

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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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 II

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
	)	
CHEMGARD, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DARRELL KEITH HAYNES,	)	
CHEM-TEK, LLC, AND ALBERT BELL,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

COMES NOW PLAINTIFF Chemgard, Inc. ("Plaintiff" or "Chemgard") and offers this Memorandum in Opposition to Defendants' Motion for Summary Judgment. This Court should deny Defendants' Motion for Summary Judgment because Defendants and their counsel have engaged in discovery abuses, which is the subject of a motion to be heard contemporaneously with Defendants' motion for summary judgment. Most significantly, Defendants have refused to appear at scheduled depositions, and have deliberately frustrated attempts to schedule others. Plaintiff has not had sufficient opportunity to conduct discovery in this case, including depositions of the named Defendants. Further, as to substantive claims raised in Defendants' Motion, the non-solicitation clause is enforceable because it is limited to existing customers of Plaintiff and protects a legitimate business purpose of Plaintiff. Finally, Plaintiff has alleged multiple other causes of action that are not dependent on the enforceability of the non-solicit, and Defendants' claim that a ruling on that one clause is sufficient to dismiss Plaintiff's case in its entirety is simply false.

I. INTRODUCTION

Plaintiff Chemgard, Inc. ("Chemgard") hired Defendant Darrell Keith Haynes ("Haynes") in 2000 to work as a salesman in its Georgia sales territory. (Affidavit of William Smith, ¶ 8, 13).¹ Haynes signed a non-solicitation and confidentiality agreement ("Agreement") when he was hired. (Smith Aff. ¶ 9, 10). Upon Haynes' resignation in May 2015 and hiring by Chem-Tek, LLC ("Chem-Tek") and Albert Bell ("Bell"), Haynes immediately began violating the Agreement by soliciting the Chemgard customers that he had serviced while at Chemgard. (Smith Aff. ¶ 17-20). Chemgard sought and received a preliminary injunction from this court that prevented Haynes from violating the Agreement further during the pendency of this litigation.

The parties have engaged in some written discovery, although disputes over the sufficiency of Defendants' responses in early 2016 were placed on hold so that depositions and a mediation could take place. (See Plaintiff's Motion to Compel, filed on August 23, 2016). Despite efforts by Chemgard's counsel, the depositions of Haynes and Bell still have not been taken.

On August 12, 2016, Defendants filed the present Motion for Summary Judgment, which this Memorandum is in response to. Defendants failed to support its Motion with any affidavits or evidence beyond the findings of facts made by the trial court for its preliminary injunction order. The appropriateness and sufficiency of Defendants' fact section is addressed later in the Memorandum. However, suffice it to say, Defendants have not produced any admissible evidence in support of their position, and have deliberately avoided doing so in hopes their discovery abuses do not come home to roost. Moreover, Defendants are not entitled to judgment as a matter of law.

¹ The Affidavit of William Smith is attached as Exhibit A.

II. FACTS AND PROCEDURAL HISTORY

A. **Defendants' Statement of the Facts is Drawn Erroneously from the Court's Finding of Facts in its Order Granting Preliminary Injunctive Relief.**

Before delving into the admissible facts of this case, Plaintiff feels compelled to address the initial matter of Defendants' presentation of the facts in its Memorandum of Law in Support of Summary Judgment. In order to avoid presenting any further sworn affidavits from Haynes and Bell, Defendants have attempted to present facts to support its motion for summary judgment that are drawn solely from the court's July 17, 2015 Order Granting Preliminary Injunctive Relief. Such a strategic decision makes sense, since the last time Haynes submitted sworn testimony to this court, he committed perjury, which was a fact submitted in support of Plaintiff's Second Rule to Show Cause. That Second Rule to Show Cause has been held in abeyance pending the outcome of this motion to avoid conflicting rulings.

Moreover, Defendants have slipped in several alleged "facts" into their recitation that are drawn from absolutely nowhere, and are certainly not from the court's July 17th Order. Specifically, Defendants have stated (1) that the court found that "Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories." *Def. Memo*, page 2. However, the trial court made no such statement in its Order and this statement appears to be fabricated by Defendants.

Defendants also stated (2) that "Defendant Haynes maintains he has continuously abided by the Court's July 17, 2015, Preliminary Injunction Order and all Defendants have refrained from directly or indirectly soliciting any customer of Chemgard." This, too, is not found in the court's July 17th order, nor does it appear in the only other sworn affidavit that any of the Defendants have ever submitted, which is Haynes' December 14, 2015 perjurious affidavit. In that December 14 affidavit, Haynes states that *he* hasn't violated the injunction up until December 14, 2015, but there's nothing in the record to support Defendants' claim in their

Memo that Haynes has abided by the court's order in the nine months between that affidavit and this present hearing (and Haynes extended refusal to turn over his phone records for that time period give further indications as to the reliability of his assertions), nor is there any sworn testimony from Bell as to whether he or Chem-Tek has directly or indirectly solicited Chemgard's employees. Defendants have simply created these facts in an attempt to influence the court, but have failed to offer any supporting affidavits or sworn testimony to support them. Such statements should be disregarded.

B. Chemgard's Business Model and Pricing Structure

Chemgard is a Greenville-based business that sells and distributes chemicals, chemical products, water treatment chemicals, and equipment, including water management systems, both at retail or wholesale. (Smith Aff. ¶ 3). Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. (*Id.*). Chemgard has business in several states, including South Carolina, North Carolina, Georgia and Alabama. (*Id.*). Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is that most of the competition in the industry comes down to price, and whether Chemgard or its competitor provides the best and most competitive price. (*Id.* at ¶ 4).

Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. (*Id.* at ¶ 5). This pricing sheet establishes the baseline price for all of Chemgard's products. (*Id.*). This baseline price is reached by taking Chemgard's cost of the product and adding an additional cost to account for Chemgard's overhead. (*Id.*). This overhead figure is critical in the calculation. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products. (*Id.*). The same

products are offered to all of Chemgard's customers in all of the territories in which Chemgard did business, and all salespeople, including Haynes, were given this sheet for purposes of their sales efforts. (*Id.* at ¶ 6).

Chemgard's sales model was to encourage its salespeople to mark up the baseline price to determine the sales price. This markup provided the additional funds from which each salesperson earned their commission and from which Chemgard earned its profits. (*Id.* at ¶ 7). This pricing sheet constitutes confidential and proprietary information of Chemgard's because if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision. (*Id.*). Haynes never returned his commission statements, which contained confidential pricing information. (*Id.* at ¶14, 17).

C. The Terms and Conditions of Haynes' Employment Agreement

In September 2000, Chemgard hired Defendant Haynes to sell its products, equipment, and services, with Haynes' primary focus to be on customers and potential customers in Georgia, although Haynes was free to (and did) make sales outside of Georgia. (*Id.* at ¶ 8, 13). During the course of his employment, Haynes was the only Chemgard salesman in Georgia. (*Id.* at ¶ 13). 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. (*Id.*).

At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement ("Agreement") with Chemgard. (*Id.* at ¶ 9). 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;

Agreement, Section 9(d). Haynes also agreed to the Non-Disclosure Clause of the Agreement, wherein Haynes promised not to use or disclose any confidential information of Chemgard after his resignation or termination. Agreement, Section 9(b). The Agreement defines “confidential information” to include “**pricing methods and pricing information, costs, profits, [and] profit margins . . .**” Agreement, Section 8(a) (emphasis added).

Because of Haynes’s assent to the non-solicitation provisions and other terms of the Agreement, Chemgard provided Haynes with its customer information, business information, and confidential pricing information. (*Id.* at ¶ 14). 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. (*Id.*). Protection of the trade secret and/or confidential information is one reason that all the salespeople agree to the same obligations: to protect sales information.

D. Haynes’ Resignation and Immediate Wrongful Solicitation of Chemgard Customers

Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days’ written notice. (*Id.* at ¶ 17). The next day, Haynes began working for Defendant Chem-Tek, LLC, which Defendant Albert Bell (a former Chemgard employee) formed on May 6, 2015 and which immediately began competing with Chemgard. (*Id.* at ¶ 18-19). Although the extent of the damage done by Haynes was mostly unknown to Chemgard at the time it filed this lawsuit, the phone records and email evidence of Haynes’ activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard’s customers for the benefit of his new employer. (*Id.* at ¶ 20). Haynes continued to call on these Chemgard customers even after he was enjoined. (*Id.*).

One blatant example concerns Chemgard's biggest customers in Georgia at that time: Piedmont Healthcare, a not-for-profit, community health system comprised of six hospitals, 2,200+ medical staff and nearly 13,000 employees. At the time of Haynes' resignation, Chemgard provided services for four of the six hospitals: Piedmont Atlanta, Piedmont Henry, Piedmont Newnan, and Piedmont Fayette. At 8:43 am on May 11, 2015—Haynes' first day with Chem-Tek—Haynes called Tommy Ballard, the engineering manager of Piedmont Atlanta, who made decisions on which vendors to select for water chemical treatment. In fact, Haynes called Mr. Ballard *four* times that day, followed by an additional forty-three times between May 13 and November 30. It should come as no surprise that Piedmont Healthcare cancelled its contract with Chemgard and switched to Chem-Tek and Haynes. Other examples abound in the evidence thus far unearthed. (For a full description and supporting documents of this occurrence and many others, see the Affidavit of Jeremy R. Summerlin, filed on May 10, 2016 in support of Plaintiff's Second Rule to Show Cause).

However, at the time Chemgard filed this lawsuit, Chemgard was unaware of the extent of Haynes' wrongful conduct. Chemgard knew only that it was losing its Georgia customers at an alarming rate. So along with its lawsuit for breach of contract, Chemgard sought injunctive relief from the court to enjoin Haynes from continuing to violate his contractual obligations to Chemgard during the pendency of this litigation. On July 17, 2015, after a hearing on the motion for injunctive relief, the Honorable Perry Gravely issued a preliminary injunction against Haynes, which enjoined him from violating the terms of the contract until a trial could be had on the merits. Judge Gravely later found Haynes in contempt of the injunction. Chemgard has since filed another request with Judge Gravely to hold Haynes in contempt for further violations of the injunction, and this Second Rule to Show Cause is still pending.

E. Haynes' Final Efforts to Dissolve the Injunction In Lieu of Obeying It

On April 29, 2016, nearly a year after Judge Gravely imposed the preliminary injunction, Defendants moved to vacate and dissolve the injunction, which Judge Gravely ruled on and denied on August 10, 2016. (Defendants had filed a motion to reconsider the injunction back in 2015, which was denied, as well as an appeal of the injunction, also in 2015, which was later voluntarily dropped by Defendants.) In August 2016, Defendants filed *another* motion to reconsider, which is still pending before Judge Gravely. Nearly simultaneously, Defendants filed this Motion for Summary Judgment, asking this court to toss out all of Chemgard's claim, despite only arguing against a single clause in the Agreement.

II. LEGAL ANALYSIS

A. Standard for Summary Judgment

Defendants cite an incorrect standard for summary judgment in its Memorandum. Defendants offer up *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1339, for the proposition that “[t]he 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]”; this is the **federal rule**. However, the South Carolina Supreme Court has denied application of the federal rule in state law cases, explicitly holding that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In a South Carolina common law case, this court must review the grant of a summary judgment motion under the standard provided for by Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). In ascertaining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.

See Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). 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); *Baughman v. American Telephone and Telephone Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

B. Defendants’ Motion for Summary Judgment is Not Supported by Admissible Evidence, but Instead Improperly Relies upon Findings of Fact in the Circuit Court’s Order Granting a Temporary Injunction.

As stated above, Defendants have failed to submit any admissible evidence in support of their Motion for Summary Judgment. Instead, Defendants rely only on findings of fact (mostly) drawn only from the court’s July 17, 2015 Order Granting Preliminary Injunctive Relief. This is contrary to the plain language of SCRCP 56. Moreover, this ignores the fact that there are various other claims at issue in this case and that since the grant of the injunction, additional parties and claims have been included in a Second Amended Complaint. (And there may be other claims to come, but due to the discovery abuses outlined in Plaintiff’s Motion to Compel and Motion for Sanctions, Plaintiff has been prevented from exploring these relevant issues.) Finally, Defendants’ attempt to get this court to rely on the facts contained in the July 17, 2015 order is improper under clear South Carolina precedent.

In *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997), the South Carolina Court of Appeals considered a trial court’s grant of summary judgment that relied on facts contained in three other circuit court orders. The trial judge initially granted summary judgment, and the Court of Appeals reversed, noting that “[w]hen ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence

within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.” *Id.* at 599, 486 S.E.2d at 272 (citing *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992)) (emphasis in original). The Court of Appeals stated firmly that “reliance on an unpublished order is improper.” *Id.* (citing *Plante v. State*, 315 S.C. 562, 446 S.E.2d 437 (1994)). The Court of Appeals concluded as follows:

We hold that neither the [Defendants] nor the trial court could rely on facts and legal conclusions within the circuit court orders. Thus, the [Defendants’] assertions at the hearing, which were based on facts within the orders, constituted factual statements of counsel. Moreover, the orders were, in effect, memoranda submitted by counsel. In any event, the trial court could not properly consider factual statements from either when deciding the motions, however they are characterized.

Id. at 600, 486 S.E.2d at 273. Defendants in the instant case are asking this court to do precisely the same thing that the Court of Appeals has already determined to be reversible error.

In *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 413 S.E.2d 824 (1992), the South Carolina Supreme Court considered whether the trial judge erred in holding he was bound by the findings of fact contained in an order granting a temporary injunction. The Supreme Court noted that the purpose of a temporary injunction is to prevent irreparable harm, and it is only for this preliminary purpose that it “may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate.” *Id.* at 32, 413 S.E.2d at 826. “A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction.” *Id.* The Supreme Court reversed a grant of summary judgment because of the trial judge’s reliance on the findings of fact in the order granting a temporary injunction. Once again, Defendants are seeking this court to rely on findings of fact that were made for the limited purpose of preventing irreparable harm, and which did not take into account alternative theories of recovery or additional claims against additional Defendants.

Thus, Defendants are attempting to get a grant of summary judgment by asking this court to commit reversible while successfully evading their most basic of discovery obligations. At bare minimum, this court should compel full and complete responses to discovery, compel depositions, and compel compliance with the agreement to produce phone records. The attempt to limit the scope of facts when this court is presented with a broader range of issues, including issues of credibility of Defendant Haynes, as well as additional causes of action, is wholly improper, as the cases above make clear. On these bases alone, the Court must deny Defendants motion for summary judgment.

C. Defendants' Motion for Summary Judgment Should Not be Granted Because Defendants have Refused to Sit for Depositions on Key Issues at Play in this Case.

The South Carolina Supreme Court has stated that “[s]ince [summary judgment] is a drastic remedy, [it] should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted **until the opposing party has had a full and fair opportunity to complete discovery.**” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (emphasis added) (internal citations and quotation marks omitted). In support of this statement, the *Baughman* court cites Rule 56(f) of the South Carolina Rules of Civil Procedure, which provides that a court can deny a motion for summary judgment or order a continuance until depositions can be taken if the non-moving party has been unable to present all necessary facts via affidavit for opposing the motion for summary judgment. SCRCP 56(f).

As outlined in Plaintiff's Motion to Compel, filed on August 23, 2016,² Defendants' counsel has engaged in a deliberate and systematic strategy of delaying and outright refusing to permit the Defendants to participate in depositions. The depositions of Defendants Haynes and Bell were initially set for April 5, 2016, but these depositions were delayed because Plaintiff's

² Plaintiff incorporates by reference that Motion and accompanying affidavits and exhibits.

counsel was informed that Haynes would be retaining counsel separate from Bell and Chem-Tek due to a conflict. However, Haynes, Bell, and Chem-Tek ultimately decided that no conflict existed and hired Defendants' current counsel, Mr. William Foster, to represent all Defendants. From the time of Mr. Foster's involvement in May 2016, Mr. Foster has repeatedly professed his dutiful attempts to procure depositions dates from his clients, but he has just as consistently failed to do so. When the depositions were final rescheduled for August 11, Mr. Foster waited until three days before the scheduled depositions before stating that his clients would not be appearing at the depositions because a motion that he had filed nearly four months previously had not been ruled on.

On September 7, 2016, Plaintiff's counsel again provided additional dates for early October 2016. Without the fear of having his clients placed under oath before the hearing on summary judgment, Defendants' counsel finally agreed to have his clients, Haynes and Bell, sit for depositions on October 5, 2016, and notices have been properly served. Plaintiff would ask for a court order requiring the Defendants to show up for their depositions this time. Further, Defendants have deliberately withheld documents that were responsive and due under Plaintiff's requests for production, and have failed to supplement their responses in accordance with the Rules.

Nearly fourteen months after filing this case and seven months after attempting to schedule depositions, Plaintiff still lacks key information about the issues in this case that would be revealed through Defendants' depositions. Under the clear standard articulated in *Baughman*, Plaintiff is entitled to full discovery in this case before summary judgment is heard and ruled upon, and Mr. Foster's transparent attempts to shield his clients from damaging depositions should not be validated by this court. Plaintiff has moved this court in its pending Motion to Compel for an order that would require Defendants to sit for depositions and to fully answer

Plaintiff's discovery requests, and Plaintiff respectfully request that this court deny Defendants' Motion for Summary Judgment or postpone a full hearing and ruling on the Motion until Plaintiff has an opportunity to complete discovery.

However, even though Plaintiff believes that this Motion for Summary Judgment is entirely premature, in an abundance of caution, Plaintiff will argue below that Defendants' Motion for Summary Judgment substantively fails as a matter of law.

D. The Employment Agreement's Non-Solicitation Provision is Enforceable Under Controlling South Carolina Precedent.

The crux of Defendants' argument is that the Agreement's non-solicitation restriction does not limit its reach to those customers Haynes actually serviced or encountered during his employment with Plaintiff, but that it seeks to prevent solicitation of all of Chemgard's customers, which makes it overly broad and unenforceable. *Def. Memorandum in Support of Motion for Summary Judgment*, page 7 (hereafter "Def. Memo"). Defendants' argument draws a very bright line, one that doesn't exist in South Carolina case law. In support of its argument, Defendants cite three cases, but only one—*Fournil v. Tuberville Ins. Agency, Inc.*,³ discussed more fully below—actually supports the proposition for which it is cited. (This single case is unpublished, a federal district court case, and not entirely consistent with the decisions and holdings of South Carolina's appellate courts). Nonetheless, this Court should consider each of these three cases in turn, as well as the controlling authority discussed below, which go unmentioned in Defendants' motion.

Defendants' motion cites only one **South Carolina** appellate court decision in favor of their proposition: *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986). Ironically, however, the decision in *Collins* actually supports the opposite proposition than the one for which it is cited. In *Collins*, the Court of Appeals reversed a trial court's grant of

³ All cases from outside of South Carolina's jurisdiction will be attached as Exhibit B.

summary judgment, which had declared the restrictive covenant overly broad. Although the provision at issue was limited to locations “served by the Employee,” the basis of the Court of Appeals holding was clearly not so limited, finding that “[a] restriction which allows the former employee to sell anywhere else, subject only to the employer’s protection of his own clients, is valid.” *Id.* (citing *Caine & Estes Insurance Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E. 2d 859 (1982)). The court concluded by “find[ing] the provision to be a valid and enforceable restriction on solicitation of Collins’ customers.” *Id.* Clearly, the language of *Collins* does not further qualify the phrase, “protection of [a company’s] own clients,” and neither do any appellate court decisions before or since. As its citation to the *Caine & Estes Insurance Agency, Inc. v. Watts* case suggests, the South Carolina Supreme Court had already provided the Court of Appeals in *Collins* with an answer.

A closer look at the *Caine & Estes Insurance Agency, Inc. v. Watts* (hereinafter “*Watts*”) case is instructive. In *Watts*, the South Carolina found a non-compete clause to be valid despite the challenge of appellant/employee. The clause at issue restricted Watt from engaging in “the sale of insurance to any person who was a Caine & Estes customer at the time Watts resigned.” *Id.* at 208, 293 S.E.2d at 860. There was no limitation on the type of customer, such as the one being suggested by Defendant, but in fact it was just the opposite: “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.” *Id.* at 278 S.C. 207, 293 S.E.2d 859, 860 (emphasis added). This provision in *Watts* has precisely the same scope as the non-solicitation in Defendant Hayne’s Employment Agreement. Just like this Court in the instant case, the court in *Watts* had well-established authority South Carolina authority to guide it: *Oxman v. Profitt*, 241 S.C. 28, 33, 126 S.E.2d 852, 854 (1962) and *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217, 222 (Ct App. 1992).

Dating all the way back to 1962, the South Carolina Supreme Court has been consistent in its holdings regarding contractual provisions that do not contain a geographic restriction but instead have limitations on soliciting “existing customers.” In *Oxman v. Proffitt*, the South Carolina Supreme Court considered the enforceability of a provision “that defendant will not ‘induce or attempt to induce *any policyholder of the Company* to terminate his or her insurance with the Company.’” 241 S.C. at 33, 126 S.E.2d at 854 (emphasis added). The Supreme Court, without equivocation, enforced the provision, which was not limited to policyholders that were only serviced by the employee. *Id.* Again, the Supreme Court upheld a non-solicitation provision with a scope that is the same as the one in Haynes’s Employment Contract: any and all customers of the company.

In the other key South Carolina case on point, *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217, 222 (Ct App. 1992), the South Carolina Court of Appeals upheld a similar covenant, and in doing so, cited and relied upon the *Watts* and *Oxman* decisions. In *Wolf*, the Court of Appeals held that “under the particular facts of this case that the prohibitions against contacting *existing customers and accounts* are enforceable....” *Id.* at 113, 420 S.E.2d at 224. The covenant at issue in *Wolf* restricted the former employee from soliciting any of Colonial’s existing policy holders, not just the ones serviced by him. The court was clear: “Prohibitions against contacting *existing customers* can be a valid substitute for a geographic limitation.” *Id.*⁴ So, not only does *Collins* **not** support Defendants’ position, the controlling authority upon which the Court of Appeals based its decision clearly establishes the validation of this Court’s injunction.

The third (and unreported) decision cited by Defendants, *Fournil v. Turbeville Ins.*

⁴ Before moving on, this Court should take note of the declaration made on page 7 of Defendant’s Motion: “South Carolina courts have never sanctioned such a patently overbroad restriction.” Not only is this statement untrue, but the last several paragraphs of this Memo have established that the controlling decisions sanction and permit exactly such a restriction.

