IN THE GEORGIA STATE-WIDE BUSINESS COURT

CAMERON MARTIN,

Plaintiff,

v.

HAUSER, INC.,

Defendant.

Case No. 20-GSBC-0008

ORDER ON PLAINTIFF'S VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This matter is before the Court on Plaintiff Cameron Martin's ("Plaintiff" or "Martin") Verified Complaint for Declaratory Judgment and Injunctive Relief ("Complaint"). Having reviewed the Complaint and related filings, and after a hearing with all parties on December 1, 2020 and December 16, 2020,[1] respectively, the Court herein **GRANTS IN PART** and **DENIES IN PART** the declaratory and injunctive relief requested in the Complaint.

[1] Each party submitted a differently-paginated version of the December 1 and 16, 2020 Hearing Transcript. Plaintiff's version of the transcript notes the Attorneys Eyes Only ("AEO") section on 405:15–17 and resumes the non-AEO testimony on 405:18. Defendant's version of the transcript also notes the AEO section on 405:15–17, but does not resume the non-AEO testimony until 412:1, presumably accounting for the AEO testimony which at the Court's direction was filed separately under seal. For purposes of this Order, the Court refers to the pagination on Defendant's filed transcript, so as to account (in page numbers) for the AEO section.

I. BACKGROUND

A. The Parties' Relationship

This dispute arises out of a January 2014 employment agreement (the "Agreement") between Martin and Defendant Hauser, Inc. ("Defendant," "Hauser," or "Company"), which includes provisions that restrict Martin's post-employment client solicitation, employee recruitment, and supplier interference. With this action, Plaintiff seeks a declaratory judgment that the restrictive covenants contained in the Agreement are void and unenforceable under Georgia law. Compl. ¶ 61.

Hauser is an Ohio-based insurance and employee benefits brokerage firm, with employees and/or offices in Atlanta, Chicago, Cincinnati, Kansas City, and Los Angeles. Compl. ¶¶ 5–6; Countercl. ¶ 1; Joint Ex. 34, at 19:24–20:6. Hauser hired Martin on January 3, 2014 to serve as Team Leader of its Management Liability Practice. Joint Ex. 2, 3. At that time Plaintiff received an offer letter detailing his role, compensation (which Plaintiff subsequently negotiated, receiving a $5,000 salary increase), and certain other benefits. Joint. Ex. 3. While the parties' correspondence regarding the initial and revised offer letters note the employment offer was contingent on passing a background check, such correspondence included no mention of the post-employment covenants at issue here. *Id.*; Joint Ex. 3, 4.[2]

[2] Plaintiff could not recall whether Defendant had orally informed him that he would be required to agree to such covenants prior to executing the Agreement, although there was testimony at the

Three weeks after accepting his offer of employment, Hauser presented Martin with the Agreement at issue, which Martin promptly executed. Joint Ex. 5. In doing so, Martin acknowledges that he did not attempt to negotiate the Agreement, including the covenants therein, which restrict his post-employment activities for a three-year time period after termination and contain no geographic limitation. Joint Ex. 5; Hr'g Tr. 182:25–182:2; Def.'s Post-Hr'g Br. at 4. Hauser, for its part, acknowledges that it has used the same Agreement, including the restrictive covenants contained therein, for every full-time employee—regardless of the employee's physical location, role, or access to confidential information at Hauser—and has done so for more than a decade. Hr'g Tr. 85:8–15. Importantly, Hauser also acknowledges that, in drafting the Agreement, it made no attempt to conform to Georgia law specific to restrictive covenants. *Id.*

Ultimately, Martin proved successful in his role and was eventually promoted to Executive Vice President and Managing Director of Defendant's Risk Advisory Practice, a position he held at the time of his departure from Hauser. Compl. ¶¶ 10–12, 18; Countercl. ¶ 7; Pl.'s Post-Hr'g Br. at 3. In this role, Martin was a member of Hauser's executive team and was the third-highest ranking member of the Company. Hr'g Tr. 116:19–22. As the leader of Hauser's Risk Advisory Practice

hearing that "restrictive covenants are common in the insurance industry." Hr'g Tr. 182 7–11; 373:18–20.

("RAP") Group, his (and his group's) primary function, according to Plaintiff, was to "act as an extension of [Hauser's] [p]rivate [e]quity clients' operations teams[,] effectively serving as the outsourced risk management operations partner" for those teams. Joint Ex. 2, at 1.

Plaintiff accordingly dedicated substantial time and effort towards building new client and customer relationships, including with both the private equity groups ("PEGs") themselves, and their affiliated portfolio companies. Hr'g Tr. 231:5–232:9. Plaintiff also regularly interacted with Company leadership, including James Stines, the President and Managing Partner of Defendant. Hr'g Tr. 242:20–244:13. Many of these interactions occurred through weekly meetings, during which attendees discussed Defendant's existing PEG relationships, potential new business opportunities in its pipeline, existing and potential revenues, and general business development opportunities. *Id.* Plaintiff, in his leadership role, interacted with dozens of PEGs, developing "intimate" relationships with those companies, through which Plaintiff and Defendant would obtain seemingly valuable non-public information about each PEG, including potential personnel changes, deal activity, and new fundraising efforts, among other information, all of which Hauser would use to deepen its relationships. Joint Ex. 1, 56:14–22; Hr'g Tr. 485:21–487:6. Defendant maintained the information it received through these interactions in a

database known as Applied Epic, to which Plaintiff, unlike many other Hauser employees, had individual access. Hr'g Tr. 241:6–22; 477:4–18; Joint Ex. 35 ¶ 29.

According to Hauser, Plaintiff had at least "some interaction" with approximately 77 PEGs, of which he was "assigned," "lead," or "second" for roughly 35.[3] Joint Exs. 8, 10; Joint Ex. 1, 59:14–60:11. "Plaintiff [also] had access to sensitive information regarding [Hauser's own] employee compensation and performance." Def.'s Post-Hr'g Br. at 11–12; Joint Ex. 1, 45:18–46:16; Joint Ex. 10, 000521–000531.

On or about August 11, 2020, Hauser announced an agreement to sell the business to an industry competitor, Brown & Brown. Hr'g Tr. 185:13–18; Pl.'s Post-Hr'g Br. at 3. In response to this news, Bruce Denson, the President of Cobbs Allen Capital, LLC, d/b/a/ CAC Specialty ("CAC")—also a direct competitor of Hauser and Plaintiff's new employer—contacted Plaintiff to determine whether he had any interest in leaving Hauser to join CAC. Hr'g Tr. 323:13–324:8; Joint Ex. 14; Def.'s Post-Hr'g Br. at 3. While neither Mr. Denson nor Plaintiff recalls the specifics of this discussion, they acknowledge discussing, in general terms, Plaintiff's potential employment at CAC, as well as general information about Plaintiff's team at Hauser. Hr'g Tr. 324:13–325:21. The two also discussed "how Hauser generated business"

[3] It appears that, in some instances, Plaintiff was given various roles for the same PEG. For example, Joint Exhibit 8 indicates Plaintiff was "assigned" to Clearlake Capital Group, while Joint Exhibit 10, p. 000546, indicates Plaintiff was "second" for that same PEG.

and "the universe in which [Plaintiff] was [then] existing," including Plaintiff's role and those of the other members of Hauser's RAP team. *Id.* The foregoing discussions led to additional conversations between Mr. Denson and Plaintiff, as well as calls and text messages between Plaintiff and other CAC employees and executives.[4] Hr'g Tr. 259:10–262:24; Joint Ex. 1, 107:11-109:19, 114:21–119:22; Joint Exs. 16, 17, 51. While these discussions ensued, Plaintiff continued to work for Hauser and had general conversations with other Hauser employees, including members of the RAP team. Specific to his discussions with other RAP team members during this period, Plaintiff described them as focused on the employees' prospective decisions to leave Hauser and the employees' respective recruitment by other firms.[5] Joint Ex. 1, 135:21–137:23; Hr'g Tr. 263:5–264:2.

