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

Reply Brief of Appellant

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Introduction

Respondents' Brief consists of essentially three elements: an argument that this appeal is somehow at the same time moot, unripe and unreviewable; an attempt to supply a factual basis for the preliminary injunction by citing to inadmissible hearsay expressly rejected by the court below; and a series of perfunctory waves at arguments made in Appellant Michael Lewallen's (Lewallen) Initial Brief.[1] LALLC's mootness argument is without merit because LALLC continues to subject Lewallen to claims that he has violated it while it was in effect. Given the unprecedented breadth and vagueness of the injunction, conduct that would otherwise be entirely proper could be argued to be a violation of the injunction.

LALLC also continues to rely on rank hearsay even after Judge Simmons specifically disavowed any reliance on such. But the issue on this appeal is whether the court below abused its discretion in entering an injunction based on any properly admissible evidence before it. Vague, second-hand accounts of alleged conversations are no more appropriate for this Court's consideration than they were in the court below.

LALLC's unsupported claims of trade secrets still have not evolved from the boilerplate assertions it relied on below. LALLC continues to assert, for example, that it possesses unidentified "formulas," unspecified "processes" and "supplier information," even though it has never explained the basic factual

[1] Although the Brief is filed by Respondents, Lewallen Automation, LLC ("LALLC") was the only party moving for injunctive relief and was, in fact, the only party plaintiff at the time it filed its Motion. None of the other Respondents has standing to participate in this appeal.

support for such bald assertions, such as what "formula" an automation company might even have. LALLC certainly never provided any evidence of such trade secrets. Likewise, LALLC continues to press unsubstantiated assertions having nothing to do with its mere speculation that Lewallen may be doing something wrong.[2]

The fact LALLC would continue to present as "facts" allegations for which there is no competent evidence is simply a testament to Lewallen's argument that there existed no legitimate basis for injunctive relief in the first place. As the following shows, LALLC's misleading arguments and simple refusal to address key issues put to rest any doubt that the Temporary Injunction was improper, is being used by Respondents simply to attempt to gain leverage, and must be vacated.

Argument

I. LALLC'S ARGUMENTS REGARDING MOOTNESS ARE BOTH INCORRECT AND REFUTED BY THE VERY AUTHORITIES UPON WHICH IT RELIES.

LALLC's position on mootness is that the injunction is not reviewable, now, later, or ever. This attempt to deny **any** appellate review falls apart upon even cursory review of the authority cited by LALLC, which establishes that direct, immediate appeal of the injunction is the proper course. Even if this point was not so clear, LALLC fails to address two additional grounds for appellate

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[2] For example, LALLC discusses the fact Lewallen met with a business partner of LALLC, which it now characterizes for hyperbolic purposes as a "competitor." (See R.p. 361). Likewise, LALLC continues to make assertions for which they have never provided any specifics for irrelevant *ad hominem* attacks such as "Lewallen rarely showed up for work." (Resp. Br. 5.)

review: (1) that the issue raised in this appeal is capable of repetition yet evading review; and (2) that judicial economy militates in favor of resolving this appeal on the merits.

A. Lewallen is entitled to appeal the issuance of the injunction until or unless it is vacated.

LALLC makes the seemingly conflicting arguments that this appeal is both "moot" and "not ripe." (Respondent Initial Brief Section I). It notes that the injunction has expired and that no motion for contempt "is anticipated" with respect to Lewallen's conduct during the time the injunction was in effect.[3] There is little reason for Lewallen to have any confidence in these assurances in light of the history of this litigation. As discussed in more detail below, LALLC continues to seek injunctive relief based on largely the same smoke and mirrors factual arguments asserted previously. There is no reason to believe LALLC will allow weak, inadmissible, or even nonexistent evidence to get in the way of an effort to gain an advantage in this litigation by seeking contempt sanctions.

