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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge

App. Case No. 2018-001140

Unpublished Opinion No. 2018-UP-078 (S.C. Ct. App. filed February 7, 2018)

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC, ... Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC, ... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ... Third-Party Plaintiffs,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

vs.

DAVID WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the .....Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM CONVERTING, LLC, ... Petitioners.

REPLY BRIEF OF PETITIONER CAROLINA CUSTOM CONVERTING, LLC

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When Wilson left CCC, he created a brand new company using CCC's hard-earned confidential information. At that company, he began selling CCC's products to CCC's customers. Respondents' briefing seeks to portray these facts as much ado about nothing. They argue that the confidential information at issue in this case is just public data available to anyone. And, that Wilson and Neologic/FWS didn't need any of CCC's confidential information to start the new company. Their argument begs the question: then why did Wilson take it with him when he left? Similarly, when he pursued FilmTech as his next employer, why did Wilson provide a detailed list of the industry segments for CCC's customers, the precise products those customers were buying, with pricing detail, and the related supplier information? Again, if this information had no value, then why would he not just send his resume instead?

I. THE CONFIDENTIAL COMMERCIAL INFORMATION IS A TRADE SECRET

A. Supplier & Customer Detail Meet the Definition of a Trade Secret

The confidential information at issue in this case is comprised of a compilation of customer and supplier information that made a substantial difference in the efficiency of CCC's processes and was the basis of CCC's commercial strategy. S.C. Code Ann. § 39-8-20(5)(b). Courts from across the country have held that this precise type of commercial information is a trade secret. *See, e.g., N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 46 (2d Cir. 1999); *Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 781 (Neb. 2001); *W. Plains, L.L.C. v. Retzlaff Grain Co. Inc.*, 927 F. Supp. 2d 776, 783–84 (D. Neb. 2013); *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 909-910 (Miss. 1998); *Unified Brands, Inc. v. Teders*, 868 F. Supp. 2d 572, 583 (S.D. Miss. 2012); *Webcraft Tech.'s, Inc. v. McCaw*, 674 F. Supp. 1039, 1044-46 (S.D.N.Y. 1987); *Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) ("I do not construe [the majority opinion] to hold that a customer

list cannot be a trade secret and therefore not protected under the [South Carolina Trade Secrets Act]."))[1]; S.C. JUR. INTELLECTUAL PROPERTY § 77 & n.1 (noting that "customer lists and other sales and marketing information can be trade secrets."). Transcript cites from the lower court proceedings are provided below to give context to the legal issue before this Court.

1. Context from the Lower Court Proceedings

At the very beginning of this case, before CCC had even been named as a defendant, Gandis and Comeau-Shirley agreed with Wilson's pleadings, and sought to have CCC dissolved in an orderly fashion. The plan was that the parties could split up the proceeds and go their separate ways. At a December 6, 2012 hearing before the circuit court, however, Wilson abruptly opposed the dissolution.[2] In open court, he noted that "[w]e don't want to gut the entity. We think the business has value. Remember, we were here not long ago because they didn't want to give us the customer list because that customer list has such value. Well, ***we agree it has value***." App. p. 998, lns. 9-13 (emphasis added).[3]

When Wilson left CCC, eleven months before that hearing, he was the Vice President of Sales and Purchasing for the entire company. In that role, he was charged with overseeing the

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[1] The South Carolina Trade Secrets Act is hereinafter referred to as "the Act."

[2] Discovery later revealed Neologic/FWS's true purpose for seeking dissolution. It is unclear, however, why they changed strategy. In a December 3, 2012 e-mail to the owner of Neologic/FWS, Wilson wrote that "[w]e have a hearing this Thursday regarding dissolution of CCC and ZOi. We have drafted our own dissolution order which will make it nearly impossible for [CCC] to conduct business once the dissolution order is in place." App. p. 1320; *see also* App. p. 532, ln. 1-p. 533, ln. 1; App. p. 529, lns. 19-22.

[3] Before this litigation began, Wilson understood the confidential nature of this information. During the buy-sell negotiations among the members in January 2012, in an e-mail Wilson was cautioned to protect the company's confidential information during discussions with third parties. App. p. 1718, at ¶ 3. In response, Wilson assured the other members, "I certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor. That really should not be a concern of yours since I have a vested interest in protecting the company . . . ." App. p. 1717 (third sentence).

company's sales force, its purchasing decisions, and he assisted Gandis with the vendor (supply) sourcing and qualifying.

