THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Judge

2014-002246

Lewallen Automation, LLC and
ASAG, Energy, LLC, Respondents,

v.

Michael Lewallen and
Everworks, LLC, Defendants,

Of Whom Michael Lewallen is the Appellant

Brief of Appellant

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STATEMENT OF ISSUES ON APPEAL

Trade Secret Injunction

1. Did the Circuit Court err by determining that a use and disclosure trade secret injunction is proper where Appellee made no showing of irreparable harm?

2. Did the Circuit Court err by determining that a use and disclosure trade secret injunction is proper where the Court made no finding that Appellee is likely to succeed on the merits?

3. Did the Circuit Court err by enforcing contractual confidentiality provisions that, as written, are unenforceable restraints on trade?

4. Did the Circuit Court err by incorporating operative definitions from written documents when Rule 65(d) specifically prohibits such?

5. Did the Circuit Court err by awarding injunctive relief in the absence of specific findings as required by Rules 52 and 65?

6. Did the Circuit Court err by not limiting definitions of confidential information to exclude, for example, information obtained from customers?

7. Did the Circuit Court err by enforcing contractual confidentiality provisions with injunctive relief when adequate remedies at law exist if any rights of Appellee were violated?

Disparagement Injunction

8. Did the Circuit Court err in enjoining Appellant from making allegedly-damaging statements to customers, vendors, and employees when there was no competent evidence whatsoever of wrongdoing on the part of Appellant?

9. Did the Circuit Court err in enjoining Appellant from making allegedly-damaging statements to customers, vendors, and employees when Appellee made no showing of any irreparable harm and there are no findings to substantiate such harm?

10. Did the Circuit Court err in enjoining Appellant from making allegedly-damaging statements to customers, vendors, and employees when Appellee made no showing that it could prevail on the merits and the Circuit Court made no finding that it can?

11. Did the Circuit Court err in enjoining future speech when adequate remedies at law exist if any rights of Appellee are violated?

12. Did the Circuit Court err in enjoining future speech by using the vague term "any other statement meant to cause harm to LALLC?"

13. Is the Circuit Court's injunction against future speech an unconstitutional prior restraint?

Adequacy of Bond

14. Did the Circuit Court err by requiring a nominal bond that will not adequately compensate Appellant and by failing to make any findings to support the amount awarded?

STATEMENT OF THE CASE

Lewallen Automation, LLC ("LALLC") commenced this action and filed its Motion for Temporary Injunction on September 5, 2014. (R.pp. 13-38; r.pp. 166-67). On September 9, the Undersigned communicated with the Special Circuit Judge,[1] requesting that LALLC be required to provide Appellant Mike Lewallen ("Lewallen") basic information as to the unspecified allegations of wrongdoing and "trade secrets." (R.p. 348).

On September 19, 2014, LALLC filed additional affidavits of five individuals. (R.pp. 234-35 (Satterwhite amended); r.pp. 236-37 (Smith); r.pp. 240-42 (Hughes); r.pp. 243-305 (Merritt); r.p. 306 (Blanton)). LALLC also amended the Complaint, adding its parent company as a plaintiff. (R.pp. 39-

[1] For purposes of simplicity, this Brief will refer to the Special Circuit Judge simply as "Circuit Judge."

71).[2] Neither the additional affidavits nor the amended complaint provide the information requested by Lewallen.

On September 22, Lewallen and the other Defendant, Everworks, LLC ("Everworks"), filed a Joint Motion to Strike Lewallen Automation's affidavits. (R.pp. 380-88). The Undersigned again complained that LALLC was not providing basic information so as to permit Lewallen to respond; he requested that the Circuit Court address this Motion prior to addressing the merits of LALLC's Motion for Temporary Injunction. (R.p. 488). On September 25, Lewallen filed his Opposition to the Motion for Temporary Injunction. (R.pp. 313-414).

The Circuit Judge convened a hearing on September 29. (R.pp. 106-43). On September 30, Lewallen filed supplemental arguments addressing representations Lewallen Automation made at the September 29 hearing. (R.pp. 415-488 & video). After LALLC responded to Lewallen's discovery request, counsel for Lewallen advised the Circuit Court that LALLC continued to refuse to identify witnesses or facts to support the underlying claims. (R.pp. 489-90). On October 7, Lewallen filed his Second Supplement with regard to LALLC's Motion for Preliminary Injunction and Lewallen's Motion to Strike. (R.pp. 449-87).

On October 9, the Circuit Court issued the Order on the Motion for Temporary Injunction. (R.pp. 3-11). The Circuit Court did not issue any Order with respect to the Motion to Strike, but stated that it "has not considered any

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[2] The amendment of the pleadings does not impact the Motion, which was not amended, and the Order only pertains to actions that would be adverse to LALLC.

inadmissible hearsay in its ruling." (R.p. 5). Lewallen served his Notice of Appeal on October 10, which was received on October 16. (R.p. 492; r.p. 496).