Moreover, LALLC provides an important clue as to its long-term strategy in this regard. LALLC makes the bold argument that, when the time comes, Lewallen can be held in contempt of the Temporary Injunction even if Lewallen

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[3] LALLC is wrong about the time frame covered by the Temporary Injunction. The Order was entered October 9 and states that it "shall stay in effect for 45 days from the date the Court executes and enters it." (R.p. 4 ¶ 7 (emphasis added)). By its terms, the Temporary Injunction expired 45 days from October 9 (i.e. November 23, 2014). However, LALLC did not post a bond until October 20, 2014. The Injunction did not become enforceable until such date. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 508 (Ct. App. 2009) (quoting 12 S.C. Jur. Equity § 19 (1992)); *id.* at 50, 674 S.E.2d at 508 ("Rule 65(c), SCRCP, requires the trial court to order Respondents to post a bond before issuing the temporary injunction.") Accordingly, the effective dates of the Temporary Injunction are October 20, 2014 through November 23, 2014.

can prove that it was improperly entered. (Resp. Initial Brief Section I, final paragraph). LALLC cites *Jennings v. Jennings*, 104 S.C. 242, 88 S.E.527 (1916), wherein the court addressed a 1915 criminal contempt charge that grew out of a 1912 injunction regarding a gated property. The appellant did not pursue an appeal from the 1912 Order. The *Jennings* Court noted that, even if the 1912 injunction was later found to be erroneous, it could form the basis for contempt sanctions in 1915 because the appellant never followed through after filing a timely notice of appeal of the injunction. 88 S.E. at 528. The Court held that even erroneous injunctions "must be respected and obeyed, until vacated or modified by competent authority." *Id.* (citation omitted). LALLC is thus arguing that Lewallen cannot challenge the validity of the injunction now **and** cannot do so later.

Jennings does not go nearly so far and does not address situations, such as this, where an enjoined party promptly seeks review. If the Temporary Injunction is vacated by this Court, it can no longer serve as a basis for LALLC to claim damages via a contempt action. *See, e.g., McLean v. Cent. States, Se. & Sw. Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985) (holding that party was "entitled to reversal of the contempt order because it has prevailed in overturning the [temporary injunction] on appeal"); *In re Keene Corp.*, 168 B.R. 285, 289 (Bankr. S.D.N.Y. 1994) (concluding that a civil contempt action must be dismissed where "the underlying order is vacated or reversed because it was erroneous"). It is therefore essential that this Court reach the merits of this appeal so as to prevent LALLC from continuing to use a contempt action, or

threat thereof, as a weapon, arguing that failure to appeal the Temporary Injunction precludes a later challenge to its validity.

B. Application of the capable of repetition yet evading review exception to mootness

Despite the mootness doctrine, an appellate court should review arguments if "the issue raised is 'capable of repetition but evading review.'" *Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting *In re Darlene C.*, 278 S.C. 664, 665, 301 S.E.2d 136, 137 (1983), additional citations omitted). South Carolina employs a "less restrictive approach . . . in determining the applicability of the evading review exception of the mootness doctrine." *Id.* at 432, 468 S.E.2d at 864.

LALLC ignores controlling precedent by arguing that this appeal is moot because "[t]he potential future event of contempt proceedings may not occur at all . . . ." (Resp. Br. at 10). South Carolina law simply "does not require a reasonable expectation that the same complaining party be subjected to the action again." *Id.* at 431, 468 S.E.2d at 864. Under *Byrd*, all Lewallen needs to show here is that the arguments he raised cannot be resolved within the time necessary for this Court to resolve the matter. *See, e.g., In re McCracken*, 346 S.C. 87, 90, 551 S.E.2d 235, 237 (2001) (SVP detentions); *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 180, 519 S.E.2d 567, 571 (1999) (election cases); *Byrd*, 321 S.C. at 432, 468 S.E.2d at 864 (school suspension cases).

The cases cited by LALLC do not advance its arguments. In *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001), the Supreme Court was explicit in

noting that the appeal from an injunction order was moot only because a final order ended the case, rendering it impossible for further injunctive relief and noting the impossibility for a new trial at that point. *Id.* at 568, 549 S.E.2d at 597; *id.* at 569, 549 S.E.2d at 597. This case, by contrast, is still in its early stages. LALLC also ignores the fact that, despite mootness, the *Curtis* Court proceeded to review the merits of the appellate arguments by employing yet another exception, discussed below.

Here, the Temporary Injunction expired over LALLC's vigorous objection. LALLC has continued to press that the same injunctive relief should be re-imposed on the basis of essentially the same inadequate evidence, repackaged as something new. (R.pp. 505-06). Lewallen had to again address such arguments and demonstrate both that there has been no improper activity and that there still exists not even a threat of any irreparable harm. (R.pp. 498-503; r.pp. 145-65). After determining that, in fact, no evidence existed for injunctive relief, Judge Simmons issued an Order that does not foreclose the possibility of further injunctive relief:

> While based upon the initial showing prior to the Order filed October 9, the Court felt the injunction was proper, it has now been over 60 days since its issuance, with extensive discovery being done during that time, and the Court finds an insufficient basis at this time for the Injunction to be renewed. The Court purposefully allowed a 45 day period for discovery to be done so that it could revisit the issue.

