

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-002318

RECEIVED

MAR 29 2017

SC Court of Appeals

Millennium Health, LLC, Appellant,

v.

Kyle B. Crawford and Unidentified John Does, Respondents.

INITIAL BRIEF OF RESPONDENT KYLE B. CRAWFORD

W. Andrew Arnold
Jeremy Summerlin
HORTON LAW FIRM, P.A.
307 Pettigru Street
Greenville, South Carolina 29601
(864) 233-4351

Attorneys for Kyle Crawford

TABLE OF CONTENTS

Table Of Authorities ii

STATEMENT OF THE ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 4

ARGUMENT 6

 I. The circuit court’s decision to deny Millennium’s request for a preliminary injunction on the basis of Millennium’s failure to demonstrate likelihood of success on the merits is supported by both applicable law and by evidence in the Record..... 6

 A. Restricting Crawford from soliciting “potential customers” of Millennium is not necessary to protect Millennium’s legitimate business interest 8

 B. The Agreement’s definition of former customers and potential customers covers a vast multitude of businesses with which Millennium either had not business with for up to a year and a half before Crawford’s resignation or had never done business with at all..... 9

 C. No existing case law supports Millennium’s claimed business interest in former customers or potential customers 11

 II. Even if Millennium had adequately proved the likelihood of success on the merits element, Millennium still failed to establish that it would suffer irreparable harm if the injunction was not granted 14

 III. Millennium’s alleged damages, if proven, can be readily calculated and compensated in dollars and cents, which means it has an adequate remedy at law 15

 IV. Millennium’s own previous fraudulent behavior constitutes unclean hands under settled principles of equity, which prevents it from now seeking equity from this court..... 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F. Supp. 967,
978 (D.S.C. 1976) 16

Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 293 S.E.2d 859 (1982)... 11, 12

Compton v. S.C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011)..... 14

Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802,
812 (4th Cir. 1991)..... 14

Doe v. Clark, 318 S.C. 274, 457 S.E.2d 336 (1995)..... 7

Faces Boutique, Ltd. v. Gibbs, 455 S.E.2d 707, 708-09 (Ct. App. 1995)..... 10

Fournil v. Turbeville Ins. Agency, Inc., 2008 U.S. Dist. LEXIS 116469,
*13 (D.S.C. Dec. 29, 2008)..... 12

Fournil v. Turbeville Ins. Agency, Inc., 2009 U.S. Dist. LEXIS 16303,
*14-15, 2009 WL 512261 (D.S.C. Mar. 2, 2009)..... 11, 12, 13

Greer v. Spartanburg Tech. Coll., 338 S.C. 76, 79-80, 524 S.E.2d 856,
858 (Ct. App. 1999) 7

Hagemeyer N. Am., Inc. v. Thompson, 2006 U.S. Dist. LEXIS 19468,
8 (D.S.C. Mar. 1, 2006) 15

Hejl v. Hood, Hargett & Assocs., 674 S.E.2d 425, 429 (N.C. Ct. App. 2009)..... 12

Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000)..... 16

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716,
722 (2000)..... 8

Knohl v. Duke Power Co., 260 S.C. 374, 376, 196 S.E.2d 115, 116 (1973) 14

Mailsources v. M. A. Bailey & Assocs., 356 S.C. 363, 369-70, 588 S.E.2d 635,
639 (Ct. App. 2003) 16

Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.,
22 F.3d 546, 551 (4th Cir. 1994) 15

Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962)..... 12

<i>Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.</i> , 387 S.C. 583, 586, 694 S.E.2d 15, (S.C. 2010)	7, 8, 16
<i>Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.</i> , 361 S.C. 117, 121, 603 S.E.2d 905, 907, (2004)	7, 8
<i>South Carolina Public Service Authority v. Carolina Power and Light Co.</i> , 244 S.C. 466, 474, 137 S.E.2d 507, 510 (1964)	14
<i>Strategic Res. Co. v. BCS Life Ins. Co.</i> , 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).....	7
<i>Stringer v. Herron</i> , 424 S.E.2d 547 (Ct. App. 1992).....	11
<i>Team IA, Inc. v. Lucas</i> , 395 S.C. 237, 717 S.E.2d 103, fn. 1 & 2 (Ct. App. 2011)	11
<i>Walterboro Cmty. Hosp. v. Meacher</i> , 392 S.C. 479, 489, 709 S.E.2d 71, 76 (Ct. App. 2011)	8
<i>Williams v. Riedman</i> , 339 S.C. 251, 278, 529 S.E.2d 28 (Ct. App. 2000)	16
<i>Wolf v. Colonial Life and Acc. Ins. Co.</i> , 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992)	11, 12
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).....	8

