2011 Il App (2d) 110180-U
No. 2-11-0180
Order filed May 13, 2011
Modified Upon Denial of Rehearing October 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WM RECYCLE AMERICA, LLC,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	10-CH-6665
	)	
SHAWN LAVIN,	)	
	)	
Defendant-Appellee	)	Honorable
	)	Bonnie M. Wheaton,
(David Pelz, Defendant.).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: (1) Restrictive covenants in employment agreement were reasonable as employment agreement and amendment to employment agreement were ancillary to sale of a business; (2) where noncompete and nonsolicitation covenants in an employment agreement expired before this court's mandate issued, injunction could not issue to extend the period of noncompetition and nonsolicitation, but the expiration of the covenants did not moot the appeal; (3) the trial court's finding that defendant did not possess confidential information of plaintiff-employer was not against the manifest weight of the evidence.

¶ 1 Plaintiff, WM Recycle America, LLC (WMRA), appeals from an order of the circuit court of Du Page County denying its motion for a preliminary injunction against defendant, Shawn Lavin, to enforce restrictive covenants in an employment agreement. For the reasons that follow, we affirm in part and reverse in part.

¶ 2 BACKGROUND

¶ 3 Waste Management's Acquisition of the Peltz Group

¶ 4 Waste Management, Inc. (WMI) is a provider of waste collection and disposal services throughout the United States. WMI's services include the recycling of paper. In general, the brokerage of recycled waste paper consists of purchasing the waste material from various vendors, such as printers, making the material market ready by processing it, if necessary, and then selling the product to a consumer such as a paper mill. Prior to 2003, WMI's recycling arm, Recycle America, LLC (RA), was a relatively insignificant presence in the market as it related to the brokerage of waste paper.

¶ 5 In 2003, the Peltz Group, a Wisconsin corporation specializing in the brokerage of waste paper, had a national presence with six or seven plants. Defendant was a one-third owner of the Peltz Group. The Peltz Group was well known and well respected in the industry, as were defendant and his partners at the Peltz Group. In January 2003, the Peltz Group and RA formed an entity under the WMI umbrella called Recycle America Alliance, LLC (RAA). Waste Management[1] paid

[1]The acquisition of the Peltz Group was effected through the use of holding companies, but for the purpose of clarity, we refer to the various Waste Management entities, except WMI, generically as Waste Management.

the Peltz Group approximately $60 million and acquired a 91% interest in RAA. Peltz acquired a 9% interest represented by membership shares in RAA. As a one-third owner of the Peltz Group, defendant received approximately $20 million. This transaction provided for Waste Management's eventual buyout of Peltz's shares through a put/call agreement.[2] Also as part of the transaction, defendant (and the other Peltz shareholders) signed a business protection agreement that contained restrictive covenants relating to competitive activity, non-solicitation, and non-disparagement. Similar restrictive covenants were contained in an employment agreement defendant (and certain other principals of the Peltz Group) signed as a condition of the transaction's closing. Defendant's position at RAA was vice-president of marketing. At first, defendant was in charge only of the Midwest, but within 90 days his territory was national in scope in keeping with his title.

¶ 6 From Waste Management's perspective, its purchase of the Peltz Group was going to expand its brokerage business greatly, and defendant was the most important person in the acquisition of the Peltz Group. Defendant was regarded as a solid, innovative, and creative participant in the brokerage business. Defendant was the "architect" of Waste Management's expansion of the brokerage business into a national business, the one responsible for managing, guiding, and directing the business's development, the one with the relationships with the nation's largest printers like RR Donnelly. According to Matthew Coz, WMRA's vice-president of growth, commodity sales, and marketing at the time of trial, defendant was able to see the complexities of the market, bring together assets to solve problems in the marketplace, and do so in a financially meaningful way. He

[2]We use Waste Management generically here because the put/call agreement is not part of the record; therefore, we do not know the precise Waste Management entity or entities named in that agreement.

was responsible for the financial results of the brokerage group. Defendant was part of a team of Waste Management's top 200 managers who set the direction and decision-making for the company. Defendant reported directly to the president of RAA in Houston, Texas, where RAA's headquarters was located.

¶ 7 By May 2005, Waste Management and the Peltz Group were in negotiations for Waste Management to buy the Peltz Group's membership shares in RAA, as contemplated in the 2003 transaction. The buyout occurred on September 30, 2005. On that date, Waste Management executed a promissory note for approximately $17 million, defendant receiving his proportionate one-third share; the Peltz Group assigned its membership shares in RAA to Waste Management; defendant resigned from RAA's board of directors; and defendant signed a first amendment to his employment agreement. Following the buyout, RAA changed its name to the present WM Recycle America, LLC (WMRA).[3]

¶ 8 Defendant's Employment Agreement

¶ 9 As a condition of the $60 million acquisition, defendant signed an employment agreement that became effective on January 1, 2003. Defendant's term of employment was three years with automatic renewals for successive two-year periods thereafter unless terminated pursuant to the agreement. Defendant could voluntarily terminate his employment at any time upon written 90-

[3]Prior to the acquisition of the Peltz Group in 2003, Waste Management's recycling business was known as Recycle America, LLC; following the acquisition, the recycling business was known as Recycle America Alliance, LLC; after the 2005 buyout, the recycling business was known as WM Recycle America, LLC. According to Waste Management's attorney, these were name changes only,
but pertained to the same company.

days' notice. Defendant's duties and responsibilities were as vice-president-marketing, reporting directly to the president of RAA. His base salary was $250,000 per year with eligibility for an annual bonus equal to from 40% up to 80% of his annual base salary.

¶ 10 Section 8 of the employment agreement was entitled "Restrictive Covenants." For a period of the longer of one year after final payments under the agreement or two years following termination of employment[4], defendant agreed not to engage in competition with any business conducted or carried on by Waste Management or any of its subsidiaries within 100 miles of any of Waste Management's operating locations or marketing offices, including those of any Waste Management affiliates. The employment agreement also contained restrictions against solicitation of customers and disclosure of confidential information. The agreement contained a provision that Texas law applied to disputes arising under it.

¶ 11 By the fall of 2005, the other Peltz principals had left RAA. Defendant testified that he, too, was planning to leave, but the president of WMI asked him to stay for three years. Defendant agreed to stay for two years, and they compromised at two and a half years. On September 30, 2005, defendant signed a "First Amendment To Employment Agreement." That document amended the term of the original employment agreement by extending it to March 31, 2008; it amended defendant's compensation by providing, *inter alia*, that upon termination he would be paid two times his annual base salary and one times his target annual bonus. Paragraph 4 of the amendment provided: "Except as expressly modified or amended herein, all provisions of the Employment

[4]Defendant resigned from WMRA on June 4, 2008, and received his last compensation payment on June 4, 2010. One year from June 4, 2010, was June 4, 2011. Effectively, defendant's period of noncompetition was three years.