Around this same time, on or near August 21, 2020, Hauser held an all-employees meeting, at which Mark Hauser, Defendant's namesake and Chief Executive Officer, addressed recently-announced pending criminal charges against him, along with a related plea agreement, arising from the federal "Varsity Blues" investigation in which Mr. Hauser had been implicated. Joint Ex. 34, 141:10–

[4] These employees and executives included CAC Chairman Paul Sparks (Joint Ex. 16); CAC Executive Vice President Darren Sonderman (Joint Ex. 43); CAC Senior Vice President David McMahan (Joint Ex. 44); CAC Chief Financial Officer Chris Trotter (Joint Ex. 45); CAC Chief Revenue Officer David Payne (Joint Ex. 46); and CAC Head of Diligence and Portfolio Solutions Andre Eichenholtz (Joint Ex. 48).

[5] This included RAP team members Erika Kasperkowiak ("Kasperkowiak") and Katie Flynn ("Flynn"), as well as Sara Carroll and Ken Rhoads.

142:14. Plaintiff testified that, following the announcement of Mr. Hauser's guilty plea, he was concerned, both personally and professionally, about Mr. Hauser's reputation being tied to his own, and questioned, going forward, whether Hauser and Plaintiff would be able to generate new clients and PEG relationships, whether PEGs would leave Hauser, and the impact of potential regulatory actions against Hauser related to the aforementioned charges. Hr'g Tr. 194:2–23. Roughly two days later, Hauser announced that its agreement with Brown & Brown "fell through." Hr'g Tr. 191:11–20.

Sensitive to the potential fallout from the news stemming from the criminal charges against Mr. Hauser, Defendant sought Plaintiff's affirmation that he remained committed to the company. Hr'g Tr. 253:4–254:3, 295:25–297:11. As such, Plaintiff had discussions with Hauser executives, including an in-person meeting with Mr. Hauser, in late August, at which he was pointedly asked whether he was "in," meaning committed to continued employment with Defendant. Hr'g Tr. 295:25–297:11. Plaintiff answered "something along the lines of, yeah, I'm in, I guess." *Id.* Plaintiff, however, continued to communicate with CAC employees and executives and with Hauser employees and executives about CAC. *See, e.g.*, Joint Ex. 43, 44, 45, 46, 48, 50, 51; Hr'g Tr. 263–264:2. In mid-September, Mr. Stines (and, through him, Defendant) began to suspect that "a coup might be brewing," referencing Martin's alleged recruitment of other Hauser employees to

leave Hauser and Martin's own potential defection to CAC. Joint Ex. 34, 102:9–103:25.

On September 17, 2020, Plaintiff informed CAC that he would resign from Hauser, which he did five days later on September 22, 2020. Joint Ex. 17; Hr'g Tr. 387:5–11; Compl. ¶¶ 18–19. That same day, two members of Plaintiff's RAP team, Ms. Kasperkowiak and Ms. Flynn, also resigned from Hauser to join CAC, each by submitting nearly identical resignation letters, all prepared by CAC's counsel. Hr'g Tr. 310:7–22; Joint Ex. 35. Almost immediately, Defendant suspected that Plaintiff had violated the Agreement's restrictive covenants. Countercl. ¶¶ 19, 21. Defendant's suspicions were, in this regard, based on allegedly increased call volume between Plaintiff and his team members, as well as allegedly increased call volume between Defendant and other Hauser and CAC employees around this time. Def.'s Post-Hr'g Br. at 11–12. From this, Defendant concludes that Plaintiff induced Ms. Kasperkowiak and Ms. Flynn to terminate their employment with Hauser and join CAC in violation of the Agreement's employee non-recruitment covenant. Countercl. ¶ 13.

Defendant further alleges that Plaintiff solicited Defendant's existing and potential clients—including the University of Phoenix, a Hauser client, and BluWave, a referral source which corresponded with Plaintiff about a potential client at the end of his tenure with Hauser—to terminate their existing contracts and

relationships with Defendant to do business with CAC instead. Countercl. ¶¶ 32–33; Def.'s Post-Hr'g Br. at 14–15. Hauser's contention in this regard is based, at least in part, on a September 24, 2020 text message from Ms. Kasperkowiak to Plaintiff stating "[t]hey are calling all PEGs today," which Defendant interpreted to mean that CAC was calling Hauser's PEG clients at that time. Joint Ex. 1, 143:16–144:8; Def.'s Post-Hr'g Br. at 14. That same day, Defendant sent Plaintiff a cease and desist letter "reminding [him] of his active post-employment obligations under the Agreement." Countercl. ¶ 25.

B. **The Restrictive Covenants**

Through this action, Plaintiff seeks a declaratory judgment that the restrictive covenants in the Agreement are unenforceable under Georgia law, and an order temporarily and permanently enjoining Hauser from attempting to enforce the covenants. Compl. ¶¶ 61, 68. Defendant answers that the Agreement and covenants are enforceable as written, and counterclaims, seeking damages for breach of contract, tortious interference with business relations, and breach of fiduciary duty. Def.'s Answer at 25–26; Countercl. ¶¶ 29–46.

There are three restrictive covenants at issue: (1) a non-solicitation provision ("Section 6(a)" or the "Non-Solicitation Covenant"); (2) an employee non-recruitment provision (the "Non-Recruitment Covenant"); and (3) a non-interference provision (the "Non-Interference Covenant") (when (2) and (3) are

referred to collectively, the "Section 6(b) Covenants"). Joint Ex. 5, § 6. As to the first, the Non-Solicitation Covenant, found in Section 6(a) of the Agreement, provides:

> Employee hereby agrees that upon termination of Employee's employment with Company, and for a period of three (3) years thereafter, Employee will not engage in any direct or indirect solicitation, whether such solicitation is initiated by Employee or some other party, of any customers or clients of Company who were customers or clients of Company at the time Employee's employment with Company terminates or at any time during the 18 months prior to such customer or client of Company [sic] to switch or move its insurance or other business to another company or agency during the aforementioned three (3) year period.

Joint Ex. 5, § 6(a). The Non-Recruitment and Non-Interference Covenants, as contained in Section 6(b) of the Agreement, provide:

> During the period of Employee's employment with Company and for a period of three (3) years thereafter, Employee shall not directly or indirectly, on Employee's own behalf or on behalf of any other person, firm, or company, without consent of Company: (i) in any manner whatsoever induce, or assist others to induce, any employee, agent, representative or other person associated with Company or any of its affiliates or subsidiaries to terminate his association with such entity, or in any manner interfere with the relationship between Company or any of its affiliates or subsidiaries and any such person; or (ii) in any manner whatsoever induce, or assist others to induce, any supplier or customer of Company or any of its affiliates or subsidiaries to terminate its association with Company or any of its affiliates or subsidiaries, or do anything, directly or indirectly, to interfere with the business relationship between Company or any of its affiliates or subsidiaries and any of its customers.

Joint Ex. 5, § 6(b). The Court addresses the enforceability of each of these covenants in Part II below.

