

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. D. Quattlebaum, Special Referee

Appellate Case No. 2012-213453

2012-CP-23-0314

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SC Court of Appeals

Jeff Yelton,Appellant,

v.

ScanSource, Inc.,Respondent.

Initial Brief of Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Special Referee err by determining that injunctive relief is necessary to prevent irreparable harm when Defendant has admitted the absence of any harm and has introduced no evidence as to the threat of harm, let alone irreparable harm?
- II. Did the Special Referee err by ignoring uncontroverted evidence that there discovery has failed to adduce any evidence that Yelton ever used or disclosed any protectable information?
- III. Did the Special Referee err by enjoining Yelton from using or disclosing protectable information based solely on the fact that he previously had access to or possessed such information?
- IV. Did the Special Referee err by finding that ScanSource established a likelihood of success on the merits without saying how and without pointing to any facts that would support such a conclusion as required by Rules 52(a) and 65(d)?
- V. Did the Special Referee err by finding that no adequate remedy at law exists when not only do such remedies exist under South Carolina, but any legitimate interest ScanSource has in protecting information already is protected by existing court orders?
- VI. Did the Special Referee err by issuing an injunction that fails to advise Yelton as to the particular information he is enjoined from using or disclosing when Rules 52(a) and 65(d) mandate such specificity?
- VII. Did the Special Referee err by issuing an injunction that incorporates by reference a document which, in turn, refers to other documents and the law when Rule 65(d) specifically prohibits incorporating the terms of other documents?
- VIII. Did the Special Referee err by requiring disclosure of unspecified devices and services?
- IX. Did the Special Referee err by granting injunctive relief not specifically sought in the Motion or the stipulation of ScanSource's counsel?
- X. Did the Special Referee err by enjoining Yelton from obtaining information from third parties when such information would not be protectable by law, the parties' agreement specifically exempts such information, and there is no factual basis for determining that there exists any imminent threat?

STATEMENT OF THE CASE

Appellant (“Yelton”) commenced this action on January 18, 2012, alleging, among other things, a breach of an employment contract between the parties. (R.pp. __[Complaint]). On January 24, 2012, Respondent (“ScanSource”) filed its Answer and Counterclaims, alleging, among other things that Yelton breached the parties’ contract and had misappropriated trade secrets. (R.pp. __ [Answer ¶¶ 19-26]). ScanSource concurrently filed its Motion for Temporary Restraining Order and Preliminary Injunction. (R.pp. __) (“ScanSource’s Motion”).

ScanSource’s Motion initially sought five forms of injunctive relief. ScanSource sought an order to:

- (1) Prohibit Yelton from “soliciting or encouraging any person employed by ScanSource to provide him with Confidential Information or Trade Secrets;
- (2) prohibit [Yelton] from “directly or indirectly soliciting or encouraging any customer or supplier of ScanSource to provide him with Confidential Information or Trade Secrets;
- (3) “[r]equi[re Yelton] to return any and all property and/or information rightfully belonging to, or wrongfully taken from ScanSource”;
- (4) “[r]equir[e Yelton] to submit to a computer examination and inspection of all his computer systems and data” and
- (5) “any other further relief as the Court may deem just and equitable.”

(R.p. __[Def Motion at 22-23]). Yelton filed documents in opposition on January 27, 2012. (R.pp. __[Pl. Doc in Opposition to TRO Motion]).

The Honorable D. Garrison Hill held a full hearing on January 27, 2012. At the hearing, Yelton readily agreed on the record to not contact ScanSource employees for the purpose of obtaining confidential information. (R.p. __[Hearing

tr. of 1/27/12 at 22-23]). Yelton also did not oppose returning any information belonging ScanSource; he simply stated his belief that he had already done so. (R.p. __[Id. at 25-26]). Yelton further agreed that forensic computer examinations were acceptable once a protocol was in place. (R.p. __[Id. at 26-28]).

On February 8, 2012, Judge Hill issued two written Orders: (1) a Temporary Restraining Order (“TRO”) (R.p. __); and (2) an Order of Reference, appointing J.D. Quattlebaum, Esq. as Special Referee and referring certain matters to Mr. Quattlebaum. (R.pp. __).

With Respect to the TRO, Judge Hill ultimately ordered only two things: (1) the return of information within a time period set by the Special Referee; and (2) that Yelton not contact ScanSource employees for the purpose of soliciting confidential information. (R.p. __ [Order of 2/8/12 at 2]). The Order of Reference specifically referred the issue of ScanSource’s Motion to the Special Referee as it pertains to the request for preliminary injunctive relief.¹

On September 17, 2012, the parties submitted briefs and other papers regarding ScanSource’s request for injunctive relief to the Special Referee. (R.pp. __ (Yelton’s submission); R.pp. __ (ScanSource’s submission)). Each party also filed responses to the opposing party’s submissions. (R.pp. __ (Yelton’s submission); R.pp. __ (ScanSource’s submission)). On October 16, the Special Referee requested additional information from Yelton. (R.pp. __[Oct 16 emails]).