R.p. 10). Although Judge Simmons has explained his reason for entering a 45-day Order, such a practice results in precisely the kind or order that remains subject to review under the capable of repetition yet evading review.

C. The judicial economy exception to mootness also applies here.

As the treatise, *Appellate Practice in South Carolina*, makes clear, *Curtis* recognizes a related exception to the mootness doctrine where a decision by this Court "may affect future events, or have collateral consequences for the parties." Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, APPELLATE PRACTICE IN SOUTH CAROLINA 114 (2d ed. 2002) (citing *Curtis*); *see also Abbeville County School Dist. v. State*, No. 2007-065159, 2014 WL 5839956, at **4-5 & n.4 (S.C. Nov. 12, 2014) (citing *Curtis*, additional citation omitted). This exception was expressly recognized in the other case cited by LALLC -- *Floyd v. Horry Cnty. Sch. Dist.*, 351 S.C. 233, 569 S.E.2d 343 (2002), *cited in* Resp. Initial Brief at 9. In the very footnote cited by LALLC, *Floyd* cites *Curtis* for the proposition that an exception to the mootness doctrine exists for judicial economy. *Floyd*, 351 S.C. at 234 n.1, 569 S.E.2d at 344 n.1 (citing *Curtis*).[4]

This case is still in its early stages and the efficacy of the agreements upon which this appeal are based are very much still at issue, as is the legitimacy of Respondents' relentless efforts to obtain additional injunctive relief. For example, how LALLC's boilerplate, "catch all" confidentiality provisions govern the parties here is analogous to the issue of how existing school-funding legislation governs the parties in *Abbeville County*. There, our Supreme Court rejected application of the mootness doctrine because a resolution would help

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[4] *Floyd* hardly advises that this case is moot and should not be reviewed as the *Floyd* Court reached the merits of the argument before it. Moreover, *Floyd* is not instructive as it does not address the capable of repetition exception, which probably did not exist 99 years ago.

define the ongoing relationship. *Abbeville County School District*, 2014 WL 5839956, at *5 & n.4. Here, appellate review of the injunction will likewise substantially aid the court below in resolving related issues and will obviate the need for successive appeals on the same or very similar issues.

II. LALLC FAILS TO REFUTE THE SHOWING THAT THE CIRCUIT COURT'S USE AND DISCLOSURE INJUNCTION REGARDING UNSPECIFIED TRADE SECRETS VIOLATES SETTLED PRECEDENT AND TWO RULES OF PROCEDURE.

A. LALLC never shows how the injunction can be squared with South Carolina's well-settled precedent regarding the standard for issuing injunctions.

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

There is no dispute here that LALLC bore the burden of proving irreparable harm. As Lewallen has shown, the Circuit Court's injunction is based solely on a hypothetical. The Circuit Court made no finding of any actual threat, only a mere recitation by the Court that "Plaintiffs[5] 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. 6 (emphasis added)). Not only does such an approach contravene settled law (Lewallen Br. Section I(A)(1)), but LALLC continues to offer no competent evidence of a threat of use or disclosure.

LALLC begins by asserting that South Carolina law permits the issuance of an injunction upon the showing of a threatened misappropriation. (Resp. Brief Section II(C)). Of course it does, but putting aside the fact that LALLC never

[5] *See supra* note 1.

specifies what these purported trade secrets are, it simply glosses over the fact that nobody claims to have any knowledge of Lewallen *threatening* to use or disclose them.

LALLC makes the equally-baseless assertion that it "presented evidence of actual use and disclosure of trade secrets" regarding likelihood of success on the merits. (*Id.*) The only cited "evidence" is a spreadsheet never accessed by Lewallen post-employment or even within six months preceding his surprise termination by LALLC. That document does not even contain information concerning the business about which LALLC has been complaining. There certainly was no evidence to refute Lewallen's showing that the information has not been accessed, which is fatal as LALLC is the party bearing the burden of proof.[6]

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

While LALLC continues to speak in generalities and wax on about how trade secret misappropriation can be enjoined, it fails to respond to the simple argument that there is no evidence that it can likely prove anything. (Lewallen Brief Section I(A)(2)). The injunction in this case was not based on evidence of misappropriation.