C. **Procedural History**

Plaintiff commenced this action on September 24, 2020, two days after resigning from Hauser. Eight days later, on October 2, 2020, Hauser filed suit in the Hamilton Court of Common Pleas in Ohio, seeking a temporary restraining order ("TRO"), preliminary injunction, and permanent injunction to restrain Martin, Flynn, and Kasperkowiak from violating the terms of their respective employment agreements, including the restrictive covenants set out above ("Ohio Action"). *See generally* Pl.'s Notice of Filing (Oct. 5, 2020).

That same day, Plaintiff filed a Motion for Temporary Restraining Order in this Court, seeking to prevent Defendant from enforcing the restrictive covenants against him, including with respect to the Ohio Action. On October 8, 2020, this Court held a hearing on Plaintiff's Motion for TRO, and orally granted the TRO against Defendant on the grounds that the covenants at issue are, on their face, presumptively unenforceable under Georgia law. Before the Court entered its written TRO order, however, Defendant removed this case to the United States District Court for the Northern District of Georgia, which—soon thereafter—remanded the case back to this Court, for failure to adequately plead damages in excess of the federal amount-in-controversy requirement. Upon remand, on October

30, 2020, the Court issued a written TRO order that was subsequently extended, with Defendant's consent, pending a final decision on the merits of Plaintiff's claims for declaratory and permanent injunctive relief.

Defendant thereafter filed its Verified Answer, Affirmative Defenses and Counterclaims, and on December 1, 2020, this Court held a final hearing on Plaintiff's claims. Due to time constraints, the hearing was suspended at the end of that day, and was reconvened and completed on December 16, 2020. The parties filed Post-Hearing Briefs and Joint Exhibits on December 30, 2020, and with this Order, the Court addresses the arguments raised therein.

II. ANALYSIS

A. Declaratory Judgment

With this action, Plaintiff seeks a declaratory judgment that the restrictive covenants found in the Agreement are unenforceable against him under Georgia law. Compl. ¶ 61. Plaintiff alleges that a "substantial, justiciable, and actual controversy exists between [Plaintiff] and [Defendant] regarding the enforceability of the relevant restrictive covenants in the Agreement." *Id* ¶ 58. He requests declaratory relief specifically because he "is insecure and uncertain as to his legal rights, interests, status, and legal relations because of the relevant restrictive covenants in the Agreement." *Id.* ¶ 59. Defendant, in turn, denies Plaintiff is insecure and uncertain as to his legal rights, and argues that "[i]nterpreting the Agreement in

accord with the RCA's intent and guidance confirms that Plaintiff is not entitled to a declaratory judgment." Def.'s Post-Hr'g Br. at 16. For the reasons set forth below, the Court finds that a declaratory judgment is proper.

The purpose of the Declaratory Judgment Act "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. Declaratory relief is available where "a legal judgment is sought that would control or direct future action." *Atlanta Cas. Co. v. Fountain*, 262 Ga. 16, 17, 413 S.E.2d 450, 451 (1992) (quotation omitted). The Declaratory Judgment Act "is to be liberally construed and administered," O.C.G.A. § 9-4-1, and further provides that where cases of actual controversy exist, a court "shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration." O.C.G.A. § 9-4-2(a). Subsection (b) of that statute provides that the Court shall also have that power "in any civil case in which it appears to the [C]ourt that the ends of justice require that the declaration should be made." O.C.G.A. § 9-4-2(b). "[T]he declaration shall have the force and effect of a final judgment or decree and be reviewable as such." *Id.*

Applied here, the Court finds that Plaintiff has alleged an actual, cognizable controversy between the parties regarding the enforceability of the covenants in question that can only be resolved through a declaration from this Court. Even

assuming that Defendant may prevail under some tort theory, as it asserts it will, the fact remains that, in the here and now, the parties are uncertain in their respective rights and obligations, and justice requires a legal declaration whether, or to what extent, their Agreement is enforceable under Georgia law. Defendant's warning to cease and desist breach of the Agreement and its counterclaims further evidence the existence of a live controversy concerning whether or to what extent Plaintiff may have contact with Defendant's customers, clients, employees, suppliers, and other associates. Countercl. ¶¶ 25–28. A determination of these issues is therefore necessary so that Plaintiff can do business within the bounds of his legal obligations, while at the same time respecting Defendant's legitimate business interests. Having determined Plaintiff's request for declaratory judgment is well-founded, the Court next turns to the enforceability of the three restrictive covenants at issue.

B. **Restrictive Covenants**

As an initial matter, the parties agree the covenants in the Agreement are governed by the Georgia Restrictive Covenants Act (O.C.G.A. § 13-8-50 *et. seq*.) (the "RCA" or the "Act").[6] Pl.'s Post-Hr'g Br. at 10; Def.'s Post-Hr'g Br. at 15.

[6] The Court recognizes the General Assembly gave no formal name to O.C.G.A. § 13-8-50, *et. seq*. However, courts and practitioners, including the practitioners in this case, have referred to the statute, at various times, as the "Georgia Restrictive Covenants Act," "Restrictive Covenants Act," or "RCA." *See, e.g., Belt Power, LLC v. Reed*, 354 Ga. App. 289, 289, 840 S.E.2d 765, 767 (2020); *Fortress Inv. Grp., LLC v. Holsinger*, 354 Ga. App. 405, 412, 841 S.E.2d 55, 61 (2020); *Grayhawk Homes, Inc. v. Addison*, 355 Ga. App. 612, 612, 845 S.E.2d 356, 357 (2020); *Kennedy v. Shave Barber Co*, 348 Ga. App. 298, 298, 822 S.E.2d 606, 608 (2018). Accordingly, the Court will do the same here.

The purpose of the RCA is to provide predictability to parties by setting out rules for restrictive covenants, including non-compete and customer non-solicitation provisions. O.C.G.A. § 13-8-50. Through the RCA, Georgia, a state "once renowned for its hostility to non[-]competes, . . . has now joined the majority of states" in a more flexible approach toward restrictive covenants, reflecting the General Assembly's view that "reasonable restrictive covenants . . . serve the legitimate purpose of protecting legitimate business interests." *Id.*; Stafford, Cullen, *Georgia's New Employer-Friendly Restrictive Covenant Statute*, 24 NO. 6 SM. GA. EMP. LL 1 (2012).

Notably, the RCA provides courts with an interpretative framework, including requirements and guidelines for enforcing restrictive covenants. *See, e.g.*, O.C.G.A. § 13-8-55. Specifically, the statute requires that "[t]he person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable." *Id.* The RCA also codifies the court's authority to modify, or "blue-pencil," certain overly-restrictive provisions instead of striking them down entirely, as was the rule

under the common law. *See Lifebrite Labs., LLC v. Cooksey*, No. 1:15-CV-4309-TWT, 2016 WL 7840217, at *6 (N.D. Ga. Dec. 9, 2016). The foregoing framework, in addition to other aspects of the Act (as discussed below), governs the Court's analysis here.

1. Section 6(a): The Non-Solicitation Covenant

First, the Court turns to the enforceability of Section 6(a) of the Agreement, the Non-Solicitation Covenant. Plaintiff argues the Non-Solicitation Covenant is unenforceable as a matter of law due to its unreasonable duration and scope, while Defendant maintains that the Covenant is enforceable as-written and, in the alternative, asserts that the Court may and should blue-pencil the Covenant to correct any material failure. As explained more fully below, the Court finds: (i) the Non-Solicitation Covenant is, in fact, unenforceable as written, and (ii) that limited modification of the Covenant is nonetheless appropriate.

a. *The Non-Solicitation Covenant's Three-Year Solicitation Restriction*

As a starting point, Defendant, as the party seeking enforcement of the Non-Solicitation Covenant, must "plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant." O.C.G.A. § 13-8-55. If Defendant makes a prima facie showing that the restraint is in compliance with Section 13-8-53, then Plaintiff, as the party opposing enforcement, has the burden of establishing that the contractually specified restraint does not comply with the

Act's requirements relating to the solicitation of customers or that such covenant is unreasonable. *Id.* "Whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court." *Pan Am Dental, Inc., v. Trammell*, Case No. CV418-288, 2020 WL 2531622, at *3 (N.D. Ga. May 5, 2020) (quotation omitted).

