NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 17, 2021

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RE: *Zachary Piper LLC v. Courtney Popelka*, Case No. CL-2021-10123

Dear Counsel:

This letter states the findings and the decision of this Court in the above-referenced matter.

FACTS

This action arises from a contract dispute between plaintiff Zachary Piper LLC ("ZP Group") and Defendant Courtney Popelka. ZP Group is a recruiting company that works with clients in information technology, government contracts, cybersecurity, and life sciences. In 2020, ZP Group had three different subsidiaries, one of which was Crypsis Group, which was a digital forensics and incident response consulting business.

Ms. Popelka a former employee of ZP Group worked as the Senior Talent Acquisition Manager at Crypsis Group. As a talent acquisition manager, she focused on identifying hard to find cybersecurity talent. Her role involved "maintaining relationships with candidates out in the

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marketplace, leveraging LinkedIn and [ZP Group's] database to … search for those candidates, …submit [] candidates… [and] maintain[] relationships" with potential candidates. Time spent tracking and communicating with a candidate could range from a month to several years. Ms. Popelka had no cybersecurity recruiting experience prior to joining ZP Group—she received training on the job.

Cybersecurity recruiting—a niche field—requires the recruiters to have a deep understanding of the industry and a network of qualified contacts. Additionally, because it is a competitive and sensitive field, Ms. Popelka and other ZP Group employees in sales and recruiting roles are required to execute a confidentiality and non-competition agreement. Ms. Popelka was hired in 2018 and signed a contract agreeing not to compete for a twelve-month period following termination of her employment. In January 2021, the company promoted Ms. Popelka and required her to sign a new contract with the same restrictive covenant.

The language of the non-competition clause, 1(b)(ii), is as follows:

> You will not, without the prior written consent of the [ZP Group]… for a period of 12 months following the last day of your affiliation with the Company Group, either individually or on behalf of or through any third party, directly or indirectly, contact, solicit, divert, appropriate, attempt to contact, solicit, divert or appropriate or provide services or products that are directly competitive with the services or products that you were engaged in providing on behalf of any Company Group entity to any Customer or Prospective Customer of the Company, or otherwise in any competitive manner be concerned with, connected with or employed by, or otherwise associate with any Customer or Prospective Customer of the Company in a role or position that is, directly or indirectly, competitive with the business of the Company.

The agreement defined a "Prospective Customer" as "any person or entity to which the Company Group has developed or made a sales presentation (or similar offering of services) during the two (2) years preceding your last date of affiliation with the Company Group and about which [employee] obtained Confidential Information through [her] affiliation with the Company Group…"

In 2020, ZP Group sold Crypsis Group to Palo Alto Network, Inc. ("Palo Alto"). As part of the sale, there was a transition services agreement in which Palo Alto contracted with ZP Group's talent acquisition team for a period of three months. Ms. Popelka led this team. As part of the transition agreement, ZP Group gave Palo Alto the candidate database that ZP Group used in its recruiting. The database consisted of candidates that were found through LinkedIn, job boards, networking events, and referrals. Some were candidates that Crypsis previously had rejected.

ZP Group "formed a strong expectation" based on negotiations with Palo Alto personnel, "that Palo Alto would agree to a more permanent services contract in some form." ZP Group

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perceived Palo Alto as a prospective customer. On May 28, 2021, Ms. Popelka resigned from her position in ZP Group, and shortly after began working with Palo Alto. ZP Group is suing Ms. Popelka for breach of contract for violating her restrictive covenant agreement.

ZP Group asks this Court to issue a preliminary injunction enjoining (a) defendant from being employed by Palo Alto in a manner that violates her contractual obligations to ZP Group, (b) enjoining her from further breach of non-competition covenants or any other covenants in the Restrictive Covenant Agreement, and (c) any such other equitable relief as the Court deems to be proper.

ZP Group argues that the Court should issue the preliminary injunction because the company suffered an irreparable harm due to Ms. Popelka's actions. Specifically, they assert that the irreparable harm is that due to her alleged conduct, Palo Alto is now a competitor with ZP rather than a client. Plaintiff asserts that Palo Alto was crucial to launching their "cybersecurity specific staffing practice…"

Notwithstanding the fact that ZP Group willingly gave Palo Alto their candidate database, they argue that Ms. Popelka was the "key to unlock that data." Plaintiff asserts that she recruited one-third of the candidates, had relationships with the candidates, and had the knowledge to recruit in this specific area. When asked what Ms. Popelka's employment at Palo Alto means for ZP Group and the business, Mr. Curran replied that "it's hard to even quantify. It's not even quantifiable."