OTHER AUTHORITIES

27 S.C. Jur. <i>Injunctions</i> § 4 (2012)	14
Rule 220(c), SCACR	8

STATEMENT OF THE ISSUE ON APPEAL

Whether the circuit court abuse its discretion in determining that Appellant had failed to establish that it was likely to succeed on the merits of its case and was therefore not entitled to preliminary injunctive relief.

STATEMENT OF THE CASE

In July 2016, Appellant Millennium Health, LLC (“Millennium”)—the former employer of Appellee Kyle Crawford (“Crawford”)—filed an action in state court against Crawford seeking damages and injunctive relief for an alleged violation of a non-solicitation provision and other associated claims, including breach of the duty of loyalty, civil conspiracy and tortious interference. Crawford answered and denied Millennium’s claims, and asserted that the non-solicitation provision was overly broad. Crawford also pled the affirmative defense of “unclean hands” based upon Millennium’s nationwide schemes of fraud that included some of Crawford’s accounts, which are now at issue in the present case.

In addition, Millennium filed a motion for temporary restraining order and for preliminary injunctive relief. In further support of its motion, Millennium identified “loss of goodwill,” “loss of and trust of customers,” and “loss of business reputation” as additional examples of “irreparable harm” that required the Court’s intervention to prevent. Crawford defended on several grounds, including unclean hands, lack of irreparable harm, and the overbreadth of the restrictive covenant. The covenant’s restriction encompasses “potential customers” (and effectively including *former* potential customers), and such a restriction is not necessary to protect Millennium’s legitimate interest. At the hearing on this motion on August 3, 2016, the parties engaged in oral argument before Circuit Judge Perry Gravely. By order dated September 1, 2016, the circuit court denied the motion for preliminary injunctive relief, finding that the non-solicitation’s application to “potential customers” was overly broad.

Millennium filed a motion to reconsider, which the circuit court subsequently denied on November 1, 2016. The order contained only a slight revision seeking to clarify that its finding made it unlikely that Millennium would prevail on the merits. This appeal was timely filed on November 17, 2016. The one-year restrictive period contained in the non-solicitation provision expires April 9, 2017, although this appeal will persist long after such time period has passed.

STATEMENT OF THE FACTS

Kyle Crawford is a salesman. (Crawford Affidavit ¶¶ 2, 4). In 2011, after having spent several years in the sales field honing his sales skills, Crawford joined Millennium as a customer support specialist for the territory of Tennessee. (*Id.* at ¶ 4). Millennium offers urine drug testing services to hospitals and doctors, and Crawford was to be responsible for dealing with these customers on behalf of Millennium. (*Id.*). As part of his employment, Crawford signed the Agreement Regarding Confidentiality, Non-Disclosure, and Non-Competition (“Agreement”) with Millennium. (*Id.* at ¶ 5).

Given his talents in the sales arena, Crawford advanced steadily up through the sales force. In 2012, Crawford moved to South Carolina to serve as a Sales Specialist for the Upstate of South Carolina. (*Id.* at ¶ 4). In 2013, he was promoted to Senior Sales Specialist. (*Id.*) Between this promotion in 2013 and his resignation in April 2016, Crawford managed many accounts for Millennium. Within the last year of his employment alone, he typically managed approximately forty to fifty accounts at a time. (*Id.* at ¶ 6).

In 2016, he resigned from Millennium. (*Id.*). His ultimate decision to leave Millennium was based on several factors, the most serious of which concerned Millennium’s fraudulent corporate practices in 2015 that resulted in Millennium entering into a Corporate Integrity Agreement (“CIA”) with the Department of Health and Human Services Office of the Inspector General. (*Id.* at ¶ 7). In October 2015, Millennium had agreed to a widely-reported settlement and paid a nearly \$260 million fine to the federal government. (*Id.* at ¶ 7).

