

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT
ROGER L. COUCH, CIRCUIT COURT JUDGE

RECEIVED

NOV 20 2017

SC Court of Appeals

Appellate Case No. 2017-001314

Chemgard, Inc.,.....Appellant,

vs.

Darrell Keith Haynes, Chem-Tek, LLC, and Alfred Bell,.....Respondents.

RECORD ON APPEAL VOLUME I

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

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

2015 JUL 17 PM 4 48

Chemgard Inc vs. Darrell Keith Haynes

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this ,

Court Reporter:

PRESIDING JUDGE -

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

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

James H. Cassidy Roe Cassidy Coates & Price, P.A.
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

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

CHEMGARD, INC., 2015 JUL 17 PM 4 48

Plaintiff,

v.

DARRELL KEITH HAYNES AND
CHEM-TEK, LLC,

Defendants.

ORDER

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

I. FINDINGS OF FACT

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

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

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

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

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

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

(Agreement at ¶ 9(d)(i)).

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

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

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

1. Plaintiff Successfully Established Entitlement to Injunctive Relief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Handwritten signature]

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

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

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

5. The Employment Agreement was Supported by Valuable Consideration.

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

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

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

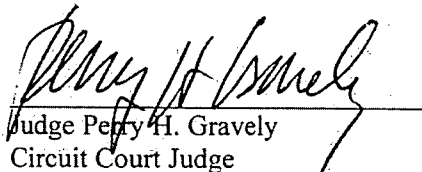
III. CONCLUSION

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

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

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

IT IS SO ORDERED.


Judge Perry H. Gravely
Circuit Court Judge

Date: July 15, 2015



Fidelity and Deposit Company of Maryland

Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

State of South Carolina
COUNTY OF Greenville

IN THE Common Pleas COURT

CAUSE NO.

Chemgard, Inc
Plaintiff

-vs-

Darrell Keith Haynes and Chem-Tek, LLC
Defendant

INJUNCTION BOND

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

Witness our hands this 8th day of July 2015.

BY: _____

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: Boyer

Attorney-in-fact

Carl L. Boyer

form#

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

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

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

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

ATTEST:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND



Eric D. Barnes

By:

Theodore G. Martinez

Eric D. Barnes

Assistant Secretary

Theodore G. Martinez

State of Maryland }
City of Baltimore } ss:

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

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



Maria D. Adamski

Maria D. Adamski

Notary Public

My Commission Expires: July 8, 2007

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2303546

Chemgard, Inc.

PAUL B. WICKENS

Darrell Keith Haynes

Chem-Tek, Inc.

2015 JUL 17 PM 4 29

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court: See page 2.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2755

Judge Code

7/7/2015

Date

For Clerk of Court Office Use Only

7/17/15
This judgment was entered on 7/17/15, and a copy mailed first class or placed in the appropriate attorney's box on 7/17/15, to attorneys of record or to parties (when appearing pro se) as follows:

W. Andrew Arnold
712 E. Washington St.
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Defendant Darrell Keith Haynes's Motion to Dismiss pursuant to Rule 12(b)(2), SCRPC is
denied. Plaintiff's Motion for Preliminary Injunction as to Defendant Darrell Keith Haynes is
granted upon presentment of security in the amount of \$15,000.00. Plaintiff's counsel is to
Submit a formal order.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes, Chem-Tek, LLC,
and Albert Bell,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-23-03546

ORDER

The Defendants filed a Motion to Dissolve and Vacate the Preliminary Injunction issued by the Court on July 17, 2015. The procedural history is relevant to the Court's analysis and decision on this Motion and is set out as follows:

1. June 5, 2015, Plaintiff filed a Motion for Preliminary Injunction.
2. Only July 6, 2015, the Court heard the Plaintiff's Motion and issued a Form 4 Order granting the injunction and requesting that the Plaintiff's Counsel submit a proposed Order which was executed and filed on July 17, 2015.
3. On July 21, 2015, the Defendants filed Motion to Reconsider which was denied by the Supplemental Order filed on August 18, 2015.
4. On November 12, 2015, Plaintiff filed a Rule to Show Cause seeking sanctions against the Defendant Darrell Keith Haynes for violation of the Preliminary Injunction. The hearing on this Motion was held on December 15, 2015.
5. On November 16, 2015, the Court issued its Order finding Defendant Haynes in violation of the Preliminary Injunction and imposed sanctions.

6. At some point following the Order imposing sanctions, the matter was appealed to the South Carolina Court of Appeals and a remittitur was issued on May 24, 2016, after notice to the Court of Appeals on April 15, 2015 that the Defendant wished to withdraw the appeal.

7. On April 29, 2016, the Defendants filed the present Motion to Dissolve and Vacate the Preliminary Injunction and the hearing to address the Defendants' Motion was held on July 8, 2016.

After consideration of all evidence presented, the substantial authority that was presented, and the strongly and eloquently argued position of the Defendants, the Court denies Defendants' Motions for the reasons discussed below.

In support of its Motion, the Defendants cite various authority for the Court to grant their Motion: PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176 (Ct. App. 1998) and Rules 59(3), 60, 62(c), and 65, SCRCF. In PPG Industries, Inc., the Court of Appeals did provide that the trial judge has the authority to amend previous orders, but this case involves a Motion to Reconsider filed by one of the parties. A Motion to Reconsider had previously been filed in this matter, considered by the Court, and denied in the present case. Rule 59(e) provides that such a Motion "shall be served not later than 10 days after receipt of the ...order" which does not apply in the present case. Rule 60 lists numerous grounds for such relief, but none apply to the present matter although Defendants' counsel appeared to argue that the analysis of the Court in the previous Order fell within "mistake" or "excusable neglect." However, this is not what was intended by this Rule. Rule 62(c) deals with amending an injunction during the pendency of an appeal, but the record clearly shows that this would not apply based on the remittitur of May 24, 2016. And Rule 65 is the general rule governing

Injunctions and does not specifically cover Motions to Dissolve and/or Vacate except for Temporary Restraining Orders without notice to the adverse party.

Even if the Court has authority to entertain the Defendants' Motion, the Court does not believe that the Defendants have properly set forth a basis for dissolving or vacating its previous Order. In light of the procedural history and the fact that these issues have been addressed on numerous occasions, the Court does not feel that the Defendants are entitled to another "bite at the apple."

Therefore, the Defendants' Motion to Dissolve and Vacate the Preliminary Injunction is respectfully denied. The Plaintiff's Second Rule to Show Cause will be addressed by separate Order.

[Signature Page to Follow]



Greenville Common Pleas

Case Caption: Chemgard Inc vs. Darrell Keith Haynes , defendant, et al

Case Number: 2015CP2303546

Type: Order/Other

Motion/Order Denied

s/ Honorable Perry H. Gravely, #2755

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ELECTRONICALLY FILED - 2016 Aug 10 4:47 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

vs.

Darrell Keith Haynes, Chem-Tek, LLC
and Alfred Bell,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-23-03546

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENHAUSER
2016 NOV 8 PM 2 26

THIS MATTER CAME BEFORE THE COURT on Defendants Darrell Keith Haynes, Chem-Tek, LLC and Alfred Bell (collectively, the "Defendants") Motion for Summary Judgment. For the reasons set forth below, the Court grants summary judgment in favor of Defendants.

I. FACTUAL BACKGROUND

Chemgard, Inc. ("Chemgard") is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. Chemgard hired Defendant Darrell Keith Haynes on September 15, 2000, and Mr. Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard.

The Agreement states that Mr. Haynes was employed as a salesman for the territory of Georgia and Alabama. During the course of his employment, Mr. Haynes was the only salesman in Georgia. Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. On May 10, 2015, Mr. Haynes



voluntarily resigned from Chemgard. On May 11, 2015, Mr. Haynes began working for Defendant ChemTek, a competitor of Chemgard.

On June 5, 2015, Plaintiff filed suit against Mr. Haynes. On June 25, 2015, Plaintiff amended its Verified Complaint to add Mr. Bell and ChemTek as Defendants. On that same day, Plaintiff moved for injunctive relief against Defendants pursuant to the following provision of his Agreement:

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

- (i) Solicit or call on, either directly or indirectly, *any customer of the Company* for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company

(Agreement at ¶ 9(d)(i)) (emphasis added.) The Hon. Perry L. Gravely heard oral arguments on Plaintiff's motion on July 6, 2015, and issued a Temporary Injunction Order (the "Order") on July 17, 2015, stating:

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

On September 25, 2016, Plaintiff again amended its Verified Complaint. Plaintiff's Second Amended Complaint alleges claims for: (1) Breach of Contract (Injunctive Relief- Defendant Haynes); (2) Breach of Contract (Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes); (3) Tortious Interference with Contractual Relations (Against Defendants ChemTek and Mr. Bell); and (4) Tortious Interference with Prospective Contractual Relations (Against All Defendants). Each of these causes of action arise solely from an alleged breach of the same provision of Mr. Haynes' Agreement set forth above.

On July 6, 2016, Defendants filed a Motion to Dissolve and Vacate the Preliminary Injunction. Judge Gravely denied Defendants' motion on August 10, 2016, finding he lacked authority to modify his earlier decision. Defendants filed a Motion to Reconsider on August 11, 2016.

On August 12, 2016, Defendants filed the instant Motion seeking summary judgment as to each of Plaintiff's claims. Judge Gravely subsequently informed the parties that he would refrain from ruling on Defendants' Motion to Reconsider (as well as a Second Rule to Show Cause filed by Plaintiffs) pending this Court's consideration of Defendants' Motion for Summary Judgment.

On September 22, 2016, this Court held a hearing on Defendants' Motion and entertained extensive arguments by the parties. For the reasons that follow, the Court grants summary judgment in favor of Defendants.

II. DISCUSSION

A. Summary Judgment Standard.

A motion for summary judgment should be granted where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990). It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E. 2d 406 (1984). A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial."

Hedgepath v. AT&T Co., 378 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Moreover, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCP.

B. Restrictive Covenants Under South Carolina Law.

Generally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Cafe Assocs. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). When a contract is clear and unambiguous, the construction of the contract is a question of law for the court. *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985). In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract. *Id.* at 101, 328 S.E.2d at 336. "When a court construes an employment contract, as with any contract, resort is first made to the language of the contract in issue, and if the language is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties." *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) (emphasis added) (citing *Stuckey v. University of South Carolina*, 284 S.C. 295, 325 S.E.2d 709 (Ct.App.1985)).

South Carolina law is clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. See, e.g., *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A covenant not to compete must be reasonable in its restrictions or it will not be upheld. *Reeves v. Sargeant*, 200 S.C. 494, 498-99, 21 S.E.2d 184, 186 (1942) (general restraint of trade is against public policy and void).

Therefore, if a covenant not to compete is deemed overbroad and unenforceable, there can be no genuine issue of material fact as to whether an employee breached the employment contract and a former employer cannot base their claims upon the invalid agreement. *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

It is equally well established that to be enforceable, a customer non-solicitation provision must limit its scope to the customers a former employee actually serviced or encountered during his or her employment. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit new customers to which he had not been assigned while in Collins' employ").¹ The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717

¹ *See e.g., Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling to eighteen certain accounts in the Greenville area of South Carolina, formerly assigned to the respondent while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11-0380, 2011 WL 3608227, at *4-5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of any of the employer's customers, not just the ones the former employee had personally serviced).

S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not “blue pencil” the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction, this allowance does not diminish the fundamental requirement that the resulting restriction must be as narrowly tailored as possible to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee).

C. The Restrictive Covenant in Question is Patently Overbroad and Unenforceable.

Based on the foregoing, the Court concludes the restrictive covenant at issue here is unenforceable as a matter of law, as it is patently overbroad. The Agreement’s customer non-solicitation provision is not limited as required by South Carolina law to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. Indeed, Mr. Haynes is prohibited from soliciting Chemgard customers that he may literally not even know were customers of the company at the time of his termination.

As written and, indeed, as interpreted by Plaintiff, the Agreement's customer non-solicitation provision also prohibits Mr. Haynes from responding to a customer's unilateral request for services or even continuing his personal friendships with employees of customers. In so doing, the restrictive covenant is patently overbroad, as it captures and binds customers to a contract to which they have never joined nor been paid consideration. This is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. See *Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) (covenants are deemed patently over broad when prohibition goes far beyond the protection of any legitimate business interests).

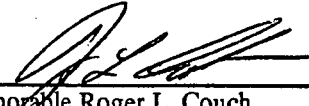
D. Plaintiff's Second Amended Complaint Must be Dismissed in its Entirety.

The Court further concludes that each of the four causes of action in Plaintiff's Second Amended Complaint arise out of an alleged breach of the covenant not to compete as stated in Paragraph 9(d) of the Employment Contract. It is well established that "only a valid agreement can support claims" for breach of contract and tortious interference with a contract. See *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); see also *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable). Chemgard's restrictive covenant, as written, is overbroad as a matter of law and there is no genuine issue of material fact as to whether Defendant Haynes is in breach of contract or whether Defendants are liable for

tortious interference with a contract or prospective contract. Accordingly, Defendants are entitled to summary judgment pursuant to Rule 56 of SCRPC, as to all of Chemgard's claims as stated within its Second Amended Complaint.

NOW THEREFORE, based on the foregoing, the Court hereby **GRANTS** Defendants' Motion and enters summary judgment as to each of Plaintiff's claims within its Second Amended Complaint.

IT IS SO ORDERED.



Honorable Roger L. Couch
Seventh Judicial Circuit

Greenville, South Carolina

~~October~~ 11/8 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	Civil Action No. 2015-CP-23-03546
	)	
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
vs.	)	MOTION TO ALTER OR AMEND
	)	JUDGMENT
Darrel Keith Haynes, Chem-Tek, LLC and	)	
Alfred Bell,	)	
	)	
Defendants.	)	

This matter is before me on the Plaintiff Chemgard, Inc.'s ("Chemgard") Motion to Alter or Amend Judgment ("Motion") the Court's Order filed on November 8, 2016, granting summary judgment to Defendants. The parties submitted briefs with proposed orders in lieu of holding a hearing with oral arguments on this Motion. This Court has reviewed the briefs submitted by the parties, as well as all attachments thereto. Based upon careful consideration of South Carolina law regarding restrictive covenants, and upon full consideration of Plaintiff's contentions, the Court denies this Motion.

A. The Restrictive Covenant is Patently Overbroad and Unenforceable

This Court has carefully reviewed all documents and evidence submitted by Plaintiff, but the evidence simply cannot overcome summary judgment as a matter of law. South Carolina law prohibits restrictive covenants that are broader than reasonably necessary to protect an employer's legitimate business interest. In this case, the non-solicitation clause was not limited in scope to Haynes' customers that he actually serviced or encountered during his employment. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit

new customers to which he had not been assigned while in Collins' employ").¹ Plaintiff attempts to save the fatally flawed non-solicitation clause by arguing the provision protects Plaintiff's legitimate business interests such as the confidentiality of Chemgard's pricing formula. (Motion at p. 2.). However, the fundamental requirement is not whether the company has interests to protect but whether the restrictive covenant is no more broad than necessary to protect those legitimate business interests. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107. Although it is true that a customer-based restriction is a valid substitute for a geographic restriction, this allowance does not diminish the fundamental requirement that the resulting restriction must be as narrowly tailored as possible to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12; 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee).

¹ *See e.g., Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling to eighteen certain accounts in the Greenville area of South Carolina, formerly assigned to the respondent while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11-0380, 2011 WL 3608227, at *4-5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of *any* of the employer's customers, not just the ones the former employee had personally serviced).



In contradiction to established precedent, Chemgard seeks to prevent the solicitation of *all of its customers*, not simply those with whom Mr. Haynes had involvement or contact. (Agreement at ¶ 9(d)(i).) The Agreement is not limited as required by South Carolina law to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had no contact or involvement. South Carolina courts have never accepted such an overbroad restriction. For this reason, the Court is not persuaded to alter or amend its Order finding the restrictive covenant patently overbroad and unenforceable as a matter of law.

B. Plaintiff's Second Amended Complaint is Dismissed in its Entirety.

Plaintiff alleges four causes of action: (1) Breach of Contract (Injunctive Relief- Defendant Haynes); (2) Breach of Contract (Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes); (3) Tortious Interference with Contractual Relations (Against ChemTek and Mr. Bell); and (4) Tortious Interference with Prospective Contractual Relations (Against All Defendants). Plaintiff's Second Amended Complaint and supporting affidavit seek equitable and monetary relief for damages caused by the alleged violation of the non-solicitation agreement and also requests monetary relief for the alleged interference with contractual relations with prospective and current customers. (Second Am. Comp. ¶¶ 22, 50, 53, 60, 70.) It is also undisputed that Plaintiff moved for injunctive relief pursuant to Section 9(d)(i) of Haynes' Employment Agreement to prevent improper solicitation of customers. The allegations within the complaint and all four causes of action alleged by Plaintiff are predicated on the breach of the non-solicitation provision as stated in Paragraph 9(d) of Haynes' Employment Agreement.

As explained *supra*, there is no genuine issue of material fact that the non-solicitation covenant, as written, is overbroad and void as a matter of law. It is well established that “only a valid agreement can support claims” for breach of contract and tortious interference with a contract. *See Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md. Ct. Spec. App. 1992) (“Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot.”); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff’d*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable). The Court acknowledges that Plaintiff has a business interest in protecting confidential information in order to prevent improper solicitation; however, Plaintiff cannot circumvent the patent invalidity of the non-solicitation provision meant to protect those business interest by newly asserting claims pursuant to the confidentiality provision. Ultimately, Plaintiff’s causes of action remain predicated upon the alleged breach of a void restrictive covenant.

For these reasons, the Court is not persuaded to reconsider its ruling granting summary judgment on Plaintiff’s four causes of actions.

C. A Rule 59(e) Motion is the Wrong Vehicle to Raise New Legal Issues

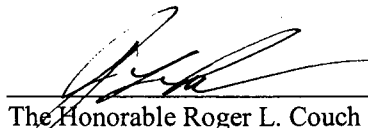
“The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Counsel’s mere disagreement with this Court’s ruling does not warrant a Rule 59(e) motion. *Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir.1993) (citing *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D.Miss.1990)). Because of the interests in finality and conservation of judicial resources, Rule 59(e) motions “are not at the

disposal of an unsuccessful party to 'rehash' the same arguments and facts previously presented." *Keyes v. National R.R. Passenger Corp.*, 766 F. Supp. 277, 280 (E.D. Pa. 1991), and "cannot be used to raise arguments which could, and should, have been made before the judgment issued," *F.D.I.C. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986); or to submit evidence that should have been previously submitted. *Borvan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989); *Rouse v. Nielsen*, 851 F. Supp. 717 (D.S.C. 1994).

The Court fully considered the pleadings, evidence and the parties arguments. Plaintiff argues that "newly discovered" evidence supports its claims for breach of the non-disclosure agreement and confidentiality agreement. (Motion at p. 8-9.) However, a Rule 59(e) motion is simply "not the proper vehicle to amend" the pleadings to add additional grounds for relief after a judgment and a hearing on the merits of the motion. *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992); *see generally* James F. Flanagan, South Carolina Civil Procedure, at 493-95 (3d. Ed. 2010) (the motion to amend cannot be used to raise an issue not previously before the court and must specifically raise the issue on which a ruling is sought).

After careful consideration of Plaintiff's Motion to Alter or Amend Judgment entered on November 8, 2016, the Court finds that no material fact or principle of law has been either overlooked or disregarded, and therefore, there is no basis to reconsider the Order granting summary judgment in favor of Defendants. Accordingly, the Plaintiff's Motion to Alter or Amend Judgment is hereby **DENIED**.

IT IS SO ORDERED.


The Honorable Roger L. Couch
Presiding Judge, Seventh Judicial Circuit

This 16 day of ^{May} April, 2017
Greenville, South Carolina
Chen Foster

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

CHEMGARD, INC.,

Plaintiff,

v.

DARRELL KEITH HAYNES,

Defendant.

SUMMONS

TO THE DEFENDANT ABOVE-NAMED:

You are hereby summoned and required to answer the Verified Complaint in this action, a copy of which is attached hereto and herewith served upon you, and to serve a copy of your answer to same upon the subscribed at 712 E. Washington Street, Greenville, South Carolina, 29601 within thirty (30) days after the service of same, exclusive of the day of such service. If you fail to answer same within the thirty (30) day period, Plaintiff will apply to the Court for the relief demanded therein and judgment will be taken against you by default.

LAW OFFICE OF W. ANDREW ARNOLD, P.C.

W. ANDREW ARNOLD

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Attorneys for Plaintiff

June 5, 2015

STATE OF SOUTH CAROLINA
FILED - CLERK OF COURT
GREENVILLE CO. S.C.

COUNTY OF GREENVILLE PAUL B. WICKENS, JR. Civil Action No. **2015-CP-23-03546**

CHEMGARD, INC., 2015 JUN 5 PM 12 38

Plaintiff,

v.

DARRELL KEITH HAYNES,

Defendant.

VERIFIED COMPLAINT

COMES NOW PLAINTIFF, by and through its counsel, and files this Verified Complaint, and does hereby allege and complain as follows:

PARTIES

1. Plaintiff Chemgard, Inc. (hereinafter "Plaintiff" or "Chemgard") is a South Carolina corporation with its principal place of business in Greenville County, South Carolina.
2. Based upon information and belief, Defendant Darrell Keith Haynes (hereinafter "Defendant" or "Haynes") is a resident and a citizen of Pine Mountain, Georgia.
3. Chemgard is in the business of selling and distributing chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

JURISDICTION

4. This Court has subject-matter jurisdiction over the claims in the lawsuit under article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.
5. This Court has personal jurisdiction over the Defendant because since 2000, Defendant has attended annual sales meetings in South Carolina, reported weekly sales reports and

expense reports to the Greenville office for reimbursement, and received his compensations and expense checks from the Greenville office. Moreover, all products sold by Defendant are shipped from Greenville, and Defendant has from time to time come to the Greenville office to discuss business and customer relationships.

VENUE

6. Venue is proper in this circuit under South Carolina Code § 15-7-30 because the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Greenville County.

FACTS

7. In September 2000, Chemgard hired Defendant Haynes to sell its products, equipment, and services.

8. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement. The Employment Agreement is attached hereto as Exhibit A and is incorporated by reference as if fully and completely contained herein.

9. The Employment Agreement contained non-solicitation provisions, which were divisible and severable and distinct obligations. Chemgard agreed to several narrowly tailored non-solicitation provisions as a condition of Haynes's original hiring, which were material terms in his employment agreement and necessary to protect a legitimate interest of Chemgard.

10. In Section 9(d) of the agreement, Haynes covenanted:

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

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

(ii) [s]olicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company.

11. The agreement also has a provision related to legal proceedings brought to enforce it. Section 9(f) of the agreement states:

Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach.

12. In consideration of the non-solicitation obligations agreed to by Haynes, Chemgard provided employment and compensation to Haynes, which was terminable by either party upon 30 days' written notice.

13. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to a pay commissions and to give employee approximately \$200,000 of pre-existing accounts for Haynes to service.

14. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.

15. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to provide reimbursement for mileage.

16. Chemgard assigned Haynes a sales territory, which was Georgia primarily, but Haynes was free to sell in any location or state he wanted. The vast majority of Haynes's assigned accounts were in Georgia; he also had one account in Alabama.

17. During the course of his employment, Haynes was the only Chemgard salesman in Georgia. Haynes was responsible for promoting sales growth and for regularly servicing the established customer accounts. Part of his mandatory job duties was reporting weekly sales efforts to the Greenville corporate office.

18. Chemgard has a legitimate business interest in maintaining customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain.

19. In the Employment Agreement, Haynes acknowledged that Chemgard's "customers and the relationship and goodwill with these customers are among the Company's most valuable assets."

20. Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard, and became known to Haynes through his employment with Chemgard.

21. Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice.

22. Haynes has become employed by a competitor of Chemgard.

23. Upon information and belief, Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day.

24. Within a week of Haynes's resignation, Chemgard received a letter from a customer, Cottle Properties, LLC, informing Chemgard that it would no longer be using Chemgard's products or services. This was an account serviced by Haynes.

25. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of a competitor and based upon information and belief, is using competitive,

confidential, and important business information, including Piedmont Hospital System in Fayette, Georgia; Flowers Baking Company in Montgomery, Alabama; Yamaha Motor Manufacturing Company in Newnan, Georgia; and Plastics Omnium Auto Exteriors in Norcross, Georgia. On at least one occasion since Defendant left Chemgard, Defendant has used his old Chemgard business card to gain access to a Chemgard customer's facility (Flowers Baking Company). Regarding Piedmont Hospital System Fayette, within approximately a week of his resignation, Haynes called on the hospital's Director of Engineering while William Smith and Vernon Campbell were already there to visit their customer and were able to observe Haynes's arrival.

26. On June 3, 2015, Chemgard received notice that St. Paul United Methodist Church in Columbus, Georgia and Flowers Baking Company have cancelled their respective accounts with Chemgard.

27. These direct solicitations are an appropriation of customer contacts, confidential information, including customer information, pricing, marketing plans, business development strategies and other information, which provides a competitive advantage if confidentiality is not maintained.

28. Haynes's solicitation of Chemgard's existing customers on behalf of a competitor is unfair competition and interference with customer relationships and customer goodwill.

29. The non-solicitation provision is for a period of twenty-four months after termination of employment, which is reasonable.

30. Defendant's actions are causing irreparable damage to Chemgard's customer relationships; once confidential information is used, this damage is irreparable and sometimes incalculable.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(Injunctive Relief)

31. Plaintiff realleges and incorporates by reference paragraphs 1 through 28, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this First Cause of Action.

32. Haynes has solicited Chemgard's existing customers, including Piedmont Hospital System Fayette, Flowers Bakery Company, Plastics Omnium Auto Exteriors, Yamaha Motor Manufacturing Company, and St. Paul United Methodist Church.

33. Upon information and belief, Haynes is using confidential business information gained during his employment with Chemgard to compete with Chemgard, including the contact information stored on his cell phone.

34. Haynes is attempting to trade on the goodwill of Chemgard's customers and to exploit the intimate knowledge of its customers gained during his employment with Chemgard to compete against Chemgard.

35. Haynes's actions are a breach of his obligations in his Employment Agreement.

36. Haynes's solicitation of existing clients and clients with whom Plaintiff had contact on behalf of a competitor has resulted and is likely to continue resulting in irreparable harm to Chemgard if it is permitted to continue.

37. Chemgard has experienced and will continue suffer irreparable harm if Defendant continues to use Chemgard's confidential information, trade on its goodwill, and solicit Chemgard's clients. Injunctive relief is necessary to prevent irreparable harm; there is not an adequate remedy at law.

38. Chemgard does not know the extent of Haynes's actions and therefore the extent of the harm done is yet unknown. Injunctive relief is necessary to preserve the status quo and protect

the legitimate and legal interest of Chemgard while discovery can be had into the extent of Haynes's wrongful conduct.

39. In paragraph 9(f) of the Employment Agreement, Haynes acknowledged that a breach would cause irreparable damage to Chemgard.

40. In paragraph 9(f) of the Employment Agreement, Haynes agreed that should Chemgard bring an action to enforce the agreement, Chemgard is entitled to temporary and/or permanent injunctive relief.

41. Also in paragraph 9(f) of the Employment Agreement, Haynes waived the defense that there is an adequate remedy at law for any such breach, which there is not in this instance.

42. Accordingly, Chemgard is entitled to an order enjoining further solicitations in violation of Haynes's Employment Agreement.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT

(Other Equitable and Legal Remedies/Attorney Fees)

43. Plaintiff realleges and incorporates by reference paragraphs 1 through 33, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Second Cause of Action.

44. Under the terms of paragraph 9(f), Chemgard is entitled to other equitable remedies and/or legal remedies to the full extent provided by South Carolina law.

45. Chemgard is entitled to reasonable discovery as to the competitive activities of Haynes and his employer to determine the scope of such activities, and to determine Haynes's employer's knowledge of Defendant's activities and culpability.

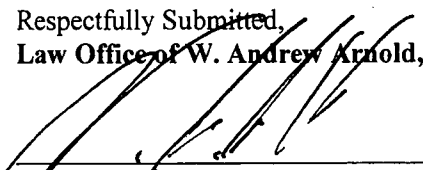
46. Chemgard is entitled to damages for any breach that resulted in pecuniary gain on behalf of Haynes and/or his employer.

47. Chemgard is incurring attorney fees in bringing and prosecuting this action for breach, and according to paragraph 9(f) of the Employment Agreement, Chemgard is entitled to an award of reasonable attorney fees.

HAVING FULLY SET FORTH ITS COMPLAINT, Plaintiff prays this Court award the following relief:

- (a) an order enjoining Defendant from breaching the confidential information and non-solicitation provisions of the Employment Agreement; an award of Plaintiff's special and compensatory damages;
- (b) an award of equitable and legal remedies as provided by the agreement of the parties;
- (c) an award of reasonable attorney fees; and
- (d) such other and further relief as this Court deems just and equitable.

Respectfully Submitted,
Law Office of W. Andrew Arnold, P.C.


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Attorneys for Plaintiff

Greenville, SC
June 5, 2015

Personally appeared before me the undersigned, who upon oath duly sworn, states as follows: I am owner and President of Chemgard, Inc., which is the Plaintiff in the above-captioned

EXHIBIT A

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EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the 15th day of SEPTEMBER, 2000, is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and DARRELL KEITH HAYNES, whose address is 4766 Turnberry Lane, Columbus, Georgia, 31909, hereinafter referred to as Employee.

WHEREAS, the Company is engaged in the business of selling and distributing chemicals, chemical products, equipment and other miscellaneous products at retail or wholesale and in the business of servicing equipment that utilizes or consumes products sold by the Company; and

WHEREAS, Employee is desirous of working for the Company in whatever capacity as may be determined by the Company;

NOW, THEREFORE, in consideration of these premises, and the mutual covenants and conditions hereinafter set forth, the Company does hereby agree to hire Employee, and Employee accepts employment upon the following terms and conditions.

1. **Employment**

The Company hereby hires Employee to conduct the business of the Company in the geographical area described in Schedule A. Employee understands and agrees that this is a nonexclusive territory and that the Company may change the geographic area described in Schedule A from time to time as it determines is necessary or desirable to the conduct of its business. The Company also may assign additional employees to all or any part of the geographic area described in Schedule A.

2. **Business Outside Assigned Area**

(a) Employee may develop customers outside the territory described in Schedule A except in existing territories assigned to other employees of the Company or territories subsequently established by the Company for other employees. For customers developed by Employee in territories not described in Schedule A and prior to assignment by the Company to other employees, the Company shall continue to pay commissions to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the



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Employee. However, after any such assignment of territory to another employee, Employee shall cease his/her efforts in such assigned territory except to service and/or transition his/her previously developed customers in such territory.

(b) Nothing in this section shall preclude Employee from developing new customers in another employee's assigned territory with the permission of the Company. For any such customers developed by the Employee, the Company shall pay any commission due to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the Employee.

3. Term

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on October 1, 2000, and continue for a period of one year until September 30, 2001, and thereafter shall be deemed to be renewed automatically, upon the same terms and conditions, for successive periods of six (6) months each, until either party, at least thirty (30) days prior to the expiration of the original term or of any extended term shall give written notice to the other party of intention not to renew such Agreement.

4. Compensation

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified in Schedule B hereto, which Schedule shall be signed by a Company representative and Employee.

5. House Accounts

The parties agree that notwithstanding the commission schedule described in subparagraphs (a) through (g) of Schedule B, the Company retains the right to amend commissions on any account categorized by the Company as a House Account, and the Company expressly reserves the right to amend the list of accounts so categorized by additions to or deletions from the list at any time. A list of all house accounts in Employee's territory shall be maintained at the offices of the Company and shall be available for review at

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that location at any reasonable time during normal business hours.

6. Reimbursement for Expenses

The Company agrees to reimburse Employee for his/her reasonable business expenses directly connected with his/her employment by the Company, said expenses to be submitted monthly with adequate documentation as required by the Company and the Internal Revenue Service. The Company normally shall reimburse Employee for such expenses within ten (10) days.

7. Termination

This Agreement may be terminated upon the occurrence of any of the following events.

a) **Without Cause.** Notwithstanding anything to the contrary stated herein, either party may terminate this Agreement without cause upon a thirty (30) day prior written notice to the other.

b) **With Cause.** Notwithstanding anything to the contrary stated herein, the Company may terminate this Agreement immediately, without prior written notice, if it determines IN ITS SOLE DISCRETION that Employee is not performing his/her job in a satisfactory manner or has engaged in misconduct.

(c) **Reports of Service and/or Sales Calls.** Employee acknowledges that reports of service and/or sales calls on customers are MANDATORY and are due on EACH MONDAY for the service and/or sales calls made during the prior week, and failure to provide such reports to the Company is reason for IMMEDIATE TERMINATION.

(d) **Illness or Incapacity.** This Agreement may be terminated by the Company upon a thirty (30) day prior written notice to the Employee in the event that Employee is unable to perform the essential functions of his/her position under the Agreement because of an illness or incapacity.

(e) **Death.** Should Employee's death occur during the term of this Agreement, the Agreement shall terminate as of the last day of the month of his/her death. Any unpaid amounts due to the deceased Employee under this Agreement shall be paid to his/her estate.

(f) **Effects of Termination.** Upon termination of this Agreement, as

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hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

8. Restrictions

Employee covenants and agrees that he/she will devote his/her entire time and energy exclusively to the business of the Company and that during the period of his/her employment, he/she will not engage in any other business, either for himself/herself or for the account of any other person, firm, or corporation without the prior written consent of the President of the Company.

9. Nondisclosure and Noncompetition Covenants

(a) **Confidential Information.** The term Confidential Information in this Agreement shall mean information that is not readily and easily available to the public or a matter of common knowledge to those in the Company's business, trade, or industry, including, but not limited to the Company's pricing methods and pricing information, costs, profits, profit margins, suppliers, business data, goals or activities, business strategy, sales techniques, identities and addresses of the Company's employees and their functions, identities and addresses of the Company's customers and prospective customers, all information concerning or relating to the Company's water treatment chemicals, cleaning chemicals, chemical formulations, chemical processes, contracts, service agreements, research and development, raw materials being used or considered and other technical and business information. In addition, Confidential Information shall include all customer information that has been provided to the Company by a customer.

(b) **Nondisclosure of Confidential Information.** During the course of Employee's employment with the Company, he/she will be given or have access to Confidential Information that has been collected, developed, and/or discovered over time by the Company and at great expense to the Company. Employee recognizes and acknowledges that the Company's Confidential Information is a valuable, special and unique asset of the Company's business and that all Confidential Information is and shall remain the property of the Company. Maintaining the confidentiality of the Confidential Information is extremely

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important to the Company's ability to compete with its competitors.

Employee agrees that while employed by the Company, he/she will not use Confidential Information of the Company except in the sole interest of the Company and will not, without the written consent of the Company, disclose Confidential Information of the Company to anyone other than those who are employed by the Company and who have a need to know the information to perform their duties on behalf of the Company.

Employee further agrees that following the termination of his/her employment with the Company, he/she will not, without the written consent of the Company, use or disclose any Confidential Information of the Company that is not a matter of common knowledge in the Company's business, trade, industry, or otherwise publicly available.

(c) **Return of Confidential Information.** It is understood and agreed by Employee that upon leaving the employ of the Company for any reason, Employee shall return all Confidential Information and other property of the Company to the Company at the time of termination of the employment relationship.

(d) **Covenant Not To Compete.** The parties acknowledge that in the course of its business, the Company develops and maintains personal and confidential relationships between the Company and its customers. The parties further acknowledge that the Company's customers and the relationship and goodwill with these customers are among the Company's most valuable assets.

The parties acknowledge that during the course of employment with the Company, Employee will develop an intimate knowledge of the Company's business and also will develop significant relationships with the Company's customers.

The parties further acknowledge that such intimate knowledge of the Company's business and significant relationships with the Company's customers should not be used to benefit any of the Company's competitors.

The parties agree that the Company will suffer significant and irreparable damage if Employee leaves the employment of the Company and goes to work for a competitor of the Company in the sale of products and/or services of the same or similar kind as those sold or provided by the Company.

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or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him/her during the course of his/her employment with the Company.

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or service similar to those sold by the Company;

(iv) Employ or attempt to employ or solicit any employee of the Company for any employment competitive with the Company, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of the Company to leave the Company's employ for the purpose of engaging in any competitive business activity.

In the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation.

It is understood by and between Employee and the Company that the foregoing restrictive covenants set forth in paragraph 9(d) are essential

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elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(e) **Protectable Interests.** Employee acknowledges and agrees that the restrictive covenants set forth in paragraphs 9 (a), (b), (c), and (d) of this Agreement are necessary for the protection of the goodwill of the Company and other legitimate business interests of the Company. Employee further acknowledges and agrees that the restrictions contained in this Agreement are reasonably limited with respect to time, customer scope, and the scope of activities restrained; are not unduly harsh and oppressive so as to deprive Employee of an opportunity to earn a living after termination of employment with the Company; and are supported by valuable consideration.

(f) **Remedies and Enforcement.** Employee acknowledges and agrees that a breach of the provisions in paragraphs 9 (a), (b), (c), and/or (d) of this Agreement by Employee will cause serious and irreparable damage to the Company that may be difficult to quantify and for which monetary damages alone will not be adequate. Accordingly, Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach. Nothing in this Agreement shall be construed to prohibit the Company from pursuing any other legal or equitable remedy.

10. General Provisions

(a) **Severability.** If any term, covenant, or condition of this Agreement or the application thereof to any person or circumstance shall be declared invalid or unenforceable, the remainder of this Agreement and the application of any term or provision to persons or circumstances other than those as to

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which it is held invalid or unenforceable shall not be affected thereby, and all other terms shall be valid and enforceable to the fullest extent permitted by the law.

(b) **Assignment.** No assignment of this Agreement or the rights and obligations hereunder shall be valid without the specific written consent of both parties hereto.

(c) **Governing Law.** This Agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina.

(d) **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) **Amendments and Agreement Execution.** This Agreement and amendments thereto shall be in writing and signed by both parties.

(f) **Notices.** Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be deemed effectively given when personally delivered or mailed by prepaid certified mail, return receipt requested, addressed to Employee at his/her last known address, or to the Company at Post Office Box 25061, Greenville, South Carolina 29616. Further, Employee shall at all times keep the Company notified of his/her home address and home telephone number.

(g) **Waiver of Breach.** The Company's waiver of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof. No waiver shall be valid unless it is in writing and signed by the President of the Company.

(h) **Entire Agreement.** This constitutes the entire Agreement between the parties. The Company and Employee shall be entitled to no benefits other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless

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incorporated herein by amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in this Agreement and no others.

IN WITNESS WHEREOF, the parties execute this Agreement this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

EMPLOYEE AFFIRMS THAT HE/SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND THAT HE/SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS AND THAT HE/SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME. EMPLOYEE FURTHER AFFIRMS THAT HE/SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND THAT HE/SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

WITNESS:

Darrell Keith Haynes

Henry A. Kile Jr

Darrell Keith Haynes

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SCHEDULE A TO EMPLOYMENT AGREEMENT

The Geographical territory assigned to Darrell Keith Haynes pursuant to the Employment Agreement between Chemgard, Inc. and Darrell Keith Haynes shall be as follows: the following counties in Georgia: Carroll, Heard, Troup, Coweta, Fayette, Pike, Meriwether, Lamar, Monroe, Upson, Talbot, Harris, Muscogee, Chattahoochee, Marion, Taylor, Crawford, Bibb, Twiggs, Houston, Macon, Schley, Steward, Webster, Sumter, and Peach, and the following counties in Alabama: Talladega, Clay, Randolph, Coosa, Elmore, Bullock, Russell, Tallapousa, Chambers, Lee, Montgomery, and Macon.

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SCHEDULE B TO EMPLOYMENT AGREEMENT

Compensation Pursuant To Employment Agreement
Between Chemgard, Inc. and
Darrell Keith Haynes dated SEPTEMBER 15, 2000.

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified below:

(a) For the first three years (36 months) of this Agreement and any extensions, or for the duration of the Agreement and any extensions if such duration is less than 36 months, the Company agrees to pay Employee a salary of five thousand five hundred eighty-three dollars and thirty-four cents (\$5,583.34) per month, less commissions paid as described in subparagraphs (b) through (g) of this schedule, and less submitted and reasonable expenses of Employee for the periods that are directly connected with his/her employment by the Company.

(b) Beginning October 1, 2000, Employee shall earn a commission each month based on equipment and chemical sales and based on services rendered during the prior month to HOUSE ACCOUNTS (accounts turned over to him/her by the Company) at the rates as specified in paragraphs (c), (d), (e), (f) and (g) below.

(c) FOR NEW BUSINESS GENERATED SOLELY BY EMPLOYEE (hereinafter New Business), the commission shall be equal to forty percent (40%) of the net profit to the Company on the SALES OF WATER TREATMENT CHEMICALS. Net profit is defined as the gross sales price less the cost to the Company of the water treatment chemicals sold (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

In the event the Employee's geographic area is modified by the Company to exclude customers for whom the Employee has solely generated New Business,

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the Employee will continue to receive a commission on the SALES OF WATER TREATMENT CHEMICALS to that customer in an amount to be determined by the Company for the duration of this Agreement unless a change is mutually agreed upon by the Company and Employee.

(d) On all SALES OF EQUIPMENT that are considered New Business, the Company agrees to pay to Employee a commission equal to twenty percent (20%) of the net profit to the Company. The net profit shall be determined by the gross sales price of the equipment less the cost to the Company of the equipment (including overhead as defined in cost sheets for pricing as developed by the Company from time to time), freight costs, a pro rata share of Employee's expenses as specified in subparagraph (h) below, and all federal and state sales and excise taxes applicable to said sale.

(e) For all BOILER CLEANING JOBS that are considered New Business, the Company agrees to pay to Employee a commission equal to the net profit on each such job. For the purposes of this subparagraph, net profit is defined as the gross sales price charged by the Company for said jobs less twenty percent (20%) of the said gross sales price, a pro rata share of Employee's expenses as specified in subparagraph (h) below, the cost of the chemicals (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), labor and transportation involved in performing the work (except for labor performed by Employee), the direct cost and/or amortized portion of the cost of all equipment used or consumed in performing the job, and all federal and state sales and excise taxes applicable to said job.

(f) For TOTAL SERVICE CONTRACTS (where the customer pays a fixed amount per period for service and chemicals) that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit. For purposes of this subparagraph, net profit shall mean the gross price paid by the customer for a period for which the payment is made, less cost of treatment chemicals delivered to the customer during the particular period, cost of drums used in fulfilling the contract, overhead

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costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, all federal and state sales and excise taxes applicable to said payment, and the cost of any equipment supplied under said service contract. Any deficit commission for total service contracts shall be offset against commissions and salary earned under subparagraphs (a), (b), (c), (d) and (e) above and (g) below or, in the company's discretion, carried forward to the next pay period.

(g) On SALES OF CLEANING CHEMICALS AND FORMULATIONS that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit to the Company. For purposes of this subparagraph, net profit is defined as the gross sales price less the cost to the Company of the cleaning chemicals and formulations sold, costs of drums, overhead costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

(h) For purposes of calculating Employee's commissions pursuant to subparagraphs (a) through (g) above, the term pro rata shall mean the percentage of Employee's expenses for the period determined by the ratio of gross sales and/or services made under each such subparagraph to the total sales and/or services made pursuant to subparagraphs (a) through (g) for the same period.

(i) In determining Employee's gross commission for any period, gross commission under subparagraphs (a) through (g) shall be totaled and Employee's submitted and reasonable expenses for the period deducted therefrom to arrive at the net commission due. Net commission payable to Employee hereunder shall be net commission as defined in this subparagraph less any commissions previously paid to Employee on sales and/or services for which the customer has not paid the Company and for which sixty (60) days has passed after the date of the invoice to the particular customer, provided, however, that should

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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

IN WITNESS WHEREOF, the parties execute this Schedule this the 15TH day of September, 2000.

WITNESS:

CHEMGARD, INC.

[Signature]

By:

[Signature]
William C. Smith, President

WITNESS:

Henry A. Kilo Jr

Darrell Keith Haynes
Darrell Keith Haynes

DKH [Signature]

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
CHEMGARD, INC.,)
Plaintiff,)
v.)
DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)
Defendants.)

COURT OF COMMON PLEAS
Civil Action No. 2015-CP-23-03546

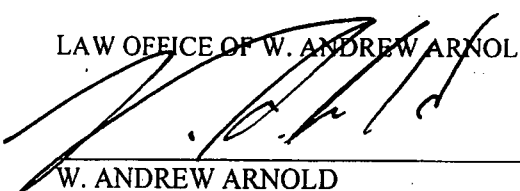
SUMMONS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENBACHER
2015 JUN 25 PM 2 27

TO THE DEFENDANT ABOVE-NAMED:

You are hereby summoned and required to answer the Verified Amended Complaint in this action, a copy of which is attached hereto and herewith served upon you, and to serve a copy of your answer to same upon the subscribed at 712 E. Washington Street, Greenville, South Carolina, 29601 within thirty (30) days after the service of same, exclusive of the day of such service. If you fail to answer same within the thirty (30) day period, Plaintiff will apply to the Court for the relief demanded therein and judgment will be taken against you by default.

LAW OFFICE OF W. ANDREW ARNOLD, P.C.


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Attorneys for Plaintiff

June 25, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
CHEMGARD, INC.,)
)
Plaintiff,)
)
v.)
)
DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)
)
Defendants.)
_____)

COURT OF COMMON PLEAS
Civil Action No. 2015-CP-23-03546

VERIFIED AMENDED COMPLAINT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUL B. WICKENHEIMER
2015 JUN 25 PM 2 28

COMES NOW PLAINTIFF, by and through its counsel, and files this Verified Amended Complaint, and does hereby allege and complain as follows:

PARTIES

1. Plaintiff Chemgard, Inc. (hereinafter "Plaintiff" or "Chemgard") is a South Carolina corporation with its principal place of business in Greenville County, South Carolina.
2. Based upon information and belief, Defendant Darrell Keith Haynes (hereinafter "Haynes") is a resident and a citizen of Pine Mountain, Georgia.
3. Defendant Chem-Tek, LLC (hereinafter "Chem-Tek") is a South Carolina company with its principal place of business in Greenville County, South Carolina.
4. Chemgard is in the business of selling and distributing chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

JURISDICTION

5. This Court has subject-matter jurisdiction over the claims in the lawsuit under article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.

6. This Court has personal jurisdiction over the Haynes because since 2000, Haynes has attended annual sales meetings in South Carolina, reported weekly sales reports and expense reports to the Greenville office for reimbursement, and received his compensations and expense checks from the Greenville office. Moreover, all products sold by Haynes are shipped from Greenville, and Haynes has from time to time come to the Greenville office to discuss business and customer relationships. He is also employed by Chem-Tek, a South Carolina business.

7. This Court has personal jurisdiction over Chem-Tek because it is a South Carolina company that is doing business in South Carolina and has its headquarters in South Carolina.

VENUE

8. Venue is proper in this circuit under South Carolina Code § 15-7-30 because the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Greenville County.

FACTS

9. In September 2000, Chemgard hired Defendant Haynes to sell its products, equipment, and services.

10. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement. The Employment Agreement is attached hereto as Exhibit A and is incorporated by reference as if fully and completely contained herein.

11. The Employment Agreement contained non-solicitation provisions, which were divisible and severable and distinct obligations. Chemgard agreed to several narrowly tailored

non-solicitation provisions as a condition of Haynes's original hiring, which were material terms in his employment agreement and necessary to protect a legitimate interest of Chemgard.

12. In Section 9(d) of the agreement, Haynes covenanted:

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

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

(ii) [s]olicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company.

13. The agreement also has a provision related to legal proceedings brought to enforce it. Section 9(f) of the agreement states:

Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach.

14. In consideration of the non-solicitation obligations agreed to by Haynes, Chemgard provided employment and compensation to Haynes, which was terminable by either party upon 30 days' written notice.

15. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to pay commissions and to give employee approximately \$200,000 of pre-existing accounts for Haynes to service.

16. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.

17. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to provide reimbursement for mileage.

18. Chemgard assigned Haynes a sales territory, which was Georgia primarily, but Haynes was free to sell in any location or state he wanted. The vast majority of Haynes's assigned accounts were in Georgia; he also had one account in Alabama.

19. During the course of his employment, Haynes was the only Chemgard salesman in Georgia. Haynes was responsible for promoting sales growth and for regularly servicing the established customer accounts. Part of his mandatory job duties was reporting weekly sales efforts to the Greenville corporate office.

20. Chemgard has a legitimate business interest in maintaining customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain.

21. In the Employment Agreement, Haynes acknowledged that Chemgard's "customers and the relationship and goodwill with these customers are among the Company's most valuable assets."

22. Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard, and became known to Haynes through his employment with Chemgard.

23. Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice.

24. Haynes has since become employed by Chem-Tek, LLC, which is a competitor of Chemgard.

25. Upon information and belief, Chem-Tek had knowledge of Haynes's non-solicitation agreement. Despite this knowledge, Chem-Tek hired Haynes to directly solicit Chemgard's current customers, and since his hiring has continued to allow Haynes to wrongfully solicit the customers of Chemgard.

26. Upon information and belief, Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day.

27. Within a week of Haynes's resignation, Chemgard received a letter from a customer, Cottle Properties, LLC, informing Chemgard that it would no longer be using Chemgard's products or services. This was an account serviced by Haynes when he was employed by Chemgard.

28. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and based upon information and belief, is using competitive, confidential, and important business information, including Piedmont Hospital System in Fayette, Georgia; Flowers Baking Company in Montgomery, Alabama; Yamaha Motor Manufacturing Company in Newnan, Georgia; and Plastics Omnium Auto Exteriors in Norcross, Georgia. On at least one occasion since Haynes left Chemgard, Haynes has used his old Chemgard business card to gain access to a Chemgard customer's facility (Flowers Baking Company). Regarding Piedmont Hospital System Fayette, within approximately a week of his resignation, Haynes called on the hospital's Director of Engineering while Chemgard's William Smith and Vernon Campbell were already there to visit their customer and were able to observe Haynes's arrival. Haynes has refused to return company information and property despite Plaintiff's request.

29. On June 3, 2015, Chemgard received notice that St. Paul United Methodist Church in Columbus, Georgia and Flowers Baking Company have cancelled their respective accounts with Chemgard.

30. These direct solicitations are an appropriation of customer contacts, confidential information, including customer information, pricing, marketing plans, business development strategies and other information, which provides a competitive advantage if confidentiality is not maintained.

31. Haynes's solicitation of Chemgard's existing customers on behalf of competitor Chem-Tek is unfair competition and interference with customer relationships and customer goodwill.

32. The non-solicitation provision is for a period of twenty-four months after termination of employment, which is reasonable.

33. Haynes's actions are causing irreparable damage to Chemgard's customer relationships; once confidential information is used, this damage is irreparable and sometimes incalculable.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(Injunctive Relief—All Defendants)

34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this First Cause of Action.

35. By virtue of the foregoing, Chemgard has demonstrated a likelihood of success on the merits that favors the issuance of an injunction against all Defendants.

36. Haynes has solicited Chemgard's existing customers on behalf of and with the knowledge and permission of Chem-Tek, including Piedmont Hospital System Fayette, Flowers

Bakery Company, Plastics Omnium Auto Exteriors, Yamaha Motor Manufacturing Company, and St. Paul United Methodist Church.

37. Upon information and belief, Haynes is using confidential business information gained during his employment with Chemgard to compete with Chemgard on behalf of and with the knowledge and permission of Chem-Tek, including the customer contact information stored on his cell phone.

38. Haynes and Chem-Tek are attempting to trade on the goodwill of Chemgard's customers and to exploit the intimate knowledge of its customers gained during Haynes's employment with Chemgard to compete against Chemgard.

39. Haynes's actions are a breach of his obligations in his Employment Agreement.

40. Haynes's solicitation of existing clients and clients with whom Chemgard had contact on behalf of competitor Chem-Tek has resulted and is likely to continue resulting in irreparable harm to Chemgard if it is permitted to continue.

41. Chemgard has experienced and will continue to suffer irreparable harm if Haynes and Chem-Tek continue to use Chemgard's confidential information, trade on its goodwill, and solicit Chemgard's clients. Injunctive relief is necessary to prevent irreparable harm, and there is not an adequate remedy at law.

42. Chemgard does not know the extent of Haynes's actions and therefore the extent of the harm done is yet unknown. Injunctive relief is necessary to preserve the status quo and protect the legitimate and legal interest of Chemgard while discovery can be had into the extent of Haynes's wrongful conduct.

43. In paragraph 9(f) of the Employment Agreement, Haynes acknowledged that a breach would cause irreparable damage to Chemgard.

44. In paragraph 9(f) of the Employment Agreement, Haynes agreed that should Chemgard bring an action to enforce the agreement, Chemgard is entitled to temporary and/or permanent injunctive relief.

45. Also in paragraph 9(f) of the Employment Agreement, Haynes waived the defense that there is an adequate remedy at law for any such breach; there is no adequate remedy in this instance.

46. Chem-Tek has knowingly permitted Haynes to violate the non-solicitation of his Employment Agreement on Chem-Tek's behalf and for Chem-Tek's benefit.

47. Accordingly, Chemgard is entitled to an order enjoining further solicitations in violation of Haynes's Employment Agreement.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT

(Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes)

48. Plaintiff realleges and incorporates by reference paragraphs 1 through 47, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Second Cause of Action.

49. Under the terms of paragraph 9(f), Chemgard is entitled to other equitable remedies and/or legal remedies to the full extent provided by South Carolina law.

50. Chemgard is entitled to reasonable discovery as to the competitive activities of Haynes and his employer, Chem-Tek, to determine the scope of such activities, and to determine Chem-Tek's knowledge of Haynes's activities and culpability.

51. Chemgard is entitled to damages for any breach that resulted in pecuniary gain on behalf of Haynes and/or his employer.

52. Chemgard is incurring attorney fees in bringing and prosecuting this action for breach, and according to paragraph 9(f) of the Employment Agreement, Chemgard is entitled to an award of reasonable attorney fees.

FOR A THIRD CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS
(Against Defendant Chem-Tek)

53. Plaintiff realleges and incorporates by reference paragraphs 1 through 52, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Third Cause of Action.

54. Haynes entered into a valid contractual obligation with Chemgard in the form of the Employment Agreement.

55. Chem-Tek knew of the existence of the Employment Agreement.

56. Chem-Tek intentional caused Haynes to breach the terms of the Employment Agreement by soliciting Chemgard's current customers.

57. Chem-Tek had no justification for procuring Haynes's breach.

58. Haynes actually breached the Employment Agreement.

59. Chemgard was damaged and continues to be damaged by Chem-Tek's interference by losing multiple customer relationships and contracts to Chem-Tek and Haynes.

