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Case No. 9398-VCN

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| NEWELL RUBBERMAID INC., | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | **C.A. No. 9398-VCN** |
| | : | |
| SANDY STORM, | : | |
| | : | |
| Defendant. | : | |

# MEMORANDUM OPINION

Date Submitted: March 11, 2014
Date Decided: March 27, 2014

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NOBLE, Vice Chancellor

## I. INTRODUCTION

Plaintiff Newell Rubbermaid Inc. ("Newell" or the "Company") seeks a temporary restraining order ("TRO") against a former employee, Defendant Sandy Storm ("Storm"). It wants to enjoin her actions that may violate the non-solicitation and confidentiality covenants of restricted stock unit ("RSU") agreements to which she assented through a third-party website less than a year before her departure from Newell. The core issues involve the enforceability of electronic "clickwrap" agreements and whether RSUs that would not vest for one year constituted adequate consideration for the restrictive covenants when Newell, without cause, could terminate her employment, which would result in the forfeiture of the RSUs.

Agreements may, of course, be made online. A clickwrap agreement is an online agreement that requires a "webpage user [to] manifest[] assent to the terms of a contract by clicking an 'accept' button in order to proceed."[1] The RSU agreements to which Storm assented and which Newell seeks to enforce were clickwrap agreements.

[1] *Van Tassell v. United Mktg. Gp., LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011) (citation omitted). This is contrasted with a so-called "browsewrap" agreement, which typically "involve[s] a situation where notice on a website conditions use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink. Thus, a party gives . . . assent simply by using the website." *Id.* (quotations and citations omitted).

For the reasons that follow, the Court concludes that clickwrap agreements and the RSUs at issue are enforceable under Delaware law.[2] Newell has more than a colorable claim that Storm has violated the restrictive covenants and that it will suffer irreparable harm in the absence of interim injunctive relief. Thus, Newell's motion for a TRO against Storm is granted.

## II. BACKGROUND

A Newell subsidiary manufactures and sells infant and juvenile products under its "Graco" brand. Graco sells its products through various retailers, including Target Corporation ("Target"). Storm worked for Newell and its subsidiaries as an employee in various capacities from June 1, 2000, until her voluntary resignation from Newell Sales & Marketing on January 7, 2014. Storm was part of a 17-person office in Minneapolis, Minnesota, which was dedicated to servicing Target.

Storm was promoted to "Director of Sales – Target" effective as of June 1, 2011. As a result of that promotion, she became eligible to receive bonuses in the form of RSUs granted under a document entitled "Newell Rubbermaid Inc. 2010 Stock Plan."[3] To accept the RSUs awarded to her, Storm was directed to a website operated by Fidelity Investments ("Fidelity"), which maintained investment and

[2] The Court is not endorsing all RSU grants which an employer may terminate in its sole discretion. It is conceivable that certain RSU grants, not presently before the Court, could be awarded but, nonetheless, be illusory.

[3] Storm Aff., Ex. C.

retirement accounts of Newell's employees. The instructions on Fidelity's website prompted Storm to "accept" the 2011 RSUs by clicking on an "accept" button.[4] Storm states that a pop-up screen then appeared with a lengthy scrolling message which discussed the RSU award and that when she clicked the "accept" button, she thought she was agreeing to certain terms relating specifically to her grant of RSUs.[5] The 2011 award did not contain a confidentiality or non-solicitation provision,[6] although it did refer to the 2010 RSU plan which explicitly stated that Newell's board of directors, in its sole discretion, could condition the grant of an award upon those provisions.[7]

Around February 2012, Storm again received written notice from Fidelity that she had been awarded additional RSUs, and she again returned to the Fidelity website to accept them.[8] As before, the provisions of this 2012 award did not contain non-solicitation or confidentiality clauses.

In February 2013, Storm was granted her third award of RSUs. She accepted half of the RSUs, which were performance based, on March 18, 2013 and the other half, which were time based, on April 1, 2013. The RSUs, as accepted, were subject to the Newell Rubbermaid Inc. 2010 Stock Plan 2013 Restricted

[4] Storm Aff. ¶ 14.
[5] *Id.* ¶¶ 14-15.
[6] *See* Storm Aff., Ex. D.
[7] Storm Aff., Ex. C § 4.3.
[8] Storm Aff. ¶ 16.

Stock Unit Award Agreement (the "2013 Agreements").[9] Under these agreements, performance-based RSUs vest three years from the award date and time-based RSUs vest ratably in one-third increments on the first, second, and third anniversaries of the award date.[10] However, if the recipient of the RSUs is terminated from employment by Newell for any reason other than death, disability, or retirement, then the RSUs shall be forfeited and no portion shall vest.[11] The RSUs also grant the recipient a cash equivalent to the value of the dividends she would have received had she been the actual owner of the number of shares of common stock represented by the time-based RSUs in the recipient's account on that date.[12] According to Newell, Storm actually received such cash equivalent awards from dividends paid in 2013.[13]