¹ Judge Hill later amended this Order to refer part of ScanSource’s Motion for Contempt to Mr. Quattlebaum. (R.pp. __[Amended Order of Reference]).

Yelton filed additional argument in response on October 19, 2012. (R.pp. ___ [Pl. Submission on damages]).

On October 26, 2012, the Special Referee issued his Order, which is the subject of this Appeal. (R.pp. ___[Order]). Yelton filed and served his Notice of Appeal on November 6, 2012. (R.pp. ___ [Notice of Appeal]).

FACTS

ScanSource is a wholesale distributor of specialty technology products. ScanSource employed Yelton as president of its North American Point of Sale (“POS”) and Barcoding division. (R.p. ___[Benbenek Dep. 13]). Yelton reported directly to the president of worldwide operations, Scott Benbenek, who reported to ScanSource’s CEO, Mike Baur. (R.pp. ___ [Benbenek Aff 1, 3; Benbenek Dep. 13, 17]).

While employed with ScanSource, Yelton used computers he personally owned for work-related purposes, and he maintained personal files on his ScanSource-owned laptop. (R.pp. ____, ___ ¶ 15, 22, 25 [look at initial transcript from hearing; original aff. ¶ 15, 22]). As did other executives, Yelton also used file-sharing software, such as “Dropbox,” which allows files to be synchronized on different computers, including personal computers. (R.p. ___ ¶ 22 [initial aff]).²

On Friday, December 9, 2011, Benbenek informed Yelton that ScanSource was terminating Yelton’s employment at the end of the month. (R.pp. ___ ¶ 4

² ScanSource has no policy restrictions on data existing on personally-owned electronic devices, including any policy that covers them after employment terminates. Nor does ScanSource restrict the use of flash drives by employees. (R.pp. ___ [Benbenek Dep. 184-85, 186-89]).

[Benbenek Aff]). The next week, Yelton began making preparations to obtain employment, and his initial idea was to work with one of the vendors that supply product to ScanSource. (R.p. ___ ¶¶ 7-9 [initial aff]). Before Yelton called the executives at these companies, he obtained copies of quarterly business review (“QBR”) documents from his subordinates, which was his practice before speaking with vendors. A QBR contains information about sales made of the particular vendor’s product by ScanSource. Yelton reviewed such documents before he would call executives at vendors in case they had any questions about the status of their business. Yelton requested the QBR’s for three vendors: (1) Motorola; (2) Honeywell; and (3) Intermec. There is no dispute that, as president of the division, Yelton had every right to review and use QBR’s. Yelton requested these documents out in the open and in front of others. The subordinates copied the QBR’s onto at least one portable USB device (i.e. “flash drives”). (R.pp. ___ ¶¶ 4-5 [initial aff]).

On Thursday, December 15, 2011, Baur and ScanSource’s in-house counsel told Yelton to clean out his office, which he did on December 15th and 16th. Because Yelton maintained personal files on his ScanSource laptop, he used a software program to erase the data on the laptop. The use of this software did not destroy any company data, which is maintained on ScanSource’s servers. (R.p. ___ ¶ 15 [original aff]).

On January 4, 2012, Yelton informed ScanSource of his plans to start a technology outsourcing business for education, marketing, and lead generation that would work with vendors. (R.p. ___ ¶ 16 [initial aff]).

After ScanSource terminated Yelton's employment, he deleted remaining ScanSource files found on his personal computer as he encountered them. (R.p. ___ ¶ 2 [contempt aff]). Nonetheless, after receiving a demand for return of information from ScanSource's in-house counsel, Yelton copied remaining electronic files he located onto flash drives and made them available for pickup.³ Nobody from ScanSource, however, retrieved the flash drives. (R.pp. ___ [1/27 tr. at 9, 14]).

On January 28, 2012 (the morning after the hearing on the TRO), Yelton made available all the contents of his office that he cleaned out. Within the many files were some ScanSource-related documents, which the Undersigned specifically called to the attention of ScanSource. Yelton also provided screen shots of files from numerous computers and devices to demonstrate what documents Yelton was able to identify that might be of interest to ScanSource. (R.pp. ____ [1/28 emails]).

Nobody from ScanSource, including its attorneys, accepted the invitation to review the materials at the Undersigned's office. Finally, on February 14, 2012, the Special Referee met with the parties at the Undersigned's office after which representatives from ScanSource reviewed the materials and the parties, by agreement, boxed up Yelton's electronic devices to be held by the Special Referee pending entry of a protocol for conducting forensic examinations. (R.pp. ___ [2/14 and 2/15 emails]).

³ There apparently has been no situation in which departing employees have been asked to disclose the electronic devices they possess that may contain ScanSource information. (R.pp. ___ [Benbenek Dep. 186-89]).