Ms. Popelka responds that the Noncompete Agreement is overbroad and unduly burdensome on her ability to earn a living. Additionally, Ms. Popelka argues that even if the contract was enforceable, Palo Alto was not a prospective client under the terms of the agreement, and therefore the agreement cannot be enforced against her in this case. Finally, Ms. Popelka's counsel argues that if the preliminary injunction is granted, "Ms. Popelka stands to lose her job" and "she'll face a significant uncertainty in finding future employment."

STANDARD OF REVIEW

A preliminary injunction is a temporary injunction that is intended to preserve the status quo. *See* Judge David W. Lannetti, *The "Test"—Or Lack Thereof—For Issuance of Virginia Temporary Injunctions: The Current Uncertainty And a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. Rich. L. Rev. 273, 310, 313 (2014). A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balances of equities tip in his favor, (4) and that the injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 21 (2008). A preliminary injunction is an extraordinary remedy that is never awarded as of right. *See id.* at 24. Instead, the courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Id.* (internal quotations omitted); *see May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (Va. 2019) ("granting or denying a temporary injunction is a discretionary act arising from the

court's equitable powers."). For the Court to award Plaintiff a preliminary injunction, *the Plaintiff must show that all four requirements are satisfied. See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342 (4th Cir. 2009) (emphasis added); *Wings v. Capitol Leather, LLC*, 88 Va. Cir. 83 (Va. Cir. Ct. Fairfax 2014) (applying *Real Truth About Obama* analysis).

ANALYSIS

While the Court is convinced that ZP Group is likely to succeed on the merits, it is not convinced that ZP Group has sufficiently proved that it has suffered irreparable harm or that the balance of equities tip in its favor. Utilizing the four-factor test set out in *Winter, supra,* this Court finds that Plaintiff's request for a preliminary injunction should be denied.

I. ZP Group Likely to Succeed on the Merits Because the Noncompete Agreement Is Enforceable on Its Face

In order to succeed on their motion for preliminary injunction, ZP Group must first prove that it can succeed on the merits of the claim. *See Winter*, 555 U.S. at 21. Specifically, ZP Group must show that at trial ZP Group can prove that Ms. Popelka breached the noncompete provision in the restrictive covenant agreement. Ms. Popelka argues that the noncompete provision in the restrictive covenant agreement is unenforceable because it is ambiguous and overbroad.

A court can determine whether a noncompete agreement is enforceable on its face. *See Lasership, Inc. v. Watson*, 79 Va. Cir. 205, *5 (Va. Cir. Ct. Fairfax 2009) ("this court can properly consider the validity of the clause on its face to determine if it is enforceable *per se* because the clause was referenced in the Complaint and was incorporated as an exhibit.").

"A non-competition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy." *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 415 (2011); *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249 (2005). When determining whether a non-competition agreement is enforceable, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee. *See Omniplex World Servs. Corp.*, 270 Va. at 249.

When evaluating whether the employer has met that burden, the Court must consider the function, geographic scope, and duration elements of the restriction. *See Home Paramount Pest Control Cos.*, 282 Va. at 415. "These elements are considered together rather than as three separate and distinct issues." *Id.* at 416 (internal quotations omitted). Courts determine enforceability by analyzing the scope of each agreement on a case-by-case basis. *See Omniplex World Servs. Corp.*, 270 Va. at 249.

The function element is assessed by determining whether the prohibited activity is of the same type as that engaged in by the former employer. *See id.* "Restrictive covenants that prohibit employees from working in any capacity for a competitor are overbroad" because they exceeded their reasonable scope. *Modern Env'ts, Inc. v. Stinnet*, 263 Va. 491, 495–96 (2002); *Strategic Enter. Sols., Inc. v. Ikuma*, 77 Va. Cir. 179, 182 (Fairfax 2008) (citing *Motion Control Sys. v. E.*, 262 Va. 33, 37–38 (2001)). For example, in *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick,* the Virginia Supreme Court upheld a non-competition agreement that prohibited employees from taking specific competing positions with any competitor or business that provides "the same or similar services" as the employer "expressly provided however, that this covenant does not preclude Employee from working in the medical industry in some role which would not compete with the business of Employer". 239 Va. 369, 370 (1990). On the other hand, in *Modern Environments, Inc. v. Stinnet,* The Virginia Supreme Court held that agreements that restrict employees from working for a competitor in any capacity, including noncompeting capacities, were unenforceable. 263 Va. 491, 495–96 (2002).