On its face, the Non-Solicitation Covenant at issue, specifically its three-year solicitation restriction, is presumptively unreasonable under O.C.G.A. § 13-8-57(b). That section provides, in relevant part: "[A] court shall presume to be reasonable in time any restraint two years or less in duration and ***shall presume to be unreasonable in time any restraint more than two years in duration***, measured from the date of the termination of the business relationship." O.C.G.A. § 13-8-57(b) (emphasis added); *see also Wind Logistics Prof'l, LLC v. Universal Truckload, Inc.*, No. 1:16-CV-00068, 2019 WL 4600055, at *9 (N.D. Ga. Sept. 23, 2019) (holding restrictive covenants were not enforceable because, among other reasons, a five-year restraint gave the party seeking enforcement "more protection than [it] could expect under the law"). The statute, however, provides little guidance as to what an employer must show to sufficiently rebut the foregoing presumption.

Here, Defendant relies primarily on the testimony of Mr. Stines, the Company's President and Managing Partner, to demonstrate that the three-year solicitation restriction is necessary to protect its customer relationships. Indeed, Mr.

Stines testified that it may take Defendant 24 to 36 months to develop a private equity relationship, though he also readily acknowledged the period could be either shorter or longer, depending on the circumstances, and that PEG acquisition rates vary considerably. Hr'g Tr. 487:7–488:2. And, while the three-year temporal limitation appears in all of the Company's agreements with all of its employees, Mr. Stines could not explain why the Company had chosen a three-year restriction in the first instance, nor could he pinpoint when such restrictions began appearing in the Company's agreements.[7] Moreover, Defendant does not dispute that it includes the Non-Solicitation Covenant in the employment agreements of ***all*** of its full-time employees, regardless of the employee's title, geographic location, contact with customers, or access to sensitive company information. Hr'g Tr. 87:2–88:25, 94:14–17; Joint Ex. 34, at 44:25–45:5, 45:24–46:7. Finally, Mr. Stines also testified that, while restrictive covenants of the sort at issue here are common in the insurance brokerage industry, he could not recall whether he had ever seen a three-year restraint.[8] Hr'g Tr. 96:12–99:10; Joint Ex. 34, at 45:6–23, 70:2–11. In light of the above, the Court finds that Defendant has not demonstrated that its three-year

[7] Specifically, Mr. Stines testified that "everyone has historically signed the same document to the best of [his] knowledge." Hr'g Tr. 87:5–24. Mr. Stines further testified that "the agreement was produced prior to [his] joining the organization in 2007." Joint Ex. 34, at 44:25–45:5.

[8] Further, Mr. Stines was not aware of any industry standard regarding the duration of such covenants and testified Defendant had not made any effort to benchmark its restrictive covenant agreements with other insurance brokerages. Hr'g Tr. 99:18–100:10; Joint Ex. 34, at 70:12–23.

restriction is reasonable under the circumstances. The Court's analysis, however, does not end here.

i. *Modification of the Non-Solicitation Covenant's Three-Year Term*

As discussed above, the Act empowers the Court to "modify a covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties." O.C.G.A. § 13-8-53(d). The Act further provides: "[I]f a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect [legitimate business interests] and to achieve the original intent of the contracting parties to the extent possible." O.C.G.A. § 13-8-54(b). While the Court is not required to "blue pencil" the restrictions here, it is nevertheless within the Court's discretion to do so. *Belt Power, LLC v. Reed*, 354 Ga. App. 289, 295, 840 S.E.2d 765, 770 (2020); *see, e.g., Kennedy v. Shave Barber Co*, 348 Ga. App. 298, 305, 822 S.E.2d 606, 608 (2018) (finding the trial court "eliminated any uncertainty in the geographic scope of [a] non-compete by limiting the restricted area to a three-mile radius surrounding [the former employer's] current location," and finding no error in upholding the restrictive covenant "[b]ecause the three-mile radius as modified by the trial court [wa]s reasonable under the facts of th[e] case"), *PointeNorth Ins. Grp. v. Zander*, No. 1:11-

CV-3262-RWS, 2011 WL 4601028, at *3 (N.D. Ga. Sept. 30, 2011) (holding that, although non-solicitation and non-disclosure covenants were overbroad in that they extended to "any of the [e]mployer's clients," the court could "blue pencil[] the provision to only apply to customers that the Defendant contacted and assisted with insurance"), *and Lifebrite*, 2016 WL 7840217, at *7 (noting that by using the blue-pencil, the court in *Hamrick v. Kelley*, 260 Ga. 307, 392 S.E.2d 518 (1990), "could have narrowed the [restrictive covenant] clause to fifty miles from seventy-five, but could not completely redefine the area").

The Court finds modification of the Non-Solicitation Covenant is justified and appropriate here both (i) to protect Defendant's legitimate business interests,[9] and (ii) to comport with the reasonable intent of the parties. *See* O.C.G.A. § 13-8-54(a), (b). Regarding the former, Defendant demonstrated, among other things, that (i) it made a significant investment in time and money in Plaintiff over his more than six years with the Company, (ii) Plaintiff, through his senior leadership position, gained "valuable insights" into, and had unique access to information concerning, Defendant's PEG relationships, and (iii) its business model—*i.e.*, its approach to the PEG marketplace—was uncommon in the industry. *See*, *e.g.*, Hr'g Tr. 489:6,

[9] *See* O.C.G.A. § 13-8-51(9) (defining "legitimate business interest" as including, but not limited to trade secrets; valuable confidential information; substantial relationships with prospective or existing customers, patients, vendors, or clients; customer patient, or client good will; extraordinary or specialized training).

489:9–10 (emphasizing Defendants "unique model in the industry"); Hr'g Tr. 486:24 (discussing Plaintiff's access to information that is not readily available to Defendant's competitors). Indeed, Mr. Stines—persuasively, in the Court's view—summed up Defendant's business interests at issue here as follows:

> [Plaintiff] had extraordinary access to critical information relative to . . . everything about [Defendant]. . . . He knew who our private equity relationships were, he knew which ones were solid, which ones needed development, which ones we had issues with, which ones we were strong with. He knew exactly how much revenue we were producing with each private equity group. He knew how much dry capital, dry powder those private equity groups had on hand to buy new companies. He knew partners that were working with us, he knew partners within the private equity group who may not be working with us. He knew what our strengths were, what our weaknesses were. He knew exactly what we sold. He knew exactly the formula or the business model that we had put in place. . . . We gave [Plaintiff] access to our clients. We allowed [Plaintiff] to help develop those clients further along the way, and we have . . . put a tremendous amount of resources behind [Plaintiff] . . . so that [he] could be successful in [his] job.

Hr'g Tr. 488:10–490:18. The record before this Court plainly demonstrates that Defendant has a legitimate business interest at stake here, one which warrants imposing some limited restraint on Plaintiff's ability to solicit certain of Defendant's customers (as described more fully below).