The Circuit Court never made a finding that LALLC could prevail, and certainly never cited any evidence that would suggest Lewallen was or is actually

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[6] The document at issue already is covered by a consent protective order and that the circumstances surrounding it being e-mailed to someone outside the company a year ago has already been explained. (R.pp. 532-33 ¶ 3). Moreover, as LALLC knows, the only reason the file has not been deleted off Lewallen's computer is that LALLC would not agree to it. (R.pp. 147-48).

using or disclosing anything that could be protected. All LALLC offered was hearsay that the Circuit Court expressly stated was not considered. (R.p. 5).

LALLC first addresses whether the agreements at issue are enforceable. (Resp. Brief Section II(B)(1)). While Lewallen will address that assertion below, it is an entirely separate issue from likelihood of success on the merits as to whether a use or disclosure injunction is appropriate. Lewallen raised this issue in an entirely different context and section of his brief. (See Lewallen Initial Brief Section I(B)).

The only issue on likelihood of success on the merits LALLC actually addresses relates to the spreadsheet document. (Resp. Initial Brief Section II(B)(2)). As noted above and previously, Lewallen has shown that this document has not been accessed and does not relate to the work about which LALLC complains. There was no need for injunctive relief to protect it. It is simply a red herring being used to justify injunctive relief that goes far beyond anything to do with this irrelevant document.

B. LALLC has failed to establish that its boilerplate agreements are enforceable under South Carolina law.

Lewallen has shown that boilerplate agreements that do not advise employees as to what specific information they are to protect are ineffective under *Carolina Chem. Equip. Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996). (Lewallen Initial Brief Section I(B)). LALLC argues that agreements not to disclose trade secrets are enforceable under *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012). There is no tension between *Muckenfuss* and *Morin*. This is simply one more attempt to change the subject.

LALLC's arguments ignore the key distinction between *Morin* and this case.[7] Lewallen certainly never argued that all agreements are unenforceable *per se*. 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. Here, Lewallen hasn't used or threatened to use any trade secrets.

The issue Lewallen raised is not whether restrictions on the use of trade secrets can be valid. Certainly they can be. The issue here is the invalidity of a boilerplate provision that, in the words of the *Muckenfuss* Court, "does not identify any specific trade secrets [, but rather] defines trade secrets so broadly that virtually all of the information . . . acquired during his employment" is covered. *Id.* at 296, 471 S.E.2d at 725. As the *Muckenfuss* Court made clear, such a "contract provision . . . is unenforceable as a matter of law." *Id.*

LALLC erroneously argues that the provisions in *Muckenfuss* are distinguishable because those provisions applied to "any knowledge or information concerning any aspect of the business." (Resp. Initial Brief Section II(B)(1)). That is simply an improper editing of the provision from *Muckenfuss*, which, as Lewallen already has pointed out, is more circumscribed than the ones

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[7] LALLC further ignores that the Supreme Court in *Morin* did not disturb this Court's holding that such agreements provide no basis for injunctive relief when remedies at law are available. *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).

before this Court. To put this all in context, the following is a comparison of the provision from *Muckenfuss* and ones before this Court:

Muckenfuss	LALLC
[Muckenfuss] agrees to not divulge any trade secrets of the Corporation. Trade secrets means any 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.[8]	**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 . . . 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.[9]

LALLC's provisions are not even limited to information that, if disclosed, would cause any damage (as was the overly-broad and void provision in *Muckenfuss*). There simply is no fair way to read LALLC's provisions as being more specific than that, which was found invalid in *Muckenfuss*.

LALLC's argument that the provisions before this Court are clearer than those in *Muckenfuss* are further undercut by the amorphous and virtually boundless types of information that LALLC has claimed to be encompassed by them, including identity of customers, as well as names of employees and what they do. Lewallen has continued to have to expend time and money to refute

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[8] *Muckenfuss*, 322 S.C. at 293, 471 S.E.2d at 723.

[9] R.pp. 7-8 ¶ 3 (emphasis added).

such claims both as a matter of law and by showing that, in fact, LALLC does not hold such information confidential. (*See, e.g.*, Lewallen Initial Brief Section II(C) n. 10).