The provisions of the Order relevant to this Appeal[3] are as follows:

3. Defendant Lewallen shall not use, directly or indirectly, or disclose any confidential information or trade secrets of LALLC, as defined by the parties in the Membership Interest Purchase Agreement, § 1.01 and § 5.04, to mean:

> any data or information of the Companies or Purchaser that is valuable to the operation of the Companies and not generally known to the public or competitors

And in the Employee Agreement, paragraph 6, to mean:

> Trade Secrets. Employee agrees that he will not, during or after the term of this Agreement with the Companies, disclose the specific terms of the Companies' relationships or agreements with its significant vendors or customers or any other significant and material trade secret of the Companies, whether in existence or proposed, to any person, firm, partnership, corporation or business for any reason or purpose whatsoever.

4. Defendant Lewallen shall not make any misrepresentation to LALLC's customers regarding [its] ability or capacity to fulfill orders from such customers.

5. Defendant Lewallen shall not make any statement to LALLC's customers, vendors or employees that suggests or implies that any of [its] officers falsify financial records, that [it] is going to cease business operations, or any other statement meant to cause harm to LALLC.

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[3] Paragraphs 1 & 2 of the Order do not involve injunctive relief and Lewallen has cooperated fully in disclosing electronic information and in reaching an accord on any electronic discovery issues. (R.pp. 359-60 ¶¶ 13-16; r.p. 116:14-24; r.p. 491). Paragraph 7 of the Order simply involves the Special Circuit Judge retaining jurisdiction and setting the length of the temporary injunction.

6. LALLC shall post bond with the Clerk of Court in the amount of $2,500 prior to this Order becoming effective. See, Rule 65, SCRCP.

FACTS

LALLC is a provider of industrial automation, custom electrical/pneumatic panels, control systems, and OEM electrical panels. (R.p. 185 ¶ 3). Lewallen, the namesake of the company, previously was president and an owner of LALLC. (R.p. 186 ¶ 5). Even before he founded Lewallen Automation, he had prior experience in the industry and has developed many contacts throughout his career. (R.p. 357 ¶¶ 2-4).

After Lewallen and others sold all interest in LALLC in December of 2012, Lewallen remained with LALLC as an employee subject to a written employment agreement. (R.pp. 214-220). The Employment Agreement states that it is the complete agreement of the parties (*Id.* r.p. 217 ¶ 10). It contains no restrictive covenant (either a non-compete or non-solicit agreement). (*Id.*; r.p. 361 ¶ 24; r.p. 109:8-9 (acknowledgment of counsel for LALLC that "[w]e do not have a non-compete with Mr. Lewallen that we have located at this time").

LALLC fired Lewallen in the June - July, 2014 timeframe. Lewallen did not expect the termination and was not seeking alternate employment at the time. (R.p. 357 ¶ 1). Lewallen subsequently obtained employment with Everworks. The focus of Everworks is somewhat different than that of LALLC. (R.p. 358 ¶ 7). Everworks apparently has not taken any customers away LALLC and Lewallen has not used any trade secrets or confidential information of LALLC in his employment with Everworks. (R.p. 357 ¶¶ 5-6). Lewallen has not solicited

work from any company that was not already a customer of Everworks before his employment began with Everworks. (R.p. 362 ¶ 20).

After the hearing, LALLC finally responded to Lewallen's discovery. LALLC could not identify any vendor or customer to which Lewallen made any disparaging remark or misrepresentation. Nor would LALLC identify a single witness with knowledge to support its allegation that Lewallen has used or disclosed any trade secret. (R.pp. 452-53, 457, 459-61, 473-77).

ARGUMENTS

Lewallen's exceptions fall within three general areas: (1) the issuance of a use or disclosure trade secret injunction (R.pp. 7-8 ¶ 3); (2) the injunctive relief granted as to the making of future statements (r.p. 8 ¶¶ 4 - 5); and (3) the nominal bond required (*Id.* ¶ 6).

The standard of review with respect to injunctive relief is the abuse of discretion standard. *Mailsource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003).

I. THE CIRCUIT COURT'S USE AND DISCLOSURE INJUNCTION REGARDING UNSPECIFIED TRADE SECRETS VIOLATES SETTLED PRECEDENT AND TWO RULES OF PROCEDURE.

A. The injunction cannot be squared with South Carolina's well-settled precedent regarding the standard for issuing injunctions.