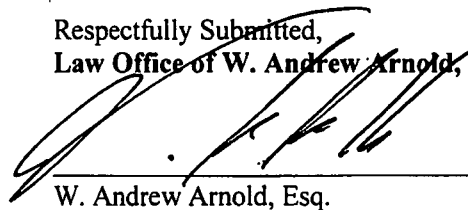
60. Chemgard is entitled to judgment against Chem-Tek for the amount of their actual, general, compensatory, incidental, special, and consequential damages relating to Chem-Tek's intentional procurement of Haynes's breach.

HAVING FULLY SET FORTH ITS COMPLAINT, Plaintiff prays this Court award the following relief:

- (a) an order enjoining Defendant Haynes from breaching the confidential information and non-solicitation provisions of the Employment Agreement;

- (b) an order enjoining Defendant Chem-Tek from accepting any business via Haynes that was obtained in violation of Haynes's contractual agreement with Chemgard;
- (c) an award of Plaintiff's special and compensatory damages;
- (d) an award of equitable and legal remedies as provided by the agreement of the parties;
- (e) an award of reasonable attorneys' fees; and
- (f) such other and further relief as this Court deems just and equitable.

Respectfully Submitted,
Law Office of W. Andrew Arnold, P.C.



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Attorneys for Plaintiff

Greenville, SC
June 25, 2015

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes and Chem-Tek, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) THIRTEENTH JUDICIAL CIRCUIT

) C.A. No.: 2015-CP-23-03546

) **DEFENDANT CHEM-TEK'S**
) **ANSWER TO THE AMENDED**
) **COMPLAINT**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2015 AUG 14 PM 2:51

The Defendant, Chem-Tek, LLC (*hereinafter* "Chem-Tek" or "Defendant"), by and through its attorneys, hereby answers the Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.

2. Chem-Tek admits the allegations of Paragraphs 1 and 2.

3. Chem-Tek admits the allegations contained in Paragraph 3.

4. Chem-Tek admits the allegations contained in Paragraph 4.

5. Chem-Tek admits the allegations contained in Paragraph 5 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Chem-Tek denies that this Court has personal jurisdiction over Defendant Keith Haynes.

6. Chem-Tek admits the allegations of Paragraph 6 to the extent they allege Haynes is employed by Chem-Tek, a South Carolina business. Chem-Tek denies that this Court has

personal jurisdiction over Haynes and that products sold by him are shipped from Greenville. Chem-Tek is without sufficient knowledge or information to respond to the remaining allegations of Paragraph 6 and therefore denies the same.

7. Chem-Tek admits the allegations contained in Paragraph 7.

8. Defendant denies the allegations contained in Paragraph 8 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

9. Chem-Tek admits the allegations contained in Paragraph 9 upon information and belief.

10. Chem-Tek admits the allegations contained in Paragraph 10 upon information and belief.

11. Chem-Tek admits the allegations of Paragraph 11 to the extent they allege that the Employment Agreement contained several restrictive covenants. Chem-Tek denies the remaining allegations of Paragraph 11 as stated.

12. Paragraph 12 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

13. Paragraph 13 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

14. Chem-Tek admits the allegations of Paragraph 14 upon information and belief.

15. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 15 and therefore denies the same.

16. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 16 and therefore denies the same.

17. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 17 and therefore denies the same.

18. Chem-Tek admits the allegations of Paragraph 18 upon information and belief to the extent they allege Haynes was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Chem-Tek lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 18 and therefore denies the same.

19. Chem-Tek admits the allegations of Paragraph 19 upon information and belief to the extent they allege Haynes was the only Chemgard salesman in Georgia. Chem-Tek lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 19 and therefore denies the same.

20. The allegations of Paragraph 20 are legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 20 as stated.

21. Paragraph 21 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

22. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 22 and therefore denies the same.

23. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 23 and therefore denies the same.

24. Chem-Tek admits the allegations of Paragraph 24.

25. Chem-Tek admits it had knowledge of Haynes' Employment Agreement at the time of his hire. Chem-Tek denies the remaining allegations of Paragraph 25 as stated.

26. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 26 and therefore denies the same.

27. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 27 and therefore denies the same.

28. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 28 including not knowing what information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the same.

29. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 29 and therefore denies the same.

30. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 30 and therefore denies the same.

31. Chem-Tek denies the allegations of Paragraph 31.

32. Chem-Tek admits the Employment Agreement attempts to prevent Haynes from competing with Chemgard for a period of 24 months. Chem-Tek denies the allegation in Paragraph 32 that a 2 year limitation on free market business and Haynes' ability to earn a living is reasonable.

33. Chem-Tek denies the allegations of Paragraph 33.

34. Paragraph 34 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

35. Chem-Tek denies the allegations of Paragraph 35.

36. Chem-Tek admits the allegations of Paragraph 36 to the extent they allege the customers listed chose to move their business to Chem-Tek following Haynes' departure from Chemgard. Chem-Tek denies these customers are exclusively Chemgard customers.

37. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 37 and therefore denies the same.

38. Chem-Tek denies the allegations of Paragraph 38 as stated.

39. Chem-Tek denies the allegations of Paragraph 39 and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

40. The allegations of Paragraph 40 contain legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 40 as stated.

41. The allegations of Paragraph 41 contain legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 41 as stated.

42. Chem-Tek denies injunctive relief is necessary in this case.

43. Paragraph 43 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

44. Paragraph 44 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

45. Paragraph 45 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

46. Chem-Tek denies the allegations of Paragraph 46 as stated.

47. Chem-Tek denies the allegations of Paragraph 47.

48. Paragraphs 48 – 52 allege a cause of action solely against Defendant Haynes and therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

49. Paragraph 53 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

50. Chem-Tek admits the allegations of Paragraph 54 to the extent they allege Haynes and Chemgard are parties to the Employment Agreement, certain provisions of which are valid and enforceable contractual obligations. Chem-Tek denies that the non-solicitation provisions contained in the Employment Agreement are valid and enforceable contractual obligations.

51. Chem-Tek admits the allegations of Paragraph 55.

52. Chem-Tek denies the allegations of Paragraph 56.

53. Chem-Tek denies the allegations of Paragraph 57 as stated.

54. Chem-Tek denies the allegations of Paragraph 58 as stated.

55. Chem-Tek admits certain customers who formerly did business with Chemgard now do business with Chem-Tek but the extent of damages allegedly suffered by Chemgard, if any, is unknown at this time and therefore Chem-Tek denies the remaining allegations of Paragraph 59. Further responding, Chem-Tek asserts that it may solicit and accept business from any customers it wishes.

56. Chem-Tek denies that Plaintiff is entitled to any relief requested in the Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

57. Chem-Tek is informed and believes that Plaintiff's Amended Complaint fails to state facts sufficient to set forth a cause of action against it and, therefore, Plaintiff's Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

58. Plaintiff's actions taken against Chem-Tek in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

59. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

60. All actions taken by Chem-Tek have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

61. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

62. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE
(Information Readily Ascertainable)

63. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

64. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Damage)

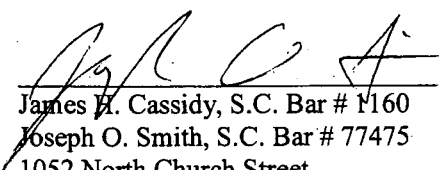
65. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

FOR AN ELEVENTH DEFENSE
(Reservation)

66. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Amended Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



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Attorneys for the Defendant Chem-Tek, LLC

August 14, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes and Chem-Tek, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) THIRTEENTH JUDICIAL CIRCUIT

) C.A. No.: 2015-CP-23-03546

) **DEFENDANT HAYNES'**
) **ANSWER TO THE AMENDED**
) **COMPLAINT**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENS, CLERK
2015 AUG 14 PM 2:51

The Defendant, Darrell Keith Haynes (*hereinafter* "Haynes" or "Defendant"), through his attorneys, hereby answers the Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.
2. Haynes admits the allegations of Paragraphs 1 and 2.
3. Haynes admits the allegations contained in Paragraph 3.
4. Haynes admits the allegations contained in Paragraph 4.
5. Haynes admits the allegations contained in Paragraph 5 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Haynes denies that this Court has personal jurisdiction over him.
6. Haynes admits the allegations of Paragraph 6 to the extent they allege he is employed by Chem-Tek, a South Carolina business. Haynes denies that this Court has personal jurisdiction over him and that products sold by him are shipped from Greenville. Haynes admits

that he attended occasional, although not annual, sales meetings in South Carolina, reported sales and expense reports via email from Georgia to the Greenville office, and received his compensation and expense checks from that office.

7. Haynes admits the allegations contained in Paragraph 7.

8. Defendant denies the allegations contained in Paragraph 8 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

9. Haynes admits the allegations contained in Paragraph 9.

10. Haynes admits the allegations contained in Paragraph 10.

11. Haynes admits the allegations of Paragraph 11 to the extent they allege that the Employment Agreement contained several restrictive covenants. Haynes denies the remaining allegations of Paragraph 11 as stated.

12. Paragraph 12 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

13. Paragraph 13 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

14. Haynes admits the allegations of Paragraph 14.

15. Haynes admits the allegations of Paragraph 15.

16. Haynes admits the allegations of Paragraph 16 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for reasonable expenses

incurred in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for his cell phone bill. Further responding, Haynes admits the remaining allegations of Paragraph 16 to the extent they allege he stored customer contact information on his phone. Haynes denies the remaining allegations of Paragraph 16.

17. Haynes admits the allegations of Paragraph 17 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for mileage traveled in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for mileage. Haynes denies the remaining allegations of Paragraph 17.

18. Haynes admits the allegations of Paragraph 18 to the extent they allege he was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Haynes denies the remaining allegations of Paragraph 18.

19. Haynes admits the allegations of Paragraph 19 to the extent they allege he was the only Chemgard salesman in Georgia. Haynes further admits that he was responsible for promoting sales growth and regularly servicing customer accounts. The Plaintiff's reporting requirements were in a constant state of flux during the years Haynes worked for the company, and therefore Defendant denies the remaining allegations of Paragraph 19 as stated.

20. The allegations of Paragraph 20 are legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 20 as stated.

21. Paragraph 21 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

22. Haynes is without sufficient knowledge or information regarding the reasons for Chemgard providing him the information alleged and therefore denies the allegations of Paragraph 22 regarding Plaintiff's motivations. Haynes does not know what specific information Plaintiff is referring to in Paragraph 22 and therefore cannot affirmatively admit or deny the remaining allegations of Paragraph 22.

23. Haynes admits the allegations of Paragraph 23.

24. Haynes admits the allegations of Paragraph 24.

25. Haynes admits Chem-Tek had knowledge of his Employment Agreement at the time it hired him. Haynes denies the remaining allegations as stated.

26. Haynes admits the allegations of Paragraph 26 to the extent they allege he utilizes his personal cell phone to contact customers. Haynes denies the remaining allegations of Paragraph 26 as stated.

27. Haynes admits the allegations of Paragraph 27 to the extent they allege he serviced the Cottle Properties, LLC account while employed by Chemgard. Haynes does not have sufficient knowledge or information concerning the remaining allegations of Paragraph 27 and therefore denies the same.

28. Haynes admits the allegations of Paragraph 28 to the extent they allege certain former customers of Chemgard have chosen to do business with Chem-tek following his resignation. Haynes denies the allegation that he used his old Chemgard business card to gain access to Flowers Baking. Further responding, Ed Williams of Flowers Baking Company requested Haynes meet with him at their facility and directed the Defendant to utilize his Flowers Baking Company access badge to enter the facility. Haynes denies he refused to return company property to Chemgard and asserts that all such property has been returned to the Plaintiff.

Haynes lacks sufficient knowledge and information to respond to the remaining allegations of Paragraph 28, including not knowing what Plaintiff is referring to as "direct solicitation" or information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the remaining allegations of that Paragraph as stated.

29. Haynes lacks sufficient knowledge or information to respond to the allegations of Paragraph 29 and therefore denies the same.

30. Haynes denies the allegations of Paragraph 30.

31. Haynes denies the allegations of Paragraph 31.

32. Haynes admits the Employment Agreement attempts to prevent him from competing with Chemgard for a period of 24 months. Haynes denies the allegation in Paragraph 32 that a 2 year limitation on free market business and his ability to earn a living is reasonable.

33. Haynes denies the allegations of Paragraph 33.

34. Paragraph 34 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

35. Haynes denies the allegations of Paragraph 35.

36. Haynes admits that the customers listed in Paragraph 36 chose to move their business to Chem-Tek following his departure from Chemgard. Haynes denies that he undertook any unlawful action to precipitate those customers' decisions to move their business. Haynes denies these customers are exclusively Chemgard customers.

37. Haynes admits that he is utilizing his personal cell phone and contact information stored on it in order to contact customers as alleged in Paragraph 27. Haynes denies the allegations of Paragraph 37 alleging he is unfairly competing with Chemgard. Without knowing

what Plaintiff considers "confidential business information" Haynes cannot respond to the remaining allegations of Paragraph 37 and therefore denies the same.

38. Haynes denies the allegations of Paragraph 38 as stated.

39. Haynes denies the allegations of Paragraph 39 as stated and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

40. The allegations of Paragraph 40 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 40 as stated.

41. The allegations of Paragraph 41 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 41 as stated.

42. Haynes denies injunctive relief is necessary in this case.

43. Paragraph 43 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

44. Paragraph 44 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

45. Paragraph 45 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

46. Haynes denies the allegations of Paragraph 46 as stated.

47. Haynes denies the allegations of Paragraph 47.

48. Paragraph 48 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

49. Paragraph 49 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

50. The allegations of Paragraph 50 are simply an assertion of Chemgard's alleged rights to discovery in this matter and do not require a response. To the extent a response is required Haynes denies the allegations of Paragraph 50 that are inconsistent with the applicable and controlling law concerning discovery, including but not limited to SCRCP 26.

51. Haynes denies the allegations of Paragraph 51.

52. Paragraph 52 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith. Haynes further denies Plaintiff can recover attorney's fees under the circumstances.

53. Paragraphs 53 – 60 allege a cause of action solely against Chem-Tek and therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

54. Haynes denies that Plaintiff is entitled to any relief requested in the Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

55. Haynes is informed and believes that Plaintiff's Amended Complaint fails to state facts sufficient to set forth a cause of action against him and, therefore, Plaintiff's Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

56. Plaintiff's actions taken against Haynes in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

57. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

58. All actions taken by Haynes have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

59. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

60. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE

(Information Readily Ascertainable)

61. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

62. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Damage)

63. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

FOR AN ELEVENTH DEFENSE
(Reservation)

64. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Amended Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

(signature page to follow)

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



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Attorneys for Defendant Keith Haynes

August 14, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CHEMGARD, INC.,

Plaintiff,

v.

DARRELL KEITH HAYNES,
CHEM-TEK, LLC, AND ALBERT BELL,

Defendants.

COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-03546

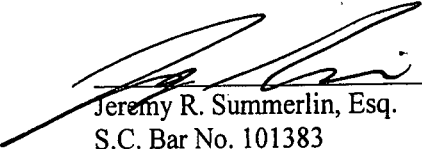
SUMMONS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKHAM
2015 SEP 25 AM 10 07

TO THE DEFENDANTS ABOVE-NAMED:

You are hereby summoned and required to answer the Second Amended Complaint in this action, a copy of which is attached hereto and herewith served upon you, and to serve a copy of your answer to same upon the subscribed at 712 E. Washington Street, Greenville, South Carolina, 29601 within thirty (30) days after the service of same, exclusive of the day of such service. If you fail to answer same within the thirty (30) day period, Plaintiff will apply to the Court for the relief demanded therein and judgment will be taken against you by default.

LAW OFFICE OF W. ANDREW ARNOLD, P.C.


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Attorneys for Plaintiff

September 25, 2015

ROA 000085

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
CHEMGARD, INC.,)
Plaintiff,)
v.)
DARRELL KEITH HAYNES,)
CHEM-TEK, LLC, AND ALBERT BELL,)
Defendants.)

COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-03546

**SECOND AMENDED
COMPLAINT**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSCHER
2015 SEP 25 AM 10 07

COMES NOW PLAINTIFF, by and through its counsel, and files this Second Amended Complaint, and does hereby allege and complain as follows:

PARTIES

1. Plaintiff Chemgard, Inc. (hereinafter "Plaintiff" or "Chemgard") is a South Carolina corporation with its principal place of business in Greenville County, South Carolina.
2. Upon information and belief, Defendant Darrell Keith Haynes (hereinafter "Haynes") is a resident and a citizen of Pine Mountain, Georgia.
3. Defendant Chem-Tek, LLC (hereinafter "Chem-Tek") is a South Carolina company with its principal place of business in Greenville County, South Carolina.
4. Upon information and belief, Defendant Albert N. Bell (hereinafter "Bell") is a citizen and resident of Greenville County, South Carolina. Upon information and belief, he is the owner of Defendant Chem-Tek.
5. Chemgard is in the business of selling and distributing chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

JURISDICTION

6. This Court has subject-matter jurisdiction over the claims in the lawsuit under article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.

7. This Court has personal jurisdiction over the Haynes because since 2000, Haynes has attended annual sales meetings in South Carolina, reported weekly sales reports and expense reports to the Greenville office for reimbursement, and received his compensations and expense checks from the Greenville office. Moreover, all products sold by Haynes are shipped from Greenville, and Haynes has from time to time come to the Greenville office to discuss business and customer relationships. He is also employed by Chem-Tek, a South Carolina business.

8. This Court has personal jurisdiction over Chem-Tek because it is a South Carolina company that is doing business in South Carolina and has its headquarters in South Carolina.

9. This Court has personal jurisdiction over Bell because he is a citizen and resident of Greenville County, South Carolina.

VENUE

10. Venue is proper in this circuit under South Carolina Code § 15-7-30 because the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Greenville County.

FACTS

11. In September 2000, Chemgard hired Defendant Haynes to sell its products, equipment, and services.

12. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement. The Employment Agreement is attached hereto as Exhibit A and is incorporated by reference as if fully and completely contained herein.

13. The Employment Agreement contained non-solicitation provisions, which were divisible and severable and distinct obligations. Chemgard agreed to several narrowly tailored non-solicitation provisions as a condition of Haynes's original hiring, which were material terms in his employment agreement and necessary to protect a legitimate interest of Chemgard.

14. In Section 9(d) of the agreement, Haynes covenanted:

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

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

(ii) [s]olicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company.

15. The agreement also has a provision related to legal proceedings brought to enforce it. Section 9(f) of the agreement states:

Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach.

16. In consideration of the non-solicitation obligations agreed to by Haynes, Chemgard provided employment and compensation to Haynes, which was terminable by either party upon 30 days' written notice.

17. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to a pay commissions and to give employee approximately \$200,000 of pre-existing accounts for Haynes to service.

18. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.
19. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to provide reimbursement for mileage.
20. Chemgard assigned Haynes a sales territory, which was Georgia primarily, but Haynes was free to sell in any location or state he wanted. The vast majority of Haynes's assigned accounts were in Georgia; he also had one account in Alabama.
21. During the course of his employment, Haynes was the only Chemgard salesman in Georgia. Haynes was responsible for promoting sales growth and for regularly servicing the established customer accounts. Part of his mandatory job duties was reporting weekly sales efforts to the Greenville corporate office.
22. Chemgard has a legitimate business interest in maintaining customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain.
23. In the Employment Agreement, Haynes acknowledged that Chemgard's "customers and the relationship and goodwill with these customers are among the Company's most valuable assets."
24. Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard, and became known to Haynes through his employment with Chemgard.
25. Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice.

26. Haynes has since become employed by Chem-Tek, LLC, which is a competitor of Chemgard.
27. Upon information and belief, Albert Bell is the owner of Chem-Tek, LLC.
28. Chem-Tek and Bell had knowledge of Haynes's non-solicitation agreement. Despite this knowledge, Chem-Tek and Bell hired Haynes to directly solicit Chemgard's current customers, and since his hiring has continued to allow Haynes to wrongfully solicit the customers of Chemgard.
29. Upon information and belief, Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day.
30. Within a week of Haynes's resignation, Chemgard received a letter from a customer, Cottle Properties, LLC, informing Chemgard that it would no longer be using Chemgard's products or services. This was an account serviced by Haynes when he was employed by Chemgard.
31. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and based upon information and belief, is using competitive, confidential, and important business information, including Piedmont Hospital System in Fayette, Georgia; Flowers Baking Company in Montgomery, Alabama; Yamaha Motor Manufacturing Company in Newnan, Georgia; and Plastics Omnium Auto Exteriors in Norcross, Georgia. On at least one occasion since Haynes left Chemgard, Haynes has used his old Chemgard business card to gain access to a Chemgard customer's facility (Flowers Baking Company). Regarding Piedmont Hospital System Fayette, within approximately a week of his resignation, Haynes called on the hospital's Director of Engineering while Chemgard's William Smith and Vernon Campbell were already there to visit their customer and were able to observe Haynes's arrival.

32. On June 3, 2015, Chemgard received notice that St. Paul United Methodist Church in Columbus, Georgia and Flowers Baking Company have cancelled their respective accounts with Chemgard.

33. These direct solicitations are an appropriation of customer contacts, confidential information, including customer information, pricing, marketing plans, business development strategies and other information, which provides a competitive advantage if confidentiality is not maintained.

34. Haynes's solicitation of Chemgard's existing customers on behalf of competitor Chem-Tek and Bell is unfair competition and interference with customer relationships and customer goodwill.

35. The non-solicitation provision is for a period of twenty-four months after termination of employment, which is reasonable.

36. Haynes's actions are causing irreparable damage to Chemgard's customer relationships; once confidential information is used, this damage is irreparable and sometimes incalculable.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(Injunctive Relief—Defendant Haynes)

37. Plaintiff realleges and incorporates by reference paragraphs 1 through 36, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this First Cause of Action.

38. By virtue of the foregoing, Chemgard has demonstrated a likelihood of success on the merits that favors the issuance of an injunction against all Defendants.

39. Haynes has solicited Chemgard's existing customers on behalf of and with the knowledge and permission of Chem-Tek and Bell, including Piedmont Hospital System Fayette,

Flowers Bakery Company, Plastics Omnium Auto Exteriors, Yamaha Motor Manufacturing Company, and St. Paul United Methodist Church.

40. Upon information and belief, Haynes is using confidential business information gained during his employment with Chemgard to compete with Chemgard on behalf of and with the knowledge and permission of Chem-Tek and Bell, including the customer contact information stored on his cell phone.

41. Haynes, Chem-Tek, and Bell are attempting to trade on the goodwill of Chemgard's customers and to exploit the intimate knowledge of its customers gained during Haynes's employment with Chemgard to compete against Chemgard.

42. Haynes's actions are a breach of his obligations in his Employment Agreement.

43. Haynes's solicitation of existing clients and clients with whom Chemgard had contact on behalf of competitor Chem-Tek and Bell has resulted and is likely to continue resulting in irreparable harm to Chemgard if it is permitted to continue.

44. Chemgard has experienced and will continue to suffer irreparable harm if Haynes, Chem-Tek, and Bell continue to use Chemgard's confidential information, trade on its goodwill, and solicit Chemgard's clients. Injunctive relief is necessary to prevent irreparable harm, and there is not an adequate remedy at law.

45. Chemgard does not know the extent of Haynes's actions and therefore the extent of the harm done is yet unknown. Injunctive relief is necessary to preserve the status quo and protect the legitimate and legal interest of Chemgard while discovery can be had into the extent of Haynes's wrongful conduct.

46. In paragraph 9(f) of the Employment Agreement, Haynes acknowledged that a breach would cause irreparable damage to Chemgard.

47. In paragraph 9(f) of the Employment Agreement, Haynes agreed that should Chemgard bring an action to enforce the agreement, Chemgard is entitled to temporary and/or permanent injunctive relief.

48. Also in paragraph 9(f) of the Employment Agreement, Haynes waived the defense that there is an adequate remedy at law for any such breach; there is no adequate remedy in this instance.

49. Chem-Tek and Bell have knowingly permitted Haynes to violate the non-solicitation of his Employment Agreement on Chem-Tek's behalf and for Chem-Tek's and Bell's benefit.

50. Accordingly, Chemgard is entitled to an order enjoining further solicitations in violation of Haynes's Employment Agreement.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT

(Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes)

51. Plaintiff realleges and incorporates by reference paragraphs 1 through 50, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Second Cause of Action.

52. Under the terms of paragraph 9(f), Chemgard is entitled to other equitable remedies and/or legal remedies to the full extent provided by South Carolina law.

53. Chemgard is entitled to reasonable discovery as to the competitive activities of Haynes and his employer, Chem-Tek and Bell, to determine the scope of such activities, and to determine Chem-Tek's and Bell's knowledge of Haynes's activities and culpability.

54. Chemgard is entitled to damages for any breach that resulted in pecuniary gain on behalf of Haynes and/or his employer.

55. Chemgard is incurring attorney fees in bringing and prosecuting this action for breach, and according to paragraph 9(f) of the Employment Agreement, Chemgard is entitled to an award of reasonable attorney fees.

FOR A THIRD CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS
(Against Defendants Chem-Tek and Albert Bell)

56. Plaintiff realleges and incorporates by reference paragraphs 1 through 55, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Third Cause of Action.

57. Haynes entered into a valid contractual obligation with Chemgard in the form of the Employment Agreement.

58. Chem-Tek knew of the existence of the Employment Agreement.

59. Bell knew of the existence of the Employment Agreement.

60. Chem-Tek and Bell intentionally caused Haynes to breach the terms of the Employment Agreement by soliciting Chemgard's current customers.

61. Chem-Tek and Bell had no justification for procuring Haynes's breach.

62. Haynes actually breached the Employment Agreement.

63. Chemgard was damaged and continues to be damaged by Chem-Tek's and Bell's interference by losing multiple customer relationships and contracts to Chem-Tek, Haynes, and Bell.

64. Chemgard is entitled to judgment against Chem-Tek and Bell for the amount of Chemgard's actual, general, compensatory, incidental, special, and consequential damages relating to Chem-Tek's and Bell's intentional procurement of Haynes's breach.

FOR A FOURTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS
(Against All Defendants)

65. Plaintiff realleges and incorporates by reference paragraphs 1 through 64, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Fourth Cause of Action.

66. Defendants have tortuously interfered with Chemgard's prospective contractual relationships with customers and potential customers.

67. Defendants were and are aware of Chemgard's prospective contractual relationships with customers and potential customers. Many of these relationships between Chemgard and its customers had existed for years, and Chemgard reasonably expected for such relationships to continue, absent the tortious conduct of another party.

68. Defendants intentionally interfered with Chemgard's prospective contractual relations with its customers and prospective customers by having Haynes target the Chemgard customers that he had serviced while employed with Chemgard.

69. Defendants' actions were for an improper purpose.

70. Defendants' actions were by improper methods, which include but are not limited to having Haynes target and solicit his former Chemgard clients in knowing violation of his non-solicitation agreement.

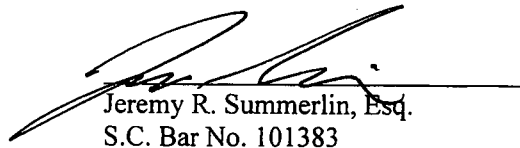
71. Defendants' conduct has resulted in and will continue to result in injury and damages to Chemgard.

72. Chemgard seeks actual, compensatory, consequential, and punitive damages in an amount to be determined by the jury.

HAVING FULLY SET FORTH ITS COMPLAINT, Plaintiff prays this Court award the following relief:

- (a) an order enjoining Defendant Haynes from breaching the confidential information and non-solicitation provisions of the Employment Agreement;
- (b) an order enjoining Defendants Chem-Tek and Bell from accepting any business via Haynes that was obtained in violation of Haynes's contractual agreement with Chemgard;
- (c) an award of Plaintiff's special and compensatory damages;
- (d) an award of equitable and legal remedies as provided by the agreement of the parties;
- (e) an award of reasonable attorneys' fees; and
- (f) such other and further relief as this Court deems just and equitable.

Respectfully Submitted,
Law Office of W. Andrew Arnold, P.C.



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September 25, 2015
Greenville, SC

Attorneys for Plaintiff

FILED-CLERK OF COURT	
STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL CIRCUIT
2015 NOV 2 PM 3 57	
Chemgard, Inc.,	C.A. No.: 2015-CP-23-03546
Plaintiff,	
v.	DEFENDANT BELL'S
Darrell Keith Haynes, Chem-Tek, LLC,	ANSWER TO THE SECOND
and Al Bell,	AMENDED COMPLAINT
Defendants.	

The Defendant, Al Bell (*hereinafter* "Bell" or "Defendant"), by and through his attorneys, hereby answers the Second Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Second Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.
2. Bell admits the allegations of Paragraphs 1 and 2.
3. Bell admits the allegations contained in Paragraph 3.
4. Bell admits the allegations contained in Paragraph 4.
5. Bell admits the allegations contained in Paragraph 5.
6. Bell admits the allegations contained in Paragraph 6 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Bell denies that this Court has personal jurisdiction over Defendant Keith Haynes.

7. Bell admits the allegations of Paragraph 7 to the extent they allege Haynes is employed by Chem-Tek, a South Carolina business. Bell denies that this Court has personal jurisdiction over Haynes and that products sold by him are shipped from Greenville. Bell is without sufficient knowledge or information to respond to the remaining allegations of Paragraph 7 and therefore denies the same.

8. Bell admits the allegations contained in Paragraph 8.

9. Bell admits the allegations contained in Paragraph 9.

10. Defendant denies the allegations contained in Paragraph 10 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

11. Bell admits the allegations contained in Paragraph 11 upon information and belief.

12. Bell admits the allegations contained in Paragraph 12 upon information and belief.

13. Bell admits the allegations of Paragraph 13 to the extent they allege that the Employment Agreement contained several restrictive covenants. Bell denies the remaining allegations of Paragraph 13 as stated.

14. Paragraph 14 recites a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

15. Paragraph 15 recites a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

16. Bell admits the allegations of Paragraph 16 upon information and belief.

17. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 17 and therefore denies the same.

18. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 18 and therefore denies the same.

19. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 19 and therefore denies the same.

20. Bell admits the allegations of Paragraph 20 upon information and belief to the extent they allege Haynes was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Bell lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 20 and therefore denies the same.

21. Bell admits the allegations of Paragraph 21 upon information and belief to the extent they allege Haynes was the only Chemgard salesman in Georgia. Bell lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 21 and therefore denies the same.

22. The allegations of Paragraph 22 are legal conclusions to which no affirmative response is required. To the extent a response is required Bell denies the allegations of Paragraph 22 as stated.

23. Paragraph 23 recites a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

24. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 24 and therefore denies the same.

25. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 25 and therefore denies the same.

26. Bell admits the allegations of Paragraph 26.

27. Bell admits the allegations of Paragraph 27.

28. Bell admits he and Chem-Tek had knowledge of Haynes' Employment Agreement at the time of Haynes' hire. Bell denies the remaining allegations of Paragraph 28 as stated.

29. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 29 and therefore denies the same.

30. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 30 and therefore denies the same.

31. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 31 including not knowing what information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the same.

32. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 32 and therefore denies the same.

33. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 33 and therefore denies the same.

34. Bell denies the allegations of Paragraph 34.

35. Bell admits the Employment Agreement attempts to prevent Haynes from competing with Chemgard for a period of 24 months. Bell denies the allegation in Paragraph 35 that a 2 year limitation on free market business and Haynes' ability to earn a living is reasonable.

36. Bell denies the allegations of Paragraph 36.

37. Paragraph 37 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

38. Bell denies the allegations of Paragraph 38.

39. Bell admits the allegations of Paragraph 39 to the extent they allege the customers listed chose to move their business to Chem-Tek following Haynes' departure from Chemgard. Bell denies these customers are exclusively Chemgard customers.

40. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 40 and therefore denies the same.

41. Bell denies the allegations of Paragraph 41 as stated.

42. Bell denies the allegations of Paragraph 42 and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

43. The allegations of Paragraph 43 contain legal conclusions to which no affirmative response is required. To the extent a response is required Bell denies the allegations of Paragraph 43 as stated.

44. The allegations of Paragraph 44 contain legal conclusions to which no affirmative response is required. To the extent a response is required Bell denies the allegations of Paragraph 44 as stated.

45. Bell denies injunctive relief is necessary in this case.

46. Paragraph 46 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

47. Paragraph 47 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

48. Paragraph 48 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Bell refers to the subject document and denies any allegations inconsistent therewith.

49. Bell denies the allegations of Paragraph 49 as stated.

50. Bell denies the allegations of Paragraph 50.

51. Paragraphs 51 – 55 allege a cause of action solely against Defendant Haynes and therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

52. Paragraph 56 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

53. Bell admits the allegations of Paragraph 57 to the extent they allege Haynes and Chemgard are parties to the Employment Agreement, certain provisions of which are valid and enforceable contractual obligations. Bell denies that the non-solicitation provisions contained in the Employment Agreement are valid and enforceable contractual obligations.

54. Bell admits the allegations of Paragraph 58 upon information and belief.

55. Bell admits the allegations of Paragraph 59.

56. Bell denies the allegations of Paragraph 60.

57. Bell denies the allegations of Paragraph 61 as stated.

58. Bell denies the allegations of Paragraph 62 as stated.

59. Bell admits certain customers who formerly did business with Chemgard now do business with Chem-Tek but the extent of damages allegedly suffered by Chemgard, if any, is unknown at this time and therefore Bell denies the remaining allegations of Paragraph 63. Further responding, Chem-Tek asserts that it may solicit and accept business from any customers it wishes.

60. Bell denies the allegations of Paragraph 64.

61. Paragraph 65 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

62. Bell denies the allegations of Paragraph 66.

63. Bell lacks sufficient knowledge or information to respond to the allegations of Paragraph 67 as stated, as therefore denies the same.

64. Bell denies the allegations of Paragraph 68 as stated.

65. Bell denies the allegations of Paragraph 69.

66. Bell denies the allegations of Paragraph 70 as stated.

67. Bell denies the allegations of Paragraph 71 as stated.

68. Bell admits Plaintiff is seeking the type of damages listed in Paragraph 72 and denies it is entitled to such damages.

69. Bell denies that Plaintiff is entitled to any relief requested in the Second Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

70. Bell is informed and believes that Plaintiff's Second Amended Complaint fails to state facts sufficient to set forth a cause of action against him and, therefore, Plaintiff's Second Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

71. Plaintiff's actions taken against Bell in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

72. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

73. All actions taken by Bell have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

74. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

75. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE
(Information Readily Ascertainable)

76. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

77. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Individual Liability)

78. Any and all complained of actions allegedly taken by Bell were not taken in his individual capacity. Rather, the alleged actions underlying Plaintiff's claims against Bell were solely undertaken on behalf of Chem-Tek, LLC and therefore to the extent Plaintiff may recover for such alleged actions Bell cannot be held individually liable.

FOR A ELEVENTH DEFENSE
(No Damage)

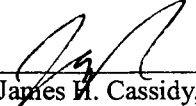
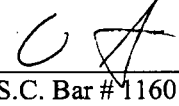
79. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

FOR AN TWELFTH DEFENSE
(Reservation)

80. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Second Amended Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



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Attorneys for the Defendant Al Bell

November 2, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes, Chem-Tek, LLC,
and Al Bell,

Defendants.

) IN THE COURT OF COMMON PLEAS

) THIRTEENTH JUDICIAL CIRCUIT

) C.A. No.: 2015-CP-23-03546

) **DEFENDANT HAYNES'**
) **ANSWER TO THE**
) **SECOND AMENDED**
) **COMPLAINT**

FILED-CLERK OF COURT
PAUL D. HAYNES
2015 NOV 2 PM 3 57

The Defendant, Darrell Keith Haynes (*hereinafter* "Haynes" or "Defendant"), by and through his attorneys, hereby answers the Second Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.

2. Haynes admits the allegations of Paragraphs 1 and 2.

3. Haynes admits the allegations contained in Paragraph 3.

4. Haynes admits the allegations contained in Paragraph 4.

5. Haynes admits the allegations contained in Paragraph 5.

6. Haynes admits the allegations contained in Paragraph 6 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Haynes denies that this Court has personal jurisdiction over him.

7. Haynes admits the allegations of Paragraph 7 to the extent they allege he is employed by Chem-Tek, a South Carolina business. Haynes denies that this Court has personal

jurisdiction over him and that products sold by him are shipped from Greenville. Haynes admits that he attended occasional, although not annual, sales meetings in South Carolina, reported sales and expense reports via email from Georgia to the Greenville office, and received his compensation and expense checks from that office.

8. Haynes admits the allegations contained in Paragraph 8.

9. Haynes admits the allegations contained in Paragraph 9.

10. Defendant denies the allegations contained in Paragraph 10 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

11. Haynes admits the allegations contained in Paragraph 11.

12. Haynes admits the allegations contained in Paragraph 12.

13. Haynes admits the allegations of Paragraph 13 to the extent they allege that the Employment Agreement contained several restrictive covenants. Haynes denies the remaining allegations of Paragraph 13 as stated.

14. Paragraph 14 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

15. Paragraph 15 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

16. Haynes admits the allegations of Paragraph 16.

17. Haynes admits the allegations of Paragraph 17.

18. Haynes admits the allegations of Paragraph 18 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for reasonable expenses incurred in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for his cell phone bill. Further responding, Haynes admits the remaining allegations of Paragraph 18 to the extent they allege he stored customer contact information on his phone. Haynes denies the remaining allegations of Paragraph 18.

19. Haynes admits the allegations of Paragraph 19 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for mileage traveled in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for mileage. Haynes denies the remaining allegations of Paragraph 19.

20. Haynes admits the allegations of Paragraph 20 to the extent they allege he was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Haynes denies the remaining allegations of Paragraph 20.

21. Haynes admits the allegations of Paragraph 21 to the extent they allege he was the only Chemgard salesman in Georgia. Haynes further admits that he was responsible for promoting sales growth and regularly servicing customer accounts. The Plaintiff's reporting requirements were in a constant state of flux during the years Haynes worked for the company, and therefore Defendant denies the remaining allegations of Paragraph 21 as stated.

22. The allegations of Paragraph 22 are legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 22 as stated.

23. Paragraph 23 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

24. Haynes is without sufficient knowledge or information regarding the reasons for Chemgard providing him the information alleged and therefore denies the allegations of Paragraph 24 regarding Plaintiff's motivations. Haynes does not know what specific information Plaintiff is referring to in Paragraph 24 and therefore cannot affirmatively admit or deny the remaining allegations of Paragraph 24.

25. Haynes admits the allegations of Paragraph 25.

26. Haynes admits the allegations of Paragraph 26.

27. Haynes admits the allegations of Paragraph 27.

28. Haynes admits Chem-Tek and Bell had knowledge of his Employment Agreement at the time it hired him. Haynes denies the remaining allegations as stated.

29. Haynes admits the allegations of Paragraph 29 to the extent they allege he utilizes his personal cell phone to contact customers. Haynes denies the remaining allegations of Paragraph 29 as stated.

30. Haynes admits the allegations of Paragraph 30 to the extent they allege he serviced the Cottle Properties, LLC account while employed by Chemgard. Haynes does not have sufficient knowledge or information concerning the remaining allegations of Paragraph 30 and therefore denies the same.

31. Haynes admits the allegations of Paragraph 31 to the extent they allege certain former customers of Chemgard have chosen to do business with Chem-tek following his resignation. Haynes denies the allegation that he used his old Chemgard business card to gain

access to Flowers Baking. Further responding, Ed Williams of Flowers Baking Company requested Haynes meet with him at their facility and directed the Defendant to utilize his Flowers Baking Company access badge to enter the facility. Haynes denies he refused to return company property to Chemgard and asserts that all such property has been returned to the Plaintiff. Haynes lacks sufficient knowledge and information to respond to the remaining allegations of Paragraph 31, including not knowing what Plaintiff is referring to as "direct solicitation" or information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the remaining allegations of that Paragraph as stated.

32. Haynes lacks sufficient knowledge or information to respond to the allegations of Paragraph 32 and therefore denies the same.

33. Haynes denies the allegations of Paragraph 33.

34. Haynes denies the allegations of Paragraph 34.

35. Haynes admits the Employment Agreement attempts to prevent him from competing with Chemgard for a period of 24 months. Haynes denies the allegation in Paragraph 35 that a 2 year limitation on free market business and his ability to earn a living is reasonable.

36. Haynes denies the allegations of Paragraph 36.

37. Paragraph 37 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

38. Haynes denies the allegations of Paragraph 38.

39. Haynes admits that the customers listed in Paragraph 39 chose to move their business to Chem-Tek following his departure from Chemgard. Haynes denies that he undertook

any unlawful action to precipitate those customers' decisions to move their business. Haynes denies these customers are exclusively Chemgard customers.

40. Haynes admits that he is utilizing his personal cell phone and contact information stored on it in order to contact customers as alleged in Paragraph 40. Haynes denies the allegations of Paragraph 40 alleging he is unfairly competing with Chemgard. Without knowing what Plaintiff considers "confidential business information" Haynes cannot respond to the remaining allegations of Paragraph 40 and therefore denies the same.

41. Haynes denies the allegations of Paragraph 41 as stated.

42. Haynes denies the allegations of Paragraph 42 as stated and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

43. The allegations of Paragraph 43 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 43 as stated.

44. The allegations of Paragraph 44 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 44 as stated.

45. Haynes denies injunctive relief is necessary in this case.

46. Paragraph 46 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

47. Paragraph 47 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

48. Paragraph 48 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

49. Haynes denies the allegations of Paragraph 49 as stated.

50. Haynes denies the allegations of Paragraph 50.

51. Paragraph 51 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

52. Paragraph 52 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

53. The allegations of Paragraph 53 are simply an assertion of Chemgard's alleged rights to discovery in this matter and do not require a response. To the extent a response is required Haynes denies the allegations of Paragraph 53 that are inconsistent with the applicable and controlling law concerning discovery, including but not limited to SCRC 26.

54. Haynes denies the allegations of Paragraph 54.

55. Paragraph 55 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith. Haynes further denies Plaintiff can recover attorney's fees under the circumstances.

56. Paragraphs 56 – 64 allege a cause of action solely against Chem-Tek and Bell therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

57. Paragraph 65 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

58. Haynes denies the allegations of Paragraph 66.

59. Haynes lacks sufficient knowledge or information to respond to the allegations of Paragraph 67 as stated, as therefore denies the same.

60. Haynes denies the allegations of Paragraph 68 as stated.

61. Haynes denies the allegations of Paragraph 69.

62. Haynes denies the allegations of Paragraph 70 as stated.

63. Haynes denies the allegations of Paragraph 71 as stated.

64. Haynes admits Plaintiff is seeking the type of damages listed in Paragraph 72 and denies it is entitled to such damages.

65. Haynes denies that Plaintiff is entitled to any relief requested in the Second Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

66. Haynes is informed and believes that Plaintiff's Second Amended Complaint fails to state facts sufficient to set forth a cause of action against him and, therefore, Plaintiff's Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

67. Plaintiff's actions taken against Haynes in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

68. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

69. All actions taken by Haynes have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

70. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

71. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE
(Information Readily Ascertainable)

72. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

73. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Damage)

74. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

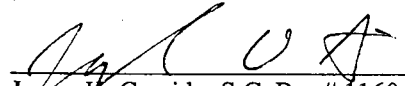
FOR AN ELEVENTH DEFENSE
(Reservation)

75. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Second Amended Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

(signature page to follow)

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.


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Attorneys for Defendant Keith Haynes

November 2, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes, Chem-Tek, LLC,
and Al Bell,

Defendants.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-03546

**DEFENDANT CHEM-TEK'S
ANSWER TO THE
SECOND AMENDED
COMPLAINT**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. HODGSON
2015 NOV 2 PM 3 57

The Defendant, Chem-Tek, LLC (*hereinafter* "Chem-Tek" or "Defendant"), by and through its attorneys, hereby answers the Second Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Second Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.
2. Chem-Tek admits the allegations of Paragraphs 1 and 2.
3. Chem-Tek admits the allegations contained in Paragraph 3.
4. Chem-Tek admits the allegations contained in Paragraph 4.
5. Chem-Tek admits the allegations contained in Paragraph 5.
6. Chem-Tek admits the allegations contained in Paragraph 6 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Chem-Tek denies that this Court has personal jurisdiction over Defendant Keith Haynes.

7. Chem-Tek admits the allegations of Paragraph 7 to the extent they allege Haynes is employed by Chem-Tek, a South Carolina business. Chem-Tek denies that this Court has personal jurisdiction over Haynes and that products sold by him are shipped from Greenville. Chem-Tek is without sufficient knowledge or information to respond to the remaining allegations of Paragraph 7 and therefore denies the same.

8. Chem-Tek admits the allegations contained in Paragraph 8.

9. Chem-Tek admits the allegations contained in Paragraph 9.

10. Defendant denies the allegations contained in Paragraph 10 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

11. Chem-Tek admits the allegations contained in Paragraph 11 upon information and belief.

12. Chem-Tek admits the allegations contained in Paragraph 12 upon information and belief.

13. Chem-Tek admits the allegations of Paragraph 13 to the extent they allege that the Employment Agreement contained several restrictive covenants. Chem-Tek denies the remaining allegations of Paragraph 13 as stated.

14. Paragraph 14 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

15. Paragraph 15 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

16. Chem-Tek admits the allegations of Paragraph 16 upon information and belief.

17. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 17 and therefore denies the same.

18. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 18 and therefore denies the same.

19. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 19 and therefore denies the same.

20. Chem-Tek admits the allegations of Paragraph 20 upon information and belief to the extent they allege Haynes was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Chem-Tek lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 20 and therefore denies the same.

21. Chem-Tek admits the allegations of Paragraph 21 upon information and belief to the extent they allege Haynes was the only Chemgard salesman in Georgia. Chem-Tek lacks sufficient knowledge or information to respond to the remaining allegations of Paragraph 21 and therefore denies the same.

22. The allegations of Paragraph 22 are legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 22 as stated.

23. Paragraph 23 recites a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

24. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 24 and therefore denies the same.

25. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 25 and therefore denies the same.

26. Chem-Tek admits the allegations of Paragraph 26.

27. Chem-Tek admits the allegations of Paragraph 27.

28. Chem-Tek admits he and Chem-Tek had knowledge of Haynes' Employment Agreement at the time of Haynes' hire. Chem-Tek denies the remaining allegations of Paragraph 28 as stated.

29. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 29 and therefore denies the same.

30. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 30 and therefore denies the same.

31. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 31 including not knowing what information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the same.

32. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 32 and therefore denies the same.

33. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 33 and therefore denies the same.

34. Chem-Tek denies the allegations of Paragraph 34.

35. Chem-Tek admits the Employment Agreement attempts to prevent Haynes from competing with Chemgard for a period of 24 months. Chem-Tek denies the allegation in Paragraph 35 that a 2 year limitation on free market business and Haynes' ability to earn a living is reasonable.

36. Chem-Tek denies the allegations of Paragraph 36.

37. Paragraph 37 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

38. Chem-Tek denies the allegations of Paragraph 38.

39. Chem-Tek admits the allegations of Paragraph 39 to the extent they allege the customers listed chose to move their business to Chem-Tek following Haynes' departure from Chemgard. Chem-Tek denies these customers are exclusively Chemgard customers.

40. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 40 and therefore denies the same.

41. Chem-Tek denies the allegations of Paragraph 41 as stated.

42. Chem-Tek denies the allegations of Paragraph 42 and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

43. The allegations of Paragraph 43 contain legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 43 as stated.

44. The allegations of Paragraph 44 contain legal conclusions to which no affirmative response is required. To the extent a response is required Chem-Tek denies the allegations of Paragraph 44 as stated.

45. Chem-Tek denies injunctive relief is necessary in this case.

46. Paragraph 46 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

47. Paragraph 47 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

48. Paragraph 48 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Chem-Tek refers to the subject document and denies any allegations inconsistent therewith.

49. Chem-Tek denies the allegations of Paragraph 49 as stated.

50. Chem-Tek denies the allegations of Paragraph 50.

51. Paragraphs 51 – 55 allege a cause of action solely against Defendant Haynes and therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

52. Paragraph 56 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

53. Chem-Tek admits the allegations of Paragraph 57 to the extent they allege Haynes and Chemgard are parties to the Employment Agreement, certain provisions of which are valid

and enforceable contractual obligations. Chem-Tek denies that the non-solicitation provisions contained in the Employment Agreement are valid and enforceable contractual obligations.

54. Chem-Tek admits the allegations of Paragraph 58 upon information and belief.

55. Chem-Tek admits the allegations of Paragraph 59.

56. Chem-Tek denies the allegations of Paragraph 60.

57. Chem-Tek denies the allegations of Paragraph 61 as stated.

58. Chem-Tek denies the allegations of Paragraph 62 as stated.

59. Chem-Tek admits certain customers who formerly did business with Chemgard now do business with Chem-Tek but the extent of damages allegedly suffered by Chemgard, if any, is unknown at this time and therefore Chem-Tek denies the remaining allegations of Paragraph 63. Further responding, Chem-Tek asserts that it may solicit and accept business from any customers it wishes.

60. Chem-Tek denies the allegations of Paragraph 64.

61. Paragraph 65 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

62. Chem-Tek denies the allegations of Paragraph 66.

63. Chem-Tek lacks sufficient knowledge or information to respond to the allegations of Paragraph 67 as stated, as therefore denies the same.

64. Chem-Tek denies the allegations of Paragraph 68 as stated.

65. Chem-Tek denies the allegations of Paragraph 69.

66. Chem-Tek denies the allegations of Paragraph 70 as stated.

67. Chem-Tek denies the allegations of Paragraph 71 as stated.

68. Chem-Tek admits Plaintiff is seeking the type of damages listed in Paragraph 72 and denies it is entitled to such damages.

69. Chem-Tek denies that Plaintiff is entitled to any relief requested in the Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

70. Chem-Tek is informed and believes that Plaintiff's Amended Complaint fails to state facts sufficient to set forth a cause of action against it and, therefore, Plaintiff's Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

71. Plaintiff's actions taken against Chem-Tek in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

72. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

73. All actions taken by Chem-Tek have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

74. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

75. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE
(Information Readily Ascertainable)

76. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

77. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Damage)

78. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

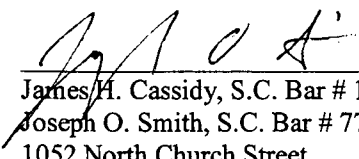
FOR AN ELEVENTH DEFENSE
(Reservation)

79. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Amended

Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

Respectfully submitted,

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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF GREENVILLE) IN THE THIRTEENTH
 3) JUDICIAL CIRCUIT
 4)
 5 CHEMGARD, INC.,)
 6 Plaintiff,) TRANSCRIPT OF RECORD
 7 vs.) 2015-CP-23-03546
 8 DARRELL KEITH HAYNES,)
 9 CHEM-TEK, LLC, AND)
 10 ALBERT BELL,)
 11 Defendants.)

ORIGINAL

11
 12 September 22, 2016
 13 Greenville, South Carolina

14 B E F O R E:

15 HONORABLE ROGER J. COUCH, Judge.

16 A P P E A R A N C E S:

17 W. ANDREW ARNOLD, ESQUIRE
 18 For Plaintiff

19 JEREMY RANDALL SUMMERLIN, ESQUIRE
 20 For Plaintiff

21 WILLIAM HARRELL FOSTER, III, ESQUIRE
 22 For Defendants

23 NICOLE CUADRADO, ESQUIRE
 24 For Defendants

25 Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

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EXHIBITS

MARKED ENTERED

NO EXHIBITS PROFFERED

1 CHEMGARD, INC. VS. DARRELL KEITH HAYNES, ET AL.

2 THE COURT: All right. We're on the record in
3 the case Chemgard Incorporated, Plaintiff, versus
4 Darrell Keith Haynes, Chem-Tek, LLC and Albert Bell.
5 I'm looking at the clerk's file. I'm also looking at my
6 docket. There appears to be several motions that are
7 pending. I see a motion to quash, a motion to compel
8 with sanctions, and also a motion for summary judgment.
9 Is that what's before the Court today, gentlemen.

10 MR. ARNOLD: I believe we've resolved the motion
11 to compel. We can, we can kind of hammer that out.

12 MR. FOSTER: I think we can handle that.

13 MR. ARNOLD: Yeah, I think we've got that
14 resolved.

15 THE COURT: So we're down to the summary
16 judgment.

17 MR. ARNOLD: And the motion to compel, but I
18 think we go forward on the ---

19 MR. FOSTER: A motion ---

20 MR. ARNOLD: I mean the motion to quash, I'm
21 sorry, that we have off.

22 THE COURT: I'll ask the attorneys, first of all,
23 to state their appearances.

24 MR. FOSTER: Your Honor, Billie Foster and my
25 colleague, Nicole Cuadrado for the Defendants.

1 THE COURT: All right.

2 MR. ARNOLD: Andy Arnold and Jeremy Summerlin.

3 THE COURT: For the Plaintiff.

4 MR. ARNOLD: For the plaintiff.

5 THE COURT: All right. So you represent all
6 defendants?

7 MR. FOSTER: Yes, sir, Your Honor.

8 THE COURT: Or both I should say.

9 MR. FOSTER: Yes, sir.

10 THE COURT: Maybe three.

11 MR. FOSTER: Yes, sir.

12 THE COURT: Okay, go ahead.

13 MR. FOSTER: Thank you, Your Honor, may it please
14 the Court?

15 THE COURT: Yes, sir.

16 MR. FOSTER: Your Honor, we represent the
17 defendants Chem-Tek, Mr. Al Bell. Mr. Bell is actually
18 seated at the table. And Keith Haynes, the other
19 individual defendant in this case. Mr. Haynes wanted to
20 be here this morning or this afternoon, Your Honor, but
21 his daughter is having a baby and he asked me if, if he
22 could stay with her and I said I did not think you would
23 mind. So if ---

24 THE COURT: That's a very important event in
25 one's life, so...

1 MR. FOSTER: Yes, sir. It's my fault he's not
2 here, so I apologize for that. Your Honor, we've come
3 here today asking for simple justice, for a fair result.
4 Mr. Bell in particular here has worked all of his life
5 and, honestly, I don't think you'll find a finer, a
6 finer gentleman. Chem-Tek is his last business venture
7 and he's poured his own money and sweat and tears. And
8 so I take this one as seriously as I possibly can.

9 For nearly a year and a half Mr. Bell and the
10 other defendants, they've been knocked around in this
11 case. They've had their ability to provide for their
12 families, their opportunity to pursue their profession.
13 Basically to leave a legacy for their family is
14 threatened to extinction by the plaintiff. The
15 plaintiff's weapon in this case is kind of a restrictive
16 covenant that frankly, Your Honor, is unambiguously,
17 inescapably overbroad and unenforceable in all respects.

18 In the interest of justice, Your Honor, we ask
19 that this end today. This motion is not about our
20 attempt to argue the court previously got something
21 wrong or prior counsel got something wrong. We're not
22 here to point fingers. This motion is not about marking
23 it and who got it wrong, it's about making things right.
24 All one has to do is to look at the provision in
25 question to see that it's invalid under South Carolina

1 law. The plaintiff's restrictive covenant is simply
2 inescapably overbroad and unenforceable.