In fact, for the first time, LALLC has now claimed that there exists some usurped "employee list" that has never before been mentioned, identified, or produced. (Respondents' Initial Brief Section II(F)). This continues LALLC's underlying strategy of using a moving target of ever-changing confidentiality claims for which no actual evidence exists. There is no telling what LALLC will next claim to be encompassed by the general language it seeks to impose. Nor could there be a more stark example as to why such generalities are not valid, as they do nothing to inform individuals as to what is actually considered to be confidential.

LALLC concludes by noting that, subsequent to *Muckenfuss*, the Trade Secrets Act was amended to clarify that trade secret agreements are not subject to the same temporal or geographic limitations as are other restrictive covenants. (Resp. Initial Brief Section II(B)(1)). This point has nothing to do with the issues before this Court.

C. LALLC fails to overcome the clear violations of Rule 65(d).

Lewallen has shown that the Temporary Injunction does precisely what Rule 65(d) prohibits: It incorporates documents by reference rather than specifying precisely the conduct proscribed. Rule 65, SCRCP. (Lewallen Initial Brief Section I(C)). LALLC does not provide any argument in response to this showing.

Lewallen also has shown that incorporated language fails to provide the specificity required of Rule 65(d). (*Id.*) LALLC cites a number of cases that are not instructive at all. First, LALLC cites *dicta* from an unreported case, *Scardelletti v. Rinckwitz*, 68 F. App'x 472 (4th Cir. 2003). The trial court in *Scardeletti* did not incorporate a boilerplate trade secret prohibition against using "all data." Rather, the court laid out a very specific prohibition in response to a *pro se* litigant's long history of vexatious litigation[10] that the Fourth Circuit correctly found to be a very straightforward prohibition against pursuing litigation in other courts regarding the same dispute. *Id.* at 479. That has nothing to do with an employer-drafted kitchen sink provision that seeks to claim as proprietary an undefinable (and ever-changing) population of information.

The Fourth Circuit's decision in *Ciena Corp. v. Jarrard*, 203 F.3d 312 (4th Cir. 2000) also is of limited value because: (1) the findings in that case that set

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[10] The court ordered that the individual was "enjoined from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." *Id.* at 478-79.

forth what was involved in terms of trade secrets were recounted on the record, but not made a part of the order, *id.* at 321; and (2) the case is unique in that the district court intended essentially a TRO with a prompt motion to reconsider by the individual so it could flesh out the issue. *Id.*; see *id.* at 319. Nowhere did the Fourth Circuit give a blanket endorsement for employers to promulgate undefined trade secret agreements that courts must rubber stamp as injunctions. As discussed in the preceding section, such an approach is foreclosed in South Carolina by *Muckenfuss*.

LALLC's reliance on two other unreported cases,[11] also is unhelpful because Rule 65(d) is not even discussed in those cases, and there was no apparent challenge to the specificity of the injunction before those courts.

In the end, the South Carolina Rule is clear, and there is no escaping the fact that the Temporary Injunction does not comply with it. This has led other courts to invalidate such attempts to simply incorporate other documents. (Lewallen Initial Brief Section I(C)).

D. LALLC cannot cite any findings or detailed reasons as to why relief was necessary, as required by Rules 52 and 65(d).

Lewallen also has taken exception to the fact that the Temporary Injunction complies with neither Rule 52(a)'s requirement that "the court to make findings of fact and conclusions of law in granting or denying temporary relief," or Rule 65(d)'s mandate that the Order "set forth the reasons for the relief . . . ." (Lewallen Initial Brief Section I(D)).

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[11] *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012) and *Uhlig, LLC v. Shirley*, No. CIVA6:081208HFFWMC, 2008 WL 3057290 (D.S.C. Aug. 5, 2008).

The totality of LALLC's retort is a single, conclusory sentence: "Moreover, the Circuit Court made specific findings of fact that were proper under Rules 65(d) and 52, SCRCP." (Respondents' Initial Brief Section II(D), final sentence). LALLC, of course, never cites to any such findings, as none exist. And without them, the Temporary Injunction cannot be sustained.

E. LALLC provides no authority for its claim that information provided by a customer is proprietary to LALLC.

Lewallen has shown that the Injunction is not properly limited to information that is independently provided to Lewallen by the customer itself. (Lewallen Initial Brief Section I(E)).

LALLC somehow claims this is wrong and recites provisions of the Trade Secret Act that fail to address the specific issue. It again cites an unreported decision[12] that has nothing to do with information the employee obtained from a customer. (Respondents' Brief Section II(E)).