Agreement shall remain in full force and effect and continue to govern the parties thereto." The restrictive covenants remained in full force and effect. The amendment provided that Texas law applied.

¶ 12 Defendant left WMRA at the end of May 2008. WMRA paid defendant the benefits under the amendment to the agreement. On August 16, 2010, while the restrictive covenants were still in effect, defendant went to work for Pioneer Industries, Inc. (Pioneer), located in Minneapolis, Minnesota, as its president and CEO. Defendant testified that the offer of a $45 million bonus upon the sale of Pioneer lured him out of retirement. Matthew Coz described Pioneer as a recycling company with multiple locations that operates in a business format comparable to Waste Management's recycling business. In Coz's opinion, Pioneer Industries competes against WMRA for recyclable material. Michael Tunney, WMRA's recycling operation's director for Illinois, Indiana, Michigan, and Ohio, testified that anyone who participates in recycling is WMRA's competitor. James Chafoulias, Pioneer's owner who recruited defendant, testified that anyone who calls on a printer (WMRA does) is Pioneer's competitor. Defendant insisted that Pioneer is a "niche" company that does not compete for the same waste materials as WMRA.[5]

¶ 13 The Lawsuit

¶ 14 On November 24, 2010, WMRA sued defendant and David Pelz, who was one of the principals of the Peltz Group, alleging violations of the restrictive covenants in their respective employment agreements. WMRA moved for a temporary restraining order, which the trial court

[5]At trial, the issue of competition was the subject of much discussion. On appeal, the issues focus on the reasonableness of the restrictions in the employment agreement. Therefore, we do not recount the voluminous testimony dealing with competition.

denied. This court affirmed the trial court's decision in *WM Recycle America, LLC v. Lavin*, No. 2-10-1216 (2010) (unpublished order under Supreme Court Rule 23). Following this court's decision, WMRA voluntarily dismissed Pelz from the suit and proceeded in the trial court against defendant only. On January 24, 2011, defendant filed an answer and affirmative defenses to the complaint, and, after discovery, the parties proceeded to an evidentiary hearing on WMRA's motion for a preliminary injunction. Following the hearing, the trial court took the case under advisement and issued its written memorandum opinion and order denying the preliminary injunction on February 3, 2011.

¶ 15 As stated above, the employment agreement contained a provision that Texas law applied. WMRA argued for the application of Texas law, while defendant argued for the application of Illinois law. The trial court did not expressly rule on the choice of law issue, but found that Texas and Illinois law were both governed by the guiding principle that restrictive covenants are enforceable if they are reasonable. The court found that the main difference between Illinois and Texas law is that Texas's law relating to restrictive covenants is codified. Under both laws, the court stated, the question of the reasonableness of the covenants is one of law. The trial court also found that both states have similar requirements for preliminary injunctions. The court applied both Texas and Illinois law.

¶ 16 Central to the trial court's analysis was its finding that the 2003 employment agreement was ancillary to the sale of a business while the 2005 amendment to the employment agreement was ancillary to employment and not to the sale of a business. Pursuant to this analysis, the court examined whether the restrictive covenants served to protect WMRA's confidential information or customer relationships. The court found that defendant did not have confidential information he gained as WMRA's employee. The trial court made no finding regarding WMRA's customer

relationships. The trial court found that there was no reasonable relationship between the 100-mile restriction and any legitimate interest of WMRA, given that WMRA's customers are located throughout the globe. The court further found that the phrase "any operating location or sales or marketing office of [WMRA] or any of its affiliates" is vague and ambiguous due to the fact that many of WMRA's sales people worked from their homes and the agreement did not define "operating location," "marketing office," or "affiliate." The trial court concluded that the restrictive covenants were unreasonable because they restricted defendant from "accepting employment anywhere on the planet."

¶ 17 The trial court ruled that WMRA did not meet the requirements for a preliminary injunction because it did not demonstrate a likelihood of success on the merits or demonstrate that it would be irreparably harmed if an injunction did not issue. The court acknowledged that Texas requires the court to reform covenants it finds to be unreasonable, but held that to do so at the preliminary injunction stage would be premature. This timely appeal followed.

¶ 18 ANALYSIS

¶ 19 WMRA contends that the trial court erred in denying the motion for preliminary injunction on four grounds: (1) the covenants protected the value of the business goodwill WMRA acquired through its acquisition of the Peltz Group; (2) the covenants were reasonable considering the breadth of WMRA's operations and the nature of defendant's high-level position; (3) absent an injunction, WMRA will suffer irreparable injury to its business goodwill and competitive edge; and (4) the harm to defendant is insignificant because he agreed to be bound by the covenants and was handsomely compensated for doing so.

¶ 20 Choice of Law

¶ 21 We must first determine which law governs. WMRA contends that Illinois law governs the standards for granting a preliminary injunction but Texas law governs the issue of the reasonableness of the restrictive covenants. Defendant agrees that Illinois law governs the standards for preliminary injunctions but contends that Illinois law also governs the issue of whether the restrictive covenants are enforceable. Accordingly, we will apply Illinois law to determine the standards for granting or denying a preliminary injunction and then discuss the parties' contentions regarding the law to be applied to the covenants.

¶ 22 A preliminary injunction is a provisional remedy to preserve the status quo pending a hearing on the merits of a case. *Hanchett Paper Co. v. Melchiorre*, 341 Ill. App. 3d 345, 351 (2003). A court may not grant a preliminary injunction unless the party seeking the preliminary injunction shows that (1) it possesses a clear right or interest needing protection; (2) it has no adequate remedy at law; (3) irreparable harm will result if the preliminary injunction is not granted; and (4) there is a reasonable likelihood of success on the merits. *Hanchett*, 341 Ill. App. 3d at 351.

¶ 23 Although the parties debate the standard of review and discuss it in different terms, they essentially are in agreement on it. The issue in this case is whether a preliminary injunction should issue to enforce a restrictive covenant, the validity of which is in question. Therefore, under this court's decision in *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 216 (2005), three different standards of review apply. We review questions of fact under a manifest weight standard; whether a covenant is enforceable is reviewed *de novo*; and whether a preliminary injunction should issue to enforce a restrictive covenant is reviewed for abuse of discretion. *Grove*, 362 Ill. App. 3d at 215-16.