Agency, Inc., 2009 U.S. Dist. LEXIS 16303 (D.S.C. 2009), on first glance appears to lend some support to Defendants' position.⁵ However, when this opinion is read in full, the decision simply does not apply to the facts before this court. The District Court in *Fournil* found that the non-compete provision was defective because it prohibited the former employee from contacting the employer's "former clients as well as clients with which [the employee] had no direct contact." *Id.* at *4. The District Court clearly indicated that the basis for its ruling was that the former employee did not have access to confidential information that could be used to compete for customers that he did not service. *Id.* at *6. The District Court stated that if there had been evidence that the former employee had access to confidential information that could be used to solicit even customers she had no direct dealings, the covenant would have been enforceable. *Id.* As the District Court concluded, "[t]hese conclusions should not be given more weight than they are due." *Id.*

Thus, *Fournil* is clearly distinguishable from the case at hand, because Defendant Haynes had access to confidential information about pricing that was relevant to all of Chemgard's customers. So, even to the extent this court views the *Fournil* approach as preferable to those in *Oxman, Watts, and Wolf*, the fact is that *Fournil* simply does not invalidate a non-solicit limited to existing customers when the former employee had access to confidential information and did not return documents containing such confidential information after his exit. And as will be discussed more below, Defendant Haynes in fact did have access to such information. Moreover, even if *Fournil* is in fact a sounder approach, until the South Carolina Supreme Court overrules *Oxman, Watts, and Wolf*, these three cases control the issue at the basis of Defendants' motion for summary judgment, and thereby mandate its denial. South Carolina precedent is clear: A non-

⁵ The second case cited by Defendants on page 7 of their Memo to support their motion is *Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003), but it is not helpful to Defendant's position either. The *Rockford* opinion simply reiterates the point just made above about *Watts, Oxman, and Wolf*. This case is quoted below.

solicit that prohibits an employee from soliciting its employer's *existing* customers is valid and enforceable.

E. The Non-Solicitation Provision Protects Legitimate Business Interests of Chemgard.

As made clear above, the decisions in *Oxman*, *Watts*, and *Wolf* clearly indicate that existing client relationships are a legitimate business interest that warrant protection. The South Carolina Court of Appeals in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013) recognized “the legitimate interest of a business in protecting its clientele and goodwill” and that the “solicitation of *former clients* can substitute for a territory restriction.” (emphasis added) (citations omitted.) The South Carolina District Court has held that the employer’s “interests to be protected [were] its existing business contacts, customer goodwill, trade secrets, and proprietary information. These concerns are legitimate business interests that warrant protection.” *Hagemeyer N. Am. Inc. v. Thompson*, No. C/A 2:05-3425, 2006 WL 516733, at *4 (D.S.C. Mar. 1, 2006) (citing *Wolf v. Colonial and Acc. Life Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217, for the proposition that there are legitimate business interests in existing business contacts and trade secrets). Likewise, the District Court in *Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003), cited *Watts*, *Oxman*, and *Wolf* before stating, “[t]he covenants at issue also impose client and employee based restrictions—to wit, Defendants are prohibited from soliciting Plaintiffs’ employees or clients—rather than geographical restrictions. While ‘the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer’s business . . . prohibitions against contacting existing customers can be a valid substitute for a geographic limitation.’” *Id.* at 689.

Of course, Defendant Haynes also had client information and confidential pricing information that extends beyond his territory and gives him an unfair advantage with all Chemgard customers. Notably, the pricing worksheet that Chemgard provided to Haynes and other salespeople contained the pricing information for all Chemgard products and services that were offered to all of Chemgard's customers across its entire sales territory. (Smith Aff. ¶ 5). And it is interesting to note that **the pricing quotes Defendant Haynes used to snatch Chemgard's customers were below Chemgard's pricing.** (*Id.* at ¶ 18). Of course, we are left to imagine the testimony of Defendant Haynes when confronted with these damning facts, since the discovery abuses of Defendants have stood in the way of obtaining such testimony.

In addition, Defendant Haynes attended yearly sales meetings at Chemgard's headquarters, where he had access to information about Chemgard's customers and potential customers across all of its sales territories. (Smith Aff. ¶ 15). He also learned about and received training on new products that Chemgard would be offering, including new technology or new chemicals. (*Id.*). Haynes participated in weekly sales calls with all of the other Chemgard salespeople, and during these meetings, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. (*Id.* at ¶ 16). They also discussed issues that the salespeople were having with individual customers in their respective sales territories. (*Id.* at ¶ 17).

Although Defendants attempt to argue that Chemgard could not have any legitimate business interest in preventing Haynes from soliciting its other customers in other sales territory, the evidence suggests just the opposite. During Haynes's tenure with Chemgard, he was exposed to confidential information about Chemgard customers, including potential customers (i.e., businesses that other Chemgard salespeople were seeking to do business with) and the pricing

structure for all of Chemgard's customers. Armed with this information, Haynes can readily contact any customer of Chemgard in other sales territories, as well as in his old Georgia territory, and systematically and precisely quote prices *just under* what Chemgard charges. This is not some flight of fancy or mere hyperbole, because as pointed out above, Haynes has already used the pricing information to undercut Chemgard's pricing. (*Id.* at ¶ 18). Chemgard clearly has a legitimate business interest in keeping Haynes from continuing to do what he's already spent the last sixteen months doing: using information obtained from Chemgard to wrongfully steal Chemgard's customers.

F. Even if this Court Grants Summary Judgment on the Non-Solicitation issue, Plaintiff Still has Other Causes of Action that are Unaffected by the Enforceability of the Non-Solicit.

Defendants have moved "for summary judgment on all claims against Defendants by the Plaintiff." *Def. Memo*, page 1. Yet Defendants only argue against the enforceability of the non-solicitation provision in this case, despite Plaintiff raising other claims in its complaint and despite a limited factual record. Specifically, Plaintiff has brought a cause of action for breach of contract, which includes allegations that Haynes was using confidential business information gained during his employment with Plaintiff to compete against Plaintiff after his resignation. (Second Amended Complaint, ¶¶ 18, 22, 24, 29, 31, 33, 36, 40, 41, 44, 65-72). These violations are a breach of the confidentiality provision that Haynes agreed to when he accepted employment with Plaintiff, and this cause of action stands separate from the non-solicitation aspect of this case.

Chemgard's pricing information falls directly within the confidentiality provision and is unique to Chemgard, and if known to a competitor, would allow that competitor to systematically undercut Chemgard's pricing with precision. (Smith Aff. ¶ 5, 8). There is

certainly other information that meets this definition, including information obtained during sales meetings and sales calls.

Plaintiff has also alleged a tortious interference with prospective contractual relations based on Haynes's use of Chemgard's confidential, proprietary pricing information to target and undercut Chemgard's relationships with its customers. This cause of action also stands separate and apart from Plaintiff's other causes of action. Defendants' patently false assertion to this court that the non-solicit is the only cause of action in this case is illustrative of Defendants' misleading and dilatory tactics that have infected this litigation since Defendants' change in counsel. Defendants seek a victory even before the parties have had a chance to play all four quarters. This court should deny summary judgment.

III. CONCLUSION

Defendants are not entitled to summary judgment in this case. Defendants have engaged in a pattern of discovery abuses that has significantly impeded Plaintiff's attempts to conduct discovery in this case, including taking depositions of the named Defendants and obtaining full and complete responses to document requests. Further, the non-solicitation clause is enforceable because it is limited to existing customers of Plaintiff and protects a legitimate business purpose of Plaintiff. Finally, Plaintiff has multiple other causes of action that are not dependent on the enforceability of the non-solicit, and about which Defendants offer no admissible evidence. For these reasons, Chemgard respectfully requests that this Court deny Defendants' motion for summary judgment.

Dated this 19th day of September, 2016.

[signature on following page]

Respectfully Submitted,

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Attorneys for Plaintiff Chemgard, Inc.

EXHIBIT A

ELECTRONICALLY FILED - 2016 Sep 19 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
	)	
CHEMGARD, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DARRELL KEITH HAYNES,	)	
CHEM-TEK, LLC, AND ALBERT BELL,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF WILLIAM SMITH IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

1. I am at least eighteen years of age and fully competent to testify to the matters stated within this affidavit. This affidavit is based upon my personal knowledge.
2. I am the owner and president of Plaintiff Chemgard, Inc.
3. Chemgard is in the business of selling and distributing chemicals, chemical products, water treatment chemicals, 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. We have business in multiple states in the Southeast, including Georgia and Alabama.
4. Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is that most of the competition in the industry comes down to pricing and whether your company can provide the best price.
5. Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. This pricing sheet establishes the baseline price for all of our products. This baseline price is reached by taking

our cost of the product and adding an additional cost to account for Chemgard's overhead. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products.

6. These same products were and are offered for all of Chemgard's customers in all of the territories that Chemgard did business in, and all salespeople, including Haynes, were given this pricing sheet for purposes of their sales efforts. This pricing sheet was the basis for calculations of the price offered by our salespersons, which involved some markup of the baseline price.

7. This pricing sheet constitutes confidential and proprietary information of Chemgard's because, if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision.

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

9. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement ("Employment Agreement"). The Employment Agreement contained non-solicitation provisions and confidentiality 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 business 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.

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. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to a pay commissions and to give Haynes approximately \$150,000-\$200,000 of pre-existing accounts for Haynes to service. Chemgard also agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.

13. 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.

14. 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." Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential pricing information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard.

15. Chemgard also has yearly sales meetings for the entire time that Haynes was employed, where we bring all our salespeople from all our sales territories to Greenville, South Carolina or another South Carolina location for one or two days. At these meetings—which Haynes regularly participated in during his tenure with Chemgard—our salespeople were trained on new products that Chemgard would be offering, including new technology and new chemicals. There would have been discussion regarding pricing and sales strategies applicable to all sales territories. We would also discuss new sales efforts of the company, as well as issues or problems we were having with individual customers or potential customers across our sales territories.

16. In addition, towards the end of Haynes' employment with Chemgard, our sales manager began scheduling weekly sales conference calls with the Chemgard sales people. Haynes participated in these conference calls. During these calls, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. They also discussed issues that the salespeople were having with individual customers in their respective sales territories.

17. In May 2015, when Haynes quit unexpectedly from Chemgard without giving us the contractually required 30-days' notice, he had possession of that pricing sheet, as well as other Chemgard property. Chemgard made multiple requests to Haynes for him to return Chemgard's property, which Haynes initially ignored. When he finally returned most of the property to our attorney's office, Haynes failed to return the copies of the invoices or commission statements for the clients he serviced, which included pricing information. All commission statements were marked "CONFIDENTIAL."

18. Additionally, as we know now, Haynes began soliciting his Chemgard customers on behalf of Chem-Tek and Bell immediately after resigning from Chemgard. He had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations. As we've conducted discovery in this case, we've realized that without fail the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut our pricing with absolute precision because he had access to this pricing sheet. And given that these prices were for all products offered by Chemgard to all customers across all of its territories, it's clear that Haynes could use this confidential and proprietary information to unfairly solicit Chemgard's customers in states other than just Georgia and Alabama. Our non-solicitation agreement is limited to our existing customers, but it anticipates harm that could come from competition for those existing customers in all territories. Haynes's new employer, Chem-Tek is a South Carolina limited liability company operating in Greenville.

19. Defendant Albert Bell ("Bell") is the owner of Chem-Tek, LLC. 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 and call on the customers of Chemgard, even in the face of an order enjoining such conduct.

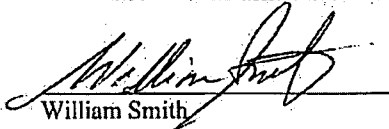
20. Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day. We do not know what information resides on his computers, but we know that Defendant Haynes and Chem-Tek have failed to provide all electronically-stored information requested in discovery. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and is using competitive, confidential, and important business and pricing information. Phone

records and email evidence of Haynes' activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard's customers for the benefit of his new employer. We are prevented from knowing the full scope of this conduct because Defendants have failed to provide redacted phone records for Haynes pursuant to their agreement with us, which was agreed to in front of this court at a previous hearing, as well as Defendants providing false responses to our discovery.

21. I believe 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.

22. Chemgard has suffered tremendous harm and damage in the form of lost profits from accounts that Haynes wrongfully solicited after his resignation from Chemgard, and these lost profits will continue to accrue for some years to come.

23. This affidavit is true and accurate to the best of my knowledge.


William Smith

09/19/2016
Date

Sworn to before me this
19th day of September, 2016


Notary Public for South Carolina North Carolina
My Commission Expires: September 14, 2020

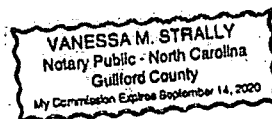


EXHIBIT B

KeyCite Yellow Flag - Negative Treatment
Distinguished by Industrial Packaging Supplies, Inc. v. Martin, D.S.C.,
March 29, 2012

2009 WL 512261

Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Columbia Division.

Cecilia **FOURNIL**, and Vista Holding Group,
Inc., d/b/a/ Vista Insurance Group, Plaintiffs,
v.

TURBEVILLE INSURANCE AGENCY,
INC.; William **Turbeville**, individually; and
Mark Ackerman, individually, Defendants.

Turbeville Insurance Agency, Inc.;
William **Turbeville**; and Mark
Ackerman, Third-Party Plaintiffs,
v.

Alex **Fournil** and Vista Insurance
Group, Third-Party Defendants.

C/A No. 3:07-3836-JFA.

March 2, 2009.

West KeySummary

1 Contracts

⇒ Nature of Business to Which Contract
Relates

Contracts

⇒ Preventing Disclosure of Trade Secrets

A former insurance agent's non-compete provision was defective and thus unenforceable because it was not related to any legitimate interest of an insurance agency. The provision was not only a prohibition of the active use of confidential information obtained while employed at the agency, but it was an absolute bar to soliciting or accepting business from any insurance business of any nature from any customer or account on the books of the agency at the time of her employment. It did not seem improper or unfair for the agent to solicit or accept

business from current clients provided that she did not trade on the agency's goodwill. Therefore, prohibiting such contacts was not related to any legitimate interest.

Cases that cite this headnote

Attorneys and Law Firms

A. Victor Rawl, Jr., McNair Law Firm, Robert L. Reibold, Walker Martin and Reibold, Columbia, SC, for Plaintiffs/Third-Party Defendants.

Christina M. Summer, Kathryn Thomas, Gignilliat Savitz and Bettis, Columbia, SC, for Defendants/Third-Party Plaintiffs.

ORDER ON MOTION TO DISMISS THIRD
PARTY DEFENDANT AND MOTION
FOR PARTIAL SUMMARY JUDGMENT

JOSEPH F. ANDERSON, JR., District Judge.

*1 This matter is before the court for review of the magistrate judge's report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(A) and (B) (West 2006) and Local Rule 73.02(B)(2)(g) (D.S.C.). As the jurisprudence in this district outlines:

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no

objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F.Supp. 137, 138 (D.S.C.1992) (citations omitted).

In this case, the magistrate's report and recommendation deals with two motions. The first is a motion filed by plaintiff/third-party defendant Vista Holding Group seeking its dismissal as a third-party defendant on the grounds that it is an already-named plaintiff in this lawsuit. See [dkt. # 82]. The second is the plaintiffs' motion for partial summary judgment on whether the non-competition provision of the employment agreement at issue in part of this case is enforceable. See [dkt. # 108]. The magistrate filed a report recommending that both motions be granted and the parties filed objections. For the reasons that follow, the court overrules the objections, adopts the magistrate's report and recommendation, and grants the motions.

I. Factual/Procedural Background

This case arises out of a disagreement in the workplace. From 1999 to 2007, Plaintiff Cecilia Fournil ("Fournil") was employed by defendant Turbeville Insurance Agency, Inc. ("Turbeville"). Fournil was an insurance agent; her primary employment duties revolved around helping people and businesses acquire insurance policies and assisting those customers in modifying or renewing insurance policies as their needs demanded.

A large part of Fournil's compensation from Turbeville was paid in the form of commissions. Turbeville as an agency receives a commission on policies written for its customers, and Turbeville pays its agents varying percentages of these commissions depending on the type of policy written and other factors. Many aspects of an agent's employment relationship, including the commission percentages Turbeville paid the agent, appear to have been set forth in what the parties refer to as the "associates agreement" an agent would execute prior to being hired by Turbeville. Central to part of this dispute is

a portion of Fournil's associates agreement which contains a clause prohibiting her from soliciting and accepting certain types of insurance business should her employment with Turbeville terminate.

*2 In 2006, Fournil received information causing her to believe that Turbeville was not paying her the percentages of commissions outlined in her associates agreement. She approached both defendant Mark Ackerman, a vice president at Turbeville, and defendant William Turbeville, the principal of the agency. The court will refer to all of the defendants collectively as "Turbeville." Discussions regarding the commissions continued for some time, and in 2007, the parties began discussing an arrangement where Fournil would purchase her book of business and end her employment at Turbeville. These discussions deteriorated, and Fournil's employment with Turbeville ended in August of 2007. Fournil contends she was fired; Turbeville contends she resigned.

Fournil initiated this action in state court bringing several state law claims including breach of contract and breach of the covenant of good faith and fair dealing. Fournil additionally sought injunctive relief and a declaratory judgment that the non-compete portion of her employment agreement was unenforceable. Fournil amended her complaint twice. She added her new insurance agency, Vista Holding Group, Inc., d/b/a Vista Insurance Group ("Vista Holding" and "Vista Insurance"), as a plaintiff, added more state law claims, and additionally alleged violations federal law including intentional discrimination. Turbeville brought state law counterclaims including claims for misappropriation of trade secrets and breach of contract, and named Alex Fournil (Cecilia Fournil's husband) and Vista Insurance as third-party defendants. The case was removed to this court in November of 2007. See [dkt. # 1].

The magistrate issued a report and recommendation on two motions. The first is a motion to dismiss filed by third-party defendant Vista Insurance. See [dkt. # 82]. Recalling that Vista Holding d/b/a Vista Insurance is a named plaintiff in this action, Vista Insurance argues that naming it as a separate third-party defendant serves no useful purpose in this litigation. The second motion is the plaintiffs' motion for partial summary judgment which argues that the non-competition portion of Fournil's associates agreement is unenforceable. See [dkt. # 108].

The magistrate recommended that both motions be granted. See [dkt. # 146].

Turbeville filed objections to the magistrate's report and recommendation as to the motion to dismiss, see [dkt. # 159], and both sides filed objections to the report and recommendation on the motion for partial summary judgment, see [dkt. #'s 157, 160]. The court will address these objections in turn.

II. Law/Analysis

The Motion to Dismiss

Turbeville appears to raise three objections to the magistrate's recommendation that Vista Insurance be dismissed as a third-party defendant. First, Turbeville argues that the magistrate has not cited any authority supporting dismissal. Second, Turbeville argues that the motion is premature in that Turbeville should be entitled to discovery on whether Vista Insurance is actually the d/b/a/ of Vista Holding. Third, Turbeville argues that dismissal precludes its ability to assert claims against Vista Insurance. None of these arguments are persuasive.

*3 Vista Holding is a named plaintiff in this action, and by all accounts, Vista Insurance is merely the trade name of Vista Holding. That is how the caption of this case lists the plaintiffs, and that is what the limited evidence bears out. Rule 17(a)(1) of the Federal Rules of Civil Procedure provides that an action must be prosecuted in the name of a real party interest. By the plaintiffs' admission, Vista Insurance is the d/b/a/ of Vista Holding, and Cecilia and Alex Fournil, named parties in this suit, are the principals of Vista Holding. [dkt. # 160-2]. For claims against Vista Insurance, Vista Holding is the real party in interest.

Turbeville's arguments regarding discovery and preclusion are thus unpersuasive. Plaintiffs admitted that Vista Holding and Vista Insurance are but a single business entity. This is an entity against which Turbeville has asserted counterclaims, and Turbeville is entitled to as much discovery from a party litigant as the rules make available. Suing the trade name of Vista Holding as a third-party defendant does not grant Turbeville any additional discovery, and striking Vista Holding as a third-party defendant does not limit Turbeville in discovery. There is no sense in asking someone every question twice.

With these additions, the court overrules Turbeville's objection and adopts the magistrate's report and recommendation on the motion to dismiss.

The Motion for Partial Summary Judgment

(A) Plaintiffs' Objection

On the motion for partial summary judgment, plaintiffs object to only one portion of the magistrate's report and recommendation. Although plaintiffs agree that the non-competition portion of the associates agreement is unenforceable for several reasons, plaintiffs contend that the magistrate erred in rejecting the argument that the covenant impermissibly prohibits members of the public from selecting the insurance agent of their choice. The court disagrees.

Under South Carolina law, whether a covenant not to compete is enforceable depends on whether the covenant (1) is necessary for the protection of the employer's legitimate interest; (2) is reasonably limited in operation with respect to time and space; (3) is not unduly harsh and oppressive in limiting the legitimate efforts of the employee to earn a living; (4) is reasonable from the standpoint of public policy; and (5) is supported by valuable consideration. *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 273 S.E.2d 338, 339 (S.C.1980) (quoting *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961)). In this case, the magistrate reasoned that the non-compete provision at issue was not necessary for the protection of Turbeville's legitimate interest and was not reasonably limited with respect to time and space. Because the court agrees with these determinations, the court need not address the plaintiffs' argument regarding public policy.

The court therefore overrules the plaintiffs' objection to the magistrate's report and recommendation that the non-compete provision does not violate South Carolina's public policy by restricting the public's choice of insurance agents.

(B) Turbeville's Objections

*4 Turbeville argues that the magistrate improperly applied the burden in judging summary judgment, erred in concluding that the non-competition provision was unenforceable, and erred in concluding that the provision

could not "blue penciled" to render parts of it enforceable. The court disagrees.¹

As a first matter, there is nothing suggesting that the magistrate applied an incorrect standard in judging summary judgment. The magistrate cited the appropriate standard for summary judgment, see [dkt. # 146, p. 5], and proceeded to answer whether the non-competition provision of Fournil's associates agreement was unenforceable as a matter of law. The construction of ambiguous contracts sometimes involves factual disputes, see *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299, 302-03 (S.C.2001), and genuine disputes of material fact preclude the grant of summary judgment. But determining whether the language of a contract is ambiguous and construing an unambiguous contract are questions of law for the court. See *id.*, and *Pearson v. Church of God*, 325 S.C. 45, 478 S.E.2d 849, 853 (S.C.1996). In this case, the magistrate viewed an unambiguous contract through the lens of South Carolina's standard for non-competition agreements and made a determination on whether the covenant at issue was enforceable. Nothing about this analysis was out of the ordinary.

The suggestion that the magistrate put the burden on Turbeville to demonstrate why the non-compete provision was enforceable is a mischaracterization of the magistrate's analysis. Plaintiffs presented the magistrate with legal arguments as to why the provision was not in compliance with South Carolina law, Turbeville presented arguments in opposition, and in the end, the magistrate judged that plaintiffs had the better of the argument. Turbeville is entitled to the benefit of the doubt on disputed factual questions, but not on the law as it applies to facts.