Although the law of this State is well settled that injunctions are to be sparingly granted, the Circuit Court granted extraordinary relief without any competent evidence and without sufficient findings. "The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are

unlawfully invaded or legal duties are willfully or wantonly neglected." *Lefurgy v. Long Cove Club Owners*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994); *Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010)(noting that "'[a]n injunction is a drastic remedy'") (quoting *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004)); *Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011); James F. Flanagan, *South Carolina Civil Procedure* 531 (3d ed. 2010).

For such a drastic remedy to be provided, the moving party must establish 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 907-08 (citations omitted); *Compton v. South Carolina Dept. of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010); *see id.* at 586, 694 S.E.2d at 17 (determining that balancing the equities is no longer a requirement for a preliminary injunction).

To ensure that injunctive relief comports with basic notions of due process, South Carolina rules require that injunctions "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rule 65(d), SCRCP.

For the reasons that follow, the Circuit Judge erred by entering an injunction in the absence of a showing as to any of the three necessary elements.

1. There was not even a valid attempt to show irreparable harm.

LALLC bore the burden of proving irreparable harm. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) ("The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.") (citing *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App.1984)). LALLC offered no competent evidence of the threat of any impending harm, let alone irreparable harm.

The Circuit Court's injunction is based solely on a hypothetical. There is no finding of any actual threat, only a mere recitation by the Court that "Plaintiffs[4] have made a sufficient showing of likely irreparable harm "**if Lewallen uses certain confidential information** of LALLC, including pricing information and cost information." (R.p. [Order at 4] (emphasis added)). In doing so, the Circuit Court simply disregarded the settled principle that surmising that harm is possible if wrongdoing occurs is not a foundation upon which injunctive relief can stand. Injunctions simply are improper "where the anticipated [harm] is doubtful, contingent, or conjectural." *Brading v. County of Georgetown*, 327 S.C. 107, 115 n.8, 490 S.E.2d 4, 8 n.8 (1997); *Welborn v. Page*, 247 S.C. 554, 566, 148 S.E.2d 375, 381 (1966) ("Equity will not interfere by the granting of the extraordinary

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[4] As noted above, Plaintiff ASAG, LLC was not party to the pending Motion.

remedy of injunction where the anticipated nuisance is doubtful, contingent or conjectural."); *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir.2001) ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury."); *Continental Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 358–59 (3d Cir.1980) (Under the Uniform Act, injunctions are "not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties. Nor will an injunction be issued to restrain one from doing what he is not attempting and does not intend to do."), *quoted in Colorcon, Inc. v. Lewis*, 792 F. Supp. 2d 786, 804 (E.D. Pa. 2011); *Applied Indus. Materials Corp. v. Brantjes*, 891 F. Supp. 432, 437-38 (N.D. Ill. 1994); *cf. Delmar Studios of the Carolinas v. Kinney*, 233 S.C. 313, 320, 104 S.E.2d 338, 342 (1958) (noting in context of non-compete case: "We cannot substitute assumption for proof.")

The entirety of the LALLC's argument is based on the fact that, while employed, Lewallen had access to confidential information. The theory goes that, *if* he used such information for competitive purposes, it could possibly be very harmful. But there is no evidence in the Record whatsoever that such a thing has occurred.

The notion that injunctive relief is possible merely because a high-level employee had access to trade secrets is foreclosed by the Supreme Court's decision in *Milliken & Co. v. Morin*, 399 S.C. 23, 38-39, 731 S.E.2d 288, 296 (2012). In *Morin*, the Supreme Court specifically noted that employee confidentiality agreements are valid only if they allow an individual to compete as long as he or she is not using the employer's trade secrets. *Id.* at 38-39, 731

S.E.2d at 296. That reasoning would make no sense if somehow one must assume that competing *requires* the use of trade secrets.

The complete absence of any competent evidence that Lewallen has acted wrongfully, or that he threatened to, is reason enough for vacating the Temporary Injunction as to paragraph 3. There is no finding of any actual wrongdoing, and it was error to enjoin Lewallen based on the simple assumption that something might possibly happen if he later chooses to act wrongfully.

2. LALLC made no showing that it can succeed – or even begin to prove – the merits of its case.

From the outset of this case, LALLC has inexcusably refused to say what, if any, evidence supports its allegations. The Undersigned has repeatedly complained that LALLC will not specify such information as the alleged trade secrets at issue (other than the one document that has never been used or disclosed improperly), or the source of its contentions that Lewallen disparaged it.[5]

This failure, by itself, should preclude consideration of any purported "trade secret" claim other than to the extent LALLC could show that it involved the referenced e-mail attachment. The first issue to address here is what Lewallen Automation seeks to protect and whether it constitutes a trade secret. *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972) ("The threshold issue in any trade secrets case is not whether there was a confidential

[5] This is true before the case was filed, after the Motion for Temporary Injunction was filed, and even after LALLC responded to discovery. (R.p. 343; r.p. 349; r.p. 488; r.pp. 382-87; r.pp. 318-19, 326; r.pp. 416-17; r.pp. 489-90; r.pp. 449-53).

relationship or a breach of contract or some other kind of misappropriation, but whether, there was a trade secret to be misappropriated."); *accord Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 295, 471 S.E.2d 721, 724 (Ct. App. 1996). Because there was no actual showing of any other information that could constitute a trade secret, LALLC failed to carry its burden of proof at the outset.