¶ 24 We turn now to the issue of which state's law applies to the restrictive covenants. As we previously noted, the employment agreement and the amendment to the employment agreement

provided that Texas law applies. Illinois will give effect to an express choice of law provision in a contract where (1) the law of the chosen state does not contravene Illinois' public policy and (2) there is some relationship between the chosen forum and the parties or the transaction. *Potomac Leasing Co. v. Chuck's Pub, Inc.*, 156 Ill. App. 3d 755, 757-59 (1987). Public policy considerations must be "strong and of a fundamental nature" to justify overriding the chosen law. *Potomac*, 156 Ill. App. 3d at 759.

¶ 25 We consider the public policy of each state. In *Reliable Fire Equipment Co. v. Arredondo*, 405 Ill. App. 3d 708 (2010), *pet. for leave to appeal granted, Table No. 111871 (filed May 25, 2011)*) this court reiterated the common law principles relating to restrictive covenants, which our supreme court has recognized. Foremost among those principles is the doctrine against restraint of trade. *Reliable*, 405 Ill. App. 3d at 724. " 'A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation, and a promise that is unreasonably in restraint of trade is unenforceable.' " *Reliable*, 405 Ill. App. 3d at 724 (quoting 1 E. Farnsworth, *Contracts* § 5.3, at 19 (3d ed. 2004)). In order for a promise to refrain from competition to be reasonable, the promisee must have an interest worthy of protection that may be balanced against the hardship on the promisor and the likely injury to the public. *Reliable*, 405 Ill. App. 3d at 724.

¶ 26 Texas has codified its law regarding restrictive covenants. Section 15.50(a) of the Covenants Not to Compete Act (Act) provides:

> (a) *** [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are

reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Tex. Bus. & Com. Code § 15.50(a) (Vernon 2009). Section 15.51(c) provides that if the limitations as to time, geographical area, or scope of activity to be restrained are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court *shall* reform the covenant, may not award damages before its reformation, and the relief granted to the promisee is limited to injunctive relief. Tex. Bus. & Com. Code § 15.51(c) (Vernon 2009). In section 15.52, the Texas legislature provided that the criteria for enforceability of a covenant not to compete as stated in section 15.50 of the Act are exclusive and preempt any other criteria for enforceability under common law or otherwise. Tex. Bus. & Com. Code § 15.52 (Vernon 2009).

¶ 27 Under Texas law, covenants not to compete are generally considered restraints of trade and are disfavored. *Valley Diagnostic Clinic, P.A. v. Dougherty*, 287 S.W. 3d 151, 155-56 (Tex. App. 2009). "It is evident that Texas has a fundamental policy to enforce reasonable covenants not to compete." *Intermetro Industries Corp. v. Kent*, 2007 WL 518345 (M.D. Pa. 2007). In interpreting the provisions of the Act, the Court of Appeals of Texas stated:

> "The Act balances both the interests of employees and their employers, recognizing that restraints should be no greater than 'necessary to protect the goodwill or other business interest of the promisee.' [Citation.] Thus, Texas will enforce reasonable restraints on competition that protect legitimate business interests of the employer." *Holeman v. National Business Institute, Inc.*, 94 S.W. 3d 91, 98 (Tex. App. 2002).

The Texas Supreme Court held that the "core inquiry" of section 15.50(a) of the Act is whether the restraints imposed by a covenant not to compete are reasonable. *Alex Sheshunoff Management Services, L.P. v. Johnson and Strunk & Assoc., L.P.*, 209 S.W. 3d 644, 655 (Tex. Sup. Ct. 2006).

Texas Supreme Court Chief Justice Jefferson put it thusly in a concurring opinion: "In sum, section 15.50(a) seeks to enforce reasonable covenants that protect legitimate business interests and are supported by valid consideration." *Alex Sheshunoff*, 209 S.W. 3d at 660 (Jefferson, C.J., concurring).

¶ 28 In our case, defendant contends that the Texas Act contravenes Illinois' public policy in two regards: (1) the hardship to the employee is not expressly considered, and (2) Texas courts must reform an unreasonable restraint to make it reasonable rather than declare it unenforceable. Thus, defendant concludes that Illinois has chosen to provide its workers greater protection than does Texas. The Act takes into account the hardship to the employee because it first requires that the covenant not to compete be ancillary to or part of an otherwise enforceable agreement at the time the agreement is made. First, section 15.50(a) does not permit the covenant to stand alone. *Alex Shehunoff*, 209 S.W. 3d at 658 (Jefferson, C.J., concurring.) It must arise out of a relationship between the employer and the employee that safeguards a legitimate business interest of the employer. *Alex Sheshunoff*, 209 S.W. 3d at 658-59 (Jefferson, C J., concurring.) Second, the covenant's restraints cannot be greater than necessary to protect the legitimate business interest of the employer. Taken together, this means what *Holeman* concluded, that the Act balances the interests of both the employee and the employer. So, while the Texas legislature did not use the words "hardship to the employee," it provided for consideration of that factor.

¶ 29 Mandatory judicial reformation of an agreement gives us more pause. In *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437 (2007), the court cautioned that allowing extensive judicial reformation of blatantly unreasonable posttermination restrictive covenants may contravene Illinois public policy because of the potentially severe effect it could have on employees subject to such covenants. *Cambridge*, 378 Ill. App. 3d at 456. The *Cambridge* court

was concerned that a policy allowing extensive reformation would give employers an incentive to draft restrictive covenants as broadly as possible, which could have a "severe chilling effect" on an employee's posttermination activities. *Cambridge*, 378 Ill. App. 3d at 456. The *Cambridge* court viewed judicial reformation of restrictive covenants with suspicion because it increases the hardship to the employee. *Cambridge*, 378 Ill. App. 3d at 456. At the same time, the court in *Cambridge* acknowledged that in some circumstances courts may choose to modify an overbroad restrictive covenant rather than invalidate it outright. *Cambridge*, 378 Ill. App. 3d at 456-57. The court held that, in deciding whether modification is appropriate, the fairness of the restraints contained in the contract is a key consideration. *Cambridge*, 378 Ill. App. 3d at 457. A court would not err in failing to modify an unconscionable contract. *Cambridge*, 378 Ill. App. 3d at 457.

¶ 30 While we share the *Cambridge* court's reservations, we do not believe that Texas' policy is so strongly and fundamentally contrary to the public policy in Illinois that it overrides the instant parties' choice of law. Illinois allows for modification, or blue-pencilling, albeit we are more circumspect in applying the rule.