3 Your Honor, I know that you know the standard for
4 summary judgment better than anybody else in this
5 courtroom. Rule 56, Your Honor, is 56 (c) provides that
6 summary judgment shall be appropriate with the
7 pleadings, depositions, answers to interrogatories and
8 admissions on file, together with the affidavits being
9 so that there is no genuine issue as to the material
10 fact or to any material fact that the moving party is
11 entitled to a judgment as a matter of law.

12 What was called out here, Your Honor, is the
13 particular standard that applies and we think is crucial
14 today, and that's for a motion for summary judgment like
15 we filed presents a crush of concerning the construction
16 of a written contract. And the question is one of law
17 if the language employed by the contract is plain and
18 unambiguous.

19 In this case, Your Honor, it's undisputed that
20 the language of this non-solicitation provision is not
21 ambiguous. I just don't or the plaintiff doesn't
22 contend otherwise and we stipulate, Your Honor, that the
23 language in question is unambiguous.

24 The plaintiffs in response to our motion, Your
25 Honor, claims that we provide -- failed to provide

1 evidence in support of our motion. We submit
2 respectfully, Your Honor, that they have misperceived
3 the standard. The defendants are relying on the
4 plaintiff's verified complaint. I think we're on the
5 second verified complaint at this point.

6 The affidavits already on file finds the facts
7 and admissions in the case. All of the evidence, Your
8 Honor, take all of that evidence and cast it in the
9 light most favorable to the plaintiff and the defendants
10 are entitled to summary judgment as to this case.

11 As written, this other ambiguous provision, Your
12 Honor, is overbroad and can't survive. And no amount of
13 additional discovery in depositions, document
14 production, et cetera, are going to change that. They
15 will not change what is a question of law or legal
16 conclusion for the court.

17 Your Honor, prior to filing our summary judgment
18 motion, we had a discussion about the path forward. And
19 I -- this is attached to our briefings, Your Honor. I
20 can hand it up if you'd like, but this is what the
21 plaintiff had to say before we filed the summary
22 judgment. This is Mr. Arnold's email of Friday August
23 12th where he says: (Begins reading.) I agree there is
24 no material issue of fact as it relates to
25 enforceability. (Ends reading.)

1 Enforceability is what we're here on today, Your
2 Honor, because it's a contractual provision at issue
3 here, this non-solicitation provision is overbroad and
4 unenforceable, then any claim that it's based on, we'll
5 submit to Your Honor to scour that Second Amendment
6 complaint. Each and every cause of action is based
7 solely on that customer non-solicitation provision.

8 They're acknowledging there is no question of
9 fact, so the opposition that they have submitted and the
10 argument they may make today that says otherwise, Your
11 Honor, that's what they said on August 12th right before
12 we filed a motion for summary judgment.

13 Your Honor, briefly, Chemgard, they're based here
14 in South Carolina. It's over in Greer. They sell and
15 distribute chemicals, chemical products, et cetera.
16 They're also in the business of serving servicing
17 equipment that utilizes or consumes the products that
18 they sell. Mr. Haynes was hired in September, on
19 September 15th of 2000, and he signed an employment
20 agreement upon starting his employment with Chemgard.

21 The agreement states that Mr. Haynes was employed
22 as a salesman for the territory of Georgia and certain
23 counties in Alabama. During his employment he was the
24 only salesperson for Chemgard in Georgia. It's
25 undisputed that Mr. Haynes never worked, worked with,

1 made contact with or had any involvement with all of
2 Chemgard's customers. For example, it's undisputed he
3 had no contact with the customers that they have in
4 North Carolina or South Carolina. It's undisputed that
5 they had other salesmen during his employment that
6 handle those accounts, Your Honor.

7 On May 10th Mr. Haynes -- of 2015, excuse me --
8 Mr. Haynes voluntarily resigned from Chemgard. On May
9 11th he started working with Mr. Bell, who he knew and
10 held in high regard, with Chem-Tek. On June 25th of
11 2015 the plaintiff moved for an injunction against the
12 defendants to enforce the non-solicitation provision in
13 question.

14 The portion of the agreement, the only portion,
15 again, which plaintiff relied on in seeking this
16 injunctive relief, Your Honor, is Section 9(d) subpart
17 (1), and we've got that in the report. It in essence in
18 reference, Your Honor, says 24 months after he leaves
19 his employment he may not solicit or call on either
20 directly or indirectly any customer of the company for
21 the purpose of selling any products or services sold by
22 the company or any products similar to those sold by the
23 company. That's the provision in question, Your Honor.

24 South Carolina law -- my high tech superior over
25 there will call that out. South Carolina law, Your

1 Honor, does not allow, does not bind enforceable a
2 customer non-solicitation provision that is not limited
3 to those customers the employee had contact with during
4 his or her employment. That's the law of South
5 Carolina. The plain and unambiguous language of this
6 provision and the expression, the unambiguous expression
7 of the plaintiff's have urged throughout this case is
8 that that means he can't solicit any customer of
9 Chemgard wherever they are as of the date he left for
10 two years, regardless of whether he had any contact with
11 them, regardless if he had information about them. Any
12 customer. And that's flat out invalid under South
13 Carolina law, Your Honor.

14 And here's what I'd like to ask for just a little
15 bit perhaps more at this point of the Court's indulgence
16 because I think it's important to kind of go through
17 just the, the analysis. I'm sure, Judge, you know as
18 well as anybody with regard to restrictive covenants,
19 but it's worth mentioning here.

20 Your Honor, South Carolina courts, and the courts
21 of most states, being restrictive covenants like the one
22 in question here today, has restraints on traders. They
23 are strictly construed against the employer on all
24 occasions. They're only valid, they're only to be
25 upheld if they are no broad or no more broad than is

1 reasonably necessary to protect a legitimate business
2 interest.

3 And under Pointer, the Supreme Court there
4 recently made it crystal clear if it's overbroad, if it
5 is more broad than is necessary, you didn't make this as
6 narrow as you possibly could, then the whole thing
7 fails. We can't blue pencil it. It is against the
8 public policy of South Carolina for a court or for a
9 party for that matter to ask the court to fix a
10 provision that they failed to make valid in the first
11 place.

12 If it is overbroad and unenforceable, it is over
13 under South Carolina law. You can't have a breach of
14 contract claim and go forward if the breach of contract
15 claim is based on a provision that's illegal, it's void.

16 Your Honor, we of course know that the
17 protection of an employer's customer base is a
18 legitimate interest. And the case law in South Carolina
19 has long been that you can substitute the geographic
20 restriction found in your typical non-compete with a
21 customer restriction and that's a valid substitute, but
22 that doesn't stop the analysis. And that, respectfully,
23 is where the plaintiff has tried to stop the analysis in
24 their presentation of this case.

25 Hey, this is, you know, this is customer

1 solicitation or customer non-solicitation. Those are --
2 that's a valid substitution for a geographic
3 restriction. We win, let's go. No, that's actually
4 where the analysis starts. That, that customer
5 restriction still has to be as narrow as it can be to
6 protect that legitimate interest.

7 And what the courts look at, Your Honor, is where
8 would that employee be able to compete under there.
9 Where did that employee have the ability, as they said
10 in Rental Uniform Services versus Dudley, to come into
11 contact with those customers? Because it's not -- you
12 don't have the right as a company, as an employer in
13 South Carolina to protect yourself against competition
14 in general. Just unfair competition.

15 And a customer non-solicitation provision, if
16 it's done correctly, protects that legitimate interest
17 in your customers by preventing an employee from taking
18 the relationship that he or she may have gained where
19 the customer recovered while they're in the company's
20 employ and converting that relationship or that good
21 will to that specific customer for themselves or for
22 some other company.

23 But what South Carolina courts will not allow is
24 for an employer to protect itself against competition in
25 general and say, hey, that guy worked for a long time,

1 he's real smart, I showed him the business, so he
2 shouldn't be able to have contact or call on any of my
3 customers anywhere for a period of time and thereafter.
4 That's, as Judge Anderson found in the Fournil case we
5 cited, Your Honor, that's a -- that's a restriction on
6 competition, not unfair competition.

7 Your Honor, just to review the cases, and we
8 could hand it up if the Court would like. We, we have a
9 copy of all the cases we've cited. Just a couple, Your
10 Honor, that I think bear discussing. In particular,
11 Collins versus Parent. Collins Music vs. Parent. The
12 plaintiff has taken an exception with our representation
13 that actually supports our position. But if the Court
14 reads the case, then I know I'm confident you have
15 before and will again, Your Honor. In Collins the
16 restriction in question was actually limited to the
17 customer service. In Collins the court specifically
18 found that the non-solicitation was permissible because
19 the employer remained free, quote, free to solicit new
20 customers to which he had not been assigned while in
21 Collins employ.

22 There's a list of what was forbidden. There's no
23 list here, Judge. This provision right here means he
24 can't solicit customers. He might not even know other
25 customers in a state he never even worked. That's what

1 this restriction does and that's invalid.

2 Your Honor, probably the -- might be still the
3 most recent case on point, and I'll admit it's
4 unpublished is Judge Anderson's decision in Fournil.
5 We've cited it primarily, Your Honor, because one it
6 goes through sort of the history of this issue in South
7 Carolina state law, state jurisprudence. And in all of
8 the arguments that the plaintiff may make in favor of
9 this provision, Judge Anderson does a great job of
10 demonstrating why they don't carry water.

11 And I also, Your Honor, we cite Fournil because
12 that's what -- what we cite, and I can submit the most
13 recent version of it to the judge, if you so desire.
14 But this is a -- this Mosburger (phonetic) on covenants
15 is not to be 50 state opinion. This is one of three
16 that's volume two of three, South Carolina is kind of
17 stuck way in the back. This is what we keep in our
18 offices when our clients call so they think we're
19 smarter than we are.

20 Judge, if you flip over to the South Carolina
21 section with the questions, will a court allow a
22 customer restriction to substitute for or complement a
23 geographic restriction? Yes, it will. But it says
24 right here on Page 4,196: (Begins reading.) In order
25 for a customer non-solicitation or non-acceptance

1 covenants to be enforceable under South Carolina Law, it
2 must be rendered in effect to those customers who are
3 actually serviced by the former employee. To extend the
4 customers with whom the former employer had no
5 relationship would be to extend improperly to those with
6 respect to whom the former employer has no legitimate
7 interest in preventing competition. (Ends reading.)
8 Truly cites Fournil as well, Your Honor. We can hand
9 that up if the Court would like.

10 Your Honor, again, looking at that provision, it
11 clearly and unambiguously covers all existing covers --
12 customers with the company. Your Honor, as such it is
13 unpermissibly or impermissibly overbroad and
14 unenforceable as a matter of law.

15 Your Honor, this isn't a situation where he is
16 being forbidden from soliciting they're own customers,
17 his own former customers, it's all customers. And that,
18 of course, Your Honor, is contrary to South Carolina
19 law. This representation of the scope of this
20 non-solicitation provision it's not hyperbole, it's not
21 histrionics. That's, that's how it reads and that's how
22 they've asked it to be enforced, and that's how they'll
23 tell the Court today it should be enforced, all
24 customers.

25 I apologize for the poor art skills, Your Honor,

1 but when I'm looking at non-compete cases, whether it be
2 a geographic non-compete or any of the non-solicitation
3 provision, I think about Stringer versus Herron. And
4 the court said, okay, you've got this geographic
5 restriction it could only be 15 miles from any location
6 of the practice. Well the Court said, look, if we lay
7 that on a little map here, it gives you a restriction
8 like this. (Indicating.) Okay. That's 15 miles from
9 all your facility. Well 95 percent of your patients are
10 within five miles of the main hub. It's overbroad.
11 You've colored outside the lines. It's done. It's a
12 question it's of law and it's done.

13 And, Your Honor, in discovery in this case and
14 before this -- before today's hearing, Your Honor, this
15 is what's been represented. Mr. Hayne's customers
16 represented 31 percent of all customers or their sales
17 volume. We're not saying ---

18 THE COURT: I read somewhere in here that he was
19 in Georgia only.

20 MR. ARNOLD: Yes, sir.

21 THE COURT: Is that correct?

22 MR. FOSTER: That's correct.

23 THE COURT: Okay. And that they were doing
24 business in both Carolinas as well?

25 MR. FOSTER: Both Carolinas, Your Honor. And I

1 think a few more states, but clearly North Carolina,
2 South Carolina, Your Honor. And this is the problem,
3 and I hate to just beat a dead horse, but to me it
4 really is surprisingly simple and undeniable. This is
5 this arguably for purposes of this hearing this morning
6 or this afternoon, Your Honor, that's -- that represents
7 what would be a reasonable restriction under the clear
8 jurisprudence of South Carolina. That's what they're
9 covering. And no amount of really anything, evidence,
10 depositions, what have you, can fix that and it can't be
11 through premiss.

12 Very briefly, Your Honor, the plaintiff's
13 opposition to the summary judgment, we submit, is a bit
14 of admission. The majority of their opposition, I'd
15 submit respectfully, is actually irrelevant to the very
16 narrow legal issue before the Court. And we flash back
17 to the standard, Your Honor. It's a question of law.
18 It's the plain and unambiguous meaning of this
19 contractual provision, it's for the Court to decide.

20 But when they do, at the very end of their
21 response, tit for tat from a legal issue, Judge, they
22 attempt to distinguish colonies, which I think I've
23 already addressed. They claimed that Fournil is an
24 unrecorded outlier and they point to three other cases
25 that they say support Chemgard's position.

1 Briefly, Collins, Your Honor, discussed,
2 according to Chemgard, they say Collins does not further
3 qualify the phrase, quote, a restriction which allows
4 the former employer to sell anywhere else, subject to
5 employer's protection if his own license is valid. They
6 claim that's the end of it, Your Honor. Of course, we
7 pointed out before that Collins does qualify that by
8 saying someone does not further -- excuse me.

9 It actually does qualify. Literally just a few
10 lines up from that, the plaintiffs are quoted by saying
11 that under the restrictive covenant in that case, as we
12 said before, Your Honor, the employee would be free to
13 solicit any customers to which they had not been
14 assigned. And as reported, I mention as well, Your
15 Honor, a key distinction in Collins is there was
16 customer list -- there was a list of customers he
17 couldn't have contact with, but he knew exactly what the
18 scope of the provision was.

19 Your Honor, Fournil we've talked about and we've
20 talked about why we, why we cited it. They also, Your
21 Honor, cite *Caine and Estes, Inc. vs. Watts* as
22 supporting their position. Your Honor, I think that's
23 very telling. Watts, if the Court reads that case, and
24 I'm sure you've read it, Judge, and will read it again.
25 Watts didn't actually involve a covenant not to compete

1 and similar general employment contract. It was an
2 agreement whereby Watts, an insurance agent, was
3 released from a noncompete in exchange for his agreement
4 to share information to Your Honor for a period of time
5 which he elected to solicit his former customers.

6 So in Watts, Watts was actually had made a deal
7 after he left. You let me out of this noncompete, I
8 agree if I do solicit I share commissions. It's not,
9 it's not subject to the same scrutiny that we're talking
10 about here, Your Honor. It's a business deal.

11 Critically, Your Honor, Watts also wasn't --
12 excuse me, I've got -- I think perhaps the most
13 important part, the Watts before its decision noted that
14 Watts had, quote, personal conduct with all of the
15 customers at issue. Of course, that makes Watts is
16 decidedly different than the case at bar.

17 Your Honor, *Wolf vs. Colonial Life Insurance*,
18 another case that the plaintiffs have relied, the
19 plaintiffs have relied on. And, Your Honor, again in
20 Watts it actually was a restriction that would cause
21 Wolf to lose his right to the payment of continued
22 conditions after he left if he solicited, solicited the
23 clients. But also, Your Honor, in Watts the court
24 expressly noted that the issue that we're here for, come
25 before you today, that a non-solicitation provision has

1 to be limited to the customers you actually had contact
2 with, the Watts Court noted you didn't raise that in
3 trial court, we're not ruling on it. So Watts too has
4 literally no impact on this issue before the Court
5 today.

6 *Oxman v. Profitt*, Your Honor, again has no
7 application to this case. Your Honor, the Court in
8 *Oxman* dealt with a restrictive covenant and
9 non-solicitation provision. It also included a
10 geographic restriction not enumerated in this particular
11 instance. It also, keyed in its decision, Your Honor,
12 on the understanding that it is unethical in the
13 insurance business for an individual agent to
14 subsequently encourage a client to cancel an insurance
15 they've bought from them in the past. And so this
16 really in *Oxman*, that wasn't a customer
17 non-solicitation, it was you won't solicit one of your
18 former customers or one of our customers to terminate
19 their insurance policy. And the Court will focus
20 expressly on that ethical duty and sort of the industry
21 standard in insurance. And I've cited *Sherman versus*
22 *Caine and Estes* later, which the court absolutely
23 forbade an all customer non-solicitation provision.

24 Your Honor, lastly, if this non-solicitation
25 provision fails, and we submit that it has to, has to

1 under South Carolina law, then the complaint failed as
2 well. Your Honor, the -- there is no genuine issue of
3 material fact as to whether Defendant Haynes is in
4 breach of the contract or whether the defendants were
5 liable for tortious interference with the contract, et
6 cetera, if the provision upon which that claim or those
7 claims are based is void under the law of South
8 Carolina.

9 We've cited cases in our brief, Your Honor, but
10 it's well established that only a valid agreement can
11 support claims for breach of contract or tortious
12 interference of the contract. I don't think the
13 plaintiffs would refute that. What the plaintiffs have
14 done, Your Honor is very interesting, is they have
15 claimed that okay, well, even if this provision goes
16 away, our causes of action are also based on Mr. Haynes
17 breach or alleged breach of section, they say, 8(a) in
18 the second amended complaint, Your Honor, but it's
19 actually after the pleadings. I don't think they
20 represent at all in their complaint.

21 In their submission to the Court they say 8(a),
22 but it's actually 9(a) and (b). And what 9(a) and (b)
23 reflect is a basically a confidentiality clause with no
24 temporal restriction. And they say we clearly have
25 breach of contract claims based on that as well.

1 Well, Your Honor, in all honesty, we scoured all
2 three versions of this complaint before we filed this
3 claim. Every single claim in this case, Your Honor, is
4 dependent upon, is based on this customer
5 non-solicitation provision. They mention
6 confidentiality in their preparatory remarks. But all
7 their causes of action are based on the customer
8 non-solicitation provision, Your Honor. The one that
9 fails, the one that's unambiguous and violates South
10 Carolina law.

11 So, Your Honor, if the plaintiffs want to now at
12 the 11th hour say, okay, well if we -- if the Court
13 dismisses any claims based on this, the case has to
14 continue because we have this confidentiality provision,
15 Your Honor, they're gonna need to amend that complaint
16 yet again. I don't think that issue was before the
17 Court. And we can take up the legality of that
18 provision at the appropriate time.

19 We submit that's not necessary, Your Honor. At
20 the end of the day the question before you is simple.
21 The defendant's motion for summary judgment presents a
22 question of law, interpretation of this unambiguous
23 contract. We ask for a fair result. Thank you, Your
24 Honor.

25 THE COURT: Yes, sir, I'll hear from you.

1 MR. ARNOLD: May it please the Court?

2 THE COURT: Yes, sir.

3 MR. ARNOLD: First of all, can you do me a favor
4 and go back to my email. That's good. Go ahead and hit
5 your highlighted point. There you go.

6 Your Honor, let me hand up the email. I think
7 this will give you a flavor of what we're dealing with
8 here. You better read everything because you will only
9 be told part of it.

10 What I had proposed on August the 12th -- let's
11 go back because that email talks -- it starts with
12 August the 11th. And I'll be briefer in my preparatory
13 remarks, but I think this will help frame what we're
14 dealing with here. We had depositions scheduled for
15 August the 11th. Mr. Foster informed us two days prior
16 that he refused, that his client would not be showing up
17 on that date. I asked him on the 11th will you make him
18 available for deposition before the end of the month.
19 He said I'll try. I never got a response to either one
20 of those two emails.

21 So what I did on the morning of the 12th is I
22 said I'll tell you what let's do this. We want to take
23 depositions and that would be there would be no
24 questions of fact, that we have a record in front of us.
25 Let's take, take the depositions. Let's agree there's

1 no questions of fact after enforceability and let's both
2 move for summary judgment because I believe we're
3 entitled to summary judgment once we get the facts of
4 the case that demonstrates their brief -- their breach.
5 The court's already granted an injunction, so we're
6 under an injunction at the moment.

7 So to my point, Your Honor, and again what
8 happened, I sent that email at 8:56 a.m. Never heard
9 back until I got a motion for summary judgment filed in
10 my box at 5:30 that same day. I was trying to be
11 cooperative. Look, your client didn't show for the
12 deposition, we've been trying to get it set for five
13 months. We've noticed it. Two days before you don't
14 show, but I tell you what, you make him available at the
15 end of the month and let's go forward. So, again,
16 that's what you're told I said and that's what I said.

17 So what is this case about, Your Honor? My
18 client, Chemgard, and Bill Smith's here with us. He is
19 the owner of Chemgard, the originator, founder of
20 Chemgard. And he has worked hard to establish his
21 business, just as Mr. Bell has worked hard his life and
22 I don't doubt, I don't have anything against Mr. Bell.
23 And he had an employee, Mr. Haynes, who worked for him.
24 And he gave Mr. Haynes -- and I've got -- he's got --
25 we've got an affidavit from our client, from Mr. Smith,

1 that says that they would have weekly sales meetings,
2 weekly sales calls. They would have annual sales
3 meetings in Greenville. They had a pricing sheet on
4 which all the pricing for all the company and all of the
5 products that was applicable to every customer in
6 Georgia, South Carolina, North Carolina, that was
7 confidential information, defined as confidential
8 information in the contract. And he gave that to Mr.
9 Haynes. He got the impression that Mr. Haynes was
10 dissatisfied and he offered to hire somebody to work
11 with Mr. Haynes to help.

12 What ends up happening, though, is that without
13 notice, as required by the contract, Mr. Haynes resigns
14 and immediately begins contacting customers. That's the
15 factual scenario. Again, Mr. Haynes is not here. Mr.
16 Bell started the competing entity. He used to work for
17 Chemgard and hired Mr. Haynes.

18 So we've alleged, if you'll look at our complaint
19 at some point, I'll let you be the judge. Our cause of
20 action incorporated by reference all the facts in the
21 complaint. The idea that we don't mention -- we mention
22 at least three breaches, Your Honor. We mention, first,
23 the breach of paragraph three, failure to give notice.
24 There's a 30-day notice provision. They didn't give
25 notice. The reason they didn't give notice, they knew

1 they didn't, that Mr. Haynes could be able to get a head
2 start. Mr. Smith had to spend day after day after day.
3 He went like a madman going to all the customers, doing
4 his best to try to keep hold of what Mr. Haynes was
5 plucking out. That's number one provision that we
6 allege in breach. It's in there, I promise you. I
7 promise you.

8 THE COURT: I'm looking at the complaint. Go
9 ahead.

10 MR. ARNOLD: Okay. We also allege that there was
11 non-disclosure, non-confidentiality non-disclosure
12 provisions that he breached. That he used confidential
13 information that was our, our property, our confidential
14 information to compete. Primarily pricey. He had that
15 pricing sheet and he didn't return it, as he was
16 required to, when he left. That gives him an -- and our
17 update explains why that pricing sheet -- and those
18 prices are not available even to the customer. Those
19 are only which customer prices are based. Some multiple
20 or some, some figure based on that break even point.
21 We've alleged a breach of that.

22 Then we've got the non-solicitation agreement.
23 The non-solicitation agreement, Your Honor, is 100
24 percent enforceable. Now despite what Mr. Foster has
25 argued, Wolf applied to any customer, any customer, any

1 customer of the employer you can't solicit. Caine
2 applies to any customer, and so does Oxen v Proffitt.
3 Not sure on Oxen v Proffitt. All, one's a '62 case,
4 one's an '82 case or '86 and one's a '92 case. The
5 court's been very consistent.

6 Now, his attempt to say, well, Caine's not really
7 a noncompete case. Well, certainly it was analyzed a
8 noncompete case. You look at it, the case he's relying
9 on, Collins, cites Caine. So the idea that it's not
10 applicable, it wasn't cited in his brief, it was cited
11 by the cases he cites. So Caine, Your Honor, all
12 existing customers.

13 There is not one South Carolina Appellate Court
14 case that holds a provision like this overly broad, not
15 one. In fact, again, just the opposite, Wolf, Watts and
16 Oxen all had existing policy holder, existing clients.

17 One -- well, let's just go to the, to the cases
18 that are cited by Mr. Foster. He cites Collins.
19 Collins does not hold that only an agreement that is
20 limited to customers only dealt with is enforceable. In
21 fact, as I mentioned, it cites Watts, which held just
22 the opposite.

23 Then he cites Rockford, which is a Federal Court
24 opinion. Rockford applies to customers and to dealers.
25 A dealer network. It found not only are the customers'

1 protective interest, but the whole dealer network they
2 dealt with was protective interest and it cited Watts,
3 Oxen and Wolf, all three, which he says aren't even
4 applicable here and the cases he's citing to apply.

5 The last case he cites and he hangs his hat on
6 Fournil. It is an unreported Federal Court decision.
7 Now, without getting into Fournil, but I want to just,
8 just briefly, but without getting into it you've got an
9 unreported federal case. You've got three well
10 established South Carolina precedence that's
11 controlling. Well, Fournil may be the better rule.
12 Mr. Foster may be smarter than all of us, but it isn't
13 the rule in South Carolina yet no matter what whoever
14 wrote this book and wherever he lives thinks.

15 Now, let's take what does Fournil say? And I
16 take a little bit of time in my memorandum to go through
17 it, so I'll defer you to that, Your Honor. But Fournil
18 essentially said that -- because the Fournil provision
19 dealt with former customers and all customers. It said,
20 no, that's overly broad because there was no evidence in
21 the record in Fournil that the employee had access to
22 any confidential information. There wasn't even a
23 record. They said it was argued, but they said it
24 wasn't in the record, or Judge Anderson said it wasn't
25 in the record.

1 The answer says that, look, don't read too much
2 into this decision. And I quote that in my, my
3 memorandum. So what you've got though, Your Honor,
4 that's why we give this memorandum, in this case there
5 is legitimate interest. Why we want and what is our
6 interest in keeping him from going to all customers
7 because he has the pricing upon which all those
8 relationships have been built. And so if you look at
9 the cases, there's two sources of these protective
10 interests. There's customer relationships and there's
11 confidential information. And I believe the cases
12 protect all customer relationships.

13 But even if I'm wrong and Fournil was right and
14 Mr. Foster is right, we've got a different scenario than
15 Fournil. But we also have these other provisions that
16 we've alleged have been breached. And the idea that
17 somehow -- well, I'll let Your Honor, you can, you can
18 read as well as I can and I'm not gonna get into that.
19 We've alleged it and we believe we ought to have an
20 opportunity to take discovery.

21 The first time -- let's get to the motion to
22 compel. I'll leave, I'll leave those arguments for the
23 motion to compel.

24 THE COURT: Yes, sir.

25 MR. FOSTER: Your Honor, if I may briefly. With

1 regard to his confidentiality provision and this alleged
2 breach of notice provision, we submit there has been no
3 claims action actually based on that, but that's
4 irrelevant because the only motion before you at the
5 present, Your Honor, is our motion for summary judgment
6 based on any claim that's based on this non-solicitation
7 provision, Your Honor.

8 I'm not saying I'm smarter than anybody, but I
9 will say this, the law of South Carolina, as interpreted
10 by everybody I know that practices in this boule says
11 that for a customer non-solicitation provision to be
12 valid, it has to be limited to the customers with whom
13 the employee had contact. You've got to have that tie.

14 In this specific argument that I think's being
15 made with respect to oh, he had a pricing list. He had
16 all this stuff, he had all our stuff. But, Your Honor,
17 look at the record in this case. If they were really
18 concerned about that, how come they didn't ask for that
19 relief when they moved for injunction? Give it back a
20 year and a half later. It's so important that now for
21 the first time, that's why this overly broad restrictive
22 covenant is okay.

23 Your Honor, nothing that the plaintiffs has
24 argued for this Court justifies this. The owner of
25 Chemgard says he, after Mr. Haynes left he ran down to

1 shore up all of those customers. Where did he go? He
2 went to Georgia. Did he go anywhere else? Did he go to
3 North Carolina? Did you run any customers in South
4 Carolina? No. Why? Because the only customers in
5 question were the ones in Georgia and a few counties in
6 Alabama. But that's not what they've asked. That's not
7 what's protected here.

8 This specific argument, this boot strap, oh, he
9 had a pricing list that I never asked for, asked for it
10 back but he had this pricing list that's so important.
11 Your Honor, that same argument was made in Fournil. And
12 the court said that may be a perfectly and is a
13 perfectly legitimate basis to support a customer
14 non-solicitation provision, but that's not what you did.

15 This unambiguous non-solicitation provision let's
16 go back to it, Your Honor. It doesn't say solicit or
17 call on either directly or indirectly any customer of
18 the company that you had contact with or that you had
19 information about. It says any customer of the company.
20 Had they, and they had all the right in the world to,
21 they drafted this, they could have said any customer of
22 the company for the purpose of selling any product or
23 services sold by the company or any products similar to
24 those sold by the company, comma, provided you had
25 contact with that customer information or involvement.

1 Just like we all, the language we use when we're
2 drafting these today.

3 Relying on Wolf, Your Honor, I know the Court's
4 read that. That specific issue that is the specific
5 issue we're arguing wasn't raised. Your Honor -- let's
6 see. One second.

7 You know, we know and we've heard and seen in the
8 plaintiff's submission to summary judgment is a drastic
9 remedy. And they're, I'm sure in this argument on the
10 motion to compel, they're gonna talk about all of the
11 bad stuff that we've allegedly done. Just for color,
12 Your Honor, we got involved in this case April 6th. The
13 depositions, the first time, almost a year in the case
14 they apparently noticed depositions that Mr. Bellinger
15 has. Those were cancelled by, I believe, by former
16 counsel before we got involved. The record of all of
17 this deposition stuff is, is covered.

18 But with respect to this attempt to use that, as
19 we respectfully submit is a distraction to prevent
20 summary judgment, Your Honor, the non-moving party has
21 to demonstrate that the likelihood of further discovery
22 will uncover additional relevant evidence and that the
23 party is not merely engaged in a fishing expedition.
24 Your Honor, as we've argued I'm sure too much already,
25 there is no evidence. There is no additional discovery

1 that will fix the fact that they colored outside these
2 lines. And they have not submitted that it would.
3 There's not any discovery or depositions that's gonna
4 show he had contact with 100 percent of the customers.
5 And they didn't tie that provision to any sort of
6 confidentiality provision.

7 Your Honor, we're here for the bare result. This
8 is a question of law for the Court to decide. Thank
9 you.

10 THE COURT: Uh-huh.

11 MR. ARNOLD: I'll just answer any questions you
12 have, if you have any.

13 THE COURT: I don't have any at this time.

14 MR. ARNOLD: Okay.

15 THE COURT: Anything else we need to cover?

16 MR. ARNOLD: Excuse me?

17 THE COURT: Anything else we need to cover?

18 MR. ARNOLD: No, sir, Your Honor.

19 THE COURT: All right, thank you very much.

20 MR. ARNOLD: All right. Oh, my motion to compel.

21 THE COURT: Oh, Yes, sir.

22 MR. ARNOLD: Yeah, I will be brief because I'm
23 not gonna repeat. Look, you don't want to hear any more
24 about our bickering than I want to recite. But I'm
25 gonna, I'm gonna ---

1 THE COURT: I'm gonna read your briefs and read
2 the cases and then I'll take a look at it.

3 MR. ARNOLD: Okay. I've got a little affidavit.
4 I just want to make two points.

5 THE COURT: Yes, sir.

6 MR. ARNOLD: That we've got the -- one of the
7 things that has been represented is it doesn't matter
8 now, that they -- we've scheduled depositions. Well,
9 they've been scheduled before. I want an order
10 providing that those depositions will take place on the
11 day they're scheduled. That's all. So that issue,
12 that's all I want.

13 THE COURT: Can we agree they'll take place on
14 those days?

15 MR. FOSTER: Already have, Judge.

16 THE COURT: All right.

17 MR. ARNOLD: Okay. Then these telephone logs, I
18 need to get it. Just in that e-mail tells much more
19 than it showed. These telephone logs, we subpoenaed
20 them. Telephone records. Telephone records. They
21 moved to quash. I said here you go, you take them, you
22 redact them, and when you redact the personal phone
23 calls you give them back. July 17th we stood in front
24 of the court, represented we had an agreement. I raised
25 that time and time and time again. Never got them,

1 never got them, never got them. Well, now their
2 position is, well, we got them to them. Yeah, let me
3 tell you how they got them. We got them Monday. We got
4 them Monday, but they were the wrong phone records.
5 Fine. Fine, we got the wrong phone records. We told
6 them on Monday, that's when I saw them or Tuesday. Hey,
7 we've got the wrong phone records. Guess what he did,
8 he got them to us in 24 hours, but he's had them since
9 July 17th. It didn't take him but 24 hours to do it
10 when he decided to do it. That's what we've been
11 working with, Your Honor.

12 The last thing is the documents. We subpoenaed
13 documents from customers, these customers. We got lots
14 of documents. Emails from the defendants that the
15 defendants didn't produce when they told us they gave us
16 all their emails. So what I propose to Mr. Foster is
17 that he supplement his discovery with all the emails and
18 if we don't believe all the emails are there, then we
19 can agree on a neutral IT person to make an image of
20 that hard drive and search. If we are wrong and they
21 did provide us with all those emails we'll pay for it
22 all. But if the IT person finds additional emails or
23 information that wasn't produced, they pay for it.
24 Seems fair to me. So if you look at the motions, the
25 memorandums...

1 THE COURT: Your position on that one?

2 MR. FOSTER: Your Honor, I don't think you can
3 actually move to compel.

4 THE COURT: I'm sorry, I couldn't hear you.

5 MR. FOSTER: I'm sorry. Our position, Your
6 Honor, and I know I probably shouldn't say I'll be brief
7 because all the evidence is to the contrary thus far.
8 This motion to compel, Your Honor, it fails to represent
9 fairly, with all due respect, what was actually going on
10 during this time. And I know the courts, and Judge
11 Couch, I know you are in particular perhaps don't want
12 to hear this kind of bickering and also sincerely take a
13 strong position on discovery abuse. And I think that --
14 and I feel the same way. It's a problem. It's bad when
15 people aren't honest and forthright in discovery. But
16 it's also bad, with all due respect, when the specter of
17 that sort of behavior is used strategically.

18 All of this stuff, if you will, on the motion to
19 compel and its strident tone and tenor and it's in their
20 complaint, it all started after we filed this motion.
21 The reason we didn't get those redacted phone records to
22 him any sooner because they don't really matter. There
23 was nothing going on that we needed to -- we're focused
24 on all these legal issues. We got involved in the case
25 April 6th.

1 THE COURT: Counsel, that's not for you to
2 decide.

3 MR. FOSTER: Absolutely, Your Honor. That's ---

4 THE COURT: You just need to produce it.

5 MR. FOSTER: And we have, Your Honor. But
6 perhaps a better way for me to explain it is that's why
7 we were slow doing it. But, Your Honor, with respect to
8 the supplementation, please understand, there was never
9 a request to me or Nicole or Nelson Mullins to
10 supplement discovery. The parties exchanged discovery
11 back in December of 2015. Andy asked for the
12 supplement. Former counsel did it. All that happened
13 before us and after they supplemented it ---

14 THE COURT: Let's just answer his proposal he
15 said about the emails. You aren't willing to have an
16 independent person take a look? Said he'll pay for it
17 if they don't find any additional emails.

18 MR. FOSTER: Your Honor, I've got no problem with
19 that, but in all of this it's the devil is in the
20 details, Your Honor, because I haven't even had a chance
21 to -- they haven't explained to me -- particular when
22 you say here's the problem. I got an email on the 19th
23 saying, among other things that were alleged, there's
24 this issue you have your client produced everything, you
25 haven't supplemented this discovery. I'm like, all

1 right, well tell me exactly what you're talking about
2 and we'll supplement it. And we're happy to do that,
3 Your Honor.

4 What we've proposed before this is give us time
5 to supplement it, we'll give you everything. But, Your
6 Honor, what I'm afraid of is, quite frankly, that's an
7 expensive thing they're talking about doing. And if --
8 I'm concerned that what they're really trying to do is
9 change the -- what kind of case this is. And to go
10 digging around in somebody's hard drive when you're
11 talking about what's at issue actually, Judge, with
12 respect to these emails, there's a question of whether
13 or not you've breached a void provision by soliciting
14 customers.

15 But at the end of the day, Judge, if we can come
16 up with the language of how this works of who pays for
17 what, have at it.

18 MR. ARNOLD: I'll prepare a proposed order,
19 submit it to Mr. Foster for his review and whatever we
20 work out ---

21 THE COURT: Submit it to me.

22 MR. ARNOLD: And we'll do that.

23 THE COURT: Thank you.

24 MR. ARNOLD: And use the -- listen, the motion to
25 compel, forget it to the motion for summary judgment.

1 Let it stand on its own.

2 THE COURT: All right.

3 MR. ARNOLD: And get to it only if we deserve to
4 get there.

5 THE COURT: Okay.

6 MR. FOSTER: And just part of the ---

7 THE COURT: See if y'all can't work that out
8 because I guess I'm kind of old fashioned I just like to
9 see full and complete discovery, and I really don't like
10 to see people fight about it.

11 MR. FOSTER: Oh, always.

12 THE COURT: If I need to get involved in it, I
13 will.

14 MR. FOSTER: Yes, sir, Your Honor.

15 MR. ARNOLD: Okay, we'll do it.

16 THE COURT: Thank you very much, that concludes
17 the hearing.

18 MR. ARNOLD: Thank you.

19 MR. FOSTER: Thank you, Judge.

20 (Whereupon, hearing concluded at 3:19 p.m.)

21

22 --- THIS ENDS TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

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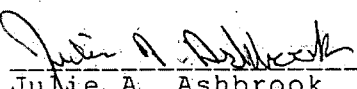
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I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record to the best of my ability of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 22nd day of September, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.


Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
FILED - CLERK OF COURT
GREENVILLE CO. S.O.
PAUL B. WICKENSIMER

IN THE COURT OF COMMON PLEAS

CHEMGARD, INC.,

☒ Plaintiff

2015 JUN 5 PM 12 40

CASE NO.

2015-CP-23-03546

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

v.

DARRELL KEITH HAYNES,

☐ Defendant.

Plaintiff's Attorney: W. Andrew Arnold Bar No. 65311 Address: 712 E. Washington Street, Greenville, SC 29601 phone: 864-242-4800 fax: 864-242-4885 e-mail: aarnold@aalawfirm.com other:		Defendant's Attorney: Bar No. Address: phone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion for Preliminary Injunction Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: Date:	
CLERK'S VERIFICATION Collected by: Date Filed: ☐ MOTION FEE COLLECTED: ☐ CONTESTED - AMOUNT DUE:			

SCCA/233 (11-03)

ROA 000169

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

CHEMGARD, INC.,)

Plaintiff,)

v.)

DARRELL KEITH HAYNES,)

Defendant.)

IN THE COURT OF COMMON PLEAS

FOR THE THIRTEENTH CIRCUIT

CIVIL ACTION NO. **2015-CP-23-03546**

MOTION FOR PRELIMINARY INJUNCTION

COMES NOW PLAINTIFF Chemgard, Inc. ("Plaintiff"), by and through its counsel, and, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, files this Motion for a Preliminary Injunction seeking to enjoin Defendant Darrell Keith Haynes ("Defendant") from violating his contractual obligations to Plaintiff.

This Motion is supported by Plaintiff's Verified Complaint for Injunctive Relief and Damages and Plaintiff's Memorandum in Support of the Motion for Preliminary Injunction, filed contemporaneously herewith. In addition, Defendant has filed a Verified Complaint and a true and accurate copy of the Employment Agreement in support of this motion.

Plaintiff has suffered and will continue to suffer irreparable injury, loss, and damage as a result of Defendant's wrongful conduct. A preliminary injunction is necessary to prevent further irreparable injury, loss, and damage to Plaintiff. As demonstrated in the supporting materials, Plaintiff has a strong likelihood of success on the merits and does not have an adequate remedy at law.

Defendant Haynes, a salesman, resigned his position with Plaintiff on May 10, 2015. Within a week, at least one established customer of Plaintiff terminated its relationship with Plaintiff, and two other customers have since followed suit. At least four other customers have

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PAUL B. WICKER
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informed Plaintiff that Defendant has solicited their business in the last few weeks. Such conduct is a continuing violation of the Employment Contract that Defendant signed with Plaintiff.

WHEREFORE, Plaintiff respectfully requests that the Court grant this Motion for Preliminary Injunction and issue an Order:

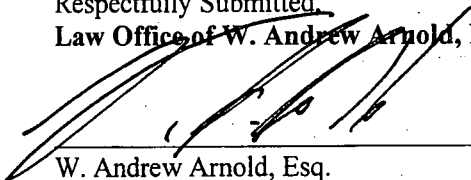
(1) enjoining Defendant from violating the terms of contractual obligation to Plaintiff to not “[s]olicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company” for a period of two years following his resignation from Plaintiff’s employ;

(2) enjoining Defendant from violating the terms of contractual obligation to Plaintiff to not “[s]olicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee’s employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;” and

(3) Other equitable relief as may be proper and just.

Dated this 5th day of June, 2015.

Respectfully Submitted,
Law Office of W. Andrew Arnold, P.C.



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S.C. Bar No. 065311
aarnold@aalawfirm.com

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ATTORNEYS FOR PLAINTIFF

) IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-03546

1

v.

)

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MOTION TO DISMISS

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By and

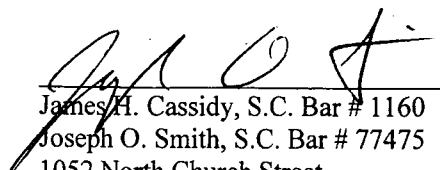
2.

Amend

Procedure

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



James H. Cassidy, S.C. Bar # 1160

Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, S.C. 29601

(864)-349-2600

(864)-349-0303 fax

JCassidy@roecassidy.com

JSmith@roecassidy.com

Attorneys for the Defendants

July 6, 2015
Greenville, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc,

Plaintiff

v.

Darrell Keith Haynes and Chem-Tek, LLC,

Defendants.

COURT OF COMMON PLEAS

C.A. No. 2015-CP-23-03546

**AFFIDAVIT OF
DARRELL KEITH HAYNES**

1. I am over the age of twenty-one (21) and competent to testify to, and am familiar with, the following facts.

2. I currently reside at 3000 Piedmont Lake Road, Pine Mountain, Georgia 31822. My entire life I have been a citizen and resident of the State of Georgia except for the few years I attended college in the State of Alabama.

3. I have never maintained citizenship or residence in the State of South Carolina.

4. I own no property or share in any business in the State of South Carolina.

5. In or around the year 2000 I saw an ad in the *Columbus Ledger Inquirer* newspaper, a publication out of and distributed in Columbus, Georgia, for an opening at Plaintiff's company Chemgard, Inc.

6. I initially met Chemgard principle, Bill Smith, in Alabama at a Holiday Inn to discuss potentially working for Chemgard.

7. I ultimately accepted Chemgard's offer of employment at my home in Columbus, Georgia.

8. Prior to my employment with Chemgard, the Plaintiff sent me the Employment Agreement (attached as Exhibit A to the Complaint) to my home address in Columbus, Georgia.

9. I reviewed and executed the Employment Agreement at my office in Columbus, Georgia.

10. I was employed by Chemgard, Inc. from October 2, 2000 to May 10, 2015 as District Representative.

11. During my employment with Chemgard I serviced customers exclusively in states outside of South Carolina. All of the customers I served while at Chemgard were in Georgia and Alabama.

12. During my employment with Chemgard I never came to the State of South Carolina in order to receive my pay. It was either mailed to my Columbus, Georgia address or deposited directly into my bank account.

13. I resigned from my position with Chemgard on May 10, 2015 due to intolerable and unworkable conditions created by principles of Chemgard.

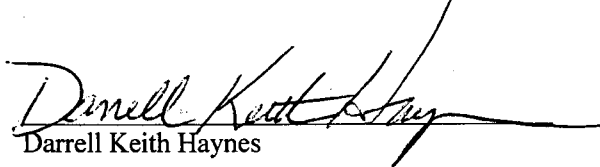
14. I accepted a position with Defendant Chem-Tek, LLC on or about May 11, 2015.

15. Any and all of the alleged actions complained of in the Amended Complaint occurred completely and wholly outside of South Carolina.

(signature page to follow)

I declare under penalty of perjury under the laws of United States of America that the foregoing is true and correct.

Executed on July 2, 2015 in Columbus, Georgia.


Darrell Keith Haynes

SWORN to before me this 2
day of July, 2015.

 (SEAL)
Notary Public for the State of Georgia
My commission expires: 2/18/2019

Latrease Rogers
NOTARY PUBLIC
Muscogee County, Georgia
My Comm. Expires
02/18/2019

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.

☐ Plaintiff

v.

Darrell Keith Haynes And Chem-Tek, LLC

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-23-03546

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: W. Andrew Arnold, Bar No. 65311 Address: 712 E. Washington Street, Greenville, SC 29601 phone: (864) 242-4800 fax: (864) 242-4885 e-mail: aarnold@aallawfirm.com other:		Defendant's Attorney: Joseph O. Smith, Bar No. 77475 Address: P.O. Box 10529, Greenville SC 29603 phone: (864) 349-2600 fax: (864) 349-0305 e-mail: jsmith@roecassidy.com other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Dismiss Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff / ☒ Defendant July 6, 2015 Date submitted			
SECTION III: Motion Fee ☐ PAID - AMOUNT: ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: <u>SMK</u> Date Filed: <u>7-6-15</u> ☒ MOTION FEE COLLECTED: <u>\$25</u> ☐ CONTESTED - AMOUNT DUE: _____ CKH 411632 ROE CASSIDY			

SCCA/233 (11-03)

ROA 000177

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes and Chem-Tek, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) THIRTEENTH JUDICIAL CIRCUIT

) C.A. No.: 2015-CP-23-03546

) **DEFENDANTS' MEMORANDUM IN**
) **SUPPORT OF MOTION TO DISMISS**

) **AND**
) **OPPOSITION TO INJUNCTION**

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COMES NOW Defendants Chem-Tek, LLC and Darrell Keith Haynes, by and through their undersigned counsel, and files this Memorandum in Support of Defendant Haynes' Motion to Dismiss and in Opposition to Plaintiff's Motion for Temporary Restraining Order.¹

FACTUAL AND PROCEDURAL BACKGROUND

In or around the year 2000 Defendant, Darrell Keith Haynes, (*hereinafter* Haynes) saw an ad in the *Columbus Ledger Inquirer* newspaper, a publication out of and distributed in Columbus, Georgia, for an opening at Plaintiff's company Chemgard, Inc. (*Haynes Aff.* ¶ 5). He initially met Chemgard principle, Bill Smith, at a Holiday Inn in Alabama to discuss potentially working for Chemgard. (*Haynes Aff.* ¶ 6). Haynes ultimately accepted a position with Chemgard at his home in Columbus, Georgia. (*Haynes Aff.* ¶ 7). Prior to beginning work with Chemgard, the Plaintiff sent Haynes an Employment Agreement to his home address in Columbus, Georgia. (*Haynes Aff.* ¶ 8). He reviewed and executed the Employment Agreement at his office also located in Columbus, Georgia. (*Haynes Aff.* ¶ 9).

¹ Defendant Haynes is making a limited appearance merely to assert his lack of personal jurisdiction defense.

Haynes worked for Chemgard, Inc. as a District Representative from October 2, 2000 until resigning on May 10, 2015. (*Haynes Aff.* ¶ 10). During his employment with Chemgard, Haynes serviced customers exclusively in states outside of South Carolina. (*Haynes Aff.* ¶ 11). All of the customers Haynes serviced while employed by the Plaintiff were in Georgia and Alabama. (*Haynes Aff.* ¶ 11). Chemgard's increasingly oppressive and physically unmaintainable demands required Haynes to look elsewhere for employment. Specifically, Chemgard principle(s) demanded Haynes, a District Representative (salesman) to physically service the locations he sold Chemgard services and products to by personally hauling large barrels of chemicals and other materials weighing hundreds of pounds from loading docks into broiler rooms and undertaking the actual maintenance of broiler systems among other things. Haynes repeatedly requested Chemgard hire a third party to undertake this increasingly difficult manual labor in order to allow him to focus on sales and as to not badly injure himself. Plaintiff refused to heed these requests and continually increased its sales demands upon Haynes. Haynes therefore resigned from Chemgard on May 10, 2015.

When he was first hired by Chemgard, Haynes signed an Employment Agreement. (Exhibit A to Amended Complaint). That document attempts to restrict Haynes post-employment potentially competitive actions stating:

9. Nondisclosure and Noncompetition Covenants

(d) Covenants Not to Compete

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

- (i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

- (ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;
- (iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(Agreement at pgs. 4-6).

The Employment Agreement also imposes an automatic extension of the noncompete period providing that "[i]n the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation." (Agreement at 6).

Haynes is now employed by Defendant Chem-Tek, LLC and trying to make a living in the industry he has served for many years. Plaintiff is attempting to monopolize the market by seeking to enjoin Defendants from fairly competing in the market place relying upon overbroad and unenforceable non-compete provisions. On June 25, 2015 Chemgard filed an Amended Complaint adding Chem-Tek as a Defendant, alleging it is entitled to temporary injunctive relief and pleading causes of action for breach of contract (against Haynes) and tortious interference with contractual relations (against Chem-Tek). Plaintiff also filed a Motion for Temporary Restraining Order petitioning the Court for temporary injunctive relief in an effort to stifle fair and free competitive actions by the Defendants. Chemgard is not entitled to the equitable relief which it seeks for the reasons set forth in detail below.

APPLICABLE LAW AND ANALYSIS

I. THE COURT LACKS PERSONAL JURISDICTION OVER HAYNES

A motion to dismiss for lack of personal jurisdiction is governed by Rule 12(b)(2) S.C. R. Civ. P. "When personal jurisdiction is challenged by the defendant, the plaintiff has the burden of showing that jurisdiction exists." *Tetrev v. Pride Int'l, Inc.*, 465 F. Supp. 2d 555, 558 (D.S.C. 2006); *Allen v. Columbia Financial Mang.*, 297 S.C. 481, 484, 377 S.E.2d 352, 354 (Ct. App. 1988). At the pre-trial phase the plaintiff must make a *prima facie* showing via the pleadings and affidavits. *Allen v. Columbia Financial Mang.*, 297 S.C. 481, 484, 377 S.E.2d 352, 354 (Ct. App. 1988). In making the determination of whether the plaintiff satisfied this burden, the Court may consider both defendant's and plaintiff's "pleadings, affidavits, and other supporting documents presented to the court." *Masselli & Lane, P.C. v. Miller & Schuh, P.A.*, 2000 WL 691100 at * 1 (4th Cir. May 30, 2000). While a court should construe allegations in the complaint in the light most favorable to plaintiff it need not "credit conclusory allegations or draw farfetched inferences." *Id.*; *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). The Plaintiff must base its claim for personal jurisdiction "on specific facts set forth in the record." *Magic Toyota, Inc., v. Southeast Toyota Distribs., Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992); *Power Prods. & Serv. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008) ("When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction."). The Plaintiff cannot meet its burden in this case to demonstrate this Court has personal jurisdiction over Haynes.

Traditionally, two conditions must be met for personal jurisdiction to exist; the plaintiff must: (1) satisfy the applicable long-arm statute; and (2) establish that the exercise of jurisdiction does not overstep the bounds of due process. *Christian Sci. Bd. of Dirs. of the First Church of*

Christ. Scientist v. Nolan, 259 F.3d 209, 215 (4th Cir. 2001). The South Carolina Supreme Court interprets the State's long-arm statute to extend to the constitutional limits imposed by the due process clause. *Sheppard v. Jacksonville Marine Supply, Inc.*, 877 F. Supp. 260, 265 (D.S.C. 1995). In recognition of this interpretation, courts have collapsed the two step inquiry into a due process only analysis. *Gateway Gaming, L.L.C. v. Custom Game Design, Inc.*, C.A. No.: 8:06-01649-HMF, 2006 WL 2781043, at *3 (D.S.C. Sept. 25, 2006); *Power Prods. & Serv. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008). "Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005).

The Due Process Clause is satisfied for personal jurisdiction purposes if a defendant has "purposefully availed itself of the privilege of conducting business in the forum state" by establishing sufficient "minimum contacts such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Burger King Corp v. Rudezewicz*, 471 U.S. 462, 475-76 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). The initial inquiry, whether the defendant established minimum contacts with the State, remains the threshold determination and constitutional touchstone for establishing jurisdiction. *Rudezewicz*, 471 U.S. at 474. If minimum contacts with the forum state exist, a defendant should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* 444 U.S. at 297. Courts also consider whether "the defendant has 'purposely directed' his activities at residents of the forum state." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

Factors courts have considered in determining whether a defendant has "purposefully availed" itself of the privilege of conducting business in the state include, but are not limited to: (1)

whether defendant maintains offices or agents in the state, *see McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957); (2) whether defendant owns property in the state, *see Base Metal Trading, Ltd. v. OJSC*, 283 F.3d 208, 213 (4th Cir. 2002); (3) whether defendant reached into the state to solicit or initiate business, *see McGee*, 355 U.S. at 221; *Burger King*, 471 U.S. at 475-76; (4) whether defendant deliberately engaged in significant or long-term business activities in the state, *see id.* at 475-76, 481; (5) whether the parties contractually agreed that the law of the state would govern disputes, *see id.* at 481-82; (6) whether defendant made in-person contact with the resident in the state regarding the business relationship, *see Hirschkop & Grad, P.C. v. Robinson*, 757 F.2d 1499, 1503 (4th Cir. 1985); (7) the nature, quality, and extent of the parties' communications about the business being transacted, *see English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990); and (8) whether the performance of contractual duties was to occur within the state. *See Peanut Corp. of Am. v. Hollywood Brands, Inc.*, 696 F.2d 311, 314 (4th Cir. 1982). "Because a sovereign's jurisdiction remains territorial, to justify the exercise of personal jurisdiction over a non-resident defendant, the defendant's contacts with the forum state must have been so substantial that 'they amount to a surrogate for presence and thus render the exercise of sovereignty just.'" *Id.* at 277-78 quoting *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997). The allegations and evidence before the Court fails to establish the presence of sufficient factors necessary to satisfy

Due Process showing that:

- Haynes as party to Employment Agreement was not and is not a South Carolina resident
- Haynes executed the Employment Agreement outside of South Carolina
- Haynes performed services for Chemgard wholly outside of the State
- The alleged injury Plaintiff claims to have sustained arose from actions and/or transactions occurring outside of South Carolina

- Haynes does not maintain an office or own property in the State
- Haynes does not collect or derive income from services rendered in South Carolina; and
- Haynes does not directly or indirectly solicit business from South Carolina businesses.