The Circuit Court never made a finding that LALLC could prevail, and certainly never cited any evidence that would suggest Lewallen is using or disclosing anything that could be protected. All LALLC offered was hearsay that the Circuit Court stated was not considered. (R.p. 5).

The Circuit Court mentions the fact that, in January, 2014, Lewallen emailed a document to himself and to an acquaintance. (*Id.*).[6] Lewallen provided unrefuted proof, however, that he has not accessed the attachment to the e-mail after January 20, 2014 – more than six months before LALLC fired him and well before there was any dispute. (R.p. 359 ¶ 15 & attachments). The document does *not* contain information regarding the only project that Lewallen can surmise to be at issue, and he has never used or disclosed the document to anyone after his LALLC employment. (R.p. 360 ¶¶ 17-18).

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[6] There was confusion about this document at the hearing as Lewallen had no recollection of emailing it. (R.p. 116:11-14; r.pp. 358-59 ¶¶ 11-13 [Lewallen Aff.]). In the interest of candor and full disclosure, the Undersigned represents that, subsequent to the hearing, he learned from the acquaintance that she did receive the document in January, 2014. The Undersigned will not explain further in light of Rule 210(c), SCACR. The Undersigned offers this representation merely to avoid the appearance that he is perpetuating a representation made below that, while truthful as to Lewallen's recollection, could be construed as misleading to this Court if not clarified as additional facts have become known.

B. The Circuit Judge erred by relying on contractual provisions that are unenforceable in South Carolina.

The contractual provisions here, which are general and unspecific, are not enforceable. Boilerplate agreements that do not advise employees as to what specific information they are to protect are a nullity. For example, in *Carolina Chem. Equip. Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), this Court held invalid a provision that defined confidential information as:

> [A]ny knowledge or information concerning any process, product, or customer of the Corporation and more generally any knowledge or information concerning any aspect of the business of the Corporation which could, if divulged to a direct or indirect competitor, adversely affect the business of the Corporation, its prospects or competitive position. Seller shall not use for his own benefit any trade secret of the Corporation in any manner whatsoever

Id. at 293, 471 S.E.2d at 723. The provisions in Muckenfuss are actually more precise than the provisions at issue here that obliquely refer to "any data or information of the Companies . . . that is valuable to the operation of the Companies and not generally known to the public or competitors" (r.p. 192 § 1.01), as well as "any other significant and material trade secret of the Companies" (r.p. 216 ¶ 6). Yet, even the provisions in *Muckenfuss* did not pass muster.

> The contractual provision at issue here does not identify any specific trade secrets; rather, it defines trade secrets so broadly that virtually all of the information Muckenfuss acquired during his employment would fall within its definition. *See Service Centers of Chicago, Inc. v. Minogue*, 180 Ill.App.3d 447, 129 Ill.Dec. 367, 372, 535 N.E.2d 1132, 1137 (1989) ("By defining confidential information as essentially all of the information provided ... the confidentiality agreement amounts ... to a post-employment covenant not to compete which is completely unrestricted in duration or geographical scope."); *cf. AMP Inc. v. Fleischhacker*, 823 F.2d

> 1199 (7th Cir.1987) (noting the risk plaintiffs run by producing long lists of general areas of information which contain unidentified trade secrets instead of identifying specific trade secrets). Therefore, the contract provision here is unenforceable as a matter of law.

Id. at 296, 471 S.E.2d at 725.

Because the contractual provisions here are even less specific than those at issue in *Muckenfuss*, they also must be disregarded as a matter of law and cannot be the basis for any relief.

C. The Circuit Judge's use and disclosure injunction violates Rule 65(d) by incorporating operative definitions from documents.

Rule 65(d) requires that any injunction itself shall describe the specific prohibitions, and "not by reference to the complaint or other document." Rule 65, SCRCP. Lewallen pointed this out after LALLC sought an injunction that simply referred to its boilerplate, "kitchen sink" confidentiality provisions. (R.pp. 317, 333-34, 335; r.p. 415 ("[A]dopting Lewallen Automation's improper boilerplate documents for purposes of injunctive relief would violate Rule 65(d) on its face."). Although the prohibition in the Rule is unambiguous, the Circuit Court nonetheless not only referenced the documents, it incorporated them. (R.pp. 7-8 ¶3). The error could not be more clear.