The Court's holding in this regard is buttressed by record evidence that the parties clearly intended for there to be some post-employment restraint on Plaintiff's ability to solicit Defendant's customers. First, and foremost, the Agreement, specifically the Non-Solicitation Covenant itself, serves as the best evidence of the

parties' intent on this point.[10] Plaintiff does not dispute that he was aware of the Non-Solicitation Covenant at or around the time he accepted employment with Defendant, nor does he contend that he somehow did not or could not understand its post-employment implications. On its face, the Agreement clearly bars Plaintiff from engaging in certain post-employment conduct which Defendant viewed as potentially detrimental to its interests. This much is obvious. Plaintiff, however, argues that reducing the Non-Solicitation Covenant's term would contradict, not uphold, the Agreement's original intent inasmuch as the Agreement contemplated a three-year term. Pl.'s Post-Hr'g Br. at 35–36; *see also* Joint Ex. 34, at 70:21–71:2. Put differently, Plaintiff appears to advance an "all or nothing" approach—*i.e.*, to honor the intent of the parties here, the Court has but two options: either (i) enforce the Non-Solicitation Covenant as written, or (ii) do not enforce it at all. Plaintiff's argument in this regard invites, in this Court's view, an overly myopic reading of not only the parties' Agreement, but the Court's powers under the Act to modify the

[10] The Court has some reservations about the timing and manner in which Defendant presented the Non-Solicitation Covenant to Plaintiff at the outset of his employment. Specifically, it is undisputed that the Non-Solicitation Covenant was not included in Defendant's written offer of employment in early January 2014. Rather, Defendant included the Non-Solicitation Covenant, as well as the other restraints at issue here, in a subsequent writing *after* Plaintiff accepted the position with the Company. *See supra* Part I.A. Plaintiff, however, acknowledges that he negotiated the other aspects of his employment offer, and cannot recall with any certainty whether he was informed that his employment would be subject to additional conditions not contained in the Agreement, including the Non-Solicitation Covenant. *Id.* For this reason, the Court is left with no alternative but to rely on the Agreement as written as the best evidence of the parties' intent.

Non-Solicitation Covenant under the circumstances presented here. *See* O.C.G.A. § 13-8-53(d) (empowering courts to modify otherwise invalid covenants "so long as the modification does not render the covenant more restrictive with regard to the employee *than as originally drafted by the parties*") (emphasis added).

Indeed, on its face, the Act instructs this Court to "construe restrictive covenants to comport with the reasonable intent and expectations of the parties to the covenant and *in favor of* providing reasonable protection to all legitimate business interests established by the person seeking enforcement." O.C.G.A. § 13-8-54(a) (entitled "Judicial Construction of Covenants") (emphasis added). Having found that the Non-Solicitation Covenant here does not comply with O.C.G.A. §§ 13-8-53(b) and 13-8-57(b), the Act further empowers this Court to modify such covenant and grant only the relief reasonably necessary to protect Defendant's legitimate business interests and "to achieve the original intent of the contracting parties *to the extent possible*." O.C.G.A. § 13-8-54(b) (emphasis added). It is without question, therefore, that the Court is empowered to modify the Non-Solicitation Covenant, which leaves only the question of if, and to what extent, that power ought to be exercised. In making this determination, the Court finds (i) the parties' Agreement clearly contemplates a post-employment restriction on Plaintiff's ability to solicit Defendant's customers and clients, (ii) Plaintiff was a senior-level employee, in whom the Company invested a significant amount of time

and money and entrusted with confidential, sensitive information, and (iii) Defendant has established, at least to some extent, a legitimate business interest and seeks this Court's intervention to protect the same. As such, the Court finds that modification of the Non-Solicitation Covenant is appropriate under the circumstances presented here. Accordingly, the Court strikes Section 6(a)'s three-year term, and modifies such term to one year from the date of Plaintiff's resignation from the Company—September 22, 2021.[11]

b. ***Scope of the Non-Solicitation Covenant***

The Court turns next to Plaintiff's contention that the Non-Solicitation Covenant is overbroad and unenforceable because it applies both to (i) customers with whom Plaintiff had no material contact, and (ii) Defendant's former customers.

Plaintiff's arguments, and therefore the Court's analysis, are governed by O.C.G.A. § 13-8-53(b), which squarely addresses the appropriate scope of non-

[11] Contrary to the holdings in other Georgia cases construing restrictive covenants under the RCA, Plaintiff nevertheless argues the Court's discretion to modify an unreasonable covenant is strictly limited to *only* striking language from an unreasonable provision. *See* Pl.'s Post-Hr'g Br. at 27–32; *but see Kennedy v. Shave Barber Co.*, 348 Ga. App. 298, 305, 822 S.E.2d 606, 608 (2018) (finding the trial court "eliminated any uncertainty in the geographic scope of [a] non-compete by limiting the restricted area to a three-mile radius surrounding [the former employer's] current location," and finding no error in upholding the restrictive covenant "[b]ecause the three-mile radius as modified by the trial court [wa]s reasonable under the facts of th[e] case"), *PointeNorth Ins. Grp. v. Zander*, No. 1:11-CV-3262-RWS, 2011 WL 4601028, at *3 (N.D. Ga. Sept. 30, 2011) (holding that, although non-solicitation and non-disclosure covenants were overbroad in that they extended to "any of the [e]mployer's clients," the court could "blue pencil[] the provision to only apply to customers that the Defendant contacted and assisted with insurance"). Under the foregoing authorities and for the reasons stated therein, the Court disagrees.

solicitation covenants. That section provides in relevant part:

> Any reference to a prohibition against "soliciting or attempting to solicit business from customers" or similar language ***shall be adequate for such purpose and narrowly construed*** to apply only to: (1) such of the employer's customers, including actively sought prospective customers, ***with whom the employee had material contact***; and (2) products or services that are competitive with those provided by the employer's business.

O.C.G.A. § 13-8-53(b) (emphasis added). Regarding Plaintiff's first contention—that Section 6(a) is not limited to customers with whom Plaintiff had material contact—the Court finds Plaintiff's argument unpersuasive.

Section 13-8-53(b), quoted above, provides a safe harbor to contracting parties, who, as here, incorporate post-employment solicitation restrictions into their agreements. That section clearly requires this Court to interpret such restrictions in a manner that presumes that the parties intended to limit the reach of the restriction to customers "with whom the employee had material contact[.]" *Id.* Any other reading would directly contradict the plain language of the Act.

Applied here, the Agreement prohibits "any direct or indirect solicitation . . . of any customers or clients." While the Act sets forth precise language that will bring non-solicitation covenants within its safe harbor, it nonetheless further contemplates that such protections will extend to agreements that employ "similar language." O.C.G.A. § 13-8-53(b). The Court finds that Section 6(a)'s prohibition against "any direct or indirect solicitation . . . of any customers or clients[]" is

sufficiently "similar" so as to bring it within the Act's safe harbor. As such, the Court is compelled to interpret the foregoing prohibition as being limited in scope and applying only to those Hauser customers with whom Plaintiff had "material contact." *See, e.g.*, *Pan Am Dental*, 2020 WL 2531622, at *6 (construing narrowly, according to O.C.G.A. § 13-8-53(b), a provision limiting contact with "any" customer, to accord with the provided statutory language).

Plaintiff next argues that the Non-Solicitation Covenant's prohibition on soliciting "former customers or clients . . . who were customers or clients of Company at . . . any time during the 18 months prior to [Plaintiff's employment terminating]" is overbroad and violates O.C.G.A. § 13-8-53(b). The Court agrees.