Moving to the magistrate's conclusions regarding enforceability, Turbeville objects to two conclusions which led the magistrate to rule that the covenant was invalid. Specifically, Turbeville argues that the covenant is necessary to protect its legitimate interest and is reasonably limited in time and space. Again, the court disagrees.

The relevant portion of Fournil's associates agreement contains a promise from Fournil not to "directly or indirectly ... solicit, attempt to obtain or accept any insurance business of any nature from any customer

or account on the books of [Turbeville] or hire any employee of [Turbeville] at the time of her employment." As the magistrate saw it, the non-compete provision was defective because it prohibits Fournil from contacting Turbeville's former clients as well as clients with which Fournil had no direct contact. The magistrate found that prohibiting such contacts was not related to any legitimate interest of Turbeville, and this conclusion was well-founded.

*5 Underlying the jurisprudence in the area of non-compete agreements is the recognition that an employer has a legitimate interest in protecting against improper and unfair methods of competition. An employer is not, however, entitled to enforce an agreement preventing ordinary competition. A foreign case cited by Turbeville provides some persuasive insight: *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391, 399 (Ne.1991) stands in part for the proposition that "[o]rdinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill or facility may make the employee an effective competitor" The court begins therefore with the proposition that non-compete agreements are enforceable only when the competition they prevent is unfair and improper.

So how could Fournil compete against Turbeville unfairly? Turbeville points to data maintained in the insurance industry known as "expirations." This data includes what could be described as intimate knowledge of an existing customer's insurance profile including what policies they currently carry, the amounts of the premiums on those policies, the dates those policies expire, and the terms of those policies. Turbeville casts this information as a trade secret, and there is some support for this characterization. See *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882, 884-85 (S.C.2007) (Pleicones, J., dissenting). But the court believes the better characterization of this information is as "goodwill." When insurance agents learn such customer information, they acquire it for their employer. Turbeville placed Fournil in a position where she acquired customer information for Turbeville's benefit. This information was relevant to the initiation or continuation of a customer's business with the Turbeville, and but for her employment with Turbeville, Fournil would not have learned this information. Were she to

use this information to compete with Turbeville. Fournil would be taking information she compiled for Turbeville, information which was not available to the general public, and using it to her advantage and Turbeville's detriment. The court therefore believes one case Turbeville points to correctly supports the view that post-employment use of such information amounts to "siphoning [the employer's] goodwill." See *Squier*, 472 N.W.2d at 391.

The problem with the covenant at issue, however, is that it extends to situations where these goodwill-siphoning concerns do not exist. The covenant at issue is not only a prohibition of the active use of confidential information obtained while employed at Turbeville, it is an absolute bar to soliciting or accepting business from "any insurance business of any nature from any customer or account on the books of [Turbeville] ... at the time of her employment." Soliciting business from former clients of Turbeville's is not unfair or improper; Turbeville has no relationship with these customers whatsoever. It also does not seem improper or unfair for Fournil to solicit or accept business from current clients of Turbeville provided that she does not trade on Turbeville's goodwill. This is not to say that an enforceable non-compete agreement must be limited to a prohibition on the use of confidential information to solicit business—South Carolina law supports the view that a limit on accepting business from a former employer's clients is enforceable when the business was serviced by the former employee. *Caine & Estes Ins. Agency v. Watts*, 278 S.C. 207, 293 S.E.2d 859 (S.C.1982). This is because the former employee's relationship with customers is part of his employer's goodwill as well. But what the magistrate recognized in this case is that the covenant at issue here extends to areas where Turbeville has no legitimate interest in preventing competition. This conclusion is sound.

*6 Two caveats bear mentioning. First, the court has discussed the problems of Turbeville's interest in confidential client information and personal relationships, and there is nothing in the evidence suggesting that Fournil's employment with Turbeville furnished her with any other type of information that would allow Fournil to compete against Turbeville unfairly if she left. This case is thus different from *Volunteer Fireman's Insurance Services, Inc. v. CIGNA Property and Casualty Insurance Agency*, 693 A.2d 1330 (PA 1997), relied upon by Turbeville. That case did not deal with "a typical independent agent selling a standard insurance policy,"

but a situation where one party developed a specialized product program and granted an exclusive license to market and sell that product to another party. *Id.*, at 1337. Because of the sales agent's intimate knowledge of the unique product created by the developer, the developer would be substantially injured if the sales agent was allowed to enter the competitive market as both a producer and seller immediately after the license relationship terminated. *Id.*, at 1338. There does not appear to be anything of this sort at play in this case.

Second, although Turbeville asserts that it should be entitled to discovery on the customer information of which Fournil is aware, the court does not find this argument persuasive. Fournil's employment at Turbeville either gave her access to confidential information and personal contacts with all of Turbeville's clients or it did not. Fournil has argued that she does not have access to this information, and the limited record supports this determination. See [dkt. # 160-3, p. 19].

Turbeville's final objection is to the magistrate's conclusion that the unenforceable portions of the covenant could not be "blue penciled" to render the covenant enforceable. The magistrate's analysis on this issue is sound, and the court adopts that analysis with one addition: In *Stonhard v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 621 S.E.2d 352 (S.C.2005), the South Carolina Supreme Court held that a court could not use "blue penciling" to add a term not previously included in a non-compete agreement. This covenant prohibits Fournil from accepting business from any current and former clients of Turbeville. It would take a great bit of judicial redrafting to work the language in the manner Turbeville proposes.

These conclusions should not be given more weight than they are due. Turbeville has included equitable claims in this lawsuit, and trading on Turbeville's goodwill is undoubtedly part of the theory of those claims. Here, the court merely overrules Turbeville's objections to the magistrate's report and recommendation that the non-compete provision of Fournil's associates agreement is unenforceable.

III. Conclusion

For the foregoing reasons, the report and recommendation of the magistrate is incorporated herein by reference and adopted as the order of this court. The

parties' objections are overruled, and the pending motions to dismiss and for partial summary judgment are granted.

All Citations

*7 IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2009 WL 512261

Footnotes

- 1 As a housekeeping matter, the court notes that Turbeville filed a reply in support of its objections on the issue of partial summary judgment, [dkt. # 166]. The rules of civil procedure do not allow a party to file a reply in support of objections to a magistrate's report and recommendation. See Fed.R.Civ.P. 72(b). Accordingly, the court did not consider this filing in reviewing the magistrate's report and recommendation. Were the court to consider the reply, its conclusions would nonetheless remain the same.

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ELECTRONICALLY FILED - 2016 Sep 19 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

296 F.Supp.2d 681
United States District Court,
D. South Carolina,
Charleston Division.

ROCKFORD MANUFACTURING,
LTD., et al., Plaintiffs,
v.
David D. BENNET, et al., Defendants.

No. CIV.A.2:03-837-23.

May 28, 2003.

Synopsis

Background: Affiliated employers sued former employees seeking damages and preliminary injunctive relief from their alleged misappropriation of confidential trade secrets in violation of non-solicitation agreements in restrictive covenants they entered during employment.

Holdings: Upon employers' motion for preliminary injunction, the District Court, Duffy, J., held that:

[1] employers did not show that they would suffer irreparable harm sufficient to conclude that balance of harms tipped decidedly in their favor, and warranted that employers demonstrate a strong possibility of success on merits, and

[2] employers demonstrated strong possibility of success on merits of claim that restrictive covenants were enforceable under South Carolina law as being properly tailored to serve employers' interests, reasonably limited as to time and place, narrowly drawn so as not to be unduly harsh on former employees' ability to earn a living, and supported by adequate consideration.

Motion granted.

West Headnotes (16)

[1] Injunction

⇒ Irreparable injury

A party requesting preliminary injunctive relief must first make a clear showing that he will suffer irreparable harm if the court denies his request.

Cases that cite this headnote

[2] Injunction

⇒ Balancing or weighing hardship or injury

If a party seeking a preliminary injunction establishes he will suffer irreparable harm if his request is denied, the next step then for the court to take is to balance the likelihood of irreparable harm to the requesting party from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief.

Cases that cite this headnote

[3] Injunction

⇒ Likelihood of success on merits

Injunction

⇒ Serious or substantial question on merits

If the balance of harms between a plaintiff requesting preliminary injunctive relief against a defendant tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation; however, if the balance does not tip decidedly in favor of the plaintiff, there must be a strong probability of success on the merits.

Cases that cite this headnote

[4] Injunction

⇒ Public interest considerations

Fourth step in analysis of a plaintiff's request for a preliminary injunction requires the court's evaluation of whether the public interest favors granting preliminary relief.

Cases that cite this headnote

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[5] Injunction

↔ Balancing or weighing factors; sliding scale

In four-part analysis applicable to the determination of whether a party is entitled to preliminary injunctive relief, the two most important factors are the probable irreparable harm to the moving party if an injunction is not issued and the probable harm to the non-moving party if an injunction is issued; if the balance of these two factors is in the non-moving party's favor, he or she does not have to show a likelihood of success on the merits, and the presentation of a grave or serious question is sufficient to warrant a preliminary injunction, but the inverse is true that if the likelihood success on the merits is great, the need for showing irreparable harm decreases proportionately.

2 Cases that cite this headnote

[6] Injunction

↔ Disclosure or use of trade secrets or confidential information

Affiliated employers who sought preliminary injunctive relief against former employees, seeking to enjoin their alleged misappropriation of confidential trade secrets, did not show that they would suffer irreparable harm sufficient to conclude that balance of harms tipped decidedly in their favor, and warranted that employers demonstrate a strong possibility of success on merits.

Cases that cite this headnote

[7] Contracts

↔ Restraint of Trade or Competition in Trade

Contracts

↔ Restriction of competition

Under South Carolina law, restrictive covenants not to compete or solicit are generally disfavored and will be strictly construed against the employer.

Cases that cite this headnote

[8] Contracts

↔ Covenants not to compete

Contracts

↔ Restraint of Trade or Competition in Trade

Under South Carolina law, enforceability of a restrictive covenant not to compete or solicit depends on whether it: (1) is necessary for the protection of the legitimate interests of the employer; (2) is reasonably limited in its operation with respect to time and place; (3) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) is reasonable from the standpoint of sound public policy; and (5) is supported by valuable consideration.

5 Cases that cite this headnote

[9] Injunction

↔ Non-competition and non-solicitation issues

Employers were likely to demonstrate that non-solicitation agreements contained in restrictive covenants between affiliated employers and employees were properly tailored and were not overbroad under South Carolina law, as required to support claim for preliminary injunctive relief against former employees; agreement was expressly premised on employee's acknowledgement that he would have access to confidential trade secret information including dealer related information, covenants were divisible and capable of enforcement to extent they protected reasonable and legitimate interests of the employers because they contained severability clause, and court could "blue-pencil" the provisions that implicated employers that had no legitimate interest in the covenants without disrupting remaining provisions.

2 Cases that cite this headnote

[10] Contracts

⇒ In restraint of trade

Under South Carolina law, two important principles apply to determination of the enforceability of non-solicitation clauses in restrictive covenants; first, the contract must be severable, and second, the severability must be apparent from the contract itself, in language and in subject matter.

1 Cases that cite this headnote

[11] Contracts

⇒ In restraint of trade

Under South Carolina law, a restrictive covenant is severable only where it is in effect a combination of several distinct covenants.

Cases that cite this headnote

[12] Injunction

⇒ Non-competition and non-solicitation issues

Restrictive covenants that prohibited employees from soliciting employees, customers, and dealers of employers for duration of two years were likely to be determined to be reasonably limited as to time and place under South Carolina law, as required to support employers' motion for preliminary injunctive relief against former employees; dealer and customer-based restrictions were a reasonable substitute for a geographical limitation that was absent, and employers produced evidence that some restrictions would not unreasonably limit former employees' ability to do business.

2 Cases that cite this headnote

[13] Contracts

⇒ Limitations as to time and place in general

While the general test is that contractual prohibitions in a restrictive covenant must be geographically limited to what is reasonably necessary to protect the employer's business

under South Carolina law, prohibitions against contacting existing customers can be a valid substitute for a geographic limitation.

1 Cases that cite this headnote

[14] Injunction

⇒ Non-competition and non-solicitation issues

Restrictive covenants that prohibited employees from soliciting employees, customers, and dealers of employers for duration of two years were likely to be determined to be narrowly drawn so as not to be unduly harsh on former employees' ability to earn a living under South Carolina law, as required to support employers' motion for preliminary injunctive relief against former employees; there was no geographical limitation to covenants, and employers' evidence tended to show that former employees could continue to pursue many related business opportunities of their choosing.

Cases that cite this headnote

[15] Contracts

⇒ Covenants not to compete

Although a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself under South Carolina law, when a covenant is entered into after the inception of employment separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.

1 Cases that cite this headnote

[16] Injunction

⇒ Non-competition and non-solicitation issues

Employers were likely to show that valuable consideration supported non-solicitation agreement against former employees under South Carolina law, as required to support

claim for preliminary injunctive relief to prevent former employees' use of confidential trade secret information; even though one employee alleged that consideration was lacking because he did not sign agreement until second day of work and another employee claimed he was not paid wages due, such evidence did not preclude finding that employers demonstrated strong probability of success on merits.

Cases that cite this headnote

Attorneys and Law Firms

*684 Ellis R. Lesemann and John C. McElwaine of Nelson Mullins Riley & Scarborough, Charleston, SC, for plaintiffs.

Allen R. Holmes, Gibbs & Holmes, Charleston, SC, for defendants.

AMENDED ORDER

DUFFY, District Judge.

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction, pursuant to 5 U.S.C. § 705 and Fed.R.Civ.P. 65. For the following reasons Plaintiffs' motion is granted.

BACKGROUND

Plaintiffs filed suit in this Court on March 14, 2003. On April 25, 2003, Plaintiffs filed their First Amended Verified Complaint, seeking damages and other relief, for various claims, including breach of contract, breach of the duty of loyalty and violations of the federal Copyright Act, 17 U.S.C. § 101, and the federal Computer Fraud and Abuse Act, 17 U.S.C. § 1030. Plaintiffs contend that Defendants were former employees who have now wrongly solicited customers, dealers, and employees and who have appropriated confidential trade secrets in violation of non-solicitation agreements entered into by the parties.

Plaintiffs are all legally distinct, but affiliated entities involved in the engineering, design, manufacture, and marketing of steel buildings. Plaintiffs' products are available to the general public through a network of authorized dealers. Defendants each formerly held a position of employment with either Plaintiff Rockford Manufacturing or Plaintiff Rockford Acceptance. Plaintiffs originally alleged that Defendants Supreme Steel Buildings, Inc. and Supreme Building Systems are the apparent and current employers of some or all of the individual Defendants. Plaintiffs, however, have recently dismissed without prejudice Defendant Supreme Steel Buildings, Inc.

Plaintiffs contend that as sales employees, Defendants had significant access to confidential, proprietary and trade secret information, including, but not limited to: (1) confidential dealer lists; (2) confidential vendor lists; (3) confidential client lists; (4) confidential cost, estimating and pricing data; and (5) confidential information concerning manufacturing processes and practices.

Plaintiffs contend that Defendants signed agreements containing restrictive covenants regarding non-solicitation, non-disclosure, and non-competition. Plaintiffs allege further that in violation of such agreements, Defendants have (1) established a web-site, which allegedly plagiarizes information from Plaintiffs' website; (2) obtained illegal access to Plaintiffs' computer systems by fraud and have used such access to misappropriate highly protected trade secrets; and (3) solicited Plaintiffs' dealers, vendors, customers, contacts, and employees.

DISCUSSION

I. Preliminary Injunction

[1] [2] [3] [4] The Fourth Circuit outlined the analytical framework, which courts must employ in determining whether to grant preliminary relief, in *Direx Israel, Ltd. v. *685 Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir.1991) (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195 (4th Cir.1977)). First, the party requesting preliminary relief must make a "clear showing" that he will suffer irreparable harm if the court denies his request. *Id.* at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance

the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Id.* at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Id.* at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." *Id.* Fourth, the court must evaluate whether the public interest favors granting preliminary relief. *Id.*

[5] The two most important factors are the probable irreparable harm to the moving party if an injunction is not issued and the probable harm to the non-moving party if an injunction is issued. *Blackwelder*, 550 F.2d at 198. If the balance of these two factors is in the non-moving party's favor, he or she does not have to show a likelihood of success on the merits, and the presentation of a grave or serious question is sufficient to warrant a preliminary injunction. *Id.* However, the inverse is true that if the likelihood of success on the merits is great, the need for showing irreparable harm decreases proportionately. *Combined Insurance Company of America v. Investors Consolidated Insurance Co.*, 499 F.Supp. 484 (E.D.N.C.1980).

A. Balance of Harms

[6] Plaintiffs contend simply that they will suffer irreparable injury because their "confidential information, dealer lists, completed building lists, price lists and pricing information, and detailed customer information that Plaintiffs have spent years developing ... is invaluable in the hands of Plaintiffs' competitors" (Pl.'s Mot. at 11.) Plaintiffs have made a significant attempt to quantify the cost associated with developing what they consider their most important asset: a network of dealers who sell Plaintiffs' steel buildings products. (See Wirth Aff. at 2-6.) Notwithstanding their ability to quantify a portion of the potential injury they face, Plaintiffs contend that if Defendants are permitted to interfere in their dealer network, much of the injury would be irreparable insofar as there would be a resultant loss of good will and inability to restore dealer relationships. Plaintiffs have submitted the affidavit of Michael Wirth in support.

In contrast, Defendants have come forward with no evidence as to the potential harm they might face if the injunction were to lie. Plaintiffs contend that Defendants would suffer no harm because abiding by the Agreement not to solicit Plaintiffs' customers, employees, or dealers in no way prohibits them from other meaningful work. (See Wirth Aff. at 6-7.)

On this evidence, however, the Court cannot conclude that the balance of harms tips decidedly in Plaintiffs' favor. The Court is not convinced of the degree of irreparability as Plaintiffs contend. As a result, the burden on Plaintiffs to establish a likelihood of success on the merits becomes considerably greater. See *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 817 (4th Cir.1991). Plaintiffs must demonstrate that there is a "strong probability of success on the merits." *Id.* at 813 (emphasis added).

*686 II. Likelihood of Success on the Merits

[7] [8] Plaintiffs also contend that there is a strong probability that they will succeed in enforcing the non-solicitation agreements. Restrictive covenants not to compete or solicit, however, are generally disfavored and will be strictly construed against the employer. An agreement's enforceability depends on whether it

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

Sermans v. Caine & Estes Insurance Agency, Inc., 275 S.C. 506, 273 S.E.2d 338 (1980); *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142, 143 (1983).

1. Legitimate Interest of the Employer

South Carolina has expressly recognized that the "most important single asset of most businesses is their stock of

customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). Plaintiffs contend that their network of dealers should be afforded the same characterization. The Court agrees that Plaintiffs will likely be able to demonstrate that the dealer-network developed by Plaintiffs is a legitimate business interest worthy of protection. Plaintiffs have already submitted some evidence of the significant time and money invested in the development of their dealer network. (Wirth Aff. at 2-4.) There is little question that such an investment would constitute a legitimate interest.

Defendants do not disagree that customers, employers, or dealers are of a legitimate interest to Plaintiffs, but contend that Plaintiffs have no legitimate interest in prohibiting the solicitation of employees, clients, and dealers of "Affiliated Companies" with whom Defendants never had any personal contact and, further, that such overbreadth renders the entire covenant unenforceable.

[9] As an initial matter, the Court is convinced that Plaintiffs may in fact demonstrate that the non-solicitation agreement is properly tailored and not overbroad. The agreement is expressly premised on the understanding and acknowledgment of the employee that "during his employment with the Company he shall have access to certain confidential, proprietary and trade secret information including dealer and Affiliated Company *687 related information." (First. Am. Compl. Ex. A-G at 1.) There is no evidence that Defendants, through their employment with either Rockford manufacturing or Rockford acceptance, might not have, in fact, had access to information concerning the proprietary interests of Affiliated Companies for which they did not actually work. Regardless, the Court concludes that Plaintiffs have shown that they are likely to demonstrate that the covenants are ultimately divisible and capable of enforcement to the extent they do protect reasonable and legitimate interests of the Plaintiffs.

Defendants contend that South Carolina does not permit courts to "blue pencil" unreasonable provisions of an agreement and enforce reasonable ones. A survey of South Carolina law suggests otherwise.

In *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972), the South Carolina Supreme Court considered that

Some courts have applied the so called "blue pencil test", that is, if the excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced; but if the contract is not severable in terms, the entire covenant falls. We recognize that some courts apply the rule that if the restrictive covenant as to time or space is unreasonable, even though *indivisible* in terms, it is nevertheless enforceable for so much of the performance as would be a reasonable restraint. These courts hold that the legality of restraint should not turn on the mere form of the wording but upon the reasonableness of giving effect to the indivisible promise to the extent that would be lawful. We quote the following from the *Somerset* case which comes from Pollock, Contracts (11th Ed.), page 335:

"A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants."

We quote from 17 C.J.S. Contracts § 289a, page 1224, the following:

The severability of the contract must be determined from its language and subject matter; and where the severable character of the agreement is not determinable from the contract itself, the court, in order to uphold the contract, cannot create a new agreement for the parties, for example, so as to make the restraint a partial restraint within a lesser area than that specified in the covenant or for a lesser period of time.

Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22, 23–24 (1972) (emphasis added) (citing *Somerset v. Reynier*, 233 S.C. 324, 104 S.E.2d 344 (1958)). *Eastern* and its progenitor, *Somerset*, suggest that South Carolina has not wholly rejected the “blue pencil” test. Both cases can be reasonably read to conclude that although an *indivisible* covenant may not be enforced even to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions. See *Eastern*, 189 S.E.2d at 23–24; *Somerset*, 104 S.E.2d at 347–48. Defendants contend that nowhere in the history of South Carolina jurisprudence has such an application of *Somerset* ever been made. Notwithstanding, it is clear that *Somerset* contemplates as much. Plaintiffs rightly contend that just because the particular agreements at issue in *Eastern* *688 and *Somerset* did not lend themselves to severability does not mean that there is not some covenant properly divisible such that the Court might honor the principles of *Somerset* and yet still, in effect, “blue pencil” any overbroad provisions of the covenant and enforce the narrowly tailored ones. The Court also agrees that Plaintiffs have shown a likelihood that the non-solicitation agreement in the present case is one such covenant.

[10] *Eastern* and *Somerset* delineate two important principles for determining the enforceability of non-solicitation clauses. First, as stated, the contract must be severable. Second the severability must be apparent from the contract itself—in language and subject matter.