(See *Haynes Aff.* and Amend. Compl.)

Personal jurisdiction over an out-of-state defendant may be either general or specific, however neither form of personal jurisdiction may be rightfully exercised over Haynes under the circumstances.

The Complaint contains jurisdictional allegations regarding Haynes contacts with South Carolina stating that “since 2000, Haynes has attended annual sales meeting in South Carolina, reported weekly sales reports and expense reports to the Greenville office for reimbursement, and received his compensation and expense checks from the Greenville office.” (Amend. Compl. at ¶ 6). It goes on alleging that “all products sold by Haynes [were] shipped from Greenville, and Haynes has from time to time come to the Greenville office to discuss business and customer relationships.” (Amend. Compl. at ¶ 6). The Plaintiff finally states that Haynes is employed by Chem-Tek, a South Carolina corporation. (Amend. Compl. at ¶ 6).

The Amended Complaint contains three causes of action (1) a plea for temporary injunction; (2) breach of contract (against Haynes) and (3) tortious interference with contractual relations (against Chem-Tek). All of the claims against Haynes relate to and arise out of his alleged solicitation of Chemgard customers in Georgia and Alabama following his resignation from the Plaintiffs’ company. Therefore the allegations forming the basis of the present action against Haynes have nothing to do with the jurisdictional allegations directed towards him. Each jurisdictional allegation concerning Haynes, save the fact he now works for Chem-tek, deal exclusively with his “pre-resignation” activities whereas the allegations underlying the claims

against him are all “post-resignation” actions. Thus the Court must have general jurisdiction over Haynes in order to proceed in this case. Under the circumstances the Court lacks general jurisdiction over the individual Defendant.

A. General Jurisdiction

The Court “may exercise personal jurisdiction under the theory of general jurisdiction, which requires a more demanding showing of ‘continuous and systematic’ activities in the forum state” than what is required to establish specific jurisdiction. *Tire Engineering & Distrib., LLC v. Shandong Linglong Rubber, Co., Ltd.*, 682 F.3d 292, 301 (4th Cir. 2012). “Broad constructions of general jurisdiction should be generally disfavored.” *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1200 (4th Cir. 1993). “Due Process precludes the exercise of general jurisdiction unless the plaintiff shows that the defendant has an ‘enduring relationship’ with the forum state.” *Brown v. Gehe-Weke GmbH*, 69 F. Supp. 2d 770, 779 (D.S.C. 1999). For a corporation the business operations within the State must be so substantial and extensive as to justify suit against the business on all causes of action dealing with matters entirely distinct from the instant litigation. *Goodyear Dunlop Tire Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011)(internal citations omitted). “For an individual, the paradigm for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Goodyear*, 131 S. Ct. at 2853-54. Neither the allegations of the Amended Complaint nor the evidence before the Court sufficiently establishes Haynes had continuous and systematic contacts with South Carolina; the frequency and nature of which would subject him to the general jurisdiction of this State’s Courts.

Haynes’ limited contacts with South Carolina were not of the continuous and systematic nature necessary to establish an “enduring relationship” with the State and act as a “surrogate for

his physical presence.” As reflected in Haynes affidavit he is and always has been domiciled in Georgia, never maintaining citizenship or residence in this State. (*Haynes Aff.* ¶ 2-3). He does not own any property or share of a business in South Carolina. (*Haynes Aff.* ¶ 4). In 2000 he saw an ad in a Columbus, GA paper for an open position at Chemgard which resulted in him meeting with the Plaintiff’s principle, Bill Smith, in Alabama to discuss the position. (*Haynes Aff.* ¶ 5-6). Haynes accepted Chemgard’s offer of employment and reviewed and executed the Employment Contract in Columbus, Georgia. (*Haynes Aff.* ¶ 7-9). Also, during his entire tenure with Chemgard he sold to and serviced customers outside of South Carolina. (*Haynes Aff.* ¶ 11). All of Haynes’ pay and reimbursement from Chemgard was sent to and received by him in Columbus, GA. (*Haynes Aff.* ¶ 12).

Haynes’ attending sporadic sales meetings and receiving his commission payments from a South Carolina company are not enough to confer the Court with general jurisdiction over him. In *Nichols v. G.D. Searle & Co.*, the 4th Circuit held that a court in Maryland could not assert general jurisdiction over a company employing 13 Maryland residents as sales representatives and one Maryland resident as a district manager. 991 F.2d 1195 (4th Cir. 1993). In that case the Defendant held district meetings three times annually in Maryland, held regional and national meetings twice annually, and had between \$9-\$13 million annual sales in the state. *Id.* The 4th Circuit held that this was not enough for the exercise of general jurisdiction. *Id.* Furthermore, undertaking activities outside of the State that may impact a South Carolina corporation is not enough for general jurisdiction. In *ESAB Group, Inc. v. Centricut, Inc.*, the Court held a New Hampshire corporation and its officer lacked sufficiently continuous and systematic contacts with South Carolina to justify exercising general in personam jurisdiction over the defendant. 126 F.3d 617 (4th Cir. 1997)(Jurisdiction ultimately exercised under RICO nationwide service provision). The Court in

ESAB was not swayed by the fact that the foreign corporation and its officer knew that, by conducting business with a Florida resident, they might gain a competitive advantage and make sales that the Plaintiff, a South Carolina competitor, would otherwise make or that Defendant had 26 customers residing in the State. *Id.*

In this case Haynes' contacts with South Carolina are much more limited and not of the frequency and nature necessary to justify the exercise of general jurisdiction over him. To subject Haynes to the general jurisdiction of this Court for any cause of action whatsoever would offend the traditional notions of fair play and substantial justice in contravention of the Due Process clause. Under the circumstances, Haynes lacks the necessary systematic and continuous contacts with the State such that South Carolina could be regarded as his home. Therefore, the Court does not have general jurisdiction over Haynes and the actions against him should be dismissed.

B. Specific Jurisdiction

A Court may exercise specific jurisdiction when "the out of state defendant engage[s] in some activity purposefully aimed toward the forum state and...the cause of action arise[s] directly from that activity." *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 331-32 (D.S.C. 1999); S.C. Code Ann. § 36-2-803 (2009). Minimal, isolated or unsolicited contacts, however, do not give rise to the required purposeful connection between an out of state defendant and the forum state. *Umbro USA, Inc., v. Goner*, 825 F. Supp. 738, 741 (D.S.C. 1993). The allegations of the Amended Complaint fail to support exercising specific jurisdiction over Haynes in this case.

Haynes' alleged misdeeds underlying the causes of action against him in this case all involve his post-employment/resignation solicitation of Chemgard customers in Georgia and Alabama. (Amend. Compl. ¶¶ 28-30, 34-52). The Plaintiff concedes that all of these alleged actions occurred outside of South Carolina. The Employment Agreement claimed to have been breached

by Haynes was sent to, received, and executed in Columbus, Georgia. In short, no alleged action underlying Plaintiff's claims against Haynes has him making contact with South Carolina in any way. Without any purposeful activity aimed at South Carolina that directly spawned and supports any of the causes of actions set forth in the Amended Complaint, the Court necessarily lacks specific jurisdiction over Haynes and therefore the actions against him should be dismissed.

II. CHEMGARD IS NOT ENTITLED TO AN INJUNCTION

Should the Court find it has personal jurisdiction over Haynes, Chemgard is not entitled to the injunctive relief sought.

The sole purpose of temporary injunctive relief is to preserve the status quo, thereby avoiding possible irreparable injury to a party pending litigation. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 199 S.E.2d 60 (1973). An action for injunctive relief is equitable. *Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (S.C. App. 1988). Accordingly, the question as to whether temporary injunctive relief should be granted rests within the sound discretion of the trial judge to whom the application is addressed. *Powell*, 199 S.E.2d at 61; *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969). In exercising that discretion, a court must remember that "[t]he 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 Ass'n*, 313 S.C. 555, 443 S.E.2d 577, 578 (S.C. App. 1994); *Carter v. Lake City Baseball Club*, 218 S.C. 255, 62 S.E.2d 470 (1950).

In order to receive an injunction, a plaintiff must establish that (1) it will likely 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 absence of an adequate remedy at law. *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004).

In the instant case, the Plaintiff has not alleged facts sufficient to satisfy these conditions, and therefore, its request for temporary injunctive relief must be denied.

A. Plaintiff Will Not Likely Succeed on the Merits

Plaintiff's claims in its Amended Complaint and Motion for Injunction are reliant upon the Employment Agreement's restrictive covenants being valid and enforceable restrictions on the free market. The Employment Agreement's non-compete provisions however are overbroad and therefore unenforceable.

Covenants not-to-compete are looked upon with disfavor by South Carolina courts, critically examined, and strictly construed against the drafter. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708(Ct. App. 1995). The drafter bears the burden of showing enforceability. See *Delmar Studios v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958). A covenant not to compete will be upheld if it is: (1) necessary for the protection of the employer's legitimate business interests; (2) reasonably limited as to time and place; (3) not unduly harsh in hindering the legitimate efforts of the employee to earn a living; (4) in accord with public policy; and (5) supported by valuable consideration. *Rental Uniform Service v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983).

(1) The Employment Agreement is Impermissibly Overbroad

The Employment Agreement is impermissibly overbroad and therefore unenforceable. To be enforceable in South Carolina, restrictive covenants must be, among other things, narrowly tailored. The reasonableness of the particular restriction, whether geographic, temporal or otherwise, can often be determinative of the enforceability of a covenant not-to-compete. *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("If the territorial scope of the restraint is unreasonable, no inquiry need be made as to the presence or absence of other necessary

requirements.”); *Stringer v. Herron*, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (1992) citing *Standard Register Co. v. Kerrington*, 238 S.C. 54, 119 S.E.2d 533 (1961). Freedom from such unnecessary encumbrances forms the bedrock of a free market economic system and therefore “a restriction against competition must be narrowly drawn to protect the legitimate interests of the employer.” *Faces*, 318 S.C. 39, 42 citing *Almers v. South Carolina Nat’l Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975); *Stringer*, 424 S.E. 2d 547.

The Employment Agreement at hand contains a non-compete provision which restrains trade or otherwise prohibits competition, which exceeds the bounds of reasonableness and legitimacy.

As noted above, the Employment Agreement contains the following non-compete provisions:

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

- (iv) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;
- (v) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee’s employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;
- (vi) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee’s employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(Agreement at pgs. 4-6).

First, the two year time restriction is unreasonable and unnecessary for the protection of Chemgard's legitimate business interests. Time limitations in non-competes must be narrowly tailored and only last as long as it is reasonably necessary for the former employer to protect its market share from unfair competition. *Milliken & Co. v. Morin*, 399 S.C. 23, 31 (2012) citing *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) ("Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer" and "must also be reasonably limited 'with respect to time and place.'"). Enforcing a two year provision is tantamount to the Court agreeing that Chemgard needs an entire two years to shore up customer relationships before the market is truly free and open to everyone, including the Defendants. Even more troubling from a time perspective is the Employment Agreement's automatic extension provision which provides that "[i]n the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation." (Agreement at 6). Assuming *arguendo* that Plaintiff's allegations are true and the Agreement enforceable, this makes the restrictive covenants last for at least 3, and possibly more, years from Haynes' resignation. In short, Chemgard does not need to stifle Haynes' ability to earn a living by locking him out of the market for three years. This goes beyond protection of legitimate business interests and travels well into the realm of unlawful restraint of free trade.

Second, the Employment Agreement's customer based restriction is outside the recognized realm of reasonableness. Paragraph 9(d)(i) prohibits direct or indirect solicitation of "any customers of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company." It is undisputed that Haynes

served customers only in Georgia and Alabama while at Chemgard. It is those very same customers that Plaintiff alleges Haynes is unlawfully doing business with in this case. Pursuant to 9(d)(i) Haynes could not do business with any and all Chemgard customers, past, present or future regardless of whether he had any contact with them during his employment with the company. This expands the reach of the Employment Agreement well beyond the legitimate and recognized scope of customer based restrictions to include areas in which Haynes never did business and customers with whom he had absolutely no contact with while at Chemgard. *Collins Music Co. v. Parent*, 288 S.C. 91 (Ct. App. 1986)(Customer restriction must be limited to specific customers); *Standard Register v. Kerrigan*, 238 S.C. 54 (1961)(Territorial restriction reasonably limited if restrained to employee's area of responsibility.). The Employment Agreement however does not stop there. Paragraph 9(d)(iii), which is not cited by Plaintiff in its Amended Complaint, attempts to prohibit Haynes from "soliciting, directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company." (Agreement at 6). All told, 9(d)(i)-(iii) attempts to restrain Haynes from soliciting any past, present or future customer of Chemgard and any prospective customer with whom Haynes had contact with in the year and a half leading up to his resignation even though that entity never did business with the Plaintiff. This overbroad customer restriction renders the non-compete provision unenforceable as such restrictive covenants must rise and fall upon their own terms. See *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)(The lack of any reasonable territorial restriction is fatal to its enforcement and overbroad territorial restriction could not be "blue penciled" by the court). In *Poynter*, the South Carolina Supreme Court explicitly ruled that the judiciary may not reform or modify non-compete provisions to make their scope reasonable

and thereby enforceable. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010)(“The restrictions in non-compete clause(s) cannot be rewritten by a court or limited by the parties’ agreement, but must stand on their own terms....”).

The Court in *Carolina Chemical Equipment Co. v. Muckenfuss* recognized that “[a]n employer has no legitimate commercial interest in prohibiting competition in itself.” 322 S.C. 289, 294, 471 S.E.2d 721, 721-24. By enforcing the overly inclusive restrictions of the Employment Agreement, Chemgard is seeking to prevent Haynes and Chem-Tek from competing with them in the free market. The law tolerates a small degree of protectionism that is reasonable and narrowly tailored, however it does not allow enforcement of oppressive restraints on the free market that support monopolistic endeavors.

(2) Enforcement of the Employment Agreement Violates Public Policy

Enforcement of the Employment Agreement offends public policy in a multitude of ways. First, allowing employers to utilize their vastly superior bargaining position to force their employees into these types of agreements is patently offensive and harmful to the free market economy and the workers that drive it. Also, the Agreement is overbroad in its restraint upon trade and the free market. See *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160-61, 621 S.E.2d 352, 354 (2005)(Territorial restrictions beyond those necessary to protect an employer’s legitimate business interest violate public policy as unwarranted and harmful restraints on free trade, and are therefore void as matter of law.); *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. 64 (1873)(“There are two grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One...the injury to the public by being deprived of the restricted party’s industry; and the other is the injury to the party himself by being precluded from pursuing his occupation...”). Finally, Chemgard’s attempt to lay claim to and prevent Haynes from

utilizing his skills and know how gained during his employment with the Plaintiff violates the public policy of this State.

In view of the failure of Plaintiff's arguments that there is a valid Employment Agreement with enforceable restrictive covenants, it is highly unlikely that Plaintiff will prevail on the merits of this case and injunctive relief should be denied.

B. Plaintiff Fails to Demonstrate Irreparable Harm

The determination of whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). Courts have carefully scrutinized claims for temporary injunctive relief, reflecting a strong preference for ordinary damage remedies. As one court observed, "the availability of money damages at law in the future cuts heavily against a conclusion that the injury which would call forth such an award is irreparable in nature. This is because it is thereby established that there is an alternative to equitable intervention: an adequate remedy at law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 74 (D. Me. 1993); accord *Plain Dealer Publ'g Co. v. Cleveland Typographical Union # 53*, 520 F.2d 1220, 1230 (6th Cir. 1975) (equitable injunctive relief should be used "sparingly and only in a clear and plain case").

In *Powell v. Immanuel Baptist Church*, the South Carolina Supreme Court refused to enjoin the completion of a construction project, rejecting the argument that greater cost would result if the project were completed prior to a trial on the merits which might ultimately conclude in the plaintiffs favor. 261 S.C. 219, 199 S.E.2d 60 (1973). *Powell* reflects South Carolina courts' refusal to use the temporary injunction remedy to second-guess the business decisions of litigants, who are entitled to risk costly damage awards if they so choose. The Supreme Court again overturned a

temporary injunction award in *Eldridge v. City of Greenwood*, recognizing the importance of "weighing the 'need for a limitation and the potential interference with the rights of the parties'" 308 S.C. 125, 417 S.E.2d 532, 534 (1992) quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 101 S. Ct. 2193, 2200 (1981).

Chemgard makes conclusory allegations that it will suffer irreparable harm and pleads for money damages in both substantive causes of action. (Amend. Compl. at pgs. 2-10). The substantive claims against both defendants are breach of contract claims that can be remedied by the payment of money damages. Chemgard fails to demonstrate that it will suffer irreparable harm in the absence of an injunction and therefore their motion must be denied. The fact that they have pled for money damages further supports the conclusion that any alleged harm they may suffer without the Court's issuance of an injunction can be quantified and remedied by the award of such damages.

C. Plaintiff Has an Adequate Remedy at Law

Plaintiff seeks damages from the Defendants in its Amended Complaint under a variety of causes of action. In the unlikely event that the Plaintiff prevails under any of those causes of action it will be entitled to such damages as they prove to the satisfaction of a jury. An injury is not irreparable if a monetary or statutory award can provide an adequate compensation or remedy at law. *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004); *Rockland Physician Assoc. v. Grodin*, 616 F. Supp. 945 (S.D.N.Y. 1985). In the present case, Plaintiffs can be fully compensated by damages if they prevail at a trial on the merits. Indeed, Plaintiff alleges that it has suffered damages, the amount of which can be ascertained and measured to a reasonable certainty at the trial of this case. (Amend. Compl. ¶¶ 51, 52, 59, 60).

These allegations indicate that temporary relief is unnecessary and an adequate remedy at law exists.

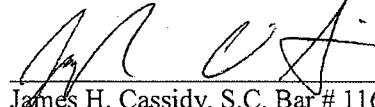
CONCLUSION

Under the circumstances and in light of the particular allegations of the Amended Complaint, the Court lacks the necessary personal jurisdiction over Defendant Haynes and his Motion to Dismiss should be granted.

Should the Court find it may properly exercise jurisdiction over the individual Defendant, an injunction should not issue because Plaintiff cannot demonstrate that it will likely succeed upon the merits of this case, fails to show irreparable injury, and has available an adequate remedy at law. For the reasons stated herein, Plaintiff's Motion for Temporary Restraining Order does not satisfy the standard for such relief and this Court should deny the Motion.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.


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Attorneys for the Defendants

July ²²0, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	Civil Action No. 2015-CP-23-03546
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MOTION TO
	)	DISSOLVE AND VACATE THE
Darell Keith Haynes, Chem-Tek, LLC	)	PRELIMINARY INJUNCTION
and Alfred Bell,	)	
	)	
Defendants.	)	

COME NOW Defendants Chem-Tek, LLC, Darrell Keith Haynes, and Alfred Bell (hereinafter collectively "Defendants"), by and through their attorneys, hereby move to dissolve and vacate the preliminary injunction granted by the Court's July 17, 2015, Order.

Defendants' Motion is made upon the following grounds:

1. Defendants hereby move this Court pursuant to Rules 59(e), 60, 62(c) and 65 of the South Carolina Rules of Civil Procedure. It is well established that "[a] trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree." *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 183 (Ct. App. 1988). Accordingly, this Court has the power to grant the relief requested by Defendants' Motion and Defendants' requested relief is timely.
2. On July 6, 2015, the Court was scheduled to and did hear arguments on Plaintiff's Motion for Temporary Injunction.
3. The Court issued a Form 4 Order dated July 7, 2015, denying Defendant Haynes' Motion to Dismiss and granting Plaintiff's preliminary injunction to restrain

Haynes. The Court further instructed Plaintiff counsel to prepare a formal order, and the Court entered a formal Order on July 17, 2015.¹

4. Defendants respectfully submit that the Employment Agreement and, specifically, the provision upon which Plaintiff relied in seeking relief from this Court, is impermissibly overbroad and unenforceable as a matter of law. The Employment Agreement provide as follows:

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company.²

5. It is well established, that restrictive covenants affecting competition are generally disfavored and must be strictly construed against the employer. *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).
6. Under South Carolina law, it is likewise axiomatic that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011).
7. It is here that the provision in question fails, as the restriction does not limit its reach to those customers Haynes actually serviced or encountered during his employment with Plaintiff. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009);

¹ See Order, attached as *Exhibit A*.

² See Employment Agreement at ¶ 9(d), attached as *Exhibit B*.

Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee).

8. Specifically, the non-solicitation provision prohibits Haynes from soliciting “either directly or indirectly, *any* customer of the Company,” which is patently over broad and should be declared void, as it does not narrow the restriction to customers which interacted with Haynes. (Ex. B.) (emphasis added).
9. Plaintiff concedes that Haynes worked for the company solely in Georgia and Alabama.³ Plaintiff likewise has not proffered any evidence suggesting Haynes worked with all of Plaintiff’s customers, regardless of where located, from Plaintiff’s inception as a business through the present. Nonetheless, this description fairly and unequivocally represents the scope of this restriction and exposes its fatal flaw.
10. As drafted and as enforced by the Court, Haynes is prohibited from soliciting customers with whom he had no contact, involvement or information, and in states in which he never worked for Plaintiff. Indeed, Haynes is restricted from soliciting businesses that he *may not even know* are customers of his former employer.
11. The courts of South Carolina have never sanctioned such an overbroad restriction, and the South Carolina Supreme Court has made it clear that this obvious over

³ Defendant Haynes’ Answer to the Second Amended Complaint at ¶ 20, attached as *Exhibit C*.

- breadth cannot be saved by judicial revision or interpretation. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587-88, 694 S.E.2d 15, 17-18 (2010) (trial court could not rewrite or “blue-pencil” restriction when issuing preliminary injunction to enforce a non-competition agreement; rather, the restrictions must stand or fall on their own terms).
12. Additionally, the non-solicitation provision as drafted is *per se* void under Georgia law; the state where Haynes resides. *See Wiley v. Royal Cup, Inc.*, 258 Ga. 357, 358, 370 S.E.2d 744, 745 (1988).
 13. Under Georgia law, a covenant not to solicit must specify with particularity the territory in which the employee is restricted from soliciting. *Id.* at 359, 370 S.E.2d at 745 (quoting *Howard Schultz & Assoc. v. Broiec*, 239 Ga. 181, 183-4, 236 S.E.2d 265 (1977)). Therefore, a restrictive covenant is *per se* void if it prohibits the former employee from soliciting any customer of the employer anywhere the employer does business, even though the employee had no relationship with such customer or the customer’s clients. *Capricorn Sys., Inc. v. Pednekar*, 248 Ga. App. 424, 426, 546 S.E.2d 554, 557 (2001).
 14. As a result, this Court has issued an order purporting to control conduct by a citizen and resident of Georgia, within that State, based upon a contractual provision that violates the law and public policy of Georgia.
 15. Respectfully, even if this covenant were enforceable in South Carolina (which is denied), this Court’s Order honors a contractual choice of law provision in the Employment Agreement to uphold a covenant that is flatly unenforceable in Georgia, thereby impinging upon “fundamental policy” of Georgia. *See Barnes*

Grp., Inc. v. C & C Products, Inc., 716 F.2d 1023, 1032, 1035 (4th Cir. 1983) (vacating injunctive decree that swept too broadly to include salesman jurisdiction where restrictive covenants are unenforceable as against public policy); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 976 (D.S.C. 1976) (“We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void”).

16. Defendants respectfully ask the Court to dissolve and vacate its Order granting Plaintiff’s Preliminary Injunction, and that Defendants be awarded all other relief as may be just and proper.

This Motion is further based upon the pleadings, depositions, affidavits, applicable law, and such other documentation or memoranda as may be submitted prior to any hearing on the motion.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

NELSON MULLINS RILEY & SCARBOROUGH LLP

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*Attorneys for Darell Keith Haynes, Chem-Tek, LLC
and Alfred Bell*

Greenville, South Carolina
April 29, 2016

Exhibit A

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

CHEMGARD, INC.,)

Plaintiff,)

v.)

DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)

Defendants.)

COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-03546

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2015 JUL 17 PM 4:47

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

I. FINDINGS OF FACT

1. Plaintiff is a citizen and resident of the County of Greenville, South Carolina. Defendant Haynes is a citizen and resident of the State of Georgia.

2. Chemgard is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

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

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

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

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

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

(Agreement at ¶ 9(d)(i)).

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

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

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

1. Plaintiff Successfully Established Entitlement to Injunctive Relief

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

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

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

129³ #3

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

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

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

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

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

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

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

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

5 *ply #5*

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

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

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

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

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

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

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

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

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

5. The Employment Agreement was Supported by Valuable Consideration.

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

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

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

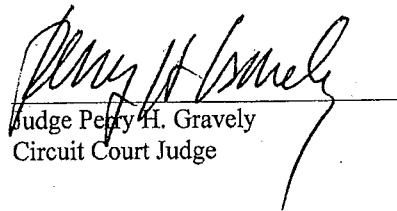
III. CONCLUSION

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

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

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

IT IS SO ORDERED.


Judge Perry H. Gravely
Circuit Court Judge

Date:

July 15, 2015

Bond #09130767



Fidelity and Deposit Company of Maryland

Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

State of South Carolina
COUNTY OF Greenville

IN THE Common Pleas COURT

CAUSE NO.

Chemgard, Inc
Plaintiff

-VS-

Darrell Keith Haynes and Chem-Tek, LLC
Defendant

INJUNCTION BOND

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

Witness our hands this 8th day of July 2015.

BY: _____

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: *Carl L. Boyer*

Attorney-in-fact

Carl L. Boyer

form#

ROA 000211

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

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

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

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

ATTEST:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND



Eric D. Barnes

Theodore G. Martinez

By:

Eric D. Barnes

Assistant Secretary

Theodore G. Martinez

State of Maryland } ss:
City of Baltimore }

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

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



Maria D. Adamski

Maria D. Adamski

Notary Public

My Commission Expires: July 8, 2007

EXTRACT FROM BY-LAWS OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND

"Article VI, Section 2. The Chairman of the Board, or the President, or any Executive Vice-President, or any of the Senior Vice-Presidents or Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power, by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Assistant Vice-Presidents and Attorneys-in-Fact as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, undertaking, recognizances, stipulations, policies, contracts, agreements, deeds, and releases and assignments of judgements, decrees, mortgages and instruments in the nature of mortgages,...and to affix the seal of the Company thereto."

CERTIFICATE

I, the undersigned, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the foregoing Power of Attorney is still in full force and effect on the date of this certificate; and I do further certify that the Vice-President who executed the said Power of Attorney was one of the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-Fact as provided in Article VI, Section 2, of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

This Power of Attorney and Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 10th day of May, 1990.

RESOLVED: "That the facsimile or mechanically reproduced seal of the company and facsimile or mechanically reproduced signature of any Vice-President, Secretary, or Assistant Secretary of the Company, whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed."

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company,

this 8 day of July, 2015

Griffith F. Halby
Assistant Secretary

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

FILED IN COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMER
 JUDGMENT IN A CIVIL CASE
 CASE NO: 2015CP2303546
 2015 JUL 17 PM 4 47

Chemgard Inc vs. Darrell Keith Haynes

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE -

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

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

Exhibit B

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EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the 15th day of SEPTEMBER, 2000, is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and DARRELL KEITH HAYNES, whose address is 4766 Turnberry Lane, Columbus, Georgia, 31909, hereinafter referred to as Employee.

WHEREAS, the Company is engaged in the business of selling and distributing chemicals, chemical products, equipment and other miscellaneous products at retail or wholesale and in the business of servicing equipment that utilizes or consumes products sold by the Company; and

WHEREAS, Employee is desirous of working for the Company in whatever capacity as may be determined by the Company;

NOW, THEREFORE, in consideration of these premises, and the mutual covenants and conditions hereinafter set forth, the Company does hereby agree to hire Employee, and Employee accepts employment upon the following terms and conditions.

1. Employment

The Company hereby hires Employee to conduct the business of the Company in the geographical area described in Schedule A. Employee understands and agrees that this is a nonexclusive territory and that the Company may change the geographic area described in Schedule A from time to time as it determines is necessary or desirable to the conduct of its business. The Company also may assign additional employees to all or any part of the geographic area described in Schedule A.

2. Business Outside Assigned Area

(a) Employee may develop customers outside the territory described in Schedule A except in existing territories assigned to other employees of the Company or territories subsequently established by the Company for other employees. For customers developed by Employee in territories not described in Schedule A and prior to assignment by the Company to other employees, the Company shall continue to pay commissions to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the

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Employee. However, after any such assignment of territory to another employee, Employee shall cease his/her efforts in such assigned territory except to service and/or transition his/her previously developed customers in such territory.

(b) Nothing in this section shall preclude Employee from developing new customers in another employee's assigned territory with the permission of the Company. For any such customers developed by the Employee, the Company shall pay any commission due to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the Employee.

3. Term

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on October 1, 2000, and continue for a period of one year until September 30, 2001, and thereafter shall be deemed to be renewed automatically, upon the same terms and conditions, for successive periods of six (6) months each, until either party, at least thirty (30) days prior to the expiration of the original term or of any extended term shall give written notice to the other party of intention not to renew such Agreement.

4. Compensation

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified in Schedule B hereto, which Schedule shall be signed by a Company representative and Employee.

5. House Accounts

The parties agree that notwithstanding the commission schedule described in subparagraphs (a) through (g) of Schedule B, the Company retains the right to amend commissions on any account categorized by the Company as a House Account, and the Company expressly reserves the right to amend the list of accounts so categorized by additions to or deletions from the list at any time. A list of all house accounts in Employee's territory shall be maintained at the offices of the Company and shall be available for review at

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that location at any reasonable time during normal business hours.

6. Reimbursement for Expenses

The Company agrees to reimburse Employee for his/her reasonable business expenses directly connected with his/her employment by the Company, said expenses to be submitted monthly with adequate documentation as required by the Company and the Internal Revenue Service. The Company normally shall reimburse Employee for such expenses within ten (10) days.

7. Termination

This Agreement may be terminated upon the occurrence of any of the following events.

a) **Without Cause.** Notwithstanding anything to the contrary stated herein, either party may terminate this Agreement without cause upon a thirty (30) day prior written notice to the other.

b) **With Cause.** Notwithstanding anything to the contrary stated herein, the Company may terminate this Agreement immediately, without prior written notice, if it determines IN ITS SOLE DISCRETION that Employee is not performing his/her job in a satisfactory manner or has engaged in misconduct.

(c) **Reports of Service and/or Sales Calls.** Employee acknowledges that reports of service and/or sales calls on customers are MANDATORY and are due on EACH MONDAY for the service and/or sales calls made during the prior week, and failure to provide such reports to the Company is reason for IMMEDIATE TERMINATION.

(d) **Illness or Incapacity.** This Agreement may be terminated by the Company upon a thirty (30) day prior written notice to the Employee in the event that Employee is unable to perform the essential functions of his/her position under the Agreement because of an illness or incapacity.

(e) **Death.** Should Employee's death occur during the term of this Agreement, the Agreement shall terminate as of the last day of the month of his/her death. Any unpaid amounts due to the deceased Employee under this Agreement shall be paid to his/her estate.

(f) **Effects of Termination.** Upon termination of this Agreement, as

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hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

8. Restrictions

Employee covenants and agrees that he/she will devote his/her entire time and energy exclusively to the business of the Company and that during the period of his/her employment, he/she will not engage in any other business, either for himself/herself or for the account of any other person, firm, or corporation without the prior written consent of the President of the Company.

9. Nondisclosure and Noncompetition Covenants

(a) **Confidential Information.** The term Confidential Information in this Agreement shall mean information that is not readily and easily available to the public or a matter of common knowledge to those in the Company's business, trade, or industry, including, but not limited to the Company's pricing methods and pricing information, costs, profits, profit margins, suppliers, business data, goals or activities, business strategy, sales techniques, identities and addresses of the Company's employees and their functions, identities and addresses of the Company's customers and prospective customers, all information concerning or relating to the Company's water treatment chemicals, cleaning chemicals, chemical formulations, chemical processes, contracts, service agreements, research and development, raw materials being used or considered and other technical and business information. In addition, Confidential Information shall include all customer information that has been provided to the Company by a customer.

(b) **Nondisclosure of Confidential Information.** During the course of Employee's employment with the Company, he/she will be given or have access to Confidential Information that has been collected, developed, and/or discovered over time by the Company and at great expense to the Company. Employee recognizes and acknowledges that the Company's Confidential Information is a valuable, special and unique asset of the Company's business and that all Confidential Information is and shall remain the property of the Company. Maintaining the confidentiality of the Confidential Information is extremely

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important to the Company's ability to compete with its competitors.

Employee agrees that while employed by the Company, he/she will not use Confidential Information of the Company except in the sole interest of the Company and will not, without the written consent of the Company, disclose Confidential Information of the Company to anyone other than those who are employed by the Company and who have a need to know the information to perform their duties on behalf of the Company.

Employee further agrees that following the termination of his/her employment with the Company, he/she will not, without the written consent of the Company, use or disclose any Confidential Information of the Company that is not a matter of common knowledge in the Company's business, trade, industry, or otherwise publicly available.

(c) **Return of Confidential Information.** It is understood and agreed by Employee that upon leaving the employ of the Company for any reason, Employee shall return all Confidential Information and other property of the Company to the Company at the time of termination of the employment relationship.

(d) **Covenant Not To Compete.** The parties acknowledge that in the course of its business, the Company develops and maintains personal and confidential relationships between the Company and its customers. The parties further acknowledge that the Company's customers and the relationship and goodwill with these customers are among the Company's most valuable assets.

The parties acknowledge that during the course of employment with the Company, Employee will develop an intimate knowledge of the Company's business and also will develop significant relationships with the Company's customers.

The parties further acknowledge that such intimate knowledge of the Company's business and significant relationships with the Company's customers should not be used to benefit any of the Company's competitors.

The parties agree that the Company will suffer significant and irreparable damage if Employee leaves the employment of the Company and goes to work for a competitor of the Company in the sale of products and/or services of the same or similar kind as those sold or provided by the Company,

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or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him/her during the course of his/her employment with the Company.

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or service similar to those sold by the Company;

(iv) Employ or attempt to employ or solicit any employee of the Company for any employment competitive with the Company, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of the Company to leave the Company's employ for the purpose of engaging in any competitive business activity.

In the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation.

It is understood by and between Employee and the Company that the foregoing restrictive covenants set forth in paragraph 9(d) are essential

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elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(e) **Protectable Interests.** Employee acknowledges and agrees that the restrictive covenants set forth in paragraphs 9 (a), (b), (c), and (d) of this Agreement are necessary for the protection of the goodwill of the Company and other legitimate business interests of the Company. Employee further acknowledges and agrees that the restrictions contained in this Agreement are reasonably limited with respect to time, customer scope, and the scope of activities restrained; are not unduly harsh and oppressive so as to deprive Employee of an opportunity to earn a living after termination of employment with the Company; and are supported by valuable consideration.

(f) **Remedies and Enforcement.** Employee acknowledges and agrees that a breach of the provisions in paragraphs 9 (a), (b), (c), and/or (d) of this Agreement by Employee will cause serious and irreparable damage to the Company that may be difficult to quantify and for which monetary damages alone will not be adequate. Accordingly, Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach. Nothing in this Agreement shall be construed to prohibit the Company from pursuing any other legal or equitable remedy.

10. General Provisions

(a) **Severability.** If any term, covenant, or condition of this Agreement or the application thereof to any person or circumstance shall be declared invalid or unenforceable, the remainder of this Agreement and the application of any term or provision to persons or circumstances other than those as to

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which it is held invalid or unenforceable shall not be affected thereby, and all other terms shall be valid and enforceable to the fullest extent permitted by the law.

(b) **Assignment.** No assignment of this Agreement or the rights and obligations hereunder shall be valid without the specific written consent of both parties hereto.

(c) **Governing Law.** This Agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina.

(d) **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) **Amendments and Agreement Execution.** This Agreement and amendments thereto shall be in writing and signed by both parties.

(f) **Notices.** Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be deemed effectively given when personally delivered or mailed by prepaid certified mail, return receipt requested, addressed to Employee at his/her last known address, or to the Company at Post Office Box 25061, Greenville, South Carolina 29616. Further, Employee shall at all times keep the Company notified of his/her home address and home telephone number.

(g) **Waiver of Breach.** The Company's waiver of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof. No waiver shall be valid unless it is in writing and signed by the President of the Company.

(h) **Entire Agreement.** This constitutes the entire Agreement between the parties. The Company and Employee shall be entitled to no benefits other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless

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incorporated herein by amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in this Agreement and no others.

IN WITNESS WHEREOF, the parties execute this Agreement this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

EMPLOYEE AFFIRMS THAT HE/SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND THAT HE/SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS AND THAT HE/SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME. EMPLOYEE FURTHER AFFIRMS THAT HE/SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND THAT HE/SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

WITNESS:

Darrell Keith Haynes

Henry A. Kile Jr

Darrell Keith Haynes

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SCHEDULE A TO EMPLOYMENT AGREEMENT

The Geographical territory assigned to Darrell Keith Haynes pursuant to the Employment Agreement between Chemgard, Inc. and Darrell Keith Haynes shall be as follows: the following counties in Georgia: Carroll, Heard, Troup, Coweta, Fayette, Pike, Meriwether, Lamar, Monroe, Upson, Talbot, Harris, Muscogee, Chattahoochee, Marion, Taylor, Crawford, Bibb, Twiggs, Houston, Macon, Schley, Steward, Webster, Sumter, and Peach, and the following counties in Alabama: Talladega, Clay, Randolph, Coosa, Elmore, Bullock, Russell, Tallapousa, Chambers, Lee, Montgomery, and Macon.

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SCHEDULE B TO EMPLOYMENT AGREEMENT

Compensation Pursuant To Employment Agreement
Between Chemgard, Inc. and
Darrell Keith Haynes dated September 15, 2000.

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified below:

(a) For the first three years (36 months) of this Agreement and any extensions, or for the duration of the Agreement and any extensions if such duration is less than 36 months, the Company agrees to pay Employee a salary of five thousand five hundred eighty-three dollars and thirty-four cents (\$5,583.34) per month, less commissions paid as described in subparagraphs (b) through (g) of this schedule, and less submitted and reasonable expenses of Employee for the periods that are directly connected with his/her employment by the Company.

(b) Beginning October 1, 2000, Employee shall earn a commission each month based on equipment and chemical sales and based on services rendered during the prior month to HOUSE ACCOUNTS (accounts turned over to him/her by the Company) at the rates as specified in paragraphs (c), (d), (e), (f) and (g) below.

(c) FOR NEW BUSINESS GENERATED SOLELY BY EMPLOYEE (hereinafter New Business), the commission shall be equal to forty percent (40%) of the net profit to the Company on the SALES OF WATER TREATMENT CHEMICALS. Net profit is defined as the gross sales price less the cost to the Company of the water treatment chemicals sold (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

In the event the Employee's geographic area is modified by the Company to exclude customers for whom the Employee has solely generated New Business,

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the Employee will continue to receive a commission on the SALES OF WATER TREATMENT CHEMICALS to that customer in an amount to be determined by the Company for the duration of this Agreement unless a change is mutually agreed upon by the Company and Employee.

(d) On all SALES OF EQUIPMENT that are considered New Business, the Company agrees to pay to Employee a commission equal to twenty percent (20%) of the net profit to the Company. The net profit shall be determined by the gross sales price of the equipment less the cost to the Company of the equipment (including overhead as defined in cost sheets for pricing as developed by the Company from time to time), freight costs, a pro rata share of Employee's expenses as specified in subparagraph (h) below, and all federal and state sales and excise taxes applicable to said sale.

(e) For all BOILER CLEANING JOBS that are considered New Business, the Company agrees to pay to Employee a commission equal to the net profit on each such job. For the purposes of this subparagraph, net profit is defined as the gross sales price charged by the Company for said jobs less twenty percent (20%) of the said gross sales price, a pro rata share of Employee's expenses as specified in subparagraph (h) below, the cost of the chemicals (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), labor and transportation involved in performing the work (except for labor performed by Employee), the direct cost and/or amortized portion of the cost of all equipment used or consumed in performing the job, and all federal and state sales and excise taxes applicable to said job.

(f) For TOTAL SERVICE CONTRACTS (where the customer pays a fixed amount per period for service and chemicals) that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit. For purposes of this subparagraph, net profit shall mean the gross price paid by the customer for a period for which the payment is made, less cost of treatment chemicals delivered to the customer during the particular period, cost of drums used in fulfilling the contract, overhead

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costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, all federal and state sales and excise taxes applicable to said payment, and the cost of any equipment supplied under said service contract. Any deficit commission for total service contracts shall be offset against commissions and salary earned under subparagraphs (a), (b), (c), (d) and (e) above and (g) below or, in the company's discretion, carried forward to the next pay period.

(g) On SALES OF CLEANING CHEMICALS AND FORMULATIONS that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit to the Company. For purposes of this subparagraph, net profit is defined as the gross sales price less the cost to the Company of the cleaning chemicals and formulations sold, costs of drums, overhead costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

(h) For purposes of calculating Employee's commissions pursuant to subparagraphs (a) through (g) above, the term pro rata shall mean the percentage of Employee's expenses for the period determined by the ratio of gross sales and/or services made under each such subparagraph to the total sales and/or services made pursuant to subparagraphs (a) through (g) for the same period.

(i) In determining Employee's gross commission for any period, gross commission under subparagraphs (a) through (g) shall be totaled and Employee's submitted and reasonable expenses for the period deducted therefrom to arrive at the net commission due. Net commission payable to Employee hereunder shall be net commission as defined in this subparagraph less any commissions previously paid to Employee on sales and/or services for which the customer has not paid the Company and for which sixty (60) days has passed after the date of the invoice to the particular customer, provided, however, that should

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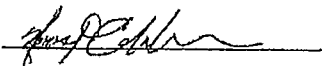
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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

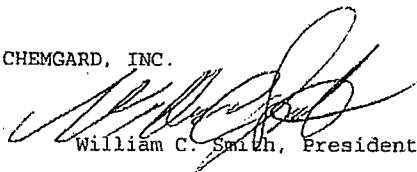
IN WITNESS WHEREOF, the parties execute this Schedule this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.



By:


William C. Smith, President

WITNESS:

Henry A. Kilo Jr

Darrell Keith Haynes
Darrell Keith Haynes

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Exhibit C

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes, Chem-Tek, LLC,
and Al Bell,

Defendants.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-03546

**DEFENDANT HAYNES'
ANSWER TO THE
SECOND AMENDED
COMPLAINT**

FILED-CLERK OF COURT
OFFICE OF THE CLERK
PAUL B. HAYNES
2015 APR 29 PM 3 57

The Defendant, Darrell Keith Haynes (*hereinafter* "Haynes" or "Defendant"), by and through his attorneys, hereby answers the Second Amended Complaint of Plaintiff, Chemgard, Inc. (*hereinafter* "Chemgard" or "Plaintiff"), as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Amended Complaint not hereinafter admitted, qualified, or explained, is hereby denied and strict proof demanded thereof.

2. Haynes admits the allegations of Paragraphs 1 and 2.

3. Haynes admits the allegations contained in Paragraph 3.

4. Haynes admits the allegations contained in Paragraph 4.

5. Haynes admits the allegations contained in Paragraph 5.

6. Haynes admits the allegations contained in Paragraph 6 to the extent they assert the Court has subject matter jurisdiction over the claims in the lawsuit pursuant to the authorities cited. Further responding, Haynes denies that this Court has personal jurisdiction over him.

7. Haynes admits the allegations of Paragraph 7 to the extent they allege he is employed by Chem-Tek, a South Carolina business. Haynes denies that this Court has personal

jurisdiction over him and that products sold by him are shipped from Greenville. Haynes admits that he attended occasional, although not annual, sales meetings in South Carolina, reported sales and expense reports via email from Georgia to the Greenville office, and received his compensation and expense checks from that office.

8. Haynes admits the allegations contained in Paragraph 8.

9. Haynes admits the allegations contained in Paragraph 9.

10. Defendant denies the allegations contained in Paragraph 10 as the most substantial part of the alleged act or omission giving rise to this action did not occur in Greenville County but rather, the most substantial part of the alleged misconduct giving rise to this action took place in Georgia and Alabama.

11. Haynes admits the allegations contained in Paragraph 11.

12. Haynes admits the allegations contained in Paragraph 12.

13. Haynes admits the allegations of Paragraph 13 to the extent they allege that the Employment Agreement contained several restrictive covenants. Haynes denies the remaining allegations of Paragraph 13 as stated.

14. Paragraph 14 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

15. Paragraph 15 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

16. Haynes admits the allegations of Paragraph 16.

17. Haynes admits the allegations of Paragraph 17.

18. Haynes admits the allegations of Paragraph 18 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for reasonable expenses incurred in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for his cell phone bill. Further responding, Haynes admits the remaining allegations of Paragraph 18 to the extent they allege he stored customer contact information on his phone. Haynes denies the remaining allegations of Paragraph 18.

19. Haynes admits the allegations of Paragraph 19 to the extent they allege the Employment Agreement obligated Chemgard to reimburse Haynes for mileage traveled in performing his job duties for the company. Haynes denies that Chemgard utilized company funds to reimburse him for mileage. Haynes denies the remaining allegations of Paragraph 19.

20. Haynes admits the allegations of Paragraph 20 to the extent they allege he was assigned a sales territory and sold to and serviced customers in Georgia and Alabama. Haynes denies the remaining allegations of Paragraph 20.

21. Haynes admits the allegations of Paragraph 21 to the extent they allege he was the only Chemgard salesman in Georgia. Haynes further admits that he was responsible for promoting sales growth and regularly servicing customer accounts. The Plaintiff's reporting requirements were in a constant state of flux during the years Haynes worked for the company, and therefore Defendant denies the remaining allegations of Paragraph 21 as stated.

22. The allegations of Paragraph 22 are legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 22 as stated.

23. Paragraph 23 recites a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and deny any allegations inconsistent therewith.

24. Haynes is without sufficient knowledge or information regarding the reasons for Chemgard providing him the information alleged and therefore denies the allegations of Paragraph 24 regarding Plaintiff's motivations. Haynes does not know what specific information Plaintiff is referring to in Paragraph 24 and therefore cannot affirmatively admit or deny the remaining allegations of Paragraph 24.

25. Haynes admits the allegations of Paragraph 25.

26. Haynes admits the allegations of Paragraph 26.

27. Haynes admits the allegations of Paragraph 27.

28. Haynes admits Chem-Tek and Bell had knowledge of his Employment Agreement at the time it hired him. Haynes denies the remaining allegations as stated.

29. Haynes admits the allegations of Paragraph 29 to the extent they allege he utilizes his personal cell phone to contact customers. Haynes denies the remaining allegations of Paragraph 29 as stated.

30. Haynes admits the allegations of Paragraph 30 to the extent they allege he serviced the Cottle Properties, LLC account while employed by Chemgard. Haynes does not have sufficient knowledge or information concerning the remaining allegations of Paragraph 30 and therefore denies the same.

31. Haynes admits the allegations of Paragraph 31 to the extent they allege certain former customers of Chemgard have chosen to do business with Chem-tek following his resignation. Haynes denies the allegation that he used his old Chemgard business card to gain

access to Flowers Baking. Further responding, Ed Williams of Flowers Baking Company requested Haynes meet with him at their facility and directed the Defendant to utilize his Flowers Baking Company access badge to enter the facility. Haynes denies he refused to return company property to Chemgard and asserts that all such property has been returned to the Plaintiff. Haynes lacks sufficient knowledge and information to respond to the remaining allegations of Paragraph 31, including not knowing what Plaintiff is referring to as "direct solicitation" or information Plaintiff is referring to as "competitive, confidential and important business information" and therefore denies the remaining allegations of that Paragraph as stated.

32. Haynes lacks sufficient knowledge or information to respond to the allegations of Paragraph 32 and therefore denies the same.

33. Haynes denies the allegations of Paragraph 33.

34. Haynes denies the allegations of Paragraph 34.

35. Haynes admits the Employment Agreement attempts to prevent him from competing with Chemgard for a period of 24 months. Haynes denies the allegation in Paragraph 35 that a 2 year limitation on free market business and his ability to earn a living is reasonable.

36. Haynes denies the allegations of Paragraph 36.

37. Paragraph 37 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

38. Haynes denies the allegations of Paragraph 38.

39. Haynes admits that the customers listed in Paragraph 39 chose to move their business to Chem-Tek following his departure from Chemgard. Haynes denies that he undertook

any unlawful action to precipitate those customers' decisions to move their business. Haynes denies these customers are exclusively Chemgard customers.

40. Haynes admits that he is utilizing his personal cell phone and contact information stored on it in order to contact customers as alleged in Paragraph 40. Haynes denies the allegations of Paragraph 40 alleging he is unfairly competing with Chemgard. Without knowing what Plaintiff considers "confidential business information" Haynes cannot respond to the remaining allegations of Paragraph 40 and therefore denies the same.

41. Haynes denies the allegations of Paragraph 41 as stated.

42. Haynes denies the allegations of Paragraph 42 as stated and avers that the Employment Agreement's restrictive covenants are unenforceable and thus are incapable of being breached.

43. The allegations of Paragraph 43 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 43 as stated.

44. The allegations of Paragraph 44 contain legal conclusions to which no affirmative response is required. To the extent a response is required Haynes denies the allegations of Paragraph 44 as stated.

45. Haynes denies injunctive relief is necessary in this case.

46. Paragraph 46 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

47. Paragraph 47 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

48. Paragraph 48 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

49. Haynes denies the allegations of Paragraph 49 as stated.

50. Haynes denies the allegations of Paragraph 50.

51. Paragraph 51 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

52. Paragraph 52 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith.

53. The allegations of Paragraph 53 are simply an assertion of Chemgard's alleged rights to discovery in this matter and do not require a response. To the extent a response is required Haynes denies the allegations of Paragraph 53 that are inconsistent with the applicable and controlling law concerning discovery, including but not limited to SCRCP 26.

54. Haynes denies the allegations of Paragraph 54.

55. Paragraph 55 recites and/or references a portion of an incorporated document and does not require a response. To the extent a response is required Haynes refers to the subject document and denies any allegations inconsistent therewith. Haynes further denies Plaintiff can recover attorney's fees under the circumstances.

56. Paragraphs 56 – 64 allege a cause of action solely against Chem-Tek and Bell therefore do not require a response from this Defendant. However, to the extent that any allegations contained in such paragraphs require an answer, the same are hereby denied.

57. Paragraph 65 is an incorporation paragraph to which no response is necessary. However, to the extent that any allegations contained in such paragraph require an answer, the same is hereby denied.

58. Haynes denies the allegations of Paragraph 66.

59. Haynes lacks sufficient knowledge or information to respond to the allegations of Paragraph 67 as stated, as therefore denies the same.

60. Haynes denies the allegations of Paragraph 68 as stated.

61. Haynes denies the allegations of Paragraph 69.

62. Haynes denies the allegations of Paragraph 70 as stated.

63. Haynes denies the allegations of Paragraph 71 as stated.

64. Haynes admits Plaintiff is seeking the type of damages listed in Paragraph 72 and denies it is entitled to such damages.

65. Haynes denies that Plaintiff is entitled to any relief requested in the Second Amended Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6))

66. Haynes is informed and believes that Plaintiff's Second Amended Complaint fails to state facts sufficient to set forth a cause of action against him and, therefore, Plaintiff's Amended Complaint should be dismissed as to this Defendant.

FOR A THIRD DEFENSE
(Bad Faith)

67. Plaintiff's actions taken against Haynes in instituting this action have been taken in bad faith.

FOR A FOURTH DEFENSE
(Estoppel)

68. Plaintiff's action is barred by the doctrine of estoppel due to the present action being predicated upon a void and unenforceable Agreement.

FOR A FIFTH DEFENSE
(Good Faith)

69. All actions taken by Haynes have been in good faith.

FOR A SIXTH DEFENSE
(No Protectable Trade Secret(s))

70. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are not protectable trade secrets, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A SEVENTH DEFENSE
(Failure to take reasonable security measures)

71. Plaintiff has failed to take reasonable security measures to protect the secrecy of its alleged trade secret information, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR AN EIGHTH DEFENSE
(Information Readily Ascertainable)

72. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information that is readily ascertainable, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A NINTH DEFENSE
(Information in Public Domain)

73. One or more of Plaintiff's claimed trade secrets alleged to have been misappropriated by the Defendant is/are information released into the public domain prior to Defendant's alleged use, and therefore, Plaintiff cannot maintain a statutory or common law cause of action against the Defendant for misappropriation.

FOR A TENTH DEFENSE
(No Damage)

74. Plaintiff has suffered no cognizable damages and therefore cannot maintain the present action against the Defendant.

FOR AN ELEVENTH DEFENSE
(Reservation)

75. Defendant contends that he cannot fully anticipate all affirmative defenses that may be applicable to this action based on the conclusory terms used in Plaintiff's Second Amended Complaint. Accordingly, Defendant expressly reserves the right to assert additional affirmative defenses if and to the extent that such affirmative defenses become applicable.

(signature page to follow)

Respectfully submitted,

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November 2, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	
	)	Civil Action No. 2015-CP-23-03546
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF ITS MOTION TO
Darell Keith Haynes, Chem-Tek, LLC	)	DISSOLVE AND VACATE THE
and Alfred Bell,	)	PRELIMINARY INJUNCTION
	)	
Defendants.	)	

COME NOW Defendants Chem-Tek, LLC, Darrell Keith Haynes, and Alfred Bell (hereinafter collectively "Defendants"), by and through their attorneys, and respectfully file this Memorandum of Law in support of their prior-filed Motion to Dissolve and Vacate the Preliminary Injunction granted by the Court's July 17, 2015, Order.

INTRODUCTION

"It is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) (Citing *C & S Nat'l Bank v. Modern Homes Constr. Co.*, 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966).); *see also Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 659 S.E.2d 263, 2008 S.C. App. LEXIS 50 (Ct. App. 2008). Pursuant to this fundamental rule of law, Defendants now call upon this Court's immutable equitable power to correct an injustice wrought by Plaintiff's overreaching request for injunctive relief; an injunction based upon a restrictive covenant that is patently overbroad and unenforceable as a matter of South Carolina law.

Plaintiff contends that Defendants have somehow acted inappropriately in seeking relief from this Court in this fashion. However, a simple, clear-eyed view of the controlling case law – including the cases Plaintiff very *carefully, partially* quotes in support of its injunction – shows

that the relief requested by Defendants is neither unusual nor particularly bold. On the contrary, it is the result compelled by South Carolina law. For the reasons explained in this Memorandum, Defendants respectfully ask this Court, pursuant to the law of South Carolina, to dissolve the injunction.