¶ 31 Having determined that *Potomac*'s first condition, public policy, does not require that we apply Illinois law, we next consider *Potomac*'s second condition, whether there is some relationship between the chosen forum and the parties or the transaction. Defendant argues that the only connections this case has to Texas is that WMRA is headquartered there, defendant's paychecks were generated there, and defendant visited there "from time to time." Defendant ignores that he agreed to be bound by Texas law. This is not a case where, in the absence of a choice-of-law provision in a contract, this court must decide the conflict-of-law question. Here, the parties were of equal bargaining power, and in both the employment agreement and the amendment, they agreed Texas law would apply. Moreover, defendant's contacts with Texas were not casual. He reported

directly to the president of RAA who was in Texas. He traveled to Texas for meetings monthly or every two months. Under *Potomac*, there must be "some" relationship between the parties or the transaction and the chosen forum. *Potomac*, 156 Ill. App. 3d at 757-59. The record here demonstrates "some" relationship between the parties and Texas. Accordingly, we hold that Texas law governs the restrictive covenants in this case.

¶32 Whether the Covenants Are Ancillary to the Sale of a Business or Ancillary to Employment

¶ 33 The trial court found that the employment agreement defendant entered into in 2003 was ancillary to the sale of a business, because it was entered into in conjunction with Waste Management's acquisition of the Peltz Group. The trial court found that the 2005 amendment to the employment agreement was ancillary to employment, not to the sale of a business. WMRA challenges the second finding as being against the manifest weight of the evidence.

¶ 34 A covenant not to compete, ancillary to the sale of a business, is upheld as a necessity to secure the goodwill the buyer purchases. *Williams v. Powell Electrical Manufacturing Co., Inc.*, 508 S.W. 2d 665, 667 (Tex. App. 1974). Put another way, such restraints are justified by the buyer's need to protect the value of the goodwill it purchased with the business. E. Farnsworth, *Contracts* § 5.3, at 22 (3d ed. 2004). Goodwill is an integral part of the business, which includes the competitive advantages accruing to a business on account of its name, location, reputation, and success. *Airflow Houston, Inc. v. Theriot*, 849 S.W. 2d 928, 933 (Tex. App. 1993). Absent a promise not to compete, the seller is free to open a new business in competition with the buyer. 1 E. Farnsworth, *Contracts* § 5.3, at 23 (3d ed. 2004). An analogous situation arises where a corporation's business depends heavily on the goodwill of one or more officers or significant shareholders. When such a person, on the sale of a business, promises not to compete, the promise is one ancillary to the sale. 1 E. Farnsworth, *Contracts* § 5.3, at 23 (3d ed. 2004). If the restraint

is ancillary to the sale of a business and its goodwill, the employer has a legitimate interest in the protection of that goodwill. 1 E. Farnsworth, *Contracts* § 5.3, at 29 (3d ed. 2004).

¶ 35 Promises not to compete ancillary to employment, however, are sustained only if the employer stands to lose its investment in confidential information or in customer lists or similar information. 1 E. Farnsworth, *Contracts* § 5.3, at 24-25 (3d ed. 2004). In other words, the inquiry in analyzing a covenant not to compete ancillary to employment is to what extent the employee has appropriated an asset of the employer and used it against the employer. E. Farnsworth, *Contracts* § 5.3, at 29 (3d ed. 2004). A post-employment restraint is scrutinized with more care than are covenants in the sale of a business, because post-employment restraints are often the product of unequal bargaining power. 1 E. Farnsworth, *Contracts* § 5.3, at 25 (3d ed. 2004).

¶ 36 This distinction reflects that over a long period of time courts have consistently found sale-of-business covenants more acceptable. *Budget Rent-A-Car Corp. of America v. Fein*, 342 F. 2d 509, 515 (5th Cir. 1965). A covenant ancillary to the sale of a business enables the seller to capitalize on and dispose of his goodwill, thereby receiving a higher price. *Fein*, 342 F. 2d at 515. A covenant is an inducement to a purchaser of a going concern who hopes to retain the seller's customers. *Fein*, 342 F. 2d at 515. Far different considerations adhere in covenants ancillary to employment, because such contracts restrict an employee's choice of occupation after termination and may produce severe hardship on some employees. *Fein*, 342 F. 2d at 516.

¶ 37 In a nutshell, the central issue in our case is whether the amendment to the employment agreement was necessary to protect the goodwill Waste Management purchased when it acquired the Peltz Group and defendant, or whether WMRA had to raise a fair question that defendant appropriated confidential information or customers.

¶ 38 Rather than summarize, we set forth the trial court's findings:

> "Testimony established that [defendant] owned approximately 1/3 of the shares of the Pelz [*sic*] Group, and received a substantial sum of money both when the merger[6] occurred in January 2003 and in September 2005 when WMRA bought back the 9% interest in WMRA that the members of the Pelz [*sic*] Group retained. It is clear, and the Court so finds, that the *initial* Employment Agreement was ancillary to the purchase of a business.
>
> However, it is equally clear that the nature of the Employment Agreement changed in September 2005 when [defendant] was preparing to leave WMRA. His agreement to remain with WMRA for an additional two and one-half years was supported by ample consideration, i.e., the assurance that he would receive two years' compensation when he voluntarily terminated employment at the of the agreed period. By that time, the nature of [defendant's] employment had changed and WMRA had reaped the benefit of any goodwill and synergies achieved by its merger with the Pelz [*sic*] Group. The Court finds that the Employment Agreement *as amended in 2005* was not an agreement ancillary to the sale of a business." (Emphases in original).

The trial court did not elaborate on its findings by citing testimony or evidence in the record to support them. Specifically, the trial court did not say why it concluded that the September 2005 buyout of the Peltz Group's membership shares in RAA did not relate to the 2005 amendment to the employment agreement, or why it concluded that in only two years Waste Management had reaped the benefit of the goodwill it purchased for $60 million.

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[6]Throughout its memorandum opinion, the trial court mischaracterized the transaction as a merger. Defendant, in his testimony and in his brief, similarly mischaracterizes the transaction.

¶ 39 Defendant asserts that WMRA has forfeited this issue because it does not argue that the trial court's findings are against the manifest weight of the evidence. At page 27 of its opening brief, WMRA states, "The trial court erred in finding that while the restrictive covenants were originally ancillary to the sale of the Peltz Group, they became ancillary to the employment agreement after the 2005 amendment to [defendant's] contract." Defendant apparently believes that the assertion the trial court "erred" in its findings is insufficient to raise the issue. Defendant's argument is without merit. Accordingly, WMRA has not forfeited the issue.