Screenshots of the Fidelity website which explain how an employee could accept award grants demonstrate that for a person to accept them, she must first select that she will accept the grant from a list of "Unaccepted Grants."[14] She would then navigate to a page which explained more fully how to accept them. Therein, a box, titled "Grant Terms and Agreement," states that "[y]ou must read your Grant Agreement and review the terms to continue." Below that is a

[9] Storm Aff., Ex. E. The 2013 Agreements are identical, except for the date of acceptance.
[10] *Id.* § 5(a).
[11] *Id.* § 5(d).
[12] Storm Aff., Ex. E § 4(a).
[13] Letter from Jason C. Jowers, Esquire at 2 (Mar. 24, 2014).
[14] Samalin Aff., Ex. A.

hyperlink to a "Grant Agreement (PDF)" which the user can click to review the agreement. Underneath that hyperlink, a checkbox is accompanied by text which reads: "I have read and agree to the terms of the Grant Agreement." Below that, bold text provides: "To complete your Grant Agreement online, you must read and accept the terms outlined in the document posted above. . . . Your grant acceptance will be final once you click Accept. To cancel the transaction, click the Cancel link." "Previous" and "Accept" buttons appear below as does a link allowing the user to "Cancel." Text under the "Accept" button reads "Submit Grant Acceptance."

In 2013, Storm again clicked the "Accept" button on the Fidelity website and again thought that she was only agreeing to terms relating directly to the RSUs and that her agreement would not impact her post-employment obligations to Newell.[15] Storm recalls that she went through the same steps on the Fidelity website to accept the 2013 Agreements as she went through on previous occasions, which included a "pop-up screen appear[ing] along with a lengthy scrolling message which discussed [her] RSU award."[16]

[15] Storm Aff. ¶ 18.
[16] *Id.* ¶¶ 14, 18.

However, the 2013 Agreements, unlike the prior RSU agreements, contained confidentiality provisions[17] and non-solicitation provisions.[18] The agreements also

[17] The confidentiality provisions provide:

> **(a)** *Definitions.* The following definitions apply in this Agreement:
>
> **(1) "Confidential Information"** means any information that is not generally known outside the Company relating to any phase of business of the Company, whether existing or foreseeable, including information conceived, discovered or developed by the Grantee. Confidential Information includes, but is not limited to: project files, product designs, drawings, sketches and processes; production characteristics; testing procedures and results thereof; manufacturing methods, processes, techniques and test results; plant layouts, tooling, engineering evaluations and reports; business plans, financial statements and projections; operating forms (including contracts) and procedures; payroll and personnel records; non-public marketing materials, plans and proposals; customer lists and information, and target lists for new clients and information relating to potential clients; software codes and computer programs; training manuals; policy and procedure manuals; raw materials sources, price and cost information; administrative techniques and documents; and any information received by the Company under an obligation of confidentiality to a third party.
>
> **(2) "Trade Secrets"** means any information, including any data, plan, drawing, specification, pattern, procedure, method, computer data, system, program or design, device, list, tool, or compilation, that relates to the present or planned business of the Company and which: (i) derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means to, other persons who can obtain economic value from their disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain their secrecy. To the extent that the foregoing definition is inconsistent with a definition of "trade secret" under applicable law, the latter definition shall control.
>
> **(3)** Neither Confidential Information nor Trade Secrets include general skills or knowledge, or skills which the Grantee obtained prior to the Grantee's employment with the Company.
>
> º º º
>
> **(b)** *Confidentiality*
>
> **(1)** During the Grantee's employment and for a period of five (5) years thereafter, regardless of whether the Grantee's separation is voluntary or involuntary or

included language through which the assenting party acknowledged that: (a) the confidentiality and non-solicitation restrictions are reasonable; (b) her ability to work and earn a living are not impaired by the restrictions; and (c) that Newell will

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> the reason therefor, the Grantee shall not use any Tangible Company Property, nor any Confidential Information or Trade Secrets, that comes into the Grantee's possession in any way by reason of the Grantee's employment, except for the benefit of the Company in the course of the Grantee's employment by it, and not in competition with or to the detriment of the Company. . . . [U]pon termination of the Grantee's employment, all Confidential Information, Trade Secrets, and Tangible Company Property (including all paper and electronic copies) will be turned over immediately to the Company, and the Grantee shall retain no copies thereof.
>
> **(2)** During the Grantee's employment and for so long thereafter as such information is not generally known to the public and, through no act or fault attributable to the Grantee, the Grantee will maintain all Trade Secrets to which the Grantee has received access while employed by the Company as confidential and as the property of the Company.
>
> **(3)** The foregoing means that the Grantee will not, without written authority from the Company, use Confidential Information or Trade Secrets for the benefit or purposes of the Grantee or of any third party, or disclose them to others, except as required by the Grantee's employment with the Company or as authorized above.

Storm Aff., Ex. E § 14(a)-(b).