FACTUAL BACKGROUND

The following salient facts are undisputed and derive from this Court's Order.¹ Chemgard, Inc. ("Chemgard") is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. Chemgard hired Defendant Darrell Keith Haynes on September 15, 2000, and Mr. Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard.² The Agreement states that Mr. Haynes was employed as a salesman for the territory of Georgia and Alabama. (Ex. A.) During the course of his employment, Mr. Haynes was the only salesman in Georgia. Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. On May 10, 2015, Mr. Haynes voluntarily resigned from Chemgard. On May 11, 2015, Mr. Haynes began working for Defendant ChemTek, a competitor of Chemgard.

On June 25, 2015, Plaintiff moved this Court for injunctive relief against Defendants to enforce Mr. Haynes' Agreement. The portion of the Agreement which Plaintiff relied on in seeking injunctive relief from this Court provides as follows:

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

¹ A copy of the Court's Order is attached hereto as *Exhibit A*.

² A copy of the subject Agreement is attached hereto as *Exhibit B*.

- (i) Solicit or call on, either directly or indirectly, *any customer of the Company* for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company

(Agreement at ¶ 9(d)(i)) (emphasis added.)

The Court heard oral arguments on July 6, 2015, and issued a Temporary Injunction

Order (the "Order") on July 17, 2015, stating:

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

(Order at p. 8) (emphasis added).

Pursuant to this Court's Order, Plaintiff filed a Rule to Show Cause on November 16, 2015. This Court found Mr. Haynes in contempt of this Court's Order on January 20, 2016. Defendant Haynes maintains he has continuously abided by this Court's July 17, 2015, Preliminary Injunction Order and all the Defendants have refrained from directly or indirectly soliciting any customer of Chemgard.

ARGUMENT

A temporary injunction remains in full force and effect until modified or rescinded by the court. The court issuing a preliminary injunction retains the power to modify or dissolve the injunction at any time. 27 S.C. Jur. Injunctions § 9 (citing *Wilkins v. Hilton-Dodge Lumber Co.*, 95 S.C. 248, 78 S.E. 873, 873 (1913)); *see also Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.") Therefore, a motion to modify or vacate a

preliminary injunction is addressed at the sound discretion of the court. *Conservation Council of N. Carolina v. Costanzo*, 528 F.2d 250, 252 (4th Cir. 1975).

As explained in Defendants' Motion to Dissolve and Vacate, the restrictive covenant at issue is overly broad and thus unenforceable because it patently exceeds any legitimate business interest in question by forbidding Mr. Haynes from contact with any *Chemgard* customer anywhere regardless of whether Mr. Haynes had any contact or involvement with that customer while employed at Chemgard. The Motion also explained that the injunction is contrary to the established policy of the state of Georgia where Mr. Haynes resides and where this Court's Order compels his obedience to a restriction void *ab initio* pursuant to Georgia law.

Chemgard had filed a memorandum opposing Defendants' Motion arguing (1) that South Carolina case law permits non-compete clauses preventing contact even with customers with whom the former employee had no prior contact, and (2) that Georgia law is irrelevant to the case at bar. As explained below, both of Chemgard's counter-arguments miss the mark, and this Court should dissolve and vacate the injunction for the reasons stated in Defendants' motion.

I. South Carolina law does not permit a restrictive covenant that bars contact with customers Haynes never served or encountered while at Chemgard.

As noted in Defendants' motion and explained in more detail below, South Carolina law is crystal clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). Thus, a non-solicitation provision must limit its scope to the customers a former employee actually serviced or encountered during his or her employment. Chemgard's arguments to the contrary rest on cases that are easily distinguishable and/or simply no longer represent the law of South Carolina.

A. South Carolina law permits only non-solicitation clauses limited to the customers with whom a former employee had direct contact while employed.

The law of this State is clear: a restrictive covenant forbidding a former employee from soliciting the business of his former employer's customers must limit the scope of its prohibition to the solicitation of customers with whom he had direct or personal contact while working for the former employer. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit new customers to which he had not been assigned while in Collins' employ"); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling to eighteen certain accounts in the Greenville area of South Carolina, formerly assigned to the respondent while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11-0380, 2011 WL 3608227, at *4-5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of *any* of the employer's customers, not just the ones the former employee had personally serviced).

The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not “blue pencil” the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction such a replacement must also be narrowly tailored to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee). Here, that interest is protecting the customer relationships gained while Mr. Haynes worked for Chemgard.

It is in this critical regard that the above restriction fails as a matter of law. In the case at bar, Chemgard seeks to prevent the solicitation of *all of its customers*, not simply those with whom Mr. Haynes had involvement or contact. (Agreement at ¶ 9(d)(i).) The Agreement is not limited as required by South Carolina law, to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face and as presently enforced by this Court’s

Order, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. Mr. Haynes is likewise prohibited from soliciting Chemgard customers that he may not even know were customers of the company at the time of his termination.

This representation of the scope of Chemgard's restriction is not hyperbole but fact, given that Plaintiff's counsel admitted in argument before this very Court that Mr. Haynes' customers represented no more than thirty-one percent (31%) of Chemgard's total sales of \$1.6 million dollars. (July 6, 2015 Transcript of Hearing at 30:24-31:7.)³ Yet in spite of this admission, Plaintiff sought and now seeks to retain a restriction that applies to 100% of Chemgard's sales from any and all customers. That is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. *See Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) (covenants are deemed patently over broad when prohibition goes far beyond the protection of any legitimate business interests).

In response to Defendants' argument, Chemgard (1) attempts to distinguish *Collins*, (2) states that *Fournil* is "an unreported outlier," and (3) points to three other South Carolina cases (which are discussed in Part B, *infra*) that purportedly support Chemgard's position. In so doing, Plaintiff is deliberately attempting to argue against the clear weight of existing South Carolina authority.

Chemgard's attempt to distinguish *Collins* badly misses the mark. Specifically, Chemgard purposefully quotes only a snippet of *Collins*, stating "[a] restriction which allows

³ The relevant portion of the transcript is attached hereto as *Exhibit C*.

the former employee to sell anywhere else, subject only to the employer's protection of his own clients, is valid.” See Chemgard’s Memo. in Opp. at 4 (quoting *Collins*). According to Chemgard, the *Collins* Court “does not further qualify the phrase, ‘protection of [a company’s] own clients,’” and thus *Collins* supports the type of overly-broad injunction at issue in the case at bar. *Id.* (alteration in Chemgard’s memo.) The flaw in Chemgard’s argument, however, is that *Collins* **does** qualify its holding by stating, just a few sentences earlier, that under the restrictive covenant the Court found to be valid the former employee “would be free to solicit new customers *to which he had not been assigned while in Collins’ employ* in any county or city in the state.” *Collins*, 288 S.C. at 94, 340 S.E.2d at 796 (emphasis added). When read in context, *Collins*’ holding is clear that the restrictive covenant the Court upheld was a limitation only on the solicitation of the employers’ customers with whom the former employee had direct and personal contact while employed.

As to Chemgard’s argument that *Fournil* is an “unreported outlier,” Chemgard overlooks the fact that *Fournil*’s conclusion is consistent with the well-established and unquestioned South Carolina cases cited above and that no South Carolina case has analyzed this exact question and reached a different conclusion (or, frankly, reached any conclusion other than that urged by Defendants in the instant Motion to Dissolve). In addition, Chemgard neglects the fact that South Carolina courts frequently rely on unpublished rulings from the District of South Carolina as highly persuasive precedent. See, e.g., *Kirven v. Central States Health & Life Co.*, 409 S.C. 30, 34, 760 S.E.2d 794, 796 (2014) (citing and relying on an unpublished D.S.C. case); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013) (same); *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 254 n.3, 725 S.E.2d 476, 480 n.3 (2011) (same); *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 194, 684 S.E.2d 541, 545 (2009) (same).

In sum, South Carolina law permit the enforcement of customer non-solicitation clauses only where the restriction is limited to the customers with whom a former employee had direct contact while employed, and Chemgard's arguments to the contrary are unavailing. Accordingly, the injunction currently restraining Haynes' business activities is overbroad and should be dissolved and vacated.

B. The cases Chemgard relies upon in its opposition to Haynes' motion are easily distinguishable and/or no longer good law.

The three cases Chemgard relies on in its memorandum opposing Defendants' Motion do not support the overly-broad injunction currently restraining Mr. Haynes' and Defendants' business activities. Rather, they actually illustrate why the injunction should be dissolved and vacated. For example, Chemgard's discussion of *Caine & Estes Insurance Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E. 2d 859 (1982) omits three significant points that distinguish *Watts* from the case at bar. First, *Watts* did not involve the enforcement of a traditional restrictive covenant. Rather, the issue in *Watts* was the enforceability of a post-resignation agreement between Watts and his former employer whereby Watts was *released* from a non-compete clause in exchange for his promise to share the commissions he earned from customers he took from his former employer. *See Watts*, 278 S.C. at 208, 293 S.E.2d at 860. Second, the agreement at issue in *Watts* did not prevent Watts from soliciting customers of his former employer. Rather, it merely required that any commissions he earned from sales to those customers be shared with the former employer. *Id.* at 209, 293 S.E.2d at 860 ("The agreement does not restrict appellant from selling insurance at all, the only restriction is that for three years, if he sells to a client of respondent, he must divide the commission received.").

Third—and perhaps most significantly—the *Watts* Court's decision to enforce the post-resignation agreement was based on the fact that Watts had "*personal contact*" with the

customers at issue. *See Id.* (noting “the necessity for an employer to protect himself where the nature of the employment brings the employee in *personal contact* with the customers of the employer”) (emphasis added). Indeed, the *Watts* Court expressly noted its holding was based on the fact that “[t]he nature of appellant’s employment exposed him . . . to clients *personally*.” *Id.* (emphasis added). That is the exact element *missing* from the case at bar. If Mr. Haynes’ employment at Chemgard had involved personal contact with all of Chemgard’s customers or if the restrictive covenant at issue barred contact only with those customers he had personally served, then perhaps *Watts*’ holding would be applicable here. But neither of those hypotheticals are true, and in their absence *Watts* actually does not support Plaintiff’s argument or the overly-broad injunction it seeks to continue; it refutes them.

Chemgard’s reliance on *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 217, 420 S.E.2d 217 (Ct App. 1992) is similarly misplaced. The *Wolf* Court noted that Wolf had failed to preserve his argument that the non-solicitation provision at issue in that case was unenforceable because it was “not limited to Mr. Wolf’s customers while working with Colonial,” and thus the Court expressly declined to rule on that issue. *See Wolf*, 309 S.C. at 106, 420 S.E.2d at 220. Accordingly, *Wolf* does not inform—much less control—the issue raised by Haynes’ pending motion.

Likewise, Chemgard’s reliance on *Oxman v. Profitt*, 241 S.C. 28, 33, 126 S.E.2d 852, 854 (1962) falls flat. The Court’s analysis regarding the restrictive covenant outlined in *Oxman* is inapplicable to the case at hand. The covenant in *Oxman*, included a geographic restriction not enumerated in Mr. Haynes’ Agreement and the Court notes that the parties did not agree to a general restrictive covenant typically found ancillary to employment contracts such as a non-compete. Instead, as the Court explains, the covenant in *Oxman* “states that defendant will not

‘induce or attempt to induce any policyholder of the Company to terminate his or her insurance with the Company.’ This covenant, therefore, allows competition but attempts to prevent what plaintiffs consider ‘unfair competition.’” *Id.* at 33, 126 S.E.2d at 854. Therefore, the contract discussed in *Oxman* is fundamentally different than the customer based contract at issue in this case.

To the extent that *Oxman* (or *Wolf*, for that matter) stand for the proposition that a non-solicitation provision may prohibit contact with the former employer’s customers without any limitation on time or location, those cases are simply no longer good law. Though *Oxman* and *Wolf* have not been expressly overruled (likely due the aforementioned unique facts binding and limiting them), the South Carolina Supreme Court has expressly repudiated the suggestion that an unlimited prohibition on solicitation of a former employer’s customers is permissible. *See Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 273 S.E.2d 338 (holding a non-solicitation clause forbidding the solicitation of any client of the former employer was “void and unenforceable”).

In short, the cases relied upon by Chemgard do not support the issuance of an injunction that enforces a restrictive covenant that exceeds an employers’ legitimate business interest and prohibits contact with customers Mr. Haynes never met or served. Moreover, the clear and overwhelming law of South Carolina compels a contrary conclusion; the restriction is patently overbroad and unenforceable as a matter of law. Accordingly, Plaintiff’s injunction should not stand.

II. Georgia law is relevant despite the existence of a choice-of-law provision in Chemgard’s restrictive covenant.

As noted in Defendants’ Motion to Dissolve and Vacate, the restrictive covenant at issue in this suit is contrary to the public policy of the State of Georgia—the state in which Mr.

Haynes resides and works and a state in which the injunction has effect. South Carolina law is clear that even when a restrictive covenant states it is to be construed according to one state's law, our courts will not enforce it if the restriction would be invalid under the law of the state where the restraint is to occur. *Kerrigan*, 238 S.C. at 70, 119 S.E.2d at 541-42 ("The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, *but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.*") (emphasis added).

Defendants do not argue that the choice of law provision in the Employment Agreement is *per se* unenforceable as Plaintiff suggests by referencing the general choice of law application used in *Lucas*, 395 S.C. at 248, 717 S.E.2d at 108. However, a basic principle under the choice-of-law doctrine is "that parties cannot by contract override public policy limitations on contractual power applicable in a state with materially greater interests in the transaction than the state whose law is contractually chosen." *See Barnes Grp., Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1029 (4th Cir. 1983) (vacating injunctive decree that swept too broadly to include salesman jurisdiction where restrictive covenants are unenforceable as against public policy). Here, the covenant is unenforceable under South Carolina law and actually void pursuant to the fundamental public policy of Georgia. *See, e.g., Wiley v. Royal Cup, Inc.*, 258 Ga. 357, 358, 370 S.E.2d 744, 745 (1988) (a covenant not to solicit must specify with particularity the territory in which the employee is restricted from soliciting); *Capricorn Sys., Inc. v. Pednekar*, 248 Ga. App. 424, 426, 546 S.E.2d 554, 557 (2001) (a restrictive covenant is *per se* void if it prohibits the former employee from soliciting any customer of even though the employee had no relationship with such customer); *see also Barnes Grp., Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1032, 1035 (4th Cir. 1983) (vacating injunctive decree that swept too broadly to include salesman

jurisdiction where restrictive covenants are unenforceable as against public policy); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 976 (D.S.C. 1976) (“We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void”).

Accordingly, the fact that Georgia law holds such restrictive covenants to be unenforceable is relevant here, and indicates Chemgard’s non-solicitation provision should not be enforced on a Georgia resident and his work in Georgia.

CONCLUSION

For the foregoing reasons, Defendants respectfully this Court dissolve and vacate the preliminary injunction granted by the Court’s Order dated July 17, 2015. Defendants also rely on the arguments and authorities asserted in their Motion to Dissolve and Vacate and only the arguments and authorities presented to the Court in oral argument.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/William H. Foster

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*Attorneys for Darrell Keith Haynes, Chem-Tek, LLC
and Alfred Bell*

Greenville, South Carolina
July 6, 2016

Exhibit A

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

Civil Action No. 2015-CP-23-03546

CHEMGARD, INC.,)

Plaintiff,)

ORDER

v.)

DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)

Defendants.)

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WICKENS
2015 JUL 17 PM 4:47

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

I. FINDINGS OF FACT

1. Plaintiff is a citizen and resident of the County of Greenville, South Carolina. Defendant Haynes is a citizen and resident of the State of Georgia.

2. Chemgard is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard.

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

[Handwritten signature]

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

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

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

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

(Agreement at ¶ 9(d)(i)).

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

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

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

1. Plaintiff Successfully Established Entitlement to Injunctive Relief

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

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

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

MM ³ #3

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

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

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

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

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

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

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

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

5 *per #5*

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

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

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

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

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

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

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

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

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

5. The Employment Agreement was Supported by Valuable Consideration.

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

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

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

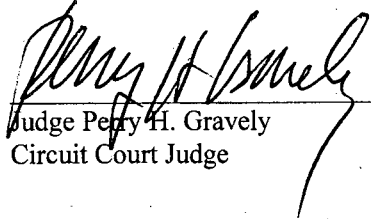
III. CONCLUSION

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

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

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

IT IS SO ORDERED.


Judge Perry H. Gravely
Circuit Court Judge

Date: July 15, 2015



Fidelity and Deposit Company of Maryland

Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

State of South Carolina
COUNTY OF Greenville

IN THE Common Pleas COURT

CAUSE NO.

Chemgard, Inc
Plaintiff

-vs-

Darrell Keith Haynes and Chem-Tek, LLC
Defendant

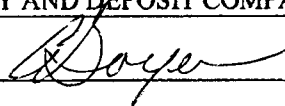
INJUNCTION BOND

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

Witness our hands this 8th day of July 2015.

BY:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: 

Attorney-in-fact

Carl L. Boyer

form#

ROA 000263

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

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

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

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

ATTEST:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND



Eric D. Barnes

Theodore G. Martinez

By:

Eric D. Barnes

Assistant Secretary

Theodore G. Martinez

State of Maryland } ss:
City of Baltimore }

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

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



Maria D. Adamski

Maria D. Adamski

Notary Public

My Commission Expires: July 8, 2007

EXTRACT FROM BY-LAWS OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND

"Article VI, Section 2. The Chairman of the Board, or the President, or any Executive Vice-President, or any of the Senior Vice-Presidents or Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power, by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Assistant Vice-Presidents and Attorneys-in-Fact as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, undertakings, recognizances, stipulations, policies, contracts, agreements, deeds, and releases and assignments of judgements, decrees, mortgages and instruments in the nature of mortgages,....and to affix the seal of the Company thereto."

CERTIFICATE

I, the undersigned, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the foregoing Power of Attorney is still in full force and effect on the date of this certificate; and I do further certify that the Vice-President who executed the said Power of Attorney was one of the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-Fact as provided in Article VI, Section 2, of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

This Power of Attorney and Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 10th day of May, 1990.

RESOLVED: "That the facsimile or mechanically reproduced seal of the company and facsimile or mechanically reproduced signature of any Vice-President, Secretary, or Assistant Secretary of the Company, whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed."

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company,

this 8 day of July, 2015.

Gerald F. Halley
Assistant Secretary

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

FILED IN COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
JUDGMENT IN A CIVIL CASE
2015 JUL 17 PM 4 47
CASE NO: 2015CP2303546

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Chemgard Inc vs. Darrell Keith Haynes

CHECK ONE:

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

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

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

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - _____

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

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

Exhibit B

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EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the 15th day of SEPTEMBER, 2000, is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and DARRELL KEITH HAYNES, whose address is 4766 Turnberry Lane, Columbus, Georgia, 31909, hereinafter referred to as Employee.

WHEREAS, the Company is engaged in the business of selling and distributing chemicals, chemical products, equipment and other miscellaneous products at retail or wholesale and in the business of servicing equipment that utilizes or consumes products sold by the Company; and

WHEREAS, Employee is desirous of working for the Company in whatever capacity as may be determined by the Company;

NOW, THEREFORE, in consideration of these premises, and the mutual covenants and conditions hereinafter set forth, the Company does hereby agree to hire Employee, and Employee accepts employment upon the following terms and conditions.

1. Employment

The Company hereby hires Employee to conduct the business of the Company in the geographical area described in Schedule A. Employee understands and agrees that this is a nonexclusive territory and that the Company may change the geographic area described in Schedule A from time to time as it determines is necessary or desirable to the conduct of its business. The Company also may assign additional employees to all or any part of the geographic area described in Schedule A.

2. Business Outside Assigned Area

(a) Employee may develop customers outside the territory described in Schedule A except in existing territories assigned to other employees of the Company or territories subsequently established by the Company for other employees. For customers developed by Employee in territories not described in Schedule A and prior to assignment by the Company to other employees, the Company shall continue to pay commissions to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the

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Employee. However, after any such assignment of territory to another employee, Employee shall cease his/her efforts in such assigned territory except to service and/or transition his/her previously developed customers in such territory.

(b) Nothing in this section shall preclude Employee from developing new customers in another employee's assigned territory with the permission of the Company. For any such customers developed by the Employee, the Company shall pay any commission due to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the Employee.

3. Term

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on October 1, 2000, and continue for a period of one year until September 30, 2001, and thereafter shall be deemed to be renewed automatically, upon the same terms and conditions, for successive periods of six (6) months each, until either party, at least thirty (30) days prior to the expiration of the original term or of any extended term shall give written notice to the other party of intention not to renew such Agreement.

4. Compensation

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified in Schedule B hereto, which Schedule shall be signed by a Company representative and Employee.

5. House Accounts

The parties agree that notwithstanding the commission schedule described in subparagraphs (a) through (g) of Schedule B, the Company retains the right to amend commissions on any account categorized by the Company as a House Account, and the Company expressly reserves the right to amend the list of accounts so categorized by additions to or deletions from the list at any time. A list of all house accounts in Employee's territory shall be maintained at the offices of the Company and shall be available for review at

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that location at any reasonable time during normal business hours.

6. Reimbursement for Expenses

The Company agrees to reimburse Employee for his/her reasonable business expenses directly connected with his/her employment by the Company, said expenses to be submitted monthly with adequate documentation as required by the Company and the Internal Revenue Service. The Company normally shall reimburse Employee for such expenses within ten (10) days.

7. Termination

This Agreement may be terminated upon the occurrence of any of the following events.

a) **Without Cause.** Notwithstanding anything to the contrary stated herein, either party may terminate this Agreement without cause upon a thirty (30) day prior written notice to the other.

b) **With Cause.** Notwithstanding anything to the contrary stated herein, the Company may terminate this Agreement immediately, without prior written notice, if it determines IN ITS SOLE DISCRETION that Employee is not performing his/her job in a satisfactory manner or has engaged in misconduct.

(c) **Reports of Service and/or Sales Calls.** Employee acknowledges that reports of service and/or sales calls on customers are MANDATORY and are due on EACH MONDAY for the service and/or sales calls made during the prior week, and failure to provide such reports to the Company is reason for IMMEDIATE TERMINATION.

(d) **Illness or Incapacity.** This Agreement may be terminated by the Company upon a thirty (30) day prior written notice to the Employee in the event that Employee is unable to perform the essential functions of his/her position under the Agreement because of an illness or incapacity.

(e) **Death.** Should Employee's death occur during the term of this Agreement, the Agreement shall terminate as of the last day of the month of his/her death. Any unpaid amounts due to the deceased Employee under this Agreement shall be paid to his/her estate.

(f) **Effects of Termination.** Upon termination of this Agreement, as

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[Signature]

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hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

8. Restrictions

Employee covenants and agrees that he/she will devote his/her entire time and energy exclusively to the business of the Company and that during the period of his/her employment, he/she will not engage in any other business, either for himself/herself or for the account of any other person, firm, or corporation without the prior written consent of the President of the Company.

9. Nondisclosure and Noncompetition Covenants

(a) **Confidential Information.** The term Confidential Information in this Agreement shall mean information that is not readily and easily available to the public or a matter of common knowledge to those in the Company's business, trade, or industry, including, but not limited to the Company's pricing methods and pricing information, costs, profits, profit margins, suppliers, business data, goals or activities, business strategy, sales techniques, identities and addresses of the Company's employees and their functions, identities and addresses of the Company's customers and prospective customers, all information concerning or relating to the Company's water treatment chemicals, cleaning chemicals, chemical formulations, chemical processes, contracts, service agreements, research and development, raw materials being used or considered and other technical and business information. In addition, Confidential Information shall include all customer information that has been provided to the Company by a customer.

(b) **Nondisclosure of Confidential Information.** During the course of Employee's employment with the Company, he/she will be given or have access to Confidential Information that has been collected, developed, and/or discovered over time by the Company and at great expense to the Company. Employee recognizes and acknowledges that the Company's Confidential Information is a valuable, special and unique asset of the Company's business and that all Confidential Information is and shall remain the property of the Company. Maintaining the confidentiality of the Confidential Information is extremely

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important to the Company's ability to compete with its competitors.

Employee agrees that while employed by the Company, he/she will not use Confidential Information of the Company except in the sole interest of the Company and will not, without the written consent of the Company, disclose Confidential Information of the Company to anyone other than those who are employed by the Company and who have a need to know the information to perform their duties on behalf of the Company.

Employee further agrees that following the termination of his/her employment with the Company, he/she will not, without the written consent of the Company, use or disclose any Confidential Information of the Company that is not a matter of common knowledge in the Company's business, trade, industry, or otherwise publicly available.

(c) **Return of Confidential Information.** It is understood and agreed by Employee that upon leaving the employ of the Company for any reason, Employee shall return all Confidential Information and other property of the Company to the Company at the time of termination of the employment relationship.

(d) **Covenant Not To Compete.** The parties acknowledge that in the course of its business, the Company develops and maintains personal and confidential relationships between the Company and its customers. The parties further acknowledge that the Company's customers and the relationship and goodwill with these customers are among the Company's most valuable assets.

The parties acknowledge that during the course of employment with the Company, Employee will develop an intimate knowledge of the Company's business and also will develop significant relationships with the Company's customers.

The parties further acknowledge that such intimate knowledge of the Company's business and significant relationships with the Company's customers should not be used to benefit any of the Company's competitors.

The parties agree that the Company will suffer significant and irreparable damage if Employee leaves the employment of the Company and goes to work for a competitor of the Company in the sale of products and/or services of the same or similar kind as those sold or provided by the Company.

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or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him/her during the course of his/her employment with the Company.

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or service similar to those sold by the Company;

(iv) Employ or attempt to employ or solicit any employee of the Company for any employment competitive with the Company, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of the Company to leave the Company's employ for the purpose of engaging in any competitive business activity.

In the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation.

It is understood by and between Employee and the Company that the foregoing restrictive covenants set forth in paragraph 9(d) are essential

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elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(e) **Protectable Interests.** Employee acknowledges and agrees that the restrictive covenants set forth in paragraphs 9 (a), (b), (c), and (d) of this Agreement are necessary for the protection of the goodwill of the Company and other legitimate business interests of the Company. Employee further acknowledges and agrees that the restrictions contained in this Agreement are reasonably limited with respect to time, customer scope, and the scope of activities restrained; are not unduly harsh and oppressive so as to deprive Employee of an opportunity to earn a living after termination of employment with the Company; and are supported by valuable consideration.

(f) **Remedies and Enforcement.** Employee acknowledges and agrees that a breach of the provisions in paragraphs 9 (a), (b), (c), and/or (d) of this Agreement by Employee will cause serious and irreparable damage to the Company that may be difficult to quantify and for which monetary damages alone will not be adequate. Accordingly, Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach. Nothing in this Agreement shall be construed to prohibit the Company from pursuing any other legal or equitable remedy.

10. General Provisions

(a) **Severability.** If any term, covenant, or condition of this Agreement or the application thereof to any person or circumstance shall be declared invalid or unenforceable, the remainder of this Agreement and the application of any term or provision to persons or circumstances other than those as to

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which it is held invalid or unenforceable shall not be affected thereby, and all other terms shall be valid and enforceable to the fullest extent permitted by the law.

(b) **Assignment.** No assignment of this Agreement or the rights and obligations hereunder shall be valid without the specific written consent of both parties hereto.

(c) **Governing Law.** This Agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina.

(d) **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) **Amendments and Agreement Execution.** This Agreement and amendments thereto shall be in writing and signed by both parties.

(f) **Notices.** Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be deemed effectively given when personally delivered or mailed by prepaid certified mail, return receipt requested, addressed to Employee at his/her last known address, or to the Company at Post Office Box 25061, Greenville, South Carolina 29616. Further, Employee shall at all times keep the Company notified of his/her home address and home telephone number.

(g) **Waiver of Breach.** The Company's waiver of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof. No waiver shall be valid unless it is in writing and signed by the President of the Company.

(h) **Entire Agreement.** This constitutes the entire Agreement between the parties. The Company and Employee shall be entitled to no benefits other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless

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incorporated herein by amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in this Agreement and no others.

IN WITNESS WHEREOF, the parties execute this Agreement this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

EMPLOYEE AFFIRMS THAT HE/SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND THAT HE/SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS AND THAT HE/SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME. EMPLOYEE FURTHER AFFIRMS THAT HE/SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND THAT HE/SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

WITNESS:

Darrell Keith Haynes

Henry A. Kile Jr

Darrell Keith Haynes

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SCHEDULE A TO EMPLOYMENT AGREEMENT

The Geographical territory assigned to Darrell Keith Haynes pursuant to the Employment Agreement between Chemgard, Inc. and Darrell Keith Haynes shall be as follows: the following counties in Georgia: Carroll, Heard, Troup, Coweta, Fayette, Pike, Meriwether, Lamar, Monroe, Upson, Talbot, Harris, Muscogee, Chattahoochee, Marion, Taylor, Crawford, Bibb, Twiggs, Houston, Macon, Schley, Steward, Webster, Sumter, and Peach, and the following counties in Alabama: Talladega, Clay, Randolph, Coosa, Elmore, Bullock, Russell, Tallapousa, Chambers, Lee, Montgomery, and Macon.

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SCHEDULE B TO EMPLOYMENT AGREEMENT

Compensation Pursuant To Employment Agreement
Between Chemgard, Inc. and
Darrell Keith Haynes dated SEPTEMBER 15, 2000.

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified below:

(a) For the first three years (36 months) of this Agreement and any extensions, or for the duration of the Agreement and any extensions if such duration is less than 36 months, the Company agrees to pay Employee a salary of five thousand five hundred eighty-three dollars and thirty-four cents (\$5,583.34) per month, less commissions paid as described in subparagraphs (b) through (g) of this schedule, and less submitted and reasonable expenses of Employee for the periods that are directly connected with his/her employment by the Company.

(b) Beginning October 1, 2000, Employee shall earn a commission each month based on equipment and chemical sales and based on services rendered during the prior month to HOUSE ACCOUNTS (accounts turned over to him/her by the Company) at the rates as specified in paragraphs (c), (d), (e), (f) and (g) below.

(c) FOR NEW BUSINESS GENERATED SOLELY BY EMPLOYEE (hereinafter New Business), the commission shall be equal to forty percent (40%) of the net profit to the Company on the SALES OF WATER TREATMENT CHEMICALS. Net profit is defined as the gross sales price less the cost to the Company of the water treatment chemicals sold (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

In the event the Employee's geographic area is modified by the Company to exclude customers for whom the Employee has solely generated New Business,

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the Employee will continue to receive a commission on the SALES OF WATER TREATMENT CHEMICALS to that customer in an amount to be determined by the Company for the duration of this Agreement unless a change is mutually agreed upon by the Company and Employee.

(d) On all SALES OF EQUIPMENT that are considered New Business, the Company agrees to pay to Employee a commission equal to twenty percent (20%) of the net profit to the Company. The net profit shall be determined by the gross sales price of the equipment less the cost to the Company of the equipment (including overhead as defined in cost sheets for pricing as developed by the Company from time to time), freight costs, a pro rata share of Employee's expenses as specified in subparagraph (h) below, and all federal and state sales and excise taxes applicable to said sale.

(e) For all BOILER CLEANING JOBS that are considered New Business, the Company agrees to pay to Employee a commission equal to the net profit on each such job. For the purposes of this subparagraph, net profit is defined as the gross sales price charged by the Company for said jobs less twenty percent (20%) of the said gross sales price, a pro rata share of Employee's expenses as specified in subparagraph (h) below, the cost of the chemicals (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), labor and transportation involved in performing the work (except for labor performed by Employee), the direct cost and/or amortized portion of the cost of all equipment used or consumed in performing the job, and all federal and state sales and excise taxes applicable to said job.

(f) For TOTAL SERVICE CONTRACTS (where the customer pays a fixed amount per period for service and chemicals) that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit. For purposes of this subparagraph, net profit shall mean the gross price paid by the customer for a period for which the payment is made, less cost of treatment chemicals delivered to the customer during the particular period, cost of drums used in fulfilling the contract, overhead

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costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, all federal and state sales and excise taxes applicable to said payment, and the cost of any equipment supplied under said service contract. Any deficit commission for total service contracts shall be offset against commissions and salary earned under subparagraphs (a), (b), (c), (d) and (e) above and (g) below or, in the company's discretion, carried forward to the next pay period.

(g) On SALES OF CLEANING CHEMICALS AND FORMULATIONS that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit to the Company. For purposes of this subparagraph, net profit is defined as the gross sales price less the cost to the Company of the cleaning chemicals and formulations sold, costs of drums, overhead costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

(h) For purposes of calculating Employee's commissions pursuant to subparagraphs (a) through (g) above, the term pro rata shall mean the percentage of Employee's expenses for the period determined by the ratio of gross sales and/or services made under each such subparagraph to the total sales and/or services made pursuant to subparagraphs (a) through (g) for the same period.

(i) In determining Employee's gross commission for any period, gross commission under subparagraphs (a) through (g) shall be totaled and Employee's submitted and reasonable expenses for the period deducted therefrom to arrive at the net commission due. Net commission payable to Employee hereunder shall be net commission as defined in this subparagraph less any commissions previously paid to Employee on sales and/or services for which the customer has not paid the Company and for which sixty (60) days has passed after the date of the invoice to the particular customer, provided, however, that should

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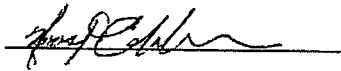
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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

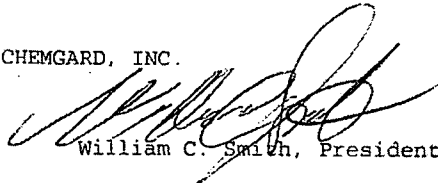
IN WITNESS WHEREOF, the parties execute this Schedule this the 15TH day of September, 2000.

WITNESS:

CHEMGARD, INC.



By:


William C. Smith, President

WITNESS:

Henry A. Kilo Jr

Darrell Keith Haynes
Darrell Keith Haynes

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Exhibit C

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Chemgard, Inc.	)	
	)	
Plaintiff,	)	
v.	)	Case No. 15-CP-23-03546
	)	
Darrell Keith Haynes and	)	
Chem-Tek, LLC,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on July 6, 2015, before The Honorable Perry H. Gravely in Courtroom 6 of the Greenville County Courthouse, 305 East North Street, Greenville, South Carolina; attended by counsel as follows:

APPEARANCES:

W. Andrew Arnold, Esq.
712 East Washington Street
Greenville, South Carolina 296021
Appearing for Plaintiff

Josh Smith, Esq.
James Cassidy, Esq.
ROE CASSIDY COATES & PRICE
P O Box 10529
Greenville, South Carolina 29603
Appearing for Defendants

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC
Case No. 15-CP-23-03546
Hearing of July 6, 2015
Before The Honorable Perry H. Gravely

1 through this stuff. I think that they may
2 have established *prima facie*, but I'm going
3 to look at it and see.

4 I guess what we need now is to hear
5 the Motion for injunction. Like I said, let
6 me look at this. It looks like -- and I will
7 also -- since this is kinda of an emergency
8 hearing, I will be happy to review anything
9 else that anybody wants to submit to me this
10 afternoon. Looks like tomorrow afternoon,
11 that we don't have a very busy afternoon, so
12 I'll be able to make a ruling and -- you
13 know, let you all know if anybody needs to
14 issue any Orders tomorrow.

15 JOSH SMITH: Okay.

16 THE COURT: If there is anything
17 that you want to send to me, try to send it
18 to me by lunchtime tomorrow.

19 Now let's get to Mr. Arnold's
20 Motion.

21 ANDREW ARNOLD: Once again, may it
22 please the court, this is the plaintiff's
23 Motion for a preliminary injunction.

24 Chemgard is a family-owned business.
25 They sell water treatments chemicals for a

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC

Case No. 15-CP-23-03546

Hearing of July 6, 2015

Before The Honorable Perry H. Gravely

1 variety of applications. They are -- they
2 have revenues of about \$1.6 Million
3 dollars. The Georgia territory where Mr.
4 Haynes worked represents thirty-one percent
5 of those sales. So the customers that he was
6 calling upon represent thirty-one percent of
7 those sales.

8 As the contract states and, again,
9 this was attached to the original Complaint,
10 the contract provided that he would be given
11 house accounts. He was given about two
12 hundred grand in house accounts before he
13 started. He signed this agreement at the
14 inception of his employment.

15 On May 10th of this year, Keith
16 Haynes sent an e-mail -- that was a Sunday
17 morning, at 8:00 a.m., 8:50 a.m. -- he sent
18 an e-mail resigning his employment effective
19 immediately.

20 Now, to contradict -- the Agreement
21 had a thirty-day notice provision. He didn't
22 give us thirty days notice. I think it makes
23 sense that he didn't give us thirty days
24 notice because that was not consistent with
25 his plan of action. His plan of action was

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	
	)	Civil Action No. 2015-CP-23-03546
Plaintiff,	)	
	)	
vs.	)	RULE 40(A)(2) PRIORITY MATTER
	)	
Darell Keith Haynes, Chem-Tek, LLC	)	DEFENDANTS' MOTION TO
and Alfred Bell,	)	RECONSIDER AND TO EXPEDITE
	)	RECONSIDERATION
Defendants.	)	
	)	
	)	

COME NOW Defendants Chem-Tek, LLC, Darrell Keith Haynes, and Alfred Bell (hereinafter collectively "Defendants"), by and through their attorneys, and respectfully file this Motion to Reconsider this Court's August 10, 2016, Order denying Defendants' Motion to Dissolve and Vacate the Preliminary Injunction ("Motion to Dissolve") granted by the Court's July 17, 2015, Order. In light of the present circumstances, Defendants further move this Court to expedite its ruling on the instant Motion.¹

This Court has denied Defendants' Motion to Dissolve without any substantive consideration of the overwhelming authority presented to this Court demonstrating that Plaintiff's restrictive covenant is invalid and unenforceable pursuant to South Carolina law. *See, e.g., Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983);

¹ Defendants would note that to the extent this Court's Order is based upon Defendants having previously filed a Motion to Reconsider, Defendants would point out that the prior Motion to Reconsider was based **only** upon this Court's order denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and did not address the matter presently before the Court (i.e., the illegality of Plaintiff's restrictive covenant and Defendants' contention that the resulting injunction should be dissolved or vacated). Copies of the prior Motion to Reconsider and the Court's resulting Order are attached hereto as *Exhibit A* for ease of reference.

Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); *ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11-0380, 2011 WL 3608227, at *4-5 (D. Md. Aug. 15, 2011) (unpublished); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009). In so doing, the Court has concluded that it lacks the authority to provide relief from its own Order; thereby leaving in place a preliminary injunction that conflicts with South Carolina law.

Defendants respectfully submits that this is in error in that this Court, having issued an equitable remedy, always retains the inherent authority to modify same at any time. 27 S.C. Jur. Injunctions § 9 (citing *Wilkins v. Hilton-Dodge Lumber Co.*, 95 S.C. 248, 78 S.E. 873, 873 (1913)); see also *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961) (“The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.”) Therefore, a motion to modify or vacate a preliminary injunction is addressed at the sound discretion of the court. *Conservation Council of N. Carolina v. Costanzo*, 528 F.2d 250, 252 (4th Cir. 1975).

The Court likewise has the express authority under 60(b) to grant relief to a party from an order for excusable neglect or mistake as long as the request is made within one year after the judgment. Rule 60(b) provides as follows:

b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;

- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Defendants' Motion to Dissolve is appropriate under 60(b)(1) inasmuch as we contend the Court's Order is premised upon a mistaken impression of South Carolina law. Defendants also contend that the Order is void as contrary to South Carolina public policy (and void under Georgia law as well), and we further contend that it is *no longer equitable* that the order have prospective application for that same reason. See S.C. Rule Civ. P. 60(b)(4), (5). Defendants' motion is timely per Rule 60(b), given that it was made within the one year period prescribed by the Rule for mistake (note, subparts (4) and (5) need only be made within a "reasonable" time).

In any event, as noted above, Defendants do not have to rely on Rule 60 in order to obtain the relief sought in this instance. It is well established that "[t]he power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment." *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992) (citing 46 Am.Jur.2d *Judgments*, § 681 (1969)); see, e.g., *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 183 (S.C. Ct. App. 1988) ("A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of

fact and conclusions of law before entry of judgment or decree.”) Indeed, the overwhelming majority of federal and state courts have recognized this inherent power of the court.²

² See, e.g., *Dietz v. Bouldin*, ___ U.S. ___, 136 S. Ct. 1885, 1888 (2016) (acknowledging “a district court’s inherent power to modify or rescind its orders before final judgment in a civil case”) (citation omitted); *Thompson v. U.S. Dept. of Housing & Urban Dev.*, 404 F.3d 821, 825 (4th Cir. 2005) (“It has long been recognized that courts are vested with the inherent power to modify injunctions they have issued.”); *Hodge v. Dept. of Housing & Urban Dev.*, 862 F.2d 859, 861 (11th Cir. 1989) (“Inherent in the jurisdiction of a court of equity is the power ‘to modify an injunction in adaptation to changed conditions.’”) (citation omitted); *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir.1984) (“A trial court’s power to modify, like the power over all its orders, is inherent. . . . When modifying a preliminary injunction, a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place.”); *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974) (“There is no doubt that the district court has continuing jurisdiction over a preliminary injunction. In the exercise of that jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason.”) (citation omitted); Neb. Rev. Stat. § 25–2001(1) (codifying the “inherent power of a district court to vacate or modify its judgments or orders during term” and the “power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy”); *Renewable Resources, Inc. v. Town of Westerly*, 110 A.3d 1166, 1171 (R.I. 2015) (“As we previously recognized, however, ‘a trial justice still retains the inherent power to modify any interlocutory judgment or order prior to final judgment.’”) (citation omitted); *Wal-Mart Stores Texas, LP v. Crosby*, 295 S.W.3d 346, 356 (Tex. Ct. App. 2009) (“The trial court has the inherent power to modify its own order.”) (citation omitted); *Rochester Buckhart Action Group v. Young*, 887 N.E.2d 49, 53 (Ill. Ct. App. 2008) (“The trial court has the inherent power during the pendency of a case to issue, modify, or vacate a preliminary injunction.”) (citation omitted); *Hubbard v. State Farm Indem. Co.*, 584 S.E.2d 176, 185 (W. Va. 2003) (“Therefore, we agree with the general rule prevailing in the federal system and hold that ‘as long as a [circuit] court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.’”) (alteration in original) (citation omitted); *Kirkley v. Jones*, 550 S.E.2d 686, 689 (Ga. Ct. App. 2001) (“The inherent power of a trial court to revise, correct, revoke, modify or vacate its own order during the same term of court is a matter of the exercise of sound discretion.”) (citation omitted); *Stephens v. Irvin*, 730 N.E.2d 1271, 1277 (Ind. Ct. App. 2000) (“A trial court has the inherent power to reconsider, vacate, or modify any previous order so long as the case has not proceeded to final judgment. [] Additionally, a trial court may base its decision to modify an order upon any theory supported in the designated materials.”) (citations omitted); *Moore v. Michelin Tire Co., Inc.*, 603 N.W.2d 513, 525 (S.D. 1999) (“A trial court has the inherent power to reconsider and modify an order any time prior to entry of judgment.”) (citation omitted); *State v. Fuller*, 964 P.2d 1140, 1143 (Or. Ct. App. 1998) (“A court has the inherent power to modify, amend, set aside or vacate any order or judgment it makes, so long as it retains jurisdiction over the underlying action.”) (citation omitted); *State v. Gunthman*, 619 A.2d 1175, 1178 (Del. 1993) (“It is a basic principle of jurisprudence that courts are generally afforded inherent powers to undertake whatever action is reasonably necessary to ensure the proper administration of justice. [] This Court has consistently held that Delaware courts have the inherent power to vacate, modify, or set aside their judgments or orders.”) (citation omitted); *State v. Josenberger*, 836 P.2d 11 (Kan. Ct. App. 1992) (“A trial court has inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment, whether by oral or written modification.”); *Novack v. Chait*, 575 A.2d 908, 912 (N.J. Ct. App. 1990) (“The court had the inherent power ‘to modify its own interlocutory orders prior to the entry of final judgment’”) (citation omitted); *Hale v. Miracle Enters. Corp.*, 517 So.2d 102, 103 (Fla. Ct. App. 1987) (“[A] a court

Here, Defendants are not asking another judge to dissolve or amend this order. Instead, Defendants are returning to the same Court and asking that it dissolve an award of *equitable* relief, set forth within an Order over which the Court clearly retains discretion and authority.

A temporary injunction remains in full force and effect until modified or rescinded by the court. The court issuing a preliminary injunction retains the power to modify or dissolve the injunction at any time.

27 S.C. Jur. *Injunctions* § 9 (citing *Wilkins*, 95 S. C. at 248, 78 S. E. at 873. This inherent power is also recognized in SCRCP 61(c), which expressly provides that a trial court has the power to modify, suspend, restore, or grant an injunction during the pendency of an appeal, even when the rest of the case is stayed.

Defendants' motion and the posture of this case are similar to the circumstances presented in *Dove Data Products, Inc. v. DeVaux*. In *DeVaux*, the trial court granted a preliminary injunction against an employee in early 2005, shortly after the employee incorporated a business to directly compete with his former employer in violation of his

necessarily retains jurisdiction to modify an injunctive order whenever changed circumstances make it equitable to do so.”); *Adams v. Vaill*, 262 A.2d 169 (Conn. 1969) (“Courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to do so.”); *Anonymous v. Superior Court In & For Pima Cnty.*, 457 P.2d 956, 960 (Ariz. Ct. App. 1969) (“[W]hen a cause is pending before the court, the court has inherent power to modify or vacate an order previously made during the pendency of the cause.”) (citation omitted); *Warden v. Peters*, 83 Nev. 298, 429 P.2d 549 (Nev. 1967) (“The trial court has inherent jurisdiction to vacate or modify its orders and judgments”); *Union Interchange, Inc. v. Savage*, 342 P.2d 249, 251 (Cal. 1959) (“[T]he power to modify or revoke a preliminary injunction is an inherent power not dependent upon statute.”); *Commonwealth v. Bailey*, 259 S.W.2d 49, 50 (Ky. Ct. App. 1953) (“Until the rendition of the final judgment and while jurisdiction is retained over a case, an interlocutory judgment remains within the control of the court and it has inherent power to modify or vacate it although the order was made at a previous term.”) (citation omitted); *Tamagno v. Waiters & Waitresses Union*, 96 A.2d 145, 146 (Pa. 1953) (“The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made . . . if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification.”) (citation omitted); *Mannah v. Robinson*, 188 P.2d 360, 362 (Okla. 1948) (“A court of record has the inherent power of its own motion to set aside, vacate, or modify its orders, however conclusive in their character, during the term at which such orders are rendered or entered of record.”) (citation and internal quotation marks omitted); *People v. Riley*, 64 N.Y.S.2d 348, 352 (N.Y. 1946) (“Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.”).

Employment Agreement. 2008 WL 9841167, at *2 (S.C. Ct. App. Mar. 24, 2008). The employer filed a motion to hold the employee in contempt on October 10, 2005. *Id.* The employee filed a motion for summary judgment and motion to dissolve the preliminary injunction on May 22, 2006. *Id.*

The trial court set the hearing for May 22, 2006, and granted the motion for summary judgment and motion to dissolve the preliminary injunction. *Id.* In so doing, the trial court held there was actually no legal basis for the injunction since it was invalidated for lack of consideration. The Court of Appeals affirmed and held the trial court properly analyzed the Employment Agreement:

A review of the arguments made to the trial court reveals that separate and valuable consideration, in addition to continued at-will employment, was not provided to DeVeaux for entering the Employment Agreement . . . The purpose of a preliminary injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Because we affirm the trial court's grant of summary judgment on all eight causes of action in favor of DeVeaux, there is no continuing basis for the preliminary injunction. Therefore, we find the trial court did not err in dissolving the preliminary injunction.

DeVeaux, 2008 WL 9841167, at *6.

As in *DeVeaux*, Defendants are asking the trial court to dissolve its own preliminary injunction based on a fatal flaw in existence at the time of its original entry. In *DeVeaux*, the flaw was lack of consideration. Here, the covenant at issue is patently overbroad under South Carolina law. The court's mistake (and the mistake of the parties presenting the issues and authority at the time) provides grounds under Rule 60(b)(1) for relief from the order. Further, the order (and the restrictive covenant upon which it is based) is void as against South Carolina (and Georgia) public policy and common law, and Defendants contend it would no longer be equitable for the order to have prospective application. Finally, this Court clearly retains independent, inherent authority and discretion to modify or dissolve his own order at any time.

Accordingly, Defendants' Motion to Dissolve is procedurally sound and the relief requested is squarely within the present authority of the Court to provide.

Finally, as argued in Defendants' Motion to Dissolve, the injunction is improper because the restrictive covenant upon which it is based is not limited to the solicitation of customers with whom Mr. Haynes actually had contact during his employment with Plaintiff. (See Defendants' Memo. in Support of Motion to Dissolve, pp. 5-11.)³ Instead, Plaintiff's non-solicitation provision, and this Court's resulting injunction, applies to "any business or entity that was a customer of Chemgard as of May 10, 2015" regardless of whether Mr. Haynes had any involvement, contact or even awareness of that customer. (Agreement at ¶ 9(d)(i).) Thus, on its face and as presently enforced by this Court's Order, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. As such, the non-solicitation provision fails to satisfy the fundamental requirement of being no more broad than is reasonably necessary to protect any legitimate business interest. See *Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107.⁴

For the foregoing reasons, Defendants respectfully this Court reconsider its Order and dissolve and vacate the preliminary injunction granted by the Court's Order dated July 17, 2015. Defendants further ask that this Court expedite its consideration of this Motion in the interests of justice.

³ A copy of Defendants' Memorandum in Support of its Motion to Dissolve is attached hereto as *Exhibit B*.

⁴ As more fully set forth in Defendants Motion to Dissolve and Memorandum in support thereof, the Court should have considered the per se invalidity of Plaintiff's non-solicitation provision under Georgia law as further grounds to dissolve or vacate its injunction. (Defendant's Memo., pp.11-13.)

NELSON MULLINS RILEY & SCARBOROUGH LLP

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*Attorneys for Darrell Keith Haynes, Chem-Tek, LLC
and Alfred Bell*

Greenville, South Carolina
August 11, 2016

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.,

Plaintiff,

v.

Darrell Keith Haynes and Chem-Tek, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-03546

MOTION TO RECONSIDER

FILED - COMMON PLEAS COURT
GREENVILLE CO. SHERIFF
PAUL B. WICKENS
2015 JUL 21 PM 3 52

The Defendants, Chem-Tek, LLC and Darrell Keith Haynes (*hereinafter collectively* "Defendants"), by and through their attorneys, hereby move this Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider the Court's July 17, 2015 Order entered by the Honorable Perry H. Gravely.

Defendants' motion is made upon the following grounds:

1. On July 6, 2015 the Court was scheduled to and did hear arguments on Plaintiff's Motion for Temporary Injunction.
2. That same day, pursuant to the agreement of the parties, the Court also heard arguments on Defendant Haynes' Motion to Dismiss under Rule 12(b)(2) for lack of personal jurisdiction over this Defendant.
3. The Court issued a Form 4 Order dated July 7, 2015 denying Defendant Haynes' Motion to Dismiss and granting Plaintiff an injunction. It instructed Plaintiff counsel to prepare a formal order. (Exhibit A).
4. The Court entered a formal Order on July 17, 2015.

5. The formal Order substantively addresses the injunction but does not mention the basis for denial of Defendant Haynes' Motion to Dismiss.

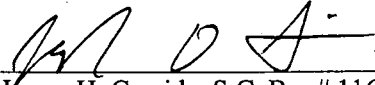
6. Defendants respectfully ask the Court to reconsider its ruling on Defendant Haynes' Motion to Dismiss, and issue a substantive order setting forth the grounds for its ruling on that motion.

Defendants make this Motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure and respectfully request that this Court reconsider the Order.

This motion will be based upon the pleadings, depositions, affidavits, applicable law, and such other documentation or memoranda as may be submitted prior to any hearing on the motion.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.


James H. Cassidy, S.C. Bar # 1160
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, S.C. 29601
(864)-349-2600
(864)-349-0303 fax
JCassidy@roecassidy.com
JSmith@roecassidy.com
Attorneys for the Defendants

July 21st, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chemgard, Inc.

☐ Plaintiff

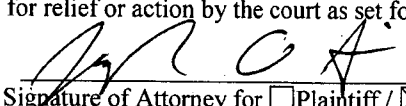
v. 2015 JUL 21 PM 3 52

Darrell Keith Haynes And Chem-Tek, LLC

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2015-CP-23-03546MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: W. Andrew Arnold, Bar No. 65311 Address: 712 E. Washington Street, Greenville, SC 29601 phone: (864) 242-4800 fax: (864) 242-4885 e-mail: aarnold@aallawfirm.com other:	Defendant's Attorney: Joseph O. Smith, Bar No. 77475 Address: P.O. Box 10529, Greenville SC 29603 phone: (864) 349-2600 fax: (864) 349-0303 e-mail: jsmith@roecassidy.com other:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Reconsider Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant July 21, 2015 Date submitted	
SECTION III: Motion Fee ☐ PAID - AMOUNT: ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by:  ☒ MOTION FEE COLLECTED: \$25.00 #41741 Roe, Cassidy... ☐ CONTESTED - AMOUNT DUE:	

SCCA/233 (11-03)

ROA 000297

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

CHEMGARD, INC.,)

Plaintiff,)

v.)

DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)

Defendants.)

COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-03546

SUPPLEMENTAL ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2015 AUG 18 PM 2 38

Defendants filed a Motion to Reconsider the Order denying Defendant Haynes' Motion to Dismiss pursuant to Rule 12(b)(2). The Order denying Defendant Haynes' Motion was set forth in a Form 4 Order with instructions for Plaintiff's counsel to submit a formal order, but the final order did not cover the Court's denial of Defendant Haynes' Motion to Dismiss. Therefore, this Order is submitted as a Supplemental Order and only addresses the Court's denial of Defendant Haynes' Motion to Dismiss under Rule 12(b)(2), SCRCF.

In the Amended Complaint the Plaintiff seeks an injunction against Defendant Haynes, a former employee, based on a Covenant Not to Compete contained in an Employment Agreement entered into by Defendant Haynes and the Plaintiff. Defendant Haynes, in his Motion to Dismiss, requested that the Amended Complaint be dismissed as to him under Rule 12(b)(2) for lack of personal jurisdiction. In support of his Motion to Dismiss, Defendant Haynes submitted an Affidavit asserting that he was a resident of Georgia and that all of his actions in relation to the negotiations and acceptance of the Employment Agreement and all work performed under the agreement took place outside of South Carolina.

Plly #1

In determining whether Defendant Haynes is subject to personal jurisdiction in this state, the Court must undertake a two-part analysis: (1) whether the cause of action falls within South Carolina's Long Arm Statute, and (2) whether the Defendant has sufficient "minimum contacts" to satisfy the due process requirements. See Springmaster, Inc. v. D & M Mfg., 402 S.E.2d 192 (S.C. Ct. App. 1991).

The Court finds that Defendant Haynes actions fall within the South Carolina Long Arm's statute, South Carolina Code Section 36-2-803(A)(7) which states as follows:

A court may exercise personal jurisdiction over a person who acts directly or by agent as to a cause of action arising from the person's:
(7) entry into a contract to be performed in whole or part by either party in this State...