On direct examination by his counsel, Wilson testified on this point as follows:

> Q: And how were your sells [sic] to your customers going? Are you above or below projections [for 2011]?
>
> A: Well, as the VP of [S]ales, I had transitioned a lot of my accounts to our reps. I viewed my role as more of supporting them. And, of course, I was still heavily involved in the ***vendor side***, ***qualifying vendors and purchasing***.
>
> So I had been ***transitioning accounts over to them***. So I couldn't really tell you which accounts I was personally managing at that time . . . .

App. p. 425, lns. 1-10 (emphasis added). During cross-examination, Wilson testified that while at Neologic/FWS, he had all of CCC's data:

> Q: You had company data. We've already talked about that; right?
>
> A: I had company data, absolutely.
>
> Q: The company data would have had ***all the e-mails of the customers***. It would have had ***the prices***. It would have had what CCC sold. . . . And you had all the information about ***what CCC was selling its customers***, ***their pricing***, ***their acquisitions***, ***costs***, and ***specifications of the products***, all the products of CCC; right?
>
> A: Yes. Royal Metal was not a customer of CCC.
>
> Q: Well, you had it for everybody else; right?
>
> A: Sure.

App. p. 529, lns. 1-18 (emphasis added).[4]

CCC did not always undertake a qualifying process for every sale to a customer. But in the majority of CCC's regular sales to large volume accounts, a qualification process was the

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[4] On cross-examination, Wilson also admitted that when he began working for Neologic/FWS, he began e-mailing (soliciting) CCC customers, App. p. 528, lns. 24-25; customers which he had ceased servicing well before leaving CCC.

norm. At trial, both sides discussed the concept of qualifying or finding the precise film that would work for a given customer's needs.

Mike Meyers (Respondents' witness) verified this process when he testified as follows:

Q: So that deal would have started in 2007. Why did that deal take so long to develop?

A: Well, we were using a different type of film. It was polyester, but it had gone through a special kind of process. And we had to send it to the customer to test. They had to do all of their testing and make sure that it works for all their process, and everything like that. And then, after that, that's when we started getting some orders.

Q: So, essentially, you've got this process where you've got to show them the film you're going to sell them; right?

A: Yes.

Q: And it's kind of got to go through a qualification process?

A: Right.

Q: And y'all had done that in 2007?

A: The end of 2007 to 2008.

App. p. 311, lns. 3-20. Bruce Hotmer (Respondents' witness) testified in a related manner as follows:

Q: Well, what about the products they need?

A: Well, you wouldn't find that in the Thomas Register, according to my memory. Now, if they've changed, I would be surprised. But the polyester business is a very specific detailed business. In ICI, we had over 20,000 product codes. So it's very, very – and we probably had – I don't know – 250 customers. ***So it all boils down to a very specific requirement by customer.***

App. p. 355, lns. 2-9 (emphasis added).

Gandis testified as to the qualifications process as follows:

Q: Okay. And let's talk about that spec in. What are we really talking about there? How does that work?

A: I mean, I think even Bruce Hotmer mentioned, whenever it was, yesterday or the day before yesterday, some of these manufactures make up to 20,000 kinds of films. That doesn't mean all of them will work for every application. So there's got to be an evaluation to make sure that [a] manufacturer's film will, in fact, meet the [customer] specification. Each manufacturer has its own little thing that's a little different that meets different codes, FDA approvals, those sort of things.

So it's not – it's never as simple as just walking in. It just doesn't happen, especially in food packaging.

Q: But he could just walk straight in, couldn't he?

A: He did.

App. p. 895, lns. 5-19.

Wilson also discussed this very concept. "[The customer was] looking for other sources of polyester, and [said] we'd love to have you quote us, if you can supply it. So I gave them a quote. ***I started to get products qualified***. And, initially, I picked up their 142-guage business . . . ." App. p. 384, lns. 9-16 (emphasis added).