[18] The non-solicitation provisions provide:

> **(d)** *Nonsolictation.* Throughout the Grantee's employment and for twelve (12) months thereafter, the Grantee agrees that the Grantee will not directly or indirectly, individually or on behalf of any person or entity, solicit or induce, or assist in any manner in the solicitation or inducement of: (i) employees of the Company, other than those in clerical or secretarial positions, to leave their employment with the Company . . . ; or (ii) customers or actively-sought prospective customers of the Company to purchase from another person or entity products and services that are the same as or similar to those offered and provided by the Company in the last two (2) years of the Grantee's employment ("**Competitive Products**") (this restriction is limited to customers or actively sought prospective customers with whom the Grantee has material contact through performance of the Grantee's job duties and responsibilities or through otherwise performing services on behalf of the Company).

*Id.* § 14(d).

suffer substantial damage for which no adequate remedy at law exists as a result of a breach of the restrictions.[19] The 2013 Agreements also contained Delaware choice of law provisions and forum selection clauses requiring that suits between Newell and Storm be litigated in Delaware.[20]

According to Storm, Newell asked other employees more directly to sign post-employment restrictive covenants. For example, employees in Newell's Exton, Pennsylvania office who were similarly situated to Storm were given paper copies of the 2013 RSU agreement which also contained answers to frequently asked questions.[21] Similar restrictive covenants were imposed on higher-level employees, such as Newell's President, through employment contracts, instead of through RSU award agreements.[22] Other employees also agreed to similar provisions in separation agreements.[23]

Newell alleges that Storm was the "face" of Newell at Target for the sale of infant and juvenile goods and that during Storm's last two years of employment she was involved primarily in selling to, developing sales strategy for, and maintaining the Company's relationship with Target.[24] Storm was directly

[19] Verified Compl. ¶ 21; *see* Storm Aff., Ex. E § 14(e).
[20] Storm Aff., Ex. E § 17.
[21] Def.'s Answering Br. in Opp'n to Pl.'s Opening Br. in Supp. of Mot. for a TRO ("AB") at 6; Storm Aff., Ex. F.
[22] *See* Storm Aff., Exs. G, H.
[23] *See* Storm Aff., Ex. I.
[24] Verified Compl. ¶ 24.

responsible for over $100 million in sales to Target in 2013.[25] Storm had access to confidential information and trade secrets regarding product pricing, marketing strategies, platform innovation, and business incentives, among other things.[26] She also had access to information about Newell's relationship with Target and access to information relating to the sale of Graco products to other retailers and distributors.[27]

When Storm was contemplating leaving Newell, she searched both her personnel file and her "Employee Connections" page, which contains employment-related information such as compensation and company policies, before she resigned.[28] Those efforts did not uncover any restrictions on subsequent employment, and neither location stored a copy of the 2013 Agreements.

Storm's resignation from Newell on January 2, 2014, became effective on January 7, 2014. Storm, during her exit interview, stated that she was making a "lateral" move to a new employer in the "baby" industry.[29] In January, Newell sent Storm two letters reminding her that she had assented to confidentiality and non-solicitation provisions in the 2013 Agreements.[30] Storm began working for Artsana USA, Inc. ("Artsana") on January 20, 2014. Artsana is a direct Newell

[25] Chapman Aff. ¶ 3.
[26] Verified Compl. ¶ 26.
[27] *Id.* ¶¶ 26-27.
[28] *See* Storm Aff. ¶¶ 21, 24.
[29] Verified Compl. ¶ 30.
[30] *Id.*, Exs. D, F.

competitor and sells infant and juvenile products under the brand name "Chicco," some of which are sold through Target. Newell also sent a letter to Artsana advising it of Storm's obligations under the 2013 Agreements.[31] Newell also alleges that Storm, on December 17, 2013, solicited two coworkers at Newell to leave it and to work for another company which sells children's furniture, although those co-workers did not resign from Newell.

## III. ANALYSIS

A TRO has two purposes: to protect the status quo and to prevent imminent and irreparable harm from occurring before a preliminary injunction hearing or the final resolution of a matter.[32] A TRO may be issued when the movant demonstrates that: (1) it has a colorable claim against the defendant; (2) it would be irreparably injured without interim injunctive relief; and (3) the balance of hardships tips in its favor.[33]

Newell argues it is entitled to a TRO because it has enforceable agreements with Storm in which she agreed to confidentiality and non-solicitation provisions. It asserts that Storm either has breached, or inevitably will breach, the terms of those agreements during her employment in a sales position for a competitor's baby products brand. Because of the difficulties of ascertaining the damages from

[31] *Id.*, Ex. G.
[32] *CBOT Hldgs., Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007).
[33] *Stirling Inv. Hldgs., Inc. v. Glenoit Universal, Ltd.*, 1997 WL 74659, at *2 (Del. Ch. Feb. 12, 1997).

such breaches, Newell seeks a TRO enjoining Storm from soliciting Newell customers, soliciting Newell employees, and divulging or using Newell's confidential information or trade secrets.