The parties entered into a Consent Protocol for electronic discovery, including the forensic discovery ScanSource desired to conduct on Yelton's electronic devices. (R.pp. ___[consent protocol]). Consistent with the terms of the Consent Protocol, ScanSource has conducted a thorough examination of the computer drives and devices Yelton possessed during his employment with ScanSource that were still in his possession. The forensic exam identifies not only existing files, but those that have been deleted previously. Yelton has been permitted to review the results and, from the best Yelton can discern, there is no evidence of any use or disclosure. Further, there was no Motorola QBR apparent from the results, and the other QBR's found were in zipped backup files on an external hard drive. (R.p. ___ ¶¶ 9-11 [Yelton Aff on damages]). ScanSource did not refute this showing.

There is no dispute in this case that, since leaving ScanSource in December 2011, Yelton has not worked for any competitor, or even in the POS/barcoding industry. Currently, Yelton sells two-way radios through an e-commerce web site. (R.p. ¶ 5 [Aff on damages]). See <http://twowayradiocenter.com>. Yelton has affirmed that he has not used or disclosed any trade secrets or confidential information belonging to ScanSource. (R.p. ¶ 3 [initial aff]; r.p. ¶ 16 [contempt aff]). ScanSource has offered no testimony to counter this showing.

ARGUMENTS

I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT SCANSOURCE ESTABLISHED THAT A USE OR DISCLOSURE INJUNCTION IS PROPER.

Despite the fact that the law of this State is well settled that injunctions are to be sparingly granted, the Special Referee granted extraordinary relief with no substantiated findings whatsoever. “The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected.” Lefurgy v. Long Cove Club Owners, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994); Denman v. City of Columbia, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010)(noting that “[a]n injunction is a drastic remedy”) (quoting Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004)); Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011); James F. Flanagan, South Carolina Civil Procedure 531 (3d ed. 2010).

For such a drastic remedy to be provided, the moving party must establish that:

- (1) it would suffer irreparable harm if the injunction is not granted;
- (2) it will likely succeed on the merits of the litigation; and
- (3) there is an inadequate remedy at law.

Scratch Golf, 361 S.C. at 121, 603 S.E.2d at 907-08 (citations omitted); Compton v. South Carolina Dept. of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011); Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694

S.E.2d 15, 17 (2010); see id. at 586, 694 S.E.2d at 17 (determining that balancing the equities is no longer a requirement for a preliminary injunction). For the reasons that follow, the Special Referee abused his discretion in determining that ScanSource made a sufficient showing as to any of these three elements.

A. ScanSource never demonstrated that it would suffer irreparable harm without additional injunctive relief.

1. The Special Referee ignored ScanSource's own repeated admissions and deflections that belie any notion that Yelton has threatened to inflict any irreparable harm on ScanSource.

a. Scott Benbenek's testimony

Scott Benbenek is ScanSource's worldwide president and Yelton's former boss. (R.p. __ [Benbenek Dep. at 13, 17 (Exh. 3)]). If anyone should know about or be concerned with Yelton posing any threat of harm, it would be Mr. Benbenek. However, Mr. Benbenek is unaware of any such harm, real or potential:

Q. Has Jeff Yelton done anything to cause your company damages in any way?

A. I'm not aware of any.

(R.p. __ [Benbenek Dep. at 176]).

Q. Has anybody ever told you that Jeff Yelton has ever used any information that you would contend is confidential information of ScanSource?

A. Say that one again.

Q. Sure Has anyone ever told you that Jeff Yelton has used information that is confidential to ScanSource?

A. No.

Q. Have you ever read anything that leads you to believe that Jeff Yelton has ever used information that is confidential to ScanSource?

A. No.

* * * *

Q. Sitting here today, Mr. Benbenek, can you tell me of anything that leads you to believe that Jeff Yelton is doing anything that could possibly harm ScanSource?

A. No, I mean, I know of nothing that he is doing, presently that is. The question seemed worded funny, so --

Q. Let me try a different way. I want you to be comfortable with these questions. I'm trying to make them straightforward, and your answers have been straightforward, so we can continue moving along, but it is important you understand the question. Since leaving the company, has Jeff Yelton done anything that you believe has harmed ScanSource?

MR. FOSTER: Object to the form.

THE DEPONENT: Not that I know of.

* * * *

Q. Has Jeff Yelton ever threatened to do anything against the interest of ScanSource, to the best of your knowledge?

A. To the best of my knowledge, no.

Q. Has Jeff Yelton done anything to benefit either himself or another company to the detriment of ScanSource?

A. Not that I know of.

Q. Has anybody told you that they believe he's done anything to benefit himself or a company to the detriment of ScanSource?

A. None that I can think of, no.

(R.pp. ____ [Id. at 173-74, 175-76, 176]). Mr. Benbenek further testified that he has no knowledge that Yelton ever even attempted to start a business using

ScanSource proprietary information. (R.pp. ___ [Id. at 244-45]). Mr. Benbenek also conceded that he has no reason to believe Yelton ever attempted to peddle information regarding one vendor to another vendor, as theorized in the Motion, but never substantiated. (R.pp. ___ [Id. at 247-48]).