¶ 40 WMRA argues that Waste Management had a protectable interest in the goodwill it purchased, which could be ensured by curtailing defendant's post-employment activities. WMRA maintains that the amendment to the employment agreement had no effect on the restrictive covenants because the amendment pertained solely to compensation and benefits and provided that the remainder of the agreement remained in full force and effect. Further, WMRA argues that there is no evidence to suggest that Waste Management contemplated that it would have reaped the goodwill it purchased in a mere two years. Had that been the case, WMRA argues, Waste Management would have paid far less than $60 million to acquire the Peltz Group. Defendant argues that the amendment to the employment agreement was ancillary to employment because it was supported by consideration and the nature of defendant's employment changed.

¶ 41 Although WMRA contends that Texas law applies to the determination of the enforceabiliity of the restrictive covenants, it relies on an Illinois case, *Hamer Holding Group, Inc. v. Elmore*, 202 Ill. App. 3d 994 (1990), in which the court held that a covenant was ancillary to the sale of business where execution of an employment agreement was a condition precedent to the sale. Elmore was the sole owner and CEO of a realty and management company he conveyed with all its assets, including goodwill. *Hamer*, 202 Ill. App. 3d at 996-97. As a condition precedent to the sale,

Elmore was to execute and deliver an employment agreement. *Hamer*, 202 Ill. App. 3d at 997. Thus, the purchaser deemed Elmore's services an indispensable asset. *Hamer*, 202 Ill. App. 3d at 1008. As in *Hamer*, WMRA says the purchase of the Peltz Group was conditioned on defendant's employment agreement, and, like Elmore, defendant was an indispensable asset. Defendant distinguishes *Hamer* on the basis that the closing documents in the instant case, unlike those in *Hamer*, did not condition Waste Management's acquisition of the Peltz Group on the execution of the employment agreement. Our research did not uncover any Texas case on point. Therefore, we find *Hamer* persuasive.

¶ 42 Defendant would have us divorce the circumstances surrounding the 2005 amendment to the employment agreement from those that preceded it. This we cannot do. The record shows that the amendment to the employment agreement was tied to the buyout of the Peltz Group's shares in RAA, which was the culmination of the transaction in which Waste Management acquired the Peltz Group.

¶ 43 Waste Management's waste-paper recycling business was negligible as of 2003. In order to make its paper brokerage business a market force, Waste Management acquired the Peltz Group, a paper recycler with a national presence. According to Waste Management's Matthew Coz, this acquisition was "very significant." Coz also made it clear that gaining defendant was no less significant. Coz testified that "[defendant] was the most important person in the acquisition." Defendant had the contacts with the largest printers, like RR Donnelly, and the market knowledge to transform Waste Management into a major competitor. To acquire this stature and competitive edge, Waste Management spent approximately $60 million.

¶ 44 Waste Management obtained 91% of the membership shares in the newly formed RAA, while the Peltz Group obtained 9%. At the time of this transaction in 2003, the parties obviously

contemplated and expected that Waste Management would buy the Peltz Group's shares, because the parties entered into a put/call agreement for those shares.[7] Simultaneously, defendant, as a shareholder in the Peltz Group, entered into a Business Protection Agreement with Waste Management, and defendant (as well as the other Peltz Group principals) signed an employment agreement. The Business Protection Agreement recited that the put/call agreement was in "furtherance of and in connection with" the transaction and further recited that the transaction would not occur unless defendant entered into the Business Protection Agreement, which contained restrictive covenants identical to those in the employment agreement. While the employment agreement contained no language making it a condition of the transaction, Mary Kliesmet, an attorney for the Peltz Group who worked on the transaction, testified that defendant's employment agreement was a condition of the sale. Defendant counters this testimony by arguing that it lacked foundation, an objection the trial court overruled. The record shows that Kliesmet did the due diligence for the transaction, reviewed the documents exchanged between the parties, and was part of the negotiations. After the acquisition, she became a senior attorney for Waste Management. Therefore, the record demonstrates the foundation for her testimony.

¶ 45 Nevertheless, defendant asserts that two facts refute the evidence that the employment agreement was a condition precedent to the sale, the business protection agreement and his right to leave at any time upon 90-days' notice. Defendant posits that if the employment agreement were a condition precedent, there would have been no need for the business protection agreement because it contained restrictive covenants of its own. Moreover, defendant argues, pursuant to the 90-day

[7]The put/call agreement was not introduced in evidence. It was mentioned in testimony, and there is a letter in evidence that gives some insight into the put/call agreement.

notice provision of the employment agreement, he could have given notice the day after the closing and still have collected his share of the $60 million purchase price. WMRA contends that the business protection agreement was an example of prudent "belt-and-suspenders-drafting" and that the 90-day notice requirement meant that defendant could not leave immediately upon signing the closing documents. We are not persuaded by defendant's arguments. First, it is not clear how Waste Management could have provided that defendant could never leave its employ; second, the time restrictions in the business protection agreement and the employment agreement were not coextensive. The business protection agreement provided that the restrictions were tied to the periods defendant had an interest in the distributions under the put/call agreement or otherwise beneficially owned an interest in the Peltz Group, whereas the restrictions in the employment agreement were tied to the periods of defendant's employment. Tying the restrictions to the period of defendant's employment in the employment agreement was in furtherance of Waste Management's purchase of goodwill in the transaction. Consequently, Kliesmet's testimony that the employment contract was a condition of the sale was not refuted by the existence of the business protection agreement.

¶ 46 The term of defendant's employment agreement was three years, automatically renewable for two-year increments. Between January 1, 2003, the beginning of the term of the agreement, and September 30, 2005, the effective date of the amendment, defendant had become the "architect" of Waste Management's brokerage business, which grew to be national, even international, in breadth. According to Coz, defendant was " a significant force for our company during that time—still today."

¶ 47 On May 1, 2005, a letter from the Peltz Group to Waste Management detailed that negotiations were underway for Waste Management's "early" buyout of the Peltz Group's shares

in RAA pursuant to the put/call agreement signed in 2003. The buyout was effected on September 30, 2005, when Waste Management gave the Peltz Group a promissory note for approximately $17 million; the Peltz Group assigned its shares in RAA to Waste Management; defendant resigned from RAA's board of directors; and defendant signed an amendment to the employment agreement. Defendant testified that the divestiture of his shares in RAA was "written into" the "original" agreement, meaning the 2003 transaction. As for the amendment to the employment agreement, Kliesmet testified that the amendment was done in conjunction with the buyout.