It is important to underscore the fact that nowhere in Respondents' briefing do they challenge the rigorous and time consuming process that CCC undertook to qualify various films. The qualification process was discussed by both parties at trial and corroborated by Wilson and his own witnesses. The circuit court did not even acknowledge this aspect of the confidential information in its order.

2. *The Court of Appeals' Conclusion that the Supplier and Customer Information Was Not a Trade Secret Was Legal Error*

The court of appeals erred when it adopted the circuit court's conclusion that the confidential information was not a trade secret because some of this information was procured

from public sources. App. pp. 1827-1828.[5] The Act instructs that a "trade secret may consist of a simple fact [or] item . . . [and] [t]he collective effect of the items . . . must be considered in any analysis of whether a trade secret exists ***and not the general knowledge of each individual item*** . . . ." S.C. Code Ann. § 39-8-20(5)(b) (emphasis added). The circuit court's order failed to acknowledge the presence of subsection (b) of the statute. Indeed, ***nowhere*** in the order is subsection (b) even cited. The circuit court's legal conclusion that the use of public information precluded the existence of a trade secret is irreconcilable with the language of the statute. This was legal error.

The circuit court's failure to acknowledge subsection (b) aside, the supplier and customer lists taken by Wilson to Neologic/FWS were developed by CCC with time and effort. CCC spent the time to find customers that needed specific film, and then spent the time and effort to find suppliers that could provide those films.[6] "[W]here time and effort ha[s] been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market." *Johnson*, 634 N.W.2d at 782; *see also W. Plains, L.L.C.*, 927 F. Supp. 2d at 783–84 (quoting *Johnson*, 634 N.W.2d at 782, for the same proposition); *Ecolaire Inc. v. Crissman*, 542 F. Supp. 196, 206 (E.D. Penn. 1982) (noting that customer lists which contain confidential customer data are of "considerably greater value than information contained in publicly available directories"); *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1018-19 (8th Cir. 2008) (noting that public information

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[5] As noted in CCC's opening brief, the facts of this case are fundamentally different and substantially more complex than the facts of *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 883 (2007). Br. of Pet'r, pp. 17-18.

[6] Wilson's own brief acknowledges that in one given year where CCC had roughly $7 million in sales, only half of those sales were from EFS customers. Wilson Br., p. 15 (last paragraph).

gained "only after, ***extensive, time-consuming research*** [is] information entitled to protection") (emphasis added). "Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers." *Johnson*, 634 N.W.2d at 782; *see also id.* (noting that courts are reluctant to protect the latter type of public customer list); *W. Plains, L.L.C.*, 927 F. Supp. 2d at 783–84.

Moreover, confidential information is not precluded from trade secret protection merely because it is based upon information from the public domain. *See Servo Corp of Am. v. General Elec. Co.*, 393 F.2d 551, 555 (4th Cir. 1968) ("But if [the cited case] holds that the mere presence in the public domain of the information upon which a trade secret is based precludes recovery for breach of a confidential relationship, we decline to follow it."); *accord BBA Nonwovens Simpsonville, Inc. v. Superior NonWovens, LLC*, 303 F.3d 1332, 1339 (Fed. Cir. 2002) (citing pre-*Atwood* South Carolina federal district court decision for the proposition that, "[i]t is well settled law that the fact that part, or even eventually all, of the components of a trade secret are matters of public law or public knowledge does not prohibit a claim of trade secret"); *see also In re Wilson*, 248 B.R. 745, 750 (M.D.N.C. 2000) (noting that "'[t]he principle that because a secret is of such a nature that it can be discovered by lawful means does not deprive its owner of a right to protection from those who obtain it unlawfully is not only generally accepted, it is also sagacious.'") (quoting *Biodynamic Techs., Inc. v. Chattanooga Corp.*, 664 F. Supp. 607, 611 (S.D. Fla. 1986)). "Such a burden would be insurmountable since trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets." *The Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 675 (Wash. 1987) (citing *Servo Corp.*, 393 F.2d at 555).

The circuit court erred by failing to apply the plain language of § 39-8-20(5)(b), which follows well-established law that the mere presence of public information does not defeat trade secret protection.