[11] A covenant is severable only where it “is in effect a combination of several distinct covenants.” *Somerset*, 104 S.E.2d at 348 (citing Pollock, *Contracts* (11th Ed.)). Unlike the covenants at issue in *Eastern* and *Somerset*, the present covenant incorporates a definition of “Affiliated Companies” which on its face may be altered without writing into the agreement something unintended by the parties. This necessarily suggests that the covenant operates more like several distinct covenants than a single indivisible one. The definition of Affiliated Company expressly lists the entire universe of companies which the Court might *potentially* conclude have a legitimate interest in enforcing the covenant against Defendants. Accordingly, the Court can logically “blue-pencil” provisions that implicate companies that have *no* legitimate interest without disrupting the integrity,

continuity, or intent of the remaining provisions. See *Somerset*, 104 S.E.2d at 348.

By comparison, *Eastern* involved a covenant that delineated an unreasonable 100-mile radius. The supreme court refused to make “a partial restraint within a lesser area than that specified in the covenant” because to do otherwise would be to “create a new agreement for the parties.” *Eastern*, 189 S.E.2d at 23–24. This conclusion is necessarily predicated on the indivisible quality of the “100 mile radius” restriction. There is no smaller unit of space which the supreme court might have identified as representing an expression of the intent of the parties. The choice was either between a 100-mile radius or none at all. Likewise, in *Somerset* “[t]he covenant ... [was] clearly indivisible. It cover[ed] the entire State of South Carolina and furnishe[d] no basis for dividing this territory. Not only d[id] the contract show that it was the intent of the parties that th[e] covenant be treated as indivisible, there [was] no basis for drawing a sharply defined line separating the excess territory.” *Somerset*, 104 S.E.2d at 348.

Such is not the case here. First, the covenant is mechanically divisible. In the structure of the covenant itself, Plaintiffs have manifested an intention regarding each company *individually*, by choosing to list them by name. Such an expression makes it possible, logistically, to extricate those companies, *without* a legitimate interest, from the more global intent concerning all “Affiliated Companies,” while leaving intact the covenant as to those companies which *do* have a legitimate interest, knowing with full confidence that the intention of the parties has been expressed and preserved in the remainder of the abridged covenant. Accordingly, the covenant is potentially severable.

Second, the parties have expressly stated their intent that the covenants be severable. Importantly, the court in *Eastern* focused on whether or not the parties *intended* that the covenant be treated as divisible. *Eastern*, 189 S.E.2d at 24. Here, the non-solicitation agreement contains a Severability Clause which states that the “invalidity or unenforceability of *689 any provisions of the Agreement shall not affect the other provisions hereof, and this Agreement shall be enforced and construed as if such invalid or unenforceable provision were omitted.” (First Am. Compl. Ex. A–G at 3.) Thus, the

covenant is not only mechanically severable, but it was the intent of the parties that it be treated as such.

Accordingly, the Court finds that Plaintiffs have demonstrated a strong probability that the Court can enforce an otherwise overly broad covenant as to only those companies which have a legitimate interest.

2. Reasonably Limited in Time and Place

[12] The covenants at issue in this case are for a two year duration. Covenants of comparable duration have been regularly upheld as reasonable. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (two year covenant); *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142, 143 (1983) (three-year covenant). Defendants contend that section 5(b) of the agreement, because it does not delineate a time limitation, requires Defendants to indefinitely communicate the substance of the non-solicitation agreement to any future employers, thereby making the entire covenant unreasonable. Defendants' argument is strained. While it is true that 5(b) states no time limitation, any obligation to give notice to an employer of the non-solicitation agreement obviously terminates when the agreement itself terminates. As the covenants expire after two years, Defendants could not possibly have any duty under the agreement to communicate the substance of a covenant no longer operative. The Court finds that Plaintiffs will likely demonstrate that the covenants are reasonable as to time.

[13] The covenants at issue also impose client and employee based restrictions—to wit, Defendants are prohibited from soliciting Plaintiffs' employees or clients—rather than geographical restrictions. While “the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business . . . [p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation.” *Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E.2d 859 (1982); *see also Oxman v. Proffitt*, 241 S.C. 28, 126 S.E.2d 852 (1962); *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217, 222 (1992). In *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217, 222 (S.C.App.1992), the South Carolina Court of Appeals expressly concluded that such restrictions are reasonable and enforceable. Plaintiffs are likely to prevail in showing that the dealer and customer based restrictions are a reasonable substitute

for a geographical limitation. Plaintiffs have already come forward with some evidence that the dealer and customer based restrictions will not unreasonably limit Defendants' ability to do business and that they are at least as narrowly construed as a geographical limitation to effectuate Plaintiffs' legitimate interest. (See Wirth Aff. at 6-7.)

3. Whether the Covenant is Unduly Harsh on the Employee-Defendants' Ability to Earn a Livelihood

[14] Plaintiffs contend that the restrictions are narrowly drawn so as not to be unduly harsh on Defendants' ability to earn a living. The Court agrees that Plaintiffs will likely be able to demonstrate that the covenants do not prohibit employment with any of Plaintiffs' competitors and that because there is no geographical limitation, Defendants can still solicit business *690 anywhere. The Wirth Affidavit is evidence tending to demonstrate that Defendants continue to enjoy the ability to pursue many, steel-building-related business opportunities of their choosing. Conversely, Defendants have put forward no evidence suggesting that enforcement of the covenant would in fact be unduly harsh.

Finally, the restrictive covenants appear reasonable from the standpoint of sound public policy and are supported by consideration (in exchange for at-will employment). Defendants have not come forward with any public policy which would call the covenants into question, other than their arguments concerning the alleged overbreadth of the covenants. The covenants were concomitant to enforceable employment agreements, which the state has an interest in enforcing. There is no indication that the agreements were made under duress.

4. Whether the Covenant is Supported by Valid Consideration

[15] [16] Defendants do challenge whether there is valuable consideration to support the non-solicitation agreement as against Defendant Bennet. The South Carolina Supreme Court has stated that “a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself.” *Riedman Corporation v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404, 404 (1986.) However, “when a covenant is entered into after the inception of employment separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.” *Poole v.*

Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207, 209 (2001).

Although at the hearing Defendants argued that certain Defendants did not sign the non-solicitation agreements until a day after they started work, Defendants have only submitted an Affidavit of Defendant Herald to that end. Rather, in their memorandum in opposition, Defendants focus primarily on Plaintiffs' alleged failure to pay Defendant Bennett upon his termination and argue that such a failure renders the provisions of the non-solicitation agreement unenforceable. Defendants cite *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (S.C.App.2000) in support. The affidavit of Defendant Herald that he did not sign the agreement until his second day of work and the affidavit of Defendant Bennett that he was not properly paid wages due, while some evidence of those facts, does not, alone, convince the Court that, on whole, Plaintiffs' have not demonstrated a strong probability of success on the merits.

CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that Plaintiffs' Motion for Preliminary Injunction is **GRANTED**. Specifically, Defendants are **ENJOINED** from (1) using all electronic files, data, and documents taken from Plaintiffs Rockford Manufacturing, LTD, and Rockford

Dealer Acceptance Corp. and destroying or altering such materials; (2) using Plaintiff Rockford Manufacturing, LTD.'s or Plaintiff Rockford Dealer Acceptance Corp's confidential information, as delineated and contemplated in the Confidentiality provision of the parties' respective Employment Agreements; (3) soliciting or accepting business from any of Plaintiff Rockford Manufacturing, LTD.'s or Plaintiff Rockford Dealer Acceptance Corp's dealers, vendors, clients, or customers whose identity was obtained through use of confidential information taken from Plaintiff Rockford Manufacturing, LTD. or Plaintiff Rockford Dealer Acceptance Corp. (any such business previously solicited shall be *691 specifically and fully detailed and accounted for at the hearing on the merits); and (4) otherwise refusing to honor in full the Employment Agreements entered into by Plaintiff Rockford Manufacturing, LTD. and Plaintiff Rockford Dealer Acceptance Corp. and Defendants until such time as the Court finally rules on the merits of Plaintiffs' claim. The parties shall confer and within five days submit a proposed scheduling order to the Court for expedited discovery and a date for a hearing on the merits. Finally Plaintiffs shall post a bond in the amount of \$200,000 (two hundred thousand dollars) as per Federal Rule of Civil Procedure 65(c).

AND IT IS SO ORDERED.

All Citations

296 F.Supp.2d 681

Footnotes

- 1 The non-solicitation agreement prohibits the solicitation of employees, customers, and dealers of Rockford Manufacturing or any "Affiliated Company." "Affiliated Company" is defined as

"any and all companies and/or other entities which, directly or indirectly, in whole or in part, own, manage, and/or are managed by the Company, and any and all companies and/or entities which, directly or indirectly, in whole or in part, are related to the Company as a result of common ownership, and/or common control and/or common management. Currently, the 'Affiliated Companies' include WedgCor, Inc., Sunward Corporation, Rockford Manufacturing, Ltd. WedgCor Acceptance Corporation, Gold Seal Steel Buildings, Inc., Rockford Dealer Acceptance Corporation, Sunward Trucking Incorporated, Advertising Incorporated, Plus 50 Delaware Corporation and Certified Components Corporation"

(Agreement at 1.)

2006 WL 516733

Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Charleston Division.

HAGEMEYER NORTH AMERICA INC., Plaintiff,

v.

Ellis THOMPSON, Defendant.

No. C/A 2:05-3425.

March 1, 2006.

Attorneys and Law Firms

Christopher B. Major, Daniel R. Unumb, Paul Peralta,
Moore and Van Allen, Charlotte, NC, for Plaintiff.

Derek Farrell Dean, Simons and Keaveny, Charleston,
SC, Peter V. Hasbrouck, Martenson Hasbrouck and
Simon, Atlanta, GA, for Defendant.

ORDER and OPINION

NORTON, J.

I. BACKGROUND

*1 This matter is before the court on plaintiff Hagemeyer North America, Inc.'s ("Hagemeyer") request for a preliminary injunction to enforce a noncompete agreement with former employee defendant Ellis Thompson ("Thompson"). Hagemeyer is a large distributor of products and services focusing on business-to-business markets in electrical, safety, and industrial products throughout North America. From 1977 to 2000, Thompson was a shareholder and employee with Cameron & Barkley Company ("CamBar"), a Georgia firm that merged with plaintiff in 2000. Hagemeyer sought to retain CamBar's key personnel to protect proprietary information, and extended employment to Thompson. Thompson received \$1,600,000 for his equity interest in CamBar.

In conjunction with the merger, Thompson signed a August 29, 2000 Employment and Noncompetition Agreement ("Agreement"). As consideration for the Agreement, Thompson received continued employment and a stay-on bonus of \$273,001. The Agreement

includes both a noncompete provision and restrictions on Thompson's ability to solicit Hagemeyer's customers. The Agreement applies to CamBar's successors. Specifically, it provides:

8. NON-DISCLOSURE OF TRADE SECRETS, NON-SOLICITATION AND COVENANT NOT TO COMPETE: In consideration of the substantial benefits conferred upon Employee as a direct consequence of CamBar's retention of Employee as an Employee of CamBar, Employee further covenants and agrees as follows:

a. *Non-Disclosure of Trade Secrets:* Employee agrees that, both during and following the Applicable Period,¹ he will not directly or indirectly disclose to any person, firm, corporation, or other entity any of CamBar's Trade Secrets for any purpose whatsoever. Employee acknowledges that CamBar's Trade Secrets have been acquired and maintained by CamBar at great effort and expense, constitute valuable assets to CamBar, and are maintained in secrecy by CamBar.

d. *Non-solicitation of Customers:* Employee agrees that he will not during the Applicable Period, directly or indirectly, assist, be associated with, consult with, or support, whether as an individual on his own account, or as a partner, owner, shareholder, joint venturer, employee, agent, salesman, or official, any Conflicting Organization² when that assistance, support or association involves Employee directly or indirectly calling upon, causing to be called upon, communicating with or assisting others in communicating with or otherwise attempting to bring about any transaction to the detriment of CamBar's business between a conflicting organization and a Customer:³

- who was served by Employee at any time during Employee's employment with CamBar, or

- whose names and/or addresses were furnished to Employee by CamBar in the furtherance of CamBar's Business, or

- with whom Employee had any contact, written or verbal, in connection with the furtherance of CamBar's Business while in the employ of CamBar.

*2 c. *Covenant Not to Compete*: Employee further covenants and agrees that during the Applicable Period, he will not directly or indirectly engage in or receive any business of a Conflicting Organization, either as an individual on his own account, or as a partner or as an employee, or in any capacity whatsoever, in the geographic area set forth in Attachment C [Georgia]. However, Employee may accept employment with a Conflicting Organization if CamBar receives, prior to Employee's accepting such employment, separate written assurance, satisfactory to CamBar, from such Conflicting Organization and from Employee that Employee will not render services, directly or indirectly, in competition with CamBar's business or in connection with any Customers and that CamBar's trade secrets will remain undisclosed. Notwithstanding anything to the contrary set forth in this agreement, a minor ownership interest (less than 2% of the issued and outstanding shares) in a Conflicting Organization that is publically traded shall not be deemed a violation of this Agreement.

Agreement § 8. Thompson acknowledged and agreed "that the restrictions contained in section 8 are reasonable and necessary for the protection of their [CamBar's] respective legitimate interests." Agreement § 8(f). Thompson also agreed that the restrictions are necessary

for the reasonable and proper protection of CamBar's business. Employee further admits and declares that he considers each and every restriction reasonable with respect to the subject matter, length of time and territory covered, and that this Agreement does not restrict his ability to earn a livelihood.

Agreement § 9. The Agreement provides that South Carolina law governs its interpretation. Thompson was a regional vice president for sales from 2000 until his voluntary resignation on November 15, 2005. In this position, Thompson oversaw sales organizations within his region and supervised account representatives, district managers, and others. Thompson was responsible for electrical product sales to electrical contractors ("contractor and installer" customers, "C & I") throughout Georgia, North and South Carolina, and was involved in the company's strategic planning.

In June 2003 Hagemeyer informed Thompson that as of December 31, 2003 he would become an at-will employee. Thompson resigned his position via email on November 15, 2005, and six days later Hagemeyer sent Thompson a letter reminding him of the Agreement's restrictions. Thompson has accepted a position with DH Supply Company, Inc. ("DH"), an entity which he admits is in the business of electrical distribution, and thus a direct competitor of Hagemeyer. He is awaiting resolution of this action before actually starting work at DH, which is located in Georgia. According to Thompson,

As a DH employee, [Thompson] would work in the same industry as in his previous position with Hagemeyer, though his duties would be materially different in that they would encompass a range of duties far wider than just sales. DH has informed Thompson that it wants him to help run all operational aspects of the business, while the senior management of DH concentrates on finances, growing the business on the data and utility side, and trying to expand into Florida and Texas.

*3 (Def.'s mot. in opp. at 5.) On December 8, 2005, Hagemeyer filed a complaint alleging breach of contract, breach of the duty of loyalty, and trade secrets violations. On December 12, Hagemeyer filed this preliminary injunction request, asking the court to prevent Thompson from violating the Agreement. Thompson has agreed to stay an arbitration proceeding underway in Georgia to determine the Agreement's enforceability.

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II. ANALYSIS

In determining the grant or denial of a preliminary injunction, four factors must be considered:

- i. the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
- ii. the likelihood of harm to the defendant if the requested relief is granted;
- iii. the likelihood that the plaintiff will succeed on the merits; and
- iv. the public interest.

Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir.1992).

a. Irreparable Harm

Thompson objects to Hagemeyer's assertion that it has or will suffer irreparable harm. As noted, Thompson has accepted the job but not yet started. This fact effects the initial consideration for a preliminary injunction; i.e., the likelihood of irreparable harm to plaintiff if the preliminary injunction is denied. *Id.* Plaintiff must demonstrate it faces an immediate threat of irreparable harm without an injunction. *Id.* at 812, 816. The "required irreparable harm must be neither remote nor speculative, but actual and imminent." *Id.* at 812; *see also* *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3rd Cir.1987) ("Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable harm.").

Hagemeyer identifies the imminent injury as loss of customer goodwill and disclosure of trade secrets and confidential information. Thompson argues that he knows no trade secrets, and that his employment with DH would pose no threat to Hagemeyer. Thompson contends all customers are known, and the various prices and margins are published in trade journals. Hagemeyer notes that Thompson possesses information on Hagemeyer and CamBar's pricing strategies, discount programs, and personnel, as well as his long-standing personal relationships with customers in his service area. Thompson admits that DH is a direct competitor of Hagemeyer. Given Thompson's length of service in this industry and knowledge of the relevant customer base in Georgia, it appears he is vastly understating his knowledge

about CamBar's business practices. Moreover, in the Agreement Thompson acknowledged the importance of keeping the proprietary information confidential. It makes no sense that Hagemeyer would require such an extensive non-compete agreement if Thompson knew nothing. As such, Thompson's employment with DH poses a threat to plaintiff's business interests.

Thompson is delaying the start of his job with DH pending the resolution of this action. His possible employment presents a risk of irreparable harm, but not an imminent threat, since Thompson could decide not to pursue his DH position.⁴ The injury is contingent on Thompson's future decisions, which the court presumes this Order will influence. As such, Hagemeyer does not face a threat of imminent, irreparable harm sufficient to warrant injunctive relief. Hagemeyer's motion for a preliminary injunction is thereby denied. Nonetheless, the court will address the Agreement's enforceability, since its validity is essential to any possible future injunctive relief.

b. Non-compete agreement

*4 South Carolina law generally disfavors covenants not to compete and strictly construes them against the employer. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct.App.1995). As a general rule, such covenants are given greater deference in the context of a sale of business than in the employment context. 54A Am.Jur. *Monopolies and Restraints of Trade* § 247 (2005). "Any such restriction must be narrowly drawn to protect the legitimate interests of the employer." *Faces Boutique*, 318 S.C. at 42, 455 S.E.2d at 708. A covenant not to compete will be upheld if it is:

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

Stringer v. Herron, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (Ct.App.1992). Such cases are highly dependent on their own set of facts. *Id.*

Despite the general disposition against such agreements, South Carolina courts have upheld non-compete agreements if they comport with the above requirements. Thompson challenges the Agreement on elements 1, 2, 3 and 5.

i. Employer's Legitimate Interest

Thompson accurately notes that Hagemeyer has no legitimate interest in prohibiting competition. *See Almers v. S.C. National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). Hagemeyer views the interests to be protected as its existing business contacts, customer goodwill, trade secrets, and proprietary information. These concerns are legitimate business interests that warrant protection. *See Wolf v. Colonial and Acc. Life Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217 (Ct.App.1992) (recognizing legitimate business interests in existing business contacts and trade secrets).

ii. Unduly Harsh or Oppressive

Thompson contends the agreement unduly restricts his ability to earn a livelihood.⁵ This element is closely related to the duration and geographic scope of the limitation. Both the noncompete and nonsolicitation provisions expire on November 16, 2006.

The noncompete limitation forbids Thompson to "engage in or receive any business of a Conflicting Organization, either as an individual ... or as a partner or as an employee, or in any capacity whatsoever." Conflicting Organization includes any person, organization or entity, engaged, directly or indirectly, in CamBar's business. Agreement § 1(j). CamBar's business includes

the business of (i) branch-based distribution to industrial, governmental and commercial customers of maintenance, repair and operation supplies, including industrial, electrical and electronic, safety supplies, automation & control equipment, material handling and power transmission equipment, coating products, cutting tools, lighting, distribution equipment, abrasives, data telecom equipment, hand & power tools, janitorial supplies, lubricants,

shelving & storage products; (ii) storeroom management, outsource purchasing, and integrated supply services for industrial, governmental and commercial customers; and (iii) sales of supplies for electrical contractors.

*5 Agreement § 1(e). The covenant not to compete precludes Thompson from participating in businesses engaged in the above-listed activities. Hagemeyer's filings and court arguments suggest that the first and third subsections provide the salient restrictions on Thompson.

The separate nonsolicitation provision is limited to Hagemeyer customers from November 15, 2004-November 15, 2005 who were served by Thompson, with whom Thompson had any contact, or whose names or addresses Hagemeyer provided to Thompson.

Contrary to Thompson's assertion, these restrictions do not shut him out of the industry. As noted, the Agreement is limited in scope and duration. The noncompete provision permits Thompson to work for a competitor as long as he does not render services in competition with Hagemeyer's business or customers, and does not disclose trade secrets. Thompson may also work for businesses not involved in the activities specified in section 1(e). Hagemeyer notes permissible employers include government entities, manufacturers, customers, suppliers, and agents, among others. Further, Thompson can work for any business outside of Georgia (including entities in states he previously oversaw). Nor would Thompson have trouble finding willing employers: as noted in court, Thompson is well known throughout the region as a top salesman. The customers subject to the nonsolicitation agreement are also appropriately limited. Moreover, the restrictive period for both covenants only extends for another eight and a half months.

Several other practical considerations weigh against Thompson. He signed the Agreement, which specifically states that "he considers each and every restriction reasonable with respect to the subject matter, length of time and territory covered, and that this Agreement does not restrict his ability to earn a livelihood." Agreement § 9. He now disagrees with that statement, although his initial decision must have been informed by his successful career in the industry. Plaintiff's attempt to portray himself as an underdog battling Goliath is undermined by the fact

that he received over \$1.5 million in the buyout. At that price, one assumes he was either represented by counsel or is a sophisticated businessman who took a keen interest in the Agreement's provisions. It simply belies reason that someone in his position did not know or take seriously the Agreement's provisions.

The restriction's statewide geographic reach does not automatically render it void. South Carolina courts have struck down statewide restrictive covenants, but not for that reason alone; a particular geographic scope is "generally reasonable if the area covered by the restraint 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." *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). The noncompete provision's scope is actually smaller than his territory for Hagemeyer. Thompson was responsible for sales throughout Georgia, North Carolina and South Carolina, but the noncompete provision is limited to Georgia. As such, the geographic reach is reasonable.

iii. Consideration

*6 Thompson contends that the Agreement was not supported by valuable consideration because Hagemeyer did not renew his term of employment in 2003, but rather reclassified him as an at-will employee. The Agreement specifies the consideration as the "substantial benefits conferred upon Employee as a direct consequence of CamBar's retention of Employee as an employee

of CamBar." The South Carolina Supreme Court has held that a covenant entered into at the inception of employment "may be enforced where the consideration is based solely upon the at-will employment itself." *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001). Defendant entered into the Agreement at the inception of his employment with plaintiff.

Even if defendant were deemed to have entered into the covenant after the inception of employment, the consideration is valid. "When a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable." *Poole*, 345 S.C. at 382, 548 S.E.2d at 209. In addition to employment, Thompson received a \$273,001 bonus. Therefore, the court concludes that the Agreement would be enforceable.

