They conclude that a six-year duration makes the noncompetition covenant unreasonable. (Defs.' Br. Opp. 9.)

45. The Court disagrees. It is unclear whether the law that has developed with respect to a look-back period applies to a noncompetition covenant that arises from the sale of a business the same way it does in the classic employment context. *See e.g., Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276 (2000); *Bite Busters, LLC v. Burris*, 2021 NCBC LEXIS 26 (N.C. Super. Ct. Mar. 25, 2021); *XPO Logistics, Inc. v. Anis*, 2016 NCBC LEXIS 54 (N.C. Super. Ct. July 12, 2016). Nevertheless, even a six-year restriction passes muster when it arises from the sale of a business involving

sophisticated parties who reached the agreement in an arms-length transaction. *See Jewel Box Stores*, 272 N.C. at 663–64 (collecting cases and observing that the duration of noncompetition covenants in the sale-of-business context can sometimes exceed "ten, fifteen, and twenty years, as well as limitations for the life of one of the parties"). Here, the parties agreed that the noncompetition covenant was reasonable. (Restrictive Covenant Agreement, Section 3.4). The Court likewise concludes that the noncompetition covenant is reasonable given that it was intended to protect assets purchased by Plaintiffs and for which the individual Defendants, sophisticated business people, were paid at least $3.6 million.

46. As far as the Restricted Territory is concerned, the noncompetition covenant is written in a manner that enables the Court to blue pencil and refuse to enforce the geographic provisions that are too broad to protect CTS Metrolina's legitimate business interests. *See Hartman v. W.H. Odell & Assoc.,* 117 N.C. App. 307, 317 (1994) (observing that a court may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable). Berastain and Moreau agree that CTS Metrolina did business in the following metropolitan areas within the relevant period:

a. Phoenix, Arizona;

b. Jacksonville, Florida;

c. Tampa Bay, Florida;

d. Orlando, Florida;

e. Atlanta, Georgia;

f. Marietta, Georgia;

g. Boise, Idaho;

h. Indianapolis, Indiana;

i. Chicago, Illinois;

j. Louisville, Kentucky;

k. Southaven, Mississippi;

l. Albuquerque, New Mexico;

m. Charlotte, North Carolina;

n. Raleigh, North Carolina;

o. Greensboro, North Carolina;

p. Columbus, Ohio;

q. Akron, Ohio;

r. Cincinnati, Ohio;

s. Portland, Oregon;

t. Greer, South Carolina;

u. Charleston, South Carolina;

v. Columbia, South Carolina;

w. Knoxville, Tennessee;

x. Nashville, Tennessee;

y. Memphis, Tennessee;

z. Austin, Texas;

aa. Dallas, Texas;

bb. Houston, Texas;

cc. San Antonio, Texas;

dd. Salt Lake City, Utah;

ee. Seattle, Washington; and

ff. Milwaukee, Wisconsin.

(Berastain Aff. ¶ 23; Moreau Aff. ¶ 23.) Each of these metropolitan areas falls within the Restricted Territory when it is defined as "the geographic territory(ies) in which [Berastain or Moreau] had a job responsibility for conducting, promoting, managing, developing or engaging in the Business on behalf of [Restoration or CTS Metrolina] anytime during the 12-month period prior to the Closing Date[.]" (Restricted Covenant Agreement, Section 4(m).) Accordingly, the Court concludes that the Restricted Territory, as defined, is not unreasonable.

47. As for whether they have violated the scope of the noncompetition covenant, Berastain and Moreau ended employment with CTS Metrolina on 10 October 2023. Inkwell, a competitor in the commercial restoration business, was formed just sixteen days later, on 26 October 2023, and it was registered to do business in North Carolina on 8 November 2023. Berastain and Moreau admit that they invested in IEP Holdings, LLC, Inkwell's parent company, just before it launched Inkwell. Inkwell's employees are all former CTS Metrolina employees who left work with CTS Metrolina and joined Inkwell. Given the evidence presented, the Court concludes for purposes of this Motion that Plaintiff is reasonably likely to succeed on the merits of its claim (1) that Berastain and Moreau are indirectly,

through the use of others, engaging in (or assisting others to engage in) the emergency property restoration business in violation of Section 3.1(a) of the Restrictive Covenant Agreement; and (2) "[h]ave an active interest in any Person that engages in the Business in the Territory" in violation of Section 3.1(c) of the Restrictive Covenant Agreement.

48. This conclusion is bolstered by Smith's alleged statement, recorded in a contemporaneous email, that Berastain and Moreau were "involved" with Inkwell, as well as the statement, attributed to Berastain by a CTS Metrolina customer, that Berastain and Moreau were "back up and running."[11] Moreover, Cherry testified that within a few weeks after Inkwell began operations, she successfully solicited business from AH4R—one of CTS Metrolina's largest customers—and assigned the job to one of CTS Metrolina's subcontractors. Cherry's affidavit only disavows Berastain and Moreau's involvement as employees or executives of Inkwell. It does not rule out their assistance in other ways. The Court concludes, therefore, that it is reasonably

[11] Recognizing the emergency nature of the relief, federal courts have permitted the consideration of hearsay in injunction proceedings. *See Am. Angus Ass'n v. Sysco Corp.*, 829 F. Supp. 807, 816 (W.D.N.C. 1992) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding."); *Dynamic Aviation Grp. Inc. v. Dynamic Int'l Airways, LLC*, No. 5:15-CV-0058, 2016 U.S. Dist. LEXIS 39248, at *80-81 (W.D. Va. 2016) (collecting cases holding that hearsay evidence may be considered in a preliminary injunction proceeding and observing that seven federal Circuit Courts have permitted this practice). Our Supreme Court has recognized that decisions under the federal rules are pertinent for "enlightenment and guidance" in developing the philosophy of the North Carolina rules. *Sutton v. Duke*, 277 N.C. 94, 101 (1970).

likely that Plaintiff will succeed in proving that, through IER Holdings, Berastain and Moreau have assisted Inkwell to compete with CTS Metrolina.