Courts will enforce geographic and temporal limitations when they are reasonable. *See* 104 Am. Jur. 3d *Enforceability of Covenant Not to Compete* §§ 4-5 (2008). It is possible for a geographic limitation to be nationwide, but only if it is reasonably related to the employer's protectable interest. *See id.*; *Chmura Econs. & Analytics, LLC, v. Lombardo*, No. 3:19-cv-813, Slip Op. at 6 (E.D. Va. July 29, 2021).

In this case, the Non-Competition Clause prevents Ms. Popelka from "directly or indirectly, solicit[ing], divert[ing], appropriat[ing], attempt[ing] to solicit, divert or appropriate or provid[ing] services ... that are directly competitive with the services" that [she was] engaged in providing on behalf of any Company Group entity to any Customer or Prospective Customer of the Company. Although the Non-Competition Clause has no geographic limitation, it lasts only for twelve months.

Ms. Popelka points to the similarity of this covenant with the one found unenforceable in *Chmura Economics & Analytics, LLC, v. Lombardo*, *supra*. However, this covenant is more limited in scope than the provision in *Chmura*, in which the U.S. District Court of the Eastern District of Virginia found that a provision that prohibits the

> "employee from pursuing 'customers that he served or solicited at Chmura' . . . [and] from soliciting any persons or entities that he knew about by virtue of his employment—whether customers he worked with directly, customers who worked with another Chmura salesperson, or simply persons or entities that Chmura actively pursued as customers" was overly burdensome. No. 3:19-cv-813, Slip Op. at 6.

Here, on the other hand, the definition of prospective clients limits it only to clients that (1) ZP Group made a pitch to in the past two years and that (2) Popelka obtained confidential information through her work at ZP Group. Ms. Popelka can work for such prospective clients in a capacity if it is not "directly competitive with the services" she engaged in at ZP Group.

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Furthermore, while the noncompete agreement has no geographic limitation, in *Preferred Systems Solutions, Inc. v. GP Consulting LLC*, the Virginia Supreme Court found that while there was no geographic limitation, the provision was still enforceable because the duration was limited to twelve months and it was narrowly drawn in support of a "particular program run under the auspices of a particular government agency.") 284 Va. 382, 393 (2012). Furthermore, in *Foti v. Cook,* 220 Va. 800, 805–07 (1980), the Virginia Supreme Court upheld a non-compete agreement that was not geographically based but was instead client specific. In this case, the non-compete provision has no geographic scope but is limited to a narrow list of third parties—customers and prospective clients. The restrictive covenant at issue in this case, when viewed in the context of the facts of this record, meets the three-part test for the validity of such covenants. *Omniplex World Servs. Corp.*, 270 Va. at 258. Therefore, this Court finds that as written, the contract is enforceable. Therefore, I conclude that ZP Group enjoys a likelihood of success on the merits.

II. ZP Group Has Been Unable to Prove That It Is Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

When determining whether to issue a preliminary injunction, "in general, a court may not grant injunctive relief unless a party has shown that party would suffer irreparable harm without the injunction, and that the party has no adequate remedy at law." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 17-18 (2019) (quoting *Wright v. Castles*, 232 Va. 218, 224 (1986)). "Proof of irreparable damage is absolutely essential to the award of injunctive relief." *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 342 (Va. App. 2005) (quoting *Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc.*, 239 Va. 468, 471–72 (1990)).

ZP Group has argued that "Popelka's breach has done such significant and irreparable harm to ZP Group's current and future business interests that the preliminary injunction is a necessary remedy at this stage." First, they argue that due to her leaving, ZP Group's customer goodwill has been severely damaged. Second, that the candidate database has become significantly less valuable to ZP Group. Third, that Palo Alto has turned into a competitor rather than a prospective customer. However, when asked what Ms. Popelka's employment at Palo Alto means for ZP Group and the business, Daniel Curran, Senior Vice President at ZP Group, replied that "it's hard to even quantify. It's not even quantifiable." On the other hand, Ms. Popelka argues that she has no confidential information that will harm ZP Group and ZP has no protectable interest in Ms. Popelka's employment.