¶ 48 As a one-third owner of the Peltz Group, defendant was compensated in the amount of approximately $20 million in 2003 and approximately $6 million in 2005 (these sums were paid over time instead of in a lump sum.) The timing of the other principals of the Peltz Group's departure from Waste Management coincided with the buyout. It was against this backdrop that defendant and Waste Management negotiated the amendment to defendant's employment agreement. The record does not support defendant's assertion or the trial court's finding, that the nature of defendant's employment changed. Defendant testified that Patrick De Rueda, RAA's president, gave defendant additional responsibilities, but defendant also testified that his assignment remained the same upon execution of the amendment. "[The president of Waste Management] wanted [defendant] to do the same thing, manage the brokerage business and sell all the volume out of [Waste Management.]"

¶ 49 Similarly, we do not find support in the record for the trial court's finding that Waste Management had reaped the benefit of the goodwill it purchased with its 2003 acquisition of the Peltz Group by the time it entered into the amendment to defendant's employment agreement. The term of the employment agreement was three years; the three years had not expired at the time of the amendment. Therefore, Waste Management had not realized its investment in defendant as of

the date of the amendment. Moreover, Waste Management was willing to invest another $17 million to acquire the Peltz Group's shares in RAA plus additional consideration to keep defendant.

¶ 50 As in *Hamer*, Waste Management would not have proceeded with the acquisition of the Peltz Group without the execution of the employment agreement, and it deemed defendant's services an indispensable asset. Waste Management spent handsomely to ensure that its acquisition was not an illusory one.

¶ 51 Just as we cannot ignore the significance of the 2003 acquisition having been completed by the 2005 buyout, we cannot ignore the significance of an amendment to the employment agreement instead of the execution of a new agreement. The amendment showed an intention to change some provisions in the original document instead of an intent to supercede the original document. See *In re Oceanside Properties, Inc.*, 1 B.R. 747, 749 (D. Hawaii 1980) ("There is a difference between a 'First Amendment to [a document]' and a 'First Amended [document]. The first shows merely an intent to change some provisions in the original document, whereas the second shows an intent to supercede the original document with the amended document.").

¶ 52 We also cannot ignore that the bargaining position of the parties here was not uneven, as it often is in an employer/employee relationship. See *Hamer*, 202 Ill. App. 3d at 1007-08. The acquisition of the Peltz Group was negotiated, as was the buyout, and defendant negotiated the terms of the amendment directly with the president of Waste Management. Defendant accepted over $20 million in exchange for his promise not to compete against his former employer. None of the concerns inherent in an employment agreement ancillary to employment, such as hardship to the employee or injury to the public, is present in this case.

¶ 53 WMRA cites *Business Records Corp. v. Lueth*, 981 F. 2d 957 (7th Cir. 1992), which we find instructive. In *Lueth*, the defendant, who had, over many years, become prominent selling election

equipment to state and local governments, worked for Thornber at the time it was acquired by the plaintiff. *Lueth*, 981 F. 2d at 958-59. The plaintiff sold election equipment nationwide, and it required the defendant to sign a noncompetition agreement as a condition precedent to its purchase of Thornber. *Lueth*, 981 F. 2d at 959. The defendant signed the agreement and received as consideration stock in the plaintiff. *Lueth*, 981 F. 2d at 959. He became vice-president of the plaintiff. *Lueth*, 981 F. 2d at 959. Before the expiration of his employment agreement, the defendant went to work for one of the plaintiff's competitors, and the plaintiff sued the defendant, alleging a violation of the noncompetition agreement. *Lueth*, 981 F. 2d at 959. The district court granted an injunction in the plaintiff's favor, and the defendant appealed. The Seventh Circuit first held that the noncompetition agreement was made ancillary to the sale of a business because it was signed as part of the sales agreement. *Lueth*, 981 F. 2d at 960. "[T]he noncompetition agreement and the sales agreement were executed simultaneously; and [the plaintiff] gave [the defendant] 3750 shares of its parent's common stock." *Lueth*, 981 F. 2d at 960. The court noted that the defendant accepted the restraints voluntarily at the bargaining table and enthusiastically accepted valuable consideration. *Lueth*, 981 F. 2d at 960. The court upheld the restraint imposed upon the defendant for two years past his quitting time on the basis that the defendant had worked for the plaintiff for only six years and the plaintiff still had goodwill it needed to protect. *Lueth*, 981 F. 2d at 960-61.

¶ 54 In our case, as in *Lueth*, defendant signed the employment agreement as part of the sale of the Peltz Group to Waste Management. Then in 2005, defendant signed the amendment to the employment agreement in conjunction with the Peltz Group's sale of its shares in RAA, which represented the culmination of the 2003 transaction. As in *Lueth*, Waste Management "invested in preserving" defendant's loyalty. In addition to the millions defendant was paid as his share of the initial sale and then the buyout, he received two years' salary plus a bonus as consideration for the

amendment to the employment agreement. If, under similar circumstances, the goodwill attached to the transaction was intact after six years in *Lueth*, it follows that Waste Management would not have reaped the benefit of the goodwill it purchased after less than three years.

¶ 55 Accordingly, we determine that the trial court's finding that the 2005 amendment to the employment agreement was ancillary to employment was against the manifest weight of the evidence. Waste Management's legitimate business interest was the value of the goodwill it purchased. It was entitled to protect that interest. Thus, defendant's inquiry into whether defendant appropriated confidential information, or whether Waste Management enjoyed a near-permanent relationship with its customers, is irrelevant.

¶ 56 Whether the Restrictive Covenants Are Overbroad

¶ 57 Having determined that defendant's employment agreement was ancillary to the sale of a business, we proceed to the issue of whether the restrictive covenants' limitations as to time, geographical area, and scope of activity were reasonable and did not impose a greater restraint than necessary to protect Waste Management's goodwill.

¶ 58 Section 8 of the employment agreement contained the restrictive covenants. Section 8(a), the noncompetition agreement, provided in relevant part as follows:

> "Employee *** agrees that for a period of one (1) year after the date payments made to, or benefits received by, Employee pursuant to this Agreement cease, or for a period of two (2) years following the date of termination of Employee's employment whichever is later (whether such termination is voluntary or involuntary by wrongful discharge, or otherwise), Employee will not, directly or indirectly through other persons, within 100 miles of any operating location or sales or marketing office of the Company or any of its affiliates, engage in, assist (whether Employee receives a financial benefit or not), or have any active interest

> or involvement, whether as an employee, agent, consultant, creditor, advisor, officer, director, stockholder (excluding holdings of less than 1% of the stock of a public company), partner or proprietor of, or any type of principal whatsoever in, any person, firm, or business entity which, directly or indirectly, is engaged in a business competing with any business conducted and carried on by the Company or any of its subsidiaries, without the Company's prior written consent."