Millennium’s competitors were quick to use Millennium’s widespread wrongdoing to their own business advantage, especially in how Millennium’s competitors approached and solicited Millennium’s existing and prospective accounts. Competitors of Millennium began

dropping off newspaper articles at Millennium's customers' offices about Millennium's fraudulent activities, along with their business card and the implicit promise that *they* did not defraud their customers. (*Id.* at ¶ 7). Crawford found that his own credibility with customers and potential customers was being undermined by the fallout of Millennium's fraudulent activity. (*Id.*).

Crawford's reputation was not the only thing that was being detrimentally affected by Millennium's fraud. After the settlement and the conclusion of bankruptcy proceedings, Millennium cut Crawford's commission rate by fifty percent, which was a significant financial loss for him and his family. (*Id.* at ¶ 9). His \$600 monthly car allowance was likewise eliminated with a single keystroke. As the sole breadwinner in his family, and with the impending birth of another child, Crawford could not afford these unilateral changes in the terms of his compensation. He decided to leave Millennium and seek employment elsewhere. (*Id.* at ¶¶ 9, 10).

In April 2016, Crawford accepted employment with Paradigm, LLC, where he is the current sales director at Paradigm. (*Id.* at ¶ 2). Paradigm offers medical services in three key areas: blood testing, urine testing, and cancer genetics. (*Id.*). Since joining Paradigm in 2016, Crawford's primary focus has been to establish Paradigm's cancer genetics and blood testing lab services for its customers, which are typically medical offices and hospitals. (*Id.*). Millennium, Crawford's former employer, provides only urine testing services.

Upon his departure, Crawford did not solicit any of Millennium's customers, although several of Crawford's Millennium accounts voluntarily decided to relocate their business to Paradigm. (*Id.* at ¶ 10). However, Crawford refused to divulge the particulars regarding his new company (Paradigm) until the customer's representative attested that Crawford had not

attempted to solicit them away from Millennium. (*Id.*). Crawford has consistently denied engaging in any solicitation of any existing Millennium customers. (Paradigm, it should be noted, offers services other than urine testing to physicians and medical practices.) (*Id.*). Millennium has not produced any admissible testimony that contradicts Crawford's testimony. In the absence of such testimony or evidence to refute Crawford's sworn testimony, it was more than reasonable for Judge Gravely to conclude that Millennium had not met its burden.

While employed at Millennium, Crawford made direct contact with many, many doctors, practices, and hospitals with whom Millennium ultimately did not do any business at all. (*Id.* at ¶ 11). Many times, the contact was a simple phone call. In the last eighteen months of his employment with Millennium, Crawford had approximately seventy-five lunches with prospective customers, and Millennium only wound up doing business with five to ten of them. (*Id.*). But Millennium's lawsuit, and its requested preliminary injunction, seek to prevent Crawford from soliciting any number of doctors, practices, and hospitals (i.e., "potential customers") that Millennium has never done business with. The effect of the injunction being sought by Millennium would restrict competition from Paradigm and Crawford in a substantial share of the market in certain locales. In addition, much time has passed since the initial resolution of these motions, but Millennium has still produced no additional proof to assist Millennium in meeting Millennium's burden.

ARGUMENT

- I. **The circuit court's decision to deny Millennium's request for a preliminary injunction on the basis of Millennium's failure to demonstrate likelihood of success on the merits is supported by both applicable law and by evidence in the Record.**

Millennium seeks to have this Court overturn the circuit court's denial of Millennium's request for a preliminary injunction. However, Millennium bears the burden of establishing that

the circuit court abused its discretion in making such a denial. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Such an abuse of discretion “occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law.” *Id.* Furthermore, the power of the circuit court to grant an injunction lies in equity. *Id.* In reviewing a proceeding in equity, this Court may find facts based on its own view of the preponderance of the evidence. *See, e.g., Greer v. Spartanburg Tech. Coll.*, 338 S.C. 76, 79–80, 524 S.E.2d 856, 858 (Ct. App. 1999); *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). However, “[t]his broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses.” *Greer*, 318 S.C. at 79, 457 S.E.2d at 856.