First, ZP Group has not pointed to a single prospective customer—other than Palo Alto—where the relationship was broken due to Ms. Popelka's leaving. There is no evidence of customers expressing dismay because Ms. Popelka left the employ of ZP Group. Secondly, ZP Group willingly gave Palo Alto the candidate database, and so she took with her no confidential material that ZP Group had not already released. ZP Group admits that they are still able to use the candidate database without Ms. Popelka. Thirdly, ZP Group had no contract with Palo Alto that they would become customers past the three—month agreement. They had no guarantee that Palo Alto would hire ZP Group to recruit for them full time. Finally, ZP Group has brought

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forward no evidence of actual damages to the corporation. Therefore, ZP Group has failed to meet its burden of showing that it is likely to suffer irreparable harm in the absence of preliminary relief.

III. The Balances of Equities Tip in Ms. Popelka's Favor

According to Virginia Code, "no temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." Va. Code § 8.01-628. A court must seriously consider the balance of equities before determining whether to grant a preliminary injunction. *See Winter*, 555 U.S. at 26.

As mentioned earlier, it is not clear what ZP Group stands to lose if Ms. Popelka remains at her job during the remainder of the suit. They are still using the candidate database despite her departure, and they have not cited any client that they will lose if Ms. Popelka continues to work for Palo Alto. On the other hand, if the preliminary injunction is granted, "Ms. Popelka stands to lose her job" and "she'll face a significant uncertainty in finding future employment." Additionally, Ms. Popelka needs her employment to be able to pay the attorney's fees as noted in the "Injunctive Relief and Legal Fees" provision in the noncompete agreement. ("In the event that any entity in the Company Group brings any action to enforce the terms of this Agreement in a court of competent jurisdiction, such entity shall be entitled, in addition to any other relief which may be awarded, to recover from you its reasonable attorneys' fees, together with such other costs and reasonable expenses incurred in connection with such litigation."). Therefore, the Court concludes the balances of equities tip heavily in Ms. Popelka's favor.

IV. The Injunction Is in the Public Interest

A plaintiff seeking a preliminary injunction must establish that the injunction is in the public interest. *See Winter*, 555 U.S. at 21. ZP Group argues that this injunction is in the public interest in respecting contractual relations between private parties. *See* Mem. in Supp. of Mot. 21 (citing *Blue Ridge Anesthesia & Critical Care, Inc.*, 239 Va. at 373-74; *Lasership Inc.*, 79 Va. Cir. 205, 2009 WL 7388870 at *5). Furthermore, ZP Group argues it is in the public interest to permit employers such as ZP Group "to protect its client base from ex-employees who may leave its employ but continue in the same line of business." *Zuccari, Lie. v. Adams*, 42 Va. Cir. 132, 1997 WL 1070565, at *2 (Va. Cir. Ct. Fairfax Apr. 10, 1997). Ms. Popelka, on the other hand, has argued that the injunction is not in the public interest because the noncompete agreement violates public policy by containing no geographic scope and therefore should not be enforced.

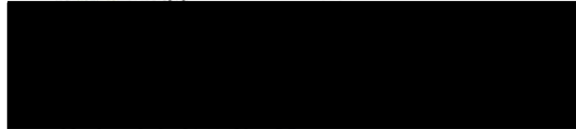
Virginia courts have often determined that if a non-compete provision is not overbroad or unduly burdensome, then it is not against public policy. This Court has already determined that the contract is on its face enforceable, and therefore enforcing it would be in the public interest.

CONCLUSION

To be awarded a preliminary injunction, ZP Group must prove that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balances of equities tip in its favor, (4) and that the injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 21 (2008). As noted earlier, each element must be established to be awarded a preliminary injunction. In this case, ZP Group is unable to establish that it suffered irreparable harm or that the equities tip in its favor. Therefore, this Court denies the plaintiff's request for a preliminary injunction.

Counsel for Ms. Popelka shall draft an order and circulate an order. They shall submit it to my law clerk, Ms. Noga Baruch, for my signature.

Sincerely,



Robert J. Smith
Judge
Fairfax County Circuit Court

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