

FILED - CLERK OF COURT  
STATE OF SOUTH CAROLINA GREENVILLE CO. S.C. COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE PAUL B. WICKENSIMMER Civil Action No. 2015-CP-23-03546

CHEMGARD, INC., 2015 JUL 17 PM 4 47

Plaintiff,

v.

DARRELL KEITH HAYNES AND  
CHEM-TEK, LLC,

Defendants.

ORDER

RECEIVED  
SEP 17 2015  
SC Court of Appeals

This matter comes before the court on Plaintiff's Motion for Preliminary Injunction, which seeks to enforce a non-solicitation provision contained in an Employment Agreement between Plaintiff and Defendant Darrell Keith Haynes ("Haynes"). Both parties presented memorandums of law and affidavits in support of their respective positions and were represented by counsel at a hearing on July 6, 2015. After a full consideration of the legal and factual issues presented to this Court, this Court finds and rules as follows:<sup>1</sup>

**I. FINDINGS OF FACT**

1. Plaintiff is a citizen and resident of the County of Greenville, South Carolina. Defendant Haynes is a citizen and resident of the State of Georgia.
2. Chemgard is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

<sup>1</sup> The Court's findings of fact and conclusions of law are preliminary in nature and based upon the record before it, including the Verified Amended Complaint, Employment Agreement at issue, Affidavit of Darrell Keith Haynes, Memorandums submitted by the parties and arguments of counsel during the hearing. Such factual findings and conclusions of law based upon them in this Order may ultimately be proven or disproven by evidence unearthed and/or established in the discovery process and brought forth at a trial on the merits.

1 *Mg #1*

3. On September 15, 2000, Chemgard hired Defendant Haynes, and Haynes signed an Employment Agreement with Chemgard before beginning his employment.

4. This agreement contained a non-solicitation provision. In the agreement, Haynes covenanted:

that during the course of his/her employment by the Company and for a period of twenty-four (24) months after termination of his/her employment, he/she will not:

(i) [s]olicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company.

(Agreement at ¶ 9(d)(i)).

5. Haynes was employed as a salesman for the territory of Georgia and Alabama, although Plaintiff claims he was not limited to this territory. During the course of his employment, Haynes was the only Chemgard salesman in Georgia.

6. Because of Haynes's agreement to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and other information it claims to be confidential.

7. When Haynes started at Chemgard, Chemgard provided Haynes with multiple current customer accounts worth approximately \$200,000.00 in billings. Haynes was responsible for promoting sales growth and for regularly servicing the established customer accounts.

8. On May 10, 2015, Haynes voluntarily resigned from Chemgard without providing Chemgard with the contractually-required 30-days' written notice. On May 11, 2015, Haynes began working for Defendant Chem-Tek, LLC ("Chem-Tek"), a competitor of Plaintiff.

9. After his resignation, Haynes began engaging in direct solicitation of Chemgard's existing customers on behalf of Chem-Tek. Several of Chemgard's customers have since cancelled their accounts with Chemgard and switched to Chem-Tek.

10. Such solicitation is a violation of the non-solicitation provisions of Haynes's Employment Agreement.

11. Plaintiff is currently without a salesman in Georgia and Alabama to service the accounts that Haynes was servicing prior to his resignation.

12. Evidence presented by the Defendants, including the Affidavit of Darrell Keith Haynes, showed that Mr. Haynes serviced customers exclusively in Georgia and Alabama during his employment with Chemgard. (Haynes Aff. ¶ 11). Defendants claim that Mr. Haynes left his employ with Chemgard due to intolerable and unworkable conditions created by the principles of Chemgard. (Haynes Aff. ¶ 13).

## II. CONCLUSIONS OF LAW

### 1. Plaintiff Successfully Established Entitlement to Injunctive Relief

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, Plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). To establish entitlement to an injunction, the plaintiff must show that "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908.

#### A. **Chemgard presented sufficient evidence to establish it may suffer irreparable harm in absence of an injunction**

Chemgard has presented sufficient evidence to establish a *prima facie* case that it has suffered and will continue to suffer irreparable injury in the form of lost business, lost customer goodwill, and a damaged business reputation if Haynes is not prevented from soliciting

124<sup>3</sup> #3

Chemgard's current customers on behalf of his new employer. If a court's failure to grant a preliminary injunction creates the *likelihood* of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994); "Irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." *Id.* at 552 (quoting *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985)). As a salesman for Chemgard for almost fifteen years, Haynes had access to and retains extensive knowledge of Chemgard's customers and pricing. If Haynes is, as Plaintiff claims, using this information to solicit Chemgard's customers with knowledge of Chemgard's alleged confidential information it may likely result in permanent damage to Chemgard's relationship and goodwill with its customers. Therefore, the Court finds an injunction is appropriate in order to guard against this potential irreparable harm.