In any event, LALLC ignores the fact that the statutory definition of "trade secret" is limited to information "not being readily ascertainable by proper means by . . . any other person." S.C. Code Ann. § 39-8-20(5)(a)(1). There is no showing that any customer obtained any information about itself by improper means. Absent some confidentiality agreement between LALLC and the customer to protect such information – and LALLC cites to none – the customer is free to share its information in order to obtain better pricing if it so chooses. To enjoin Lewallen from using information another person (not a party to this

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[12] *Uhlig, LLC v. Shirley*, No. CIVA6:081208HFFWMC, 2008 WL 3057290 (D.S.C. Aug. 5, 2008).

litigation) chooses to share with him for purposes of engaging in fair competition simply is not proper.

F. LALLC does not address this Court's holdings that adequate remedies at law preclude injunctive relief where an employer seeks enforcement of written employment agreements.

LALLC simply ignores such cases as this Court's decisions in *Morin* and *Mailsource*, which establish 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. *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009), *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). (See Lewallen Initial Brief Section I(F)).

LALLC turns to unreported federal trial court decisions that are not based on South Carolina law and that do not address *Morin* or *Mailsource*. The Court in *Woods v. Boeing*, did cite this Court's decision in *Morin* in a string cite for the proposition that a party may request both injunctive relief and money damages. *Woods v. Boeing Co.*, No. 2:11-CV-02855-RMG, 2013 WL 5332620, at *1 (D.S.C. Sept. 23, 2013). However, the pages cited by the *Woods* Court merely show that such relief was requested in *Morin* – not that it was granted (which it clearly wasn't). *See id.* (citing *Morin*, 685 S.E.2d at 832–33). The *Woods* court never addressed the actual finding that "Milliken had an adequate remedy at law, and the trial judge correctly found Milliken was not entitled to equitable relief." *Morin*, 386 S.C. at 9, 685 S.E.2d at 833.

In addition, LALLC appears to argue that it lacks an adequate remedy at law because that is what the parties' Membership Interest Purchase Agreement says. (Resp. Br. 21-22.) Both federal and state courts have rejected the showing that a moving party may avoid its legal obligation to show the absence of an adequate remedy by pointing to a pre-dispute contractual stipulation. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1266 (10th Cir. 2004) (citing, *inter alia, Smith, Bucklin & Associates, Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996); *Baker's Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987) ("We also agree with the district court that the contractual language declaring money damages inadequate in the event of a breach does not control the question whether preliminary injunctive relief is appropriate."); *Markovits v. Venture Info Capital, Inc.*, 129 F. Supp. 2d 647, 661 (S.D.N.Y. 2001)); *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 736 n.6, 97 Cal. Rptr. 3d 856, 887 n.6 (2009); *Shoreline Gas, Inc. v. McGaughey*, No. 13-07-364-CV, 2008 WL 1747624, at *11 (Tex. App. Apr. 17, 2008); *Ed Bertholet & Associates, Inc. v. Stefanko*, 690 N.E.2d 361, 364 (Ind. Ct. App. 1998); *George F. Mueller & Sons, Inc. v. Morales*, 25 Ill. App. 3d 466, 470, 323 N.E.2d 518, 521 (1974); *Stokes v. Moore*, 262 Ala. 59, 64, 77 So. 2d 331, 335 (1955). LALLC cannot substitute contractual language for proof that it lacks an adequate legal remedy.

III. THE CIRCUIT COURT ERRED BY ENJOINING FUTURE SPEECH.

A. LALLC provides no basis for injunctive relief as to unproven statements allegedly made to unidentified persons.

1. LALLC points to no competent evidence of any wrongdoing by Lewallen.

As Lewallen already has shown, the Circuit Court made no finding that Lewallen made improper statements to any customer, vendor, or employee. Nobody claims to have heard Lewallen make misrepresentations to LALLC's customers regarding its ability or capacity to fulfill orders. Nor is there a single witness to any purported statement by Lewallen directed 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.

Instead, LALLC continues to point solely to unsubstantiated hearsay, upon which the Circuit Court disavowed any reliance. (R.p. 5). (Lewallen Initial Brief Section II(A)(1)).