Furthermore, Mr. Benbenek does not believe that Yelton broke any company rule or violated any policy while an employee, that Yelton violated the provision in his employment contract prohibiting the publishing, dissemination, or disclosure of confidential information, or that Yelton has ever disclosed any confidential information of ScanSource. (R.pp. ___ [id. at 169 ll. 15-18; 172-73]).

ScanSource has failed to provide any testimony—including any affidavit support—for the notion that Yelton has ever threatened any harm, let alone that any such harm at this late date is imminent. Given the passage of time since Yelton's departure, the notion that injunctive relief is necessary simply is unsupportable.

b. After repeated court intervention, ScanSource begrudgingly admitted there is no evidence Yelton has used any confidential data.

The Order enjoining Yelton from using or disclosing confidential information also is improper because ScanSource finally admitted that, consistent with the Benbenek testimony, it has no evidence of any such activity. In January 2012, Yelton served his first set of discovery. These interrogatories included simple requests for identification of witnesses, as well as simple contention interrogatories. ScanSource first responded on March 20, 2012. ScanSource never identified a single witness to testify that Yelton has used any trade secrets or confidential information. (R.p. ___ (Def. Resp. to Interrog. 1, 4 [Exh. 4])). When asked for facts

to support any contention that Yelton has “used” any information that ScanSource contends is a “trade secret,” ScanSource interposed an objection that such information was beyond the scope of discovery, and merely reiterated its allegations regarding misappropriation. (R.p. ___ (Def. Resp. to Interrog. 23 [Exh. 4]). ScanSource offered no facts regarding use.

Yelton filed a Motion to Compel on April 27, 2012, seeking such basic information as any facts ScanSource contends shows “use” if, in fact, ScanSource was contending that Yelton used proprietary information. (R.p. ¶ 3 [Exh. 5]). At the hearing, Yelton continued to press that, as to the contention interrogatories, he would not accept boilerplate objections and responses such as “the investigation is continuing.” (R.pp. ___ [Hearing tr. of 6/19/12 at 17-25 (Exh. 6)]). The Honorable G. Edward Welmaker pointedly asked defense counsel “Can you tell him simply what he did?” Defense counsel replied “Your Honor, I can.” (R.p. ___ [Id. at 19]). Judge Welmaker instructed: “Just give him a straight answer.” (R.p. ___ [Id. at 21]). Judge Welmaker procured another promise from ScanSource to answer the questions, including Interrogatory 23, in a straight-forward manner and then considered the matters resolved based on the following colloquy:

Mr. Murphy: Your Honor, I think this is helping. But this is the first time I’ve gotten an agreement to get a straight answer.

The Court: Well, he’s going to shoot straight with you now. Right?

Mr. Foster: Yes, Your Honor.

The Court: That’s what you’re telling the Court?

Mr. Foster: That’s what I’m telling the Court.

(R.pp. __ [Id. at 22-23]).

Six days later (June 25, 2012), ScanSource again responded to the Use interrogatory, and again provided nothing resembling a straightforward answer. Instead, ScanSource maintained its objection that its own “use” allegation was beyond the scope of discovery, and again provided no facts whatsoever to support any contention of use. (R.p. ___ (Def. Supp. Resp. to Interrog. 23)[Exh. 7].⁴ After being unable to resolve the matter, the Undersigned again contacted Judge Welmaker to alert the Court that the responses promised were not provided. (R.p. __ [Exh. 8]).

Judge Welmaker promptly held a conference call the next day (June 28, 2012). Unfortunately, there is no transcript of that call. Afterwards, however, ScanSource once again amended its responses on July 13. After again reciting contentions regarding misappropriation (rather than use), ScanSource finally conceded that it “presently lacks further information demonstrating that Yelton has used any ScanSource trade secret information.” (R.p. __ [Exh. 9]). This was almost six months after Yelton served discovery. To this day, ScanSource has not presented any evidence that Yelton has used any confidential information.

Against this backdrop, it is difficult, at best, to understand how the Special Referee found that there exists a threat of imminent harm from use or disclosure. The Special Referee improperly relied, at best, on nothing more than rank speculation and unsubstantiated conspiracy theories. This approach simply is

⁴ ScanSource added a reference to QBR’s, but provided no facts to show use.

contrary to settled principles for issuing injunctions. Continental Grp., Inc. v. Amoco Chems. Corp., 614 F.2d 351, 358–59 (3d Cir.1980) (Under the Uniform Act, injunctions are “not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties. Nor will an injunction be issued to restrain one from doing what he is not attempting and does not intend to do.”), quoted in Colorcon, Inc. v. Lewis, 792 F. Supp. 2d 786, 804 (E.D. Pa. 2011); Applied Indus. Materials Corp. v. Brantjes, 891 F. Supp. 432, 437-38 (N.D. Ill. 1994).