49. Furthermore, both Berastain and Moreau covenanted not to disclose CTS Metrolina's confidential Proprietary Information. Plaintiff's evidence is that Berastain has refused to allow his computer to be imaged to reassure CTS Metrolina that he did not take Proprietary Information with him when he left. Berastain responds, without additional detail, that he trashed his computer when it broke while he was on vacation in New Jersey. Berastain's excuse leaves the Court wanting. Combined with other evidence of record, the Court concludes that it is reasonably likely that Plaintiff will succeed on the merits of its claim that Berastain has breached the confidentiality provision in the Restricted Covenant Agreement.

50. In sum, as provided herein, the Court concludes that the evidence presented makes it reasonably likely that Plaintiff will succeed on the merits of its claim that Defendants have breached one or more provisions of the Restricted Covenant Agreement, that Plaintiff would suffer irreparable harm to its customer relationships or from disclosure of its confidential, proprietary information if injunctive relief is not afforded, that the equities weigh in Plaintiff's favor as the buyer of Restoration's assets for more than $3.6 million and, therefore, that preliminary injunctive relief is warranted.

51. **WHEREFORE**, based upon the **FOREGOING FINDINGS** and **CONCLUSIONS**, the Court, in its discretion, hereby **GRANTS** Plaintiff's Motion for Preliminary Injunction and **ORDERS** as follows:

1. For the duration of this Order, Defendants Dustin Berastain, Timothy Moreau, and their respective agents, servants, employees, and attorneys, and those persons in active concert or participation with them, including Defendant Inkwell, are enjoined from disclosing or using information regarding Plaintiff's customers, subcontractors, and vendors that reveals:

a. Pricing provided to CTS Metrolina's customers;

b. Discounts provided to CTS Metrolina's customers;

c. CTS Metrolina's customers' preferences regarding the manner in which CTS Metrolina provides services to those customers;

d. CTS Metrolina's customers' requirements of CTS Metrolina when performing work for them;

e. Contractual terms that are offered to CTS Metrolina's customers;

f. Prices for goods or services that CTS Metrolina acquires from its subcontractors and/or vendors;

g. Discounts on the goods or services that CTS Metrolina acquires from its subcontractors and/or vendors; and

h. Contractual terms of the agreements that CTS Metrolina enters into which its subcontractors or vendor.

2. Defendants Dustin Berastain, Timothy Moreau and their respective agents, servants, employees, and attorneys, and those persons in active concert or participation with them, including Defendant Inkwell, shall immediately discontinue use of the iRestore job listings that were created, maintained, or otherwise assisted

by Berastain or Moreau's use of Plaintiff's proprietary information. In carrying out the provisions of this paragraph, Defendants shall take all reasonably necessary steps to preserve information regarding how the discontinued job listings were established and operated, such that information relating to this case is not deleted.

3. Defendants Dustin Berastain and Timothy Moreau and their respective agents, servants, employees, and attorneys, and those persons in active concert or participation with them, including Defendant Inkwell, are enjoined from (i) engaging in, (ii) assisting any other entity or person (including any person working on or behalf of Inkwell) to engage in, or (iii) providing or performing services for, any person or entity in the commercial property restoration business, to the extent Berastain or Moreau would be acting in a capacity that is substantially similar to the capacity Berastain or Moreau served Restoration within the 12-month period preceding the closing date of the APA between Restoration and CTS Metrolina. The prohibition shall apply to the following metropolitan areas:

a. Phoenix, Arizona;

b. Jacksonville, Florida;

c. Tampa Bay, Florida;

d. Orlando, Florida;

e. Atlanta, Georgia;

f. Marietta, Georgia;

g. Boise, Idaho;

h. Indianapolis, Indiana;

i. Chicago, Illinois;

j. Louisville, Kentucky;

k. Southaven, Mississippi;

l. Albuquerque, New Mexico;

m. Charlotte, North Carolina;

n. Raleigh, North Carolina;

o. Greensboro, North Carolina;

p. Columbus, Ohio;

q. Akron, Ohio;

r. Cincinnati, Ohio;

s. Portland, Oregon;

t. Greer, South Carolina;

u. Charleston, South Carolina;

v. Columbia, South Carolina;

w. Knoxville, Tennessee;

x. Nashville, Tennessee;

y. Memphis, Tennessee;

z. Austin, Texas;

aa. Dallas, Texas;

bb. Houston, Texas;

cc. San Antonio, Texas;

dd. Salt Lake City, Utah;

ee. Seattle, Washington; and

ff. Milwaukee, Wisconsin.

4. Except as herein stated, the Motion for Preliminary Injunction is **DENIED**.

5. The $1,000.00 bond that Plaintiff paid to the Mecklenburg County clerk of court on 28 December 2023, (ECF No. 12), is sufficient security for this Preliminary Injunction Order. However, either party may move to modify the amount of the bond upon a showing of good cause.

6. The Preliminary Injunction Order shall remain in effect until the entry of final judgment in this case or until a further order is entered modifying or terminating the Preliminary Injunction Order.

IT IS SO ORDERED, this 19th day of January, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases