UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES P. LARWETH,

Plaintiff,

v. **Case No: 6:18-cv-823-Orl-41DCI**

MAGELLAN HEALTH, INC.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Magellan's Motion for Partial Final Summary Judgment as to Counts II, III, and V of Larweth's Complaint (Doc. 136); Magellan's Motion for Partial Final Summary Judgment as to Counts I and III of its Amended Counterclaim (Doc. 137); Plaintiff/Counter-Defendant James P. Larweth's Motion for Partial Final Summary Judgment (Doc. 138); and Plaintiff/Counter-Defendant James P. Larweth's Motion to Stay Pending Appeal ("Motion to Stay," Doc. 161). Each motion will be addressed in turn.

I. BACKGROUND

This case involves the pharmaceutical rebate contract business. By way of background, insurance companies provide drug benefits for their members, and as part of these benefits, insurance companies have lists of preferred drugs. (May 28, 2019 Hr'g Tr., Doc. 122, at 54:19–25). The insurance companies encourage their doctors and members to use the preferred drugs. (*Id.* at 55:2–5). Unsurprisingly, pharmaceutical manufacturers want their drugs to be on the preferred list. (*See id.*). So, the manufacturers offer rebates to the insurance companies to encourage the companies to put their drugs on the preferred list. (*Id.* at 55:6–9). To negotiate these

rebates, insurance companies often retain a pharmaceutical benefit management company ("PBM"). (*Id.* at 56:21–57:3).

At issue here are "carve out" pharmaceutical rebates. A "carve out" is when an entity offers to negotiate a rebate on behalf of an insurance company separately from what is generally being done by the PBM—in other words, to "carve out" a specific drug, therapeutic category, or disease state from the insurance company's standard PBM contract. (*Id.* at 57:7–17). Defendant and Counter-Plaintiff Magellan Health Inc. ("Magellan") is involved in, among other things, this carve out rebate industry. (Kamal Dep., Doc. 98-21, at 12:7–25).

In 2006, Plaintiff and Counter-Defendant James Larweth ("Larweth") began working for Magellan as the Vice President of Account Management. (Doc. 122 at 59:8–18). In 2011, Larweth left Magellan and began working for a company called CDMI. (*Id.* at 62:5–9). There, Larweth signed an employment agreement ("CDMI Employment Agreement," Doc. 60-2). The CDMI Employment Agreement contained, among other things, a bonus upon sale provision—which provided that, if CDMI was sold while Larweth was still employed with CDMI and a few other conditions precedent occurred, Larweth was entitled to a percentage of the sale price. (*Id.* at 3). The CDMI Employment Agreement also contained several restrictive covenants, including a non-competition agreement. (*Id.* at 5).

In March 2014, Magellan purchased CDMI for over $300 million. ("CDMI Purchase Agreement," Doc. 60-4, at 2; Petrovas Dep., Doc. 98-10, at 167:23–168:3; Doc. 122 at 69:3–6). Alongside the purchase of CDMI, Larweth agreed to return to work for Magellan and signed the Magellan Employment Agreement (Doc. 116-1). The relevant portions of the Magellan Employment Agreement were effective only upon the closing of the purchase of CDMI by Magellan. (*Id.* at 2). Further, the Magellan Employment Agreement contained a bonus upon sale

provision that referenced, and explicitly amended, the CDMI Employment Agreement, (*id.* at 3–4), and it contained new restrictive covenants, (*id.* at 8–10). Ultimately, Larweth was paid an approximately $12 million bonus upon the sale of CDMI. (Doc. 122 at 78:19–25; May 29, 2019 Hr'g Tr., Doc. 123, at 123:24–124:3).

When Larweth returned to Magellan, he became the Senior Vice President of Business Development for Magellan's Specialty Unit. (Doc. 122 at 143:22–144:1; Doc. 123 at 127:12–15). In this role, Larweth was in charge of managing Magellan's clients in the carve out rebate business. (Doc. 122 at 144:11–14). He was responsible for upselling to existing customers and attracting new ones as well as managing the business development team. (*Id.* at 144:14–18). During this time, Larweth had direct contact with customers and had access to, among other things, the rebate contracts and addenda. (*See id.* at 148:5–19, 155:8–13; Doc. 123 at 128:10–129:1).

In 2015, Larweth became eligible for a commission plan. (Larweth Feb. 19, 2019 Dep., Doc. 98-1, at 290:8–11). The commission plan is memorialized in a written document, which lays out in an abbreviated manner the terms and conditions of the plan. ("2015 Commission Plan," Doc. 1-1).[1] Larweth also asserts that he had many conversations regarding the revenue upon which he would receive a commission or some sort of incentive, including commissions on price protection revenue.[2] (*See* Doc. 98-1 at 317:4–24, 319:22–320:18). Ultimately, Larweth was paid a one percent commission on his revenue attributable to price protection, (Magellan Corporate

[1] Although the 2015 Commission Plan is labeled as "proposed," the parties agree that this is the final writing controlling the 2015 commission structure. (Compl., Doc. 1, ¶ 36; Answer, Doc. 69, ¶ 36 (admitting)).

[2] Price protection is where the pharmaceutical manufacturers promise to cap the price of a certain drug, and if they raise the price over that cap, the manufacturer will, essentially, provide a bigger rebate to compensate. (*See* Doc. 98-1 at 261:10–17; Doc. 98-21 at 64:23–65:22; Doc. 123 at 88:3–9).

Representative Dep., Doc. 98-22, at 35:22–36:3, 36:20–24), which was less than Larweth contends he was entitled to.

For reasons irrelevant to this discussion, Larweth's employment with Magellan was terminated in January 2018. (Doc. 123 at 135:10–19). Approximately six or seven months after his termination, Larweth established two new businesses—Anton Rx and Anton Health. (*Id.* at 135:20–25). The two businesses appear to be somewhat overlapping and co-mingled, but Larweth admitted that Anton Rx is in the same business as Magellan and directly competes with Magellan's pharmaceutical rebate business. (*Id.* at 136:12–22). Indeed, in the limited time Anton Rx has been in business, it has solicited contracts from at least twenty of Magellan's clients, (Larweth's Answers to Interrogs., Doc. 71-4, at 3–4), and it has already been awarded work from four or five of them, (Doc. 123 at 162:13–163:7). Larweth also hired two former employees of Magellan—Craig Caceci and Jacques Ghebali—to work for him at the Anton businesses. (*Id.* at 138:14–139:12).

In the timeframe following his employment with Magellan, Larweth contends that Magellan mounted a smear campaign against him, defaming him to customers and colleagues alike. (*See* Caceci Dep., Doc. 98-16, at 111:13–114:13, 115:11–119:19; Mar. 13, 2018 Text Message, Doc. 98-17, at 6–7).

As a result of this protracted and now acrimonious relationship, the parties have asserted multiple claims against one another. As relevant here, Larweth has asserted claims of unjust enrichment, quantum meruit, and defamation per se against Magellan. In turn, and as relevant here, Magellan asserted counterclaims for breach of contract and declaratory judgment against Larweth. Magellan and Larweth have each moved for partial summary judgment on portions of Magellan's

counterclaims, and Magellan has moved for partial summary judgment on some of Larweth's claims against it.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

"These principles are equally applicable when . . . the plaintiff is seeking entry of summary judgment, and the defendant has asserted affirmative defenses." *Amoco Oil Co. v. Gomez*, 125 F.

Supp. 2d 492, 499 (S.D. Fla. 2000). In such a case, a "defendant has the initial burden of making a showing that the [affirmative] defense is applicable." *Blue Cross & Blue Shield v. Weitz*, 913 F.2d 1544, 1552 (11th Cir. 1990).

III. MAGELLAN'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

Magellan seeks summary judgment on its breach of contract claim and its related declaratory judgment claim. In the breach of contract claim, Magellan asserts that Larweth has breached the restrictive covenants contained in his Magellan Employment Agreement. Relatedly, Magellan seeks declaratory judgment that those restrictive covenants are valid. Magellan does not seek summary judgment as to damages or injunctive relief; it only addresses liability at this time.

A. Question for the Court or Jury

The parties' primary dispute is whether the restrictive covenants are enforceable, which as discussed below, turns on whether they are reasonable. As an initial matter, Larweth argues that whether the restrictive covenants are reasonable is a question for the jury. Larweth relies on *Deming v. Nationwide Mutual Insurance Co.*, 905 A.2d 623 (Conn. 2006).[3] Specifically, Larweth pulls a sentence from a footnote of the opinion, which states: "In the vast majority of cases . . . whether a covenant is reasonable is a question of fact." *Id.* at 633 n.15. Larweth argues that *Deming*, therefore, stands for the proposition that the question of whether a restrictive covenant is reasonable must go to the jury. However, Larweth fails to read his selectively edited *Deming* quote in context.

In *Deming*, the trial court was reviewing a deferred compensation provision, which permitted the defendant to stop paying deferred compensation if the plaintiffs engaged in certain

[3] Both parties agree that Connecticut law applies to the substantive analysis regarding the enforceability of the restrictive covenants. (*See* Doc. 116-1 at 17).

competitive conduct. *Id.* at 628. The trial court concluded that the provision was not a restrictive covenant and therefore did not require a reasonableness analysis. *Id.* at 632–33. Nevertheless, the trial court also "summarily conclud[ed], based on case law from other jurisdictions as to the same provision, that the restriction was reasonable as a matter of law." *Id.* at 633 n.15.

In reversing the trial court, the Connecticut Supreme Court determined that the deferred compensation provision at issue was, in fact, a restrictive covenant and that trial court had erred by failing to "examine whether there were material issues of fact related to its reasonableness." *Id.* at 633. Then, in the footnote cited by Larweth, the court noted that the trial court's reasonableness assessment was insufficient because the trial court concluded—without examining the specific factual circumstances of the case before it—that the language of restrictive covenant was per se reasonable as a matter of law. *Id.* at 633 n.15. Further, within this discussion, the Connecticut Supreme Court explained that its precedent "requir[ed] [a] *court*, in evaluating [the] reasonableness of [a] covenant not to compete, to weigh five fact bound considerations." *Id.* (emphasis added). Thus, the Connecticut Supreme Court's statement that whether a restrictive covenant is reasonable is typically "a question of fact" does not mean that reasonableness must be determined by a jury; it means that courts must examine the reasonableness factors in the context of the particular factual circumstances of each case. This conclusion is consistent with the other Connecticut decisions on the matter. *See, e.g.*, *Hare v. McClellan*, 662 A.2d 1242, 1247 (Conn. 1995) (citing *Robert S. Weiss & Assocs., Inc. v. Wiederlight*, 546 A.2d 216 (Conn. 1988) for the proposition that the reasonableness of a covenant not to compete is a question of law for the court); *Discoverytel SPC, Inc. v. Pinho*, No. CV106011816S, 2010 WL 4515414, at *3 (Conn. Super. Ct. Oct. 14, 2010) ("The enforceability of a covenant not to compete is a question of law to be decided by the court."); *Fairfield Cty. Bariatrics & Surgical Assocs., P.C. v. Ehrlich*, No.

FBTCV1050291046, 2010 WL 1375397, at *31 n.22 (Conn. Super. Ct. Mar. 8, 2010) (same); *Riordan v. Barbosa*, 395945, 1999 WL 124335, at *2 (Conn. Super. Ct. Mar. 1, 1999) (same).

Thus, as long as there are not underlying issues of material fact, reasonableness is a question for the Court, not the jury.

B. Validity of the Restrictive Covenants

"[U]nder Connecticut law, post-employment covenants are valid if reasonable under the circumstances." *MacDermid, Inc. v. Raymond Selle & Cookson Grp.*, 535 F. Supp. 2d 308, 316 (D. Conn. 2008). "[A] party challenging the enforceability of a restrictive covenant has the burden of proving that the covenant is not enforceable." *A.H. Harris & Sons, Inc. v. Naso*, 94 F. Supp. 3d 280, 288 (D. Conn. 2015) (quoting *Sagarino v. SCI Conn. Funeral Servs., Inc.*, No. CV 000499737, 2000 WL 765260, at *3 (Conn. Super. May 22, 2000) and citing *Mattis v. Lally*, 82 A.2d 155, 156 (Conn. 1951)). To determine reasonableness, Connecticut courts consider the following five factors: "(1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interests." *Robert S. Weiss & Assocs.*, 546 A.2d at 219 n.2.

1. Temporal Restriction

Larweth's restrictive covenants are in place for three years. Larweth argues that this is an unreasonably long amount of time because any allegedly confidential information would have become stale "quickly"; the rebate contracts at issue can be terminated on short notice—often on thirty, sixty, or ninety days; "the entire rebate industry is becoming more competitive and more transparent"; and other Magellan employees have either had no restrictive covenants or ones much shorter in duration. (Resp., Doc. 147, at 9). Notably, Larweth cites absolutely no case law or other

legal authority to support his argument that these factors render the three-year timeframe unreasonable.

Moreover, Larweth has failed to address Magellan's assertion that these restrictive covenants were entered into in connection with the sale of CDMI. Under Connecticut law, "[r]estrictive stipulations given at the time of a sale of a business are more readily enforceable than in the case of employer-employee relationship. When a covenant not to compete is given in connection with a sale of business, 'a large scope for freedom of contract and a correspondingly large restraint of trade' is allowable." *Sagarino*, 2000 WL 765260, at *3 (quoting *Samuel Stores, Inc. v. Abrams*, 108 A. 541, 543 (Conn. 1919)).

The only part of Larweth's Response that could possibly be construed as responsive to Magellan's argument is paragraph three of Larweth's factual background. There, Larweth "disputes any characterization that ties his bonus compensation, which was paid pursuant to his employment agreement with CDMI, to future performance or contractual obligations with [Magellan]." (Doc. 147 at 5). However, *Sagarino* makes clear that a direct contractual obligation memorialized in the sales agreement itself is not required. Instead, "it is well settled [in Connecticut law] that an agreement not to compete will be considered to have been given in connection with the sale of a business even if the covenantor is not the seller, if the covenant was reasonably necessary for the protection of the good will of the business." *Sagarino*, 2000 WL 765260, at *4. The *Sagarino* Court goes on to say that "[i]f the covenantor was active in the management of or intimately involved with the business, . . . the covenant will be considered to have been given in connection with the sale of the business."[4]

[4] As discussed below in the analysis of Magellan's unjust enrichment and quantum meruit claims, the fact that a restrictive covenant was given in connection with the sale of a business does not operate to make the restrictive covenant part of the contract for sale. As explained above, the

Magellan has presented undisputed evidence that Larweth was a key employee at CDMI and that securing his restrictive covenants was a vital part of the CDMI sale negotiation—i.e., that Magellan would not have purchased CDMI without Larweth agreeing to the restrictive covenants in the Magellan Employment Agreement.[5] (Doc. 122 at 72:3–73:8, 210:24–211:10; Doc. 98-10 at 68:10–13). Also, as discussed previously, while Larweth was not an owner of CDMI, he received a percentage of the sale due to his employment with CDMI—totaling approximately $12 million. Thus, under *Sagarino*, the restrictive covenants at issue here are entitled to more leeway than covenants based purely on employment.

Accordingly, Larweth has not met his burden to show that the restrictive covenants are temporally unreasonable.

2. Geographic Restriction

Larweth does not challenge the geographic restrictions, which are nationwide, and Connecticut law indicates that they are reasonable. *Sylvan R. Shemitz Designs, Inc. v. Brown*, AANCV136013145S, 2013 WL 6038263, at *8 (Conn. Super. Ct. Oct. 23, 2013) (finding reasonable a nationwide geographic restriction because it was reasonably related to the former employer's national business).

Court looks to all of the surrounding circumstances to determine whether restrictive covenants are reasonable, not just the terms of the relevant contracts.

[5] Again, this fact does not somehow transform the restrictive covenants into a term of the CDMI Purchase Agreement or evince that Larweth signed the Magellan Employment Agreement in exchange for his $12 million bonus upon sale. These are separate contracts, setting forth separate obligations, but they were entered into in connection with one another, which is relevant to the at-issue reasonableness analysis. (*See* Doc. 60-4 at 8 (reciting in the whereas clauses that "certain Bonus Employees"—including Larweth—"have[] concurrently . . . entered into the Non-Competition and Non-Solicitation Agreements" but not imposing any obligations on or conferring any direct benefit on Larweth)).

3. Fairness of the Protection Accorded to Magellan

"[W]hen the character of the business and the nature of the employment are such that the employer requires protection for his established business against competitive activities by one who has become familiar with it through employment therein, restrictions are valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights." *Robert S. Weiss & Assocs.*, 546 A.2d at 221 (quotation omitted). As noted, there are three separate restrictive covenants. The Court will examine whether each covenant provides fair protection to Magellan.

a. Non-Solicitation of Customers

When all is said and done, Magellan's relevant business is sales. Magellan negotiates rebates with the pharmaceutical manufacturers and then markets them to health plans and similar entities. The more entities that contract with Magellan for rebates, the more money Magellan makes. While there may be some nuance in how Magellan gets paid, it's business is ultimately still sales. Further, all parties agree that this is a highly competitive market. Unremarkably, price, value, and relationships are important to Magellan in obtaining and retaining business. (Doc. 122 at 64:23–65:23, 149:15–151:1, 209:4–7; Doc. 123 at 50:3–19; Doc. 98-1 at 260:5–10). Thus, Magellan has a protectable interest in its customer relationships. *See Robert S. Weiss & Assocs.*, 546 A.2d at 221 (noting that where "the employment involves . . . [the employee's] contacts and associations with clients or customers it is appropriate to restrain the use, when the service is ended, of the knowledge and acquaintance, so acquired, to injure or appropriate the business which the party was employed to maintain and enlarge" (quotation omitted)); *A.H. Harris & Sons, Inc.*, 94 F. Supp. 3d at 297 ("It is fair for [the plaintiff] to protect itself, in a highly competitive market with narrow profit margins and where both pricing and personal relationships are very important . . . .").

Moreover, it is irrelevant whether Larweth had some of these relationships prior to working for Magellan. As noted, Larweth worked for Magellan from 2006 to 2011 and then again from 2014 to 2018. And, Magellan purchased—for over $301 million—the company Larweth worked for during his brief three-year absence from Magellan. It is also undisputed that Magellan invested huge amounts of money into building and maintaining relationships with customers, and Larweth benefitted from those efforts. (Doc. 122 at 65:24–66:21, 151:6–152:6; Doc. 123 at 134:3–135:9). Further, as a result of his employment with Magellan, Larweth had regular access to customers and was able to continuously develop, maintain, and cultivate those relationships. (Doc. 122 at 86:24–88:5, 103:2–20, 148:1–4). Larweth also became familiar with the precise individuals in charge of making relevant decisions and each customers' specific preferences. (*Id.*). The mere fact that Larweth may have known some of these individuals or had a certain reputation when he first began his employment with Magellan—*twelve years* prior to his termination—does not render inconsequential the continued relationship development Larweth was able to engage in during his employment with Magellan.

These customer relationships, and the investment made by Magellan to establish, build, and maintain them, are protectable under Connecticut law. *See Drummond Am. LLC v. Share Corp.*, No. 3:08-cv-1665 (MRK), 2009 WL 3838800, at *3 (D. Conn. Nov. 12, 2009) (noting that businesses have a legally cognizable interest in their customer relationships, relying on *New Haven Tobacco Co., Inc. v. Perrelli*, 559 A.2d 715, 718 (Conn. App. Ct. 1989)). And, the non-solicitation of customers restrictive covenant in this case—which is limited to those customers with whom Larweth had contact with or knowledge of during the final year of his employment, (Doc. 116-1 at 10)—reasonably protects Magellan's interest in its customer relationships. *See Robert S. Weiss & Assocs.*, 546 A.2d at 220 (upholding as reasonable a restrictive covenant that prohibited the

employee "from soliciting the [employer's] accounts that existed when [the employee] left" and collecting cases); *New Haven Tobacco Co.*, 559 A.2d at 717, (finding reasonable a restrictive covenant that prohibited the sales employee from selling products to any of the customers that he had dealt with, discovered, or become aware of during his employment); *Roth Staffing Cos. v. Thomas Brown & OEM ProStaffing, Inc.*, No. 3:13 CV 216 (JBA), 2013 WL 12122072, at *10 (D. Conn. Oct. 16, 2013), *report and recommendation adopted*, 2014 WL 12576629 (D. Conn. Mar. 14, 2014)[6] (finding similar non-compete reasonable where the defendant's customer relationships were developed over a significant period of time while he was employed by the plaintiff and noting that the "investment of time in getting to know[] these customers gave him a distinct advantage in the market as he learned the identities of the individual contact persons at these customers, the pricing applicable to the customers, their buying cycles, . . . and the customers' likes and dislikes").

Contrary to Larweth's unsupported argument, and based on the plethora of case law cited above, Connecticut law protects more than mere confidential customer lists. Larweth has failed to establish that the non-solicitation of customers provision provides unreasonable protection to Magellan.

b. Non-Competition

The non-competition restrictive covenant also reasonably protects Magellan's interests. By virtue of his employment with Magellan, Larweth was privy to the rebate percentages that Magellan obtained from pharmaceutical companies, the pricing and terms in the contracts that Magellan negotiated with end-users, and the expiration dates of contracts. (Doc. 123 at 128:10–

[6] A second supplemental Report and Recommendation was issued in this case prior to the district court's adoption, but it addressed two new issues and did not alter the analysis in the first Report and Recommendation. *See generally* 2014 WL 12573683.

129:1, 130:1–132:17). Further, contrary to Larweth's argument, Magellan did not simply make "generic" claims of confidential information; it has pointed to specific confidential information that Larweth was privy to, including Magellan's rebate tracker, contract addenda, and key terms in their contracts such as price and expiration dates. (*Id.*). For example, the contract addenda that Larweth had access to provide all of the financial and coverage terms relating to a specific drug, such as the rebate percentage, any market share requirements for the rebate, price protection terms, and the termination provisions, including termination dates. (Doc. 122 at 163:19–164:7, 164:19–23). Even if it were not common sense that knowledge of this confidential information would enable someone to unfairly compete with Magellan, one of Larweth's employees, Craig Caceci, provided specific examples of how Anton Rx undercut Magellan by passing through larger portions of the rebates to customers. (Doc. 123 at 29:7–30:8). Absent knowledge of Magellan's pricing and business structure, Larweth would not have been able to so deliberately undercut Magellan's prices.

Moreover, this unfair advantage is not limited to those entities that were customers of Magellan during Larweth's employment. If Larweth is permitted to directly compete with Magellan for the same future business, knowledge of the way Magellan operates, including its pricing, marketing, business practices, and negotiating strategies, will give Larweth a distinct and unfair advantage over Magellan. The non-competition restrictive covenant reasonably protects Magellan against such unfair competition. *Grillea v. United Nat'l Foods, Inc.*, No. 16-cv-3505SJFSIL, 2016 WL 4573981, at *12 (E.D.N.Y. Aug. 31, 2016) (applying Connecticut law and determining that "[i]n light of, *inter alia*, the fact that plaintiff held a high-level position with defendant and, thus, has specialized knowledge of defendant's internal structure and business, marketing and pricing strategies, the restrictions in the non-competition clause appear reasonably

necessary for the fair protection of defendant's business"); *A.H. Harris & Sons*, 94 F. Supp. 3d at 297 (finding that the former employer had "a legitimate concern about [the employee] being able to utilize her knowledge of [the employer's] inner workings to [the competitor's] benefit and [the employer's] detriment").

c. Non-Solicitation of Employees

With regard to the non-solicitation of employees restrictive covenant, Magellan asserts that it has the same protectable business interests as articulated above with regard to the two previous covenants. However, Magellan has not presented evidence that *all* of its employees covered by this provision had access to the same confidential information and developed similar customer relationships as Larweth. Therefore, summary judgment on Magellan's declaratory relief claim as it pertains to the enforceability of non-solicitation of employee's covenant in general must be denied.

Further, Magellan did not cite evidence indicating that the two employees Larweth hired—Caceci and Ghebali—had such access. Accordingly, Magellan's Motion must also be denied as to the breach of contract claim based on the non-solicitation of employees provision.

4. Larweth's Opportunity to Pursue his Occupation

Magellan argues that none of the restrictive covenants prohibit Larweth from pursuing his occupation because he is able to work in the pharmaceutical manufacturer side of the business. Larweth does not dispute Magellan's assertion, and the Court agrees. The non-competition restrictive covenant—as narrowed in the Court's Preliminary Injunction Order to the provision of pharmaceutical rebate management services, (July 31, 2019 Order, Doc. 145, at 8)—and the non-solicitation of customers restrictive covenant allow Larweth to pursue jobs in related, but not directly competitive, parts of the business. Indeed, Larweth testified that one of his companies—

Anton Health—provides services unrelated to pharmaceutical rebate management. (Doc. 123 at 72:20–73:1).

5. Public Interest

Under the "public interest" factor, the Court considers "(1) the scope and severity of the covenant's effect on the public interest, (2) the probability of the restriction creating or maintaining an unfair monopoly in the area of trade, and (3) the interest sought to be protected by the employer." *New Haven Tobacco Co. v. Perrelli*, 528 A.2d 865, 868 (Conn. 1987).

Larweth argues that restraining him from competing against Magellan is against the public interest because he is providing higher rebates to health care entities and is marketing lower-cost biosimilar drugs. As an initial matter, the Court notes that Larweth has cited absolutely no legal authority to support his argument that providing customers with lower prices, in and of itself, is sufficient to show that the restrictive covenants are against the public interest. Given that it is Larweth's burden to show that the restrictive covenants are contrary to the public interest, this basis alone is sufficient to conclude that Magellan is entitled to summary judgment on this issue. Nevertheless, Larweth's arguments also fail on the merits.

With regard to the first element, the Court considers how "large a section of the populace will be affected if the covenant is enforced." *Id.* First, insofar as Larweth is providing savings to private health plans, he has presented no evidence that such savings are being passed on to consumers. For government health plans, taking at face-value Larweth's assertion that he is saving the government money, he has not established that requiring him to abide by his non-compete would have a large impact. By Larweth's own admission, his company is small and has a small book of business. (*See* Doc. 123 at 90:11–13). Also, the evidence cited by Larweth only provides one example of a biosimilar drug that he has marketed to three health plans—one of which is

described as a "small Medicaid plan in California." (*Id.* at 98:24). Further, Larweth acknowledges that other competitors, including Magellan, could market these biosimilar drugs. (*Id.* at 98:2–6). This is simply not enough for the Court to conclude that enforcement of the restrictive covenants would have such a negative impact on the public as to require a finding of unreasonableness. *See Braman Chem. Enters. v. Barnes*, No. CV064020633S, 2006 WL 3859222, at *8 (Conn. Super. Ct. Dec. 11, 2006) ("In the absence of specific facts showing the way in which enforcement of a non-compete would interfere with the public's interest in open competition, there is no basis for a court to conclude that enforcing the non-compete would impair that interest.").

As to the second element, there is no evidence that Magellan will be able to create or maintain a monopoly. As to the third element, "the interest the employer seeks to protect must be weighed against the interest of the general public in an open marketplace." *New Haven Tobacco Co.*, 528 A.2d at 868–69. When Magellan's interests—which were thoroughly discussed previously—are balanced against the small effect on the public interest that Larweth provided evidence of, it is clear that enforcement does not sufficiently impact the public as to render it unreasonable. *See id.* at 868 n.3 ("[T]he public does not have an inherent right to do business with whomever it chooses when the individual of its choice has contracted away his ability to do business with the public.").

6. Conclusion

Accordingly, there are issues of fact as to the non-solicitation of employees covenant, but the non-solicitation of customers and non-competition restrictive covenants are reasonable and enforceable. Therefore, because Larweth does not dispute that he is violating those covenants, (Doc. 98-1 at 124:19–125:4; Doc. 71-4 at 3–4; Doc. 123 at 162:13–163:7), Magellan is entitled to

summary judgement as to liability unless Larweth can meet his burden to establish an affirmative defense—or at least a material issue of fact as to an affirmative defense.

C. Affirmative Defenses

As an initial matter, Larweth appears to misunderstand his burden with regard to his affirmative defenses. As noted in the summary judgment standard, Larweth has the initial burden of making a showing that an affirmative defense is applicable. He cannot survive summary judgment by simply throwing out a laundry list of defenses without providing any substantive analysis or support. *See FDIC v. Attorneys' Title Ins. Fund, Inc.*, No. 12-23599-CIV, 2014 WL 4384270, at *7 n.8 (S.D. Fla. Sept. 3, 2014) (holding that where the defendant had "not adduced a scintilla of evidence in the record that any of its remaining eleven defenses [were] applicable" and had "merely . . . pled those defenses," the defendant could not "preclude the entry of summary judgment for [the p]laintiff"). "To the extent [Larweth] expected the Court to divine all possible arguments supporting [his] affirmative defenses—including those [he] failed to make—from the ether of the voluminous factual record before granting summary judgment, [he] misunderstands a court's role on summary judgment." *FDIC v. Attorneys' Title Ins. Fund, Inc.*, No. 12-23599-CIV, 2015 WL 11784950, at *7 (S.D. Fla. Mar. 11, 2015).

Nevertheless, the Court will briefly address each affirmative defense mentioned in Larweth's Response.

1. Illegality

Larweth's first and second affirmative defenses are that the contract is unreasonable and therefore illegal. These arguments have been fully addressed above. Larweth has not met his burden to survive summary judgment on this issue as to the non-competition and non-solicitation

of customers covenants; there are issues of material fact that preclude summary judgment as to the non-solicitation of employees covenant.

2. Waiver

Larweth argues that Magellan has waived its right to enforce the restrictive covenants because Magellan did not enforce restrictive covenants against other employees, did not require certain employees to have restrictive covenants, and let other employees have shorter restrictive covenants. Larweth cites no legal authority for the proposition that wavier is a viable defense under these circumstances. Indeed, the limited Connecticut case law on the subject indicates that failing to enforce restrictive covenants against other employees does *not* constitute waiver of the right to enforce a different employee's restrictive covenants. *See Entex Info. Servs., Inc. v. Behrens*, No. CV 990593692, 2000 WL 347802, at *2 (Conn. Super. Ct. Mar. 17, 2000) ("The defendants claim that [the employer's] act of allowing other employees to [work for a competitor], in itself, constituted a waiver of the restrictive covenant . . . [however,] this court cannot equate the relinquishment of the plaintiffs covenant rights as to other employees as conclusory as to these defendants." (internal citation omitted)).[7]

Other courts have also persuasively rejected the concept that selective enforcement of non-competition agreements constitutes waiver. *See, e.g., Med. Educ. Assistance Corp. v. Mehta*, 19 S.W.3d 803, 818 (Tenn. Ct. App. 1999) ("Employers should be encouraged to make an independent determination concerning each employee as to whether or not it is necessary to enforce a covenant not to compete. If we accept [the employee's] position, we will tell employers

[7] Although the *Entex* Court ultimately found that the employer had waived its right to enforce the non-compete agreement against the employees in the case, it was because the employer explicitly told those employees that it would not enforce the agreements—not because the employer opted not to enforce others' agreements. 2000 WL 347802, at *1–2.

that if they wish to retain the right to enforce a covenant not to compete against any employee, they must enforce all covenants not to compete even if such enforcement is not necessary to protect the employer's interest. We decline to do this."); *Laidlaw, Inc. v. Student Transp. of Am.*, 20 F. Supp. 2d 727, 751 (D.N.J. 1998) ("Defendants' suggestion would require an employer to enforce every restrictive covenant, without regard to cost-effectiveness or individual circumstances. This is impractical and unfair, not only to Plaintiffs, but to other former employees, particularly here where the other former employees have not launched a collective effort that represents as great a competitive threat to [the employer] as [the defendants].").

In a single throwaway line, Larweth asserts that Magellan also waived its rights by placing purportedly confidential information on the public record in this case. Although Larweth provides no further explanation of or support for this argument, the Court presumes Larweth is referring to the same information he referenced in his argument discussing Magellan's protectable business interests. There, Larweth focuses on the fact that Magellan put on the public record a list of the health plans that are customers of Magellan. (*See* Doc. 137 at 5). Larweth misconstrues Magellan's argument regarding confidential information. Magellan is not seeking to protect the names of the health plans in and of themselves. They are seeking to protect the relationships with those customers and confidential information relating to the specific agreements and preferences of those customers. The mere fact that Magellan acknowledged which health plans they were doing business with does not amount to waiver of its right to protect the business interests discussed above, and Larweth has not shown that any of the confidential information relied upon by Magellan has been disclosed publicly.

3. Prior Breach

Next, Larweth argues that Magellan committed a prior breach of the Magellan Employment Agreement by failing to fully pay his 2015 bonus. First, Larweth fails to cite any evidence to show that Magellan failed to pay him anything. Second, Larweth provides no legal authority; he only distinguishes the case relied on by Magellan. This is insufficient to meet his burden to show that the affirmative defense of prior breach is applicable

Moreover, the portion of the Magellan Employment Agreement cited by Larweth in his Answer[8] (Doc. 133 at 13), merely provides that, by virtue of his employment, he "will be eligible to participate in any annual incentive bonus plan and long-term incentive plan applicable to [him]." (Doc. 60-3 at 3). The relevant provisions that Larweth contends were breached are the specific terms of the Commission Plan, which was set forth in a separate contract. (*See id.*; *see also generally* Doc. 1-1). Larweth has not established a prior breach of the *Magellan Employment Agreement*—as opposed to the 2015 Commission Plan—that would negate his duty to comply with the restrictive covenants in the Magellan Employment Agreement.

4. Unclean Hands

Larweth asserts that Magellan has unclean hands because it failed to pay him bonuses under the Commission Plan and terminated Larweth for raising concerns about possible antitrust violations. Staying on-trend, Larweth fails to set forth even the elements of unclean hands much less any supportive legal authority. Indeed, the only case cited by Larweth in this section supports his argument that, in general, unclean hands can be a defense to an unjust enrichment claim.

[8] In his Response, Larweth fails to even identify what provision of what contract he believes was breached.

Unfortunately for Larweth, Magellan is not seeking summary judgment on its unjust enrichment claim, and that case is entirely inapplicable.

Larweth has not met his burden to establish that the defense of unclean hands operates to prevent summary judgment on Magellan's breach of contract and declaratory judgment claims. In Connecticut, "[t]he doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue." *Thompson v. Orcutt*, 777 A.2d 670, 676 (Conn. 2001) (quotation omitted). "[T]he doctrine of unclean hands exists to safeguard the integrity of the court," and therefore, "where a [party's] claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have." *Id.* at 677 (quotation omitted). However, "[t]he wrong must . . . be in regard to the matter in litigation. . . . Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the [party] does not require the aid of the illegal transaction to make out his case." *Id.* (quotation omitted).

In other words, under Connecticut law, "the party seeking to invoke the doctrine [of unclean hands] must show (1) that the other side engaged in willful misconduct with respect to the subject matter of the litigation so that the integrity of the court would be impugned by granting relief to the party . . . and (2) that the [party's] position relies on its own fraud or transgression in order to present its cause of action." *Ne. Double Disc Grind, LLC v. Pietrowicz*, No. CV126018053S, 2014 Conn. Super. LEXIS 998, at *10 (Super. Ct. Apr. 22, 2014).

Larweth first asserts that he complained of potential antitrust violations and was terminated as a result. Larweth cites no evidence in support of his claim. And the evidence cited by Magellan

indicates that, at most, Larweth made an internal complaint in either 2015 or 2016—approximately two to three years prior to his termination—and as a result the company implemented antitrust training. (Larweth Apr. 1, 2019 Dep. Vol. II, Doc. 98-4, at 548:24–552:16). There is no evidence whatsoever cited by either party that this internal complaint, made several years prior to Larweth's termination, was in any way connected to that termination. Thus, Larweth has failed to establish that Magellan engaged in any willful misconduct in this regard.

Additionally, even if he had, Larweth has utterly failed to explain how Magellan's position with regard to its breach of contract claims is in any way related to the 2015 or 2016 internal complaint. The same is true for Larweth's argument regarding Magellan's alleged failure to pay his 2015 bonus compensation. Larweth has not explained how Magellan's breach of contract claim relies on its supposed "bad act" of not paying Larweth's bonus.

Finally, the doctrine of unclean hands only applies to claims for equitable relief, *Thompson*, 777 A.2d at 676. Magellan argues that, at the very least, it is seeking monetary damages for the breach of contract, which is a remedy at law, and therefore Larweth's unclean hands defense does not preclude summary judgment on liability—which is all Magellan is seeking at this time. Unsurprisingly, Larweth fails to address this argument.

For all of these reasons, Larweth has not met his burden to establish an unclean hands defense. Summary judgment will not be prevented on this basis.

5. Latches

Larweth asserts that Magellan's claim is barred by the doctrine of latches because Magellan waited five months after being apprised of Larweth's competition to file its counterclaim for breach of contract. First, "[l]aches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory

period." *A. Sangivanni & Sons v. F. M. Floryan & Co.*, 262 A.2d 159, 164 (Conn. 1969). Specifically, the Connecticut Supreme Court has explained that "[a]n express limitations period reflects a legislative value judgment striking the appropriate balance between the interests promoted by the statute and countervailing interests of repose. . . . To import laches as a defense to actions at law would pit the legislative value judgment embodied in a statute of limitations . . . against the equitable determinations of individual judges." *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 494 (Conn. 2015) (quotation omitted). Thus, the Connecticut Supreme Court concluded "that the line between legal and equitable claims vis-a-vis laches is still sound . . . . In cases at law, where the legislature has determined through a statute of limitations that the door for bringing suit should remain open for a predetermined period of time, it should not be left to a judge's discretion to close that door early." *Id.*

Accordingly, latches is inapplicable to, at a minimum, the portion of Magellan's breach of contract claim that is seeking damages. And because Magellan is only seeking summary judgement on the matter of liability at this time, Larweth's claim of latches cannot preclude summary judgment on that issue.

Moreover, "[l]aches consists of two elements: (1) an inexcusable delay by a party seeking enforcement of a claim and (2) resulting prejudice to the party defending against enforcement of the claim." *N.Y. Annual Conference of United Methodist Church v. Fisher*, 438 A.2d 62, 72 (Conn. 1980). First, as discussed at length in the Preliminary Injunction Order, Magellan's mere five-month delay was far from inexcusable. (Doc. 145 at 13). Moreover, Larweth has provided no evidence of resulting prejudice. In his Response, Larweth summarily claims that "[i]n the intervening time, Larweth built a substantial business," which "has significant responsibilities" to

its clients. (Doc. 147 at 16). But, Larweth cites no evidence in support of his assertion.[9] This, in and of itself, is detrimental to his affirmative defense. *See Burrier v. Burrier*, 758 A.2d 373, 375 (Conn. App. Ct. 2000) ("The court could not properly rely on argument by the defendant's attorney or on matters not in evidence in finding prejudice to the defendant. The defendant did not offer evidence as to financial or bank records or as to his ability to recoup such records; therefore, he failed to carry his evidentiary burden on the second element of the defense of laches."(citation omitted)).

Accordingly, Larweth has not met his burden with regard to latches.

6. Mitigation of Damages

As stated multiple times above, Magellan is not seeking summary judgment on the issue of damages. Therefore, Larweth's assertion that Magellan failed to mitigate those damages is inapplicable. Summary judgment as to liability is not precluded on this basis.

D. Conclusion

Magellan has established that the non-competition and non-solicitation of customer covenants are reasonable and enforceable, and Larweth has not met his burden as to any of his affirmative defenses. Therefore, Magellan is entitled to summary judgment on its declaratory judgment claim insofar as it relates to the non-competition and non-solicitation of customers provisions. Further, because Larweth does not dispute that he violated those covenants, (Doc. 98-1 at 124:19–125:4; Doc. 71-4 at 3–4; Doc. 123 at 162:13–163:7), Magellan is entitled to summary judgment as to liability on its breach of contract claim insofar as it asserts violations of the non-competition and non-solicitation of customer covenants. Magellan has not established that it is

[9] To the extent Larweth cites evidence that he would be prejudiced if he were forced to not fulfill his current contracts, such prejudice has already been mitigated in the preliminary injunction, which permits Larweth to fulfill those contracts. (Doc. 145 at 17–18).

entitled to summary judgment on its breach of contract or declaratory judgment claims relating to the non-solicitation of employees covenant, and summary judgment will not be granted as to that provision.

IV. LARWETH'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

Larweth seeks summary judgment in his favor on several of Magellan's Counterclaims, including Magellan's breach of contract, tortious interference, and unjust enrichment claims.

A. Breach of Contract

As discussed above, Magellan's breach of contract claim involves Larweth's violations of the restrictive covenants contained in the Magellan Employment Agreement and is subject to Connecticut law. Larweth argues that this claim fails because Magellan has not adduced any evidence of damages stemming from the breach of contract. "Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." *Am. Diamond Exch., Inc. v. Alpert*, 28 A.3d 976, 986 (Conn. 2011). However, "damages often are not susceptible of exact pecuniary computation and must be left largely to the sound judgment of the trier[,] this situation does not invalidate a damage award as long as the evidence afforded a basis for a reasonable estimate by the trier [of fact]." *Ulbrich v. Groth*, 78 A.3d 76, 119 (Conn. 2013). In other words, "[m]athematical exactitude" is not required. *Id.* The Court must simply "have evidence by which it can calculate the damages, which is not merely subjective or speculative." *Am. Diamond Exch.*, 28 A.3d at 986. "Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion." *Viejas Band of Kumeyaay Indians v. Lorinsky*, 976 A.2d 723, 735 (Conn. App. Ct. 2009).

Magellan has presented at least some evidence to support a reasonable estimate of damages that is not speculative or subjective. Specifically, Magellan presented testimony by its CEO Mostafa Kamal that Magellan lost business with one of its customers—Health Partners Plan ("HPP")—to Larweth's company, Anton Rx. (Doc. 122 at 208:5–17). Larweth admitted that the business was awarded to Anton Rx.[10] (Larweth Apr. 1, 2019 Dep. Vol. I, Doc. 98-3, at 480:14–20 (discussing Larweth's company being awarded Medicaid business from HPP)). And, Larweth testified that the HPP business equates to "roughly $100,000 a quarter." (Anton Rx Corp. Rep. Dep., Doc. 98-19, at 119:18–23). This is sufficient to survive summary judgment on the issue of damages.[11]

B. Tortious Interference

Larweth next argues that Magellan has not provided sufficient evidence to establish its tortious interference with advantageous business relationships claim. The elements of tortious interference with a business relationship are "(1) the existence of a business relationship[;] (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994). "A protected business relationship need not be evidenced by an enforceable contract. However, the alleged business relationship must afford the plaintiff existing or prospective legal or contractual rights." *Id.* (quotation omitted).

[10] Although Larweth argues that Magellan could not have kept that business even if his company was not involved, that is an issue of fact.

[11] Because Larweth's Motion for Summary Judgment with regard to the breach of contract claim is limited to arguing that Magellan cannot prove any damages, it is due to be denied. The Court need not consider whether Magellan can establish any of the other types of damages that it sets forth in its Response.

Larweth asserts that Magellan had no protectable business relationship. In response, Magellan points to a single business relationship—the relationship it had with Independent Health ("IHA") during December 2017. The only evidence cited regarding that relationship is that Larweth was trying to negotiate rebate contracts with IHA on behalf of Magellan for certain products up until his departure from the company. (Doc. 123 at 186:7–22). Magellan cites no evidence that the parties had entered into any sort of enforceable contract at the time.

When tortious interference "is predicated on an unenforceable agreement," there normally must be "an understanding between the parties [that] would have been completed had the defendant not interfered." *Ethan Allen, Inc.*, 647 So. 2d at 814. Magellan has offered no evidence that any agreement between it and IHA had progressed to this point. Indeed, Magellan has not even provided evidence that it had a protectable business interest under some of the more liberal circumstances that have been recognized by lower Florida courts. *See Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc.*, 262 F.3d 1152, 1154–58 (11th Cir. 2001) (discussing the various ways "business relationship" has been treated under Florida's tortious interference law).[12]

Regardless, even if Magellan had established that it had a protectable business relationship with IHA, such a relationship is certainly only protectable as to the specific rebate contracts being negotiated in December 2017 as discussed in the evidence—not every potential contract. And, Magellan has failed to show any interference with those contracts by Larweth or any damages.

[12] The Court also notes that Magellan seems to be relying on the fact that its customer relationships are sufficient to support the enforcement of Larweth's restrictive covenants in order to establish that this relationship with IHA constitutes a "business relationship" for tortious interference purposes. However, a protectable business interest in the restrictive covenant context under Connecticut law does not automatically equate to a business relationship under Florida's tortious interference law. These are two entirely different contexts.

In an attempt to satisfy its burden, Magellan relies on a series of inferences. Specifically, Magellan argues that because Larweth was servicing IHA's account immediately prior to his termination, and then shortly after his termination Larweth helped Gateway secure business with IHA, there is a reasonable inference that Larweth was actually undermining Magellan's position with IHA while he was still employed with Magellan. However, Magellan is missing a crucial piece of evidence. It has cited no evidence that IHA terminated *any* business with Magellan or that IHA declined to award *any* business to Magellan, much less that IHA did so with regard to the specific December 2017 negotiations. Nor has Magellan cited any evidence that Gateway was awarded contracts relating to the products Larweth was negotiating while at Magellan. Magellan has simply failed to meet its burden as to its tortious interference claim, and Larweth is entitled to summary judgment on that claim.

C. Unjust Enrichment

Next Larweth argues that he is entitled to summary judgment on Magellan's unjust enrichment claim because there are express contracts that cover the subject-matter at issue. Magellan's unjust enrichment claim seeks to recover the $12 million bonus-upon-sale it paid Larweth in connection with the sale of CDMI. To put the issue in context, the Court must examine the three pertinent contracts.

First is the CDMI Employment Agreement. That agreement contains a "Bonus on Sale" provision, which provides that upon the sale of CDMI,

> if [Larweth] has been continuously employed by [CDMI] from the date of this Agreement through the date of sale and is an employee of [CDMI], in good standing, as of the date of the sale, [Larweth] shall be entitled to receive, from [CDMI] or from the principals of [CDMI], a bonus in an amount equal to a percentage of the gross sales price received.

(Doc. 60-2 at 3). The CDMI Employment Agreement then goes on to explain the precise percentage Larweth would be entitled to depending on circumstances irrelevant to this discussion. (*Id.* at 3–4).

CDMI was sold to Magellan on March 31, 2014, pursuant to the CDMI Purchase Agreement. Larweth was not party to that agreement. (*See generally* Doc. 60-4). The CDMI Purchase Agreement is referenced by the Magellan Employment Agreement but only insofar as the closing detailed in the CDMI Purchase Agreement is a condition precedent to any obligation contained in the Magellan Employment Agreement. (*See* Doc. 116-1 at 2).

On the other hand, the Magellan Employment Agreement expressly addresses Magellan's payment of the bonus upon sale and amends the CDMI Employment Agreement. (*Id.* at 3–4). It provides in relevant part:

> Contingent upon the Closing [of the purchase of CDMI by Magellan], if [Larweth] has been continuously employed by CDMI from the date of this Agreement through the date of the Closing, is providing services to CDMI under the terms of the [CDMI Employment Agreement] as of the date of the Closing, and has not violated any term or provision of the [CDMI] Employment Agreement (including, but not limited to, the [CDMI restrictive covenants]), [Larweth] . . . shall be entitled to receive certain bonus payments, subject to certain conditions as described below, with a total value equal to 4.0 percent . . . of the Sales Proceeds . . . . If [Larweth's] employment terminates with CDMI prior to the Closing for any reason, no bonus payments shall be payable to [Larweth] pursuant to this Section 4(c) or Section 3(d) of the [CDMI Employment Agreement].

(*Id.* at 3). This provision goes on to state that it "constitutes an amendment of the [CDMI] Employment Agreement effective as of the date hereof." (*Id.* at 4).

Clearly, the Magellan Employment Agreement controls this issue. The relevant portion of CDMI Employment Agreement was expressly amended by the Magellan Employment Agreement, so the CDMI Employment Agreement does not control. Further, Larweth is not party to the CDMI

Purchase Agreement, nor does it directly confer benefits on or secure obligations from Larweth. Thus, it cannot control Larweth's obligations to Magellan. The fulfillment of the CDMI Purchase Agreement is merely a condition precedent to Larweth's obligations. On the other hand, the Magellan Employment Agreement unambiguously sets forth the rights and obligations of both Magellan and Larweth with regard to his bonus upon sale compensation.

As noted above, the Magellan Employment Agreement is subject to Connecticut law. Under Connecticut law, "an express contract between the parties precludes recognition of an implied-in-law contract governing the same subject matter," and therefore precludes a claim of unjust enrichment. *Town of New Hartford v. Conn. Res. Recovery Auth.*, 970 A.2d 592, 611 & n.25 (Conn. 2009); *Polverari v. Peatt*, 614 A.2d 484, 489 (Conn. App. Ct. 1992) ("Proof of a contract enforceable at law precludes the equitable remedy of unjust enrichment."). "Nevertheless, when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice." *Id.* at 612 (quotation omitted). To obtain such equitable relief, however, Magellan "must show . . . how the relief it seeks is not covered directly by" the Magellan Employment Agreement. *Richard Parks Corrosion Tech., Inc. v. Plas-Pak Indus., Inc.*, 3:10-cv-437(VAB), 2015 WL 5708539, at *4 (D. Conn. Sept. 29, 2015). It has failed to do so.

The subject matter at issue here—i.e., what Larweth was required to do in order to receive his bonus upon sale—is directly and explicitly covered by the Magellan Employment Agreement. As explained above, the Magellan Employment Agreement required Larweth to remain employed by CDMI *through the date of the closing* and comply with the provisions of the CDMI Employment Agreement, including the CDMI restrictive covenants, *through the date of the closing*. If Larweth did those things and the closing occurred, Larweth "shall" be entitled to the bonus upon sale. There are no other requirements referenced, no obligations beyond the closing,

and no mention of ongoing restrictive covenants. If Magellan wanted the bonus payment contingent on Larweth's compliance with its restrictive covenants going forward, it should have made that a condition in a contract with Larweth. It did not.

Moreover, Magellan's argument that it cannot be "fully and adequately" compensated for Larweth's "wrongs" of "taking $12 million in exchange for his agreement to abide by certain promises and then swiftly breaking such promises" is without merit. (Doc. 146 at 19). Larweth did not promise to abide by Magellan's restrictive covenants in exchange for the $12 million; he promised to stay employed by CDMI and continue to abide by the CDMI Employment Agreement until the closing. Evidence that Magellan would not have purchased CDMI without Larweth's promise to abide by Magellan's restrictive covenants is inadmissible parole evidence. The explicit language in the Magellan Employment Agreement fully and explicitly addresses the rights and obligations between Magellan and Larweth regarding the bonus upon sale. The fact that Magellan is now upset with Larweth and wants its money back does not equate to it not being fully and adequately compensated. Larweth is entitled to summary judgment on Magellan's unjust enrichment claim.

V. MAGELLAN'S MOTION FOR SUMMARY JUDGMENT ON LARWETH'S CLAIMS

Finally, Magellan seeks summary judgment on Larweth's unjust enrichment, quantum meruit, and defamation per se claims. Each will be addressed in turn.

A. Unjust Enrichment and Quantum Meruit

Larweth asserts that he is entitled to commission payments based on price protection rebates he claims are attributable to him in 2015 during his employment with Magellan. Magellan argues that Larweth's commissions are explicitly governed by the 2015 Commission Plan. The Court agrees with Magellan's basic proposition that "Florida law does not generally permit a party

to pursue a cause of action on an express contract at the same time as he pursues a cause of action for unjust enrichment" or quantum meruit. *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1316 (M.D. Fla. 2000) (citing *Hazen v. Cobb-Vaughan Motor Co.*, 117 So. 853 (1928); *Yates v. Ball*, 181 So. 341 (1937)); *Solutec Corp. v. Young & Lawrence Assocs., Inc.*, 243 So. 2d 605, 606 (Fla. 4th DCA 1971). However, it is Magellan's burden to prove that there is an express written contract that covers the subject matter of Larweth's claims. It has failed to do so.

The 2015 Commission Plan is ambiguous as to what the commission structure set forth therein will be based on. Specifically, it states: "Each year . . . each existing account[] will be assigned an expected revenue value for the following year . . . . For each [specified employee's] book of business, the summation of these expected revenue targets will become their baseline threshold target." (Doc. 1-1 at 1). The Plan goes on to explain that, once the baseline threshold target is met, the subject employees will be paid ".03% of the total baseline value in commission" and for certain "incremental revenue" beyond the baseline, the employees are entitled to additional commissions thereon. (*Id.*). Nowhere in the entire 2015 Commission Plan does it define "expected revenue value" or explain what revenue will be considered as part of the baseline calculation or the additional, incremental revenue. The 2015 Commission Plan also does not expressly exempt anything; there is no mention of price protection rebates, or any other identifiable rebates. So, while it is possible that the 2015 Commission Plan controls Larweth's entitlement to commissions on price protection rebates, such a conclusion is not inevitable from the face of the document.

Magellan attempts to resolve this issue by arguing that the only thing Larweth relies on to contend he is entitled to price protection commissions is the 2015 Commission Plan. This is incorrect. Larweth testified that he had numerous conversations with Magellan's higher-ups—

including Kamal and George Petrovas[13]—where those executives encouraged him to obtain price protection rebates and told him he would be paid commissions on such rebates. (Doc. 98-1 at 317:18–24, 319:22–320:18). Whether those conversations related to the 2015 Commission Plan or a separate promise is an issue of fact. Thus, Magellan has not met its burden to show that there is no issue of material fact as to whether the 2015 Commission Plan expressly controls Larweth's claim to price protection commissions, and summary judgment on Larweth's unjust enrichment and quantum meruit claims will be denied.

B. Defamation Per Se

In Florida, defamation has five elements: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). Defamation per se is a statement that is "actionable on its face," *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 457 (Fla. 5th DCA 1999), and is actionable without a showing of damages "because the harm is readily apparent," *Scobie v. Taylor*, 13-60457-CIV, 2013 WL 3776270, at *2 (S.D. Fla. July 17, 2013). There are two iterations of defamation per se when the alleged statements interfere with business or employment. "One iteration finds actionable any language that tends to injure a person in [his] office, occupation, business, or employment and which in natural and proximate consequence will necessarily cause injury . . . [a]nother iteration requires language that imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office." *Paulson v. Cosmetic Dermatology, Inc.*, No. CV 17-20094-

[13] Petrovas was the owner of CDMI and has held various executive-level positions with Magellan.

CIV, 2017 WL 2484197, at *3 (S.D. Fla. June 8, 2017) (internal citations removed) (collecting cases); *see also Teare v. Local Union No. 295 of the United Ass'n of Journeymen & Apprentices of Plumbers & Pipe Fitters Indus. of U.S. & Canada*, 98 So. 2d 79, 82 (Fla. 1957).

Magellan moves for summary judgment on Larweth's defamation per se claim, arguing that Larweth has presented no admissible evidence of any defamatory statements. Larweth asserts that four Magellan employees made defamatory statements about him: Kamal, Phil Vecchiolli, Petrovas, and Joe Tavares. The Court will address each.

1. Kamal

Larweth provides evidence that a client—Mesfen Antagnew—contacted Kamal, and Antagnew told Kamal about rumors regarding "some former Magellan executives who [were] looking to compete with Magellan in the rebate carve-out business," but Antagnew did not know any specifics or the names of the individuals involved. (Doc. 98-21 at 146:6–25). Larweth points to no evidence indicating that Larweth was ever mentioned or insinuated in the conversation, nor does he provide any evidence that Kamal made any statements during this conversation at all. This conversation clearly does not provide a basis for Larweth's claim that Magellan, acting through Kamal, defamed him.

Next Larweth asserts that "Kamal instructed Vecchiolli to contact Caceci's clients and Larweth's former clients regarding this rumor." (Doc. 148 at 4). However, the evidence cited does not support this assertion. The evidence merely establishes that, after Caceci and Larweth left Magellan's employ, Kamal directed Vecchiolli to contact Magellan's clients with whom Caceci and Larweth had been working to make sure that the clients had a plan to transition to a different Magellan employee. (Doc. 98-21 at 127:10–20, 143:17–24, 144:23–145:4). There is absolutely no mention in the evidence cited by Larweth of Kamal making any reference to Larweth's competing

enterprise or anything relating to any rumors about Larweth. Larweth has failed to present any evidence that Kamal made any defamatory statements.

2. Taveres

Larweth similarly fails to cite any evidence in support of his claim that Magellan employee Joe Tavares was spreading rumors about Larweth. Indeed, the only evidence Larweth cites in support is his own testimony where he is explaining what he alleges in his Complaint. (Doc. 98-1 at 375:2–6). Despite Larweth's repeated citations to his Complaint within his Response to support his factual arguments, allegations in the Complaint are not evidence and cannot be used to defeat summary judgment. Larweth has presented no evidence that Tavares published any defamatory statements regarding Larweth.

3. Vecchiolli and Petrovas

First, as noted above, Larweth cites his Complaint and Magellan's Motion for many of his assertions. Those filings are not evidence and cannot be relied on for summary judgment purposes. To the extent Larweth's arguments rely on those, such arguments are disregarded.

Larweth's purported evidence supporting his claim of defamation regarding Vecchiolli's and Petrovas's statements reads like a game of telephone. It all boils down to Caceci's testimony that third-parties told him that Vecchiolli and Petrovas told them something about Larweth. (Doc. 98-16 at 111:13–22, 112:8–19, 113:10–22, 116:22–117:1, 117:17–20).[14] All of these statements are clearly inadmissible hearsay. Indeed, there are multiple layers of hearsay contained in the evidence provided by Larweth. Caceci's testimony about what the third party told him is one layer

[14] There is also a text message between Caceci and Vecchiolli that explains Caceci's understanding of what was said. (Doc. 98-17 at 6–7). However, in that text message string, Vecchiolli denies making such statements. (*Id.* at 7).

of hearsay. Then the third party's statement about what Vecchiolli or Petrovas told them is the second layer of hearsay.

First, Larweth argues that these statements are not being offered for the truth of the matter asserted. That argument, however, only takes into account the second layer of hearsay. If the third party testified that Vecchiolli or Petrovas made defamatory statements to the third party, that testimony may be admissible to show that those statements were published—as opposed to the truth of what was stated. However, the third party's statement to Caceci that these statements were, in fact, made is still hearsay and is offered for the truth of the matter asserted—"the matter asserted" is that Vecchiolli and Petrovas made statements.

In an apparent effort to circumvent this first layer of hearsay, Larweth makes the utterly absurd argument that Caceci's "statements were made both in open court and in his deposition. As such, they do not constitute hearsay." (Doc. 148 at 17). The mere fact that an individual is testifying under oath does not somehow transform a statement and make it not hearsay. Conveniently, and unsurprisingly, Larweth cites no authority for such a proposition.

So, the question then becomes, despite the fact that Caceci's testimony is hearsay and would not be admissible at trial, can it be considered on summary judgment? Although the Eleventh Circuit caselaw is somewhat murky on the subject, it appears that, under the circumstances presented here, the answer is yes.

"The general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment." *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) (footnote and quotation omitted). But, "a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *Id.* at 1323 (quotations and citations omitted). Originally, it appears that the

Eleventh Circuit considered hearsay evidence that could be reduced to an admissible form to be evidence that "falls within an exception to the hearsay rule, or does not constitute hearsay at all (because it is not offered to prove the truth of the matter asserted), or is used solely for impeachment purposes (and not as substantive evidence)." *Id.* at 1323–24.

However, subsequent Eleventh Circuit cases have broadened the concept, allowing otherwise inadmissible hearsay to be considered on summary judgment in circumstances such as these—i.e., where the witness testifies as to what someone else told him for the truth of the matter asserted and where no hearsay exception exists—if the hearsay declarant is identified and could testify at trial, whether or not there is any evidence presented at summary judgment from the third party. *See Coffman v. Battle*, No. 19-10592, 2019 WL 4300657, at *6 (11th Cir. Sept. 11, 2019) (explaining that "[m]ore recently, [the Eleventh Circuit] concluded that a district court did not err in considering a hearsay statement at the summary judgment stage where the hearsay declarant could testify to the relevant facts at trial and had not otherwise offered contradictory statements" and citing *Smith v. LePage*, 834 F.3d 1285, 1296 n.6 (11th Cir. 2016) and *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012)); *Brannon v. Finkelstein*, 754 F.3d 1269, 1277 n.2 (11th Cir. 2014) (noting that even if certain testimony was hearsay, "it should be considered on summary judgment here because it can be reduced to an admissible form at trial" by having the hearsay declarant testify). *But see Shockley v. Barbee*, 747 F. App'x 754, 757 (11th Cir. 2018) (holding that inadmissible hearsay could not be considered on summary judgment even where the hearsay declarant was identified but relying on *Macuba* without discussing subsequent case law or discussing whether the hearsay declarant could have testified at trial).

The line drawn by the Eleventh Circuit seems to be where the third party is unknown or hypothetical or where the hearsay declarant has testified in contradiction to the hearsay; at that

point, the hearsay cannot be considered on summary judgment. *See Edwards v. Nat'l Vision Inc.*, 568 F. App'x 854, 858 (11th Cir. 2014) (affirming the district court's decision to strike hearsay statements of unidentified third parties); *Jones*, 683 F.3d at 1294 ("If, however, the declarant has given sworn testimony during the course of discovery that contradicts the hearsay statement, [courts] may not consider the hearsay statement at the summary judgment phase."). *But see Robertson v. Interactive Coll. of Tech./Interactive Learning Sys., Inc.*, 743 F. App'x 269, 274 (11th Cir. 2018) (affirming the district court's decision not to consider hearsay on summary judgment where the declarant was identified but "nothing in the record indicates that [the declarant] or anyone else with personal knowledge of the incident was going to testify at trial so as to reduce the hearsay testimony into an admissible form" and relying on *Jones*, 683 F.3d at 1293–94).

Here, all of the hearsay declarants are identified, and Larweth has indicated that he intends to call the hearsay declarants at trial.[15] Thus, under the more recent, published Eleventh Circuit case law, it appears that Caceci's hearsay testimony can be considered for summary judgment purposes. To make clear, however, Caceci's hearsay testimony, as currently presented, will not be admissible at trial—it must be reduced to an admissible form.

Because the only basis that Magellan moved for summary judgment on with regard to Larweth's defamation claim was the fact that Larweth had only presented hearsay testimony, the Motion is due to be denied. Magellan did not assert that, even if considered, the statements allegedly made by Vecchiolli and Petrovas do not constitute defamation per se, so the Court cannot address that argument at this point. Accordingly, Magellan's Motion for Summary Judgment will

[15] The Court presumes that Larweth has a good faith basis to believe the hearsay declarants will testify in a manner supportive of Caceci's hearsay testimony beyond merely speaking to Caceci.

be granted as to statements allegedly made by Taveres and Kamal and denied as to Vecchiolli and Petrovas's statements.

VI. MOTION TO STAY

As noted, this Court issued a preliminary injunction, enjoining Larweth from violating his restrictive covenants. (*See generally* Doc. 145). Larweth seeks a stay of the preliminary injunction pending his interlocutory appeal of that Order. Under Federal Rule of Civil Procedure 62(d), the Court has jurisdiction to stay a preliminary injunction pending interlocutory appeal. However, such a stay "is not a matter of right." *Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, No. 6:16-cv-366-Orl-40KRS, 2017 U.S. Dist. LEXIS 219646, at *3 (M.D. Fla. Sep. 15, 2017) (citing *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)). To obtain a stay pending appeal, Larweth must demonstrate "(1) a strong showing of the likelihood of success on the merits; (2) that the moving party will be irreparably injured absent the relief; (3) that the issuance of the stay or injunction will not substantially injure the other parties interested in the proceeding; and (4) that the public interest will not be adversely affected by the requested relief." *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs*, No. 3:10-cv-564-J-25 JBT, 2012 U.S. Dist. LEXIS 197661, at *4 (M.D. Fla. Jan. 3, 2012) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, No. 3:13-cv-931-J-39JBT, 2015 U.S. Dist. LEXIS 192147, at *2 (M.D. Fla. Feb. 5, 2015) (collecting cases).

Larweth's Motion to Stay is, essentially, a motion for reconsideration regarding the merits of Magellan's breach of contract counterclaim. For the reasons stated herein, Larweth has not demonstrated that he has a likelihood of success on the merits of Magellan's counterclaims.

Indeed, Magellan has established that it is entitled to judgment on the liability of those claims.[16] The Motion to Stay will be denied.

VII. CONCLUSION

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Magellan's Motion for Partial Final Summary Judgment as to Counts II, III, and V of Larweth's Complaint (Doc. 136) is **GRANTED in part** and **DENIED in part**.
    a. Magellan is entitled to summary judgment on Larweth's defamation per se claim insofar as it is based on any statements by Kamal or Taveres.
    b. The motion is **DENIED** in all other respects.
2. Magellan's Motion for Partial Final Summary Judgment As to Counts I and III of its Amended Counterclaim (Doc. 137) is **GRANTED in part** and **DENIED in part**.
    a. Magellan is entitled to summary judgment on its breach of contract claim as to liability with regard to the non-competition and non-solicitation of customers covenants.
    b. Magellan is also entitled to summary judgment on its declaratory judgment claim as to the enforceability of the non-competition and non-solicitation of customers covenants.
    c. The motion is **DENIED** in all other respects.
3. Plaintiff/Counter-Defendant James P. Larweth's Motion for Partial Final Summary Judgment (Doc. 138) is **GRANTED in part** and **DENIED in part**.

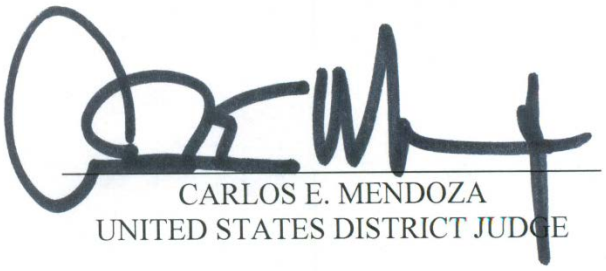
[16] Although Magellan's Motion for Summary Judgment fails as to the non-solicitation of employees restrictive covenant, Larweth's Motion to Stay is not based on that provision.

a. Larweth is entitled to summary judgment on Magellan's tortious interference and unjust enrichment claims.

b. The motion is **DENIED** in all other respects.

4. Plaintiff/Counter Defendant James P. Larweth's Motion to Stay Pending Appeal (Doc. 161) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on December 17, 2019.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record