Nor can the error be dismissed as harmless. For example, Section 1.01 of the Membership Interest Purchase Agreement simply states: "'Confidential Information' means any data or information of the Companies or Purchaser that is valuable to the operation of the Companies and not generally known to the

public or competitors." (R.p. 192).[7] There simply is no palpable limit to such terms as "[a]ny data . . . that is valuable." The Order not only does what Rule 65(d) specifically prohibits, but a prohibition based on a subjective standard applicable to all "data" also could never satisfy Rule 65(d)'s mandate that an injunction "shall be specific in terms." See *Gibson v. Cline*, 28 N.C. App. 657, 659, 222 S.E.2d 478, 479 (1976) ("Reference to some other document is not sufficient to provide a description of the act or acts enjoined or restrained.") (citations omitted).[8]

Likewise, the Employment Agreement, which the Circuit Court also incorporated by reference, does not provide the specificity required by Rule 65(d). Paragraph 6 of the Employment Agreement precludes the disclosure of such things as "any other significant and material trade secret of the Companies." (R.p. 216 ¶ 6). Generic proscriptions against using such things as "proprietary materials" or "trade secrets" simply are too vague to be enforceable. *Sanford v.*

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[7] Article III of the Agreement itself makes clear that this is reference to the due diligence materials exchanged prior to the transaction – none of which are at issue here. (R.p. 203 ¶ 3.19(d)). To the contrary, at the time it filed its Motion LALLC alleged that the information at issue in this case are purported secrets it generated subsequent to the transaction. (R.p. 16 ¶ 13).

[8] This specificity requirement is a mandatory aspect of due process. *United States v. McAndrew*, 480 F. Supp. 1189, 1192 (E.D. Va. 1979) (citations omitted). "'The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.'" *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)). "The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." 11A Charles A. Wright, Arthur R. Miller, et. al, *Fed. Prac. & Proc. Civ.*, § 2955 Form and Scope of Injunctions or Restraining Orders.

RDA Consultants, Ltd., 244 Ga. App. 308, 312, 535 S.E.2d 321, 325 (2000) (citations omitted); *Union Pac. R. Co. v. Mower*, 219 F.3d 1069, 1073, 1077 (9th Cir. 2000) (injunction against disclosure of "information or communication of a confidential nature, including the information and communications described in the accompanying findings of fact and conclusions of law, that he acquired, learned, or helped to generate during his employment by [UP] or while he was a consultant for plaintiff" simply "does not even come close to satisfying Rule 65's specificity requirements; it provides little, if any, guidance to [enjoined party] regarding how he should determine what particular information is confidential or privileged").

Given LALLC's propensity to argue that even information readily found on the Internet is a "trade secret,"[9] such boilerplate and unspecific language is

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[9] At the hearing in this matter, counsel for LALLC asserted that the "trade secrets" at issue included such information as the identity of its employees, what they do, and the operations in their plant. (R.p. 123:45; *id.* at 137:25 - 138:10). With LALLC's ownership's involvement, however, LALLC's employees post their credentials on LinkedIn as well as the customers for which they work. Further, the supposedly-secret operations of the plant are featured in a video posted by LALLC on the Internet. (R.pp. 415-48 & Exhibits A & B (video)).

Finally, there is no protectable interest in the mere identity of customers. *See, e.g., Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007); Jerry Cohen & Alan S. Gutterman, *Trade Secrets Protection & Exploitation* at 99-100 (ABA/BNA Books 1998) ("Courts are uniform in holding that a business does not have a proprietary interest in its customers; however, trade secret protection may be available for customer lists compiled by the former employer, as well as for lists that extend beyond the names and addresses of the customers to other items with an element of independent economic value.") (footnotes omitted) (r.pp. 401-02); *Novacare Orthotics & Prosthetics East, Inc. v. Speelman*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (N.C. Ct. App. 2000) (no trade secret at issue where employee developed a relationship with the customer and "any information used to contact the clients would have been easily accessible to defendant through a local telephone book"); *Combs & Associates, Inc. v. Kennedy*, 147

precisely what Rule 65(d) was meant to prohibit. Merely incorporating it into an Order simply compounds the violations of Rule 65(d) and makes it impossible for Lewallen to determine how to work in his chosen field in a manner that does not violate the Temporary Injunction. Accordingly, the Order should be vacated because that is precisely the situation Rule 65(d) was created to avoid.

D. The Circuit Judge violated Rules 52 and 65(d) by failing to provide findings and detailed reasons as to why relief was necessary.