Storm argues that if the party seeking a TRO has "had an opportunity to develop evidence and present a more complete record"[34] from which the Court can make a more informed judgment concerning the merits of the case, the Court should apply a standard more akin to that of a preliminary injunction and determine whether there is a probability of success on the merits. Storm argues that, because Newell delayed filing its TRO application until February 28, 2014, and knew of her departure in early January, this higher standard should apply.[35]

However, Newell points out that Storm was unwilling to reveal which company she would work for after resigning from Newell and part of its delay in filing suit was related to identifying Storm's new employer. Newell also asserts that part of its delay was brought about by its desire to seek an accommodation with Storm. Because both of these reasons for delay are reasonable and the delay has not resulted in a materially superior factual record, the Court concludes that the typical colorable claim standard should apply.

[34] *Roseton OL, LLC v. Dynegy Hldgs. Inc.*, 2011 WL 3275965, at *8 (Del. Ch. July 29, 2011) (quotation and citation omitted).
[35] Storm argues that this result is compelled by *Roseton*, where the plaintiffs delayed the filing of their request for a TRO for 12 days. *See id.*

Finally, this motion also presents a novel question for this jurisdiction, involving the enforceability of agreements which are assented to online, such as the 2013 Agreements.[36] Another novel question addresses whether RSU grants are sufficient consideration if the employer is able to terminate the employee at will and thereby cause the employee to lose her award.

A. *Did Storm Assent to the Post-Employment Covenants in the 2013 Agreements?*

Newell argues that clickwrap agreements, such as the 2013 Agreements that Storm accepted, are routinely recognized by courts and thus Storm's belief that the 2013 Agreements were like earlier RSU agreements to which she had assented does not create a defense to enforcement. Storm counters that the parties to the 2013 Amendments did not mutually assent to their terms because of Newell's failure to indicate on the Fidelity website that Storm was modifying her post-employment rights.

[36] Delaware courts have considered the related issue of "shrinkwrap" agreements in which contract terms appear on or inside a product's packaging and become enforceable after a consumer opens it. *See, e.g.*, *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369, at *3-5 (Del. Ch. Mar. 16, 2000), *aff'd*, 763 A.2d 92 (Del. 2000) (upholding arbitration clause found within "shrinkwrap" agreement, although not referring to the agreement by that name); *Rinaldi v. Iomega Corp.*, 1999 WL 1442014 (Del. Super. Ct. Sept. 3, 1999) (upholding disclaimer of the implied warranty of merchantability found within "shrinkwrap" agreement). Newell also argues that cases in which parties assent to an agreement through email communications provide a model for finding in its favor. *See* Pl.'s Opening Br. in Supp. of Mot. for a TRO ("OB") at 17 (citing *Bryant v. Way*, 2011 WL 2163606, at *4-5 (Del. Super. Ct. May 25, 2011)). Cases discussing general principles of contract formation have relevance, but those cases addressing contract formation in the context of e-commerce are more relevant here because Storm accepted through the internet, by clicking a button, a form agreement provided by her employer. She did not engage in a negotiation in an electronic medium in which both parties were directly involved in structuring the agreement.

"A contract is valid if it manifests mutual assent by the parties and they have exchanged adequate consideration."[37] The use of the internet as the vehicle for contract formation "has not fundamentally changed the principles of contract."[38] The "threshold issue is the same: did the [party who assented online] have reasonable notice, either actual or constructive, of the terms of the putative agreement and did [that party] manifest assent to those terms."[39]

Storm voluntarily accepted the RSU awards she received in 2013, and she had reasonable notice that she was manifesting her acceptance of the 2013 Agreements by clicking "Accept" on the Fidelity web portal. Screenshots documenting how employees accept the RSU awards on the Fidelity website demonstrate that a user would have to click a box next to a sentence in bold reading: "I have read and agree to the terms of the Grant Agreement."[40] A link to the Grant Agreement (PDF), appeared above the checkbox. Finally, below the check box and above the "Accept" button, an additional instruction was present, in bold, which read: "To complete your Grant Agreement online, you must read and

[37] *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 WL 902406, at *4 (Del. Ch. Apr. 3, 2008).
[38] *Van Tassell*, 795 F. Supp. 2d at 789 (citation omitted).
[39] *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1149 (D. Colo. 2012), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013). The bracketed portion of the quotation uses the term "consumer" because many of the cases applying traditional contract law in an electronic medium are based upon consumer relationships. The Court sees no reason why such holdings are not equally applicable here in the context of employment and indeed Storm impliedly acknowledges her agreement by arguing cases such as *Schnabel*, *see infra* note 42, should result in a determination in her favor.
[40] *See* Samalin Aff., Ex. A.

accept the terms outlined in the document posted above. . . . Your grant acceptance will be final once you click Accept. To cancel this transaction, click the Cancel link."[41] These are clear terms that would place a user on actual notice that she was assenting to an agreement.

Storm relies heavily on *Schnabel v. Trilegiant Corp.*, which states that "the mere acceptance of a benefit . . . may constitute assent, but only where the 'offeree makes a decision to take the benefit with knowledge [actual or constructive] of the terms of the offer . . . .'"[42] She seeks to have the Court conclude that "[a]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."[43] However, *Schnabel* considered an arbitration provision which was emailed to parties after enrolling in an online service and thus is more focused on whether later-provided terms are part of an agreement.[44] Here,

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[41] *See id.*

[42] *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (alternations in original) (quoting Restatement (Second) of Contracts § 19(2)).