Section 8(b) of the employment governed non-solicitation, and for the same time periods as section 8(a) provided:

> "***Employee will not, directly or indirectly through others, (i) induce any customers of the Company or its affiliates to patronize any similar business which competes with any business of the Company or its affiliates to patronize any similar business which competes with any business of the Company or its subsidiaries; (ii) canvass, solicit or accept any similar business from any customer of the Company or its affiliates; (iii) request or advise any customers of the Company or its affiliates to withdraw, curtail or cancel such customer's business with the Company or its affiliates; (iv) disclose to any other person, firm or corporation the names or addresses of any of the customers of the Company or its subsidiaries; or (v) cause, solicit, entice, or induce any present or future employee of the Company or any of its subsidiaries to leave the employ of the Company or such subsidiary or to accept employment with, or compensation from, the Employee or any other person, firm, association, or corporation, without the Company's prior written consent."

Section 8(c) was a non-disparagement clause, and section 8(d) prohibited the disclosure of confidential information.

¶ 59 The non-disparagement clause was not a subject of the litigation. However, in its complaint, WMRA alleged that defendant breached the non-disclosure clause and requested that injunctive relief include prohibiting defendant from disclosing confidential information. In this appeal, WMRA reiterates its position that the non-disclosure clause, which is indefinite in duration, is enforceable. WMRA argues that the non-disclosure clause is not in restraint of trade and, therefore, its reasonableness is not at issue. It appears that the trial court in its memorandum opinion did not address this issue. The trial court's discussion of confidential information was directed toward whether defendant had appropriated confidential information for purposes of determining whether WMRA possessed a legitimate business interest that would justify the restraint imposed by the restrictive covenants in the noncompete and non-solicitation clauses. In his brief, defendant similarly addresses only the legitimate-business-interest. We will return to a discussion of the confidentiality clause in our discussion of defendant's petition for rehearing.

¶ 60 The trial court found that the restrictions in the noncompete and non-solicitation clauses of the employment agreement amounted to an industry-wide exclusion in that it prohibited defendant from engaging in any activity in any business entity that is engaged in a business competing with any business conducted by Waste Management or any of its subsidiaries. Given that Waste Management operates around the world in all areas of recycling, the court found that defendant would act at his peril in accepting employment "anywhere on the planet."

¶ 61 WMRA argues that the restrictions are reasonable. It maintains that the time restriction is three years after termination of employment, which is reasonable. It asserts that the geographical restriction is reasonable because WMRA conducts business nationwide and defendant's duties as vice-president of sales and marketing extended to the entire country. WMRA argues that one of its business interests is the goodwill it acquired through the purchase of the Peltz Group, which did

business throughout the country. Therefore, WMRA concludes that the restrictions are not greater than necessary to protect its goodwill.

¶ 62 On its face, section 15.50 of the Act does not apply to non-solicitation agreements. However, Texas courts apply the same analysis to non-solicitation agreements as to covenants not to compete. *Shoreline Gas, Inc. v. McGaughey*, 2008 WL 1747624, at *10 (Tex. App. 2008); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W. 2d 593, 600 (Tex. App. 1995).

¶ 63 We first consider the time restriction. Defendant's employment agreement prohibited him from competing or soliciting for a period of one year following his receipt of payment and benefits under the agreement, or for a period of two years after termination from employment, whichever is later. In *Gallagher Healthcare Insurance Services v. Vogelsang*, 312 S.W. 3d 640, 655 (Tex. App. 2010), the court stated "[t]wo to five years has repeatedly been held as a reasonable time in a noncompetition agreement." Consequently, we hold that the time restriction is reasonable.

¶ 64 We next consider the geographical restrictions. WMRA disputes the trial court's finding that the restriction was national in scope, arguing that defendant could work in Kansas City, Missouri, because WMRA does not operate within 100 miles of that city. However, for purposes of our discussion, we will accept the trial court's finding. Generally, a reasonable area for purposes of a covenant not to compete is the territory in which the employee worked while in the employment of his employer. *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W. 3d 114, 119 (Tex. App. 2000). In our case, defendant began his employment as vice-president of sales and marketing in the Midwest, but within 90 days, he was made vice-president of sales and marketing nationwide. Consequently, the territory in which he worked was the entire country.

¶ 65 We are persuaded by the facts of this case that it is governed by *Powell*. In *Powell*, the issue was whether the trial court erred in issuing a nationwide injunction. *Powell*, like the present case,

involved a restrictive covenant ancillary to the sale of a business. "When a business is sold, a reasonable area is that which is no larger than necessary to protect the business sold." *Powell*, 508 S. W. 2d at 667-68. Faced with an issue of first impression, the appellate court upheld the injunction. The court stated that it would have agreed that a nationwide restriction was unreasonable "if appellees had not demonstrated that the business sold was national in character." *Powell*, 508 S.W. 2d at 668. Here, the evidence showed that the Peltz Group, the business sold to Waste Management, was national in character. "In an era of national and international corporations, a modern court of equity cannot feel constrained by past precedents involving the sale of barber shops and livery stables." *Powell*, 508 S.W. 2d at 668. Consequently, the territorial restrictions in the instant case are reasonable.

¶ 66 We reiterate that the instant case does not present us with a situation in which defendant had no bargaining power, or where abiding by the restrictions visited harm on defendant. Indeed, defendant testified that he had looked forward to retirement and was lured out of retirement by the prospect of a $45 million bonus upon the sale of Pioneer. Defendant argues that in balancing the harms, we should take into account that Waste Management is a multi-billion-dollar company. If this were not an employment agreement ancillary to the sale of a business, and if defendant had been a mere salaried employee, this argument might carry weight. However, defendant was paid over $20 million plus two years' salary and a bonus to keep a three-year promise. Accordingly, we determine that the restrictive covenants in the noncompete and non-solicitation clauses are enforceable.

¶ 67 Defendant's Petition for Rehearing

¶ 68 This court filed its original order on May 12, 2011, reversing the trial court's determination that the restrictive covenants were unenforceable, and we remanded for entry of a preliminary injunction. On June 3, 2011, defendant filed a petition for rehearing in which he alleged, *inter alia*,

that the non-competition and non-solicitation covenants would expire on June 4, 2011, rendering ~~mooting~~ the issue of the preliminary injunction moot. We ordered WMRA to respond to the petition for rehearing, which it did on August 4, 2011. WMRA conceded that the non-competition and non-solicitation covenants expired on June 4, 2011, but argues that the issues relating to the injunction enforcing those covenants are not moot, because on remand the trial court "will then have to determine the amount of attorney's fees and costs to which WMRA is entitled under the employment agreement." WMRA further contends that since the confidentiality covenant is of indefinite duration and has not expired, the issue of whether a preliminary injunction should issue to enforce the confidentiality covenant is not moot.