"Rule 52(a) requires the court to make findings of fact and conclusions of law in granting or denying temporary relief. Likewise Rule 65(d) requires the order to set forth the reasons for the relief . . . ." Flanagan, *supra* at 535 (citing Rules 52(a) and 65(d), SCRCP). Because LALLC provided no competent evidence, it comes as no surprise that the Circuit Court made no findings of fact that Lewallen has threatened to use or disclose any trade secret or confidential information since LALLC terminated his employment.[10] Without such findings, and none are possible with this Record, injunctive relief simply cannot be sustained.

N.C. App. 362, 555 S.E.2d 634 (N.C. Ct. App. 2001) (sales representative's customer database was not a trade secret, since database could have easily been compiled through public listings, such as trade show and seminar attendance lists).

[10] The Court merely pointed to the forwarding of the e-mail half a year before any dispute that was not accessed since as evidence of disclosure prior to this action. (R.p. [Order at 4]).

E. The Circuit Court erred in not limiting customer information to information not provided by the customer.

While employers have every right to expect that employees do not pilfer customer-related trade secrets for use to the employer's disadvantage, there is no legal basis from enjoining former employees from using the same information if obtained from the customer itself. Here, the Circuit Court erred by enjoining Lewallen from using information regardless of its source.

Information belonging to a customer that a customer chooses to share is not a trade secret belonging to Lewallen Automation. *Systems Dev. Services, Inc. v. Haarmann*, 389 Ill. App. 3d 561, 577, 907 N.E.2d 63, 77 (Ill. Ct. App. 2009); *Softchoice Corp. v. MacKenzie*, 636 F. Supp.2d 927, 939 (D. Neb. 2009) (rejecting trade secret claim where "the only information that could arguably be categorized as 'secret,' that is, pricing information, [came] from the potential customers themselves, who freely shared the information with him in hopes of obtaining a lower price"). Because the injunction is not limited properly to recognize this point, it is too broad to protect any legitimate interest of LALLC.

F. To the extent the Temporary Injunction was granted to enforce contractual provisions, adequate remedies at law preclude injunctive relief.

The Circuit Court's adoption of the membership interest purchase agreement and employment agreement terms also is error in that injunctive relief is not appropriate for purposes of enforcing contractual provisions. Specific performance injunctive relief may be ordered only where no adequate remedy at law exists. *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 284, 672

S.E.2d 816, 820 (Ct. App. 2009). Injunctive relief is improper for purposes of enforcing the referenced contracts. *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) (noting that an action by an employer to enforce a confidentiality agreement is an action at law and that adequate remedies at law preclude injunctive relief as to enforcement of the agreement), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012); *MailSource, LLC v. M.A. Bailey & Associates*, 356 S.C. 363, 369-70, 588 S.E.2d 635, 639 (Ct. App. 2003) (adequate legal remedy exists for loss of business attributed to alleged breach of noncompete agreement), *overruled on other grounds*, *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

II. THE CIRCUIT COURT ERRED BY ENJOINING FUTURE SPEECH.

A. There is absolutely no basis for injunctive relief as to unproven statements allegedly made to unidentified persons.

1. There is no evidence of wrongdoing by Lewallen.

The Circuit Court made no finding that Lewallen made improper statements to any customer, vendor, or employee.[11] In fact, nobody claims to have heard Lewallen "make misrepresentations to LALLC's customers regarding [its] ability or capacity to fulfill orders." (R.p. 8 ¶ 4 (Order at 6]). Nor has anyone claimed to hear Lewallen "make any statement to LALLC's customers, vendors or employees that suggests or implies that any of LALLC's officers falsify financial records," or that LALLC was "going to cease business operations." (*Id.*

[11] As Lewallen pointed out at the hearing, even though LALLC controls the current employees, not one of them signed a sworn statement to support its claims. (R.p. 131:11-19 [transcript at 26]). Nor has any vendor or customer – if any exist – stepped forward to support LALLC's allegations.

¶ 5). Even after Lewallen requested information in discovery, LALLC could not name a single person who even claims to be a witness to such statements. (R.pp. 449-53). All LALLC offered was purported hearsay, upon which the Circuit Court disavowed any reliance. (R.p. 5 [Order at 3]). There simply is no cognizable argument that LALLC satisfied the first basic requirement for obtaining an injunction.

2. LALLC offered no evidence whatsoever of any harm, let alone irreparable harm.

The Circuit Court also never made any finding that there exists the threat of irreparable harm from any statements Lewallen may have made. In addition to offering no competent evidence of wrongdoing, LALLC offered no evidence of any irreparable, or even actual, harm. LALLC alluded to a customer, which it finally acknowledged to be Michelin as Lewallen assumed from the location cited. (R.pp. 225-26 ¶¶ 4-7). Putting aside the fact that Michelin already was a customer of Everworks, LALLC never refuted Lewallen's showing that Everworks is not performing work on the Ardmore project. (R.p. 357 ¶ 5). Even if Michelin moved business from LALLC to Everworks, that is not evidence that would support injunctive relief as to future speech. *Cf. Williams v. Riedman*, 339 S.C. 251, 280, 529 S.E.2d 28, 43-44 (Ct. App. 2000) (mere fact that clients transferred to competitor employee's termination is not sufficient to establish that Williams misappropriated trade secrets, especially since customers were with the employee prior to the employer purchasing the business).