Prior to the enactment of the RCA, it was well-established that there was no legitimate business interest in prohibiting the solicitation of former clients or customers. *See, e.g.*, *Wachovia Ins. Servs., Inc. v. Fallon*, 299 Ga. App. 440, 443, 682 S.E.2d 657, 661 (2009) (holding non-solicitation provision overly broad where it defined "customer" to include "any individual or entity that ha[d] purchased an insurance contract through [the defendant]," because it could be read to preclude the solicitation of clients who had already severed their relationship with the defendant); *Gill v. Poe & Brown of Ga., Inc.*, 241 Ga. App. 580, 582, 524 S.E.2d 328, 331 (1999) (holding employer had no legitimate business interest in preventing solicitation of clients who may have severed relationship with employer up to four years before

employee's termination).[12] The Court finds no support in the Act, and Defendant offers none, from which one could conclude the General Assembly intended to abrogate this common sense principle. Rather, O.C.G.A. § 13-8-53(b) merely articulates a rule of contract construction specific to non-solicitation covenants, which brings covenants within a safe harbor to the extent the agreement in question contains certain qualifying language. Thus, the first question the Court must address here is whether the Agreement does, in fact, use such qualifying language. The Court previously addressed this question in the affirmative (with respect to Plaintiff's "material contacts" argument). Where, as here, an agreement contains qualifying language, the General Assembly mandated (through its use of the modifier "shall") that courts "narrowly construe" such covenant so as to apply only

[12] Plaintiff also argues the Non-Solicitation Covenant could be read to unlawfully prohibit him from receiving unsolicited business from Defendant's customers and clients as they would be among the "some other part[ies]" who would be prohibited from initiating any "direct or indirect solicitation." Joint Ex. 5, § 6(a). The Court, however, finds this to be a highly strained reading of Section 6(a) insofar as it would contemplate a customer or client directly or indirectly soliciting itself. *See Office Depot, Inc. v. Dist. at Howell Mill, LLC*, 309 Ga. App. 525, 530, 710 S.E.2d 685, 689 (2011) ("A contract . . . must be read reasonably, in its entirety, and in a way that does not lead to an absurd result."). To avoid any doubt, the Court does not construe the Non-Solicitation Covenant as precluding Plaintiff from accepting unsolicited business, which is plainly authorized under both the common law and the Agreement itself. Hr'g Tr. 139:5–18, 144:4–25, 161:22–162:7 (Wherein Mr. Stines acknowledged that "if [Martin] receive[d] unsolicited business . . . he can accept the business"). *See Holland Ins. Grp., LLC v. Senior Life Ins. Co.*, 329 Ga. App. 834, 840, 766 S.E.2d 187, 193 (2014) ("Generally, a restrictive covenant may not validly preclude the employee from accepting unsolicited business from customers of his former employer. . . . An employer may properly protect itself from the risk that a former employee might appropriate its customers by taking unfair advantage of client contacts developed while working for that employer, but the company cannot prevent the employee from merely accepting overtures from those customers." (citation and internal punctuation omitted)).

to "the employer's customers, including actively sought prospective customers, with whom the employee had material contact."[13] With this in mind, the Court is compelled to conclude that the Non-Solicitation Covenant is, on its face, invalid, inasmuch as it prohibits the solicitation of Defendant's "former customers or clients."

i. *Modification of the Non-Solicitation Covenant's Scope*

The legitimate business interests that weighed in favor of modifying the Non-Solicitation Covenant to reduce its term likewise support a narrowing of its scope to bring it within Section 13-8-53(b). In so holding, and in rejecting Plaintiff's invitation to strike Section 6(a) in its entirety, the Court again recognizes the Company's legitimate business interest in protecting its relationships with existing and actively sought prospective customer and client relationships—relationships in which Hauser has invested considerable time, effort, and expense (including the Company's investment in Plaintiff) to develop. The Court's holding in this regard, when viewed together with the modified one-year term, honors both the intent of the parties "to the extent possible" by upholding some limited post-employment restriction on Plaintiff's ability to solicit the Company's customers or clients, while also granting Defendant only as much relief as—in the Court's judgement—is

[13] That section contains additional considerations that have not been raised by the parties and do not appear to be disputed.

reasonably necessary to protect the Company's interest in such relationships. *See* O.C.G.A, § 13-8-54(b).

Accordingly, the Court will sever the words "or at any time during the 18 months prior" from the Non-Solicitation Covenant, making it applicable to "any customers or clients of Company who were customers or clients of Company at the time Employee's employment with Company terminates . . ."[14]

2. Section 6(b): Non-Recruitment and Non-Interference Covenants

Next, the Court turns to the enforceability of Section 6(b) of the Agreement (defined above as the "Non-Recruitment Covenant" and the "Non-Interference Covenant," respectively, and taken together as the "Section 6(b) Covenants"). Plaintiff argues that the Section 6(b) Covenants are unreasonable with regard to time, geographic scope, and the activities restricted. Pl.'s Post-Hr'g Br. at 17–23. Defendant, on the other hand, argues the covenants are enforceable, reasonable, and necessary to protect Defendant's aforementioned business interests; in the

[14] For the avoidance of doubt, the Court's holding applies to both current and prospective customers or clients, with whom Plaintiff had material contacts. As noted herein, the record before the Court indicates that there are approximately 35 customer or client relationships for which Plaintiff was either the primary or secondary contact. The record, however, remains somewhat undeveloped on this question. As such, the parties are directed to confer and attempt to reach an agreement on a list of clients or customers with whom Plaintiff had material contact (as that term is defined in the Act). In so doing, the parties are directed to treat both PEGs and their portfolio companies or other affiliated entities (*where applicable*), as "customers or clients" of Hauser. To the extent the parties cannot reach an agreement as to whether certain customers or clients should be included or excluded from the above-referenced list, the Court will resolve such dispute on a more-developed record.

alternative, Defendants ask the Court to modify those covenants instead of striking them entirely. As explained below, the Court finds the Section 6(b) Covenants unenforceable, and declines to exercise its authority to modify the covenants.

a. ***Governing Statute***

The Court's analysis of the Section 6(b) Covenants is governed by the Court of Appeals' recent decision in *Belt Power*—specifically, the court's holding that agreements satisfying the statutory definition of a "restrictive covenant" fall within the scope of the RCA, and that "the enforceability of [such] covenants should be analyzed under the provisions of the Act." *Belt Power*, 354 Ga. App. at 293–94 (holding employee no-hire and employee no-solicitation covenants were "agreement[s] . . . to protect [the former employer's] interest in . . . employees" and thus were restrictive covenants subject to the RCA).[15] Here, the Section 6(b) Covenants purport to prohibit Plaintiff from inducing certain parties (including

[15] In reaching this decision, the court in *Belt Power* considered the RCA's definition of a restrictive covenant (O.C.G.A. § 13-8-51(15)), in conjunction with the Act's "broadly" worded "judicial review provision." 354 Ga. App. at 293; *see* O.C.G.A. § 13-8-54(b) ("In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section §13-8-53 . . . ."). The *Belt Power* court found that, "[t]aken together, the clear and plain language of these two provisions compels a conclusion that *any* agreement that meets the Act's definition of restrictive covenant, and is otherwise not excepted from the Act's provisions, is subject to the terms of the Act and must comply with the terms of the Act." 354 Ga. App. at 293 (emphasis in original). "Suffice it to say, we are never at liberty to ignore or disregard a binding precedent of th[e] [appellate courts]." *Evergreen Packaging, Inc. v. Prather*, 318 Ga. App. 440, 445, 734 S.E.2d 209, 214 (2012). *See* Court of Appeals Rule 33.2(a)(2) ("If an appeal was decided by a division of this Court, a published opinion in which all three panel judges fully concur is binding precedent."). As such, the Court is constrained to follow the conclusion reached in *Belt Power*.