[43] *Id.* (citation omitted).

[44] The other two cases upon which Storm relies are distinguishable. The first involves a "browsewrap" license, which often fails to provide adequate notice before assent. *See Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 594-95 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002). It is therefore factually distinguishable from the present circumstances. The second case relies on California law to invalidate an agreement, which Storm refers to as a "browse-wrap agreement," as unconscionable. *See Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002); AB at 19 n.17. California's test for unconscionability apparently reviews a contract to determine if it is both procedurally and substantively unconscionable. The *Comb* court determined that the agreement at issue was procedurally unconscionable because it was found to be a contract of adhesion and was substantively unconscionable because only the company could enforce the arbitration provision, but the consumer could not, and thus no

Storm accepted a benefit from her employer, additional RSUs, which she supported with new consideration, such as the post-employment restrictive covenants. Furthermore, the contractual nature of the 2013 Agreements was obvious and the restrictive provisions were not inconspicuous.[45]

Nonetheless, *Schnabel*'s concern with the reasonable expectations of the parties is relevant in the context of contract formation. Storm thus argues that the manner in which she agreed to the restrictive post-employment covenants did not manifest mutual assent or was unconscionable. She contends that her history of reviewing RSU agreements on Fidelity's website did not put her on notice that employment-related covenants might be contained in future agreements and that she had reasonable expectations that the subject matter of such agreements would be limited in scope to matters concerning RSUs. In addition, she argues that Newell's treatment of other similarly situated employees or higher-level employees would have been a more appropriate method of putting her on notice of the content of the 2013 awards.

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mutuality was present. Delaware's unconscionability doctrine will inquire whether the plaintiff had "a meaningful choice and [whether] the contract terms [] unreasonably favored Defendant." *Bryant v. Way*, 2012 WL 1415529, at *11 (Del. Super. Ct. Apr. 17, 2012) (citing *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978)) ("The test for unconscionability is whether the provision amounts to the taking of an unfair advantage by one party over the other." (citation and quotations omitted)). Here, the contractual terms did not unreasonably favor Newell. Rational parties could conclude that accepting the RSUs in exchange for assenting to certain post-employment restrictions was reasonable.

[45] They were in normal-sized font, preceded by clear titles, and were easily ascertainable had Storm read the 2013 Agreements.

The Court concludes that Newell's method of seeking Storm's agreement to the post-employment restrictive covenants, although certainly not the model of transparency and openness with its employees,[46] was not an improper form of contract formation. Storm, to accept her RSUs, was directed to a screen which informed her in several places that she was agreeing to the 2013 Agreements. Storm admits that she clicked the checkbox next to which were the words "I have read and agree to the terms of the Grant Agreement." This functions as an admission that she had the opportunity to review the agreement (even if she now states she did not read it despite her representation that she did) upon which Newell was entitled to rely. Her actions of clicking the checkbox and "Accept" button were manifestations of assent. She even admits that she clicked on the hyperlink which contained the restrictive covenants when she states that the procedures for accepting the 2013 Agreements were the same as the earlier RSU awards she accepted which included a pop-up screen with a "lengthy scrolling message which discussed [her] RSU award."[47] Storm thus assented after being provided with, and after acknowledging, actual notice.

[46] If Newell's email to Storm notifying her of her grant of RSUs stated that her post-employment rights would be modified, perhaps this litigation would have been unnecessary. Such a solution likely requires only a slight modification to a form email and would remove the element of surprise that Storm seems to have been met with here.

[47] Storm Aff. ¶¶ 14, 18.

It is not determinative that the 2013 Agreements were part of a lengthy scrolling pop-up.[48] Storm's failure to review fully the terms (on a 10-page readily accessible agreement) to which she assented also does not invalidate her assent. A party may assent to an agreement on the internet without reading its terms and still be bound by it if she is on notice that she is modifying her legal rights, just as she may with a physical written contract.[49] The Court also will not conclude that Storm was entirely helpless or that Newell lacked a justification for seeking such restrictions. She was an experienced employee who managed a significant client relationship worth over $100 million annually and Newell apparently believed the retention of her services merited RSU grants for three years.

Storm is understandably unhappy that she did not read the 2013 Agreements; however, she was presented with a fair opportunity to do so, opened up the appropriate pop-up from which she could do so, and even indicated through the

[48] *See Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, at *11 (S.D.N.Y. Oct. 16, 2006) ("Although it is true that the individual would have had to scroll down through about 38 screens to read the Customer Agreement in its entirety (including 30 screens before reaching the arbitration provision), it is not significantly more arduous to scroll down to read an agreement on a computer screen than to turn the pages of a printed agreement; that an individual must go through multiple computer screens to read an agreement does not in and of itself mean that he should not be bound by his consent to the agreement as manifested by his clicking of the 'accept' button.").