The Employment Agreement in question between Defendant Haynes and the Plaintiff states that the Plaintiff is a South Carolina corporation and according to evidence submitted, all actions by the Plaintiff originated from South Carolina including payment to Defendant Haynes. Further, Defendant Haynes attended periodic sales meetings in South Carolina. Therefore, the Court finds that the Plaintiff, as a party to the Employment Agreement, had entered into a contract which was to be performed at least in part within this state and the South Carolina Long Arm's statute would apply.

Now the Court must consider whether the exercise of personal jurisdiction over Defendant Haynes is appropriate under due process and "comports with the traditional notions of fair play and substantial justice." Springmaster, Inc., 402 S.E.2d 192 (citing Hammond v. Butler, Means, Evins & Brown, 388 S.E.2d 796 (S.C. 1990)). In the matter before this Court, the factors supporting the exercise of personal jurisdiction are as follows:

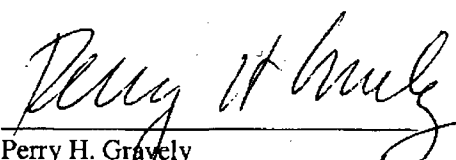
1. Defendant Haynes entered into an employment agreement with a South Carolina corporation with its principal offices located in South Carolina;

2. Payment to Defendant Haynes originated in South Carolina;
3. Defendant Haynes attended sales meetings in South Carolina on a periodic basis;
4. The employment agreement contains a provision stating that *"This agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina."* (Employment Agreement, 10(c)); and
5. All notices to be provided to the Plaintiff from Defendant Haynes were to be delivered or mailed to the Plaintiff at its Greenville, South Carolina address. (Employment Agreement, 10(f)).

Based on these factors, the Court finds that Defendant Haynes maintained sufficient contacts and the exercise of personal jurisdiction over Defendant Haynes in this matter does not offend due process or Defendant Haynes' right to "traditional notions of fair play and substantial justice." See Berkeley PG Corp. v. Southbank Investment Grp., Inc., 353 S.E.2d 305 (S.C. Ct. App. 1987).

Therefore, Defendant Haynes' Motion to Dismiss is denied.

IT IS SO ORDERED.


Perry H. Gravely
Judge, 13th Circuit

August 17, 2015

Greenville, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2303546

ChemGard, Inc.

Darrell Keith Haynes
and Chem-Tek, LLC.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court: The Plaintiff/Appellant's Motion to Continue is granted.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2755

Judge Code

8/17/2015

Date

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 3/2013)

ROA 000301

ELECTRONICALLY FILED - 2016 Aug 17 6:07 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

For Clerk of Court Office Use Only

This judgment was entered on ^{8/18/15} and a copy mailed first class or placed in the appropriate attorney's box on ^{8/18/15} to attorneys of record or to parties (when appearing pro se) as follows:

Andrew W Arnold

James H Cassidy
Joseph Owen Smith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2016 Aug 11 6:07 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

Exhibit B

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	
	)	Civil Action No. 2015-CP-23-03546
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF ITS MOTION TO
Darell Keith Haynes, Chem-Tek, LLC	)	DISSOLVE AND VACATE THE
and Alfred Bell,	)	PRELIMINARY INJUNCTION
	)	
Defendants.	)	

COME NOW Defendants Chem-Tek, LLC, Darrell Keith Haynes, and Alfred Bell (hereinafter collectively "Defendants"), by and through their attorneys, and respectfully file this Memorandum of Law in support of their prior-filed Motion to Dissolve and Vacate the Preliminary Injunction granted by the Court's July 17, 2015, Order.

INTRODUCTION

"It is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) (Citing *C & S Nat'l Bank v. Modern Homes Constr. Co.*, 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966).); *see also Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 659 S.E.2d 263, 2008 S.C. App. LEXIS 50 (Ct. App. 2008). Pursuant to this fundamental rule of law, Defendants now call upon this Court's immutable equitable power to correct an injustice wrought by Plaintiff's overreaching request for injunctive relief; an injunction based upon a restrictive covenant that is patently overbroad and unenforceable as a matter of South Carolina law.

Plaintiff contends that Defendants have somehow acted inappropriately in seeking relief from this Court in this fashion. However, a simple, clear-eyed view of the controlling case law – including the cases Plaintiff very *carefully, partially* quotes in support of its injunction – shows

that the relief requested by Defendants is neither unusual nor particularly bold. On the contrary, it is the result compelled by South Carolina law. For the reasons explained in this Memorandum, Defendants respectfully ask this Court, pursuant to the law of South Carolina, to dissolve the injunction.

FACTUAL BACKGROUND

The following salient facts are undisputed and derive from this Court's Order.¹ Chemgard, Inc. ("Chemgard") is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, both at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. Chemgard hired Defendant Darrell Keith Haynes on September 15, 2000, and Mr. Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard.² The Agreement states that Mr. Haynes was employed as a salesman for the territory of Georgia and Alabama. (Ex. A.) During the course of his employment, Mr. Haynes was the only salesman in Georgia. Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. On May 10, 2015, Mr. Haynes voluntarily resigned from Chemgard. On May 11, 2015, Mr. Haynes began working for Defendant ChemTek, a competitor of Chemgard.

On June 25, 2015, Plaintiff moved this Court for injunctive relief against Defendants to enforce Mr. Haynes' Agreement. The portion of the Agreement which Plaintiff relied on in seeking injunctive relief from this Court provides as follows:

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

¹ A copy of the Court's Order is attached hereto as *Exhibit A*.

² A copy of the subject Agreement is attached hereto as *Exhibit B*.

- (i) Solicit or call on, either directly or indirectly, *any customer of the Company* for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company

(Agreement at ¶ 9(d)(i)) (emphasis added.)

The Court heard oral arguments on July 6, 2015, and issued a Temporary Injunction

Order (the "Order") on July 17, 2015, stating:

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

(Order at p. 8) (emphasis added).

Pursuant to this Court's Order, Plaintiff filed a Rule to Show Cause on November 16, 2015. This Court found Mr. Haynes in contempt of this Court's Order on January 20, 2016. Defendant Haynes maintains he has continuously abided by this Court's July 17, 2015, Preliminary Injunction Order and all the Defendants have refrained from directly or indirectly soliciting any customer of Chemgard.

ARGUMENT

A temporary injunction remains in full force and effect until modified or rescinded by the court. The court issuing a preliminary injunction retains the power to modify or dissolve the injunction at any time. 27 S.C. Jur. Injunctions § 9 (citing *Wilkins v. Hilton-Dodge Lumber Co.*, 95 S.C. 248, 78 S.E. 873, 873 (1913)); *see also Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.") Therefore, a motion to modify or vacate a

preliminary injunction is addressed at the sound discretion of the court. *Conservation Council of N. Carolina v. Costanzo*, 528 F.2d 250, 252 (4th Cir. 1975).

As explained in Defendants' Motion to Dissolve and Vacate, the restrictive covenant at issue is overly broad and thus unenforceable because it patently exceeds any legitimate business interest in question by forbidding Mr. Haynes from contact with any *Chemgard* customer anywhere regardless of whether Mr. Haynes had any contact or involvement with that customer while employed at Chemgard. The Motion also explained that the injunction is contrary to the established policy of the state of Georgia where Mr. Haynes resides and where this Court's Order compels his obedience to a restriction void *ab initio* pursuant to Georgia law.

Chemgard had filed a memorandum opposing Defendants' Motion arguing (1) that South Carolina case law permits non-compete clauses preventing contact even with customers with whom the former employee had no prior contact, and (2) that Georgia law is irrelevant to the case at bar. As explained below, both of Chemgard's counter-arguments miss the mark, and this Court should dissolve and vacate the injunction for the reasons stated in Defendants' motion.

I. South Carolina law does not permit a restrictive covenant that bars contact with customers Haynes never served or encountered while at Chemgard.

As noted in Defendants' motion and explained in more detail below, South Carolina law is crystal clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). Thus, a non-solicitation provision must limit its scope to the customers a former employee actually serviced or encountered during his or her employment. Chemgard's arguments to the contrary rest on cases that are easily distinguishable and/or simply no longer represent the law of South Carolina.

A. South Carolina law permits only non-solicitation clauses limited to the customers with whom a former employee had direct contact while employed.

The law of this State is clear: a restrictive covenant forbidding a former employee from soliciting the business of his former employer's customers must limit the scope of its prohibition to the solicitation of customers with whom he had direct or personal contact while working for the former employer. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit new customers to which he had not been assigned while in Collins' employ"); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling to eighteen certain accounts in the Greenville area of South Carolina, formerly assigned to the respondent while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11-0380, 2011 WL 3608227, at *4-5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of *any* of the employer's customers, not just the ones the former employee had personally serviced).

The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not “blue pencil” the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction such a replacement must also be narrowly tailored to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee). Here, that interest is protecting the customer relationships gained while Mr. Haynes worked for Chemgard.

It is in this critical regard that the above restriction fails as a matter of law. In the case at bar, Chemgard seeks to prevent the solicitation of *all of its customers*, not simply those with whom Mr. Haynes had involvement or contact. (Agreement at ¶ 9(d)(i).) The Agreement is not limited as required by South Carolina law, to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face and as presently enforced by this Court’s

Order, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. Mr. Haynes is likewise prohibited from soliciting Chemgard customers that he may not even know were customers of the company at the time of his termination.

This representation of the scope of Chemgard's restriction is not hyperbole but fact, given that Plaintiff's counsel admitted in argument before this very Court that Mr. Haynes' customers represented no more than thirty-one percent (31%) of Chemgard's total sales of \$1.6 million dollars. (July 6, 2015 Transcript of Hearing at 30:24-31:7.)³ Yet in spite of this admission, Plaintiff sought and now seeks to retain a restriction that applies to 100% of Chemgard's sales from any and all customers. That is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. *See Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) (covenants are deemed patently over broad when prohibition goes far beyond the protection of any legitimate business interests).

In response to Defendants' argument, Chemgard (1) attempts to distinguish *Collins*, (2) states that *Fournil* is "an unreported outlier," and (3) points to three other South Carolina cases (which are discussed in Part B, *infra*) that purportedly support Chemgard's position. In so doing, Plaintiff is deliberately attempting to argue against the clear weight of existing South Carolina authority.

Chemgard's attempt to distinguish *Collins* badly misses the mark. Specifically, Chemgard purposefully quotes only a snippet of *Collins*, stating "[a] restriction which allows

³ The relevant portion of the transcript is attached hereto as *Exhibit C*.

the former employee to sell anywhere else, subject only to the employer's protection of his own clients, is valid.” See Chemgard’s Memo. in Opp. at 4 (quoting *Collins*). According to Chemgard, the *Collins* Court “does not further qualify the phrase, ‘protection of [a company’s] own clients,’” and thus *Collins* supports the type of overly-broad injunction at issue in the case at bar. *Id.* (alteration in Chemgard’s memo.) The flaw in Chemgard’s argument, however, is that *Collins* **does** qualify its holding by stating, just a few sentences earlier, that under the restrictive covenant the Court found to be valid the former employee “would be free to solicit new customers to which he had not been assigned while in *Collins*’ employ in any county or city in the state.” *Collins*, 288 S.C. at 94, 340 S.E.2d at 796 (emphasis added). When read in context, *Collins*’ holding is clear that the restrictive covenant the Court upheld was a limitation only on the solicitation of the employers’ customers with whom the former employee had direct and personal contact while employed.

As to Chemgard’s argument that *Fournil* is an “unreported outlier,” Chemgard overlooks the fact that *Fournil*’s conclusion is consistent with the well-established and unquestioned South Carolina cases cited above and that no South Carolina case has analyzed this exact question and reached a different conclusion (or, frankly, reached any conclusion other than that urged by Defendants in the instant Motion to Dissolve). In addition, Chemgard neglects the fact that South Carolina courts frequently rely on unpublished rulings from the District of South Carolina as highly persuasive precedent. See, e.g., *Kirven v. Central States Health & Life Co.*, 409 S.C. 30, 34, 760 S.E.2d 794, 796 (2014) (citing and relying on an unpublished D.S.C. case); *Auto Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013) (same); *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 254 n.3, 725 S.E.2d 476, 480 n.3 (2011) (same); *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 194, 684 S.E.2d 541, 545 (2009) (same).

In sum, South Carolina law permit the enforcement of customer non-solicitation clauses only where the restriction is limited to the customers with whom a former employee had direct contact while employed, and Chemgard's arguments to the contrary are unavailing. Accordingly, the injunction currently restraining Haynes' business activities is overbroad and should be dissolved and vacated.

B. The cases Chemgard relies upon in its opposition to Haynes' motion are easily distinguishable and/or no longer good law.

The three cases Chemgard relies on in its memorandum opposing Defendants' Motion do not support the overly-broad injunction currently restraining Mr. Haynes' and Defendants' business activities. Rather, they actually illustrate why the injunction should be dissolved and vacated. For example, Chemgard's discussion of *Caine & Estes Insurance Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E. 2d 859 (1982) omits three significant points that distinguish *Watts* from the case at bar. First, *Watts* did not involve the enforcement of a traditional restrictive covenant. Rather, the issue in *Watts* was the enforceability of a post-resignation agreement between Watts and his former employer whereby Watts was *released* from a non-compete clause in exchange for his promise to share the commissions he earned from customers he took from his former employer. *See Watts*, 278 S.C. at 208, 293 S.E.2d at 860. Second, the agreement at issue in *Watts* did not prevent Watts from soliciting customers of his former employer. Rather, it merely required that any commissions he earned from sales to those customers be shared with the former employer. *Id.* at 209, 293 S.E.2d at 860 ("The agreement does not restrict appellant from selling insurance at all, the only restriction is that for three years, if he sells to a client of respondent, he must divide the commission received.").

Third—and perhaps most significantly—the *Watts* Court's decision to enforce the post-resignation agreement was based on the fact that Watts had "*personal contact*" with the

customers at issue. *See Id.* (noting “the necessity for an employer to protect himself where the nature of the employment brings the employee in *personal contact* with the customers of the employer”) (emphasis added). Indeed, the *Watts* Court expressly noted its holding was based on the fact that “[t]he nature of appellant’s employment exposed him . . . to clients *personally*.” *Id.* (emphasis added). That is the exact element *missing* from the case at bar. If Mr. Haynes’ employment at Chemgard had involved personal contact with all of Chemgard’s customers or if the restrictive covenant at issue barred contact only with those customers he had personally served, then perhaps *Watts*’ holding would be applicable here. But neither of those hypotheticals are true, and in their absence *Watts* actually does not support Plaintiff’s argument or the overly-broad injunction it seeks to continue; it refutes them

Chemgard’s reliance on *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 217, 420 S.E.2d 217 (Ct App. 1992) is similarly misplaced. The *Wolf* Court noted that Wolf had failed to preserve his argument that the non-solicitation provision at issue in that case was unenforceable because it was “not limited to Mr. Wolf’s customers while working with Colonial,” and thus the Court expressly declined to rule on that issue. *See Wolf*, 309 S.C. at 106, 420 S.E.2d at 220. Accordingly, *Wolf* does not inform—much less control—the issue raised by Haynes’ pending motion.

Likewise, Chemgard’s reliance on *Oxman v. Profitt*, 241 S.C. 28, 33, 126 S.E.2d 852, 854 (1962) falls flat. The Court’s analysis regarding the restrictive covenant outlined in *Oxman* is inapplicable to the case at hand. The covenant in *Oxman*, included a geographic restriction not enumerated in Mr. Haynes’ Agreement and the Court notes that the parties did not agree to a general restrictive covenant typically found ancillary to employment contracts such as a non-compete. Instead, as the Court explains, the covenant in *Oxman* “states that defendant will not

‘induce or attempt to induce any policyholder of the Company to terminate his or her insurance with the Company.’ This covenant, therefore, allows competition but attempts to prevent what plaintiffs consider ‘unfair competition.’” *Id.* at 33, 126 S.E.2d at 854. Therefore, the contract discussed in *Oxman* is fundamentally different than the customer based contract at issue in this case.

To the extent that *Oxman* (or *Wolf*, for that matter) stand for the proposition that a non-solicitation provision may prohibit contact with the former employer’s customers without any limitation on time or location, those cases are simply no longer good law. Though *Oxman* and *Wolf* have not been expressly overruled (likely due the aforementioned unique facts binding and limiting them), the South Carolina Supreme Court has expressly repudiated the suggestion that an unlimited prohibition on solicitation of a former employer’s customers is permissible. *See Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 273 S.E.2d 338 (holding a non-solicitation clause forbidding the solicitation of any client of the former employer was “void and unenforceable”).

In short, the cases relied upon by Chemgard do not support the issuance of an injunction that enforces a restrictive covenant that exceeds an employers’ legitimate business interest and prohibits contact with customers Mr. Haynes never met or served. Moreover, the clear and overwhelming law of South Carolina compels a contrary conclusion; the restriction is patently overbroad and unenforceable as a matter of law. Accordingly, Plaintiff’s injunction should not stand.

II. Georgia law is relevant despite the existence of a choice-of-law provision in Chemgard’s restrictive covenant.

As noted in Defendants’ Motion to Dissolve and Vacate, the restrictive covenant at issue in this suit is contrary to the public policy of the State of Georgia—the state in which Mr.

Haynes resides and works and a state in which the injunction has effect. South Carolina law is clear that even when a restrictive covenant states it is to be construed according to one state's law, our courts will not enforce it if the restriction would be invalid under the law of the state where the restraint is to occur. *Kerrigan*, 238 S.C. at 70, 119 S.E.2d at 541-42 ("The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, *but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.*") (emphasis added).

Defendants do not argue that the choice of law provision in the Employment Agreement is *per se* unenforceable as Plaintiff suggests by referencing the general choice of law application used in *Lucas*, 395 S.C. at 248, 717 S.E.2d at 108. However, a basic principle under the choice-of-law doctrine is "that parties cannot by contract override public policy limitations on contractual power applicable in a state with materially greater interests in the transaction than the state whose law is contractually chosen." *See Barnes Grp., Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1029 (4th Cir. 1983) (vacating injunctive decree that swept too broadly to include salesman jurisdiction where restrictive covenants are unenforceable as against public policy). Here, the covenant is unenforceable under South Carolina law and actually void pursuant to the fundamental public policy of Georgia. *See, e.g. Wiley v. Royal Cup, Inc.*, 258 Ga. 357, 358, 370 S.E.2d 744, 745 (1988) (a covenant not to solicit must specify with particularity the territory in which the employee is restricted from soliciting); *Capricorn Sys., Inc. v. Pednekar*, 248 Ga. App. 424, 426, 546 S.E.2d 554, 557 (2001) (a restrictive covenant is *per se* void if it prohibits the former employee from soliciting any customer of even though the employee had no relationship with such customer); *see also Barnes Grp., Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1032, 1035 (4th Cir. 1983) (vacating injunctive decree that swept too broadly to include salesman

jurisdiction where restrictive covenants are unenforceable as against public policy); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 976 (D.S.C. 1976) (“We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void”).

Accordingly, the fact that Georgia law holds such restrictive covenants to be unenforceable is relevant here, and indicates Chemgard’s non-solicitation provision should not be enforced on a Georgia resident and his work in Georgia.

CONCLUSION

For the foregoing reasons, Defendants respectfully this Court dissolve and vacate the preliminary injunction granted by the Court’s Order dated July 17, 2015. Defendants also rely on the arguments and authorities asserted in their Motion to Dissolve and Vacate and only the arguments and authorities presented to the Court in oral argument.

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and Alfred Bell*

Greenville, South Carolina
July 6, 2016

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ELECTRONICALLY FILED - 2016 Aug 11 6:07 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

Exhibit A

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

CHEMGARD, INC.,)

Plaintiff,)

v.)

DARRELL KEITH HAYNES AND)
CHEM-TEK, LLC,)

Defendants.)

COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-03546

ORDER

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WICKENS
2015 JUL 17 PM 4:47

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

I. FINDINGS OF FACT

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

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

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

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

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

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

(Agreement at ¶ 9(d)(i)).

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

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

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

1. Plaintiff Successfully Established Entitlement to Injunctive Relief

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

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

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

124³ #3

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

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

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

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

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

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

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

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

5 *per #5*

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

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

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

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

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

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

6 *ply #6*

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

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

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

5. The Employment Agreement was Supported by Valuable Consideration.

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

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

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

7 *ply #7*

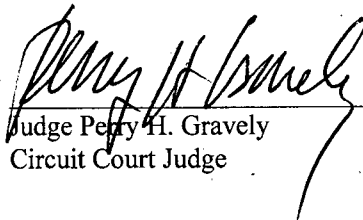
III. CONCLUSION

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

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

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

IT IS SO ORDERED.


Judge Perry H. Gravely
Circuit Court Judge

Date: July 15, 2015

Bond #09130767



Fidelity and Deposit Company of Maryland

Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

State of South Carolina
COUNTY OF Greenville

IN THE Common Pleas COURT

CAUSE NO.

Chemgard, Inc
Plaintiff

-VS-

Darrell Keith Haynes and Chem-Tek, LLC
Defendant

INJUNCTION BOND

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

Witness our hands this 8th day of July 2015.

BY: _____

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: *Carl L. Boyer*

Attorney-in-fact

Carl L. Boyer

form#

ROA 000325

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Power of Attorney
FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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

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

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

ATTEST:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND



Eric D. Barnes

Eric D. Barnes

Theodore G. Martinez

By:

Assistant Secretary

Theodore G. Martinez

State of Maryland } ss:
City of Baltimore }

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

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



Maria D. Adamski

Maria D. Adamski

Notary Public

My Commission Expires: July 8, 2007

EXTRACT FROM BY-LAWS OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND

"Article VI, Section 2. The Chairman of the Board, or the President, or any Executive Vice-President, or any of the Senior Vice-Presidents or Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee shall have power, by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Assistant Vice-Presidents and Attorneys-in-Fact as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, undertakings, recognizances, stipulations, policies, contracts, agreements, deeds, and releases and assignments of judgements, decrees, mortgages and instruments of the nature of mortgages,....and to affix the seal of the Company thereto."

CERTIFICATE

I, the undersigned, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the foregoing Power of Attorney is still in full force and effect on the date of this certificate; and I do further certify that the Vice-President who executed the said Power of Attorney was one of the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-Fact as provided in Article VI, Section 2, of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

This Power of Attorney and Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 10th day of May, 1990.

RESOLVED: "That the facsimile or mechanically reproduced seal of the company and facsimile or mechanically reproduced signature of any Vice-President, Secretary, or Assistant Secretary of the Company, whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed."

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company,

this 8 day of July, 2015.

Gerald F. Halby
Assistant Secretary

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

FILED IN COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
JUDGMENT IN A CIVIL CASE
CASE NO: 2015CP2803546
2015 JUL 17 PM 4 47

Chemgard Inc vs. Darrell Keith Haynes

CHECK ONE:

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

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

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

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - _____

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

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

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Exhibit B

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EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the 15th day of SEPTEMBER, 2000, is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and DARRELL KEITH HAYNES, whose address is 4766 Turnberry Lane, Columbus, Georgia, 31909, hereinafter referred to as Employee.

WHEREAS, the Company is engaged in the business of selling and distributing chemicals, chemical products, equipment and other miscellaneous products at retail or wholesale and in the business of servicing equipment that utilizes or consumes products sold by the Company; and

WHEREAS, Employee is desirous of working for the Company in whatever capacity as may be determined by the Company;

NOW, THEREFORE, in consideration of these premises, and the mutual covenants and conditions hereinafter set forth, the Company does hereby agree to hire Employee, and Employee accepts employment upon the following terms and conditions.

1. Employment

The Company hereby hires Employee to conduct the business of the Company in the geographical area described in Schedule A. Employee understands and agrees that this is a nonexclusive territory and that the Company may change the geographic area described in Schedule A from time to time as it determines is necessary or desirable to the conduct of its business. The Company also may assign additional employees to all or any part of the geographic area described in Schedule A.

2. Business Outside Assigned Area

(a) Employee may develop customers outside the territory described in Schedule A except in existing territories assigned to other employees of the Company or territories subsequently established by the Company for other employees. For customers developed by Employee in territories not described in Schedule A and prior to assignment by the Company to other employees, the Company shall continue to pay commissions to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the

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Employee. However, after any such assignment of territory to another employee, Employee shall cease his/her efforts in such assigned territory except to service and/or transition his/her previously developed customers in such territory.

(b) Nothing in this section shall preclude Employee from developing new customers in another employee's assigned territory with the permission of the Company. For any such customers developed by the Employee, the Company shall pay any commission due to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the Employee.

3. Term

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on October 1, 2000, and continue for a period of one year until September 30, 2001, and thereafter shall be deemed to be renewed automatically, upon the same terms and conditions, for successive periods of six (6) months each, until either party, at least thirty (30) days prior to the expiration of the original term or of any extended term shall give written notice to the other party of intention not to renew such Agreement.

4. Compensation

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified in Schedule B hereto, which Schedule shall be signed by a Company representative and Employee.

5. House Accounts

The parties agree that notwithstanding the commission schedule described in subparagraphs (a) through (g) of Schedule B, the Company retains the right to amend commissions on any account categorized by the Company as a House Account, and the Company expressly reserves the right to amend the list of accounts so categorized by additions to or deletions from the list at any time. A list of all house accounts in Employee's territory shall be maintained at the offices of the Company and shall be available for review at

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that location at any reasonable time during normal business hours.

6. Reimbursement for Expenses

The Company agrees to reimburse Employee for his/her reasonable business expenses directly connected with his/her employment by the Company, said expenses to be submitted monthly with adequate documentation as required by the Company and the Internal Revenue Service. The Company normally shall reimburse Employee for such expenses within ten (10) days.

7. Termination

This Agreement may be terminated upon the occurrence of any of the following events.

a) **Without Cause.** Notwithstanding anything to the contrary stated herein, either party may terminate this Agreement without cause upon a thirty (30) day prior written notice to the other.

b) **With Cause.** Notwithstanding anything to the contrary stated herein, the Company may terminate this Agreement immediately, without prior written notice, if it determines IN ITS SOLE DISCRETION that Employee is not performing his/her job in a satisfactory manner or has engaged in misconduct.

(c) **Reports of Service and/or Sales Calls.** Employee acknowledges that reports of service and/or sales calls on customers are MANDATORY and are due on EACH MONDAY for the service and/or sales calls made during the prior week, and failure to provide such reports to the Company is reason for IMMEDIATE TERMINATION.

(d) **Illness or Incapacity.** This Agreement may be terminated by the Company upon a thirty (30) day prior written notice to the Employee in the event that Employee is unable to perform the essential functions of his/her position under the Agreement because of an illness or incapacity.

(e) **Death.** Should Employee's death occur during the term of this Agreement, the Agreement shall terminate as of the last day of the month of his/her death. Any unpaid amounts due to the deceased Employee under this Agreement shall be paid to his/her estate.

(f) **Effects of Termination.** Upon termination of this Agreement, as

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[Signature]

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hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

8. Restrictions

Employee covenants and agrees that he/she will devote his/her entire time and energy exclusively to the business of the Company and that during the period of his/her employment, he/she will not engage in any other business, either for himself/herself or for the account of any other person, firm, or corporation without the prior written consent of the President of the Company.

9. Nondisclosure and Noncompetition Covenants

(a) **Confidential Information.** The term Confidential Information in this Agreement shall mean information that is not readily and easily available to the public or a matter of common knowledge to those in the Company's business, trade, or industry, including, but not limited to the Company's pricing methods and pricing information, costs, profits, profit margins, suppliers, business data, goals or activities, business strategy, sales techniques, identities and addresses of the Company's employees and their functions, identities and addresses of the Company's customers and prospective customers, all information concerning or relating to the Company's water treatment chemicals, cleaning chemicals, chemical formulations, chemical processes, contracts, service agreements, research and development, raw materials being used or considered and other technical and business information. In addition, Confidential Information shall include all customer information that has been provided to the Company by a customer.

(b) **Nondisclosure of Confidential Information.** During the course of Employee's employment with the Company, he/she will be given or have access to Confidential Information that has been collected, developed, and/or discovered over time by the Company and at great expense to the Company. Employee recognizes and acknowledges that the Company's Confidential Information is a valuable, special and unique asset of the Company's business and that all Confidential Information is and shall remain the property of the Company. Maintaining the confidentiality of the Confidential Information is extremely

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important to the Company's ability to compete with its competitors.

Employee agrees that while employed by the Company, he/she will not use Confidential Information of the Company except in the sole interest of the Company and will not, without the written consent of the Company, disclose Confidential Information of the Company to anyone other than those who are employed by the Company and who have a need to know the information to perform their duties on behalf of the Company.

Employee further agrees that following the termination of his/her employment with the Company, he/she will not, without the written consent of the Company, use or disclose any Confidential Information of the Company that is not a matter of common knowledge in the Company's business, trade, industry, or otherwise publicly available.

(c) **Return of Confidential Information.** It is understood and agreed by Employee that upon leaving the employ of the Company for any reason, Employee shall return all Confidential Information and other property of the Company to the Company at the time of termination of the employment relationship.

(d) **Covenant Not To Compete.** The parties acknowledge that in the course of its business, the Company develops and maintains personal and confidential relationships between the Company and its customers. The parties further acknowledge that the Company's customers and the relationship and goodwill with these customers are among the Company's most valuable assets.

The parties acknowledge that during the course of employment with the Company, Employee will develop an intimate knowledge of the Company's business and also will develop significant relationships with the Company's customers.

The parties further acknowledge that such intimate knowledge of the Company's business and significant relationships with the Company's customers should not be used to benefit any of the Company's competitors.

The parties agree that the Company will suffer significant and irreparable damage if Employee leaves the employment of the Company and goes to work for a competitor of the Company in the sale of products and/or services of the same or similar kind as those sold or provided by the Company.

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or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him/her during the course of his/her employment with the Company.

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or service similar to those sold by the Company;

(iv) Employ or attempt to employ or solicit any employee of the Company for any employment competitive with the Company, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of the Company to leave the Company's employ for the purpose of engaging in any competitive business activity.

In the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation.

It is understood by and between Employee and the Company that the foregoing restrictive covenants set forth in paragraph 9(d) are essential

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elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(e) **Protectable Interests.** Employee acknowledges and agrees that the restrictive covenants set forth in paragraphs 9 (a), (b), (c), and (d) of this Agreement are necessary for the protection of the goodwill of the Company and other legitimate business interests of the Company. Employee further acknowledges and agrees that the restrictions contained in this Agreement are reasonably limited with respect to time, customer scope, and the scope of activities restrained; are not unduly harsh and oppressive so as to deprive Employee of an opportunity to earn a living after termination of employment with the Company; and are supported by valuable consideration.

(f) **Remedies and Enforcement.** Employee acknowledges and agrees that a breach of the provisions in paragraphs 9 (a), (b), (c), and/or (d) of this Agreement by Employee will cause serious and irreparable damage to the Company that may be difficult to quantify and for which monetary damages alone will not be adequate. Accordingly, Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach. Nothing in this Agreement shall be construed to prohibit the Company from pursuing any other legal or equitable remedy.

10. General Provisions

(a) **Severability.** If any term, covenant, or condition of this Agreement or the application thereof to any person or circumstance shall be declared invalid or unenforceable, the remainder of this Agreement and the application of any term or provision to persons or circumstances other than those as to

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which it is held invalid or unenforceable shall not be affected thereby, and all other terms shall be valid and enforceable to the fullest extent permitted by the law.

(b) **Assignment.** No assignment of this Agreement or the rights and obligations hereunder shall be valid without the specific written consent of both parties hereto.

(c) **Governing Law.** This Agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina.

(d) **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) **Amendments and Agreement Execution.** This Agreement and amendments thereto shall be in writing and signed by both parties.

(f) **Notices.** Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be deemed effectively given when personally delivered or mailed by prepaid certified mail, return receipt requested, addressed to Employee at his/her last known address, or to the Company at Post Office Box 25061, Greenville, South Carolina 29616. Further, Employee shall at all times keep the Company notified of his/her home address and home telephone number.

(g) **Waiver of Breach.** The Company's waiver of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof. No waiver shall be valid unless it is in writing and signed by the President of the Company.

(h) **Entire Agreement.** This constitutes the entire Agreement between the parties. The Company and Employee shall be entitled to no benefits other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless

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incorporated herein by amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in this Agreement and no others.

IN WITNESS WHEREOF, the parties execute this Agreement this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

EMPLOYEE AFFIRMS THAT HE/SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND THAT HE/SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS AND THAT HE/SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME. EMPLOYEE FURTHER AFFIRMS THAT HE/SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND THAT HE/SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

WITNESS:

Darrell Keith Haynes

Henry A. Kile IV

Darrell Keith Haynes

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SCHEDULE A TO EMPLOYMENT AGREEMENT

The Geographical territory assigned to Darrell Keith Haynes pursuant to the Employment Agreement between Chemgard, Inc. and Darrell Keith Haynes shall be as follows: the following counties in Georgia: Carroll, Heard, Troup, Coweta, Fayette, Pike, Meriwether, Lamar, Monroe, Upson, Talbot, Harris, Muscogee, Chattahoochee, Marion, Taylor, Crawford, Bibb, Twiggs, Houston, Macon, Schley, Steward, Webster, Sumter, and Peach, and the following counties in Alabama: Talladega, Clay, Randolph, Coosa, Elmore, Bullock, Russell, Tallapousa, Chambers, Lee, Montgomery, and Macon.

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SCHEDULE B TO EMPLOYMENT AGREEMENT

Compensation Pursuant To Employment Agreement
Between Chemgard, Inc. and
Darrell Keith Haynes dated SEPTEMBER 15, 2000.

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified below:

(a) For the first three years (36 months) of this Agreement and any extensions, or for the duration of the Agreement and any extensions if such duration is less than 36 months, the Company agrees to pay Employee a salary of five thousand five hundred eighty-three dollars and thirty-four cents (\$5,583.34) per month, less commissions paid as described in subparagraphs (b) through (g) of this schedule, and less submitted and reasonable expenses of Employee for the periods that are directly connected with his/her employment by the Company.

(b) Beginning October 1, 2000, Employee shall earn a commission each month based on equipment and chemical sales and based on services rendered during the prior month to HOUSE ACCOUNTS (accounts turned over to him/her by the Company) at the rates as specified in paragraphs (c), (d), (e), (f) and (g) below.

(c) FOR NEW BUSINESS GENERATED SOLELY BY EMPLOYEE (hereinafter New Business), the commission shall be equal to forty percent (40%) of the net profit to the Company on the SALES OF WATER TREATMENT CHEMICALS. Net profit is defined as the gross sales price less the cost to the Company of the water treatment chemicals sold (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

In the event the Employee's geographic area is modified by the Company to exclude customers for whom the Employee has solely generated New Business,

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the Employee will continue to receive a commission on the SALES OF WATER TREATMENT CHEMICALS to that customer in an amount to be determined by the Company for the duration of this Agreement unless a change is mutually agreed upon by the Company and Employee.

(d) On all SALES OF EQUIPMENT that are considered New Business, the Company agrees to pay to Employee a commission equal to twenty percent (20%) of the net profit to the Company. The net profit shall be determined by the gross sales price of the equipment less the cost to the Company of the equipment (including overhead as defined in cost sheets for pricing as developed by the Company from time to time), freight costs, a pro rata share of Employee's expenses as specified in subparagraph (h) below, and all federal and state sales and excise taxes applicable to said sale.

(e) For all BOILER CLEANING JOBS that are considered New Business, the Company agrees to pay to Employee a commission equal to the net profit on each such job. For the purposes of this subparagraph, net profit is defined as the gross sales price charged by the Company for said jobs less twenty percent (20%) of the said gross sales price, a pro rata share of Employee's expenses as specified in subparagraph (h) below, the cost of the chemicals (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), labor and transportation involved in performing the work (except for labor performed by Employee), the direct cost and/or amortized portion of the cost of all equipment used or consumed in performing the job, and all federal and state sales and excise taxes applicable to said job.

(f) For TOTAL SERVICE CONTRACTS (where the customer pays a fixed amount per period for service and chemicals) that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit. For purposes of this subparagraph, net profit shall mean the gross price paid by the customer for a period for which the payment is made, less cost of treatment chemicals delivered to the customer during the particular period, cost of drums used in fulfilling the contract, overhead

Handwritten signature/initials

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costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, all federal and state sales and excise taxes applicable to said payment, and the cost of any equipment supplied under said service contract. Any deficit commission for total service contracts shall be offset against commissions and salary earned under subparagraphs (a), (b), (c), (d) and (e) above and (g) below or, in the company's discretion, carried forward to the next pay period.

(g) On SALES OF CLEANING CHEMICALS AND FORMULATIONS that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit to the Company. For purposes of this subparagraph, net profit is defined as the gross sales price less the cost to the Company of the cleaning chemicals and formulations sold, costs of drums, overhead costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

(h) For purposes of calculating Employee's commissions pursuant to subparagraphs (a) through (g) above, the term pro rata shall mean the percentage of Employee's expenses for the period determined by the ratio of gross sales and/or services made under each such subparagraph to the total sales and/or services made pursuant to subparagraphs (a) through (g) for the same period.

(i) In determining Employee's gross commission for any period, gross commission under subparagraphs (a) through (g) shall be totaled and Employee's submitted and reasonable expenses for the period deducted therefrom to arrive at the net commission due. Net commission payable to Employee hereunder shall be net commission as defined in this subparagraph less any commissions previously paid to Employee on sales and/or services for which the customer has not paid the Company and for which sixty (60) days has passed after the date of the invoice to the particular customer, provided, however, that should

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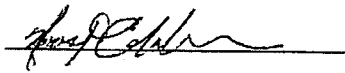
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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

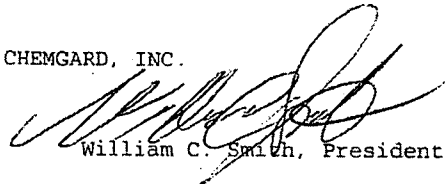
IN WITNESS WHEREOF, the parties execute this Schedule this the 15TH day of September, 2000.

WITNESS:

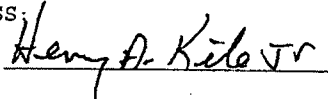
CHEMGARD, INC.



By:


William C. Smith, President

WITNESS:

 
Darrell Keith Haynes

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Exhibit C

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STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Chemgard, Inc.)
)
) Plaintiff,)
 v.) Case No. 15-CP-23-03546
)
Darrell Keith Haynes and)
Chem-Tek, LLC,)
)
) Defendants.)

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on July 6, 2015, before The Honorable Perry H. Gravely in Courtroom 6 of the Greenville County Courthouse, 305 East North Street, Greenville, South Carolina; attended by counsel as follows:

APPEARANCES:

W. Andrew Arnold, Esq.
712 East Washington Street
Greenville, South Carolina 296021
Appearing for Plaintiff

Josh Smith, Esq.
James Cassidy, Esq.
ROE CASSIDY COATES & PRICE
P O Box 10529
Greenville, South Carolina 29603
Appearing for Defendants

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC

Case No. 15-CP-23-03546

Hearing of July 6, 2015

Before The Honorable Perry H. Gravely

1 through this stuff. I think that they may
2 have established *prima facie*, but I'm going
3 to look at it and see.

4 I guess what we need now is to hear
5 the Motion for injunction. Like I said, let
6 me look at this. It looks like -- and I will
7 also -- since this is kinda of an emergency
8 hearing, I will be happy to review anything
9 else that anybody wants to submit to me this
10 afternoon. Looks like tomorrow afternoon,
11 that we don't have a very busy afternoon, so
12 I'll be able to make a ruling and -- you
13 know, let you all know if anybody needs to
14 issue any Orders tomorrow.

15 JOSH SMITH: Okay.

16 THE COURT: If there is anything
17 that you want to send to me, try to send it
18 to me by lunchtime tomorrow.

19 Now let's get to Mr. Arnold's
20 Motion.

21 ANDREW ARNOLD: Once again, may it
22 please the court, this is the plaintiff's
23 Motion for a preliminary injunction.

24 Chemgard is a family-owned business.
25 They sell water treatments chemicals for a

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC

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1 variety of applications. They are -- they
2 have revenues of about \$1.6 Million
3 dollars. The Georgia territory where Mr.
4 Haynes worked represents thirty-one percent
5 of those sales. So the customers that he was
6 calling upon represent thirty-one percent of
7 those sales.

8 As the contract states and, again,
9 this was attached to the original Complaint,
10 the contract provided that he would be given
11 house accounts. He was given about two
12 hundred grand in house accounts before he
13 started. He signed this agreement at the
14 inception of his employment.

15 On May 10th of this year, Keith
16 Haynes sent an e-mail -- that was a Sunday
17 morning, at 8:00 a.m., 8:50 a.m. -- he sent
18 an e-mail resigning his employment effective
19 immediately.

20 Now, to contradict -- the Agreement
21 had a thirty-day notice provision. He didn't
22 give us thirty days notice. I think it makes
23 sense that he didn't give us thirty days
24 notice because that was not consistent with
25 his plan of action. His plan of action was

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Chemgard, Inc.,	)	
	)	Civil Action No. 2015-CP-23-03546
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MOTION AND
	)	MEMORANDUM
Darrell Keith Haynes, Chem-Tek, LLC	)	OF LAW IN SUPPORT OF MOTION
and Alfred Bell,	)	FOR SUMMARY JUDGMENT
	)	
Defendants.	)	

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, Defendants Chem-Tek, LLC, Darrell Keith Haynes, and Alfred Bell (hereinafter collectively "Defendants"), by and through their attorneys, hereby move the Court for summary judgment on all claims against Defendants by the Plaintiff.

Defendants respectfully submit that Plaintiff cannot present evidence sufficient to establish a genuine issue of material fact as to Plaintiff's claims against Defendants because the foundation for each of these claims is a restrictive covenant that is patently overbroad, void and unenforceable as a matter of law. It is axiomatic that Plaintiff cannot premise any legally valid claim upon an invalid and unenforceable contractual obligation.

Accordingly, for the reasons stated herein, Defendants respectfully request this Court grant their Motion for Summary Judgment against Plaintiff and dismiss all claims asserted against Defendants in Plaintiff's Second Amended Complaint.

FACTS¹

Chemgard, Inc. ("Chemgard") is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, at retail or

¹ The following facts are undisputed and derive from the Court's July 17, 2015, Order.

wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. Chemgard hired Defendant Darrell Keith Haynes on September 15, 2000, and Mr. Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard.² The Agreement states that Mr. Haynes was employed as a salesman for the territory of Georgia and Alabama. (Ex. A.) During the course of his employment, Mr. Haynes was the only salesman in Georgia. Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. On May 10, 2015, Mr. Haynes voluntarily resigned from Chemgard. On May 11, 2015, Mr. Haynes began working for Defendant ChemTek, a competitor of Chemgard.

On June 25, 2015, Plaintiff moved for injunctive relief against Defendants to enforce Mr. Haynes' Agreement. The portion of the Agreement which Plaintiff relied on in seeking injunctive relief from this Court provides as follows:

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

- (i) Solicit or call on, either directly or indirectly, *any customer of the Company* for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company

(Agreement at ¶ 9(d)(i)) (emphasis added.)

The Court heard oral arguments on July 6, 2015, and issued a Temporary Injunction Order (the "Order") on July 17, 2015, stating:

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

² A copy of the subject Agreement is attached hereto as *Exhibit A*.

(Order at p. 8) (emphasis added).

Pursuant to the Court's July 17, 2015, Order, Plaintiff filed a Rule to Show Cause on November 16, 2015. This Court found Mr. Haynes in contempt of this Court's Order on January 20, 2016. Defendant Haynes maintains he has continuously abided by this Court's July 17, 2015, Preliminary Injunction Order and all the Defendants have refrained from directly or indirectly soliciting any customer of Chemgard. Defendants filed a Motion to Dissolve and Vacate the Preliminary Injunction on July 6, 2016, which the Court denied on August 10, 2016, finding it lacked the authority to vacate its July 17, 2015, Preliminary Injunction Order. (Order of Hon. Perry H. Gravely, August 10, 2016.)

STANDARD OF REVIEW

This Court is well familiar with the standard for summary judgment. In deciding a summary judgment motion, the court must determine whether there is a genuine issue of material fact. S.C.R.C.P. Rule 56. The party seeking summary judgment bears the burden of informing the court of the basis of its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, any admissions on file, together with affidavits, if any, which show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (S.C.R.C.P. 56(c)); *Baughman v. American Telephone and Telephone Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Although the burden is on the party seeking summary judgment, the non-moving party must point to specific facts showing that there is a genuine issue for trial rather than resting on the assertions of its pleadings. *Matsushita Electrical Industries Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574(1986).

The non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts. The mere existence of a scintilla of evidence in support of [the non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [the non-moving party]. *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992) (quotations and citations omitted), *cert. denied*, 113 S. Ct. 1415 (1993); *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** dispute as to any **material** fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original). Viewing the evidence in the light most favorable to the opposing party, summary judgment must be entered if the evidence is so one-sided that a reasonable fact-finder could not find for the opposing party. *Id.* at 248-50.

Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E. 2d 406 (1984). The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine. *Id.* 316 S.E.2d at 407.

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

LEGAL ANALYSIS

Generally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Cafe Assocs. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). When a

contract is clear and unambiguous, the construction of the contract is a question of law for the court. *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985). In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract. *Id.* at 101, 328 S.E.2d at 336. “When a court construes an employment contract, as with any contract, resort is first made to the language of the contract in issue, and if the language is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties.” *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) (emphasis added) (citing *Stuckey v. University of South Carolina*, 284 S.C. 295, 325 S.E.2d 709 (Ct.App.1985)).

South Carolina law is clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer’s legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A covenant not to compete must be reasonable in its restrictions or it will not be upheld. *Reeves v. Sargeant*, 200 S.C. 494, 498-99, 21 S.E.2d 184, 186 (1942) (general restraint of trade is against public policy and void). Therefore, if a covenant not to compete is deemed overbroad and unenforceable, there can be no genuine issue of material fact as to whether an employee breached the employment contract and a former employer cannot base their claims upon the invalid agreement. *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) (“Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot.”); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff’d*, 345

S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

It is equally well established that to be enforceable, a customer non-solicitation provision must limit its scope to the customers a former employee actually serviced or encountered during his or her employment. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained “free to solicit new customers to which he had not been assigned while in Collins’ employ”).³ The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not “blue pencil” the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

³ See e.g., *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether “is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer’s customers.”) (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined “from competing, directly or indirectly, with it, in selling to eighteen certain accounts in the Greenville area of South Carolina, formerly assigned to the respondent while he was employed as a sales representative of business forms and equipment for the appellant”) (emphasis added); see also *ScanSource, Inc. v. Thurston Group, LLC*, C/A No. DKC 11–0380, 2011 WL 3608227, at *4–5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers “with which Contractor had contact during the term of this Agreement as a result of being retained by the Company”); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11–12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of any of the employer’s customers, not just the ones the former employee had personally serviced).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction, this allowance does not diminish the fundamental requirement that the resulting restriction must be as narrowly tailored as possible to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee). Here, that interest is protecting the customer relationships gained while Mr. Haynes worked for Chemgard. It is in this critical regard that the above restriction fails as a matter of law.

In the case at bar, Chemgard seeks to prevent the solicitation of *all of its customers*, not simply those with whom Mr. Haynes had involvement or contact. (Agreement at ¶ 9(d)(i).) The Agreement is not limited as required by South Carolina law to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. Indeed, Mr. Haynes is prohibited from soliciting Chemgard customers that he may literally not even know were customers of the company at the time of his termination. South Carolina courts have never accepted such a patently overbroad restriction.

Nonetheless, Plaintiff has actually argued for an ever *broad* interpretation of this fatally overbroad restriction, and has maintained that Mr. Haynes would be in violation of the restriction merely for *responding* to a customer's unilateral request for services, providing services to a customer whom Mr. Haynes had not solicited in the first instance, or even continuing his

personal friendships with employees of customers.⁴ In so doing, Plaintiff champions a restrictive covenant so overbroad as to capture and bind customers to a contract to which they have never joined nor been paid consideration, and Chemgard seeks to dictate to these non-parties who they may or may not conduct business regardless of any actual solicitation by Mr. Haynes.

This representation of the egregious scope of Chemgard's restrictive covenant is not hyperbole but fact, given that Plaintiff's counsel admitted on the record that Mr. Haynes' customers represented no more than thirty-one percent (31%) of Chemgard's total sales of \$1.6 million dollars. (July 6, 2015 Transcript of Hearing at 30:24-31:7.)⁵ Yet in spite of this admission, Plaintiff bases the entirety of its case upon a restriction that applies to 100% of Chemgard's customers and, as explained above, to prevent and punish Defendants for even responding to unilateral requests for service by 100% of Chemgard's customers, from providing services to customers who came to Defendants unilaterally, or from even having any communication with 100% of these customers, regardless of whether such communication is related to the pursuit of business. This is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. *See Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) (covenants are deemed patently over broad when prohibition goes far beyond the protection of any legitimate business interests).

Chemgard's restrictive covenant, as written, is patently over broad and unenforceable. There can simply be no genuine issue of material fact as to whether Defendant Haynes is in breach of contract or whether Defendants are liable for tortious interference with a contract or

⁴ See Plaintiff's May 27, 2016, Rule to Show Cause.

⁵ The relevant portion of the transcript is attached hereto as *Exhibit B*.

prospective contract. It is well established that “only a valid agreement can support claims” for breach of contract and tortious interference with a contract. See *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) (“Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot.”); see also *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff’d*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

CONCLUSION

Accordingly, Plaintiff’s claims against Defendants must fail as a matter of law. This Court should grant Defendants’ motion for summary judgment because Haynes’ cannot be in violation of a covenant not to compete that is unreasonable and void under the laws of South Carolina.

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*Attorneys for Darrell Keith Haynes, Chem-Tek, LLC
 and Albert Bell*

Greenville, South Carolina
 August 12, 2016

Exhibit A

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EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the 15th day of SEPTEMBER, 2000, is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and DARRELL KEITH HAYNES, whose address is 4766 Turnberry Lane, Columbus, Georgia, 31909, hereinafter referred to as Employee.

WHEREAS, the Company is engaged in the business of selling and distributing chemicals, chemical products, equipment and other miscellaneous products at retail or wholesale and in the business of servicing equipment that utilizes or consumes products sold by the Company; and

WHEREAS, Employee is desirous of working for the Company in whatever capacity as may be determined by the Company;

NOW, THEREFORE, in consideration of these premises, and the mutual covenants and conditions hereinafter set forth, the Company does hereby agree to hire Employee, and Employee accepts employment upon the following terms and conditions.

1. Employment

The Company hereby hires Employee to conduct the business of the Company in the geographical area described in Schedule A. Employee understands and agrees that this is a nonexclusive territory and that the Company may change the geographic area described in Schedule A from time to time as it determines is necessary or desirable to the conduct of its business. The Company also may assign additional employees to all or any part of the geographic area described in Schedule A.

2. Business Outside Assigned Area

(a) Employee may develop customers outside the territory described in Schedule A except in existing territories assigned to other employees of the Company or territories subsequently established by the Company for other employees. For customers developed by Employee in territories not described in Schedule A and prior to assignment by the Company to other employees, the Company shall continue to pay commissions to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the

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Employee. However, after any such assignment of territory to another employee, Employee shall cease his/her efforts in such assigned territory except to service and/or transition his/her previously developed customers in such territory.

(b) Nothing in this section shall preclude Employee from developing new customers in another employee's assigned territory with the permission of the Company. For any such customers developed by the Employee, the Company shall pay any commission due to the Employee for the duration of the Agreement, unless a change is mutually agreed upon by the Company and the Employee.

3. Term

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on October 1, 2000, and continue for a period of one year until September 30, 2001, and thereafter shall be deemed to be renewed automatically, upon the same terms and conditions, for successive periods of six (6) months each, until either party, at least thirty (30) days prior to the expiration of the original term or of any extended term shall give written notice to the other party of intention not to renew such Agreement.

4. Compensation

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified in Schedule B hereto, which Schedule shall be signed by a Company representative and Employee.

5. House Accounts

The parties agree that notwithstanding the commission schedule described in subparagraphs (a) through (g) of Schedule B, the Company retains the right to amend commissions on any account categorized by the Company as a House Account, and the Company expressly reserves the right to amend the list of accounts so categorized by additions to or deletions from the list at any time. A list of all house accounts in Employee's territory shall be maintained at the offices of the Company and shall be available for review at

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[Signature]

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that location at any reasonable time during normal business hours.

6. Reimbursement for Expenses

The Company agrees to reimburse Employee for his/her reasonable business expenses directly connected with his/her employment by the Company, said expenses to be submitted monthly with adequate documentation as required by the Company and the Internal Revenue Service. The Company normally shall reimburse Employee for such expenses within ten (10) days.

7. Termination

This Agreement may be terminated upon the occurrence of any of the following events.

a) **Without Cause.** Notwithstanding anything to the contrary stated herein, either party may terminate this Agreement without cause upon a thirty (30) day prior written notice to the other.

b) **With Cause.** Notwithstanding anything to the contrary stated herein, the Company may terminate this Agreement immediately, without prior written notice, if it determines IN ITS SOLE DISCRETION that Employee is not performing his/her job in a satisfactory manner or has engaged in misconduct.

(c) **Reports of Service and/or Sales Calls.** Employee acknowledges that reports of service and/or sales calls on customers are MANDATORY and are due on EACH MONDAY for the service and/or sales calls made during the prior week, and failure to provide such reports to the Company is reason for IMMEDIATE TERMINATION.

(d) **Illness or Incapacity.** This Agreement may be terminated by the Company upon a thirty (30) day prior written notice to the Employee in the event that Employee is unable to perform the essential functions of his/her position under the Agreement because of an illness or incapacity.

(e) **Death.** Should Employee's death occur during the term of this Agreement, the Agreement shall terminate as of the last day of the month of his/her death. Any unpaid amounts due to the deceased Employee under this Agreement shall be paid to his/her estate.

(f) **Effects of Termination.** Upon termination of this Agreement, as

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[Signature]

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hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

8. Restrictions

Employee covenants and agrees that he/she will devote his/her entire time and energy exclusively to the business of the Company and that during the period of his/her employment, he/she will not engage in any other business, either for himself/herself or for the account of any other person, firm, or corporation without the prior written consent of the President of the Company.

9. Nondisclosure and Noncompetition Covenants

(a) **Confidential Information.** The term Confidential Information in this Agreement shall mean information that is not readily and easily available to the public or a matter of common knowledge to those in the Company's business, trade, or industry, including, but not limited to the Company's pricing methods and pricing information, costs, profits, profit margins, suppliers, business data, goals or activities, business strategy, sales techniques, identities and addresses of the Company's employees and their functions, identities and addresses of the Company's customers and prospective customers, all information concerning or relating to the Company's water treatment chemicals, cleaning chemicals, chemical formulations, chemical processes, contracts, service agreements, research and development, raw materials being used or considered and other technical and business information. In addition, Confidential Information shall include all customer information that has been provided to the Company by a customer.