3. *Respondents' Efforts to Gloss Over the Court of Appeals' Legal Error Fail*

First and foremost, Wilson contributed his industry and customer information to CCC in exchange for his equity interest. App. pp. 1318-1319; App. p. 1572. Consequently, Wilson's exhaustive discussion of previous contacts with customers that he brought to Neologic/FWS is a red herring. But, even if it strikes a chord with this Court, it is only half of the equation. What Wilson and Nelologic/FWS fail to discuss are the sources of supply CCC developed for those customers.

Likewise, Wilson's effort to portray the confidential information in this case as independently gained from years of industry experience is also a red herring. "Although the friends and acquaintances acquired in the course of a history of business dealings in an industry is not generally considered a trade secret, different considerations apply where a list of useful and influential contacts among customers and prospects is accumulated with considerable effort for the benefit of the employer." *Webcraft Tech's.*, 674 F. Supp. at 1046; *see also Fred's Stores*, 725 So.2d at 909 ("[I]t is this very work effort or process of acquiring and ***retaining clientele***, that constitutes a protectable trade secret.") (emphasis added). "There is little doubt that information which [Wilson] learned while employed at [CCC] concerning customer preferences and . . . pricing is protectable."[7] *Webcraft Tech's.*, 674 F. Supp. at 1046. And, although Wilson

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[7] CCC generated substantial amounts of new business while Wilson was working for the company. Again, he acknowledged in his responding brief that in one year, CCC had $7 million in sales; and of those sales, only half were from former EFS customers. Wilson Br., p. 15 (last paragraph).

said he didn't need any of the confidential information to compete, "the fact remains that []he took the list and no doubt it helped h[im] remember far more than []he could have remembered without it." *Id.*; *see also Johnson*, 634 N.W.2d at 782 (noting that if the information on the customer list was so readily available, then why go to the trouble of obtaining it (and in that case paying for it)).[8]

Second, Wilson's brief has oversimplified the typical one-off film-sales transaction. For example, Wilson notes testimony regarding a transaction as follows: "[I]f we had a customer—specific customer need, we'd go out. We'd look at three or four different vendors, find the film that we needed. If it was available, then, you know, the decision to purchase it was made." Wilson Br., p. 11. Wilson then cursorily concludes no trade secrets were required to make that transaction. *Id.* What Wilson does not discuss, however, is the previous efforts it took to have that customer look to CCC for supply in the first place. *Fred's Stores*, 725 So.2d at 909 ("[I]t is this very work effort or process of acquiring and retaining clientele, that constitutes a protectable trade secret.") (citation omitted). Again, Wilson does not address the previous efforts it took for CCC to locate the different vendors as a source of supply, and any efforts to ensure the supply was of a reliable quality. *Ecolaire Inc.*, 542 F. Supp. at 203 (noting that the defendant "could not have realistically made certain bids for projects without this supplier information"). Likewise, Wilson does not discuss the fact that the ability to locate those vendors was made easier by use of the electronic vendor reference program created by CCC.

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[8] Wilson claims that the identity of the customers he called on supports the claim that he did not use any of the confidential information, and that "Petitioners presented no evidence to the contrary." Wilson Br., p. 8. But that statement has no support in the record. *See, e.g.*, App. p. 892, ln. 6-p. 894, ln. 2 (discussing solicitation by Neologic/FWS of Patrick Industries); App. p. 894, ln. 3-p. 895, ln. 4; *see also* App. p. 1420 (customer noting that "Dave was in last week and he said that this is the same material that we get from [CCC]").

Third, Respondents' description of the film supply market as a commodities market likewise fails. Wilson Br., p.15; Neologic/FWS Br., p. 6. The price that a company like CCC pays a supplier for its film stock is only half the battle: the suitability of the film from that supplier for a given customer is the other half of the battle. *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that "which suppliers supplied chemicals at the ***requisite quality and price*** was not in public domain" and protected as a trade secret) (emphasis added).

Finally, Respondents argue that customer pricing is not a trade secret because customers freely provide sales persons with competing companies' current prices. While that is a dubious argument,[9] whether it is correct or incorrect is irrelevant to this appeal. Wilson knew all of the customers that were buying from CCC, and he already had CCC's pricing information. *Webcraft Tech.'s*, 674 F. Supp. at 1046 (holding that pricing information is a trade secret); *see also Teders*, 868 F. Supp. 2d at 583 (denying motion to dismiss and recognizing that pricing information has been found to be a trade secret). Accordingly, Wilson was able to underbid CCC, App. p. 893, ln. 18-p. 894, ln. 2; App. p. 896, lns. 2-20; App. p. 897, lns. 6-11; App. p. 1375 (stating "these prices are very attractive"); App. p. 1417 (showing $400 profit on roughly $80,000 sale), which explains why Neologic/FWS's net sales numbers were not higher and suggests that a predatory pricing strategy was being waged against CCC.