III. CONCLUSION

For the reasons stated above, it is therefore ORDERED that plaintiff Hagemeyer's motion for a preliminary injunction is DENIED.⁶ The parties are directed to the court's conclusion that the Agreement is not void as a matter of law.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 516733

Footnotes

- 1 The Applicable Period is one year from the date of his resignation, from November 15, 2005 until November 15, 2006. See Agreement § 1(b).
- 2 "Conflicting Organization means any person, organization or entity (other than CamBar) engaged, directly or indirectly, in CamBar's Business." Agreement § 1(i).
- 3 "Customers means all accounts of CamBar and/or accounts solicited by CamBar and its employees, including Employee, during the twelve (12) month period immediately preceding Employee's Date of Termination." Agreement § 1(j).
- 4 The case cited by Hagemeyer involves a more imminent and immediate threat than the circumstance at bar. See *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). Given the discretion accorded the court in such matters, Fourth Circuit case law on this aspect of injunctive relief, and the court's ultimate conclusion regarding the Agreement's enforceability, the threat posed is insufficient to warrant an injunction at this time.
- 5 At the hearing on this motion, Thompson did not allege that he cannot earn a living if this court were to enjoin him; rather, he complains that he cannot earn at the same level he would have if he had not left Hagemeyer. The court has heard estimates (from Thompson himself) that he could earn between \$75,000 and \$130,000 per year without violating his Agreement. He also noted he could get these jobs. For most folks, \$75,000-\$130,000 is a pretty good living.
- 6 The court has several concerns regarding potential enforcement of the non-solicitation provision (section 8(d)) if Thompson were to violate it. Upon the court's request, Hagemeyer submitted a list of customers subject to the

nonsolicitation provision. The nonsolicit provision applies to customers that Thomson "served," those whose names Hagemeyer provided to him, and those with whom he had "any contact." Hagemeyer's list includes all its C & I customers during the applicable period. Hagemeyer assumes that all of the C & I customers were either served or contacted by Thompson through his position as Regional Vice President overseeing C & I sales in Georgia, or were furnished by Hagemeyer to Thompson. However, Hagemeyer does not demonstrate that Thompson had a relationship with all of the companies on the list. It is entirely possible he never had any contact or relationship with some of these customers, never "served" them, or that Hagemeyer did not identify them to Thompson. It is also possible that some of the businesses never heard of him.

The list's accuracy is questionable for a second reason. Originally, the list included all customers solicited during calendar year 2005. Upon the court's request, Hagemeyer deleted customers solicited between November 16, 2005 and December 31, 2005. However, due to the database's limitations, this deletion is an estimation "based upon historical sales experience." In order to issue a preliminary injunction the court would need something more concrete.

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
	)	
CHEMGARD, INC.,	)	
	)	
Plaintiff,	)	
	)	MOTION TO AMEND COMPLAINT
v.	)	
	)	
DARRELL KEITH HAYNES,	)	
CHEM-TEK, LLC, AND ALBERT BELL,	)	
	)	
Defendants.	)	
	)	

COMES NOW Plaintiff Chemgard, Inc., by and through its undersigned counsel, and moves this Court pursuant to SCRPC 15(a) to grant leave to amend Plaintiff's complaint. A copy of the proposed Third Amended Complaint is attached to this motion as Attachment A.

Since initiating this lawsuit in June 2015, Plaintiff has conducted discovery into the allegations of its Complaint. However, Defendants failed to provide full and complete responses (over six thousand emails were withheld from Plaintiff, and only after Plaintiff filed a motion to compel did Defendant begin producing such information). However, to this day, such information has not been fully and completely produced. Moreover, Defendants just recently submitted to depositions, again only after Plaintiff filed a motion to compel. Plaintiff has obtained copies of Defendants' phone records, which show extensive planning between Defendants prior to Defendant Haynes' surprise resignation.

Plaintiff filed a Motion to Compel on August 19, 2016 after Defendants and their counsel engaged in conduct that violates the South Carolina Rules of Civil Procedure. Plaintiff sought an order compelling Defendants to produce information. This motion has yet to be ruled upon. And after sixth months of efforts by Plaintiff's counsel, Plaintiff was finally able to take the

depositions of Defendants Bell and Haynes on October 5, 2016, which revealed and confirmed certain facts, explained below, that provide sufficient grounds for additional claims against Defendants. Additionally, as of October 4, 2016, Defendants finally produced several thousand emails and documents that were previously requested for by Plaintiff but never turned over by Defendants. Defendants also noted that some 5,000+ responsive emails are still to come. (See Attachment B: Email from William Foster, October 4, 2016, RE: Supplemental Discovery). Even a cursory review of the initial several thousand emails produced show additional wrongful actions by Defendants, previously unknown to Plaintiff, that call for the addition of other causes of action to Plaintiff's complaint.

Specifically, Plaintiff seeks to amend its complaint as follows:

1. Add an additional cause of action against Defendant Alfred Bell for breach of his employment contract with Plaintiff. Bell solicited Defendants Darrell Keith Haynes, while Haynes was still employed with Chemgard, to leave Chemgard and join Bell at Bell's new company, Defendant Chem-Tek, LLC. This solicitation, only recently revealed through Bell's October 6, 2016 deposition, was in direct violation of Bell's employment contract, which prevents Bell from soliciting employees of Chemgard to join him at a competing business for a period of two years following his resignation.

2. Add an additional cause of action against Haynes for breach of duty of loyalty. Based on emails finally produced by Defendants in early October 2016, Haynes sent an email to Bell, nearly a week prior to Haynes's resignation from Chemgard, that contained an invoice from Chemgard with Chemgard's pricing information on it. Defendants have stated that they have an additional 5,000+ emails that are responsive to Plaintiff's discovery requests and that have not been produced yet in this litigation. Plaintiff anticipates that additional documents supporting

this cause of action may yet be uncovered. Haynes and Bell also engaged in numerous phone calls during company hours to plan this new competitive business, later called Chem-Tek.

3. Add additional facts, uncovered during discovery, to Plaintiff's existing causes of action for (a) Intentional Interference with Contracts against Defendant Bell; (b) Intentional Interference with Existing and Prospective Contracts against all Defendants; and (c) Breach of Employment Contract against Haynes.

Amending Plaintiff's Complaint is necessary for a full and fair adjudication of all issues and is in the interest of justice, and amending Plaintiff's Complaint will not result in prejudice to Defendants. This motion is not intended to delay the proceedings, and in fact, Plaintiff is ready and prepared to try all such causes of action. Moreover, Defendants have yet to take any depositions and are in no way prejudiced. Plaintiff's counsel has consulted with Defendants' counsel in an effort to obtain consent to file an Amended Complaint, but Defendant's counsel has not consented. Because of the current posture of this case, Plaintiff could not afford to wait long. As Plaintiff's Motion is made in good faith and is not interposed for the purpose of delay, Plaintiff requests that this Court grant Plaintiff leave to file its Third Amended Complaint.

Respectfully submitted,

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October 10, 2016

Attorneys for Plaintiff Chemgard, Inc.

ATTACHMENT A:

PLAINTIFF'S PROPOSED THIRD
AMENDED COMPLAINT

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

THIRD AMENDED COMPLAINT

COMES NOW PLAINTIFF, by and through its counsel, and files this Third 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. 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. Defendant Alfred N. Bell (hereinafter "Bell") is a citizen and resident of Greenville County, South Carolina. He is the sole 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

Haynes's Employment with Chemgard: September 1, 2000 – May 10, 2015

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 ("Haynes Agreement"). The Haynes

Agreement is attached hereto as Exhibit A and is incorporated by reference as if fully and completely contained herein.

13. The Haynes 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 Haynes 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;

15. Haynes agreed to provide at least thirty days' written notice to Chemgard prior to resigning. (Haynes Agreement, Section 3; Section 7(a).)

16. Haynes agreed that he would "devote [his] entire time and energy exclusively to the business of the Company and that during the period of [his] employment, [he] will not engage in any other business, either for [himself] or for the account of any other person, firm, or corporation with the prior written consent of the President of the Company." (Haynes Agreement, Section 8.)

17. Haynes agreed to the Non-Disclosure Clause in the Agreement, wherein Haynes promised not to use or disclose any confidential information of Chemgard after his resignation or termination. The Haynes Agreement defines "confidential information" to include "pricing methods and pricing information, costs, profits, [and] profit margins . . ." (Haynes Agreement, Section 9(a) and (b)). Haynes agreed to return all confidential information and company property at the time of his resignation. (Haynes Agreement, Section 9(c)).

18. 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.

19. Haynes agreed that "[i]f any term, covenant, or condition of this Agreement of 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 circumstance other than those as to 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." (Haynes Agreement, Section 10(a)).

20. 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.

21. 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.

22. 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.

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

24. 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.

25. 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.

26. 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.

27. 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."

28. 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.

29. Chemgard provided Haynes with a copy of its confidential pricing sheet. This pricing sheet contained Chemgard's pricing structure. This sheet was given to all Chemgard salesmen, including Defendant Haynes. This pricing sheet establishes the baseline price for all of Chemgard's products. This baseline price is reached by taking Chemgard's cost of the product and adding an additional cost to account for Chemgard's overhead. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products.

30. These same products were and are offered for all of Chemgard's customers in all of the territories that Chemgard did business in, and all salespeople, including Haynes, were given this pricing sheet for purposes of their sales efforts. This pricing sheet was the basis for calculations of the price offered by our salespersons, which involved some markup of the baseline price.

31. This pricing sheet constitutes confidential and proprietary information of Chemgard's because, if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision.

32. During Haynes's employment with Chemgard, Chemgard had yearly sales meetings, bringing its salespeople from all of Chemgard's sales territories to Greenville, South Carolina or another South Carolina location for one or two days. At these meetings—which Haynes regularly participated in during his tenure with Chemgard—the salespeople were trained on new products that Chemgard would be offering, including new technology and new chemicals. There were discussions regarding pricing and sales strategies applicable to all sales territories. The employees would also discuss new sales efforts of the company, as well as issues or problems salespeople were having with individual customers or potential customers across Chemgard's sales territories.

33. In addition, towards the end of Haynes' employment with Chemgard, Chemgard's sales manager began scheduling weekly sales conference calls with the Chemgard sales people. Haynes participated in these conference calls. During these calls, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. They also discussed issues that the salespeople were having with individual customers in their respective sales territories.

34. Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice. He failed to return Chemgard's confidential information and property for several weeks, despite driving to Greenville the very first of his employment with Chem-Tek. He still has possession of his commission sheets, which contain Chemgard's confidential information.

**Defendant Bell's Employment with Chemgard and
Wrongful Solicitation of Haynes**

35. Defendant Bell worked for Chemgard from February 1, 2010 until April 30, 2013 as its sales manager.

36. At the inception of his employment with Chemgard, he entered into an Employment Contract with Chemgard ("Bell Agreement"). This Agreement is attached to this Third Amended Complaint as Exhibit B and is incorporated by reference fully into this Third Amended Complaint.

37. Bell agreed that for a period of 24 months following his resignation he would not "employ or attempt to employ any employee of Chemgard for any employment competitive with the Chemgard, or directly or indirectly, on Employee's own behalf or for others, seek to influence any employee of Chemgard to leave Chemgard's employ for the purpose of engaging in any competitive business activity." (Bell Agreement, Section 8(d)(iv)).

38. Bell agreed that if Chemgard had to bring an action to enforce its rights under Section 8 of the Agreement, including the non-solicit of employees described in the paragraph above, then Chemgard would be entitled to money damages caused by the breach and its reasonable attorneys' fees. (Bell Agreement, Section 8(f)).

39. On April 16, 2013, Bell tendered his resignation from Chemgard. He was paid through the end of April 2013.

40. In March 2015, Bell and Haynes met together for dinner. Bell asked Haynes if he was interested in joining Bell at a new company doing the same type of work he was doing with Chemgard. A week later, Bell called Haynes and again asked him about leaving Chemgard and coming to work for Bell in a capacity that would be competitive with Chemgard.

41. Between March 1, 2015 and May 10, 2015 (Haynes's date of resignation from Chemgard), Haynes and Bell engaged in over 65 phone calls, totaling more than 500 minutes.

42. On April 15, 2015, the domain name "chemteksc.com" was registered. This domain name is currently used for Defendants' work email accounts. Bell and Haynes spoke by telephone that same day for more than 30 minutes.

43. On May 4, 2015, Haynes emailed a copy of a Chemgard invoice to Bell for his review.

44. On May 6, 2015, Bell filed incorporation papers with the South Carolina Secretary of State to create his new company, Defendant Chem-Tek, LLC.

45. At some point prior to his resignation from Chemgard, Haynes agreed to come work for Bell and Chem-Tek.

46. Haynes never returned all copies of his commission statements, which had been marked by Chemgard as "confidential" and which contained confidential pricing information unique to Chemgard. As of October 6, 2016, Haynes still had copies of these sheets in his car.

Haynes's Post-Employment Activities

47. On May 11, 2015, Haynes began working for Chem-Tek, LLC, which is a competitor of Chemgard.

48. Bell is the sole owner of Chem-Tek, LLC.

49. As part of their initial plans for Chem-Tek, Bell and Haynes planned to have Haynes solicit his former customers for Chemgard. On these customers, they planned to build their

company. As of October 5, 2016, nearly a year and half after his resignation, all of Chem-Tek's customers, save one, are former Chemgard customers.

50. 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.

51. 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.

52. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and based upon information and belief, has used competitive, confidential, and important business and pricing information to solicit and gain the business of the following Chemgard customers, which have cancelled their contracts with Chemgard and begun doing business with the Defendants:

- a. Piedmont Atlanta;
- b. Piedmont Henry;
- c. Piedmont Fayette;
- d. Piedmont Newnan;
- e. Flowers Bakery in Montgomery, Alabama;
- f. St. Paul United Methodist Church;
- g. Columbus Waterworks;
- h. Cottle Properties/REC Ministries;
- i. Criterion Technologies;
- j. Peach County School District; and
- k. Upson Regional Medical Center.

53. Haynes has also solicited the business of several other Chemgard customers that have not yet become a Chem-Tek customer.

54. On May 11, 2015, the same day that Haynes began working for Chem-Tek, Haynes drove up to Greenville to meet with Bell. During this car ride, Haynes immediately began calling customers of Chemgard to solicit their business. This solicitation includes Haynes's seven separate phone calls, starting at 8:43 a.m., with Tommy Ballard, Engineering Manager for Piedmont Healthcare, which was Plaintiff's largest customer in Georgia at the time of Haynes's resignation. Defendants later began doing business with Piedmont Healthcare.

55. These solicitations occurred during the stated "Term" of the Agreement. Defendant made proposals during the 30-day notice period, which resulted in these accounts terminating their relationships with Chemgard.

56. Haynes had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations. Chemgard's pricing sheet is the basis for all charges to customers, but this information is not revealed to any person who has not executed an agreement containing a Confidentiality Provision.

57. The pricing sheet was stamped "CONFIDENTIAL."

58. The prices on the pricing sheet constitute Chemgard's costs, including overhead, and represents the breakeven amount. Possession of this information gives any competitor an unfair advantage in competing with Chemgard for any and all of Chemgard's customers, whether a sales person has solicited or serviced such customer on behalf of Chemgard.

59. Without fail, the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut Chemgard's pricing with absolute precision because he had access to this pricing sheet.

60. These direct solicitations are an appropriation of customer contacts.

61. The use of "Confidential Information," including customer information, pricing, marketing plans, business development strategies and other information, provides a competitive advantage if confidentiality is not maintained and is a breach of Haynes' Employment Agreement.

62. 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.

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

64. 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)

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 First Cause of Action.

66. 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.

67. Haynes has solicited Chemgard's existing customers on behalf of and with the knowledge and permission of Chem-Tek and Bell. Defendants have begun doing business with many of the Chemgard customers that Haynes serviced for Chemgard during his employment.

68. 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 and the confidential pricing information of Chemgard

69. 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.

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

71. 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.

72. 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.

73. 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.

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

75. 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.

76. 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.

77. 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.

78. 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)

79. Plaintiff realleges and incorporates by reference paragraphs 1 through 78 to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Second Cause of Action.

80. Haynes breached his contract with Chemgard by wrongfully soliciting his former Chemgard customers after resigning from Chemgard and beginning employment with Chem-Tek, in violation of the non-solicitation provision in his Agreement.

81. Haynes breached his contract with Chemgard by failing to provide thirty days' written notice of his resignation. These breaches occurred during the stated Term of the Employment Agreement.

82. Further, Haynes used these thirty days to target and obtain the business of Chemgard's customers before Chemgard could hire a replacement salesman.

83. Haynes breached his contract with Chemgard by failing to return all of Chemgard's Confidential Information (i.e., the pricing sheet and his commission sheets).

84. Haynes breached his contract by wrongfully using Chemgard's Confidential Information, including Chemgard's confidential and proprietary pricing sheet, to wrongfully solicit business on behalf of Chem-Tek and in violation of his Agreement.

85. Haynes's breaches of his contract caused Chemgard to suffer extensive damage, both in monetary form and in the loss of goodwill of its customers.

86. 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.

87. 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.

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

89. 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 attorneys' fees.

FOR A THIRD CAUSE OF ACTION
Tortious Interference with Contractual Relations
(Against Defendants Chem-Tek and Bell)

90. Plaintiff realleges and incorporates by reference paragraphs 1 through 89 to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Third Cause of Action.

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

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

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

94. Chem-Tek and Bell intentionally caused Haynes to breach the terms of his Employment Agreement by having him resign from Chemgard without providing the contractually agreed-upon thirty days' notice, by having him solicit Chemgard's current customers in violation of Haynes's Agreement and during the Term of the Employment Agreement, and by permitting him to keep and use Chemgard's confidential information, such as the pricing sheet, in violation of his Agreement.

95. Chem-Tek and Bell had no justification for procuring Haynes's breaches.

96. Moreover, Bell procured Haynes breaches by engaging in conduct that violated Bell's own Employment Agreement.

97. Haynes actually breached the Employment Agreement by failing to provide thirty days' notice, by keeping and using Chemgard's Confidential Information, and by wrongfully soliciting Chemgard's customers on behalf of his new employer.

98. 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.

99. 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 Existing and Prospective Contractual Relations
(Against All Defendants)**

100. Plaintiff realleges and incorporates by reference paragraphs 1 through 99, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Fourth Cause of Action.

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

102. Defendants were and are aware of Chemgard's existing and 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.

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

104. Defendants' actions were for an improper purpose.

105. 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; using Chemgard's confidential pricing information to target and obtain business from Chemgard's customers; and permitting Haynes to resign without providing his contractually obligatory thirty days' written notice.

106. Improper methods also include Defendant Bell breaching his own Employment Agreement by soliciting and enticing Defendant Haynes to breach his Employment Agreement.

107. In addition, Defendants had improper motives. Defendants' improper motives included a desire to harm Chemgard and its owner, Bill Smith.

108. As further evidence of improper motives and examples of improper means, Defendants attempted to entice and induce other Chemgard salespersons in other territories to terminate their Employment Agreements, and to breach their obligations to Plaintiff. These allegations are made on information and belief.

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

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

FOR A FIFTH CAUSE OF ACTION

Breach of Duty of Loyalty

(Against Defendant Haynes)

111. Plaintiff realleges and incorporates by reference paragraphs 1 through 110, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Fifth Cause of Action.

112. While still employed by and receiving salary and commissions from Chemgard, Haynes engaged in actions that were in breach of his duty of loyalty to Chemgard, including calling Defendant Bell on numerous during business hours to discuss plans for forming a competing company and sending Bell copies of company information on May 4, 2015 while still employed with Chemgard.

113. Moreover, the Term of the contract extends to a period that includes the thirty-day notice period. Defendant Haynes engaged in disloyal conduct during the Term of his Employment Agreement.

114. Such actions were willful and intentional on the part of Defendant Haynes.

115. As a direct and proximate result of Haynes's breach of loyalty, Chemgard has suffered damage.

FOR A SIXTH CAUSE OF ACTION

**Breach of Contract
(Against Defendant Bell)**

116. Plaintiff realleges and incorporates by reference paragraphs 1 through 115, to the extent not inconsistent herewith, as if each is set forth fully and completely hereunder in this Sixth Cause of Action.

117. Defendant Bell entered into an enforceable contract, supported by consideration, with Chemgard.

118. Bell agreed that for a period of 24 months following his resignation, he would not employ or attempt to employ or solicit any employee of Chemgard for the purpose of engaging in competitive business activity.

119. Bell breached this contractual obligation by soliciting Haynes to come work for Bell. This solicitation by Bell came within the 24-month prohibition in Bell's contract.

120. Haynes did come to work for Bell and Bell's new company, Chem-Tek.

121. Haynes's employment with Chem-Tek and Bell has caused damage to Chemgard.

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,
Horton Law Firm, P.A.

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Attorneys for Plaintiff Chemgard, Inc.

October ____, 2016

EXHIBIT A:

HAYNES EMPLOYMENT
AGREEMENT

CONFIDENTIAL

COPY

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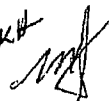
elements of this Agreement and that but for the agreement of Employee to comply with such covenants, the Company would not have agreed to hire Employee.

(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, Tallapoussa, 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:

BELL EMPLOYMENT

AGREEMENT

EMPLOYMENT AGREEMENT

THIS AGREEMENT, made this the February 1st day of 2010 is by and between CHEMGARD, INC., a South Carolina corporation, hereinafter referred to as Company, and Alfred N. Bell, whose address is 8 Fredricksburg Drive, Greenville S.C. 29615 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 Sales Manager of the Company as described in Schedule A.

2. **Term**

Except in the case of earlier termination as hereinafter specifically provided, the term of this Agreement shall commence on February 1st, and continue for a period of 6 months until July 31st, 2010, 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.

3. 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.

4. Company Vehicle

The Company agrees to provide Employee with an appropriate vehicle of The Company's choice, and to pay all expenses incident to maintenance and operation of the vehicle as required for use of the vehicle by Employee in the performance of his duties hereunder.

5. Reimbursement for Expenses

The Company agrees to reimburse Employee for his reasonable business expenses directly connected with his 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 of receipt of an acceptable submission of expenses and documentation as specified herein.

6. 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) 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.

(d) 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.

(e) Effects of Termination. Upon termination of this Agreement, as hereinabove provided, Employee shall have no right to any payment from the Company except for obligations accruing prior to the date of termination.

7. 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.

8. Nondisclosure and Non-competition 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 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, or in any other capacity that would permit Employee to take advantage of the customer contacts and/or Confidential Information acquired by him during the course of his 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 employment, he 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 eighteen (18) 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 eighteen (18) 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 paragraphs 8(a), (b), (c) and (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 paragraphs 8(a), (b), (c), and (d) are essential 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 8 (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 8 (a), (b), (c), and (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 8 (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.

9. 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 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 benefit's 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 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 31st day of February, 2010.