[49] *See id.* ("And the fact that an individual could click the 'Accept' button without having to scroll down to the end of the agreement does not mean that an individual's clicking of the 'accept' button is therefore inherently meaningless; indeed, an individual who signs or otherwise assents to a contract without reading it is bound by that contract, including its arbitration provision." (citations omitted)). Here, Storm is not claiming that she did not open the 2013 Agreements, but that she did not read them. *Bar-Ayal* explicitly rejected such a defense. The Court concludes that a similar outcome is appropriate here as well.

checkbox that she did so. She altered her post-employment rights in a manner she appears to regret now, but it was her choice to modify her rights without fully investigating the terms to which she agreed.

Furthermore, there is nothing inherently improper about conditioning the grant of RSUs on restrictive covenants. The plan upon which her earlier RSU agreements were based and which they explicitly referenced provided that Newell might condition future awards on restrictive covenants. Thus, to the extent Storm argues she read earlier RSU documentation, but not the 2013 Agreements, she was on notice that such a change could later be included.

In sum, the 2013 Agreements were validly assented to and created, assuming adequate consideration, an enforceable contract between Storm and Newell. As the Delaware Supreme Court has observed:

> It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission.[50]

These principles remain applicable even when two parties utilize technology to distribute agreements and to assent to them online.

[50] *Pellaton v. Bank of New York*, 592 A.2d 473, 477 (Del. 1991) (citing *Upton, Assignee v. Tribilcock*, 91 U.S. 45, 50 (1875)).

B. *Was the Consideration for the Non-Competition Covenants Illusory?*

Storm next argues that the 2013 Agreements were supported only by illusory consideration and are therefore unenforceable. This is so, she contends, because the 2013 Agreements would cause Storm to forfeit her awards if Newell terminated her, which it could do at its sole discretion and without cause because she was an at-will employee. Storm urges the Court to follow other jurisdictions which reject consideration as illusory if it will be forfeited if the employee is fired before vesting occurs[51] or which otherwise reject this form of consideration as inadequate.[52] She also asserts that the RSUs were awarded before Storm visited Fidelity's website to accept them and that her acts were merely ministerial.

Newell points out that the authority upon which Storm relies to argue that the RSUs were illusory consideration, reached its conclusion in part based on Texas law that, in an at-will employment context, "consideration for a promise, by either the employee or the employer, cannot be dependent on a period of continued employment."[53] Moreover, other authority has concluded that an RSU award was not illusory, even where the units vested over time and the employer could

[51] *See Olander v. Compass Bank*, 363 F.3d 560, 565-66 (5th Cir. 2004) (applying Texas law).
[52] *See Sturgis Equipment Co., Inc. v. Falcon Industrial Sales Co.*, 930 S.W.2d 14 (Mo. App. 1996).
[53] *Olander*, 363 F.3d at 565 (alterations in original omitted) (citing *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644-45 (Tex. 1994), *modified by Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006), *and abrogated on other grounds by Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011)).

withdraw the award by terminating the employee.[54] Authority also exists which upholds restrictive covenants granted in the context of stock option awards that are entirely at the discretion of the board in an at-will employment context.[55]

Our law permits continued employment to "serve as consideration for an at-will employee's agreement to a restrictive covenant."[56] This principle of our law distinguishes the grounds upon which, for example, *Olander*'s holding was based, although it does not necessarily compel a conclusion that such RSUs are not illusory consideration. However, those cases holding that RSUs awards are not illusory, even if the RSUs may be forfeited through termination without cause, seem to the Court to reach the more sound conclusion.

The Court concludes that the 2013 Agreements are not illusory for two reasons. First, Storm was granted a benefit that held actual value. That value is somewhat contingent, based on certain factors such as the time period in which the units will vest and Storm's likelihood of future employment, but nonetheless is not illusory. Second, Storm's likelihood of future employment, although perhaps not precisely knowable, is likely high in this circumstance. Newell awarded Storm the RSUs because it recognized the value of her contribution to the Company and

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[54] *See United Healthcare Servs., Inc. v. Richards*, 2010 WL 3895705, at *4 (W.D.N.C. Sept. 30, 2010) *adopting report and recommendations of* 2010 WL 3895709, at *2-4 (W.D.N.C. July 2, 2010). Another case upheld such a grant where the employee's consideration was allegedly illusory. *See Verizon Commc'ns. Inc. v. Pizzirani*, 462 F. Supp. 2d 648, 656-57 (E.D. Pa. 2006).
[55] *See Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 491 (D.N.J. 1999).
[56] *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *3 (Del. Ch. Aug. 9, 2004).

wanted to incentivize her to remain as one of its employees. Thus, although Storm argues that Newell could fire Storm for any or no reason, doing so was not costless to Newell: it would lose the benefit of a valued employee.

Although the 2013 Agreements contemplate a contingency—some deterioration of the relationship between the employer and the employee—which would then cause the grants to be forfeited, the inclusion of such a contingency does not convert the RSUs into illusory consideration. Moreover, Newell asserts that Storm also received consideration of the cash equivalent of dividends in 2013 and thus has actually received consideration supporting her promises. Thus, independent consideration exists under Storm's awards which cannot be considered illusory.