B. The Modified Excel Programs are Trade Secrets

The circuit court failed to acknowledge the presence of these programs in its order.

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[9] For example, if a purchasing agent tells Salesman X that he buys a roll of film from Competitor Company for $100 then the purchasing agent is bidding against his company because now Salesman X knows he just needs to come in below $100.

Discovery confirmed that Neologic/FWS had these programs in their possession.[10] Neologic/FWS argue that CCC was not damaged by the misappropriation of these efficiency programs. Neologic/FWS Br., p. 12. This argument represents a misapprehension of the Act. When trade secrets like the subject efficiency programs are taken, the General Assembly recognized that it may be hard to quantify damages. For that reason, the Act authorizes a "reasonable royalty for a misappropriator's unauthorized . . . use of a trade secret." S.C. Code Ann. § 39-8-40(B). CCC incorporates by reference its discussion of this issue in its opening brief. Br. of Pet'r, pp. 11-12, 13-14.

II. WILSON & NEOLOGIC/FWS MISAPPROPRIATED THE CONFIDENTIAL INFORMATION

As detailed in CCC's opening brief, when Wilson began making plans to leave the company with intentions to join FilmTech, he harvested all of the company's confidential information. And, when FilmTech did not bite, Wilson used his family's resources to start a new film company. Discovery confirmed this fact; and, as a result, Wilson was forced to admit that he took the confidential information with him to Neologic/FWS. App. p. 528, ln. 18-p. 529, ln. 18.

Wilson and Neologic/FWS's attempt to narrow the amount of confidential information that they used down to the single inventory tracking program is belied by the record. Wilson Br., p. 13; Neologic/FWS Br., p. 12. The record is replete with evidence that Respondents traded on CCC's confidential information. *E.g.*, App. p. 891, ln. 10-p. 910, ln. 18; *see also* App. p. 1831 ("Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim.").

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[10] Respondents attempt to distract from their possession of this document by labelling it "dated." The only reason the document was "dated" is because Neologic/FWS produced the program in pdf form, as opposed to electronic format. The data was not dated.

III. CCC EXERCISED REASONABLE EFFORTS TO MAINTAIN THE SECRECY OF ITS CONFIDENTIAL INFORMATION

In a background section of its order, the circuit court noted that "CCC made little if any effort to protect the information; neither Wilson, Gandis, Shirley, Bill Shaw, Mike Myers, nor any other CCC employee or contractor was required to sign a non-disclosure agreement prior to Wilson's ***ouster***.[11]" App. p. 1882 (emphasis added). Respondents pushed the circuit court in this erroneous legal direction throughout the trial, *e.g.*, App. p. 185, lns. 16-25; App. p. 189, lns. 1-17; App. p. 314, lns. 18-20; App. p. 328, lns. 21-23; App. p. 444, lns. 3-12, in the exact same manner they are attempting to push this Court. Wilson Br., pp. 11, 14, 26; Neologic/FWS Br., p. 9. The circuit court took this factual observation and then applied it to a legally erroneous standard. Specifically, the circuit court erred when it held that a "party claiming a trade secret violation must exercise '***eternal vigilance,' which 'calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.***'" App. p. 1828 (emphasis added).

Respondents' briefs argue that the Act's reasonable efforts standard is nothing more than a different phraseology of the above standard requiring ***eternal vigilance***, ***constant warnings***, and a ***required secrecy agreement***. Wilson Br., pp. 21-23; Neologic/FWS Br., pp. 8-9. The plain language of the Act, however, does not include these heightened standards. Respondents' arguments that these common law standards merely differ in semantics from the standard embodied in the Act is meritless.

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[11] Whether or not Wilson was ousted from CCC has no bearing on the question of whether he and Neologic/FWS misappropriated CCC's trade secrets. *See* App. p. 1829 ("The evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ***ouster*** from CCC." (emphasis added).