¶ 69 The question is whether we may extend the non-competition (and non-solicitation) period absent a provision in the employment agreement allowing us to do so. WMRA has not pointed to any provision in the employment agreement that would allow such an extension, and our reading of the employment agreement has not revealed such a provision.

¶ 70 This case is governed by this court's decision in *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077 (2007). In *Stenstrom*, Mesch, Stenstrom's former employee, was bound by a restrictive covenant in an employment agreement that provided that Mesch would not, for a period of six months from the date of termination of his employment, work in the excavation or repair field in Stenstrom's trade area. *Stenstrom*, 375 Ill. App. 3d at 1088. Mesch breached the covenant, and the trial court enjoined him for six months, using the date of Mesch's termination of employment as the injunction's commencement date. *Stenstrom*, 375 Ill. App. 3d at 1087. On appeal, Stenstrom argued that the six months should have commenced as of the date the injunction entered in order to give Stenstrom its full six months of non-competition. *Stenstrom*, 375 Ill. App. 3d at 1087. This court disagreed. We held that the termination date governed, because "there [was]

no provision in the agreement for an extension of this period or any modification of the commencement date." *Stenstrom*, 375 Ill. App. 3d at 1088. In our case, defendant's employment agreement provided that he would not engage in competition, or solicit, for a period of the longer of one year after final payments under the agreement or two years following termination of employment. Thus, as in *Stenstrom*, the termination date was the commencement date. The two-year period expired before this court's mandate issued, and if we ordered the trial court to issue an injunction now, we would be extending the non-competition and non-solicitation covenants, contrary to the agreement reached by the parties.

¶ 71 However, the issue of the enforceability of the non-competition and non-solicitation covenants is not moot merely because it is too late for an injunction to enter. See *Mohanty v. St. John Heart Clinic*, S.C., 225 Ill. 2d 52, 63-64 (2006); see *People ex rel. Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 6-7 (1988). There is life in the appeal, because our decision could have a direct impact on the rights and duties of the parties, as WMRA has sued for damages. In *Bernardi*, the director of the Illinois Department of Labor sought to enjoin Highland Park from awarding a contract for a public works project without first complying with the provisions of the Prevailing Wage Act. *Bernardi*, 121 Ill. 2d at 4. The trial court initially granted the department a temporary restraining order, but then denied a preliminary injunction, dissolved the temporary restraining order, and dismissed the department's case. *Bernardi*, 121 Ill. 2d at 5-6. The department appealed, and the appellate court affirmed the trial court's judgment. *Bernardi*, 121 Ill. 2d at 6. While the case was pending before the supreme court, the parties disclosed that the project that brought about the controversy had been completed, so that the injunctions sought by the department could not issue. *Bernardi*, 121 Ill. 2d at 6. Nevertheless, our supreme court held that the appeal "is not moot merely because the injunctions enumerated in [the department's] prayer for relief are now too late.

There is life in the appeal because our decision could have a direct impact on the rights and duties of the parties." *Bernardi*, 121 Ill. 2d at 6-7. Our supreme court reversed both the trial court and the appellate court. *Bernardi*, 121 Ill. 2d at 17.

¶ 72 In *Mohanty*, Drs. Mohanty and Ramadurai, former employees of the defendant heart clinic and its defendant owner, sued the defendants, alleging in their declaratory judgment complaint that the restrictive covenants in their employment agreements should be declared void. *Mohanty*, 225 Ill. 2d at 58. The defendants filed a counterclaim raising claims of misappropriation and unjust enrichment and seeking preliminary and permanent injunctions to restrain the doctors from violating the restrictive covenants in their employment agreements. *Mohanty*, 225 Ill. 2d at 59. The trial court denied the defendants' request for injunctive relief, and the appellate court reversed. *Mohanty*, 225 Ill. 2d at 61. During the litigation before the supreme court, the period of restriction as to Dr. Ramadurai expired. *Mohanty*, 225 Ill. 2d at 63. Our supreme court held that Dr. Ramadurai's appeal was not moot despite the expiration of the covenants, because the defendants' counterclaim sought damages against Dr. Ramadurai, and a decision "as to the enforceability of the restrictive covenants could have a direct impact on Dr. Ramadurai's rights and obligations in these matters." *Mohanty*, 225 Ill. 2d at 63-64.

¶ 73 Our case is practically indistinguishable from *Mohanty*. Here, WMRA has included a request for damages in its complaint. Consequently, our decision that the non-competition and non-solicitation covenants were enforceable could have a direct impact on the parties' rights and obligations, even though those covenants have expired as to defendant. Accordingly, our determination as to the enforceability of those covenants is not affected by our inability to grant injunctive relief.

¶ 74 The Confidentiality Covenant

¶ 75 We next consider whether the trial court's ruling that defendant did not possess confidential information was against the manifest weight of the evidence. While the trial court did not specifically deny an injunction to enforce the confidentiality covenant, it made sufficient findings of fact such that remand is not necessary. The trial court found that testimony established that the waste-paper brokerage business changed in the many months since defendant last worked for WMRA. The court found that the evidence established that the business and profit margins depend on foreign currency values, weather, seasonal fluctuations, and "many other" variables. The court further found that many strategies of WMRA are public knowledge, and that any confidential information defendant once possessed about growth strategies and margins would have become stale. Defendant testified consistently with the trial court's findings. In addition to defendant's testimony, the court considered the testimony of Waste Management's president, Patrick DeRueda. DeRueda agreed that he made certain growth strategies public, and while he testified to the confidential nature of certain information generally, he admitted that he did not know if defendant currently possessed any confidential information. Based on the record, we cannot say that the trial court's finding that defendant did not possess confidential information was against the manifest weight of the evidence. Accordingly, WMRA would not be entitled to an injunction to enforce the confidentiality covenant.

¶ 76 For all of the reasons stated, we hold that the restrictive covenants pertaining to non-competition and non-solicitation were enforceable. We therefore reverse the trial court's judgment that those covenants were not enforceable. We hold that the trial court's finding that defendant possessed no confidential information was not against the manifest weight of the evidence and that the trial court did not err in failing to enter an injunction to enforce the confidentiality covenant.

¶ 77 CONCLUSION

¶ 78 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed in part and reversed in part.

¶ 79 Affirmed in part; reversed in part.