**B. Chemgard Has Made a *Prima Facie* Showing that it Will Likely Succeed on the Merits**

Plaintiff has presented evidence sufficient to make a *prima facie* showing that it will likely succeed on the merits of this case at trial on one or more of its claims. *Transcon Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made.").

Based upon the allegations in the Verified Amended Complaint and evidence presented to the Court Haynes remains bound by the restrictive covenants which he voluntarily signed before beginning employment with Chemgard. It is well-settled that while contracts in general

restraint of trade are against public policy, those in partial restraint, supported by valid consideration, and which are reasonable in their operation, are valid and binding. *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533, 536 (S.C. 1961).

South Carolina courts have applied the following test to determine whether covenants not to compete should be upheld:

1. The covenant must be necessary for the protection of the employer's legitimate interests;
2. The provisions must be reasonably limited as to time and space;
3. Provisions must not be unduly harsh in curtailing the employee's legitimate effort to earn a livelihood;
4. The covenant must be reasonable from the standpoint of public policy; and
5. The covenant or contract containing the covenant not to compete must be supported by valuable consideration.

*Stringer*, 424 S.E.2d at 548.

The restrictive covenants in Haynes' Employment Agreement appear to meet all of these requirements for enforceability under South Carolina law. Accordingly, Plaintiff has made a *prima facie* showing that it will likely prevail on the merits.

**1. The Restrictive Covenant is Designed to Protect Chemgard's Legitimate Business Interests**

One element of Chemgard's legitimate business interest in upholding the non-solicit is the protection of its stock of customers, which is "the most important single asset" of the business. *Standard Register*, 119 S.E.2d at 539 (emphasis added); see also *Dove Data Products, Inc. v. Murray*, 2006 WL 463588, \*3 (D.S.C. Feb. 23, 2006).

Additionally, an employer has a legitimate interest in preventing disclosure and use of confidential, trade secret, or other proprietary information or knowledge that the employee has no right to reveal to the extent the employer has a protectable trade secret and/or the employee

possess and is utilizing such information. *See Wolf*, 420 S.E.2d at 222 (to the extent the information is useful to the new employer in selling its products, it is detrimental to the old employer who had the restriction).

Based upon what has been presented to the Court, it appears that the restrictive covenants in this case are tailored specifically to protect Chemgard's business interests and relationships with its existing customers, and also to prevent knowledge and information about Chemgard's detailed customer contact information and business strategies from being used against them by competitors like Haynes and his new employer. As such, the restrictive covenants appear to serve a legitimate purpose, and the evidence before the Court at this stage does not show they are overly broad as exceeding the boundaries necessary to protect such business interests.

**2. The Restrictions Contained in the Employment Agreement are Reasonable in Scope, Time, and Place.**

The non-solicitation compete covenant in the Employment Agreement contains customer-based rather than geographic restrictions. This two-year, customer-based restriction is nearly identical to others that South Carolina courts have upheld as reasonable and enforceable. As noted above, covenants with temporal duration of two years have repeatedly been enforced in South Carolina. *See supra; Rockford Mfg.*, 296 F. Supp. 2d at 689. Similarly, customer-based restrictions, such as Haynes's non-solicitation covenant, have been recognized as reasonable and enforceable under South Carolina law. *Rockford Mfg*, 296 F. Supp. 2d at 689.

**3. None of the Restrictive Covenants by which Haynes is Bound Unduly Affect His Efforts to Earn a Livelihood.**

The restrictions on Haynes are reasonable as they are limited in time and scope. The non-solicit is enforceable for a period of two years and does not continue indefinitely. Haynes is free to work as a salesman anywhere he wants as long as he does not solicit Chemgard's customers.

*[Handwritten signature]*

This does not appear to create an undue burden on Haynes to earn a living and therefore is appropriate to be enforced against him.

**4. The Covenants Applicable to Haynes are Reasonable from the Standpoint of Public Policy.**

The public interest is best served by upholding and enforcing the valid contractual agreements between two private parties. "Sound public policy generally requires the enforcement of contracts freely entered into by the parties." *Wolf*, 420 S.E.2d at 221. No public interest would be affected by an order enjoining and restraining Haynes from violating his non-solicitation, because Chemgard and its competitors will continue to provide their services to their customers and the general public. Consequently, public policy rests in favor of Chemgard.

**5. The Employment Agreement was Supported by Valuable Consideration.**

Haynes was required to sign his Employment Agreement as a condition of being hired by Chemgard; that is, the Agreement was ancillary to his initial contract of employment. Therefore, under South Carolina law, there was valuable consideration sufficient to support Haynes's promises in the Employment Agreement.

**D. Chemgard Does Not Have an Adequate Remedy At Law.**

The final factor for Court to consider is whether Chemgard has an adequate remedy at law. The alleged damage that is being done, and will continue to be done to Chemgard's business and goodwill is irreparable. If confidential information is used to solicit a Chemgard customer, the future lost income becomes difficult, if not impossible, to calculate with the requisite customer. There is no adequate remedy at law for the permanent loss of a customer or the damage to Chemgard's goodwill. Unless Haynes is immediately enjoined from breaching the Agreement, Chemgard's business, confidential information and customer relationships may be permanently impaired.