Neologic/FWS further argues that CCC not only failed to safeguard its trade secrets, "Gandis and Shirley gave CCC company information and opportunities away." Neologic/FWS Br., p. 10. Specifically, Neologic/FWS accuses CCC of "pa[ying] Shaw to work on ZOi deals using CCC's QuickBooks system to enter sales transactions and purchase orders." *Id.* Of course, CCC did pay Shaw to do just that, but only because—as detailed further in Part V.B.—ZOi was a ***wholly owned subsidiary*** of CCC and the QuickBooks for both companies were integrated.

As noted in CCC's opening brief, only three individuals had access to all of the confidential information relating to the suppliers (vendors) and the customers: Wilson, Gandis, and Comeau-Shirley. Furthermore, the testimony showed that this information was password protected on CCC's server. Password protecting confidential information and making it available to only a limited number of individuals constitutes reasonable efforts. *Fred's Stores*, 725 So.2d at 910-11 (holding reasonable efforts met where access to the "computer on which the list was stored was obtainable only though a password" and the "number of employees who had access to the list was limited"). As a matter of law, CCC employed reasonable efforts.

IV. CCC WAS DAMAGED

Respondents misappropriated CCC's trade secrets, and through the use of that information, they were able to capture a share of the market (*i.e.*, through underbidding). *See* Br. of Pet'r, p. 19. CCC incorporates by reference its discussion of this issue in its opening brief. Br. of Pet'r, pp. 22-24.

V. RESPONSE TO RED HERRING ARGUMENTS

In the circuit court, Respondents defended this case by introducing a number of inflammatory claims about CCC and its members. These attacks were effective because they

distracted the circuit court from the plain legal defects in their defenses. The record before this Court, however, does not back up the arguments. CCC will provide a brief response.

A. Corporate E-mail

Wilson argues that CCC spied on him by monitoring, in real time, his personal email. Wilson Br., p. 6 . That statement has no basis in fact or the record. The incoming e-mails for key staff members at CCC were compiled in an archive system. *E.g.*, App. p. 128, lns. 19-23; App. p. 301, lns. 9-11. When Wilson claims his e-mails were monitored, he is referring to this archive system. Consequently, the only Wilson e-mail that was ever reviewed came from his corporate e-mail account: dave@ccc-films.com. And, again, only the incoming e-mails could be seen. App. p. 128, lns. 19-23. Wilson's other e-mail addresses, *e.g.*, davewilson@easternfilms.net or davewilsonsr@charter.net, were not reviewed—until discovery.

Despite claims to the contrary, Wilson understood that his corporate e-mail account was not private. When corresponding with FilmTech, Wilson primarily did so by sending e-mails from his charter e-mail account, App. p. 1727, and from his easternfilms e-mail account. App. p. 1730. An exception is an e-mail exchange on January 13, 2012. On that date, FilmTech initiated the correspondence by sending Wilson, at his corporate e-mail account, some ideas about their potential business. App. pp. 1731-32. Wilson immediately forwarded that e-mail to his easternfilms account; he then promptly responded from the easternfilms account acknowledging the e-mail and asking that "all future emails pertaining to our working together [be sent] to my eastern films email address. I can't be 100% sure that the CCC email is secure." *Id.* Of course, he knew it was not secure because CCC had a handbook that said that very thing. App. p. 129, lns. 6-9; *see also* App. pp. 1434-60.

The claims of "real time" monitoring are likewise without any basis in the record. There is an e-mail from Wilson's wife to Wilson where, one week after it was sent to Wilson, Gandis forwarded the e-mail to Comeau-Shirley. App. pp. 1078-79. There was an e-mail exchange regarding Comeau-Shirley's proposed tax reduction plan for Wilson's tax liability that included Wilson's accountant, but it is unclear whether Wilson forwarded that e-mail to Gandis. Gandis testified that his review of the archived e-mails was primarily after Wilson left the company. App. p. 131, ln. 21-p. 132, ln. 7. Contrary to Wilson's claims, there is zero evidence that anyone reviewed communications between Wilson and his lawyer.