WITNESS:

CHEMGARD, INC.

By:

William C. Smith, President

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

WITNESS:

By:

Employee

SCHEDULE A TO EMPLOYMENT AGREEMENT

Essential Duties and responsibilities of Sales Manager:

Includes the following and other duties may be assigned.

- (a) Establishes Sales and Marketing Plans and programs, both short and long range, to ensure the profitable growth and expansion of Chemgard's products and services.
- (b) Researches, analyzes, and monitors financial, technological, and demographic factors so that market opportunities may be capitalized on and the effects of competitive activity may be minimized.
- (c) Develops and recommends pricing strategy for Chemgard in order to gain the greatest market share over the long run.
- (d) Ensures effective control of Sales & Marketing results and that corrective action takes place to be certain that the achievement of marketing objectives are within designated budgets.
- (e) Prepare Sales and Marketing activity reports.

Supervisory Responsibilities:

- (a) Provide leadership and guidance to the Sales, Marketing and Service Staff.
- (b) Follow up on all Sales, Marketing and Service reporting required by Management.
- (c) Exhibit strong management skills to plan, organize, direct and control the work of Chemgard's Sales, Marketing and Service Staff.

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Schedule B as to Employment Contract

Compensation Pursuant To Employment Agreement

Between Chemgard, Inc. and

Alfred N. Bell dated February 1st, 2010

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 year (6 months) of this Agreement, or for the duration of the Agreement and any extensions, the Company agrees to pay an annual salary of Forty Five Thousand and no/100 Dollars (\$45,000). This salary shall be paid in equal monthly payments of Three Thousand Seven Hundred Fifty and No/100 Dollars, (\$3,750.00) (hereinafter referred to as "Salary") and reasonable expenses of Employee for the periods that are directly connected with his/her employment by Company.

(b) Beginning December 31st, 2010, Employee shall earn an additional Nine Percent (9%) commission on net profit of sales over year 2009 net sales, and shall be in addition to base salary of forty Five thousand dollars.

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), freight cost, and all federal and state sales and excise taxes applicable to said sales.

(c) Beginning February 1st, 2010 there shall be no commission paid on Commodity items such as Ferric Chloride, Alum or Caustic Soda.

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(d) Beginning on February 1st 2010 there shall be no commissions paid on the sale of Boilers, Cooling Towers, Deaerators or other said heavy equipment unless prior written agreement is signed by both parties.

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ATTACHMENT B:

EMAIL FROM WILLIAM FOSTER,
OCTOBER 4, 2016, RE: SUPPLEMENTAL
DISCOVERY

Jeremy Summerlin

From: Bill Foster <bill.foster@nelsonmullins.com>
Sent: Tuesday, October 04, 2016 12:40 PM
To: Andy Arnold; Jeremy Summerlin
Cc: Nicole Cuadrado Andino; Laurie Jerome
Subject: Supplemental discovery

Andy and Jeremy,

Following up on our supplemental discovery and document production yesterday.

Based on our review of the documents produced back in January 2015, it does appear that Mr. Haynes' former counsel may not have effectively explained the concept of discovery and "responsiveness." Although we do not believe Mr. Haynes acted in bad faith in any way, to ensure Plaintiff receives all documents responsive to Plaintiff's Requests for Production we have uploaded both of Mr. Haynes' cloud based emails - keithhaynes@chemtek.com (work) and keith.haynes114@gmail.com (persona)- to one of our review systems. Laurie and Nicole are personally reviewing all of Mr. Haynes' emails for responsiveness to ensure we fully respond to your requests.

There are 9,373 total emails and documents. They reviewed 3,682 by yesterday's deadline (based on the proposed consent order) and there are 5,691 left to review. The documents sent in the first batch of production include (but are not limited to):

1. ongoing correspondence from Chem-Tek customers (former customers of Chemgard) requesting services, responses from Haynes' regarding ongoing services
2. emails from accounting sending customers invoices
3. all emails discussing and all attached proposals, quotes, contracts, insurance forms
4. Haynes' expense reports
4. communications between Al Bell and Haynes regarding Chemgard
5. communications between customers and Defendants regarding this lawsuit
6. all communications regarding lawsuit-which include attorney correspondence and judicial correspondence (**we have marked all documents between Defendants' counsel and Defendants as privileged, and a privilege log will be created once the review is complete).

In order to produce the most responsive documents by October 3, we ran the following search terms and reviewed these documents first:

- ✓ Business expense reports
- ✓ Chemgard
- ✓ Client development
- ✓ Columbus Water Works
- ✓ Criterion Technologies
- ✓ Flowers Baking Company
- ✓ ICFORM
- ✓ Lawsuit

- ✓ Magnolia Manor
- ✓ Marketing
- ✓ Piedmont Atlanta
- ✓ Piedmont Fayette
- ✓ Piedmont Hospital System
- ✓ Piedmont Newnan
- ✓ Plastics Omnium Auto
- ✓ REC Ministries
- ✓ Roosevelt Warm Springs
- ✓ St. Paul United Methodist Church
- ✓ Yamaha Motor

Once all of these were reviewed and marked for responsiveness, we started reviewing "Not Tagged" documents in chronological order until we ran out of time for the day and sent all responsive documents for bates numbering.

Laurie and Nicole will review the rest of the documents and then Defendants will timely produce any additional responsive documents ASAP. Due to the number of documents to be reviewed and processed, however, it may be the first of next week before we are able to complete this document production.

Best regards,

Nelson Mullins

William H. Foster

Attorney at Law
bill.foster@nelsonmullins.com

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From: bill.foster@nelsonmullins.com

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2015-CP-23-03546
	)	
CHEMGARD, INC.,	)	
	)	
Plaintiff,	)	PLAINTIFF'S RULE 59 MOTION
	)	TO ALTER OR AMEND JUDGMENT
v.	)	
	)	
DARRELL KEITH HAYNES,	)	
CHEM-TEK, LLC, AND ALBERT BELL,	)	
	)	
Defendants.	)	
	)	

Plaintiff Chemgard, Inc. ("Plaintiff"), pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, moves this Court to alter or amend its Order Granting Summary Judgment, filed on November 9, 2016, for three reasons: (1) the non-solicitation provision contained in Defendant Haynes's Employment Agreement is not overly broad and unenforceable under existing South Carolina precedent; (2) Plaintiff's Second Amended Complaint is based on Defendant Haynes's breaches of other provisions contained in the Employment Agreement that are separate and distinct from his contractual duties under the non-solicitation provision, as well as non-contract-based causes of action against Defendant Bell; and (3) through depositions, conducted just days before this Court announced its decision to grant summary judgment, Plaintiff discovered additional and previously unknown evidence of contractual breaches of the confidentiality provision by Haynes and also discovered that Defendants Haynes and Bell had previously engaged in additional wrongful conduct that creates new causes of action against both. Additionally, the Court's order fails to rule upon or even acknowledge several arguments raised by Plaintiff in its Memorandum in Opposition to Plaintiff's Motion for Summary

Judgment. For these reasons, and as explained in more detail below, Plaintiff asks this court to alter or amend its Order Granting Summary Judgment.

I. GROUND

A. The non-solicitation provision contained in Haynes's Employment Agreement serves to protect Plaintiff's confidential information and pricing information from wrongful exploitation by Haynes.

The non-solicitation provision at issue in this case protects Plaintiff's legitimate business interest by prohibiting solicitation of Plaintiff's customers by former salespersons who possess confidential information about Plaintiff's business and particularly its pricing formula. Plaintiff's proprietary formula for pricing includes a baseline price that is not publicly known and that applies to **all** of Plaintiff's customers, not just to customers with whom Plaintiff had dealings or contact. The Court's ruling fails to even acknowledge existing South Carolina authority that an employer's legitimate interest is not simply limited to relationships with a customer—which may only extend to customers with whom an employee had contact—but explicitly encompasses the protection of trade secrets and confidential information. In 2012, the South Carolina Supreme Court noted approvingly that:

[l]egitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of employment; confidential information other than trade secrets communicated by the employer to the employee, such as information regarding a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image.

Milliken & Co. v. Morin, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) (citations omitted). Even *Fournil v. Turbeville Ins. Agency, Inc.*, which Defendants relied on so heavily in their Motion for Summary Judgment, acknowledges that the existence of **other** confidential information, more than just contact or personal information about the customer, changes the analysis. *See Fournil*,

2009 U.S. Dist. LEXIS 16303, at *6 (D.S.C. 2009). Specifically, the *Fournil* court noted that in their case there simply wasn't "other evidence" before the court that would have enabled the employee to compete "unfairly" with her employer when she left. *Id.* (emphasis in original). In this case, however, as noted below in more detail, Haynes had confidential information above and beyond the mere identity and contact information of Plaintiff's clients: he had Plaintiff's confidential and proprietary pricing information that was applicable to *all of Plaintiff's customers*.

The Court's order fails to even acknowledge or comment upon the facts before it on this issue, which are contained in the affidavit of Chemgard's owner and President, Bill Smith. As Mr. Smith recounts, Chemgard's confidential pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. (Bill Smith Affidavit at ¶ 5) (attached as Exhibit A). This pricing sheet establishes the baseline price for all of Chemgard's products. (*Id.*). This baseline price is reached by taking Chemgard's cost of the product and adding an additional cost to account for Chemgard's overhead. (*Id.*). This overhead figure is critical in the calculation. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products. (*Id.*). The same products are offered to all of Chemgard's customers in all of the territories in which Chemgard did business, and all salespeople, including Haynes, were given this sheet for purposes of their sales efforts. (*Id.* at ¶ 6).

South Carolina courts have widely recognized that an employer may "restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the

employment relationship.” *Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295. As Mr. Smith explains in his affidavit, Chemgard’s pricing sheet was created solely by Chemgard and provided to its salespeople. Additionally, Chemgard took active steps to protect this pricing information by having all employees, including Haynes, sign a confidentiality agreement as a condition of initial employment (which, in Haynes’s case, was contained within the Employment Agreement, but was a separate and distinct contractual obligation from the non-solicitation provision). Despite those efforts, Haynes has systematically used this confidential information for the benefit of his new employer, Defendant Chem-Tek, in direct breach of his confidentiality agreement. That scenario falls directly into the one described by the *Fournil* court of an employee using additional confidential information to **unfairly** compete. Other than the fact that Defendants’ counsel drafted this Court’s order, it is inexplicable how the Court could reconcile a grant of summary judgment in light of these facts and controlling South Carolina authority. Plaintiff respectfully requests that this Court reconsider its ruling in light of the argument above and those contained in its Memorandum in Opposition to Defendant’s Motion for Summary Judgment.

B. Plaintiff’s Complaint alleges breaches of multiple provisions of Haynes’s contract, not just a breach of the non-solicitation agreement.

Defendant Haynes has breached more than the non-solicitation provision contained in his Employment Agreement, and Plaintiff did not limit its allegations of breach to just that one provision either. The Court has ruled 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.” (Order, p. 7). Respectfully, Plaintiff disagrees. Plaintiff made the following allegations in its Second Amended Complaint (emphasis added):

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.

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.**

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.

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.**

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. **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.

33. **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.

Each of the paragraphs were incorporated by reference in into the two causes of action for breach of contract, except that paragraph 33 was contained in the additional paragraphs contained within the breach of contract claim.

Once again, inexplicably, the Court dismissed the entire breach of contract claim because of its finding that the non-solicitation was “patently” overbroad. However, the Employment Agreement, which was incorporated by reference into the Second Amended Complaint, contains provisions that require Defendant Haynes to provide a thirty-day notice prior to leaving Chemgard’s employ and to not disclose or use confidential information after leaving, as well as to return confidential information. The allegations contained in the above quoted Second Amended Complaint clearly are not limited to the non-solicitation provision, and specifically allege breaches of these provisions. In *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) the Court of Appeals quite clearly enunciates well established law: “In construing a complaint or responsive pleading, the court must review the entire pleading. See *Doe ex rel. Legal Guardian v. Barnwell School Dist.* 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct.App.2006). ‘To ensure substantial justice to the parties, the pleadings must be liberally construed.’ *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct.App.2000), *aff’d as modified on other grounds*, 354 S.C. 416, 581 S.E.2d 169 (2003); see Rule 8(f), SCRCP (providing that all pleadings must be construed to do substantial justice to all parties).” Again, the Order is silent on these matters.

Also ignored are the facts contained in William Smith’s affidavit, which include the following allegations:

17. In May 2015, when Haynes quit unexpectedly from Chemgard without giving us the contractually required 30-days’ notice, he had possession of that pricing sheet, as well as other Chemgard property. Chemgard made multiple requests to Haynes for him to return Chemgard’s property, which Haynes initially ignored. When he finally returned

most of the property to our attorney's office, Haynes failed to return the copies of the invoices or commission statements for the clients he serviced, which included pricing information.

18. Additionally, as we know now, Haynes began soliciting his Chemgard customers on behalf of Chem-Tek and Bell immediately after resigning from Chemgard. He had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations. As we've conducted discovery in this case, we've realized that without fail the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut our pricing with absolute precision because he had access to this pricing sheet. And given that these prices were for all products offered by Chemgard to all customers across all of its territories, it's clear that Haynes could use this confidential and proprietary information to unfairly solicit Chemgard's customers in states other than just Georgia and Alabama. Our non-solicitation agreement is limited to our existing customers, but it anticipates harm that could come from competition for those existing customers in all territories. Haynes's new employer, Chem-Tek, is a South Carolina limited liability company operating in Greenville.

20. 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. We do not know what information resides on his computers, but we know that Defendant Haynes and Chem-Tek have failed to provide all electronically-stored information requested in discovery. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and is using competitive, confidential, and important business and pricing information. Phone records and email evidence of Haynes' activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard's customers for the benefit of his new employer. **We are prevented from knowing the full scope of this conduct because Defendants have failed to provide redacted phone records for Haynes pursuant to their agreement with us, which was agreed to in front of this court at a previous hearing, as well as Defendants providing false responses to our discovery.**

Defendant's counsel pretends that these provisions, allegations, and facts do not exist, and the order he drafted perpetuates the absurdity of such contentions by failing to even mention the other provisions upon which the breach of contract claim is based or by providing a reason why the overbreadth of the non-solicitation provision *mandates* the dismissal of the entire breach of contract claim.¹ "An employee's express commitment not to disclose his employer's

¹ The Employment Agreement also contains a severability clause.

confidential information, whether or not it comprises trade secrets, unlike the covenant not to compete[,] cannot be challenged as an unreasonable restraint of trade.” *Morin*, 399 S.C. at 31, 731 S.E.2d at 292 (internal quotation marks and citations omitted). Plaintiff has alleged other contractual obligations that Haynes breached regarding confidential information, and Plaintiff urges the Court to reconsider its ruling that the non-solicit’s enforceability determines the enforceability of the other separate and distinct contractual provisions.

C. Newly discovered documents further illustrate Defendant Haynes’s vivid and unrepentant violations of his confidentiality obligations.

After the hearing on the Motion for Summary Judgment (and the now forgotten Motion to Compel and for Sanctions), Defendant’s counsel advised Plaintiff that he had suddenly discovered “9,373 total emails and documents” that had never previously been produced, although they had been requested 10 months earlier. (See Exhibit B: Email from William Foster). Just by way of example, attached is an email that contains a picture of a Chemgard customer invoice sent by Defendant Haynes to Defendant Bell prior to Defendant Haynes’s resignation. (See Exhibit C: Email from Haynes to Bell). This is clear support for Plaintiff’s claims that Defendant Haynes breached the Employment Agreement’s confidentiality provisions and non-disclosure provisions. Moreover, deposition testimony finally obtained after the eight months of delay outlined in Plaintiff’s Motion to Compel provides a wealth support for these claims and more.

These emails included correspondence to and from Chemgard customers (See Exhibit B). Only a portion of these emails and documents were produced prior to Defendant Haynes deposition held on October 3, 2016, but the ones produced provide additional support for Plaintiff’s claims based upon breach of the confidentiality and non-disclosure agreement. These new documents and deposition testimony not only support Plaintiff’s breach of the non-

disclosure agreement, but they also provide the basis for additional claims that are included in Plaintiff's Third Amended Complaint attached to its pending Motion to Amend. However, the Court's grant of summary judgment on all claims while ignoring the conduct outlined in the pending Motion to Compel rewarded the "hide the ball" strategy that now shields Defendants from responsibility for the true extent of their wrongful behavior, which had been previously hidden by Defendants.

Finally, in Defendant Haynes Deposition, it was discovered that Defendant Haynes had Chemgard confidential information in his car on the very day of his deposition, which under the Employment Contract he was obligated to return fourteen months prior. (Haynes Deposition 107-108, Exhibit D). This information had the pricing that Chemgard had charged its customers, and Defendant Haynes conceded that pricing information was indeed confidential information. (Haynes Depo. 111-113). It was also discovered for the first time that Defendant Bell had violated his contractual duties to Chemgard. The depositions were held open pending the production of the remaining emails from the 6,000 plus that had yet to be reviewed. Plaintiff made a motion to amend. To this day, those emails were never produced nor was Plaintiff permitted a hearing on its motion to amend because this Court prematurely granted summary judgment.

II. CONCLUSION

Based upon the arguments above, the Exhibits hereto, and the arguments previously stated in its Memorandum in Opposition to Summary Judgment and documents previously submitted, the Court should reconsider its decision to grant summary judgment and alter and/or amend its judgment in this case by denying summary judgment or limiting its grant to any claim

for breach of the non-solicitation agreement and allowing the claims related to other portions of the contract to move forward.

Respectfully submitted,
Horton Law Firm, P.A.

s/ W. Andrew Arnold

W. Andrew Arnold

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Jeremy R. Summerlin

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864.242.4800 864.242.4885 fax

Attorneys for Plaintiff Chemgard, Inc.

November 11, 2016

EXHIBIT A

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

**AFFIDAVIT OF WILLIAM SMITH IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

1. I am at least eighteen years of age and fully competent to testify to the matters stated within this affidavit. This affidavit is based upon my personal knowledge.

2. I am the owner and president of Plaintiff Chemgard, Inc.

3. Chemgard is in the business of selling and distributing chemicals, chemical products, water treatment chemicals, 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. We have business in multiple states in the Southeast, including Georgia and Alabama.

4. Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is that most of the competition in the industry comes down to pricing and whether your company can provide the best price.

5. Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. This pricing sheet establishes the baseline price for all of our products. This baseline price is reached by taking

our cost of the product and adding an additional cost to account for Chemgard's overhead. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products.

6. These same products were and are offered for all of Chemgard's customers in all of the territories that Chemgard did business in, and all salespeople, including Haynes, were given this pricing sheet for purposes of their sales efforts. This pricing sheet was the basis for calculations of the price offered by our salespersons, which involved some markup of the baseline price.

7. This pricing sheet constitutes confidential and proprietary information of Chemgard's because, if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision.

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

9. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement ("Employment Agreement"). The Employment Agreement contained non-solicitation provisions and confidentiality 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 business 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.

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. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to pay commissions and to give Haynes approximately \$150,000-\$200,000 of pre-existing accounts for Haynes to service. Chemgard also agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.

13. 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.

14. 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." Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential pricing information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard.

15. Chemgard also has yearly sales meetings for the entire time that Haynes was employed, where we bring all our salespeople from all our sales territories to Greenville, South Carolina or another South Carolina location for one or two days. At these meetings—which Haynes regularly participated in during his tenure with Chemgard—our salespeople were trained on new products that Chemgard would be offering, including new technology and new chemicals. There would have been discussion regarding pricing and sales strategies applicable to all sales territories. We would also discuss new sales efforts of the company, as well as issues or problems we were having with individual customers or potential customers across our sales territories.

16. In addition, towards the end of Haynes' employment with Chemgard, our sales manager began scheduling weekly sales conference calls with the Chemgard sales people. Haynes participated in these conference calls. During these calls, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. They also discussed issues that the salespeople were having with individual customers in their respective sales territories.

17. In May 2015, when Haynes quit unexpectedly from Chemgard without giving us the contractually required 30-days' notice, he had possession of that pricing sheet, as well as other Chemgard property. Chemgard made multiple requests to Haynes for him to return Chemgard's property, which Haynes initially ignored. When he finally returned most of the property to our attorney's office, Haynes failed to return the copies of the invoices or commission statements for the clients he serviced, which included pricing information. All commission statements were marked "CONFIDENTIAL."

18. Additionally, as we know now, Haynes began soliciting his Chemgard customers on behalf of Chem-Tek and Bell immediately after resigning from Chemgard. He had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations. As we've conducted discovery in this case, we've realized that without fail the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut our pricing with absolute precision because he had access to this pricing sheet. And given that these prices were for all products offered by Chemgard to all customers across all of its territories, it's clear that Haynes could use this confidential and proprietary information to unfairly solicit Chemgard's customers in states other than just Georgia and Alabama. Our non-solicitation agreement is limited to our existing customers, but it anticipates harm that could come from competition for those existing customers in all territories. Haynes's new employer, Chem-Tek is a South Carolina limited liability company operating in Greenville.

19. Defendant Albert Bell ("Bell") is the owner of Chem-Tek, LLC. 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 and call on the customers of Chemgard, even in the face of an order enjoining such conduct.

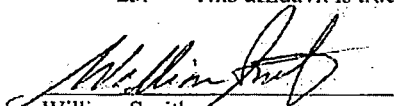
20. Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day. We do not know what information resides on his computers, but we know that Defendant Haynes and Chem-Tek have failed to provide all electronically-stored information requested in discovery. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and is using competitive, confidential, and important business and pricing information. Phone

records and email evidence of Haynes' activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard's customers for the benefit of his new employer. We are prevented from knowing the full scope of this conduct because Defendants have failed to provide redacted phone records for Haynes pursuant to their agreement with us, which was agreed to in front of this court at a previous hearing, as well as Defendants providing false responses to our discovery.

21. I believe 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.

22. Chemgard has suffered tremendous harm and damage in the form of lost profits from accounts that Haynes wrongfully solicited after his resignation from Chemgard, and these lost profits will continue to accrue for some years to come.

23. This affidavit is true and accurate to the best of my knowledge.


William Smith

09/19/2016
Date

Sworn to before me this
19th day of September, 2016


Notary Public for South Carolina ~~South Carolina~~ North Carolina
My Commission Expires: September 14, 2020

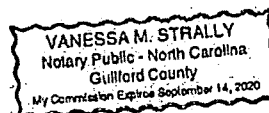


EXHIBIT B

Friday, November 11, 2016 at 9:45:07 AM Eastern Standard Time

Subject: Re: Supplemental discovery
Date: Wednesday, October 5, 2016 at 8:34:11 AM Eastern Daylight Time
From: Andy Arnold
To: Jeremy Summerlin, Bill Foster
CC: Laurie Jerome, Nicole Cuadrado Andino
Attachments: image001.gif@01D21E3C.7C715980, Horton_Law_Firm_logo_small.jpeg

Bill:

In addition, we want all communications between Bell and Haynes at least through June 30, 2015. Based upon the emails yesterday, there was at least one that was highly relevant that had no terms in it at all. To your credit, you were able to dig it out, but with this many, it might be difficult. We can discuss.