The Special Referee simply disregarded the settled principle that surmising that harm is possible if wrongdoing occurs is not a foundation upon which injunctive relief can stand. Delmar Studios of the Carolinas v. Kinney, 233 S.C. 313, 320, 104 S.E.2d 338, 342 (1958) (noting in context of non-compete case: “We cannot substitute assumption for proof.”). However, because that is all the Order is based upon, it should be vacated.

c. The Special Referee ignored uncontroverted evidence regarding the contents of the computer data.

When Yelton moved for summary judgment as to ScanSource’s claim of use or disclosure, ScanSource offered no actual evidence of use or disclosure. Instead, it argued that the Motion was premature and that the Court should await the results of a forensic computer examination of Yelton’s computers and devices. (R.pp. ____ [tr. 10/2 at 27-29]). Judge Hill, who heard that Motion, agreed and decided to wait until the forensic computer examination was complete. (R.pp. ____ [tr. 10/2 at 36-37]). After the results of that examination became available, Yelton argued that the Special Referee should wait just a short while for ScanSource to proffer actual

evidence as it appears to Appellant that there is none. (R.p. ___ [emails 10/16]). Yelton offered affidavit testimony regarding the results that further show that Yelton has not used or disclosed any ScanSource confidential information. (R.pp. ___ ¶¶ 7-11[Yelton 10/19 aff ¶¶ 7-11]). ScanSource offered nothing to the contrary. The Special Referee abused his discretion by completely ignoring Yelton's showing and by accepting ScanSource's hypocritical argument that, when it comes to injunctive relief, the Special Referee must act quickly before the actual facts came out. This is particularly troubling as "[t]he party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing Calcutt v. Calcutt, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App.1984)). In the end, however, what is important is the lack of any actual competent evidence supporting the Motion. For this reason as well, the Order should be vacated.

2. The Special Referee enjoined Yelton from "using" or "disclosing" trade secrets based only on his past possession of them

The Special Referee stated in cursory fashion that ScanSource "has demonstrated that it faces the very real threat of irreparable harm absent continued injunctive relief by virtue of the potential use or disclosure of its confidential, trade secret and proprietary information." (R.p. __[Order at 2]). The question, though, remains: What potential use or disclosure? The Special Referee made no findings⁵

⁵ This is an example of an instance in which the Special Referee ignored the requirements of Rules 52(a) and 65(d) – a matter discussed more fully below in Sections I(B) and II(B).

– and no evidence ever was offered – to show: (1) that Yelton has used or disclosed confidential information; or (2) that Yelton has threatened to do so. Instead, the Special Referee issued a “use” and “disclosure” injunction based on two faulty premises.

First, the Special Referee found that “[Yelton] has acknowledged that [Yelton] is or was in possession of information that is confidential, trade secret and/or proprietary and that ScanSource is entitled to return of this information in Yelton’s possession.” There are several problems with this finding. It is not clear the “acknowledgment” to which the Special Referee refers. Yelton certainly “was” in possession of confidential information at one point – it was his job to use such information. There was never acknowledgment that Yelton is in still in possession of such information. Yelton has fully complied with the terms of the Consent Protocol, which was specifically designed to allay any concerns in this regard. As to the “acknowledgment” that ScanSource is entitled to the return of information, the Special Referee points to no acknowledgment, which is significant when the scope of information at issue is unclear at best. ScanSource did allege in its Motion for Contempt that Yelton failed to return all devices, but it failed to prove such any such allegation. (R.pp. ___ [order denying contempt]).⁶ To the extent the Special Referee is simply referring to the Consent Protocol (which would be improper speculation in

⁶ Yelton has stated unequivocally that, to the extent he locates any devices or information, they will be promptly disclosed pursuant to the terms of the Consent Protocol. (R.p. ___¶ 12 [Yelton Contempt Aff]).

the absence of a finding), such a recognition itself defeats the notion that injunctive relief is improper as there is no finding that Yelton ever breached its terms.

The second faulty premise is that, while Yelton has “assured the Special Referee that all such information has been returned . . . [ScanSource] has presented evidence which suggests that this claim is at the very least in doubt” (R.p. ___[Order at 2]). The Special Referee never identifies any such “evidence.” S.C. R. Civ. P. 52(a). Perhaps this is a reference to the information provided in the Motion for Contempt that the Special Referee denied. (R.pp. ___ [Order denying Contempt]).⁷ There simply is no competent evidence that Yelton possesses any confidential information. ScanSource offered none, and the Special Referee cited none.

B. ScanSource never demonstrated any likelihood of success on the merits

In perfunctory fashion, the Special Referee stated that ScanSource had “demonstrated a likelihood of success on the merits” because Yelton “has no right to make any use or disclosure of this information.” (R.p. ___). That is not a finding; it is a non sequitur. Whether Yelton has a *right* to use or disclose information (that

⁷ Although ScanSource articulated a theory that, post employment, Yelton possessed a flash drive that, at one time, contained QBR’s, there is no proof Yelton accessed, used, or disclosed any such information. Nor is there any competent evidence that he located but refused to produce such a device. The mere possibility that Yelton may, at one time, have possessed a flash drive, that the drive at one time contained ScanSource information (that is useless to Yelton), and that the drive may turn up some day does not warrant injunctive relief against use or disclosure. This is especially so since the full forensic search appears to refute the notion that Yelton accessed any QBR’s (even to delete them) after his employment terminated.

he no longer possesses) hardly suggests that ScanSource will likely prevail on a claim that he actually used or disclosed it.⁸ The Special Referee made no findings to actually support the notion that ScanSource will prevail, and did not even specify the issue(s) upon which the Special Referee believes ScanSource will prevail.