B. ZOi Films, LLC

Every transaction of Zoi flowed to the CCC balance sheet for the benefit of CCC. The Court's expert (Bradshaw) confirmed this fact.[12] App. p. 606, ln. 25-p. 607, ln. 15. For that reason, all work done by CCC employees to further a ZOi transaction were for the benefit of CCC. Respondents contend that far from protecting CCC's trade secrets, its members freely gave them away to a competing entity. Respondents know that is an incorrect statement. Accordingly, Respondents' claims that CCC employees worked to aid a competitor has no basis in fact or the record. Indeed, almost as soon as ZOi was formed, in or around July 2012, it became public

[12] The circuit court's expert witness also did not cost $150,000; he cost $112,000. And the expert was requested by Wilson; this was not a *sua sponte* decision by the court. The appointment was driven by an affidavit from Wilson's expert witness that alleged indicia of fraud—which the circuit court's expert witness refuted—in the balance sheet. This claim hinged upon year-end adjustments to the inventory. Wilson plainly knew CCC's inventory was overstated by $300,000 - $400,000. App. p. 493, lns. 6-18; App. p. 498, lns. 2-8; App. p. 530, lns. 2-14; App. p. 564, ln. 20-p. 565, ln. 4. Accordingly, Wilson knew the adjustments were necessary but Wilson withheld that important information from his own expert witness. Motion to Exclude Stoddard, App. pp. 2195-96, 2190-91.

knowledge to all parties.[13] And, while it is a correct statement that ZOi was formed separate from CCC initially (for the reasons discussed above), it is also a correct statement that soon after its formation ZOi became a wholly owned subsidiary of CCC. The context behind the creation of Zoi follows.

When Wilson started this litigation in April of 2012, he named only Gandis and Comeau-Shirley as defendants and sought dissolution of CCC, among other relief. App. p. 2259-70. Gandis and Comeau-Shirley agreed to dissolve CCC. Throughout the entire first year of litigation, it was believed that CCC would be dissolved. When Respondents refer to Comeau-Shirley's e-mail where she says they would not have to "haggle" over the new "stuff," she is referring to the new "stuff" after CCC's dissolution and the new "stuff" they were hoping to generate. App. pp. 1158. An e-mail from July 20, 2012 outlined this very issue. As noted above, the parties were moving toward dissolution. In the e-mail, Comeau-Shirley noted that,

> CCC will be aggressive in reducing its film stock between now and November 30th - with a goal to have all film sold by October 31st at the retail level and then spend November selling the residual in bulk sales to other brokers/scrap dealers. This would allow for collection of the receivables by December 31st.

App. pp. 1173. She further noted that:

> As there likely won't be new film purchases (there are some open POs still to be fulfilled) – this cash should allow CCC to pay all its vendors and . . . if we do this right, have cash left over – which would be divisible amongst the owners. The first portion of cash goes to John (and Me) to catch us up to the cash that Dave has already received (via loans) from CCC. Any excess would be divided appropriately - - the court &/or the attorneys will guide us as to how to properly settle. . . . And when that cash comes out of CCC in December – John and I will be placing ours into ZOi.

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[13] When counsel for the parties learned of the existence of ZOi, they advised the individuals that notwithstanding their desire to make preparations for a dissolution of CCC and perhaps branch into a different segment of film sales, App. p. 194, ln. 12-p. 195, ln. 8, the related nature of the business counseled in favor of making ZOi a part of CCC until, as planned, after CCC was dissolved.

Id. As it turned out, however, Wilson decided not to allow CCC to be dissolved at that time.[14]

C. Destruction of Evidence

Respondents attempt to portray the destruction of evidence in this case as harmless. Wilson argues that there were 40,000 e-mails loaded back onto the CCC computers after he erased the computers. Wilson Br., 7; *see also* Wilson Br., p. 27 (noting "he returned his CCC computers with all the information contained in the 40,000 e-mails, which were on the computer"). To support this claim, Wilson cites to a forensic exam of the computers that noted the presence of his e-mails. App. pp. 1773-94; App. p. 453, ln. 9-p. 454, ln. 2. What Wilson does not mention, however, is that the forensic exam described his e-mails as "corrupt or encrypted." App. p. 1774, #11. Indeed, Gandis testified that when he attempted to review the e-mails, it was "like reading hieroglyphics." App. p. 923, lns. 24-25; *see also* App. p. 923, ln. 1-p. 924, ln. 2 (fuller discussion of same).