The circuit court must be cautious in granting preliminary injunctions. In *Strategic Res. Co. v. BCS Life Ins. Co.*, the South Carolina Supreme Court set out clearly the nature of an injunction and the high burden for obtaining one:

The power of the court to grant an injunction is in equity. The court will reserve its equitable powers for situations when there is no adequate remedy at law. The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. The remedy of an injunction is a drastic one and ought to be applied with caution.

367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (internal citations omitted); *see also Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (“An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the Appellant.”). To establish a cause of action for preliminary injunctive relief, Millennium must have shown that (1) it would suffer irreparable harm if the injunction is not granted; (2) it would likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C.

583, 586, 694 S.E.2d 15, 17 (S.C. 2010); *see also Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908; *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). As will be explained below, Millennium failed to meet each of these necessary elements.

Ultimately, however, even if this Court finds that the circuit court's decision was made for the wrong reasons, the Court may still affirm for other reasons contained within the Record on Appeal. Rule 220(c), SCACR; *see also Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 489, 709 S.E.2d 71, 76 (Ct. App. 2011); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000). The Record is replete with additional grounds in support of the circuit court's decision to deny issuance of a preliminary injunction, which are addressed in turn below.

In this case, the circuit court applied the appropriate legal standard and reasonably concluded that the Millennium had failed to prove it was likely to prevail on the merits, at least for purposes of obtaining a preliminary injunction. While the circuit court did not address the remaining elements for a preliminary injunction, the Record establishes that not only did Millennium fail to prove likelihood of success on the merits, Millennium also failed to show irreparable harm and failed to show that it did not have an adequate remedy at all, both of which are additional grounds for affirming the circuit court's decision to deny Millennium's motion for preliminary injunctive relief. Millennium's unclean hands, described below, provides yet another ground for affirming the circuit court's decision.

A. Restricting Crawford from soliciting "potential customers" of Millennium is not necessary to protect Millennium's legitimate business interest.

In determining whether the drastic remedy of a preliminary injunction against Crawford was warranted, the circuit court went through the analysis of whether Millennium was likely to succeed on the merits of the case. The circuit court focused specifically on whether the non-

solicitation agreement at issue was even enforceable, because if Millennium could not meet its burden to establish the enforceability, even at this early stage of litigation, then a preliminary injunction would be inappropriate. Amended Order, p. 3. The circuit court, in reviewing the facts and holdings of previous appellate decisions, determined that “potential customers” or “prospective customers”—which the non-solicit agreement clearly encompassed—are not legitimate protectable interests of an employer. *Id.* Since Millennium was attempting to prevent Crawford from soliciting “potential customers” or “prospective customers,” and since these protection of these “potential customers” or “prospective customers” were not legitimate interests of Millennium, the circuit court held that Millennium was overreaching and had drafted an overly broad non-solicitation agreement, one whose reach was difficult to determine and could well include companies that had never even been customers of Millennium at all. *Id.* The issue for this Court is whether the circuit court’s conclusion was an error of law or is wholly unsupported by evidence in the record. We argue that the circuit court’s decision is supported by both the law and the evidence.

B. The Agreement’s definition of former customers and potential customers covers a vast multitude of businesses with which Millennium either had not business with for up to a year and a half before Crawford’s resignation or had never done business with at all.

A review of the Agreement and of the Verified Complaint reveals that Millennium seeks to prevent Crawford from soliciting or accepting business from customers and “potential customers” whom Crawford had contacted within the last eighteen months of his employment. Thus, if a business was a customer seventeen months prior to Crawford’s termination but was not a *current* customer, Crawford would be prohibited from soliciting or even accepting its business on behalf of a new employer. Such a prohibition is overly broad, as there is no legitimate business interest at stake in business already lost. Moreover, the non-solicit extends its restrictive

reach to physician practices that have never done even one dollar of business with Millennium. Millennium would argue that even one phone call by Crawford to a potential customer over one year ago gives rise to a protectable interest. Yet there is no true protectable business interest served by prohibiting solicitation of medical practices or physicians who have never been a Millennium customer (and who are not even considering a current proposal). This restrictive covenant is unnecessarily overly broad, and as such, it functions as a restraint on *any* competition, as opposed to unfair competition.