In addition to the illogical nature of the conclusion, the Special Referee's determination violates both Rule 52(a) and Rule 65(d). "Rule 52(a) requires the court to make findings of fact and conclusions of law in granting or denying temporary relief. Likewise Rule 65(d) requires the order to set forth the reasons for the relief" Flanagan, supra at 535 (citing S.C. R. Civ. P. 52(a), 65(d)).⁹ This "requires a detailed recitation of the reasons for issuance of the injunction." Id. at 537. Here, the Special Referee simply reiterated a legal standard and then ordered extraordinary relief with no findings, detailed recitation, or even an explanation as to how and on what ScanSource could likely prevail.

⁸ The Special Referee correctly notes that Yelton agreed to not contact ScanSource employees for the purpose of obtaining confidential information. (R.p. __). The e-mail exchange to which ScanSource continues to point between Yelton and Jeannie Aiken shows: (1) that Yelton did not believe that the list he requested was confidential to ScanSource (a belief ScanSource has failed to effectively rebut; and (2) he was cordial when it was explained that he could not have it. (R.pp. __ [Aiken - Yelton emails in Answer exhibit].

⁹ S.C. R. Civ. P. 52(a) ("[I]n granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.")

C. The Special Referee Erred in finding that there exists no adequate remedy at law

The Special Referee erred when he simply recited the requirement that there exists no remedy at law, but provided no basis or findings whatsoever to support such a conclusion. In fact, not only are legal remedies available as a matter of law, but the existing court orders already provide complete protection.

Allegations of improper theft of business are, in fact, remediable through legal remedies if actually proven. MailSource, LLC v. M.A. Bailey & Associates, 356 S.C. 363, 369-70, 588 S.E.2d 635, 639 (Ct. App. 2003), overruled on other grounds, Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010). Indeed, ScanSource has specifically sought such damages here. (R.p. ____ [Counterclaims p. 26 ¶ F]).

Any confidential information also is already protected by existing orders. The only confidential information ever specified to be at issue are the QBR's. ScanSource has marked them "Confidential" pursuant to the amended Consent Amended Confidentiality Order. (R.p. ___ [Exh. 10]). Yelton has not challenged that they contain confidential information. The Order already provides: "Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties . . . for any purposes whatsoever other than preparing for and conducting the litigation . . ." (R.p. ___ ¶ 6(a) [id.]). The Special Referee erred in finding that injunctive relief is required to prohibit use of these documents, as the information already is protected by force of a Circuit Court Order.

The Special Referee never explained how any theoretical wrongdoing could not be addressed through available remedies under the law, the Consent Amended Confidentiality Order, or even the Consent Protocol. The Special Referee's rote recitation regarding the absence of remedies simply fails to establish the propriety of the extraordinary relief granted here.

II. THE SPECIAL REFEREE'S ORDER VIOLATES BASIC TENETS OF RULE 65(d)

A. The Special Referee's Order violates Rule 65 by referring to a document that simply refers to other documents.

The Order violates Rule 65(d) because the Special Referee simply referred to another document (the TRO), which incorporated terms of other documents. (R.p. ___ ¶ 6 [Order]; r.pp. ___ ¶ 3 [TRO]). Rule 65(d) also requires that any injunction itself shall describe the specific prohibitions, and "not by reference to the complaint or other document." S.C. R. Civ. P. 65(d). Accordingly, simply referencing ScanSource's policy for a definition is not sufficient. Gibson v. Cline, 28 N.C. App. 657, 659, 222 S.E.2d 478, 479 (1976) ("Reference to some other document is not sufficient to provide a description of the act or acts enjoined or restrained.") (citations omitted).

Because the Order violates the clear dictates of Rule 65, the incorporation of other documents provides another independent basis for vacating the Order.

B. The Special Referee violated Rule 65(d) by failing to specify what Yelton is being enjoined from using or disclosing and what he must return and as well as by ordering relief that is indefinite in scope.

The Special Referee also erred in failing to apprise Yelton of what information he is enjoined from “using” or disclosing,” as well as what he must return, which is especially problematic as the parties vigorously dispute what is “confidential.” (R.pp. ___ ¶¶ 3, 6).