Nelogic/FWS makes the claim that "Wilson returned his computer to CCC with all information intact." Neologic/FWS Br., p. 12 (citing App. p. 452, lns. 1-3). But that transcript cite is from the direct testimony of Wilson admitting that he erased the computers. App. p. 452, lns. 1-2. Indeed, in the lines immediately following that transcript cite, Wilson also admitted that he "reformatted the Blackberry and made sure there was nothing on it." App. p. 452, lns. 9-10. There is no evidence in the record that supports the claim that Wilson "returned his computer to CCC with all information intact." Rather, the evidence shows that Wilson ran a hard drive erasure program and an e-mail shredder program on the computers before returning them to

[14] *See* n. 2, *supra*.

CCC.[15] App. p. 1776, ## 33-39, 43; App. p. 923, lns. 16-20. Notably, because of the use of these programs, it is impossible to know what was destroyed. In addition, discovery showed that Wilson instructed others to delete e-mails about this litigation, during this litigation.[16] App. p. 546, ln. 21-p. 547, ln. 23; App. p. 1345.

As noted in CCC's opening brief, the destruction of evidence was substantial, and Respondents' efforts to minimize such destruction are not supported by the record. The circuit court's decision not to address or acknowledge this issue is confounding.

D. So-Called Afterthought Filing

Respondents argue that Petitioner's trade secret claim is nothing but an after-thought filing. They are wrong. The trade secret claim was brought in an effort to make CCC whole due to the harm caused by Wilson and Neologic/FWS's misappropriation of CCC's trade secrets. As noted above, the parties believed CCC would be dissolved in an orderly fashion in 2012. When it became clear that Wilson did not seek that type of resolution, the management authorized CCC to assert all claims available in an effort to make the company whole. As a result, an independent trade secret lawsuit was filed in 2013. After that lawsuit was served, Wilson amended his complaint to add CCC as a party. App. p. 2318-34. In the interests of judicial economy and the resources of the litigants, CCC agreed to dismiss the independent trade secret action, and it was agreed that CCC would answer the amended complaint with all counterclaims.

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[15] As noted in Petitioner's opening brief, one day after Wilson left the company, counsel for CCC sent a letter to Wilson's counsel. That letter specifically notified Wilson that he had taken company property and instructed him "not to destroy, copy . . . or use any of this property, including the computer data." Br. of Pet'r, p. 8 (citing App. p. 1749).

[16] While irrelevant to the legal errors committed by the lower courts in their application of the Act, Respondents seek to chip away at the character of all Petitioners throughout their briefing in an effort to distract from these legal errors. It is worth noting then, that during cross-examination it was revealed that Wilson had previously asked a business associate to lie for him. App. p. 323, ln. 10-23.

Respondents fault CCC for not serving the counterclaims until later in the litigation. But the later service date was entirely driven by Respondents' decision to pull the parties into a second round of settlement talks. Indeed, CCC was handicapped in its prosecution of the trade secret case by this fact because it did not start receiving discovery from Neologic/FWS until a few months before trial. The trade secret claims have always been asserted to make CCC whole.

VI. CONCLUSION

In judging CCC's trade secret claim, the lower courts improperly applied the Act—the plain language of which demonstrates that the confidential information at issue is a trade secret. Because the record also evidences that Respondents misappropriated those trade secrets, CCC is entitled to an award of damages. Accordingly, CCC respectfully requests that this Court reverse the court of appeals' decision affirming the circuit court's improper application of the Act, and remand this case for a new trial or a trial on damages.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge

App. Case No. 2018-001140

Unpublished Opinion No. 2018-UP-078 (S.C. Ct. App. filed February 7, 2018)

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC, ... Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC, ... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ... Third-Party Plaintiffs,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

vs.

DAVID WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the .....Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM CONVERTING, LLC, ... Petitioners.

PROOF OF SERVICE

I certify that I have served the **REPLY BRIEF OF PETITIONER CAROLINA CUSTOM CONVERTING, LLC**, by depositing a copy of same in the United States Mail, postage prepaid, on January 30, 2019, addressed to its attorneys of record:

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