W. Andrew Arnold
Horton Law Firm, P.A.
307 Pettigru St.
Greenville, SC 29601
[864.233.4351](tel:864.233.4351) (phone)
[864.233.7142](tel:864.233.7142) (fax)



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On October 4, 2016 at 12:40:40 PM, Bill Foster (bill.foster@nelsonmullins.com) wrote:

Andy and Jeremy,

Following up on our supplemental discovery and document production yesterday.

Based on our review of the documents produced back in January 2015, it does appear that Mr. Haynes' former counsel may not have effectively explained the concept of discovery and "responsiveness." Although we do not believe Mr. Haynes acted in bad faith in any way, to ensure Plaintiff receives all documents responsive to Plaintiff's Requests for Production we have uploaded both of Mr. Haynes' cloud based emails - keithhaynes@chemtek.com (work) and keith.haynes114@gmail.com (persona) - to one of our review systems. Laurie and Nicole are personally reviewing all of Mr. Haynes' emails for responsiveness to ensure we fully respond to your requests.

There are 9,373 total emails and documents. They reviewed 3,682 by yesterday's deadline (based

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on the proposed consent order) and there are 5,691 left to review. The documents sent in the first batch of production include (but are not limited to):

1. ongoing correspondence from Chem-Tek customers (former customers of Chemgard) requesting services, responses from Haynes' regarding ongoing services
2. emails from accounting sending customers invoices
3. all emails discussing and all attached proposals, quotes, contracts, insurance forms
4. Haynes' expense reports
4. communications between Al Bell and Haynes regarding Chemgard
5. communications between customers and Defendants regarding this lawsuit
6. all communications regarding lawsuit which include attorney correspondence and judicial correspondence (**we have marked all documents between Defendants' counsel and Defendants as privileged, and a privilege log will be created once the review is complete).

In order to produce the most responsive documents by October 3, we ran the following search terms and reviewed these documents first:

- ü Business expense reports
- ü Chemgard
- ü Client development
- ü Columbus Water Works
- ü Criterion Technologies
- ü Flowers Baking Company
- ü ICFORM
- ü Lawsuit
- ü Magnolia Manor
- ü Marketing
- ü Piedmont Atlanta
- ü Piedmont Fayette
- ü Piedmont Hospital System

- ü Piedmont Newnan
- ü Plastics Omnium Auto
- ü REC Ministries
- ü Roosevelt Warm Springs
- ü St. Paul United Methodist Church
- ü Yamaha Motor

Once all of these were reviewed and marked for responsiveness, we started reviewing "Not Tagged" documents in chronological order until we ran out of time for the day and sent all responsive documents for bates numbering.

Laurie and Nicole will review the rest of the documents and then Defendants will timely produce any additional responsive documents ASAP. Due to the number of documents to be reviewed and processed, however, it may be the first of next week before we are able to complete this document production.

Best regards,

[image001.gif@01D21E3C.7C715980](#)

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EXHIBIT C

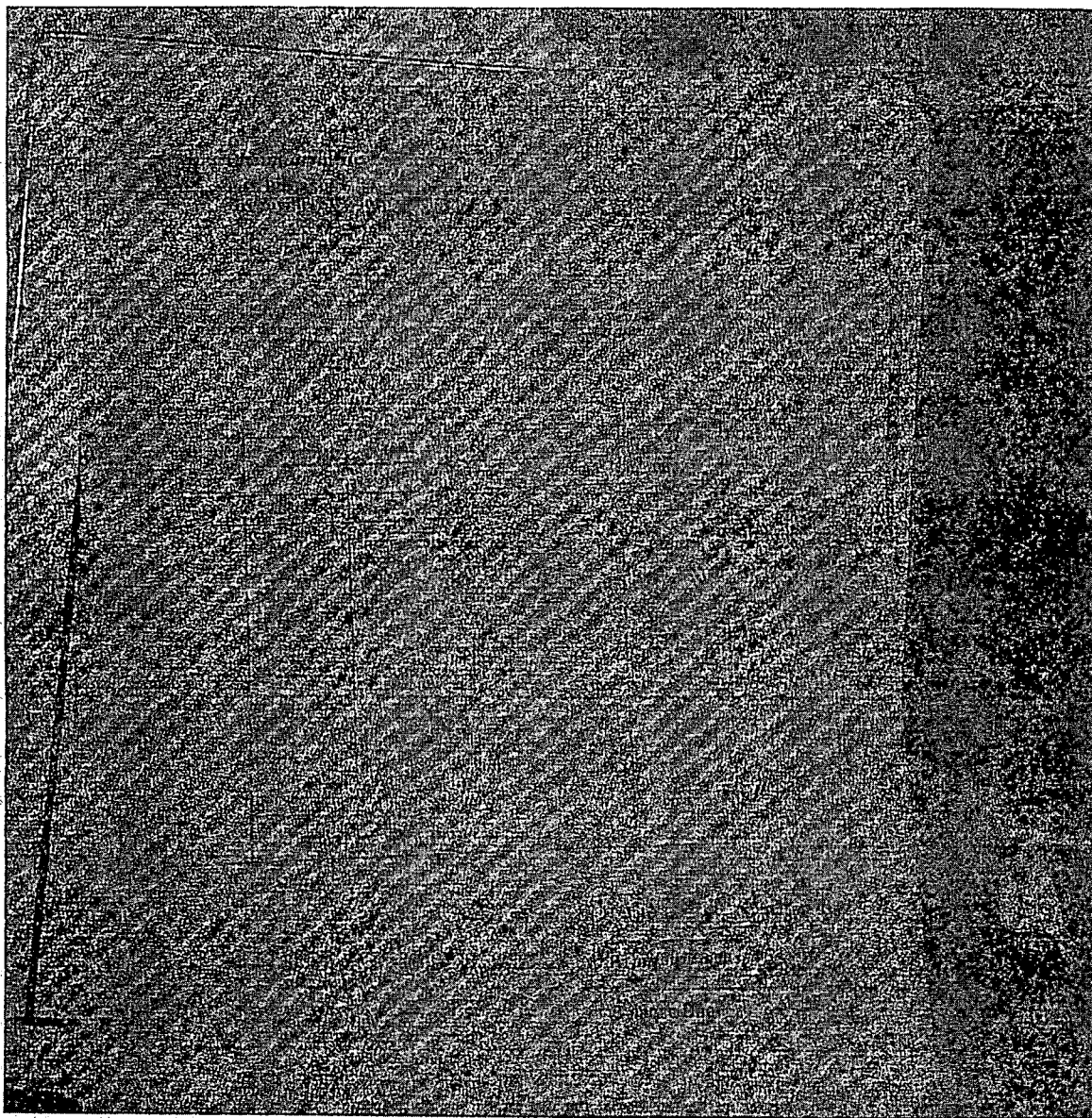
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From: Keith Haynes
To: Al Bell
Sent: 5/4/2015 12:47:11 PM
Subject:
Attachments: 20150430_101436.jpg

Haynes_02935

ROA 000626

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Haynes_02935

ROA 000627

EXHIBIT D

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ROA 000628

HAYNES DEPOSITION

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1 MR. FOSTER: Object to the form.

2 THE WITNESS: I just didn't return it. I
3 didn't make any decision not to return it. I just
4 didn't. It wasn't something I thought about
5 returning.

6 BY MR. ARNOLD:

7 Q. Did you make pictures of other business
8 documents of Chemgard and send those to Al Bell?

9 MR. FOSTER: Object to the form.

10 THE WITNESS: None that I'm aware of, no.
11 I take that back. I did send a -- we were trying
12 to develop a contract, and I sent a copy of an old
13 Chemgard contract because he had someone in legal
14 to help us design -- because he kept saying, what
15 do we need to have in it, and I said, just these
16 basics. I said, this is way overboard. We just
17 want something about a page long. And he got
18 somebody to just read it and draw us up a small
19 contract. I don't know who did it. But other
20 than that, that's the only thing I sent to him,
21 just to help us design a contract.

22 BY MR. ARNOLD:

23 Q. Okay. And would you agree that the
24 commission statements that are in your car, again,
25 have information about what the customer was

HAYNES DEPOSITION

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1 charged?

2 A. It has their monthly billing, yeah.

3 Q. And so if you wanted to price Chem-Tek to be
4 below Chemgard, you would know what the price Chemgard
5 was charging by looking at your commission statement.

6 A. Of course, I knew what they were charging,
7 but I priced them based on what my costs were from my
8 supplier.

9 Q. Who was your supplier?

10 A. QualiChem.

11 Q. And when did you make contact with QualiChem?

12 A. To be honest, I don't remember because we
13 talked to several suppliers and two of them said that,
14 you know, if you give us formulas, we can make them
15 for you. I said, I don't have formulas. And then I
16 had another source that recommended these people and
17 we called and talked to them because they are a
18 supplier, I think, to a lot of water treatment
19 companies. They have all the formulations already
20 made.

21 I'm sure it was at some point in time during
22 that first week that we were searching and going on
23 the Internet trying to find somebody to make chemicals
24 or provide chemicals.

25 Q. Who were the other companies you contacted?

HAYNES DEPOSITION

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1 address.

2 A. True.

3 Q. So your card would have had your new email
4 address?

5 A. Correct.

6 Q. Now, did you go about getting the email set
7 up, or who did that for you all?

8 A. Al Bell.

9 Q. So is it your contention you haven't
10 solicited any customers of Chemgard? Is that your
11 testimony?

12 MR. FOSTER: Object to the form.

13 THE WITNESS: My testimony is that I
14 informed people I had moved to another company,
15 and in none of those situations did I ask them for
16 their business.

17 BY MR. ARNOLD:

18 Q. Is that an indirect solicitation?

19 MR. FOSTER: Objection.

20 BY MR. ARNOLD:

21 Q. In your opinion?

22 A. In my opinion, no, it's not. It was
23 informative.

24 Q. Okay. Looking at Paragraph 6 -- I'm sorry.

25 Page 6, Paragraph little i, over it it says,

HAYNES DEPOSITION

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1 "Accordingly, Employee agrees that during the course
2 of his or her employment by the Company for a period
3 of 24 months after termination of his/her employment,
4 he or she will not solicit or call on either directly
5 or indirectly any customer of the Company for the
6 purpose of selling any products or services sold by
7 the Company or any products or services similar to
8 those sold by the company."

9 Now, you would admit that the products and
10 services sold by Chem-Tek are services and products
11 similar to those sold by Chemgard.

12 A. Yes.

13 Q. Now, when we requested some information from
14 Chem-Tek, proposals and that sort of thing, the
15 pricing on those initial contracts was blacked out.
16 Why was that?

17 A. I just didn't feel like our pricing should be
18 out there.

19 Q. Why is that?

20 A. That's information for us, for our company.

21 Q. You consider that confidential information
22 for Chem-Tek?

23 A. Sure.

24 Q. Would that help a competitor if they had that
25 information? They could under bid you, if they had

HAYNES DEPOSITION

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1 it?

2 A. They could. In this situation, it wouldn't.

3 Q. Well, then why did you decide to black it
4 out?

5 MR. FOSTER: Object to the form.

6 BY MR. ARNOLD:

7 Q. Why did you not want Chemgard to have that
8 information?

9 A. Same reason they don't want me having the
10 information, I guess.

11 Q. So you think there's a legitimate purpose by
12 you not wanting them to have that information?

13 A. I just thought the whole purpose of the thing
14 was to get information like that. If you want the
15 pricing, I'll be more than happy to give it to you.

16 Q. I got it.

17 A. That's fine.

18 Q. I'm just saying, you blacked it out. I'm
19 just trying to figure out your logic.

20 A. Well, I knew the customers were sending it
21 too, because they told me. So I knew you were getting
22 it. But it was after I had blacked it all out. I
23 wouldn't have reprinted everything.

24 Q. I understand. I think you answered the
25 question. You blacked it out because that 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,	)	
	)	DEFENDANTS' MEMORANDUM IN
vs.	)	OPPOSITION TO PLAINTIFF'S
	)	MOTION FOR
Darrel Keith Haynes, Chem-Tek, LLC	)	RECONSIDERATION
and Alfred Bell,	)	
	)	
Defendants.	)	
	)	

Defendants Darrell Keith Haynes, Chem-Tek, LLC and Alfred Bell (collectively "Defendants"), by and through undersigned counsel, hereby submit the following Memorandum in opposition to Plaintiff Chemgard, Inc.'s ("Chemgard" or "Plaintiff") Motion to Reconsider. Plaintiff's Motion – much like its Response in Opposition to Defendants' Motion for Summary Judgment – largely relies upon improper and unfounded accusatory allegations in an effort to distract from the fatally overbroad restrictive covenant at the heart of its Second Amended Complaint while failing to offer a single credible argument to challenge this Court's well-reasoned order. Plaintiff's Motion should be denied outright.

This Court granted Summary Judgment on November 8, 2016, holding that as written, the Defendant Haynes' Employment Agreement, specifically the customer non-solicitation provision, was unenforceable as a matter of law.¹ The Court granted summary judgment on all causes of action in Plaintiff's Second Amended Complaint as they were all based on an alleged breach of the covenant not to compete as stated in Paragraph 9(d) of the Employment Agreement. As set

¹ Please find the November 8, 2016 Order, attached hereto as *Exhibit A*.

forth herein, Plaintiff's Motion must be denied as (1) the non-solicitation provision is patently overly broad and unenforceable as a matter of law pursuant to existing South Carolina precedent; (2) the Court correctly found that each cause of action set forth Plaintiff's Second Amended Complaint is clearly based on Defendant Haynes' alleged breach of the non-solicitation provision; and (3) a motion to amend is not the proper vehicle to raise an issue not previously before the court. For the reasons more fully set forth below, Plaintiff's Motion should be denied.

I. BRIEF FACTS

Background of the Case

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 Agreement² (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. (Ex. B.) During the course of his employment, Mr. Haynes was the only salesman in Georgia. It is undisputed that 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 their Summons and Complaint. On June 25, 2015, Plaintiff amended its Verified Complaint to add Mr. Bell and ChemTek as Defendants and moved for injunctive relief against Defendants to enforce Mr. Haynes' Agreement. The portion of the

² Please find the Employment Agreement, attached hereto as *Exhibit B*.

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 Hon. Perry Gravely 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).

On September 25, 2016, Plaintiff again amended its Verified Complaint.³ 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). (Ex. C.) It is important to note, that in all three filed complaints against Defendants, Plaintiff only referenced Sections 9(d) and 9(f) in his factual allegations and throughout the four causes of action. (*Id.*) Each of these causes of action arise solely from an alleged breach of the same provision of Mr. Haynes’ Agreement set forth above.

³ Please find Plaintiff’s Second Amended Complaint, attached hereto as *Exhibit C*.

Plaintiff subsequently filed a Rule to Show Cause on November 16, 2015, alleging that Defendant Haynes had continued to solicit certain customers in violation of the standing injunction. Judge Gravely entered an order on January 20, 2016, sanctioning Defendant Haynes for alleged forbidden solicitations.

Defendants' Motion for Summary Judgment

Defendants' present counsel first appeared in this case on April 6, 2016. Defendants shortly thereafter filed a Motion to Dissolve and Vacate on April 29, 2016, asking that Judge Gravely dissolve the July 17, 2015, injunction because the non-solicitation provision and corresponding injunction are in clear conflict with the overwhelming weight of South Carolina precedent. In response, Plaintiff filed a Second Rule to Show Cause on May 27, 2016. Following briefing by the parties, Judge Gravely heard oral arguments on both motions on July 8, 2016.

On August 10, 2016, Judge Gravely issued an order denying Defendants' Motion to Dissolve on the grounds that he believed he lacked the authority to vacate his July 17, 2015, Preliminary Injunction Order. Defendants immediately filed a Motion to Reconsider and to Expedite Reconsideration on August 11, 2016. The following day, August 12, 2016, Defendants filed their pending Motion for Summary Judgment, contending that Plaintiff's claims – all of which derive from the patently overbroad “all customers” non-solicitation provision – fail as a matter of law. True to form, Plaintiff filed its Motion to Compel and Motion for Sanctions on August 23, 2016, in response to Defendants' Motion for Summary Judgment.

On Friday, September 9, 2016, Judge Gravely *unilaterally* wrote to the parties to inform them that he was abstaining from a ruling on the aforementioned motions.⁴ In so doing, Judge

⁴ A copy of Judge Gravely's September 9, 2016, email is attached hereto as *Exhibit D*.

Gravely cited the pending consideration of Defendants' Motion for Summary Judgment and his desire to avoid the possibility of conflicting rulings. (Ex. D.)

On September 22, 2016, the court held a hearing on Defendants' Motion for Summary Judgment and entertained extensive arguments by the parties. On Friday, October 7, 2016, Adrian Wilkes, law clerk to the Hon. Roger L. Couch, emailed the parties to inform them of Judge Couch's ruling:

After much consideration and extensive research, Judge Couch has found that the covenant not to compete is unenforceable as a matter of law, as it is patently overbroad. As such, Defendant's Motion for Summary Judgment shall be GRANTED. Counsel for the Defendant will please draft and submit a proposed order to that effect. The Legal Analysis section of Defendant's Memo in Support of Its Motion for Summary Judgment was spot on. Rather than repeat that analysis in this email, I will ask that the same authority cited in that Memo be cited in the proposed order.⁵

Plaintiff's counsel then sought clarification from Judge Couch as to whether his decision would apply to Plaintiff's Second Amended Complaint in its entirety, as Plaintiff had urged in its Motion and at oral argument. (Ex. E.) Judge Couch's law clerk replied:

Mr. Arnold,

Each of the four causes of action in the Second Amended Complaint arise out of an alleged breach of the covenant not to compete (Paragraph 9(f) of the Employment Contract). As such, and unless there are causes of actions that I have missed, the grant of summary judgment applies to all causes of action. If I am mistaken about the causes of action, please let me know as soon as possible.

(Ex. E.)

Counsel for Plaintiff continued to correspond with the Court, contending as Plaintiff has at oral argument that Plaintiff had other causes of action and that Plaintiff "had planned on filing a motion to amend" the Second Amended Complaint. (Ex. E.) Counsel for Defendants responded

⁵ Copies of the referenced correspondence are attached hereto as *Exhibit E*.

by stating that the parties had made all arguments at the proper time and forum at the Court's September 22, 2016, hearing, and that Defendants would refrain from improper re-argument in the judge's email in box. (*Id.*) Plaintiff's counsels' correspondence continued, but neither the Court nor Defendants responded.

The Court entered its Order granting summary judgment in favor of Defendants on November 8, 2016, holding that Chemgard's restrictive covenant, as written, was overbroad as a matter of law and as there could be no genuine issue of material fact, effectively dismissing all of Plaintiff's causes of action. (Ex. A).

DISCUSSION

A. As Written the Non-Solicitation Provision is Overly Broad and Unenforceable.

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).

Plaintiff's Motion misses the mark. 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").⁶ 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 because obviously every business has legitimate protectable interests. The question is whether the restrictive covenant is no more broad than is 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

⁶ 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).

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).

Plaintiff's Motion incorrectly suggests that their business interests somehow extend its right to enforce a patently overbroad covenant. The Second Amended Complaint states that Haynes' breach in soliciting clients is an attempt to "trade on the goodwill of Chemgard's customers and to exploit the intimate knowledge of its customers gained during Haynes' employment with Chemgard to compete against Chemgard." (Second Amended Comp. ¶ 41.) This argument is very similar to Turbeville Insurance Agency's argument in *Fournil* and fails because as the District Court astutely explained in *Fournil*:

The problem with the covenant at issue, however, is that it extends to situations where these goodwill-siphoning concerns do not exist. The covenant at issue is not only a prohibition of the active use of confidential information obtained while employed at Turbeville, it is an absolute bar to soliciting or accepting business from "any insurance business of any nature from any customer or account on the books of [Turbeville] . . . at the time of her employment."

Fournil v. Turbeville Ins. Agency, Inc., 2009 U.S. Dist. LEXIS 16303, *14, 2009 WL 512261 (D.S.C. Mar. 2, 2009). In complete 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 absolutely no contact or involvement whatsoever. South Carolina courts have never accepted such a patently overbroad restriction.

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.)⁷ 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).

II. The Second Amended Complaint was Properly Dismissed in its Entirety.

The Court correctly held that each of the four causes of action in Plaintiff's Second Amended Complaint arises out of an alleged breach of the covenant not to compete as stated in Paragraph 9(d) of the Employment Contract. (Ex. A.) A review of the entire Second Amended Complaint and construing the pleading "to do substantial justice to all parties" plainly establishes

⁷ The relevant portion of the transcript is attached hereto as *Exhibit F*.

Plaintiff sued Defendant Haynes' for breach of the non-solicitation provision. *Parish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007); *see also* Rule 8(f), SCRPC. First, the Plaintiff's Complaint states factual allegations which specifically list and quote Section 9(d) and 9(f). (Ex. C). The Plaintiff described the consideration offered to Haynes in acceptance of the agreement and states that the "legitimate business interest in maintain customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain." (Second Amended Comp. ¶ 22.) The paragraph that immediately follows states, "*Because Haynes' assent to the non-solicitation provisions*, Chemgard provided Haynes with customer information, business information, and confidential information." (*Id.* at ¶ 24) (emphasis added). Similarly, Paragraphs 28, 29 and 31-35 all definitively refer to the non-solicitation agreement, wrongful solicitation, solicitation and direct solicitation. A review of the Plaintiff's causes of action show a similar reliance on the non-solicitation provision. The First Cause of Action for Breach of Contract action requests injunctive relief to prevent solicitation.⁸ (Second Amended Comp. ¶ 50). The Second Cause of Action for Breach of Contract vaguely requests equitable remedies available for "competitive activities" and finally the Tortious Interference with Contractual Relations Clause specifically alleges "Chem-Tek and Bell intentionally caused Haynes to breach the terms of the Employment Agreement by *soliciting* Chemgard's current customers." (Second Amended Comp. ¶¶ 53, 60) (emphasis added).

The Court appropriately held the claims all arise out solely from an alleged breach of the same provision of Mr. Haynes' Agreement set forth above. As discussed above, there is no question that Chemgard's restrictive covenant, as written, is patently over broad and

⁸ It is important to note, that the Motion for the Injunctive Relief and the Court's July 17, 2015 Order, refer solely to the non-solicitation clause.

unenforceable. (*See* Ex. A.) 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 as the Court’s decision to dismiss Plaintiff’s claims should be upheld. There simply can 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 prospective contract.