Rule 65(d) mandates that any injunction “shall be specific in terms” and that it “shall describe in reasonable detail . . . the act or acts sought to be restrained.” S.C. R. Civ. P. 65(d).¹⁰ This includes the “detailed recitation of . . . the acts sought to be enjoined.” Flanagan, supra at 537. The purpose of this requirement is to provide “fair and precisely drawn notice of what the injunction actually prohibits,”

¹⁰ This specificity requirement is a mandatory aspect of due process. United States v. McAndrew, 480 F. Supp. 1189, 1192 (E.D. Va. 1979) (citations omitted). “The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” CPC Int’l, Inc. v. Skippy Inc., 214 F.3d 456, 459 (4th Cir. 2000) (quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974)). “The drafting standard established by Rule 65(d) is that an ordinary person reading the court’s order should be able to ascertain from the document itself exactly what conduct is proscribed.” 11A Charles A. Wright, Arthur R. Miller, et. al, Fed. Prac. & Proc. Civ., § 2955 Form and Scope of Injunctions or Restraining Orders.

Yelton cites to the parallel federal rule because, in the absence of state authority, federal cases construing the same verbiage are persuasive. Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”) (citing H. Lightsey & J. Flanagan, South Carolina Civil Procedure, (2d ed. 1985)); Unisun Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) (citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App.1987)).

Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 444 (1974), to “prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood,” Schmidt v. Lessard, 414 U.S. 473, 476 (1974).

Judge Hill’s initial TRO, which did not enjoin use or disclosure, referenced four things in defining “confidential information”: (1) the parties Agreement (R.pp. ___ [Answer Exh. A]); (2) an internal ScanSource policy (R. pp. ___ [Answer Exh. D]); (3) the Trade Secret Act; and (4) other unspecified laws of South Carolina. (R.p. ___ [TRO]).¹¹ The Special Referee also issued specific directives that, as discussed below are far too indefinite as they do not define what is encompassed in the injunction.

1. Using policy definitions of categories of information is not proper.

The documents incorporated by reference contain only characterizations of information. The employment contract simply lists general categories of information, and never specifies what, specifically, ScanSource considers to be confidential. (R. pp. [Answer Exh. A]). The referenced policy is even more general and does not even attempt to exempt information obtained from others or that is generally known or ascertainable by other means. (R. pp. [Answer Exh. D]).

¹¹ Because Judge Hill did not issue a use or disclosure injunction, the Special Referee’s Order provides the first instance in which this error is subject to appeal. As discussed above, Judge Hill ordered the return of confidential information, which did not become an issue as Yelton made available all information. There simply was no need to appeal the definition of confidential information in Judge Hill’s Order.

Broad proscriptions against using such things as “proprietary materials” or “trade secrets” simply are too vague to be enforceable. Sanford v. RDA Consultants, Ltd., 244 Ga. App. 308, 312, 535 S.E.2d 321, 325 (2000) (citations omitted); Union Pac. R. Co. v. Mower, 219 F.3d 1069, 1073, 1077 (9th Cir. 2000) (injunction against disclosure of “information or communication of a confidential nature, including the information and communications described in the accompanying findings of fact and conclusions of law, that he acquired, learned, or helped to generate during his employment by [UP] or while he was a consultant for plaintiff” simply “does not even come close to satisfying Rule 65's specificity requirements; it provides little, if any, guidance to [enjoined party] regarding how he should determine what particular information is confidential or privileged.”). One simply cannot tell the specific information Yelton is enjoined from using or disclosing or what his is ordered to return by reading definitions of categories of information and exceptions that are arguable, at best. (R.pp. ___ ¶¶ 3, 6). This is, no doubt, the very reason Rule 65(d) prohibits the practice.

2. Incorporating the law into a use and disclosure injunction creates an improper “follow the law” injunction.

By enjoining Yelton from use or disclosure with references to another order that simply references statutes and other unspecified laws, the Special Referee transformed the TRO’s definition into an unspecific “follow the law” injunction. S.E.C. v. Sky Way Global, LLC, 710 F. Supp.2d 1274, 1277-78 (M.D. Fla. 2010)

“follow the law” injunctions are too vague to be enforceable and are not compliant with Rule 65(d)).¹²

3. The Special Referee erred in issuing injunctive relief with overly-broad definitions and an indefinite scope.

The Special Referee’s Order improperly sets one more trap for additional efforts to hold Yelton in contempt. The Order requires that Yelton identify all “computer systems,” and “data storage devices of any kind” to which Yelton has had access since December 16, 2011. (R.p. ___ ¶ 4 [Order]). That would be virtually impossible to do, especially given the passage of time and the breathtaking array of devices that could be argued to be a “computer system” or a “data storage device.” Likewise, the Special Referee also ordered the disclosure of accounts with cloud-based servers “or the like.” (R.p. ___[id.]). Yelton simply cannot discern the scope of the injunction with certainty when the Special Referee uses such nebulous phrases as “or the like.” Because the scope of paragraph four of the Order is impossible to discern, this Court should vacate it.