Accordingly, although LALLC made no effort to satisfy its burden, where Lewallen can discern the identity of a customer allegedly at issue (despite

LALLC's efforts to withhold the same), he provided unrefuted proof that there is neither cognizable nor irreparable harm.

3. LALLC's own representations belie the notion it could ever prevail.

The Circuit Court never made a specific finding that LALLC could ever prevail, and certainly not one that it was likely to. Again, this is an undeniable result of the fact that LALLC has offered no competent evidence of wrongdoing with regard to the making of statements to customers, vendors, or employees. Even when required to disclose such information in discovery, LALLC identified no witness, and offered no evidence, to support its claims. (R.pp. 449-87).

4. If any harm was conceivable and supported, there is an adequate legal remedy.

Any loss of business attributed to alleged tortious conduct can be remedied at law. In fact, as the Fourth Circuit Court of Appeals has noted, "[g]enerally an injunction will not issue to restrain torts, such as defamation or harassment, against the person. There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation." *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (citations omitted).

The prohibition against injunctions against future harmful speech, which is discussed more fully below, is applied routinely to deny injunctive relief against departed and competing former employees because of the adequacy of legal remedies. *E.g. Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 262 (La. App. 1 Cir. 2006) ("We must reverse the injunction as to [employer's] claim for defamation, because should such activities occur, it would have an adequate

remedy at law, i.e., a civil action in tort for damages. Indeed, even if the defendants' words were defamatory, an injunction would not be a proper remedy."); *Daugherty v. Allen*, 729 N.E.2d 228 (Ind. Ct. App. 2000) (defamation injunction against former employee is improper because there exists an adequate remedy at law); *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 257 Ga. 267, 267, 357 S.E.2d 576, 577 (1987) (reversing injunction against making disparaging statements to prospective customers of the appellee regarding the appellee's business, publishing materials which contained untrue misleading statements and other false information, and giving other false information to prospective customers); *Brannon v. Am. Micro Distributors, Inc.*, 255 Ga. 691, 691, 342 S.E.2d 301, 303 (1986) (reversing injunction issued against former company president for communicating false and misleading information concerning corporation to business customers or potential business customers).

B. The Circuit Court's Order is too vague and lacks the requisite findings.

As discussed above, injunctions must provide specific guidance to the enjoined persons in order to comport with South Carolina rules and due process. Although the Circuit Court was specific in several regards as to what Lewallen should not say, it included a breathtakingly-broad catch all prohibition against making "any other statement meant to cause harm to LALLC." (R.p. 8 ¶ 5).

At the hearing, the Circuit Judge properly recognized that it was constrained from granting an injunction against competition itself as there are no agreements or legal impediments to Lewallen competing once LALLC fired him.

(R.p. 126:18-21[transcript p.21]). Given the boundless arguments LALLC has proffered, almost any statement Lewallen makes for the purpose of obtaining work for Everworks could be the basis for a forthcoming contempt motion as "mean[ing] to cause harm to LALLC."

An injunction must provide "fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 444 (1974). The requirements are mandatory so as to "prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Because no reasonable person could discern what might trigger an argument for contempt given the "any other statement" proviso, the Temporary Injunction violates the fundamental due process mandates of Rule 65(d), SCRCP.

C. The Circuit Court's Order constitutes an improper prior restraint.

The Circuit Court declined to grant LALLC's request for a defamation injunction, concluding properly that "such is typically not the basis for an injunction." (R.p. 6 [Order at 4]). However, the ordered prohibition against future speech, including the saying of anything "meant to cause harm," suffers from the same Constitutional infirmities as do defamation injunctions.[12]

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[12] "Absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases. Some courts have ruled that equity will not enjoin libel and slander unless a continuing irreparable injury is shown." 42 Am. Jur. 2d Injunctions § 96. Even academics, who advocate for a loosening of the restrictions on the bar against injunctions, recognize how deeply ingrained the

The term prior restraint is used "to describe . . . judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting Melvin B. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)); *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 66 n. 3, 398 S.E.2d 687, 689 n. 3 (1990) (recognizing that a prior restraint is "'suppressing speech because of its content before the speech is communicated.'") (quoting *In re G. & A. Books, Inc.*, 770 F.2d 288, 296 (2d Cir.1985)); *State-Record Co. v.*

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rule remains in the common law, even when it pertains to matters of purely private concern:

> The no-injunction rule has been a fixture of Anglo-American law for more than three centuries. Well before the First Amendment was ratified, it was taken as a given by judges and lawyers that injunctions, including permanent injunctions following trial, were not permissible remedies in defamation actions. The rule's lineage can be traced to the backlash that arose from England's infamous Star Chamber, which "served as an unhealthy hybrid of legislature and court," issuing laws and trying those accused of libel or slander while acting "both as Judges and Jurors."