The Court also will not reject the consideration as inadequate because Delaware courts "limit our inquiry into consideration to its existence and not whether it is fair or adequate."[57] Finally, Storm's claim that her acceptance of the RSUs on the Fidelity website was only ministerial is an unsupported assertion. She has not adequately explained how a contract was formed before she manifested her assent to accept the RSUs. The language of the Fidelity website is at odds with Storm's theory because it is explicit that the grant awards have not

[57] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quotation and citation omitted) ("Mere inadequacy of consideration, in the absence of any unfairness or overreaching, does not justify a denial of . . . specific performance where in other respects the contract conforms with the rules and principles of equity.").

been accepted until certain specific actions are taken by the employee through the website. Without a more developed argument or evidence supporting her assertion, the Court reiterates its earlier determination that Storm's clicking of the checkbox and "Accept" button manifested her acceptance of the 2013 Agreements.

Accordingly, Newell's consideration in support of Storm's promises was not illusory and is adequate. Storm's arguments that the non-competition covenants of the 2013 Agreements are unenforceable are unavailing.

C. *Has Newell Demonstrated its Entitlement to a Temporary Restraining Order?*

1. Has Newell Stated a Colorable Claim?

The party seeking a TRO "need only state a colorable claim for relief, which is essentially a non-frivolous cause of action."[58] Storm bases her arguments that no colorable claim exists on her position that the 2013 Agreements are not enforceable. Because the Court has concluded otherwise, it rejects Storm's arguments. Furthermore, Storm's brief appears to concede that she has already been in contact with Target during her brief period of employment with Artsana.[59] Such activity is sufficient to state a colorable claim that she is breaching her non-solicitation covenant.

[58] *Reserves Dev. Corp. v. Wilmington Trust Co.*, 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008) (citation omitted).
[59] Pl.'s Reply Br. in Supp. of Mot. for a TRO at 3 (citing AB at 34).

Storm also argues that Newell has not identified with appropriate specificity the trade secrets at issue in the misappropriation claim and that no evidence supports Newell's allegations that it is inevitable that Storm would share with Artsana the information learned during her tenure with Newell. Injunctive relief may be appropriate if evidence exists which casts doubt on the trustworthiness of a former employee, such as Storm, such that disclosure of trade secrets would be inevitable if she were allowed to resume working in a particular area of the industry[60] or if the use or disclosure of confidential information is threatened.[61]

Newell asserts that Storm was responsible for over $100 million in annual sales of Graco products to Target and had access to information about Graco's product line, information regarding current products, new products, services, pricing, business and sales plans, marketing plans, contracts, and customer contacts.[62] Storm also had access to confidential information and trade secrets regarding Newell's and Graco's relationship with and sales to other non-Target customers with which Artsana also does business. Storm is unwilling to acknowledge her obligations to Newell. Finally, Newell again points out that Storm's brief indicates that she has already been in contact with Target during her

[60] *See W.L. Gore & Associates, Inc. v. Wu*, 2006 WL 2692584, at *10 (Del. Ch. Sept. 15, 2006).
[61] *See E.I. du Pont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428, 435-36 (Del. Ch. 1964).
[62] OB at 23 (citing Chapman Aff. ¶¶ 4-5; Roderbaugh Aff. ¶¶ 4-5).

employment at Artsana.[63] If these allegations are true, they are sufficient to support a colorable claim that confidential information or trade secrets could be disclosed in Storm's role with a direct Newell competitor in the baby and juvenile products industry in violation of her obligations. They also support a colorable claim that Storm has been soliciting Target.

2. Has Newell Demonstrated Irreparable Harm?

Storm argues that Newell cannot make a "clear showing of imminent irreparable harm" because of the vague, conclusory allegations of harm to its relationship with customers and because Storm was only one of 17 employees who worked with Target at Newell. She also contends that Target's representative with both Newell and Artsana recently left Target and thus both companies need to rebuild relationships with Target's new baby products buyer. Finally, she argues that the amount of sales for which she was responsible is less than two percent of Newell's total business and thus the harm is minimal.[64]

It, of course, is not abnormal for this Court to grant injunctive relief to enforce post-employment restrictive provisions.[65] Newell correctly asserts that it

[63] *See supra* note 59.
[64] AB at 30.
[65] *See, e.g.*, *Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at *18 n.93 (Del. Ch. Jan. 17, 2007) *judgment entered*, 2007 WL 2768777 (Del. Ch. Jan. 23, 2007) (discussing earlier cases using injunctive relief as the primary tool of enforcing covenants not to compete); *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 (Del. Ch. Apr. 15, 2004) (finding irreparable harm based on violation of non-solicitation agreement); *Stirling Inv. Hldgs., Inc.*, 1997 WL 74659, at *2 (finding irreparable harm based on breached confidentiality agreement).

has no adequate remedy at law for the value of any business lost to Artsana through Storm's solicitation efforts or for the harm that may arise from disclosure of confidential information or trade secrets. Storm's argument that Target's business represents less than two percent of Newell's total business is unpersuasive; that business is nevertheless worth $100 million and Newell is permitted to protect it. Similarly, even if 16 other employees of Newell remained with it, it may still enforce its rights against a single key employee who departed. Finally, even if both Artsana and Newell must develop new relationships with a key contact at Target, Storm's knowledge of Target's processes and the level of responsibility she formerly held entitle Newell to protect its business from her solicitation efforts.