Hauser employees, suppliers, and customers) to terminate their association with the Company, or from "interfere[ing]" with the "business relationship" between those parties and the Company. Joint Ex. 5, §6(b). As such, the covenants constitute "agreement[s] . . . to protect [Company's] . . . interest . . . in . . . business relationships, [and] employees," such that the enforceability of the covenants must be analyzed under the provisions of the RCA. *See* O.C.G.A. § 13-8-51(15); *see also Belt Power*, 354 Ga. App. at 294.

While *Belt Power* does not articulate where or how such covenants fall within the "ambit of the Act," 354 Ga. App. at 292, O.C.G.A. § 13-8-53 expressly speaks to three different types of restrictive covenants: (i) "contracts that restrict competition during the term of a restrictive covenant"; (ii) "customer non-solicitation provision[s]"; and (iii) "nondisclosure of confidential information provision[s]." O.C.G.A. § 13-8-53(a), (b), (e). The Section 6(b) Covenants can reasonably be construed—as Plaintiff correctly urges here—as "restrict[ing] competition during the term of a restrictive covenant," such that they must be "reasonable in time, geographic area, and scope of prohibited activities" (O.C.G.A. § 13-8-53(a))—the reasonableness of which is, in turn, informed by O.C.G.A. §§ 13-8-56, 13-8-57, and other provisions of the Act. *See Kennedy*, 348 Ga. App. at 302 ("Pursuant to the Act, restrictive covenants in employment contracts are permitted and enforceable if they are reasonable in time, geographic area, and scope

of prohibited activities"); *see also ID Tech. v. Hamilton*, No. 1:14–CV–00594–TWT, 2014 WL 12703272, at *1 (N.D. Ga. Mar. 24, 2014) ("O.C.G.A. § 13-8-53(a) requires that a restrictive covenant must be reasonable in time, geographic area, and scope of activities prohibited."). For the following reasons, the Section 6(b) Covenants fail each of these requirements.

b. ***The Section 6(b) Covenants' Restrictions***

The Court first turns to Section 6(b)'s temporal restriction. In so doing, the Court "shall presume to be unreasonable in time any restraint more than two years in duration." O.C.G.A. § 13-8-57(b). The Section 6(b) Covenants purport to restrict Plaintiff for a period of three years after his employment ended. They are, therefore, presumptively unreasonable, and Defendant has failed entirely to rebut the presumption with respect to the Section 6(b) Covenants.

Second, the territorial reach of the Section 6(b) Covenants is similarly unreasonable. O.C.G.A. § 13-8-56(2) provides that "[a] geographic territory which includes the areas in which the employer does business at any time during the parties' relationship, even if not known at the time of entry into the restrictive covenant, is reasonable, provided that: (A) The total distance encompassed by the provisions of the covenant also is reasonable; (B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a business or commercial relationship; or (C) Both . . . (A) and

(B) . . . ." The covenants here, however, contain no geographic or other limitation that would otherwise constrain the territorial reach of these covenants. Indeed, they appear to apply to all Hauser employees, agents, representatives, and associates—wherever they are in the world and regardless of (i) what they do for the company, (ii) whether Plaintiff ever had any contact with them, and (iii) whether or not such individual "terminate[s] his [or her] association" with Hauser to engage with a competing business. The lack of any geographic or similar limitation is fatal to the enforcement of these covenants.[16]

[16] The Court acknowledges that, prior to the enactment of the RCA, there was a split of authority regarding whether employee non-recruitment or non-solicitation covenants required a geographic limitation to be enforceable. *See, e.g., CMGRP, Inc. v. Gallant*, 343 Ga. App. 91, 96, 806 S.E.2d 16, 20 (2017) ("[I]t is worth noting that this Court has upheld employee non-recruitment provisions that lacked a geographic limitation."); *Sanford v. RDA Consultants, Ltd.*, 244 Ga. App. 308, 310(1), 311(2), 535 S.E.2d 321, 323–24 (2000) (upholding an employee non-recruitment provision that lacked a geographic limitation); *Sunstates Refrigerated Servs., Inc. v. Griffin*, 215 Ga. App. 61, 63, 449 S.E.2d 858, 861 (1994) (upholding an employee non-recruitment provision that lacked a geographic limitation); *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 377(2)(a), 414 S.E.2d 513, 516 (1991) (upholding an employee non-recruitment provision that lacked a geographic limitation); *Lane Co. v. Taylor*, 174 Ga. App. 356, 359-60(2)(b), 330 S.E.2d 112 (1985) (physical precedent only) (upholding an employee non-recruitment provision that lacked a geographic limitation); *but see Capricorn Sys., Inc. v. Pednekar*, 248 Ga. App. 424, 427(2)(b), 546 S.E.2d 554, 557 (2001) (holding that a restrictive covenant that had no definite geographic-area limitations as to the recruitment of employees was overbroad and unenforceable), *and Hulcher Servs., Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 491–92, 543 S.E.2d 461, 467 (2000) (holding non-recruitment covenant with no restriction as to territory unreasonable where it applied to all North America even though the former employee had no contact with employees outside his work area); *see also MacGinnitie v. Hobbs Grp., LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) (holding unenforceable an employee non-solicitation provision which set no geographical or relationship restriction but rather prohibited the former employee from soliciting other employees, "regardless of place or prior relationship to [the former employee]"), *and Becham v. Synthes (U.S.A.)*, No. 5:11-CV-73 MTT, 2011 WL 4102816, at *7 (M.D. Ga. Sept. 14, 2011), aff'd on other grounds sub nom. *Becham v. Synthes USA*, 482 F. App'x 387 (11th Cir. 2012) (holding unenforceable an employee non-recruitment and non-solicitation provision for lack of a territorial restriction). Now, however, such covenants are subject to the RCA, which requires them to be reasonable in territorial scope. *See Belt Power*, 354 Ga. App. at 293 (holding that "*any* agreement

Third, and finally, the RCA requires the "scope of prohibited activities" to be reasonable and described in a way that gives "fair notice" to the party against whom enforcement is sought. O.C.G.A. § 13-8-53(c)(1).[17] *See also* O.C.G.A. §13-8-56(3) ("The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given."). The Court finds the Non-Recruitment Covenant and Non-Interference Covenant here are overbroad and vague both as to the scope of prohibited activity and as to universe of individuals and entities to which they may apply.

The Section 6(b) Covenants give Plaintiff no discernable way to determine what post-employment behavior would or could be prohibited. In the context of these covenants, what does it mean, for example, to "in any manner interfere with the relationship" between Hauser and the individuals and entities described in the covenants? At an October 8, 2020 hearing on Plaintiff's Motion for a Temporary Restraining Order, Defendant's counsel indicated "badmouthing" Hauser to clients would be prohibited by the Non-Interference Covenant (TRO Hr'g Tr. 80:3–11). Moreover, when Defendant was asked in written discovery to "[d]escribe all conduct that [Hauser] contend[s] would constitute a violation of the phrase 'do anything,

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that meets the Act's definition of restrictive covenant . . . must comply with the terms of the Act." (emphasis in original)).