A brief review of the case law on restrictive covenants is instructive. The South Carolina Court of Appeals has summarized the law governing non-competes as follows:

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. A restriction against competition must be narrowly drawn to protect the legitimate business interests of the employer. A covenant not to compete will be upheld only if it is:

- (1) necessary for the protection of the legitimate interest of the employer;
- (2) reasonably limited in its operation with respect to time and place;
- (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) reasonable from the standpoint of sound public policy; and
- (5) supported by a valuable consideration.

* * * *

If a covenant not to compete is defective in one of the above referenced areas, it is totally defective and cannot be saved.

Faces Boutique, Ltd. v. Gibbs, 455 S.E.2d 707, 708-09 (Ct. App. 1995) (citations omitted). “We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Id.* Whether or

not such a non-compete is reasonably limited in its operation is a question of law. *See Stringer v. Herron*, 424 S.E.2d 547 (Ct. App. 1992).

Non-solicitation agreements are subject to the same general requirements as non-competes, but with some differences. Specifically, the geographic limitation requirement in non-solicitation agreements can be replaced by a prohibition against contacting *existing* customers. *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992) (“The general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business. Prohibitions against contacting **existing customers** can be a valid substitute for a geographic limitation.”) (emphasis added), citing *Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E.2d 859 (1982)). *See also Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103, fn. 1 & 2 (Ct. App. 2011). However, despite this standard set forth in *Wolf*, Millennium seeks to make new law with this appeal. The circuit court was not compelled to go beyond the “existing customer” limitation, which appears to be well-established in South Carolina law. The circuit court can hardly be blamed for a failure to foresee Millennium’s envisioned expansion of an employer’s prerogative in restricting competition with, or solicitation of, **non**-customers.

C. No existing case law supports Millennium’s claimed business interest in former customers or potential customers.

In fact, there is not one reported South Carolina Supreme Court or Court of Appeals decision that permits prohibitions against contacting *prior* customers and *former* prospective customers to substitute for a geographic limitation. In fact, in a 2009 district court case, the court held that “[s]oliciting business from former clients of [the former employer] is not unfair or improper; [the former employer] has no relationship with these customers whatsoever.” *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *14-15, 2009 WL 512261 (D.S.C.

Mar. 2, 2009).¹ And in *Hejl v. Hood, Hargett & Assocs.*, the North Carolina Court of Appeals held that a non-solicitation agreement that encompassed former prospective customers was overly broad: “Defendant's attempt to prevent Plaintiff from obtaining clients where Defendant had failed to do so, is an impermissible restraint on Plaintiff.” 674 S.E.2d 425, 429 (N.C. Ct. App. 2009). Millennium’s non-solicitation agreement seeks to impermissible restrain Crawford from soliciting businesses that Millennium has no current relationship with or *never had a relationship with*. Such a restraint is overly broad, says *Fournil*, which is the same conclusion that the circuit court reached.

The insurance market provides an interesting parallel to the present case, in that anyone in the insurance market is a potential customer. In *Wolf*, the plaintiff-employee had been employed in insurance sales and had signed a non-compete agreeing not to solicit any “existing policyholders and payroll deduction accounts.” 309 S.C. at 105, 420 S.E.2d at 220. However, the agreement did not contain any geographic-based restrictions or a “blanket prohibition against competition.” *Id.* For that reason, the court upheld this narrowly tailored prohibition on soliciting existing customers, citing *Caine & Estes Ins. Agency, Inc. v. Watts. Watts*, 278 S.C. 207, 293 S.E.2d 859 (1982). The *Caine & Estes* court had reached a similar conclusion and had also limited its holding to current/existing customers. *Id.* at 209, 293 S.E.2d at 860. And once again in *Oxman v. Profitt*, the South Carolina Supreme Court upheld a non-solicitation provision that was limited to existing policyholders. 241 S.C. 28, 126 S.E.2d 852 (1962).