David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 18 (2013) (footnotes omitted) (R.pp. [Opposition Exh. 10]); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) ("Generally an injunction will not issue to restrain torts, such as defamation or harassment, against the person. There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation.") (citations omitted); *Fernandez v. N. Georgia Reg'l Med. Ctr., Inc.*, 260 Ga. 765, 766, 400 S.E.2d 6, 8 (1991) (reversing injunction to preclude discussion or solicitation of information about corporate business operations as "equity will not enjoin libel and slander"); *Pittman v. Cohn Communities, Inc.*, 240 Ga. 106, 108, 239 S.E.2d 526 (1977) ("[E]quity will not enjoin libel and slander.") (citations omitted); *Vrasic v. Leibel*, 106 So. 3d 485, 486 (Fla. Dist. Ct. App. 2013) ("Florida's courts have long held that temporary injunctive relief is not available to prohibit the making of defamatory or libelous statements.") (citations omitted); *Kyritsis v. Vieron*, 53 Tenn. App. 336, 345, 382 S.W.2d 553, 557 (1964); *Am. Univ. of Antigua Coll. of Med. v. Woodward*, 837 F. Supp. 2d 686, 701 (E.D. Mich. 2011).

State, 332 S.C. 346, 350 n. 7, 504 S.E.2d 592, 594 n. 7 (1998) (proscriptions against prior restraints apply to judicial injunctions).

"Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, (1971). As a result, courts routinely recognize that injunctions against alleged competitors and former employees constitute improper prior restraints in violation of constitutional rights, even where the speech does not involve matters of public concern.[13] David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 3-4 (2013) ("Modern courts most often cite the First Amendment's prior restraint doctrine as a reason to deny injunctive relief . . . .") (R.pp. 394-95); e.g. *Alberti*, 383 F.2d at 272; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 918 (Tex. App. 2006) (noting in an unfair competition case that, "defamation alone is not a sufficient justification for restraining an individual's right to speak freely" and that an order restraining defamation was an unconstitutional prior restraint); *Cohen v. Advanced Med. Grp. of Georgia, Inc.*, 269 Ga. 184, 184, 496 S.E.2d 710, 711 (1998) (reversing injunction against disparaging statements of overcharging, fraud, intimidation of patients, and not paying the plaintiff and noting that, "[c]onsistent with this Court's firm policy to protect the right of free speech, we apply the general rule that "equity will not enjoin libel and slander," on the grounds that it constituted an impermissible prior restraint).

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[13] Matters of public concern receive heightened scrutiny under the Constitution, but governmental prohibitions against speech, including injunctive action by the judiciary, also warrant First Amendment protections. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215, (2011).

There simply is no basis for the Circuit Court to have distinguished the prior restraint it issued from the one it found to be impermissible. For this reason as well, paragraphs 4 and 5 of the Injunction must be vacated.

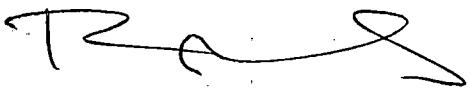
III. THE CIRCUIT COURT ERRED IN REQUIRING ONLY A NOMINAL BOND.

In the alternative to the above arguments, any injunctive relief this Court finds to be proper should be implemented only after an adequate bond amount is determined. Rule 65(c), SCRCP. Without any explanation, the Court assessed a bond of a mere Two Thousand Five Hundred Dollars. (R.p. 8 ¶ 6). Such a nominal amount cannot begin to compensate Defendant Lewallen even for the costs he will incur in establishing that injunctive relief is improper. *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) (nominal bond premised on notion that the injunction is proper violates Rule 65(c)); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50 n. 3, 674 S.E.2d 505, 508 n. 3 (Ct. App. 2009) (recognizing that costs in the rule include "court and other costs"), *aff'd*, Op. No. 27455 (S.C. October 22, 2014). The totality of this claim cannot be decided until after an appeal. *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351 (Ct. App. 2001). Accordingly, should this Court determine that injunctive relief is proper, paragraph 6 of the Order should nonetheless be vacated and remanded for a determination as to the amount that would adequately compensate Lewallen should he ultimately show that relief should not have been granted.

CONCLUSION

For the reasons set forth above, this Court should vacate the Order granting injunctive relief.

Respectfully submitted,



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