(b) **Nondisclosure of Confidential Information.** During the course of Employee's employment with the Company, he/she will be given or have access to Confidential Information that has been collected, developed, and/or discovered over time by the Company and at great expense to the Company. Employee recognizes and acknowledges that the Company's Confidential Information is a valuable, special and unique asset of the Company's business and that all Confidential Information is and shall remain the property of the Company. Maintaining the confidentiality of the Confidential Information is extremely

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important to the Company's ability to compete with its competitors.

Employee agrees that while employed by the Company, he/she will not use Confidential Information of the Company except in the sole interest of the Company and will not, without the written consent of the Company, disclose Confidential Information of the Company to anyone other than those who are employed by the Company and who have a need to know the information to perform their duties on behalf of the Company.

Employee further agrees that following the termination of his/her employment with the Company, he/she will not, without the written consent of the Company, use or disclose any Confidential Information of the Company that is not a matter of common knowledge in the Company's business, trade, industry, or otherwise publicly available.

(c) Return of Confidential Information. It is understood and agreed by Employee that upon leaving the employ of the Company for any reason, Employee shall return all Confidential Information and other property of the Company to the Company at the time of termination of the employment relationship.

(d) Covenant Not To Compete. The parties acknowledge that in the course of its business, the Company develops and maintains personal and confidential relationships between the Company and its customers. The parties further acknowledge that the Company's customers and the relationship and goodwill with these customers are among the Company's most valuable assets.

The parties acknowledge that during the course of employment with the Company, Employee will develop an intimate knowledge of the Company's business and also will develop significant relationships with the Company's customers.

The parties further acknowledge that such intimate knowledge of the Company's business and significant relationships with the Company's customers should not be used to benefit any of the Company's competitors.

The parties agree that the Company will suffer significant and irreparable damage if Employee leaves the employment of the Company and goes to work for a competitor of the Company in the sale of products and/or services of the same or similar kind as those sold or provided by the Company.

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or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him/her during the course of his/her employment with the Company.

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

(i) Solicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(ii) Solicit or call on, either directly or indirectly, any business or entity that had been a customer of the Company within fifteen (15) months prior to the termination of Employee's employment with the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

(iii) Solicit or call on, either directly or indirectly, any business or entity with which Employee had contact on behalf of the Company within fifteen (15) months prior to the termination of Employee's employment but which did not become a customer of the Company for the purpose of selling any products or services sold by the Company or any products or service similar to those sold by the Company;

(iv) Employ or attempt to employ or solicit any employee of the Company for any employment competitive with the Company, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of the Company to leave the Company's employ for the purpose of engaging in any competitive business activity.

In the event of a violation by Employee of any one or more of the covenants contained in paragraph 9(d), it is agreed that the term of each such covenant violated shall be automatically extended for a period of twelve (12) months from the date of the last violation.

It is understood by and between Employee and the Company that the foregoing restrictive covenants set forth in paragraph 9(d) are essential

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elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(e) **Protectable Interests.** Employee acknowledges and agrees that the restrictive covenants set forth in paragraphs 9 (a), (b), (c), and (d) of this Agreement are necessary for the protection of the goodwill of the Company and other legitimate business interests of the Company. Employee further acknowledges and agrees that the restrictions contained in this Agreement are reasonably limited with respect to time, customer scope, and the scope of activities restrained; are not unduly harsh and oppressive so as to deprive Employee of an opportunity to earn a living after termination of employment with the Company; and are supported by valuable consideration.

(f) **Remedies and Enforcement.** Employee acknowledges and agrees that a breach of the provisions in paragraphs 9 (a), (b), (c), and/or (d) of this Agreement by Employee will cause serious and irreparable damage to the Company that may be difficult to quantify and for which monetary damages alone will not be adequate. Accordingly, Employee agrees that if the Company should bring an action to enforce its rights under paragraphs 9 (a), (b), (c) or (d) of this Agreement, the Company shall be entitled to (a) temporary and/or permanent injunctive relief without the need for posting a bond, (b) money damages caused by the breach, and (c) reasonable attorney's fees incurred by the Company in bringing and prosecuting any action for breach. Further, Employee waives the defense in any judicial proceeding that there is an adequate remedy at law for any such breach. Nothing in this Agreement shall be construed to prohibit the Company from pursuing any other legal or equitable remedy.

10. General Provisions

(a) **Severability.** If any term, covenant, or condition of this Agreement or the application thereof to any person or circumstance shall be declared invalid or unenforceable, the remainder of this Agreement and the application of any term or provision to persons or circumstances other than those as to

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[Signature]

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which it is held invalid or unenforceable shall not be affected thereby, and all other terms shall be valid and enforceable to the fullest extent permitted by the law.

(b) **Assignment.** No assignment of this Agreement or the rights and obligations hereunder shall be valid without the specific written consent of both parties hereto.

(c) **Governing Law.** This Agreement has been executed and delivered in, and shall be interpreted, construed, and enforced pursuant to and in accordance with the laws of the state of South Carolina.

(d) **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) **Amendments and Agreement Execution.** This Agreement and amendments thereto shall be in writing and signed by both parties.

(f) **Notices.** Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be deemed effectively given when personally delivered or mailed by prepaid certified mail, return receipt requested, addressed to Employee at his/her last known address, or to the Company at Post Office Box 25061, Greenville, South Carolina 29616. Further, Employee shall at all times keep the Company notified of his/her home address and home telephone number.

(g) **Waiver of Breach.** The Company's waiver of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof. No waiver shall be valid unless it is in writing and signed by the President of the Company.

(h) **Entire Agreement.** This constitutes the entire Agreement between the parties. The Company and Employee shall be entitled to no benefits other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless

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incorporated herein by amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in this Agreement and no others.

IN WITNESS WHEREOF, the parties execute this Agreement this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

EMPLOYEE AFFIRMS THAT HE/SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND THAT HE/SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS AND THAT HE/SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME. EMPLOYEE FURTHER AFFIRMS THAT HE/SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND THAT HE/SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

WITNESS:

Darrell Keith Haynes

Henry D. Kile IV

Darrell Keith Haynes

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SCHEDULE A TO EMPLOYMENT AGREEMENT

The Geographical territory assigned to Darrell Keith Haynes pursuant to the Employment Agreement between Chemgard, Inc. and Darrell Keith Haynes shall be as follows: the following counties in Georgia: Carroll, Heard, Troup, Coweta, Fayette, Pike, Meriwether, Lamar, Monroe, Upson, Talbot, Harris, Muscogee, Chattahoochee, Marion, Taylor, Crawford, Bibb, Twiggs, Houston, Macon, Schley, Steward, Webster, Sumter, and Peach, and the following counties in Alabama: Talladega, Clay, Randolph, Coosa, Elmore, Bullock, Russell, Tallapousa, Chambers, Lee, Montgomery, and Macon.

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SCHEDULE B TO EMPLOYMENT AGREEMENT

Compensation Pursuant To Employment Agreement
Between Chemgard, Inc. and
Darrell Keith Haynes dated SEPTEMBER 15, 2000.

Compensation paid by the Company to Employee during the original term and any extension of this Agreement shall be that specified below:

(a) For the first three years (36 months) of this Agreement and any extensions, or for the duration of the Agreement and any extensions if such duration is less than 36 months, the Company agrees to pay Employee a salary of five thousand five hundred eighty-three dollars and thirty-four cents (\$5,583.34) per month, less commissions paid as described in subparagraphs (b) through (g) of this schedule, and less submitted and reasonable expenses of Employee for the periods that are directly connected with his/her employment by the Company.

(b) Beginning October 1, 2000, Employee shall earn a commission each month based on equipment and chemical sales and based on services rendered during the prior month to HOUSE ACCOUNTS (accounts turned over to him/her by the Company) at the rates as specified in paragraphs (c), (d), (e), (f) and (g) below.

(c) FOR NEW BUSINESS GENERATED SOLELY BY EMPLOYEE (hereinafter New Business), the commission shall be equal to forty percent (40%) of the net profit to the Company on the SALES OF WATER TREATMENT CHEMICALS. Net profit is defined as the gross sales price less the cost to the Company of the water treatment chemicals sold (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

In the event the Employee's geographic area is modified by the Company to exclude customers for whom the Employee has solely generated New Business,

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the Employee will continue to receive a commission on the SALES OF WATER TREATMENT CHEMICALS to that customer in an amount to be determined by the Company for the duration of this Agreement unless a change is mutually agreed upon by the Company and Employee.

(d) On all SALES OF EQUIPMENT that are considered New Business, the Company agrees to pay to Employee a commission equal to twenty percent (20%) of the net profit to the Company. The net profit shall be determined by the gross sales price of the equipment less the cost to the Company of the equipment (including overhead as defined in cost sheets for pricing as developed by the Company from time to time), freight costs, a pro rata share of Employee's expenses as specified in subparagraph (h) below, and all federal and state sales and excise taxes applicable to said sale.

(e) For all BOILER CLEANING JOBS that are considered New Business, the Company agrees to pay to Employee a commission equal to the net profit on each such job. For the purposes of this subparagraph, net profit is defined as the gross sales price charged by the Company for said jobs less twenty percent (20%) of the said gross sales price, a pro rata share of Employee's expenses as specified in subparagraph (h) below, the cost of the chemicals (including drums and overhead as defined in cost sheets for pricing as developed by the Company from time to time), labor and transportation involved in performing the work (except for labor performed by Employee), the direct cost and/or amortized portion of the cost of all equipment used or consumed in performing the job, and all federal and state sales and excise taxes applicable to said job.

(f) For TOTAL SERVICE CONTRACTS (where the customer pays a fixed amount per period for service and chemicals) that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit. For purposes of this subparagraph, net profit shall mean the gross price paid by the customer for a period for which the payment is made, less cost of treatment chemicals delivered to the customer during the particular period, cost of drums used in fulfilling the contract, overhead

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costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, all federal and state sales and excise taxes applicable to said payment, and the cost of any equipment supplied under said service contract. Any deficit commission for total service contracts shall be offset against commissions and salary earned under subparagraphs (a), (b), (c), (d) and (e) above and (g) below or, in the company's discretion, carried forward to the next pay period.

(g) On SALES OF CLEANING CHEMICALS AND FORMULATIONS that are considered New Business, the Company agrees to pay to Employee a commission equal to forty percent (40%) of the net profit to the Company. For purposes of this subparagraph, net profit is defined as the gross sales price less the cost to the Company of the cleaning chemicals and formulations sold, costs of drums, overhead costs (as defined in cost sheets for pricing as developed by the Company from time to time), a pro rata share of Employee's expenses as specified in subparagraph (h) below, freight costs, and all federal and state sales and excise taxes applicable to said sales.

(h) For purposes of calculating Employee's commissions pursuant to subparagraphs (a) through (g) above, the term pro rata shall mean the percentage of Employee's expenses for the period determined by the ratio of gross sales and/or services made under each such subparagraph to the total sales and/or services made pursuant to subparagraphs (a) through (g) for the same period.

(i) In determining Employee's gross commission for any period, gross commission under subparagraphs (a) through (g) shall be totaled and Employee's submitted and reasonable expenses for the period deducted therefrom to arrive at the net commission due. Net commission payable to Employee hereunder shall be net commission as defined in this subparagraph less any commissions previously paid to Employee on sales and/or services for which the customer has not paid the Company and for which sixty (60) days has passed after the date of the invoice to the particular customer, provided, however, that should

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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

IN WITNESS WHEREOF, the parties execute this Schedule this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.

[Signature]

By:

[Signature]
William C. Smith, President

WITNESS:

Henry A. Kilo Jr

Darrell Keith Haynes
Darrell Keith Haynes

DKH [Signature]

Exhibit B

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Chemgard, Inc.	)	
	)	
Plaintiff,	)	
v.	)	Case No. 15-CP-23-03546
	)	
Darrell Keith Haynes and	)	
Chem-Tek, LLC,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on July 6, 2015, before The Honorable Perry H. Gravely in Courtroom 6 of the Greenville County Courthouse, 305 East North Street, Greenville, South Carolina; attended by counsel as follows:

APPEARANCES:

W. Andrew Arnold, Esq.
712 East Washington Street
Greenville, South Carolina 296021
Appearing for Plaintiff

Josh Smith, Esq.
James Cassidy, Esq.
ROE CASSIDY COATES & PRICE
P O Box 10529
Greenville, South Carolina 29603
Appearing for Defendants

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC

Case No. 15-CP-23-03546

Hearing of July 6, 2015

Before The Honorable Perry H. Gravely

1 through this stuff. I think that they may
2 have established *prima facie*, but I'm going
3 to look at it and see.

4 I guess what we need now is to hear
5 the Motion for injunction. Like I said, let
6 me look at this. It looks like -- and I will
7 also -- since this is kinda of an emergency
8 hearing, I will be happy to review anything
9 else that anybody wants to submit to me this
10 afternoon. Looks like tomorrow afternoon,
11 that we don't have a very busy afternoon, so
12 I'll be able to make a ruling and -- you
13 know, let you all know if anybody needs to
14 issue any Orders tomorrow.

15 JOSH SMITH: Okay.

16 THE COURT: If there is anything
17 that you want to send to me, try to send it
18 to me by lunchtime tomorrow.

19 Now let's get to Mr. Arnold's
20 Motion.

21 ANDREW ARNOLD: Once again, may it
22 please the court, this is the plaintiff's
23 Motion for a preliminary injunction.

24 Chemgard is a family-owned business.
25 They sell water treatments chemicals for a

Chemgard, Inc. v. Darrell Keith Haynes and Chem-Tek, LLC

Case No. 15-CP-23-03546

Hearing of July 6, 2015

Before The Honorable Perry H. Gravely

1 variety of applications. They are -- they
2 have revenues of about \$1.6 Million
3 dollars. The Georgia territory where Mr.
4 Haynes worked represents thirty-one percent
5 of those sales. So the customers that he was
6 calling upon represent thirty-one percent of
7 those sales.

8 As the contract states and, again,
9 this was attached to the original Complaint,
10 the contract provided that he would be given
11 house accounts. He was given about two
12 hundred grand in house accounts before he
13 started. He signed this agreement at the
14 inception of his employment.

15 On May 10th of this year, Keith
16 Haynes sent an e-mail -- that was a Sunday
17 morning, at 8:00 a.m., 8:50 a.m. -- he sent
18 an e-mail resigning his employment effective
19 immediately.

20 Now, to contradict -- the Agreement
21 had a thirty-day notice provision. He didn't
22 give us thirty days notice. I think it makes
23 sense that he didn't give us thirty days
24 notice because that was not consistent with
25 his plan of action. His plan of action was

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
	)	
CHEMGARD, INC.,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF'S MOTION TO COMPEL
v.	)	AND MOTION FOR SANCTIONS
	)	
DARRELL KEITH HAYNES,	)	
CHEM-TEK, LLC, AND ALBERT BELL,	)	
	)	
Defendants.	)	

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Plaintiff Chemgard, Inc. hereby moves this Court to compel the Defendants to appear for their depositions, to produce phone records agreed upon to be produced, to provide full and complete responses to discovery, and to produce their hard drives for imaging and inspection. In addition, Plaintiff moves for an order awarding costs and fees associated with filing this motion, as well as other sanctions under Rule 37(d). Plaintiff makes this motion in order to protect the right to discovery as provided by the South Carolina Rules of Civil Procedure and to deter such egregious discovery abuses as present in this case.

I. Defendants Have Refused to Appear for Depositions.

First, Defendants have repeatedly refused to appear for depositions, and their legal counsel, William Foster, has continued to delay the depositions in an effort to shield Defendants from being deposed. As the Affidavit of W. Andrew Arnold (filed contemporaneously with this Motion) and the emails attached to that affidavit demonstrate, Defendants' counsel has repeatedly indicated a willingness to cooperate in scheduling, even while his actions after the fact clearly demonstrate he had no intentions of allowing his clients to be deposed. (See Exhibits

A-I to Arnold Affidavit). Plaintiff seeks an order compelling Defendants to attend a deposition at a time agreeable to Plaintiff.

II. Defendants Have Failed to Honor Their Agreement in Regards to Redacted Phone Records.

In addition, Plaintiff subpoenaed updated phone records for Defendant Haynes from Haynes' cell phone provider, a subpoena which Defendants moved to quash. At a hearing held on July 9, 2016 in front of Judge Perry Gravely, Mr. Foster acknowledged on the record that he and Plaintiff's counsel had agreed that Defendants would produce the phone records with some narrow redactions (calls to family and to legal counsel only). However, since this hearing, Defendants' counsel has refused to produce the redacted phone records. Repeated attempts to get Defendants' counsel to honor his word have not been successful. Plaintiff seeks an order compelling Defendant Haynes to produce his phone records (redacted or not).

III. Defendants Have Failed to Fully Answer Discovery Requests and Have Withheld Documents in Violation of the Rules.

Thirdly, Defendants failed to provide full and complete responses in their discovery responses and have not provided supplementation where clearly supplementation is required. (Exhibits 2 and 3). Plaintiff seeks an order compelling Defendant Haynes to respond fully to Interrogatories 7 and 8, 13, 14 and 15, to respond fully to Requests to Produce numbers 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19 and 22, and to supplement all others which require supplementation. Moreover, Plaintiff seeks an order compelling Defendant Chem-Tek to respond fully to interrogatories 7 and 8, to respond fully to requests to produce numbers 7, 8, 9, 10, 11, 12, 13, and 15, and to supplement all others which require supplementation. Also, because Defendants clearly did not produce all responsive emails and sales orders—as indicated by the multiple emails from Haynes that were produced under subpoena from Chemgard customers but

not from Haynes—Plaintiff seeks an order requiring Defendants to produce their hard drives for imaging and search with terms likely to discovery all discoverable emails and documents maintained in an electronic format on any and all hard drives used by Defendants. (Exhibit 1.)

Finally, Plaintiff seeks an order awarding fees and costs associated with the filing of this motion and the accompanying memorandum, and such other sanctions as necessary to effectuate and protect the right to discovery as provided by the South Carolina Rules of Civil Procedure and to deter similar abuses in the future. Prior to making this Motion, Plaintiff made a good faith effort to resolve this matter through emails and phone calls between counsel. Plaintiff asserts that although a good faith effort to resolve this matter has been made, Defendants have refused to comply with the South Carolina Rules of Civil Procedure, thereby rendering this Court's intervention an unfortunate necessity.

Respectfully submitted,

Law Office Of W. Andrew Arnold, P.C.

s/ W. Andrew Arnold
W. Andrew Arnold
SC Bar No. 65311
712 E. Washington Street
Greenville, SC 29601
864.242.4800 864.242.4885 fax
aarnold@aalawfirm.com
ATTORNEY FOR PLAINTIFF

August 23, 2016

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
CHEMGARD, INC.,	)	
Plaintiff,	)	
v.	)	AFFIDAVIT OF W. ANDREW
	)	ARNOLD, COUNSEL FOR
DARRELL KEITH HAYNES,	)	PLAINTIFF
CHEM-TEK, LLC, AND ALBERT BELL,	)	
Defendants.	)	

I, W. Andrew Arnold, testify that I am an adult over the age of eighteen (18) year of age and that the following is true and accurate information:

1. I, along with Jeremy Summerlin, represent Plaintiff Chemgard, Inc. in the above-captioned litigation.

2. Defendants have filed a motion for summary judgment and are attempting to expedite the hearing of that matter in one last ditch effort to avoid appearing for depositions, which were originally scheduled for April 5, 2016. (Exhibit A.)

3. By way of background, after the mediation of this matter on March 21, 2016, Defendants' counsel Jim Cassidy advised Plaintiff's counsel that he believed a conflict of interest existed between his clients and that Keith Haynes would need to obtain separate counsel.¹ (Exhibit B).

4. On May 5, 2016, Defendants' new counsel, Mr. William Foster, was asked to get deposition dates for late May or early June 2016. Mr. Foster indicated "[w]ill get you some dates." (Exhibit. C).

¹ There is no question that Mr. Cassidy was honest and sincere in his concerns, and honestly, counsel for Plaintiff concurred. However, Defendants were able to find replacement counsel who viewed the matter differently.

5. After waiting a month without a word in follow up from Mr. Foster, Plaintiff's counsel emailed Mr. Foster proposing additional dates for taking depositions. (Exhibit D.) This June 7th email was ignored. After another week passed without a response, Plaintiff's counsel emailed Mr. Foster once again. (Exhibit D.) Mr. Foster gave a familiar reply: "Will get back to you ASAP." (Exhibit D.)

6. Several weeks passed with no response from Defendants' counsel. So, Plaintiff's counsel prepared two Notices of Deposition setting the depositions for August 4th and emailed them to Defendants' counsel on July 25, 2016. (Exhibit E.) Mr. Foster forwarded the email to his associate, asking her, "[H]ave we heard back from both of our guys[?]" (Exhibit E.) One of the Defendants was (apparently) not available on the 4th, so Plaintiff's counsel agreed to set the deposition for August 11th and sent two amended notices. (Exhibit E.)

7. On August 8, 2016, Plaintiff's counsel sent an email to Mr. Foster confirming the depositions. (Exhibit F.) At the end of that day, Mr. Foster indicted his clients would not appear on August 11, 2016 because Judge Gravely had yet to rule on Defendants' motion to vacate. (Exhibit F.) Notably, this motion had been filed nearly four months prior, and it was not until three days before the deposition was finally set that Mr. Foster first raised the argument that his motion would somehow interfere with the depositions.

8. Two days later, Judge Gravely denied Defendants' motion, and Defendants' counsel immediately filed a motion to reconsider (seeking a fourth "bite of the apple," to use Judge Gravely's expression). On August 11, Plaintiff's counsel emailed Mr. Foster to ask if his clients would attend a deposition before the end of the month. (Exhibit G.) His response evinced a familiar refrain: "We will certainly try."

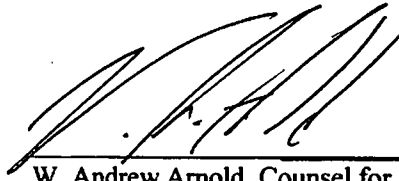
9. There was no further word from Mr. Foster until on August 16, when Plaintiff's counsel sought to schedule depositions or seek an agreement. (Exhibit H). After a text and two calls later (all initiated by Plaintiff's counsel), Mr. Foster stated he did not think depositions were necessary to resolve his motion for summary judgment, and despite indicating he would try to schedule before the end of the month, he made no effort to do any such thing. The call ended with a common refrain: "Let me check with my clients." However, he also added, "we will do everything we can to have our motion heard by Judge Verdin." Mr. Foster never provided dates for his clients depositions.

10. Prior to filing this motion, Plaintiff's's counsel reached out one more time having noticed depositions for August 26, 2016. On August 22, Mr. Foster indicated he would make his clients available, although they could not appear at the noticed deposition on August 26, 2016. He asked for proposed dates to reschedule the depositions. At present, Mr. Foster has yet to follow-up to for any of the multiple dates suggested by Plaintiff's counsel, which are less than a week from the date of this affidavit.

11. Finally, in reviewing documents produced by former customers of Plaintiff in response to subpoenas issued by Plaintiff and comparing those documents to Defendants' responses to Plaintiff's requests for production, it has been discovered that Defendant Haynes sent more emails to Chemgard customers than Defendants produced in his discovery responses; in essence, Defendants withheld unprivileged, relevant, and responsive documents in the face of Plaintiff's discovery requests. (Exhibit I). Such behavior indicates that Defendants cannot be trusted to comply with a court's order.

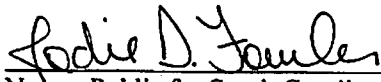
12. This affidavit is accurate and true to the best of my knowledge

Dated this 23rd day of August 2016.



W. Andrew Arnold, Counsel for Plaintiff

Sworn to before me this
23rd day of August, 2016



Notary Public for South Carolina

My Commission Expires: 8-12-24

EXHIBIT A

From: **Jeremy Summerlin** jsummerlin@aalawfirm.com
Subject: **Deposition Dates (Chemgard v. Haynes)**
Date: **February 26, 2016 at 10:19 AM**
To: **Josh Smith** jsmith@roecassidy.com
Cc: **Jim Cassidy** jcassidy@roecassidy.com, **W. Andrew Arnold** aarnold@aalawfirm.com, **Jodie Fowler** jfowler@aalawfirm.com

Josh:

Per our discussion yesterday, I've gathered together some dates that work with our clients' schedule and our schedule. If you'll run these by your guys, we'll try to get something set up. As I mentioned, we'd like to take Mr. Haynes' and Mr. Bell's depositions, and we can probably get them both done in one day (four hours each, perhaps). These dates would work for you to take our guys' depositions, too.

Dates: **March 23-25, 28, 30, 31, April 1, and 4-8.**

If none of these days work with your schedule and your clients' schedules, let me know and we'll get some more dates together a little further out.

Regards,

Jeremy R. Summerlin
Associate Attorney
Law Office of W. Andrew Arnold, P.C.
712 E. Washington Street
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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<image001.gif>

1052 North Church St.
Greenville, S.C. 29601
p 864 349 2600 f 864 349 0303

Roe Cassidy Coates & Price, P.A. | Greenville, SC Law Firm

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DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

IRS/CIRCULAR 230 NOTICE: Any statements regarding tax matters made herein, including any attachments, are not formal tax opinions by this firm, cannot be relied upon or used by any person to avoid tax penalties, and are not intended to be used or referred to in any marketing or promotional materials. Moreover, any tax advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties posed under the Internal Revenue Code.

From: W. Andrew Arnold [<mailto:aarnold@aallawfirm.com>]
Sent: Monday, March 14, 2016 10:13 AM
To: Josh Smith
Cc: Jeremy Summerlin; Jim Cassidy; Jodie Fowler
Subject: Re: Deposition Dates (Chemgard v. Haynes)

Have you been able to get deposition dates. We were looking at April 4-8.

Andy Arnold
Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 864-349-2600 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

Disclaimer under IRS Circular 230: Any statements regarding tax matters made herein, including any attachments, are not formal tax opinions by this firm, cannot be relied upon or used by any person to avoid tax penalties, and are not intended to be used or referred to in any marketing or promotional materials. Moreover, any tax advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties posed under the Internal Revenue Code.

From: W. Andrew Arnold [<mailto:aarnold@aallawfirm.com>]
Sent: Thursday, March 17, 2016 2:56 PM
To: Josh Smith
Cc: Jeremy Summerlin; Jim Cassidy; Jodie Fowler
Subject: Re: Deposition Dates (Chemgard v. Haynes)

Let's plan on taking Keith's first on the 5th. I will let you know if I think we can do Bell's also. That would be my preference.

Andy Arnold
Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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On Mar 15, 2016, at 11:15 AM, Josh Smith <JSmith@roecassidy.com> wrote:

Andy,

April 5th works best for us.

Joseph O. "Josh" Smith
email jsmith@roecassidy.com
direct 864-404-3140

<image001.gif>

1052 North Church St.
Greenville, S.C. 29601
p 864 349 2600 / 864 349 0303

Roe Cassidy Coates & Price, P.A. | Greenville, SC Law Firm

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From: Jeremy Summerlin [mailto:jsummerlin@aalawfirm.com]
Sent: Friday, February 26, 2016 10:19 AM
To: Josh Smith
Cc: Jim Cassidy; 'W. Andrew Arnold'; 'Jodie Fowler'
Subject: Deposition Dates (Chemgard v. Haynes)

Josh:

Per our discussion yesterday, I've gathered together some dates that work with our clients' schedule and our schedule. If you'll run these by your guys, we'll try to get something set up. As I mentioned, we'd like to take Mr. Haynes' and Mr. Bell's depositions, and we can probably get them both done in one day (four hours each, perhaps). These dates would work for you to take our guys' depositions, too.

Dates: March 23-25, 28, 30, 31, April 1, and 4-8.

If none of these days work with your schedule and your clients' schedules, let me know and we'll get some more dates together a little further out.

Regards,

ROA 000388

Jeremy R. Summerlin
Associate Attorney
Law Office of W. Andrew Arnold, P.C.
712 E. Washington Street
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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<Historical-Call-Detail-Explanation.pdf><Historical-text-messaging-detail-report-explanation.pdf>
<Incoming_Outgoing_7068882827_2015_11_25-05_59_24_983_Redacted.pdf>
<Text_Message_Detail_7068882827_2015_11_25-07_11_55_661_Redacted.pdf>

EXHIBIT B

From: W. Andrew Arnold aarnold@aalawfirm.com
Subject: Re: Deposition Dates (Chengard v. Haynes)
Date: March 21, 2016 at 5:03 PM
To: Jim Cassidy jcassidy@roecassidy.com
Cc: Josh Smith jsmith@roecassidy.com, W. Andrew Arnold aarnold@aalawfirm.com, Jeremy Summerlin jsummerlin@aalawfirm.com

Jim:

I understand that Keith will be retaining separate counsel and so his deposition on the 5th will not take place. Please confirm. And if my understanding is correct, I would like to do a consent stay so that clock will stop ticking.

Andy Arnold

Law Office of W. Andrew Arnold, P.C.

712 E. Washington St.

Greenville, SC 29601

864.242.4800

864.242.4885 (fax)

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On Mar 17, 2016, at 3:58 PM, Jim Cassidy <jcassidy@roecassidy.com> wrote:

Andy

That will work. I have marked the whole day off.

JHC

James H. Cassidy, Esquire

864/349-2602 (Direct Dial)

864/349-0303 (Fax)

jcassidy@roecassidy.com

<image001.gif>

1052 North Church Street Greenville SC 29601

Post Office Box 10529 Greenville SC 29603

p 864 349 2600 f 864 349 0303

www.roecassidy.com

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EXHIBIT C

From: Bill Foster bill.foster@nelsonmullins.com
Subject: RE: Continuance
Date: May 5, 2016 at 9:50 AM
To: W. Andrew Arnold aarnold@aallawfirm.com

That's a good idea and I am confident we can make that a consent request for continuance.

Will get you some dates.

How is arbitration coming along?

From: W. Andrew Arnold [mailto:aarnold@aallawfirm.com]
Sent: Thursday, May 05, 2016 9:49 AM
To: Bill Foster
Subject: Re: Continuance

Wanted to follow-up. Do you believe we should request a continuance to ensure we don't end up on the trial docket at the end of the month? I canceled Keith deposition to allow him to seek out other counsel. I thought it might be easier for you to request since you are just in the case, but if you would prefer me to do it, just let me know.

In the meantime, could you get some dates for your client's deposition last week in May and first week in June?

Andy Arnold

Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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On May 4, 2016, at 7:56 AM, W. Andrew Arnold <aarnold@aallawfirm.com> wrote:

Bill, I would agree to a 30/60 day continuance. :) We've gotten one. Your request would be granted. I delayed when Jim sent Keith looking for another lawyer so I can make one but would prefer the other way. Thoughts?

Andy Arnold
Sent from my iPhone

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EXHIBIT D

From: Bill Foster bill.foster@nelsonmullins.com
Subject: RE: Deposition dates for Haynes and Bell (Chemgard v. Haynes et al)
Date: June 14, 2016 at 3:47 PM
To: Jeremy Summerlin jsummerlin@aalawfirm.com, Sam Outten sam.outten@nelsonmullins.com
Cc: W. Andrew Arnold aarnold@aalawfirm.com

Apologies. Will get back to you ASAP.

From: Jeremy Summerlin [mailto:jsummerlin@aalawfirm.com]
Sent: Tuesday, June 14, 2016 3:46 PM
To: Bill Foster; Sam Outten
Cc: 'W. Andrew Arnold'
Subject: RE: Deposition dates for Haynes and Bell (Chemgard v. Haynes et al)

Bill:

What is your and your clients' availability on June 27, June 30, or July 1 for depositions?

Regards,

Jeremy R. Summerlin
Associate Attorney
Law Office of W. Andrew Arnold, P.C.
712 E. Washington Street
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

From: Jeremy Summerlin [mailto:jsummerlin@aalawfirm.com]
Sent: Tuesday, June 7, 2016 10:51 AM
To: 'Bill Foster' <bill.foster@nelsonmullins.com>; 'sam.outten@nelsonmullins.com' <sam.outten@nelsonmullins.com>
Cc: 'W. Andrew Arnold' <aarnold@aalawfirm.com>
Subject: Deposition dates for Haynes and Bell (Chemgard v. Haynes et al)

Bill:

We plan to take the depositions of Keith Haynes and Al Bell, and we believe that we can take both depositions in the same day. We're looking at some dates in the last week of June (June 27 to July 1). Would you check with your clients and see what their availability is during that week? And let us know if you and Sam are available that week as well. Thank you.

Regards,

Jeremy R. Summerlin
Associate Attorney
Law Office of W. Andrew Arnold, P.C.
712 E. Washington Street
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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EXHIBIT E

From: Nicole Cuadrado Andino nicole.cuadrado@nelsonmullins.com
Subject: RE: Depositions
Date: July 25, 2016 at 11:27 AM
To: W. Andrew Arnold aaarnold@aalawfirm.com
Cc: Laurie Jerome laurie.jerome@nelsonmullins.com, Bill Foster bill.foster@nelsonmullins.com

Andy,

I spoke to both clients on Friday. Keith is not available on August 4th but they are both available on August 11th.

Does August 11th work for you?

Thank you,
Nicole

From: Bill Foster
Sent: Monday, July 25, 2016 11:20 AM
To: W. Andrew Arnold
Cc: Nicole Cuadrado Andino; Laurie Jerome
Subject: RE: Depositions

Nicole, have we heard back from both our guys? Let's confirm for Andy.

From: W. Andrew Arnold [<mailto:aaarnold@aalawfirm.com>]
Sent: Monday, July 25, 2016 11:16 AM
To: Bill Foster
Subject: Re: Depositions

On Jul 18, 2016, at 11:00 AM, W. Andrew Arnold <aaarnold@aalawfirm.com> wrote:

Are the dates included on the notice workable?

Andy Arnold
Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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EXHIBIT F

From: Bill Foster [<mailto:bill.foster@nelsonmullins.com>]
Sent: Monday, August 8, 2016 4:06 PM
To: Jeremy Summerlin <jsummerlin@aafirm.com>; Nicole Cuadrado Andino <nicole.cuadrado@nelsonmullins.com>
Cc: 'W. Andrew Arnold' <aarnold@aafirm.com>; Sam Outten <sam.outten@nelsonmullins.com>
Subject: RE: Depositions of Haynes and Bell (Chemgard v. Haynes et al)

Jeremy, we will need to postpone these depositions pending a ruling from Judge Gravely on Defendants' motion to dissolve.

The nature of this case and the issues presented will obviously be dramatically impacted by this ruling. As such, we suggest it makes sense for both sides to wait until the Court has ruled so that we don't engage in issues that could become moot. I think we are all hopeful for a ruling very soon and we should be able to quickly reschedule the depositions, if necessary, once that occurs.

Best regards,
<image001.gif>

William H. Foster
Attorney at Law
bill.foster@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Poinsett Plaza, Suite 900
104 South Main Street, Greenville, SC 29601
Tel: 864.373.2222
Mobile: 864.915.9989
Fax: 864.373.2383
www.nelsonmullins.com
([View Bio](#))

From: Jeremy Summerlin [<mailto:jsummerlin@aafirm.com>]
Sent: Monday, August 08, 2016 9:20 AM
To: Nicole Cuadrado Andino
Cc: 'W. Andrew Arnold'; Bill Foster
Subject: RE: Depositions of Haynes and Bell (Chemgard v. Haynes et al)

Nicole:

Confirming Haynes's deposition for this Thursday, August 11th, at 9:00am here at our office and Bell's right after, as agreed to below. Thanks.

Regards,

Jeremy R. Summerlin
Associate Attorney
Law Office of W. Andrew Arnold, P.C.

EXHIBIT G

From: Bill Foster bill.foster@nelsonmullins.com
Subject: RE: Depositions of Haynes and Bell (Chemgard v. Haynes et al)
Date: August 11, 2016 at 8:07 PM
To: W. Andrew Arnold aarnold@aalawfirm.com
Cc: Jeremy Summerlin jsummerlin@aalawfirm.com

We will certainly try. Let me get with them and see what dates work.

From: W. Andrew Arnold [<mailto:aarnold@aalawfirm.com>]
Sent: Thursday, August 11, 2016 6:38 PM
To: Bill Foster
Cc: Jeremy Summerlin
Subject: Re: Depositions of Haynes and Bell (Chemgard v. Haynes et al)

Will yours clients attend deposition before end of the month?

Andy Arnold
Sent from my iPhone

On Aug 11, 2016, at 6:19 PM, Bill Foster <bill.foster@nelsonmullins.com> wrote:

Attached please find a courtesy copy of Defendants' Motion to Reconsider, filed this afternoon.

Best regards,
<image001.gif>

William H. Foster
Attorney at Law
bill.foster@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Poinsett Plaza, Suite 900
104 South Main Street, Greenville, SC 29601
Tel: 864.373.2222
Mobile: 864.915.9989
Fax: 864.373.2383
www.nelsonmullins.com
(View Bio)

From: Gravely, Perry H. [<mailto:pgravelyj@sccourts.org>]
Sent: Wednesday, August 10, 2016 3:53 PM
To: W. Andrew Arnold; Gravely, Perry H. Law Clerk (Michelle Jones)
Cc: Bill Foster; Jeremy Summerlin; Sam Outten
Subject: RE: Depositions of Haynes and Bell (Chemgard v. Haynes et al)

I have issued my order denying the Motion to Vacate but have not issued the order on Sanctions at this point. The order was efiled this afternoon. Perry

From: W. Andrew Arnold [<mailto:aarnold@aalawfirm.com>]
Sent: Tuesday, August 09, 2016 10:43 AM
To: Gravely, Perry H. Law Clerk (Michelle Jones); Gravely, Perry H.
Cc: Bill Foster; Jeremy Summerlin; Sam Outten; W. Andrew Arnold

EXHIBIT H

From: W. Andrew Arnold aarnold@aalawfirm.com
Subject: Re: Motion "MSUMJM-Defs/Darrell Keith Haynes' Motion/Summary Judgment" for Case "2015CP2303546- Chemgard Inc vs. Darrell Keith Haynes , defendant, et al" was added to a Motions Roster for 9/1/2016 at 2:00 PM
Date: August 16, 2016 at 10:00 AM
To: Bill Foster bill.foster@nelsonmullins.com
Cc: W. Andrew Arnold aarnold@aalawfirm.com, Jeremy Summerlin jsummerlin@aalawfirm.com

Bill:

It's obvious you do not want your clients to sit for a deposition. I certainly understand why. We have sent notices by mail (and I will have Jodie forward by email), but if you will represent that you will not submit affidavits in support of your motion and in opposition to our motion, then I will agree to await to take depositions after summary judgment. I think there will still be the issue of damages if we prevail even if we obtain permanent injunctive relief. I would like to go ahead and schedule those for two weeks after summary judgment.

However, we intend to submit affidavits in support of our motion, which I suppose are also in opposition to yours. I don't want to deal with questions of fact if we are going to pursue this route. So if we are going to have deal with additional facts on SJ, we will need to take depositions and I will seek to have your motion delayed under Rule 56 until those depositions can take place if necessary. Your call. Happy to discuss.

Andy Arnold

Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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On Aug 16, 2016, at 9:32 AM, Bill Foster <bill.foster@nelsonmullins.com> wrote:

Steve, thanks again for all of your leg work on this.

Either of those dates work, but if you would be so kind, it'd be great if you could ask Judge Verdin if she wouldn't mind setting us for any time in the afternoon on 8/29 or 8/30.

It never hurts to ask!

From: Lopez, Stephen [<mailto:SLopez@greenvillecounty.org>]
Sent: Tuesday, August 16, 2016 8:59 AM

EXHIBIT I

Donald J. Allen

From: Keith Haynes <keith.haynes114@gmail.com>
Sent: Monday, May 18, 2015 4:52 PM
To: Donald J. Allen
Subject: Water Treatment Quote
Attachments: Piedmont Fayette Quote.docx

Don,
Attached is my proposal for the water treatment service at all of the Piedmont Hospitals.

Keith Haynes



408 East North Street • Greenville, SC 29601 • 864-272-0565

May 18, 2015

Piedmont Fayette Hospital
1255 HWY 54 West
Fayetteville, Ga. 30214
Attn: Mr. Don Allen

Dear Don,

Here is my proposal for the water treatment service for all of the Piedmont Hospitals. These prices will cover all of the chemicals need to treat all of the systems at each facility. All of the freight charges on chemical shipments are also covered. Chemtek will also provide chemical containment tanks where they are needed.

- 1) Piedmont Hospital (Atlanta) - \$50,112.00 per year (\$4,176.00 per month)
- 2) Piedmont Fayette Hospital - \$15,540 per year (\$1,295.00 per month)
PSB Building - \$3,168.00 per year (\$264.00 per month)
- 3) Piedmont Henry Hospital - \$20,424.00 per year (\$1,702.00 per month)
- 4) Piedmont Newnan Hospital - \$11,832.00 per year (\$986.00 per month)

Thank you for the opportunity to quote on you water treatment service. If I can be of further assistance please do not hesitate to call me.

Sincerely,

Keith Haynes
Regional Manager
CHEMTEK
706-888-2827

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

CHEMTEK, LLC

Date	Invoice #
1/1/2016	21029

P.O. No.	Terms	Project
2000356019	Net 30	Piedmont Fayette Hospital...

Phone #	E-mail
864-272-0565	delella@dynatruck-accounting.com

Date	Invoice #
1/1/2016	21032

408 E North Street
Greenville, SC 29601

Bill To
Piedmont Hospital-Atlanta 1968 Peachtree Road, NW Atlanta, GA 30309

P.O. No.	Terms	Project
2000355995	Net 30	Piedmont Atlanta Hospital

[illegible]

Phone #	E-mail
864-272-0565	dredka@greyrock-accounting.com

Invoice

CHEMTEK, LLC

408 E North Street
Greenville, SC 29601

Date	Invoice #
1/1/2016	21030

Bill To
Piedmont Fayette Hospital 1255 HWY 54 West Fayetteville, GA 30214

P.O. No.	Terms	Project
2000356020	Net 30	Piedmont Fayette Hospital ...

1	Monthly Service Fee-January 2015	264.00	264.00
		Total	\$264.00

Phone #	E-mail
864-272-0565	dcellars@grayrock-accounting.com

CHEMTEK408 E North Street
Greenville, SC**Invoice**

Date	Invoice #
2/1/2016	21046

Bill To
Piedmont Fayette Hospital 1255 HWY 54 West Fayetteville, GA 30214

P.O. No.	Terms	Project
2000356019	Net 30	Piedmont Fayette Hospital...

Quantity	Description	Unit Price	Total
1	Monthly Service Fee	1,295.00	1,295.00
Total			\$1,295.00

Phone #	E-mail
864-660-8159	dsc@chemtek-accounting.com

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ROA 000412

CHEMTEK408 E North Street
Greenville, SC**Invoice**

Date	Invoice #
2/1/2016	21047

Bill To
Piedmont Fayette Hospital 1255 HWY 54 West Fayetteville, GA 30214

P.O. No.	Terms	Project
2000156020	Net 30	Piedmont Fayette Hospital ...

Quantity	Description	Unit Price	Amount
1	Monthly Service Fee	264.00	264.00
Total			\$264.00

Phone #	E-mail
864-660-8159	daelan@chemtek-accounting.com

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ROA 000413

Brittany Austin

From: Brittany Austin
Sent: Wednesday, September 16, 2015 11:55 AM
To: Wendell T. Ballard; 'Al Bell'; 'keith.haynes@chemteksc.com'
Subject: RE: Chemtek

Al,
 I spoke with Tommy this morning, and we've decided to create separate POs for each facility. With that said, below are the individual PO numbers that need to be referenced on each invoice going forward.

Location	PO Number
Atlanta	2000355995
Fayette	2000356019
Fayette Professional Building	2000356020
Henry	2000356021
Newnan	2000356022

Please let me know if you have any questions, or if you need anything else.

Brittany Austin | Senior Strategic Sourcing Coordinator | Supply Chain
 1968 Peachtree Road NW | Atlanta, GA 30318
 O: 404.605.5417 F: 404.603.2774 : brittany.austin@piedmont.org



"Be kinder than necessary, for everyone you meet is fighting some kind of battle."

From: Wendell T. Ballard
Sent: Tuesday, September 15, 2015 5:02 PM
To: 'Al Bell'; 'keith.haynes@chemteksc.com'
Cc: Brittany Austin
Subject: FW: Chemtek

ROA 000414

Wendell T. Ballard

From: Keith Haynes <keith.haynes114@gmail.com>
Sent: Thursday, July 02, 2015 8:02 AM
To: Wendell T. Ballard
Subject: Re: Communication

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DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Thanks

On Jul 2, 2015 7:02 AM, "Wendell T. Ballard" <Wendell.Ballard@piedmont.org> wrote:

Keith,

I sent your contact information to the rep at our supply chain. In our meeting with them yesterday they stated they have been trying to get in touch with you. Be on the lookout for them to contact you to firm up contract details.

Thank you,

Tommy

Tommy Ballard | Plant Engineering | Operations Manager
1968 Peachtree Road NE | Atlanta, GA 30309
O: [404.605.2097](tel:404.605.2097) | M: [404-805-0141](tel:404-805-0141) | E: Wendell.Ballard@piedmont.org.



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This original email was sent to the internet for delivery at 06:30:07

Wendell T. Ballard

From: Keith Haynes <khaynes@chemgard.com>
Sent: Monday, February 02, 2015 6:38 PM
To: Wendell T. Ballard
Subject: Contract Pricing

Tommy,
There will be no changes in my pricing for the annual water treatment service for the next year.
If you need any additional information, please let me know.
Thanks,
Keith

Wendell T. Ballard

From: Keith Haynes <khaynes@chemgard.com>
Sent: Tuesday, February 17, 2015 3:54 PM
To: Wendell T. Ballard
Cc: Gail Young
Subject: Quote on Laterals for Water Softener
Attachments: Piedmont Laterals.doc

Tommy,
Attached is the quote for the laterals that we need for the water softener.
If you have any questions, please call me.
Thank You,
Keith Haynes
Chemgard, Inc.

1062 S. Batesville Road
Greer, SC 29650
Phone (864) 879-0884 Fax (864) 848-9625

CHEA

TO: Piedmont Hospital 1968 Peachtree Road NW Atlanta, Ga. 30309 Attn: Mr. Kevin Morriss		DATE: 1/22/15	
PRICE FIRM		PAGE NO. 1	
DELIVERY TIME	SHIP VIA	F.O.B.	TERMS
30 DAYS	2 to 3 Weeks	UPS	ORIGIN
NET 30 DAYS			
LINE ITEM NO.	QUANTITY	UNIT	DESCRIPTION
1	3	Each	190768 Sensor. Contacting Conductivity. Boiler. No Junction Box (4 Wire).
			UNIT PRICE \$314.00
			EXTENDED PRICE \$942.00
2	3	Each	102449 Worcester Series 36 Motorized Ball Valve. Boiler. 3/4", 0-300 psi. 120V
			UNIT PRICE \$1,163.00
			EXTENDED PRICE \$3,489.00
TOTAL			\$4,431.00

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



408 East North Street • Greenville, SC 29601 • 864-272-0565

This contract written and entered into this 1st day of September, 2015 by and between ChemTek, LLC located in Greenville, SC referred to hereafter as Seller and Piedmont Healthcare, Inc. located in Atlanta, GA referred to hereafter as Buyer.

Now the two parties agree as follows:

1. Purchase: Seller agrees to sell and Buyer agrees to buy for 3 years all water treatment chemicals and services on a monthly basis in the amounts as follows:
 - a. Piedmont Hospital (Atlanta) - \$50,112.00 per year (\$4,176.00 per month)
 - b. Piedmont Fayette Hospital - \$15,540 per year (\$1,295.00 per month)
Piedmont Fayette Hospital, PSB Building - \$3,168.00 per year (\$264.00 per month)
 - c. Piedmont Henry Hospital - \$20,424.00 per year (\$1,702.00 per month)
 - d. Piedmont Newnan Hospital - \$11,832.00 per year (\$986.00 per month)
2. Equipment: Seller agrees to supply the necessary equipment under the same above terms. Seller will supply all of the containment tanks for all chemicals and one cooling tower controller.
3. Future Service: If at the end of three years the Buyer wishes to continue the same service, this agreement will automatically roll over into the next year.
4. Cancellation: This contract may be cancelled by either party by giving a 30 day written notice of intention to cancel. Products and service will continue through the thirty day period and Buyer agrees to pay for chemicals and services.
5. Precedent: This agreement is subject to the Terms and Conditions provided in Piedmont Healthcare Inc.'s Service Addendum No. 1 attached. For purposes of clarity, this agreement should read in combination with Service Addendum No. 1.

By: Alfred N. Bell, President

Authorized Representative

Please Print Name and Title

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Wendell T. Ballard

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Monday, January 25, 2016 8:20 AM
To: Wendell T. Ballard
Cc: Linda Schultz
Subject: Re: water testing

Linda,
The following is the contact information that Tommy asked to forward to you.

Our address is:
CHEMTEK
408 East North Street
Greenville, SC 29601

My cell phone number is 706-888-2827.

If you need any additional information, please let me know.
Thank You,
Keith Haynes
Regional Manager

On Mon, Jan 25, 2016 at 6:46 AM, Wendell T. Ballard <Wendell.Ballard@piedmont.org> wrote:

Keith.

Can you send Linda some contact information.

Tommy Ballard | Plant Engineering | Operations Manager
1968 Peachtree Road NE | Atlanta, GA 30309
O: [404.605.2097](tel:404.605.2097) | M: [404-805-0141](tel:404-805-0141) | E: Wendell.Ballard@piedmont.org.



It's time to get Better!

From: Linda Schultz
Sent: Wednesday, January 20, 2016 5:01 PM
To: Wendell T. Ballard <Wendell.Ballard@piedmont.org>
Subject: water testing

Tommy, can you give me the contact information for the person that does your water testing? It seems like it would be best to have that person do my water testing at the same time they do yours, or they can teach me how to do my own. This is high on the surgical site infection project plan so I need to get something in place as soon as possible.



Linda Schultz | Central Service Manager

Surgical Services Administration, 1968 Peachtree Road | Atlanta, GA 30082

(P: [404-605-2345](tel:404-605-2345) | M: [678-215-4672](tel:678-215-4672) | E: Linda.Schultz@piedmont.org

If your messaging client supports TLS for secure connections, then this message was sent securely via TLS from Piedmont Healthcare, Inc.

This e-mail communication, including any attached files may contain material that is proprietary, privileged, confidential, or otherwise legally exempt from disclosure. This communication is intended solely for the use of the individual or entity to which it is addressed. If you are not the intended recipient or the person responsible for delivering this communication to the intended recipient, you are prohibited from retaining, using, disseminating, forwarding, printing or copying this communication. If you have received this communication in error, please immediately notify the sender via return e-mail or telephone. This email has been scanned and found to be virus free. If this message contains a virus please contact postmaster@piedmont.org.

This original email was sent to the internet for delivery at 06:46:25

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

This email originated outside of Piedmont.

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Monday, May 04, 2015 4:21 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Boilers at 05-04-2015 16:07
Attachments: Service Report for Boilers at 05-04-2015 1607.pdf

Randy,

Attached is my report on the boilers for May 2015.

Thank You,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Tuesday, April 07, 2015 6:21 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Towers at 04-07-2015 18:10
Attachments: Service Report for Towers at 04-07-2015 1810.pdf

Randy,

Attached is my report on the towers for April 2015.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Tuesday, April 07, 2015 6:15 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Boilers at 04-07-2015 18:00
Attachments: Service Report for Boilers at 04-07-2015 1800.pdf

Randy,

Attached is my report on the boilers for April 2015.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Wednesday, March 04, 2015 4:24 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Towers at 03-04-2015 16:14
Attachments: Service Report for Towers at 03-04-2015 1614.pdf

Randy,

Attached is my report on the towers for February.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Tuesday, February 03, 2015 5:43 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Towers at 02-03-2015 17:34
Attachments: Service Report for Towers at 02-03-2015 1734.pdf

Randy,

Attached is my report on the towers for February.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Tuesday, February 03, 2015 5:36 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Boilers at 02-03-2015 17:25
Attachments: Service Report for Boilers at 02-03-2015 1725.pdf

Randy,

Attached is my report on the boilers for February.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Thursday, January 08, 2015 6:53 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Towers at 01-08-2015 18:46
Attachments: Service Report for Towers at 01-08-2015 1846.pdf

Randy,

Attached is my report on the towers for January 2015.

Thanks,

Keith

Michael J. Holtzclaw

From: support@mytechreports.com
Sent: Thursday, January 08, 2015 6:47 PM
To: amoreno@chemgard.com; Michael J. Holtzclaw; Randy Pryor
Subject: Service Report for Boilers at 01-08-2015 18:30
Attachments: Service Report for Boilers at 01-08-2015 1830.pdf

Randy,

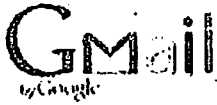
Attached is my report on the boilers for January 2015.

Thanks,

Keith

7/10/2015

North Veterans Executive Center Mail - Contract



Ted Suchaski <ted.suchaski@nvexecutivecenter.com>

Contract

1 message

Keith Haynes <keith.haynes@chemteksc.com>
To: ted.suchaski@nvexecutivecenter.com
Cc: Al Bell <albell@chemteksc.com>

Mon, Jun 22, 2015 at 10:15 AM

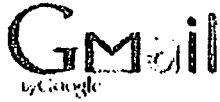
Ted,
Attached is the contract that we spoke about earlier this morning. Once you get it signed send it back to me and I will get Al to sign it and send you back a copy.
Thanks,
Keith

 Cottle Properties Contract.docx
1306K

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7/10/2015

North Veterans Executive Center Mail - July Invoice



Ted Suchaski <ted.suchaski@nvexecutivecenter.com>

July Invoice

1 message

Keith Haynes <keith.haynes@chemteksc.com>

Tue, Jul 7, 2015 at 8:47 AM

To: Ted Suchaski <ted.suchaski@nvexecutivecenter.com>

Cc: Al Bell <albell@chemteksc.com>

Ted, Attached is our invoice for July. If you have any questions please let me know. I will be by in the next week to check all of your systems.

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

 Cottle Invoice CO0715.pdf
89K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

Maintenance Supervisor

Criterion Technology, Inc.
101 McIntosh Parkway
Thomaston GA 30286

706-646-7034 (direct line)

706-647-5082 (main line)

706-647-5052 (fax)

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]

Sent: Thursday, June 25, 2015 10:23 AM

To: Clayton Burgess

Subject: COI

Clayton,

I have requested the COI. You should get it sometime today by e-mail. If you need any additional information, please let me know.

Thanks,

Keith

—
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

From: Lori McDaniel
To: Clayton Burness
Subject: FW: New Account set-up and NDA
Date: Monday, June 29, 2015 9:17:00 AM

Just an update, Mr. Keith will get all paperwork back to us.