To return momentarily to the District Court’s decision in *Fournil v. Turbeville Ins. Agency, Inc.*, the District Court there found that the restrictive covenant was defective because it

¹ The District Court adopted the Report and Recommendation of the Federal Magistrate, who held: “[A] covenant prohibiting [an employee] from accepting business from customers who no longer do business with TIA advances no legitimate business interest of her former employer.” *Fournil v. Turbeville Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 116469, *13 (D.S.C. Dec. 29, 2008).

prohibited the former employee from contacting the employer's "former clients as well as clients with which [the employee] had no direct contact." 2009 WL 512261 at *4 (emphasis added). The Court reasoned that:

The covenant at issue is not only a prohibition of the active use of confidential information obtained while employed at Turbeville, it is an absolute bar to soliciting or accepting business from 'any insurance business of any nature from any customer or account on the books of [Turbeville] ... at the time of her employment.' Soliciting business from former clients of Turbeville's is not unfair or improper; Turbeville has no relationship with these customers whatsoever.

Id. at *5. In the present case, Millennium's restrictive covenant extends to former customers and former potential customers, including those businesses or entities that have had at least one contact with Millennium within the last eighteen months, but who have no present relationship with Millennium or even a prospective relationship. *Fournil's* logic applies equally to "potential customers" and to former potential customers; soliciting these accounts cannot be not unfair or improper since Millennium has never had any relationship with these businesses, ever. A *current* business relationship is the first building block of a legitimate business interest. If Crawford is successful in its solicitation of an "potential customer," former potential customer, or even a former customer, then Millennium is damaged in an amount exactly equal to zero, and that cannot result in a legally protectable interest of Millennium.

The *Fournil* court would agree, as it sharply defines "intimate knowledge of [] **existing** customer[s]" as "a goodwill-siphoning concern." *Id.* at *5 (emphasis added). The District Court did seem to acknowledge that the employer had a legitimate interest as it related to *existing* customers, "because the former employee's relationship with customers is part of his employer's goodwill as well" But the covenant the *Fournil* court was reviewing extended "to areas where [the employer] has no legitimate business in preventing competition," much like Millennium's attempt in this case. *Id.* Therefore, to the extent Millennium can be said to have

goodwill worth protecting, such goodwill does not extend to former customers, potential customers, or former potential customers. And to the extent the covenant as drafted extends beyond what may be deemed legitimate interests, then the entire covenant fails.

II. Even if Millennium had adequately proved the likelihood of success on the merits element, Millennium still failed to establish that it would suffer irreparable harm if the injunction was not granted.

Millennium has failed to show that it would be irreparably harmed by the circuit court's failure to issue the preliminary injunction. This failure provides another basis for upholding the circuit court's order. The Record—and specifically the Verified Amended Complaint—is devoid of specific, admissible facts upon which a finding of irreparable harm might be based, which means Millennium's request for an injunction fails.

Under South Carolina Law, a complaint fails to state a cause of action for injunctive relief *unless* facts are alleged that show that the Appellant has no adequate remedy at law and will suffer irreparable harm. *See South Carolina Public Service Authority v. Carolina Power and Light Co.*, 244 S.C. 466, 474, 137 S.E.2d 507, 510 (1964); *see also Knohl v. Duke Power Co.*, 260 S.C. 374, 376, 196 S.E.2d 115, 116 (1973).² Pursuant to SCRCF 65, even if the complaint is properly pled, an injunction may be granted “only if it clearly appears from **specific facts** shown . . . that immediate and irreparable injury, loss, or damage will result to the applicant.”³ (emphasis added). It is well established in South Carolina that Millennium must make a clear showing that it “will suffer immediate, irreparable harm without the injunction . . .” *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011); *see also Direx Israel, Ltd. v.*

² “Irreparable injury,” as used in the law of injunctions, does not necessarily mean that the injury is beyond the possibility of compensation in damages. The fact that no actual damages can be proved, and in an action at law that the jury could award only nominal damages, is often the best reason for a court of equity to interfere to prevent a continuous injury. 27 S.C. Jur. *Injunctions* § 4 (2012).

³ South Carolina Rule of Civil Procedure 65 is based upon the federal rule and uses an identical standard for immediate and irreparable harm.

Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991). “Appellant must demonstrate it faces an immediate threat of irreparable harm without an injunction. The required irreparable harm must be neither remote nor speculative, but actual and imminent.” *Hagemeyer N. Am., Inc. v. Thompson*, 2006 U.S. Dist. LEXIS 19468, 8 (D.S.C. Mar. 1, 2006) (internal quotation marks omitted). “When the record indicates that [Appellant's loss] is a matter of simple mathematical calculation, an Appellant fails to establish irreparable injury for preliminary injunction purposes.” *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994).

In the present case, Millennium failed to allege sufficient factual allegations in its Amended Verified Complaint and certainly failed to prove any specific facts that support the boilerplate contentions of imminent irreparable harm contained in the Complaint. Loss of an existing customer account is certainly calculable and compensable in money damages. (See Section III below.) Moreover, the loss of goodwill assumes that the company has goodwill to lose. (See Section IV below). Regarding non-losses arising from solicitation of non-customers, not only is there no irreparable harm, but there is not any other type of harm in the least. The record is devoid of any factual basis to find imminent and probable irreparable harm, and it simply is not credible to argue that the circuit judge's failure to find irreparable harm is an abuse of discretion. Ultimately, Millennium's failure to prove even the remote prospect of irreparable harm provides an additional basis to uphold the circuit court's denial of preliminary injunctive relief.

III. Millennium's alleged damages, if proven, can be readily calculated and compensated in dollars and cents, which means it has an adequate remedy at law.

Millennium is seeking monetary damages that can be calculated in dollars. As alleged in the Amended Verified Complaint: “Millennium has *likely* lost valuable customers, and the

financial revenue associated with those customers, to Defendant Crawford because of his breach of contract.” (Amended Verified Complaint, ¶ 71) (emphasis added). The South Carolina Court of Appeals has previously upheld the denial of an injunction on the ground that the appellant had the ability to seek and prove damages from an alleged breach of a non-compete. The court noted that “[a]n injunction is an equitable remedy; as such, it is available only where no remedy at law exists or where the legal remedy would fail to make the party whole.” *Mailsources v. M. A. Bailey & Assocs.*, 356 S.C. 363, 369-70, 588 S.E.2d 635, 639 (Ct. App. 2003) (overruled on other grounds by *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 587-588, 694 S.E.2d 15, 17-18 (2010)). Millennium’s only alleged damages are pecuniary. Accordingly, Millennium is seeking monetary damages, which are readily calculable (if damages exist at all). Therefore, Millennium has an adequate remedy at law and is not entitled to equitable relief in the form of this sought-after preliminary injunction.

IV. Millennium’s own previous fraudulent behavior constitutes unclean hands under settled principles of equity, which prevents it from now seeking equity from this court.

As laid out in Paragraphs 7 to 9 of Kyle Crawford’s Affidavit, Millennium engaged in a nationwide scheme to defraud and give illegal kickbacks to physicians, including many of the very accounts Millennium now seeks to enjoin Crawford from soliciting or servicing. Such inequitable conduct by Millennium bars it from obtaining equitable relief to protect the fruits of its unlawful schemes. South Carolina law is clear that “[u]nclean hands precludes an Appellant from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000); *see also Williams v. Riedman*, 339 S.C. 251, 278, 529 S.E.2d 28 (Ct. App. 2000); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 978 (D.S.C. 1976) (in

denying enforcement of a non-compete, the court held that “[t]he doctrines that ‘He who seeks equity must do equity’ and that ‘He who comes into equity must come with clean hands’ are firmly established in South Carolina as applicable to any of the multitude of matters which may arise in equity.”). To provide an equitable remedy to protect business obtained and bilked unlawfully would violate seemingly every equitable maxim in the book.

Crawford had no knowledge that the practices pushed by his employer were illegal. (Crawford Affidavit, ¶ 8). Of course, practically-speaking, every Millennium employee who engaged in sales under these corporately-mandated practices became unwittingly implicated by association with the unlawful conduct of Millennium. Upon discovering that Millennium’s sales and marketing strategies had been unlawful and fraudulent, Crawford came quickly to believe that unless he left Millennium’s employment, his reputation would remain tarnished. (*Id.* at ¶ 7). In April 2016, Crawford learned that he and other salesmen would pay the price for Millennium’s fraud when his commissions were cut by nearly fifty percent. (*Id.* at ¶ 9). It should come as no surprise then, that when Crawford informed some of his accounts of his departure from Millennium, several immediately expressed a desire to follow him. (*Id.* at ¶ 10).