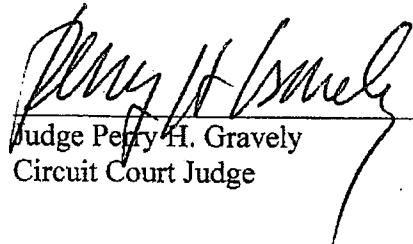
**III. CONCLUSION**

Accordingly, based upon these finding of fact and conclusions of law, this Court grants Plaintiff's Motion for Injunctive Relief as follows:

Defendant Haynes is enjoined from soliciting or calling on, either directly or indirectly, any business or entity that was a customer of Chemgard as of May 10, 2015, for the purpose of selling any products or services sold by Chemgard or any products or services similar to those sold by Chemgard for a period of two years from the date of May 10, 2015 or until a trial can be had on the merits, whichever is earlier.

Chemgard shall obtain and post a security bond with the Greenville County Clerk of Court in the amount of Fifteen Thousand 00/100 (\$15,000.00) Dollars as required under Rule 65 of the South Carolina Rules of Civil Procedure.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Judge Perry H. Gravely  
Circuit Court Judge

Date: July 15, 2015

**Power of Attorney  
FIDELITY AND DEPOSIT COMPANY OF MARYLAND**

KNOW ALL MEN BY THESE PRESENTS: That the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, by THEODORE G. MARTINEZ, Vice President, and ERIC D. BARNES, Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which are set forth on the reverse side hereof and are hereby certified to be in full force and effect on the date hereof does hereby nominate, constitute and appoint **Hugh B. MCGOWAN, Hugh M. MCGOWAN, Sheila K. FREDERICK and Carl BOYER**, all of **Indianapolis, Indiana**, EACH its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed: , each in a penalty not to exceed the sum of **ONE MILLION DOLLARS (\$1,000,000)** and the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Md., in their own proper persons. This power of attorney revokes that issued on behalf of Hugh B. MCGOWAN, Nancy A. TAYLOR, Hugh M. MCGOWAN, Sheila K. FREDERICK, Cynthia A. SHANE, Carl BOYER, dated September 18, 2006.

The said Assistant Secretary does hereby certify that the extract set forth on the reverse side hereof is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 2nd day of October, A.D. 2006.

ATTEST:

**FIDELITY AND DEPOSIT COMPANY OF MARYLAND**



*Eric D. Barnes*

Eric D. Barnes     Assistant Secretary

*Theodore G. Martinez*

By:     Theodore G. Martinez

State of Maryland }  
City of Baltimore } ss:

On this 2nd day of October, A.D. 2006, before the subscriber, a Notary Public of the State of Maryland, duly commissioned and qualified, came THEODORE G. MARTINEZ, Vice President, and ERIC D. BARNES, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.



*Maria D. Adamski*

Maria D. Adamski     Notary Public  
My Commission Expires: July 8, 2007



**Fidelity and Deposit Company of Maryland**  
Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

State of South Carolina  
COUNTY OF Greenville

IN THE Common Pleas COURT  
CAUSE NO.

**Chemgard, Inc**  
Plaintiff

-vs-

**Darrell Keith Haynes and Chem-Tek, LLC**  
Defendant

**INJUNCTION BOND**

We undertake that the plaintiff in the above entitled cause shall pay to the defendant all damages and costs which may accrue to him by reason of the injunction of this action, not to exceed the sum of (\$15,000.00) Fifteen Thousand and NO/100 Dollars.

Witness our hands this 8<sup>th</sup> day of July 2015.

\_\_\_\_\_  
BY:

\_\_\_\_\_  
FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: \_\_\_\_\_

Attorney-in-fact

Carl L. Boyer

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
JUDGMENT IN A CIVIL CASE  
CASE NO: 2015CP2303546

2015 JUL 17 PM 4 47

Chemgard Inc vs. Darrell Keith Haynes

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a),  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy:  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
**PRESIDING JUDGE -**

This judgment was entered on the 17th day of July, 2015, and a copy mailed first class this 17th day of July, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
W. Andrew Arnold Law Office Of W. Andrew  
Arnold, P.C. 712 E. Washington St. Greenville, SC  
29601

\_\_\_\_\_  
James H. Cassidy Roe Cassidy Coates & Price, P.A.  
P.O. Box 10529 Greenville, SC 29603  
Joseph Owen Smith Roe Cassidy Coates & Price,  
P.A. P.O. Box 10529 Greenville, SC 29603

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

\_\_\_\_\_  
Paul B. Wickensimer Greenville County Clerk Of Court -  
Clerk of Court