[17] *See* O.C.G.A. § 13-8-53(c)(1) (recognizing that "fair notice" exists "even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters").

directly or indirectly, to interfere' as used in Section 6(b) of the Agreement, Defendant objected on the grounds the interrogatory was "overly broad and unduly burdensome." Joint Ex. 57, Interrog. Answer No. 13. Although Defendant proceeded to attempt to describe the prohibited "interference" activity, its response—as does counsel's "badmouthing" example—highlights the impossibly expansive and vague nature of the Section 6(b) Covenants, and how they could be broadly, and unfairly, construed to Hauser's benefit and without fair notice to Plaintiff. *See id.* ("Defendant states conduct violating the phrase 'do anything, directly or indirectly, to interfere,' as used in Section 6(b) of the Agreement, includes but is not limited to ***soliciting*** Hauser, Inc. ***vendors***, ***diverting*** Hauser, Inc. ***suppliers, vendors, or customers*** away from Hauser, Inc., and ***soliciting, inducing, or encouraging any person, business or entity which is a supplier of, a purchaser from, or a contracting party*** with, Hauser, Inc. ***to terminate any written or oral agreement***, ***order, or understanding with Hauser, Inc.*** or to conduct business in a way that results in ***an adverse impact*** to Hauser, Inc.").

The Section 6(b) Covenants are also overbroad and vague with respect to the individuals and entities to whom those covenants apply. In regard to the Non-Interference Covenant, for example, Plaintiff has no way of knowing what PEGs, or other companies, may have, or will develop, a relationship with Defendant outside of the PEGs with which Plaintiff had material contact. With respect to the Non-

Recruitment Covenant, Defendant again objected to Plaintiff's interrogatory requesting that Hauser "[i]dentify every employee, agent, representative or other person associated with Hauser or any of Hauser's affiliates or subsidiaries"—the exact language from the Non-Recruitment Covenant—on the basis that making such an identification would be "overly broad and unduly burdensome." Joint Ex. 57, Interrog. Answer No. 12. Indeed, identifying all persons "associated" with Hauser or its affiliates or subsidiaries would be a challenge, if not an impossibility—for Hauser, and much more so for Plaintiff. In sum, the language in the Section 6(b) Covenants is unduly and impermissibly vague and overbroad. It does not provide fair notice to Plaintiff of the prohibited activity or the "maximum reasonable scope of the restraint" (O.C.G.A. § 13-8-53(c)(1)), and thus is unreasonable and unenforceable as written.

In light of the foregoing, the Court must next determine whether to modify or strike the Section 6(b) Covenants.

c. ***Modification***

As with Section 6(a), the Court has the discretion to modify the Section 6(b) Covenants. The Court is under no obligation to do so, however. *See Belt Power*, 354 Ga. App. at 295 (holding that "it is within a trial court's discretion whether or not to apply the [RCA's] blue pencil provisions"). And perhaps more importantly,

the Court "may not completely reform and rewrite contracts by supplying new and material terms whole cloth." *Lifebrite*, 2016 WL 7840217, at *7.

Here, unlike in Section 6(a) (where the Court needed only to narrow an overbroad time provision and strike impermissible language), the Court finds no permissible basis to modify the Section 6(b) Covenants, even if it were inclined to do so. Indeed, to "blue pencil" these covenants as written, the Court would have to install new and material terms—*e.g.*, a territorial restriction, a definition or clarification for the term "interfere," etc.—even where the covenants themselves provide no such terms. Such a modification would not be permissible under O.C.G.A. §§ 13-8-53(d) or 13-8-54(b). And, unlike Section 6(a)'s narrow restrictions forbidding Plaintiff from actively soliciting customers or clients with whom he had material contact while employed by Defendant, the Section 6(b) Covenants' vagueness leaves the Court with no meaningful parameters within which it could narrow the covenants. As noted above, Section 6(b)'s restrictions are far more opaque, and less apt for modification, than Section 6(a)'s restriction on actively soliciting customers or clients with whom Plaintiff had previously developed a working relationship on behalf of Defendant.[18]

[18] Defendant cites *Interra Int'l, LLC. v. Al Khafaji*, No. 1:16-CV-1523-MHC, 2017 WL 4866266 (N.D. Ga. Mar. 21, 2017) and *S. Felt Co., v. Konesky*, No. CV 119-200, 2020 WL 5199269, at *5 (S.D. Ga. Aug. 31, 2020) for the proposition that at least some courts have upheld similar non-interference clauses to the covenant in Section 6(b)(ii). Those cases, however, are distinguishable. In both cases, the restrictions at issue only applied for a two-year period after termination, which is not a presumptively unreasonable time period under the RCA. Further, the *Interra* agreement

Lastly, the Court finds that, while Defendant sufficiently demonstrated that its business interests justify restricting Plaintiff from soliciting Defendant's customers or clients, it has failed to do so here. The Court is troubled by the breadth and lack of precision (to put it mildly) of the Section 6(b) Covenants. The Court cannot help but consider the fact that the covenants were not the byproduct of a deliberate and thoughtful drafting process targeted at protecting the Company's interests, while considering the specific requirements of this State's laws. Rather, as noted previously, the covenants are boilerplate restrictions imposed on virtually every Hauser employee across the country, and have gone unchanged for more than a decade. To repair the deficiencies of Section 6(b) would require the Court to rewrite the covenants, almost entirely, and to pretend that the parties actually "intended" this language to mean anything at all. *See* O.C.G.A. § 13-8-54(b) (allowing the Court to modify restrictive covenants to grant "the relief reasonably necessary to protect [legitimate business interests] and to achieve the original intent of the contracting

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applied only to soliciting ***customers*** or ***vendors*** of the former employer, or its affiliates, with whom the employee interacted. *Id.* at *2. The covenants here, unlike those in *Interra*, restrict activity for three years after termination and prohibit Plaintiff from inducing or assisting others to induce "***any supplier or customer of Company or any of its affiliates or subsidiaries*** to terminate its association with Company or any of its affiliates or subsidiaries, or do ***anything, directly or indirectly, to interfere with the business relationship between Company or any of its affiliates or subsidiaries and any of its customers***" (emphasis added). While Defendant is correct that some broad provisions have been upheld where supported by legitimate business interests, the covenants in Section 6(b) are far broader than necessary to protect the legitimate business interests discussed in Part II.B.1, *supra.*

parties to the extent possible"). Such is not permitted by the RCA, and the Court declines to do so here.

III. CONCLUSION

Having considered the record and given all of the above, the Court hereby GRANTS IN PART and DENIES IN PART the declaratory and injunctive relief requested in Plaintiff's Complaint. The Court modifies Section 6(a) of the Agreement by reducing its term to one year and striking the phrase "or at any time during the 18 months prior to such customer or client of Company." Section 6(a) shall be enforced as modified:

> Employee hereby agrees that upon termination of Employee's employment with Company, and for a period of one (1) year thereafter, Employee will not engage in any direct or indirect solicitation, whether such solicitation is initiated by Employee or some other party, of any customers or clients of Company who were customers or clients of Company at the time Employee's employment with company terminates to switch or move its insurance or other business to another company or agency during the aforementioned one (1) year period.

Plaintiff's request for a declaratory judgment that Section 6(a) is unenforceable is hereby DENIED to the extent it conflicts with the modified covenant as ordered above.

Declaratory relief is GRANTED with respect to Section 6(b) of the Agreement. It is hereby ORDERED, ADJUDGED, AND DECREED that Section 6(b) is unenforceable and void, and Defendant, and any associated person or entity

acting on its behalf, is permanently enjoined from attempting or threatening, in any way, and in any forum or jurisdiction, (i) to enforce the covenants contained in Section 6(b) against Plaintiff, (ii) to seek to recover damages or other remedies based upon an alleged violation of Section 6(b), and (iii) to take any action to preclude or disrupt Plaintiff's employment with CAC or other business relationships based on an alleged violation of Section 6(b).

IT IS SO ORDERED this 5th day of March, 2021.

WALTER W. DAVIS, JUDGE
Georgia State-wide Business Court

Copies to:

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