THANK YOU.
Lori

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Monday, June 29, 2015 8:48 AM
To: Lori McDaniel
Subject: Re: New Account set-up and NDA

Lori,
I will get this back to you.
Keith

On Jun 29, 2015 8:13 AM, "Lori McDaniel" <lmcdaniel@ctioptics.com> wrote:

Good morning Mr. Keith.

I sure have missed seeing you the past two months.

Clayton and Mike have indicated that we will be placing a purchase order with you in the near future and a contract. In anticipation of this, I would like to get an account established with your company. I have attached Criterion's Georgia Sales Tax Exemption form and Criterion's Application for credit which includes credit references, bank information and tax identification numbers. Also please find Criterion's vendor set-up sheet which is needed in order to process payments in our accounting system. Please complete the set-up sheet and a W-9 form for your company and return via email at your earliest convenience. Attached you will also find Criterion's completed W-9 form with our Tax Identification information.

Please find Criterion's Confidentiality Agreement which has been sign by our VP of Operation Myra Boyt, have the appropriate personal within your company sign the agreement and return via email. If you would like a hardcopy of the agreement please advise and we will be more than happy to send one via mail.

Clayton and/or Mike are gathering an inventory of the Chemgard Chemicals we have on hand, can you tell us once we send you the list an approxiamate value for these chemicals. Our contract states as you probably remember we have to give a 30 day

notice and also purchase any chemicals we have on hand they sent us for the service. Having an idea of the cost we should be charged would be great to have so we are not blind sighted with a crazy dollar amount. Also can you use these chemicals once you start back handling our monthly service?

Sorry if you have already spoken to Clayton or Mike and answered these questions, if so let me know and I will get answers from them. Once we have all the paperwork we can send the notice of cancellation to Chemgard. Please send me any documents you need for me to complete.

Thank you in advance for your assistance. If you have any questions or need additional information, please do not hesitate to contact me via email: lmcdaniel@ctioptics.com.

Again thank you for your assistance.

Best Regards,

Lori McDaniel
Accounts Manager/Administrative Assistant
Criterion Technology, Inc.
[706-646-7040](tel:706-646-7040)(direct)
[706-647-5082](tel:706-647-5082) (main)
[706-647-5052](tel:706-647-5052) (fax)
lmcdaniel@ctioptics.com

From: Keith Haynes
To: Lori McDaniel
Subject: Re: New Account set-up and NDA
Date: Monday, June 29, 2015 9:23:26 AM
Attachments: Criterion W9 and Conf.pdf

Lori,
Attached is some of the information that you requested. I will send the other forms as soon as I get them back. As for the left over chemicals from Chemgard, you should not have to buy them. They should come and pick them up, but if they do not we will use them.
Thanks,
Keith

On Mon, Jun 29, 2015 at 9:16 AM, Lori McDaniel <lmcdaniel@ctioptics.com> wrote:

Thanks- We will be here through Wednesday then we will be off Thursday for the Holiday and our normal Friday schedule of being off.

Thank you,

From: Keith Haynes (<mailto:keith.haynes@chemteksc.com>)
Sent: Monday, June 29, 2015 8:48 AM
To: Lori McDaniel
Subject: Re: New Account set-up and NDA

Lori,
I will get this back to you.
Keith

On Jun 29, 2015 8:13 AM, "Lori McDaniel" <lmcdaniel@ctioptics.com> wrote:

Good morning Mr. Keith.

I sure have missed seeing you the past two months.

Clayton and Mike have indicated that we will be placing a purchase order with you in the near future and a contract. In anticipation of this, I would like to get an account

established with your company. I have attached Criterion's Georgia Sales Tax Exemption form and Criterion's Application for credit which includes credit references, bank information and tax identification numbers. Also please find Criterion's vendor set-up sheet which is needed in order to process payments in our accounting system. Please complete the set-up sheet and a W-9 form for your company and return via email at your earliest convenience. Attached you will also find Criterion's completed W-9 form with our Tax Identification information.

Please find Criterion's Confidentiality Agreement which has been sign by our VP of Operation Myra Boyt, have the appropriate personal within your company sign the agreement and return via email. If you would like a hardcopy of the agreement please advise and we will be more than happy to send one via mail.

Clayton and/or Mike are gathering an inventory of the Chemgard Chemicals we have on hand, can you tell us once we send you the list an approxiamate value for these chemicals. Our contract states as you probably remember we have to give a 30 day notice and also purchase any chemicals we have on hand they sent us for the service. Having an idea of the cost we should be charged would be great to have so we are not blind sighted with a crazy dollar amount. Also can you use these chemicals once you start back handling our monthly srevice?

Sorry if you have already spoken to Clayton or Mike and snasered these questions, if so let me know and I will get answers from them. Once we have all the paperwork we can send the notice of cancellation to Chemgard. Please send me any documenets you need for me to complete.

Thank you in advance for your assistance. If you have any questions or need additional information, please do not hesitate to contact me via email: lmcdaniel@ctioptics.com

Again thank you for your assistance.

Best Regards,

706-646-7034 (direct line)
706-647-5082 (main line)
706-647-5052 (fax)

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Tuesday, June 30, 2015 2:27 PM
To: Clayton Burgess
Cc: Al Bell
Subject: Re: COI

Clayton,
Attached is the contract with pricing.
Thanks,
Keith

On Tue, Jun 30, 2015 at 9:43 AM, Clayton Burgess <CBurgess@crioptics.com> wrote:
Keith can we get you to email us the price and the contract please sir.

Thank you,

Clayton Burgess
Maintenance Supervisor

Criterion Technology, Inc.
101 McIntosh Parkway
Thomaston GA 30286

706-646-7034 (direct line)
706-647-5082 (main line)
706-647-5052 (fax)

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, June 25, 2015 10:23 AM
To: Clayton Burgess
Subject: COI

Clayton,
I have requested the COI. You should get it sometime today by e-mail. If you need any additional information, please let me know.
Thanks,
Keith

--
Thank You,
Keith Haynes

Regional Manager
CHEMTEK, LLC
706-888-2827

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

From: Clayton Burgess
To: Lori McDaniel; Mike Lenhart
Subject: FW: Criterion Technology, Inc - CHEMTEK, LLC
Date: Thursday, June 25, 2015 1:04:29 PM
Attachments: A25-ch200253-seq1-22.pdf

Thank you,

Clayton Burgess
Maintenance Supervisor

Criterion Technology, Inc.
101 McIntosh Parkway
Thomaston GA 30286

706-646-7034 (direct line)
706-647-5082 (main line)
706-647-5052 (fax)

From: Karen Seals [mailto:Karen@watercolormanagement.com]
Sent: Thursday, June 25, 2015 12:18 PM
To: Clayton Burgess; keith.haynes@chemteksc.com
Subject: Criterion Technology, Inc - CHEMTEK, LLC

Please see attached.

Thank you,

Karen Seals
WaterColor Management
PO Box 1132
Decatur, AL 35602
256-260-0412
256-355-3070 fax
karen@watercolormanagement.com

From: Keith Haynes
To: Lori McDaniel
Subject: Fwd: Vendor Request Form
Date: Monday, June 29, 2015 11:31:33 AM
Attachments: Vendor Request Form.pdf

Lori,
Here is the vendor form that you needed. If you need any additional information, please let me know.

Thanks,
Keith

----- Forwarded message -----

From: Keith Haynes <keith.haynes114@gmail.com>
Date: Mon, Jun 29, 2015 at 11:29 AM
Subject: Fwd: Vendor Request Form
To: Keith Haynes <keith.haynes@chemteksc.com>

----- Forwarded message -----

From: Jenna Thompson <jthompson@bellcarrington.com>
Date: Mon, Jun 29, 2015 at 9:58 AM
Subject: Vendor Request Form
To: Keith Haynes <Keith.haynes114@gmail.com>

Please note our new Office Address:
400 North Street. We look forward to serving you in our new location.

Jenna Thompson
864-272-0556
Bellcarrington & Price, LLC

Keith Haynes
Bellcarrington & Price, Inc.

From: Mike Lenhart
To: Lori McDaniel; Myra Boyd
Subject: FW: Criterion Technology, Inc. Contract
Date: Wednesday, August 26, 2015 6:04:21 AM
Attachments: 20150825135338.pdf

Mike Lenhart
Engineering Manager
716 646-7035

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Tuesday, August 25, 2015 5:12 PM
To: Mike Lenhart <mlehart@ctioptics.com>; Clayton Burgess <CBurgess@ctioptics.com>
Subject: Fwd: Criterion Technology, Inc. Contract

Clayton,
Attached is our contract.
Thank You,
Keith

----- Forwarded message -----
From: Haley Greer <hgreer@bellcarrington.com>
Date: Tue, Aug 25, 2015 at 1:54 PM
Subject: Criterion Technology, Inc. Contract
To: "keith.haynes@chemteksc.com" <keith.haynes@chemteksc.com>
Cc: "albell@chemteksc.com" <albell@chemteksc.com>

Keith,

Please see attached contract.

Best Regards,

Haley E. Greer
Commercial Real Estate Paralegal
Bell Carrington & Price, LLC
408 E. North St.
Greenville, SC 29601
(P) 864-272-0556

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

From: Clayton Burgess
To: Mike Lenhart; Lori McDaniel
Subject: FW: Chemtek Information
Date: Thursday, June 25, 2015 11:37:33 AM

Here is Keith's information
Thank you,

Clayton Burgess
Maintenance Supervisor

Criterion Technology, Inc.
101 McIntosh Parkway
Thomasston GA 30286

706-646-7034 (direct line)
706-647-5082 (main line)
706-647-5052 (fax)

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, June 25, 2015 10:12 AM
To: Clayton Burgess
Cc: Al Bell
Subject: Chemtek Information

Clayton,
Here is the information that you requested.

CHEMTEK, LLC
408 East North Street
Greenville, SC 29601
Phone - 864-272-0565

I will also have the Certificate of Insurance sent to you.

Thanks,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

From: Keith Haynes
To: Lori McDaniel
Subject: Re: Vendor Request Form
Date: Tuesday, June 30, 2015 9:09:26 AM

Lori,
The correct number is [REDACTED].
Keith

On Tue, Jun 30, 2015 at 7:36 AM, Lori McDaniel <lmcdaniel@ctioptics.com> wrote:

Morning, Mr. Keith.

Can you please confirm the account number for ACH is it [REDACTED] or [REDACTED]?

Thank you.

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Monday, June 29, 2015 11:31 AM
To: Lori McDaniel
Subject: Fwd: Vendor Request Form

Lori,

Here is the vendor form that you needed. If you need any additional information, please let me know.

Thanks,

Keith

----- Forwarded message -----

From: Keith Haynes <keith.haynes114@gmail.com>
Date: Mon, Jun 29, 2015 at 11:29 AM
Subject: Fwd: Vendor Request Form
To: Keith Haynes <keith.haynes@chemteksc.com>

----- Forwarded message -----

From: Jenna Thompson <jthompson@belcarrington.com>
Date: Mon, Jun 29, 2015 at 9:58 AM
Subject: Vendor Request Form
To: Keith Haynes <Keith.haynes114@gmail.com>

Please note our new Office Address:

408 East North Street. We look forward to serving you in our new location.

Jenna Thompson

864-272-0556

Bel Carrington & Price, LLC

Keith Haynes
Chemgard, Inc.

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

From: Lori McDaniel
To: "Keith Haynes"
Subject: RE: New Account set-up and NDA
Date: Monday, June 29, 2015 9:16:00 AM

Thanks- We will be here through Wednesday then we will be off Thursday for the Holiday and our normal Friday schedule of being off.

Thank you.

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Monday, June 29, 2015 8:48 AM
To: Lori McDaniel
Subject: Re: New Account set-up and NDA

Lori,
I will get this back to you.
Keith

On Jun 29, 2015 8:13 AM, "Lori McDaniel" <lmcdaniel@ctioptics.com> wrote:

Good morning Mr. Keith.

I sure have missed seeing you the past two months.

Clayton and Mike have indicated that we will be placing a purchase order with you in the near future and a contract. In anticipation of this, I would like to get an account established with your company. I have attached Criterion's Georgia Sales Tax Exemption form and Criterion's Application for credit which includes credit references, bank information and tax identification numbers. Also please find Criterion's vendor set-up sheet which is needed in order to process payments in our accounting system. Please complete the set-up sheet and a W-9 form for your company and return via email at your earliest convenience. Attached you will also find Criterion's completed W-9 form with our Tax Identification information.

Please find Criterion's Confidentiality Agreement which has been sign by our VP of Operation Myra Boyt, have the appropriate personal within your company sign the agreement and return via email. If you would like a hardcopy of the agreement please advise and we will be more than happy to send one via mail.

Clayton and/or Mike are gathering an inventory of the Chemgard Chemicals we have on hand, can you tell us once we send you the list an approxiamate value for these

chemicals. Our contract states as you probably remember we have to give a 30 day notice and also purchase any chemicals we have on hand they sent us for the service. Having an idea of the cost we should be charged would be great to have so we are not blind sighted with a crazy dollar amount. Also can you use these chemicals once you start back handling our monthly service?

Sorry if you have already spoken to Clayton or Mike and answered these questions, if so let me know and I will get answers from them. Once we have all the paperwork we can send the notice of cancellation to Chemgard. Please send me any documents you need for me to complete.

Thank you in advance for your assistance. If you have any questions or need additional information, please do not hesitate to contact me via email: lmcdaniel@ctioptics.com.

Again thank you for your assistance.

Best Regards,

Lori McDaniel
Accounts Manager/Administrative Assistant
Criterion Technology, Inc.
[706-646-7040](tel:706-646-7040)(direct)
[706-647-5082](tel:706-647-5082) (main)
[706-647-5052](tel:706-647-5052) (fax)
lmcdaniel@ctioptics.com

(1)



emails from Keith Haynes
Ed Williams to: Tracy Davis

06/18/2015 10:25 AM

History: This message has been forwarded.

These are the only emails I have from keith in my in-box...

— Forwarded by Ed Williams/Flowers on 06/18/2015 10:20 AM —

From: Keith Haynes <khaynes@chemgard.com>
To: "ed_williams@flocorp.com" <ed_williams@flocorp.com>
Cc: Gail Young <gyoung@chemgard.com>
Date: 02/17/2015 02:48 PM
Subject: Boiler Conductivity Probe

Ed,
Here is the price for the boiler conductivity probe that we need.
Watchem Boiler Conductivity Probe (Part # 190768) - \$314.00.
This price does not include shipping.
If you need any additional information please let me know.
Thank You,
Keith Haynes
Chemgard, Inc.

— Forwarded by Ed Williams/Flowers on 06/18/2015 10:20 AM —

From: Keith Haynes <khaynes@chemgard.com>
To: "ed_williams@flocorp.com" <ed_williams@flocorp.com>
Date: 03/18/2015 09:58 AM
Subject: Fwd: quote

Ed,
Here is the quote on the softener.
Keith

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: John <jtgriesbach@diamonhdh2o.com>
Date: 03/18/2015 10:16 AM (GMT-05:00)
To: Keith Haynes <khaynes@chemgard.com>
Subject: quote

Keith,

The attached is the quote we discussed. please let me know if you have any questions.

Regards,

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

John Griesbach CWS-V

Diamond H2O®

800-236-8931 ext 112



02CHE002_SO_0056080_Q_000.PDF DCS7 - Freedom (low res commercial).pdf

— Forwarded by Ed Williams/Flowers on 06/18/2015 10:20 AM —

From: Keith Haynes <keith.haynes114@gmail.com>
To: Al Bell <albell@sandpiperco.com>, "W. J. Barrs" <barrstrio@knology.net>, billdeer12 <BillDeer12@aol.com>, "brian.ledbetter@valic.com" <brian.ledbetter@valic.com>, Cindy Haynes <Cindy.Haynes@valic.com>, Charlotte Lavery <charlotte_lavery@hotmail.com>, Dennis Pobbig <dpobbig@columbustech.edu>, "Edmondson, Don" <edmondson@kysorwarren.com>, ed_williams@flocorp.com, Evelyn OShaughnessy <oshaugh@bellsouth.net>, Erin Thornton <ethorntonRN@yahoo.com>, "Golden, Ronald" <rgolden@columbustech.edu>, Jim Grimes <jimmy432@aol.com>, Keith Granger <kgranger@columbustech.edu>, Henry Kile <hkile@aol.com>, Jamey <jameyfilson@aol.com>, Jeff Keefe <jkeefe@moonmeeks.com>, Jeff Rader <jeff@kentmechanical.com>, Keith Phillips <kphillips1@windstream.net>, Mark Smith <Mark.Smith@columbusregional.com>, Joel Mattocks <jmattocks@liform.us>, Tom Patterson <tompatterson44@gmail.com>, SPOELB <phand@knology.net>, Sam Ruffner <samruffner@gmail.com>, dalway@bellsouth.net
Date: 06/12/2015 04:07 PM
Subject: Fwd: FW: Water.... Neat information!!

----- Forwarded message -----

From: Sam Robinson <srklm@gmail.com>
Date: Fri, Jun 12, 2015 at 4:49 PM
Subject: Fwd: FW: Water.... Neat information!!
To: Michael Longstreet <mlongstreet@bellsouth.net>, Jim Railey <railey.jim@gmail.com>, Keith Haynes <keith.haynes114@gmail.com>

----- Forwarded message -----

From: Mac Clark <macsodabb@gmail.com>
Date: Fri, Jun 12, 2015 at 8:31 AM
Subject: FW: Water.... Neat information!!
To: Mac Clark <macsodabb@gmail.com>

WATER....

How many folks do you know who say they don't want to drink anything before going to bed because they'll have to get up during the night!!

Something else I didn't know ... I asked my Doctor why do people need to urinate so much at night time.

Answer from my Cardiac Doctor:

Gravity holds water in the lower part of your body when you are upright (legs swell).

When you lie down and the lower body (legs, etc.) is level with the kidneys, it is then that the kidneys remove the water because it is easier.

This then ties in with the last statement!

I knew you need your minimum water to help flush the toxins out of your body, but this was news to me.

Correct time to drink water... Very Important. From A Cardiac Specialist!

Drinking water at a certain time maximizes its effectiveness on the body:

2 glasses of water after waking up - helps activate internal organs

1 glass of water 30 minutes before a meal - helps digestion

1 glass of water before taking a bath - helps lower blood pressure (who knew???)

1 glass of water before going to bed - avoids stroke or heart attack (good to know!)

I can also add to this... My Physician told me that water at bed time will also help prevent night time leg cramps. Your leg muscles are seeking hydration when they cramp and wake you up with a Charlie Horse. (this I know for sure!)

A Cardiologist has stated that if each person after receiving this e-mail, sends it to 10 people, probably one life could be saved!

—
Keith Haynes

— Forwarded by Ed Williams/Flowers on 06/18/2015 10:20 AM —

From: Keith Haynes <keith.haynes@chemteksc.com>
To: ed_williams@flocorp.com
Date: 06/15/2015 04:44 PM
Subject: Discount

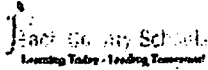
Ed,

Attached is the letter for the discount that Chemtek will offer for payment within 30 days.
Please let me know if you need any additional information.

Thanks,



Keith Flowers Discount.docx



Jason Little <jlittle@peachschools.org>

Service Report for Fort Valley Schools at 02-25-2015 17:35

1 message

support@mytechreports.com <support@mytechreports.com>

Wed, Feb 25, 2015 at 5:44 PM

Reply-To: khaynes@chemgard.com

To: jlittle@peachschools.org, amoreno@chemgard.com, bmaddox@peachschools.org

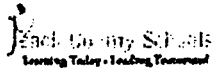
Jason,

Attached is my report on the Ft Valley Schools for February.

Thanks,

Keith

 Service Report for Fort Valley Schools at 02-25-2015 17:35.pdf
61K



Jason Little <jlittle@peachschools.org>

Service Report for Fort Valley Schools at 03-25-2015 17:54

1 message

support@mytechreports.com <support@mytechreports.com>

Wed, Mar 25, 2015 at 6:02 PM

Reply-To: khaynes@chemgard.com

To: jlittle@peachschools.org, amoreno@chemgard.com, bmaddox@peachschools.org

Jason,

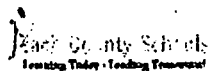
Attached is my report on the Ft Valley schools for March 2015.

Thanks,

Keith

 Service Report for Fort Valley Schools at 03-25-2015 17:54.pdf
61K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Service Report for Fort Valley Schools at 03-25-2015 17:54

1 message

support@mytechreports.com <support@mytechreports.com>

Wed, Mar 25, 2015 at 6:02 PM

Reply-To: khaynes@chemgard.com

To: jlittle@peachschools.org, amoreno@chemgard.com, bmaddox@peachschools.org

Jason,

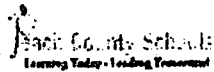
Attached is my report on the Ft Valley schools for March 2015.

Thanks,

Keith

 Service Report for Fort Valley Schools at 03-25-2015 17:54.pdf
61K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Service Report for Fort Valley Schools at 04-21-2015 15:46

1 message

support@mytechreports.com <support@mytechreports.com>

Tue, Apr 21, 2015 at 3:56 PM

Reply-To: khaynes@chemgard.com

To: jlittle@peachschools.org, amoreno@chemgard.com, bmaddox@peachschools.org

Jason,

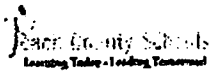
Attached is my report on the Ft Valley Schools for April 2015.

Thanks,

Keith

 Service Report for Fort Valley Schools at 04-21-2015 15:46.pdf
58K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

August Invoices

1 message

Keith Haynes <keith.haynes@chemteksc.com>
To: ssmallwood@peachschools.org, jlittle@peachschools.org
Cc: Al Bell <albell@chemteksc.com>

Tue, Aug 4, 2015 at 11:42 AM

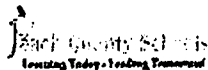
Ms. Smallwood,
Attached are our invoices for the August service. If you have any questions, please let me know.

—
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

4 attachments

-  BE0815 Invoice.pdf
89K
-  BMS0815 Invoice.pdf
89K
-  FVMS0815 Invoice.pdf
89K
-  PCHS0815 Invoice.pdf
89K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Boilers Service Report (September 22, 2015 , 4:19 PM EDT)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org, albell@chemteksc.com

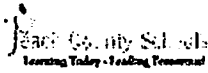
Tue, Sep 22, 2015 at 4:23 PM

On September 22, 2015 at 4:23 PM EDT, Keith Haynes wrote:

Please see attached our Service Report for September on the Byron Schools. Thanks, Keith

 September Service Report_9-22-2015.PDF
146K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Boilers Service Report (September 22, 2015 , 4:25 PM EDT)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org, albell@chemteksc.com

Tue, Sep 22, 2015 at 4:29 PM

On September 22, 2015 at 4:29 PM EDT, Keith Haynes wrote:

Please see attached our Service Report for September on the Ft Valley schools. Thanks, Keith

 September Service Report_9-22-2015.PDF
146K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Boilers Service Report (October 13, 2015 , 09:56 AM EDT)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org

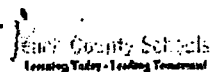
Fri, Oct 30, 2015 at 10:02 AM

On October 30, 2015 at 10:02 AM EDT, Keith Haynes wrote:

Please see attached our Service Report on the Byron Schools for October. Thanks, Keith

 **October Report_10-13-2015.PDF**
143K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Boilers Service Report (November 3, 2015 , 08:02 AM EST)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org

Thu, Nov 5, 2015 at 8:08 AM

On November 5, 2015 at 8:08 AM EST, Keith Haynes wrote:

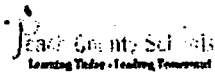
Please see attached our Service Report on the Byron schools for November. Thanks, Keith

 November Report_11-3-2015.PDF
146K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

<https://mail.google.com/mail/u/0/?ui=2&ik=151a7272c5&view=pt&q=chemtek&qs=true&...> 3/10/2016

ROA 000462



Jason Little <jlittle@peachschools.org>

Boilers Service Report (January 20, 2016 , 09:09 AM EST)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org

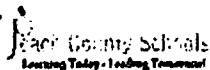
Mon, Jan 25, 2016 at 9:16 AM

On January 25, 2016 at 9:16 AM EST, Keith Haynes wrote:

Please see attached our Service Report on the Byron Schools for January 2016. Thanks, Keith

 January Report_1-20-2016.PDF
147K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546



Jason Little <jlittle@peachschools.org>

Boilers Service Report (February 11, 2016 , 09:48 AM EST)

1 message

keith.haynes@chemteksc.com <keith.haynes@chemteksc.com>
To: jlittle@peachschools.org

Fri, Feb 12, 2016 at 9:51 AM

On February 12, 2016 at 9:51 AM EST, Keith Haynes wrote:

Please see attached our Service Report on the Ft Valley Schools for February 2016. Thanks, Keith

 February 2016_2-11-2016.PDF
146K

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

Brittany Austin

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Friday, July 31, 2015 2:53 PM
To: Brittany Austin
Subject: RE: Water Treatment Contract

Brittany,
I do not know what you mean by boiler plate T&Cs. Are you asking for A CERTIFICATE OF INSURANCE. Any help you can provide would be appreciated.
Thank You,
Keith

On Jul 31, 2015 2:40 PM, "Brittany Austin" <Brittany.Austin@piedmont.org> wrote:

Keith-

Per my email to AI above, please provide a copy of your boiler plate T&Cs to be vetted through my legal department. I will follow up with you via telephone.

Thanks,

Brittany Austin | Senior Strategic Sourcing Coordinator | Supply Chain
2334 Defoor Hills Rd | Atlanta, GA 30318
O: 404.605.5417 F: 404.603.2774 brittany.austin@piedmont.org



"Be kinder than necessary, for everyone you meet is fighting some kind of battle."

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Friday, July 31, 2015 8:40 AM
To: Brittany Austin
Cc: Zack Holt
Subject: Water Treatment Contract

Brittany,
Would you please call me so we can discuss the things you need from CHEMTEK to finalize the water treatment contract. My number is 706-888-2827.
Thank You,
Keith Haynes

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This original email was sent to the internet for delivery at 14:04:15

This email originated outside of Piedmont.

ROA 000466

Brittany Austin

From: Brittany Austin
Sent: Tuesday, August 04, 2015 4:07 PM
To: 'Keith Haynes'
Subject: RE: CHEMTEK Contracts
Attachments: Chemtek Master Agreement 8-4-2015.pdf

No, that is a typo. Good catch! The updated Master Agreement is attached. Please let me know if you find anything else of concern.

Brittany Austin | Senior Strategic Sourcing Coordinator | Supply Chain
2334 Defoor Hills Rd | Atlanta, GA 30318
O: 404.805.5417 F: 404.603.2774 brittany.austin@piedmont.org



"Be kinder than necessary, for everyone you meet is fighting some kind of battle."

From: Keith Haynes [<mailto:keith.haynes@chemteksc.com>]
Sent: Tuesday, August 04, 2015 4:02 PM
To: Brittany Austin
Subject: Re: CHEMTEK Contracts

Brittany,
On item 2 under the agreement you are saying the buyer will provide the tanks and the tower controller. We were going to supply these items, is this something that you want to supply.
Keith

On Tue, Aug 4, 2015 at 12:22 PM, Brittany Austin <Brittany.Austin@piedmont.org> wrote:

Keith-

Please see revised agreement and service addendum attached for signature. Let me know if you have any questions.

Thanks,

Brittany Austin | Senior Strategic Sourcing Coordinator | Supply Chain
2334 Defoor Hills Rd | Atlanta, GA 30318
O: 404.605.5417 F: 404.603.2774 brittany.austin@piedmont.org



"Be kinder than necessary, for everyone you meet is fighting some kind of battle."

From: Brittany Austin
Sent: Tuesday, August 04, 2015 10:40 AM
To: 'Keith Haynes'
Cc: Al Bell; Zack Holt; Tracy Allardice
Subject: RE: CHEMTEK Contracts

Keith-

I am working to consolidate each contract into one Master Agreement. I hope to have it back to you by the end of the day. In the meantime, completion of the attached form is required (along with the W-9 you already provided) for input of all new vendors into PeopleSoft. Please fill out the form and let me know if you have any questions.

Thanks,

Brittany Austin | Senior Strategic Sourcing Coordinator | Supply Chain
2334 Defoor Hills Rd | Atlanta, GA 30318
O: 404.605.5417 F: 404.603.2774 brittany.austin@piedmont.org



"Be kinder than necessary, for everyone you meet is fighting some kind of battle."

From: Keith Haynes [<mailto:keith.haynes@chemteksc.com>]
Sent: Monday, August 03, 2015 10:10 AM
To: Brittany Austin
Cc: Al Bell
Subject: CHEMTEK Contracts

Brittany,

Attached are the contracts and W9 that you requested for CHEMTEK. I put a date of September 1st, but I can change this if you can give me the exact start date. I will also have a Certificate of Insurance sent to you from our insurance company.

If you need any additional information, please let me know.

--

Thank You,

Keith Haynes

Regional Manager

CHEMTEK, LLC

706-888-2827

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This original email was sent to the internet for delivery at 11:45:55

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

This email originated outside of Piedmont.

ROA 000470

Steve G. Jordan

From: Steve G. Jordan
Sent: Thursday, October 15, 2015 2:17 PM
To: 'Keith Haynes'
Subject: RE: Quote For Chemical Feed Equipment

Everything that I would be repairing or purchasing will be PHH at the end of the day correct?



Steve Jordan | Director of Engineering | Engineering
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: 678.604.5444 | M: 678.300.6068 | E: steve.jordan@piedmont.org



From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, October 15, 2015 1:58 PM
To: Steve G. Jordan <Steve.Jordan@piedmont.org>
Subject: Re: Quote For Chemical Feed Equipment

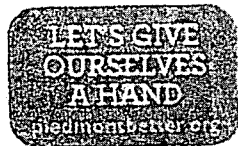
Steve,
If we do everything we are looking at around \$9,000.00. We can go over each item next week.
Keith

On Thu, Oct 15, 2015 at 1:16 PM, Steve G. Jordan <Steve.Jordan@piedmont.org> wrote:

What is the total price? Let's review with Randy before we move.



Steve Jordan | Director of Engineering | Engineering
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: [678.604.5444](tel:678.604.5444) | M: 678.300.6068 | E: steve.jordan@piedmont.org



From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, October 15, 2015 11:47 AM
To: Steve G. Jordan <Steve.Jordan@piedmont.org>; Randy H. Zebrowski <Randv.Zebrowski@piedmont.org>; Al Bell <albell@chemteksc.com>
Subject: Quote For Chemical Feed Equipment

Steve,

Please find attached the quote for the chemical feed equipment to upgrade your current systems. I will be coming by to do service early next week. If you and Randy have time, we can sit down and go over each item. Please let me know if you have any questions.

Thank You,

Keith Haynes

Regional Manager

CHEMTEK, LLC

706-888-2827

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This original email was sent to the internet for delivery at 13:16:55

—
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

This email originated outside of Piedmont.

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

Glynda N. Burpee

From: Glynda N. Burpee
Sent: Monday, December 28, 2015 9:31 AM
To: 'Deana Sellars'
Cc: 'keith.haynes@chemteksc.com'
Subject: RE: Invoice 21033 from Chemtek LLC

Your invoice does not have your company name on it. Can you fix the invoice and resend to me?

Thank You!

Glynda



Glynda N. Burpee | Department Secretary | Engineering
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: 678.604.1012 | F: 678.604.5130 | E: glynda.burpee@piedmont.org

From: Deana Sellars [mailto:dsellars@greyrock-accounting.com]
Sent: Wednesday, December 23, 2015 5:55 PM
To: Glynda N. Burpee <Glynda.Burpee@piedmont.org>
Cc: 'keith.haynes@chemteksc.com' <keith.haynes@chemteksc.com>
Subject: Invoice 21033 from Chemtek LLC

Chemtek LLC

Invoice Due: 01/31/2016
21033

Amount Due: **\$1,702.00**

Dear Customer:

Your invoice-21033 for 1,702.00 is attached. Please remit payment at your earliest convenience.

Thank you for your business - we appreciate it very much.

Sincerely,
Chemtek LLC

864-272-0565

Steve G. Jordan

From: Steve G. Jordan
Sent: Thursday, October 15, 2015 1:17 PM
To: 'Keith Haynes'; Randy H. Zebrowski; Al Bell
Subject: RE: Quote For Chemical Feed Equipment

What is the total price? Let's review with Randy before we move.



Steve Jordan | Director of Engineering | Engineering
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: 678.604.5444 | M: 678.300.6068 | E: steve.jordan@piedmont.org



From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, October 15, 2015 11:47 AM
To: Steve G. Jordan <Steve.Jordan@piedmont.org>; Randy H. Zebrowski <Randy.Zebrowski@piedmont.org>; Al Bell <albell@chemteksc.com>
Subject: Quote For Chemical Feed Equipment

Steve,
Please find attached the quote for the chemical feed equipment to upgrade your current systems. I will be coming by to do service early next week. If you and Randy have time, we can sit down and go over each item. Please let me know if you have any questions.

Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

This email originated outside of Piedmont.

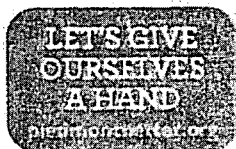
Steve G. Jordan

From: Steve G. Jordan
Sent: Friday, October 02, 2015 8:02 AM
To: 'Keith Haynes'
Subject: RE: FW: Chemicals

Thanks



Steve Jordan | Director of Engineering | Engineering
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: 678.604.5444 | M: 678.300.6068 | E: steve.jordan@piedmont.org



From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Thursday, October 01, 2015 5:11 PM
To: Steve G. Jordan <Steve.Jordan@piedmont.org>
Subject: Re: FW: Chemicals

Steve,

I sent the MSDS sheets, but I did not have his e-mail address right. I will send them again. I also sent these to Glynda as well. I will be up there next Friday with the Walchem distributor to look at all of the chemical feed equipment. I was going to bring the closed loop chemical with me. Randy asked me if I could get the reagent for the chlorine monitors, but I do not remember him asking me to order him some. I will get this ordered and on the way.

Keith

On Thu, Oct 1, 2015 at 1:59 PM, Steve G. Jordan <Steve.Jordan@piedmont.org> wrote:

Randy, needs these chemicals ASAP. Why haven't we receive them?



Steve Jordan | Director of Engineering | Engineering

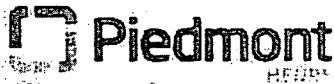
1133 Eagle's Landing Pkwy | Stockbridge, GA 30281
O: 678.604.5444 | M: 678.300.6068 | E: steve.jordan@piedmont.org



From: Randy H. Zebrowski
Sent: Thursday, October 01, 2015 1:46 PM
To: 'AlBell@chemteksc.com' <AlBell@chemteksc.com>
Cc: Steve G. Jordan <Steve.Jordan@piedmont.org>; Bradley D. Manning <Bradley.Manning@piedmont.org>; Bradford R. Elliott <Bradford.Elliott@piedmont.org>
Subject: Chemicals
Importance: High

Mr. Bell, Keith said he would e-mail the MSDS sheets and I haven't seen those yet, also did he bring any 5 gal pails of chemicals for our closed loop system? We have 4 hot water and 1 chilled water loops in the South Tower and 1 Hot water and 1 Chilled water loop in the North Tower. If I don't get some reagents soon for the CL-17 monitors part # 2556900 (Reagent, Buffer and DP powder) I will have to turn them off and plug the chlorine pumps in and operate them manually. I would appreciate some kind of response to this e-mail, preferably by e-mail it makes it easier to keep track on the conversations.

Looking forward to hearing from you real soon!



Randy Zebrowski | Boiler Technician | Engineering

1133 Eagles Landing Parkway | Stockbridge, GA 30281

O: 678.604.5284 | C: 404.391.0459 | E: randy.zebrowski@piedmont.org

ELECTRONICALLY FILED - 2016 Aug 23 3:20 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

If your messaging client supports TLS for secure connections, then this message was sent securely via TLS from Piedmont Healthcare, Inc.

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This original email was sent to the internet for delivery at 13:59:40

—
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

This email originated outside of Piedmont.

Streetman, Suzanne

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Tuesday, June 02, 2015 4:52 PM
To: mlyle@urmc.org
Cc: dgilbert@urmc.org
Subject: Water Treatment Proposal
Attachments: Upson Regional Quote.docx

Mr. Lyle,

Attached is my proposal for the water treatment service at Upson Regional Medical Center.
If you have any questions or need any additional information please let me know.

Thank You,
Keith Haynes
Chemtek, LLC
Regional Manager
706-888-2827

Streetman, Suzanne

From: mlyle@urmc.org
Sent: Tuesday, June 02, 2015 7:32 PM
To: keith.haynes@chemteksc.com
Subject: Re: Water Treatment Proposal

I will also need your W-9 and insurance letter. Thanks

Sent from my iPhone

On Jun 2, 2015, at 4:51 PM, "Keith Haynes" <keith.haynes@chemteksc.com> wrote:

> Mr. Lyle,
>
> Attached is my proposal for the water treatment service at Upson Regional Medical Center.
> If you have any questions or need any additional information please let me know.
> Thank You,
> Keith Haynes
> Chemtek, LLC
> Regional Manager
> 706-888-2827
> <Upson Regional Quote.docx>

Streetman, Suzanne

From: mlyle@urmc.org
Sent: Tuesday, June 23, 2015 10:52 AM
To: keith.haynes@chemteksc.com
Cc: albell@chemteksc.com; gwtyler@urmc.org
Subject: RE: Contract

Keith – Please revise the start date to August 1, 2015 and resend.

Thank you,

Michael J. Lyle
Director of Facilities Management
Upson Regional Medical Center
801 West Gordon St.
Thomaston GA, 30286
Office: 706 975 4021 ext. 1570

From: Keith Haynes [<mailto:keith.haynes@chemteksc.com>]
Sent: Monday, June 22, 2015 12:51 PM
To: Lyle, Michael
Cc: Al Bell
Subject: Contract

Mr. Lyle,
Attached is the contract that we talked about earlier today.
If you have any questions or need any additional information, please let me know.
Thanks,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Streetman, Suzanne

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Tuesday, June 23, 2015 3:37 PM
To: Lyle, Michael
Subject: Re: Contract
Attachments: Upson Regional Contract.docx

Mr. Lyle,
Attached is the revised contract that you requested.
If you need any additional information, please let me know.
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

On Tue, Jun 23, 2015 at 10:52 AM, Lyle, Michael <mlyle@urmc.org> wrote:

Keith -- Please revise the start date to August 1, 2015 and resend.

Thank you,

Michael J. Lyle

Director of Facilities Management

Upson Regional Medical Center

801 West Gordon St.

Thomaston GA, 30286

Office: 706 975 4021 ext. 1570

From: Keith Haynes [mailto:keith.haynes@chemteksc.com]
Sent: Monday, June 22, 2015 12:51 PM
To: Lyle, Michael
Cc: Al Bell
Subject: Contract

Mr. Lyle,

Attached is the contract that we talked about earlier today.

If you have any questions or need any additional information, please let me know.

Thanks,

Keith Haynes

Regional Manager

CHEMTEK, LLC

706-888-2827

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Streetman, Suzanne

From: mlyle@urmc.org
Sent: Tuesday, July 07, 2015 4:22 PM
To: keith.haynes@chemteksc.com
Cc: gwtyler@urmc.org; gjones@urmc.org; dgilbert@urmc.org
Subject: FW: Scanned from PSCOPY 07/07/2015 15:12
Attachments: DOC070715.pdf

Keith - Please have Mr. Bell, Chemtek President sign the attached contract and return it to us asap.
We are expecting you to begin servicing URM account beginning Aug.1, 2015.

Thank you,

Michael J. Lyle
Director of Facilities Management
Upson Regional Medical Center
801 West Gordon St.
Thomaston GA, 30286
Office: 706 975 4021 ext. 1570

Streetman, Suzanne

From: dgilbert@urmc.org
Sent: Thursday, August 13, 2015 12:36 PM
To: keith.haynes@chemteksc.com
Subject: RE: August Invoice

This code for this is 01:8365.5700.
Thank you

Donald Gilbert
Plant Svcs. Trades Superintendent
Upson Regional Medical Center
801 West Gordon St.
Thomaston, GA 30286
Email: dgilbert@urmc.org
Phone: 706 647-8111 ext 1166

From: Keith Haynes [<mailto:keith.haynes@chemteksc.com>]
Sent: Wednesday, August 12, 2015 2:03 PM
To: Gilbert, Donald
Cc: Al Bell
Subject: August Invoice

Donald,
Attached is our invoice for the August service. Bentley said that I should send this to you. If I need to send it to someone else instead, please let me know.

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Streetman, Suzanne

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Wednesday, August 12, 2015 2:03 PM
To: Donald Gilbert
Cc: Al Bell
Subject: August Invoice
Attachments: Upson Invoice UR0815.pdf

Donald,

Attached is our invoice for the August service. Bentley said that I should send this to you. If I need to send it to someone else instead, please let me know.

--

Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Streetman, Suzanne

From: dgilbert@urmc.org
Sent: Wednesday, August 12, 2015 2:08 PM
To: keith.haynes@chemteksc.com
Subject: RE: August Invoice

I need your company information so that I can set up a account in accounting.

Donald Gilbert
Plant Svcs. Trades Superintendent
Upton Regional Medical Center
801 West Gordon St.
Thomaston, GA 30286
Email: dgilbert@urmc.org
Phone: 706 647-8111 ext 1166

From: Keith Haynes [<mailto:keith.haynes@chemteksc.com>]
Sent: Wednesday, August 12, 2015 2:03 PM
To: Gilbert, Donald
Cc: Al Bell
Subject: August Invoice

Donald,
Attached is our invoice for the August service. Bentley said that I should send this to you. If I need to send it to someone else instead, please let me know.

--
Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Streetman, Suzanne

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Sunday, September 13, 2015 7:17 PM
To: Donald Gilbert
Cc: Al Bell
Subject: September Invoice
Attachments: Upson Invoice UR0915.pdf

Donald,
Attached is our invoice for September 2015. I am sorry for sending it so late this month.

Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Streetman, Suzanne

From: Keith Haynes <keith.haynes@chemteksc.com>
Sent: Sunday, September 13, 2015 7:39 PM
To: Donald Gilbert
Cc: Al Bell
Subject: Invoice
Attachments: Upson Invoice UR090415.pdf

Donald,
Attached is our invoice for a pump and pump parts that Bentley ordered last month. If you have any questions please let me know.

Thank You,
Keith Haynes
Regional Manager
CHEMTEK, LLC
706-888-2827

Tyler, Glenda

From: Tyler, Glenda
Sent: Friday, October 02, 2015 1:35 PM
To: 'keith.haynes@chemteksc.com'
Subject: FW: Tax Exempt Certificate
Attachments: DOC100215.pdf

Bentley asked that I forward this tax exempt certificate to you. If you need any other information, please let me know.

Thanks.

Glenda Tyler
Administrative Assistant
Facilities Management
Upson Regional Medical Center
706-647-8111 Ext. 1154
gwt Tyler@urmc.org

ROA 000490



ST-6 (REV. 7-88)

STATE OF GEORGIA
DEPARTMENT OF REVENUE
SALES AND USE TAX CERTIFICATE OF EXEMPTION
GEORGIA PURCHASER OR DEALER

To: Chemtek Date 9/30 2015
(SUPPLIER)
408 East North Street Greenville, SC 29601
(STREET) (CITY) (STATE) (ZIP CODE)

THE UNDERSIGNED HEREBY CERTIFIES that all tangible personal property purchased after this date will be purchased for the purpose indicated, unless otherwise specified on each order, and that this certificate shall remain in effect until revoked in writing. Check proper box:

- ☐ 1. Resale or rental only, including but not limited to, the purchase for resale of gasoline and other motor fuels.
- ☐ 2. Materials for further processing, manufacture or conversion into articles of tangible personal property for resale which will become a component part of the property for sale, or be coated upon or impregnated into the product at any stage of its processing, manufacture or conversion; or, are non-returnable materials used for packaging tangible personal property for shipment or sale. Containers or other packaging materials purchased for reuse are not exempt.
- ☐ 3. Direct Pay Permit authorized under Regulation 560-12-16. The holder of a Direct Pay Permit must pay the 3% Motor Fuel Tax to suppliers on purchases of gasoline.
- ☒ 4. For use by Federal Government, State of Georgia, or any county or municipality of this State, supported by official purchase orders; and, likewise, Hospital Authorities created by Article 4, Chapter 7, Title 7 of the Georgia Public Revenue Code. The State of Georgia, Counties and Municipalities thereof and Hospital Authorities must pay the 3% Motor Fuel Tax to suppliers.
- ☐ 5. Seed, seedlings, fertilizers, insecticides, fungicides, rodenticides, herbicides, defoliants, soil fumigants, plant growth regulating chemicals, desiccants (including shavings and sawdust from wood, peanut hulls, fullers earth, straw and hay) and feed for livestock, fish or poultry when used either directly in tilling the soil or in animal, fish or poultry husbandry. Non Returnable Materials used for packaging farm products for shipment or sale.
- ☐ 6. Aircraft, watercraft, motor vehicles and other transportation equipment manufactured or assembled, sold and delivered by the manufacturer or assembler for use exclusively outside this State, or delivery of the craft is for the sole purpose of removing same under its own power when it does not lend itself more reasonably to removal by other means.
- ☐ 7. Aircraft, watercraft, railroad locomotives and rolling stock, motor vehicles and major components of each, which will be used principally to cross the borders of this state in the service of transporting passengers or cargo by common carriers and by carriers who hold common carrier and contract carrier authority in interstate or foreign commerce under authority granted by the United States government. Replacement parts installed by carriers in such craft or vehicles which become an integral part of the craft or vehicle. Private and contract carriers are not exempt.
- ☐ 8. Liquefied petroleum gas or other fuel used to heat a structure in which broilers, pullets, or other poultry are raised.

Georgia Sales and Use Tax Certificate of Registration Number must be stated below by persons purchasing under categories 1, 2, 3 and 7.

KIND OF BUSINESS ENGAGED IN BY PURCHASER HOSPITAL

Any tangible personal property obtained under this certificate of exemption is subject to the sales and use tax if it is used or consumed by the purchaser in any manner other than indicated on this certificate.

I declare, under penalties of false swearing, that this certificate has been examined by me and to the best of my knowledge and belief is true and correct, made in good faith, pursuant to the sales and use tax laws of the State of Georgia.

Purchaser's Firm Name UPSON REGIONAL MEDICAL CENTER

Certificate of Registration No. 145-NH-60

Address 801 WEST GORDON STREET

OMASTON
(CITY)

Georgia 30286
(ZIP CODE)

John Williams
(Signature)

Title CHIEF FINANCIAL OFFICER
(OWNER, PARTNER, OFFICIAL)

A supplier is required to have only one certificate of exemption on file from each purchaser buying tax exempt. The supplier must exercise ordinary care to determine that the tangible personal property obtained under this certificate is for the purpose indicated. Suppliers failing to exercise such care will be held liable for the sales tax due on such purchases. For example, a supplier cannot accept a Certificate of Registration number bearing a "214" prefix since this was issued to a Contractor which has been deemed to be the consumer and is required to pay the tax at the time of purchase.

EXHIBIT 2



December 4, 2015

Jim Cassidy
Joseph O. Smith
ROE CASSIDY COATES & PRICE
PO Box 10529
Greenville, SC 29603

RE: Chemgard, Inc. v. Darrell Keith Haynes, Chem-Tek, LLC, and Albert Bell
C.A. Number: 2015-23-CP-03546

Dear Mr. Cassidy and Mr. Smith:

We have received Defendants Haynes's and Chem-Tek's Responses to Plaintiff's 1st Sets of Interrogatories and 1st Sets of Requests for Production (dated November 19, 2015), and per Rule 11(a), we are conferring with you in good faith by outlining our objections below to your incomplete responses. We hope we can resolve this issue without resorting to a motion to compel.

Plaintiff's First Set of Interrogatories to Haynes

No. 7 and 8: In Defendant Haynes's response to Interrogatories #7 and #8, Haynes objects that his compensation arrangement and terms of employment with Defendant Chem-Tek are "irrelevant" and "not reasonably calculated to lead to discovery of relevant admissible evidence." However, such information goes directly to our interference claim and for one type of calculation of damages (disgorgement of profits) specific to Haynes, and as such is relevant for purposes of discovery.

No. 13: In Defendant Haynes's response to Interrogatory #13, Haynes objects that his banking information is "irrelevant" and "not reasonably calculated to lead to discovery of relevant admissible evidence." However, this information is relevant because should supplementary proceedings and collections become necessary after a judgment, Plaintiff will have the right to seize assets of Haynes to satisfy the judgment, including the contents of his bank account. It also is important to determine whether any revenues were diverted by Defendant Haynes and ran through his personal back account.

No. 14 and 15: Haynes answers #14 and #15 by stating "*see Defendants' document production.*" However, because Defendants' document production encompasses almost 300 pages of documents, Haynes's answers are non-responsive. Please indicate which documents are specifically responsive to this interrogatory.

Plaintiff's First Set of Interrogatories to Chem-Tek, LLC

No. 7 and 8: In Defendant Chem-Tek's response to Interrogatories #7 and #8, Chem-Tek objects that the compensation arrangement and terms of employment with Defendant Haynes are "irrelevant" and "not reasonably calculated to lead to discovery of relevant admissible evidence." However, such information goes directly to our interference claim and is relevant to one type of calculation of damages, and as such is relevant for purposes of discovery.

Plaintiff's First of Requests for Production to Haynes

No. 6-9, 12, 15-19: For these requests, Haynes responds with "see Haynes 0001-0119 and CT 0001-0166," which fails to indicate which documents are responsive to these requests. Please indicate specifically which documents are responsive to the request.

No. 10: Haynes's objection to relevancy is improper here, as the nature of his compensation, the commissions he earns on certain accounts (former Chemgard accounts), and the other requested compensation information is directly relevant to the issues of the damages that Haynes has individually caused Plaintiff.

No. 11: Haynes has objected in part on the grounds of attorney-client privilege and work product. As required by SCR 26(b)(5), please provide a detailed privilege log for all documents withheld from production, and include the date of the document, the author, the addressee and anyone who is copied, the purpose or description, the privilege claimed, and the Bates number of the document.

In the same response, Haynes also referred Plaintiff to "CT 0001-0285," but Plaintiff only received CT 0001-0166. Indicate whether such notation was a typo, and if not, produce the referenced documents.

No. 16: Haynes objects to this request for "proposals of work, statements of work, pricing estimates, or related documentation" because such information is "confidential, sensitive, and proprietary," as well as "irrelevant." Yet in its complaint, Plaintiff has pled that the customer information and pricing information that Haynes allegedly took with him upon his resignation constitutes confidential information that provides the possessor with a competitive advantage (Second Amended Complaint, paragraph 33), a contention which Defendant Haynes flatly denied (Haynes's Answer to Second Amended Complaint, paragraph 33). Here now, Haynes seeks to take the opposite position when refusing to turn over the same sort of information to the Plaintiff about his new business that Haynes took with him from Plaintiff when he left. Such a position is untenable and the doctrine of judicial estoppel is clearly applicable.

As to relevance, the profits of Defendants are the measure of damages for these causes of action and are discoverable.

No. 22: Haynes has objected in part on the grounds of attorney-client privilege and work product. As required by SCR 26(b)(5), please provide a detailed privilege log for all documents withheld from production, and include the date of the document, the author, the addressee and

anyone who is copied, the purpose or description, the privilege claimed, and the Bates number of the document.

Plaintiff's First of Requests for Production to Chem-Tek, LLC

No. 7-10, 12-13, 15: For these requests, Chem-Tek responds with "see Haynes 0001-0119 and CT 0001-0166," which fails to indicate which documents are responsive to these requests. Please indicate specifically which documents are responsive to the request.

No. 11: Chem-Tek's objection to relevancy is improper here, as the nature of Haynes's compensation, the commissions he earns on certain accounts (former Chemgard accounts), and the other requested compensation information is directly relevant to the issues of the damages that Haynes has individually caused Plaintiff and that Chem-Tek has assisted in causing.

No. 12: Chem-Tek has objected in part on the grounds of attorney-client privilege and work product. As required by SCR 26(b)(5), please provide a detailed privilege log for all documents withheld from production, and include the date of the document, the author, the addressee and anyone who is copied, the purpose or description, the privilege claimed, and the Bates number of the document.

Given the elusive nature of many of Defendants' responses, it is difficult (if not impossible) for us to determine whether each interrogatory and request for production has actually been answered, so Plaintiff reserves the right to object accordingly if the Defendants' supplemental responses are again deficient.

If the deficiencies raised in this letter are not resolved by Monday, December 21, we will have to file a motion with the court to compel these responses. We will withdraw our motion if and when you fully answer our discovery requests. Please feel free to give us a call so we can resolve this issue amicably and efficiently. I look forward to your response.

Sincerely,



Jeremy Summerlin

EXHIBIT 3

From: **W. Andrew Arnold** aarnold@aalawfirm.com
Subject: **Re: To Confirm**
Date: **August 19, 2016 at 11:21 AM**
To: **Bill Foster** bill.foster@nelsonmullins.com
Cc: **W. Andrew Arnold** aarnold@aalawfirm.com, **Jeremy Summerlin** jsummerlin@aalawfirm.com

Bill:

Well, I was in the middle of reading our email exchanges about depositions when I received your "joke." You can judge for yourself if our email exchanges are enough to raise trust issues, particularly in light of your latest position. Your lack of follow through on the redacted phone records show a similar pattern. Nonetheless, after consider all the matters below, depositions will absolutely be necessary as will additional supplementation as discussed below.

Before your involvement, we served discovery and raised several deficiencies with your clients' responses. (See attached). Cassidy replied, provided some modest supplementation but there were several issues left unresolved. We decided to take depositions to see what information we could get before filing a motion to compel. Of course, no depositions have taken place. So, we intend to include in our motion to compel these deficiencies. Moreover, there has been no supplementation, although certainly the information has changed over the last 8 months.

Perhaps most significantly, in reviewing documents in preparation for the depositions, it became apparent that your clients has not produced (and have not produced) all the requested information. We know this because subpoenas issued to former clients of Chemgard (now Chem-Tek clients) resulted in production of documents and emails not produced by your client. Many significant ones. So as part of our motion to compel, we intend to request as relief from the court an order that your clients identify hard drives and storage devices for inspection and imaging. We believe this should be done at their expense (looks like more precedent from your Premier victory will be cited once again.)

In addition, Haynes' redacted phone records have yet to be produced, and our emails seeking this information have been ignored. You represented to the court you would follow the protocol previously established but have not in fact followed through on this commitment. You can let me know if I need to get the transcript. These need to be produced by Monday as well if we are to resolve this issue.

Let me know if it may be possible to resolve these matters. However, it is indisputable your client has failed to produce all documents in their possession (or destroyed such documents before production). Can't be disputed that information promised has not been produced nor can it be argued that your clients have supplemented responses as new information has become available. Phone records are still in your possession.

Sincerely,

Andy Arnold
Law Office of W. Andrew Arnold, P.C.
712 E. Washington St.
Greenville, SC 29601
864.242.4800
864.242.4885 (fax)

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