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

A Rule 59(e) motion is “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). South Carolina Rule of Civil Procedure 15 applies to amendments to pleadings, however the rule cannot be abused to add new claims to pleadings after judgment has been rendered and when substantial prejudice would result. Rule 15(a), SCRCF. The purpose of Rule 59(e), to alter or amend the judgment is to request the trial judge to “consider matters properly encompassed in a

decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) (citations omitted).

The Court fully considered parties arguments and fittingly held that the non-solicitation clause was overbroad and that Plaintiff’s four causes of actions arise from the invalid non-solicitation clause. Plaintiff artfully attempts to use this Motion to Reconsider as a vehicle to amend his Second Amended Complaint with accusatory language and without tangible legal support. (Motion at p. 8-9.) However, 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). Plaintiff would assert to this Court that the summary judgment on all claims is somehow a reward. (Motion at p. 9.) It is no reward for Defendants, who have been subjected to a wrongful preliminary injunction for over sixteen months, for this Court to grant summary judgment as a matter of law. The Defendants have lost time, business opportunities and money as a result of the imposition of an injunction based on a flawed, overbroad and unenforceable restrictive covenant. The Plaintiff’s allegations towards this Court are inappropriate and a poor attempt to salvage the Second Amended Complaint after the Court’s Order properly foreclosed Plaintiff’s claims against Defendants.

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*Attorneys for Darrell Keith Haynes, Chem-Tek, LLC
and Alfred Bell*

Greenville, South Carolina
November 28, 2016

Exhibit A

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. WICKENS
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 SCRCP, 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

~~Entered~~ 11/8, 2016

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 Chengard, 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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[Signature]

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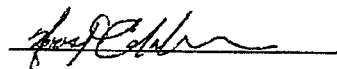
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such customer thereafter make payment of such invoices for which Employee's commission was deducted, such commission shall be added back to Employee's gross commission for the first period after such delinquent payments to the Company have been made.

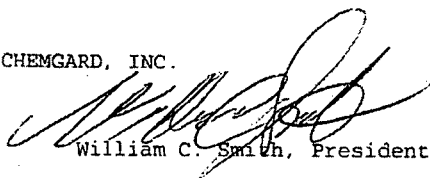
IN WITNESS WHEREOF, the parties execute this Schedule this the 15th day of September, 2000.

WITNESS:

CHEMGARD, INC.



By:


William C. Smith, President

WITNESS:

Henry A. Kilo Jr

Darrell Keith Haynes
Darrell Keith Haynes

DKH 

Exhibit C

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 D. WICKENSHER
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.

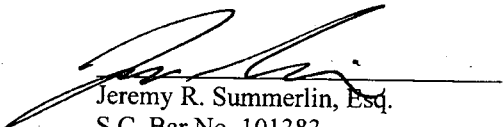
71. Defendants' conduct has resulted in and will continue to result in injury and damages to Chemgard.

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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jsummerlin@aalawfirm.com
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Greenville, South Carolina 29601
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864.242.4800 864.242.4885 fax

Attorneys for Plaintiff

September 23, 2015
Greenville, SC

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

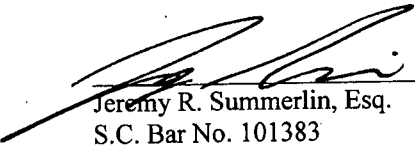
SUMMONS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WILKINSON
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.


Jeremy R. Summerlin, Esq.

S.C. Bar No. 101383

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Greenville, South Carolina 29601

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Greenville, SC 29601

aarnold@aallawfirm.com

864.242.4800 864.242.4885 fax

Attorneys for Plaintiff

September 25, 2015

Exhibit D

From: Gravely, Perry H.
Sent: Friday, September 9, 2016 11:06:30 AM
To: W. Andrew Arnold; Bill Foster
Cc: Gravely, Perry H. Law Clerk (Michelle Jones)
Subject: Chemgard v. Darrell Haynes, et.al.
Importance: Normal

Gentlemen- I wanted to update you on the status of the pending Motions before me which include a Motion for Reconsideration filed by Mr. Foster and a Motion for Sanctions/Rule to Show Cause filed by Mr. Arnold. It is my understanding that a Motion for Summary Judgment has been filed and is scheduled to be heard in the next several weeks and to avoid the possibility of conflicting Orders, I thought it prudent to wait until that matter has been heard and decided. I do not think this will prejudice anyone's position since there are Orders in place at this time. Please let me know if you have any questions.

Perry H. Gravely
Judge, 13th Judicial Circuit
P.O. Box 219
Pickens, SC 29671
(864) 898-5790

~~~~~ CONFIDENTIALITY NOTICE ~~~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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# Exhibit E

**From:** Andy Arnold  
**Sent:** Friday, October 7, 2016 12:25:35 PM  
**To:** Jeremy Summerlin; Andy Arnold; Couch, Roger L. Law Clerk (Adrian Wilkes); Nicole Cuadrado Andino; Bill Foster  
**Subject:** RE: Chemgard v. Haynes, 2015-CP-23-03546  
**Importance:** Normal  
**Attachments:**  
 image002.jpg@01D22090.B1D79200 ;

Adrian:

It is our contention that Defendant Haynes breached the confidentiality provisions of his contract as well as the 30 days notice provision (most of the accounts were contacted during that 30 day period). We have claims for tortious interference, which are based upon the fact that confidential information was not returned as required, was used to interfere with contracts and that the breach of 30 day notice provision was designed to harm Chemgard.

We had planned on filing a motion to amend. After we submitted our proposed order regarding our motion to compel, we received 1101 of emails, requested over a year ago. We believe these support a claim for breach of duty of loyalty claims and provide additional information about the other claims we have outlined above. Also, we were notified THIS WEEK that another 9,000 new emails were found. We were awaiting review of all the information before we made our motion to amend. Most of these emails were the those we claimed had not been produced in our motion to compel. Of course, we had no idea just how right we were.

Based upon the fact that it has been determined as a matter of law the non-solicit is unenforceable, the newly produced information would not impact that claim, but it would impact other causes of action. However, we believe that granting summary judgment on all claims is not warranted based upon a sole determination that the non-compete is unenforceable. And not being permitted to take action on thousands of emails that were not produced almost a year ago really goes to the heart of what we were complaining about in our motion to compel. We were only notified of the discovery of thousands of emails after sending Judge Couch our proposed order regarding the motion to compel.

**W. Andrew Arnold**  
 Horton Law Firm, P.A.  
 307 Pettigru St.  
 Greenville, SC 29601  
 864.233.4351 (phone)  
 864.233.7142 (fax)



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On October 7, 2016 at 11:55:13 AM, Couch, Roger L. Law Clerk (Adrian Wilkes) ([rcouchlc@sccourts.org](mailto:rcouchlc@sccourts.org)) wrote:

Mr. Arnold,

Each of the four causes of action in the Second Amended Complaint arise out of an alleged breach of the covenant not to compete Paragraph f of the Employment Contract. As such, and unless there are causes of actions that I have missed, the grant of summary judgment applies to all causes of action. If I am mistaken about the causes of action, please let me know as soon as possible.

Best Regards,

**Adrian E. Wilkes**

Law Clerk to the Honorable Roger L. Couch  
 Seventh Judicial Circuit  
 180 Magnolia Street  
 Spartanburg, SC 29306  
 Office: (864) 562-4235

ROA 000687

Fax: (864) 562-4234

**From:** Andy Arnold mailto:aarnold@hortonlawfirm.net  
**Sent:** Friday, October 7, 2016 10:17 AM  
**To:** Jeremy Summerlin jsummerlin@hortonlawfirm.net Couch, Roger L. Law Clerk Adrian Wilkes rcouchlc@sccourts.org Nicole Cuadrado Andino nicole.cuadrado@nelsonmullins.com Bill Foster bill.foster@nelsonmullins.com  
**Subject:** Re: Chemgard v. Aynes, et al. -CP- 16-000688

Adrian:

Please advise if the grant of summary judgment pertains to all causes of action or only to the portion of the contract claim based upon the non-solicitation?

**Andre Arnold**

Horton Law Firm, P.A.

30 Pettigrew St.

Greenville, SC 29601

864.233.4311 (phone)

864.233.1421 (fax)

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On October 7, 2016 at 10:17:34 AM, Couch, Roger L. Law Clerk (Adrian Wilkes) (rcouchlc@sccourts.org) wrote:

Dear All,

After much consideration and extensive research, Judge Couch has found that the covenant not to compete is unenforceable as a matter of law, as it is patently overbroad. As such, Defendant's Motion for Summary Judgment shall be GRANTED. Counsel for the Defendant will please draft and submit a proposed order to that effect. The Legal Analysis section of Defendant's Memo in Support of Its Motion for Summary Judgment was spot on. Rather than repeat that analysis in this email, I will ask that the same authority cited in that Memo be cited in the proposed order.

Best Regards,

**Adrian E. Wilkes**

Law Clerk to the Honorable Roger L. Couch

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, SC 29306

Office: (864) 562-4235

Fax: (864) 562-4234

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ELECTRONICALLY FILED - 2016 Nov 28 3:33 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303546

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ROA 000689

Exhibit F

| | | |
|--------------------------|---|-------------------------|
| 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. Gravelly

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, |) | |
| |) | |
| v. |) | |
| |) | |
| DARRELL KEITH HAYNES, |) | |
| CHEM-TEK, LLC, AND ALBERT BELL, |) | |
| |) | |
| Defendants. |) | |

**AFFIDAVIT OF WILLIAM SMITH IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

1. I am at least eighteen years of age and fully competent to testify to the matters stated within this affidavit. This affidavit is based upon my personal knowledge.
2. I am the owner and president of Plaintiff Chemgard, Inc.
3. Chemgard is in the business of selling and distributing chemicals, chemical products, water treatment chemicals, 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. We have business in multiple states in the Southeast, including Georgia and Alabama.
4. Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is that most of the competition in the industry comes down to pricing and whether your company can provide the best price.
5. Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. This pricing sheet establishes the baseline price for all of our products. This baseline price is reached by taking

our cost of the product and adding an additional cost to account for Chemgard's overhead. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products.

6. These same products were and are offered for all of Chemgard's customers in all of the territories that Chemgard did business in, and all salespeople, including Haynes, were given this pricing sheet for purposes of their sales efforts. This pricing sheet was the basis for calculations of the price offered by our salespersons, which involved some markup of the baseline price.

7. This pricing sheet constitutes confidential and proprietary information of Chemgard's because, if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision.

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

9. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement ("Employment Agreement"). The Employment Agreement contained non-solicitation provisions and confidentiality 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 business 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.

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. As additional consideration of the non-solicitation obligations agreed to by Haynes, Chemgard agreed to a pay commissions and to give Haynes approximately \$150,000-\$200,000 of pre-existing accounts for Haynes to service. Chemgard also agreed to pay the phone bill for Haynes's personal cell phone. Haynes stored confidential customer data on his phone, including contact numbers.

13. 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.

14. 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." Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential pricing information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard.

15. Chemgard also has yearly sales meetings for the entire time that Haynes was employed, where we bring all our salespeople from all our sales territories to Greenville, South Carolina or another South Carolina location for one or two days. At these meetings—which Haynes regularly participated in during his tenure with Chemgard—our salespeople were trained on new products that Chemgard would be offering, including new technology and new chemicals. There would have been discussion regarding pricing and sales strategies applicable to all sales territories. We would also discuss new sales efforts of the company, as well as issues or problems we were having with individual customers or potential customers across our sales territories.

16. In addition, towards the end of Haynes' employment with Chemgard, our sales manager began scheduling weekly sales conference calls with the Chemgard sales people. Haynes participated in these conference calls. During these calls, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. They also discussed issues that the salespeople were having with individual customers in their respective sales territories.

17. In May 2015, when Haynes quit unexpectedly from Chemgard without giving us the contractually required 30-days' notice, he had possession of that pricing sheet, as well as other Chemgard property. Chemgard made multiple requests to Haynes for him to return Chemgard's property, which Haynes initially ignored. When he finally returned most of the property to our attorney's office, Haynes failed to return the copies of the invoices or commission statements for the clients he serviced, which included pricing information. All commission statements were marked "CONFIDENTIAL."

18. Additionally, as we know now, Haynes began soliciting his Chemgard customers on behalf of Chem-Tek and Bell immediately after resigning from Chemgard. He had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations. As we've conducted discovery in this case, we've realized that without fail the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut our pricing with absolute precision because he had access to this pricing sheet. And given that these prices were for all products offered by Chemgard to all customers across all of its territories, it's clear that Haynes could use this confidential and proprietary information to unfairly solicit Chemgard's customers in states other than just Georgia and Alabama. Our non-solicitation agreement is limited to our existing customers, but it anticipates harm that could come from competition for those existing customers in all territories. Haynes's new employer, Chem-Tek is a South Carolina limited liability company operating in Greenville.

19. Defendant Albert Bell ("Bell") is the owner of Chem-Tek, LLC. 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 and call on the customers of Chemgard, even in the face of an order enjoining such conduct.

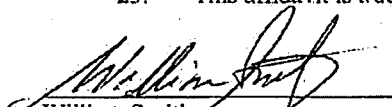
20. Haynes still has access to and is utilizing the contact information stored in his cell phone in wrongfully soliciting Chemgard's customers to this day. We do not know what information resides on his computers, but we know that Defendant Haynes and Chem-Tek have failed to provide all electronically-stored information requested in discovery. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and is using competitive, confidential, and important business and pricing information. Phone

records and email evidence of Haynes' activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard's customers for the benefit of his new employer. We are prevented from knowing the full scope of this conduct because Defendants have failed to provide redacted phone records for Haynes pursuant to their agreement with us, which was agreed to in front of this court at a previous hearing, as well as Defendants providing false responses to our discovery.

21. I believe 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.

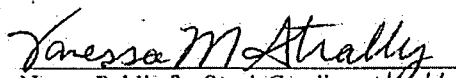
22. Chemgard has suffered tremendous harm and damage in the form of lost profits from accounts that Haynes wrongfully solicited after his resignation from Chemgard, and these lost profits will continue to accrue for some years to come.

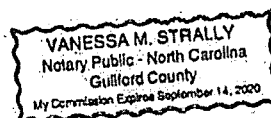
23. This affidavit is true and accurate to the best of my knowledge.


William Smith

09/19/2016
Date

Sworn to before me this
19th day of September, 2016


Notary Public for South Carolina North Carolina
My Commission Expires: September 14, 2020



From: Gravely, Perry H. <pgravelyj@sccourts.org>
Sent: Friday, September 9, 2016 11:06 AM
To: W. Andrew Arnold; Bill Foster
Cc: Gravely, Perry H. Law Clerk (Michelle Jones)
Subject: Chemgard v. Darrell Haynes, et.al.

Gentlemen- I wanted to update you on the status of the pending Motions before me which include a Motion for Reconsideration filed by Mr. Foster and a Motion for Sanctions/Rule to Show Cause filed by Mr. Arnold. It is my understanding that a Motion for Summary Judgment has been filed and is scheduled to be heard in the next several weeks and to avoid the possibility of conflicting Orders, I thought it prudent to wait until that matter has been heard and decided. I do not think this will prejudice anyone's position since there are Orders in place at this time. Please let me know if you have any questions.

Perry H. Gravely
Judge, 13th Judicial Circuit
P.O. Box 219
Pickens, SC 29671
(864) 898-5790

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Monday, October 23, 2017 at 10:28:07 AM Eastern Daylight Time

**Subject:** RE: Chemgard v. Haynes, 2015-CP-23-03546  
**Date:** Friday, October 7, 2016 at 11:55:06 AM Eastern Daylight Time  
**From:** Couch, Roger L. Law Clerk (Adrian Wilkes)  
**To:** Andy Arnold, Jeremy Summerlin, Nicole Cuadrado Andino, Bill Foster  
**Attachments:** image002.jpg

Mr. Arnold,

Each of the four causes of action in the Second Amended Complaint arise out of an alleged breach of the covenant not to compete (Paragraph 9(f) of the Employment Contract). As such, and unless there are causes of actions that I have missed, the grant of summary judgment applies to all causes of action. If I am mistaken about the causes of action, please let me know as soon as possible.

Best Regards,

**Adrian E. Wilkes**  
Law Clerk to the Honorable Roger L. Couch  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, SC 29306  
Office: (864) 562-4235  
Fax: (864) 562-4234

**From:** Andy Arnold [mailto:aarnold@hortonlawfirm.net]  
**Sent:** Friday, October 07, 2016 11:22 AM  
**To:** Jeremy Summerlin <jsummerlin@hortonlawfirm.net>; Couch, Roger L. Law Clerk (Adrian Wilkes) <rcouchlc@sccourts.org>; Nicole Cuadrado Andino <nicole.cuadrado@nelsonmullins.com>; Bill Foster <bill.foster@nelsonmullins.com>  
**Subject:** Re: Chemgard v. Haynes, 2015-CP-23-03546

Adrian:

Please advise if the grant of summary judgment pertains to all causes of action or only to the portion of the contract claim based upon the non-solicitation?

**W. Andrew Arnold**  
Horton Law Firm, P.A.  
307 Pettigru St.  
Greenville, SC 29601  
864.233.4351 (phone)  
864.233.7142 (fax)



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On October 7, 2016 at 10:17:34 AM, Couch, Roger L. Law Clerk (Adrian Wilkes) ([rcouchlc@sccourts.org](mailto:rcouchlc@sccourts.org)) wrote:

Dear All,

After much consideration and extensive research, Judge Couch has found that the covenant not to compete is unenforceable as a matter of law, as it is patently overbroad. As such, Defendant's Motion for Summary Judgment shall be GRANTED. Counsel for the Defendant will please draft and submit a proposed order to that effect. The Legal Analysis section of Defendant's Memo in Support of Its Motion for Summary Judgment was spot on. Rather than repeat that analysis in this email, I will ask that the same authority cited in that Memo be cited in the proposed order.

Best Regards,

**Adrian E. Wilkes**  
Law Clerk to the Honorable Roger L. Couch  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, SC 29306  
Office: (864) 562-4235  
Fax: (864) 562-4234

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prvs=708824b639=rcouchlc@sccourts.org

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Monday, October 23, 2017 at 10:29:23 AM Eastern Daylight Time

Subject: RE: NOTICE RECALLED: Motion "MAMNMO-Plt/Chemgard Inc Motion To Amend Complaint" for Case "2015CP2303546" was added to a Motions Roster for 12/12/2016 at 11:00 PM

Date: Thursday, November 10, 2016 at 2:19:44 PM Eastern Standard Time

From: Lopez, Stephen

To: Jeremy Summerlin, 'jsummerlin@aalawfirm.com', 'bobbie.schilder@nelsonmullins.com', 'sam.outten@nelsonmullins.com', 'karan.digiacoia@nelsonmullins.com', 'bill.foster@nelsonmullins.com', 'jsmith@roecassidy.com', 'lalewine@roecassidy.com', 'jcassidy@roecassidy.com', Jodie Fowler, Andy Arnold, 'martha.crampton@mgclaw.com', 'ggibbon@mgclaw.com', 'Fig.c.jones@gmail.com'

Counsel,

I have just become aware that this case is now Dismissed as per Judge Couch's Order Granting Defendant's Motion for Summary Judgment. Therefore I must cancel the 12/12/2016 hearing scheduled in this case.

Please feel free to contact me if you have any questions or concerns.

Best regards to all,
Steve

Stephen Lopez
Non-Jury Coordinator
Greenville County Clerk of Court
ph (864) 467-8546
fax (864) 467-8519
e-mail: njcoord@greenvillecounty.org

-----Original Message-----

From: Lopez, Stephen

Sent: Thursday, November 10, 2016 12:46 PM

To: jsummerlin@hortonlawfirm.net; jsummerlin@aalawfirm.com; bobbie.schilder@nelsonmullins.com; sam.outten@nelsonmullins.com; karan.digiacoia@nelsonmullins.com; bill.foster@nelsonmullins.com; jsmith@roecassidy.com; lalewine@roecassidy.com; jcassidy@roecassidy.com; jfowler@hortonlawfirm.net; aarnold@hortonlawfirm.net; martha.crampton@mgclaw.com; ggibbon@mgclaw.com; Fig.c.jones@gmail.com

Subject: NOTICE RECALLED: Motion "MAMNMO-Plt/Chemgard Inc Motion To Amend Complaint" for Case "2015CP2303546" was added to a Motions Roster for 12/12/2016 at 11:00 PM

NOTICE RECALLED: Motion "MAMNMO-Plt/Chemgard Inc Motion To Amend Complaint" for Case "2015CP2303546" was added to a Motions Roster for 12/12/2016 at 11:00 PM

Hearing remains where originally scheduled.

Stephen Lopez
Non-Jury Coordinator
Greenville County Clerk of Court
ph (864) 467-8546
fax (864) 467-8519
e-mail: njcoord@greenvillecounty.org

-----Original Message-----

From: roster@greenvillecounty.org [<mailto:roster@greenvillecounty.org>]

Page 1 of 2

ROA 000703

Sent: Thursday, November 10, 2016 12:38 PM

To: jsummerlin@hortonlawfirm.net

Cc: Lopez, Stephen

Subject: Motion "MAMNMO-Plt/Chemgard Inc Motion To Amend Complaint" for Case "2015CP2303546- Chemgard Inc vs. Darrell Keith Haynes , defendant, et al" was added to a Motions Roster for 12/12/2016 at 11:00 PM

A Hearing in this case is SCHEDULED- DATE/TIME on Subject line above

Location: Greenville County Courthouse, 305 East North Street, Greenville, SC 29601

MOVANT IS RESPONSIBLE TO NOTIFY OPPOSING COUNSEL AND PRO SE PARTIES Check the online roster at

<http://www.greenvillecounty.org/scjd/courtrosters/>

CONTINUANCE, RESOLVED, WITHDRAWN - send detailed e-mail (copy opposing counsel/party)

to Non-Jury Coordinator Steve Lopez njcoord@greenvillecounty.org

****MEMO REQUIREMENTS**** (e-file w Clerk 72 Hours Prior to Hearing)

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From: slopez@greenvillecounty.org

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Medium (75): Pass

Low (90): Pass

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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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains material proposed to be included by any of the parties and not any other material.

October 26, 2016.

Respectfully submitted,

Horton Law Firm, P.A.

W. ANDREW ARNOLD

SC Bar # 0065311

JEREMY R. SUMMERLIN

SC Bar # 101383

307 Pettigru St.

Greenville, SC 29601

(864) 233-4351

aarnold@hortonlawfirm.net

jsummerlin@hortonlawfirm.net

ATTORNEYS FOR APPELLANT