Moreover, Storm's arguments ignore her assent to Section 14(e)(2) of the 2013 Agreements, in which she agreed that Newell would "suffer substantial damage for which there is no adequate remedy at law due to the impossibility of ascertaining exact money damages" should she breach the restrictive covenants in those sections.[66] Such stipulations as to irreparable harm have been held to be sufficient to establish that element in order to issue preliminary injunctive relief.[67]

[66] Storm Aff., Ex. E § 14(e)(2).
[67] *Cirrus Hldg. Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001) (citations omitted).

Thus, the Court concludes that Newell has made a sufficient showing that it will suffer irreparable harm.

3. Does the Balance of Equities Favor Newell?

Storm primarily relies on authority from another jurisdiction to argue that the balance of hardships favors her.[68] However, the balance of the harms appears to favor Newell because Storm is not being asked not to work, or even not to work for a direct competitor, but to acknowledge and comply with those obligations to which she consented under the 2013 Agreements. She is free to continue her employment with Artsana, though she is being asked to honor her agreement, supported by consideration, that she not solicit Target on behalf of a competitor. This is not an undue hardship for Storm to bear.

Furthermore, Storm was responsible for $100 million worth of business with Target. Even if Target's primary contact is no longer employed there and both Graco and Artsana need to develop a new relationship with that key contact's replacement, Storm's institutional knowledge of the client, proximity to it, and the value of the business for which she had responsibility at Graco persuade the Court that Graco would suffer harm if Storm were allowed to apply that knowledge to benefit a direct competitor. The Court concludes that the balance of harms therefore favors Newell.

[68] AB at 31-32 (citing *Hess v. Gebhard & Co.*, 808 A.2d 912, 920 (Pa. 2002); *Christopher M.'s Handpoured Fudge, Inc. v. Hennon*, 699 A.2d 1272, 1275 (Pa. Super. 1997)).

D. *Does Laches Bar Newell's Claim?*

Storm further argues that Newell's application for a TRO must be denied because it unreasonably delayed filing this action, resulting in prejudice to Storm. Laches generally requires proof of: "(1) knowledge of a claim by the claimant; (2) unreasonable delay in bringing the claim; and (3) resulting prejudice to the nonmovant."[69] Storm asserts that Newell's two-month delay from the time that it knew of her departure to the time that it brought suit was unreasonable and asserts generally that this prejudiced Storm, apparently because she already has sought employment with Artsana without knowledge that Newell might seek injunctive relief.

As Storm points out, "[a]n unreasonable delay can range from as long as several years to as little as less than one month, but the temporal aspect of the delay is less important than the reasons for it."[70] On these facts, Newell's delay was not unreasonable. It sought through several letters to resolve the matter without judicial intervention until the end of January. Although some additional delay occurred after that time, Newell asserts that, despite its earlier letter to Artsana, it was still uncertain about the identity of Storm's new employer and had not learned that Storm had contacted Target until that point. Newell's delay which

[69] *Roseton OL, LLC*, 2011 WL 3275965, at *7.
[70] *Id.* (citation omitted).

resulted from a desire to seek an accommodation[71] or which was motivated by its desire to better understand the factual circumstances underlying its claims was not unreasonable. Newell's claim is therefore not barred by laches.

## IV. CONCLUSION

This result may appear somewhat harsh given Storm's seemingly genuine belief that she had no post-employment restrictive covenants in place with her employer. However, the decision was reached by applying the well-settled principles and conclusions of persuasive authority concerning contract formation on the internet. Unfortunately, Storm finds herself in this position because of her willingness to accept an agreement without reviewing its terms when there should have been no doubt that she was assenting to a valid, enforceable contract. Although the Court sympathizes with the state in which she finds herself, it concludes that parties under Delaware law have the same ability, prevalent in other jurisdictions, which they have with respect to paper agreements: to assent to such agreements even without reading them and to bear the consequences. The Court will enforce such agreements as it would an agreement written on paper.

[71] *See Doskocil Cos. Inc. v. Griggy*, 14 Del. J. Corp. L. 661, 667 (Del. Ch. 1988) (where movant apparently believed an accommodation could be reached with the nonmovant).

An implementing order will be entered.[72]

[72] The non-solicitation aspect of the order will be limited to Target because there is no showing of any likelihood that Storm would work with any other retailer and gain a special benefit from her employment with Newell in working with other retailers. The order will also include a requirement that Newell post a bond in order to assure Storm's ability to recover damages if it turns out that the TRO was improperly issued. *See Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010) ("A party that is wrongfully enjoined may recover damages resulting from the injunction, but that recovery is limited to the amount of the bond."). The Court acknowledges that the 2013 Agreements (Section 14(e)(2)) purport to relieve Newell of any obligation to post security.