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

It remains undisputable that the Circuit Court also never made any finding that there exists the threat of irreparable harm from any statements Lewallen may have made. (Lewallen Initial Brief Section II(A)(2)). Nonetheless, LALLC continues to assert that it "showed irreparable harm from each of the statements" it has never substantiated. (Respondents' Initial Brief Section III). What is the irreparable harm from statements that apparently never were made? LALLC doesn't say. Instead it simply discusses mere speculation about evidence never

considered and discusses case law that has nothing to do with unproven assertions of alleged statements being made by unidentified persons. (*Id.*)

3. LALLC does not refute that its own representations belie the notion it could ever prevail.

Lewallen also has demonstrated that the Circuit Court never made a specific finding that LALLC was likely to prevail as to the alleged statements made to unidentified persons. As Lewallen demonstrated, LALLC's own discovery responses offer no clue that such conduct occurred. (Lewallen Initial Brief Section II(A)(3)).

LALLC offers no argument on this point.

4. LALLC also fails to address the available legal remedy that renders inappropriate injunctive relief.

Lewallen has shown that, as to the alleged defamatory statements, any loss of business attributed to alleged tortious conduct can be remedied at law. (Lewallen Initial Brief Section II(A)(4)).

Once again, LALLC does not address the argument.

B. LALLC also fails to adequately address the vagueness and lack of findings In the Order.

Section II(B) of Lewallen's Initial Brief noted that the Circuit Court's catch-all prohibition against making "any other statement meant to cause harm to LALLC" makes the prohibition against future speech too vague. (Lewallen Initial Brief Section II(B) (citing R.p. 8 ¶ 5)).

LALLC does not address this "any other statement provision," or even directly address Lewallen's authorities or argument. In its arguments regarding irreparable harm, LALLC states that "the injunction is more specific than the ones

listed above and fairly and precisely drew notice of what the injunction actually prohibited." (Respondents' Initial Brief Section III, final paragraph). None of the cases cited by LALLC, however, contain such a sweeping provision.[13]

C. LALLC does not respond to Lewallen's prior restraint argument.

Lewallen also has shown that a prohibition on future speech, including the saying of anything "meant to cause harm," is an unconstitutional prior restraint. (Lewallen Initial Brief Section II(C)).

LALLC ducks the issue and offers a solitary throw-away sentence on this important issue. "Moreover as [the cases discussed *supra* note 13] illustrate, the temporary injunction in this matter was not an invalid prior restraint." (Respondents' Initial Brief Section III, final sentence). This assertion is not only remarkable in its brevity, but also because none of the cases cited discuss the issue of prior restraint. Once again, LALLC simply fails to address Lewallen's showing.

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[13] In *Rodriguez v. Nat'l Freight, Inc.*, 5 F. Supp.3d 725 (M.D. Pa. 2014), there was no Order entered that could be compared to the Circuit Court's. The Rodriquez Court merely concluded that "We will issue an appropriate order." *Id.* at 731. Apparently, the *pro se* plaintiff to be enjoined engaged in such abusive tactics that the court simply dismissed his case. *Rodriguez v. Nat'l Freight, Inc.*, No. 1:13-CV-2083, 2014 WL 2720439, at *1 (M.D. Pa. June 16, 2014).

The court in *Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 988 F. Supp. 2d 1047 (D. Minn. 2013) was very specific as to what statements were encompassed within the injunction. Nowhere did that court issue an injunction comparable to an injunction against "any other statement meant to cause harm."

The unpublished decisions from Pennsylvania and Indiana federal courts, lack the specificity that would be required under South Carolina law. However, even there, the statements were limited to those that could be construed as "defamatory," and no such limitation exists here.

IV. LALLC'S ARGUMENT REGARDING THE NOMINAL BOND IGNORES CONTROLLING AUTHORITY.

Lewallen has challenged the nominal bond entered as being inconsistent with settled law such as *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007). (Lewallen Initial Brief Section III).

LALLC argues that the amount of the bond is acceptable because the injunction "was premised on requirements that Lewallen was already bound to follow . . . ." (Respondents' Initial Brief Section IV). It would be difficult to imagine an argument that more squarely contradicts *Atwood Agency*. There, the Circuit Court premised a low bond amount on the very same basis. *Atwood Agency*, 374 S.C. at 73, 646 S.E.2d at 884. The Supreme Court squarely held that such a rationale constituted reversible error. *Id.* ("The circuit court's order requiring only a nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper"). LALLC's continued practice of ignoring South Carolina law and relying on federal courts in other jurisdictions simply is not availing.

Conclusion

For the reasons set forth above as well as those in Lewallen's Brief, this Court should vacate the Order granting injunctive relief.

Respectfully submitted,

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