Clearly, Millennium comes to the court now with unclean hands, even while seeking a drastic equitable remedy against Crawford, who has done nothing wrong. Established principles of equity prevent Millennium from obtaining equitable injunctive relief, and therefore the circuit court’s ruling should be affirmed.

CONCLUSION

Millennium has failed to show likelihood of success on the merits, as the non-solicitation/non-compete at issue is overly broad, unreasonable, and not necessary to protect a legitimate interest, and is therefore unenforceable. Moreover, Millennium has made no showing

of irreparable harm and clearly has an adequate remedy at law. Finally, Millennium comes before this court with unclean hands, and cannot now seek equity. For these reasons, the circuit court's exercise of discretion in denying Millennium's request for a preliminary injunction was supported by both the law and the facts, and the circuit court's decision should be affirmed.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-002318

RECEIVED

MAR 29 2017

SC Court of Appeals

Millennium Health, LLC,Appellant,

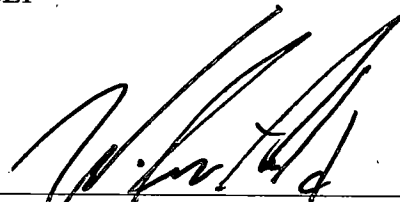
v.

Kyle B. Crawford and Unidentified John Does,Respondents.

PROOF OF DELIVERY

I certify that I have served the Initial Brief of Respondent Kyle B. Crawford and Respondent Kyle B. Crawford's Designation of Matter to be Included in the Record on Appeal via overnight delivery service, with the package being sent on March 28, 2017, addressed to the attorneys of record as follows:

A. Mattison Bogan, Esquire
Nicholas A. Charles, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, SC 29201



W. ANDREW ARNOLD
SC Bar # 0065311
Horton Law Firm, P.A.
307 Pettigru St.
Greenville, SC 29601
(864) 233-4351
aarnold@hortonlawfirm.net



HORTON

LAW FIRM, P.A.

DAVID B. WARD
WALLACE A. MULLINAX, JR.
MICHAEL A. FARRY
THOMAS F. DUGAS
BRUCE B. CAMPBELL
W. ANDREW ARNOLD
JEREMY R. SUMMERLIN

OF COUNSEL

JOSEPH M JENKINS, JR.
RICHARD N. TAPP, P.A.

VANCE B. DRAWDY
1928-1997

J. WRIGHT HORTON
1919-2011

March 28, 2017

VIA OVERNIGHT DELIVERY

Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Millennium Health, LLC vs. Kyle B. Crawford and Unidentified John Does
Case No. 2016-002318

Dear Sir or Madam:

In reference to the above, enclosed for filing are Initial Brief of Respondent Kyle B. Crawford, Respondent Kyle B. Crawford's Designation of Matter to be Included in the Record on Appeal, and Proof of Delivery.

Sincerely,

Jodie D. Fowler
Paralegal

cc: A. Mattison Bogan, Esquire (with enclosures)
Nicholas A. Charles, Esquire (with enclosures)

RECEIVED

MAR 29 2017

SC Court of Appeals

JODIE FOWLER
8642334351
HORTON LAW FIRM, P.A.
307 PETTIGRU STREET
GREENVILLE SC 29601

0.5 LBS LTR

1 OF 1

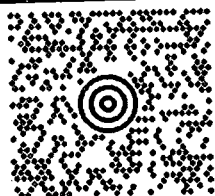
RECEIVED

SHIP TO:

CLERK OF COURT
8037341890
SC COURT OF APPEALS
1220 SENATE STREET
COLUMBIA SC 29201-3769

MAR 29 2017

SC Court of Appeals



SC 292 9-01



UPS NEXT DAY AIR SAVER

1P

TRACKING #: 1Z FA2 982 13 1700 2629



BILLING: P/P

Reference No.1: ANDY ARNOLD
Reference No.2: CRAWFORD

UIS 19.1.20.

MAGNV50 84.0A 01/2017