Throughout this case, ScanSource has refused to specify what is at issue in terms of confidential information. Early on, the Special Referee inquired as to what information ScanSource contended was at issue. (R.pp. ___ [Special Referee letters 2/10 and 2/13]). ScanSource never would be specific. (R.pp. ___[Harper 2/13 and 2/15 responses]). Throughout the proceedings below, Yelton has complained that

¹² In striking down an injunction that generically proscribed the use of “trade secrets,” the Georgia Supreme Court has held that, at a minimum, the injunction must provide a general description of the materials at issue. Ward v. Process Control Corp., 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981).

there was no specificity as to the scope of information at issue. This is especially concerning to Yelton given ScanSource's proclivity to claim contempt. (R.p. ___[Motion for Contempt]). Nonetheless, the Special Referee proceeded to enjoin Yelton without ever providing specifics as to the information that Yelton is enjoined from using or disclosing and by using terms that simply do not delineate the scope of relief granted. This approach simply cannot be squared with the specificity mandates of Rule 65(d).

III. THE INJUNCTION PROCEEDINGS VIOLATED FUNDAMENTAL NOTIONS OF DUE PROCESS AS YELTON WAS NOT APPRISED AS TO THE SCOPE OF THE MOTION OR PROCEEDINGS

The Special Referee also erred in granting relief that transcended the Motion itself and in allowing ScanSource to present a moving target with respect to its amorphous requests for relief. ScanSource's Motion does not specifically seek any prohibition against use or disclose of confidential information. (R.pp. ___ [Motion at 22-23]). Yelton has consistently complained that ScanSource's attempts to obtain injunctive relief have presented an improper moving target. (R.pp. ___ [Pl. Resp to Def. Submission at 1-2; Tr. of 8/31/12 at 85-86 (Exh. 2)]).¹³ Counsel for ScanSource stated that, with respect to the Motion for Preliminary Injunction:

But in terms of the preliminary injunction, I agree. I think the only – it's the same discussion we had months ago, you know, leaving the provisions of the TRO that continued in place and adding a use restriction. That's the only additional relief we would ask for. We

¹³ To be clear, Yelton is not conceding that all of the information that ScanSource may be contending is "confidential" actually qualifies for protection (save the QBR's, which are not at issue). It is incumbent on ScanSource to prove that the information at issue is a trade secret or otherwise merits extraordinary protections.

think it's within the scope of the initial request which includes other and further –

(R.p. __ (emphasis added)[Id. at 87 (emphasis added)]).

In total disregard of this representation, ScanSource sought, and obtained, relief that far exceeds what it claimed to be at issue. Despite the fact that Yelton has complained about ScanSource moving the goal posts, the Special Referee ignored the Motion and simply granted ScanSource relief on issues for which there was not even evidence. (R.pp. ____ [Pl resp to Def submission at 1-2]; r.pp. __ ¶ 5 [Order at 4 ¶ 5]).

IV. THERE IS NO LEGAL OR FACTUAL BASIS FOR AN INJUNCTION AGAINST OBTAINING INFORMATION FROM THIRD PARTIES.

The Special Referee also enjoined Yelton from seeking confidential information from any vendor or customer. (R.p. __ ¶ 3 [Order]). This provision is improper for several reasons. First, any information a vendor or customer might possess and choose to provide Yelton would not be information to which ScanSource could claim a proprietary interest. E.g., Systems Dev. Services, Inc. v. Haarmann, 389 Ill. App. 3d 561, 577, 907 N.E.2d 63, 77 (2009); Softchoice Corp. v. MacKenzie, 636 F. Supp.2d 927, 939 (D. Neb. 2009) (rejecting trade secret claim where “the only information that could arguably be categorized as “secret,” that is, pricing information, from the potential customers themselves, who freely shared the information with him in hopes of obtaining a lower price”).

Second, the prohibition from obtaining information from others actually conflicts with the contract incorporated by reference in the Order, which excepts information from third parties. (R.p. __ ¶ (iv) [Answer Exh. A]).

Third, the incorporation of other documents to define what is "confidential," is improper as discussed above in Section II(A).

Finally, there has been no showing whatsoever that Yelton ever sought information improperly from any vendor or customer. This prohibition is based on nothing more than unsubstantiated theories proffered by ScanSource that, nearly a year later, have proven to be nothing but fantasy. In addition, as Yelton has already shown, ScanSource has no motive to seek such a prohibition other than to cause further reticence in the industry to hire Yelton and have the court impose a restrictive covenant that ScanSource was unsuccessful in being able to negotiate. (R.pp. ____).

CONCLUSION

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

Respectfully submitted,

December 4, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. D. Quattlebaum, Special Referee

Appellate Case No. 2012-213453

2012-CP-23-0314

Jeff Yelton,Appellant,

v.

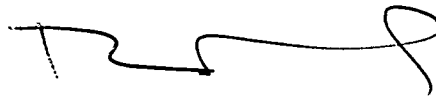
ScanSource, Inc.,Respondent.

Proof of Service

The Undersigned hereby certifies that, on the date indicated below, she served counsel for Respondent with a copy of *Appellant's Initial Brief* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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December 4, 2012