THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J.D. Quattlebaum, Special Referee, Circuit Court Judge

Appellate Case No. 2012-213453

Common Pleas Case No. 2012-CP-23-0314

Jeff Yelton, ... Appellant,

v.

ScanSource, Inc., ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), SCACR, ScanSource provides additional information omitted by Yelton. With regard to the Temporary Restraining Order ("TRO") issued by the Honorable D. Garrison Hill on February 8, 2012, in addition to requiring the return of ScanSource's confidential, trade secret, and proprietary information and prohibiting Yelton from contacting ScanSource employees for the purposes of soliciting this information, the TRO also defined the terms "Confidential Information" and "Trade Secrets."[1] (R. __, TRO p.2.)

STATEMENT OF FACTS

The evidence presented to the Special Referee was detailed and technical. Yelton's brief does not address the numerous facts supporting the preliminary injunction that were considered by the Special Referee. Therefore, to provide this Court with a full view of the evidence before the Special Referee, this Statement of Facts describes the timing and extent of Yelton's actions that led to the request for injunctive relief.

I. ScanSource's Business.

ScanSource distributes specialty technology products manufactured by its vendors, such as Motorola and Honeywell, in the automatic identification, data capture, and point-of-sale ("POS") markets, among other business lines. (*See* R. ___, Answer ¶¶ 55, 56.) ScanSource's customers, known as Value Added Resellers, or VARs, resell those technology products and provide solutions and services to the end users of the products. (*Id.* ¶ 57.) Yelton was President of ScanSource North America's POS and Barcoding unit for 3 1/2 years, and in that position served on ScanSource's top leadership team. (*Id.* ¶¶ 55, 82.)

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[1] This brief refers to ScanSource's confidential and proprietary information and trade secrets as defined by ScanSource's Business Ethics and Code of Conduct (R. ___) and Yelton's Employment Agreement. (R. ___.) Unless otherwise specified, the use of "Confidential Information" throughout this brief means all of these terms.

II. Yelton's Termination and Actions Before Leaving ScanSource.

Yelton resigned from ScanSource effective December 31, 2011, after a meeting with Scott Benbenek on December 9, 2011, in which Mr. Benbenek informed Yelton of the Company's decision to terminate his employment. (R. ___-Benbenek ¶ 4.) While coordinating with Mr. Benbenek and ScanSource's in-house counsel about how he would announce his resignation, Yelton posted a status on his Facebook account that led people to believe he was leaving. (*Id.* ¶ 5.) After some disparaging comments by Yelton were reported to management, the Company elected to accelerate Yelton's departure, and his last full day of work was December 15, 2011. (*Id.* ¶ 10-11.)

After the December 9, 2011 meeting, Yelton began to gather ScanSource's Confidential Information. First, on December 13 and 14, 2011, after Yelton knew he was leaving but before he announced his resignation to anyone else, including his subordinates, Based on the accounts of several employees, Yelton requested and received Confidential Information from them, including Quarterly Business Reports ("QBRs"), by having the employees load the information onto a flash drive. (*See* R. ___-Benbenek ¶ 12; R.___-Spearman ¶¶ 4-5; R. ___-Cox ¶ 5.) Yelton also requested, but did not receive, other Confidential Information. (*See* R. ____Aiken ¶ 5.) Despite these multiple accounts confirming Yelton's actions, Yelton later submitted affidavit testimony that he "did not remove company documents or electronic files when I left." (R. ___-Yelton 1/26/12 Aff. ¶ 12.)

Next, at 12:06 PM on Yelton's last full day in the office (December 15, 2011), Yelton ***moved 863 files*** from his ScanSource laptop into his Dropbox account.[2] (*See* R. ___- Gaida.)

[2] Dropbox is an online external cloud storage service that allows a user to add documents to a Dropbox folder on his computer. Dropbox then will sync the folders so that the user can access the documents on all devices the user has connected to Dropbox. *See* Dropbox, How do I add or

By uploading these files to his Dropbox account, Yelton immediately could access the files from any other device he had synced to Dropbox. (*Id.* at Part II.A, ¶¶ 2-4.) Yelton had at least three devices connected to Dropbox, including his home laptop, which was last connected to Dropbox on February 13, 2012.[3] (*Id.* at Part II.A, ¶ 8(a).) As shown on the Dropbox screenshots, ScanSource's Confidential Information can be found among the 863 files that were uploaded on December 15, 2011. (*Id.* at Ex. C.)

As shown by the Dropbox activity logs, Yelton ***accessed*** and ***edited*** at least three Confidential ScanSource files in his Dropbox account ***after leaving ScanSource***: General Two Tier Distribution Pres.ppt, edited on January 3, 2012; Bottom 1000 Catalog Reciepients.xls, edited on January 4, 2012; and BU 01 Forecasting Worksheet 04-2011 (2).xls, edited on January 4, 2012. (*Id.* at Part II.B, ¶ 12.) Accessing and editing these ScanSource documents in his Dropbox account after his last day of work directly contradicts Yelton's sworn statement that he "did not remove company documents or electronic files when I left." (R. __, Yelton Aff. ¶ 12.) Yelton does not deny that the Bottom 1000 and BU 01 Forecasting Worksheets are ScanSource's Confidential Information. (R. __, Yelton 8/27/12 Aff. ¶ 7(b) & (c).)[4]

The Dropbox activity logs also show that Yelton ***deleted*** or ***moved*** ScanSource files from Dropbox ***after leaving ScanSource***, contrary to his averments. "Deleted" files on Dropbox actually could be deleted or they simply could have been moved to another electronic location.

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upload files to my Dropbox?, *available at* https://www.dropbox.com/help/90/en.

[3] Yelton created a new Dropbox account on January 12, 2012 (R. __ Yelton 8/30/12 ¶ 17 & Ex. C; 8/31/12 Tr. 47:21-50:1), the same day he formed Varsguide, and it has not yet been made available for analysis.

[4] Yelton does deny that the General Two Tier Distribution Pres.ppt file contains ScanSource confidential information. (Yelton 8/27/12 Aff. ¶ 7(a).) He says it was a "generic presentation" and was given to many groups. (*Id.*) He does not explain how this generic presentation was tailored to particular groups and how this specific file could be different than the tailored presentations. Although portions of the file may have been disclosed to third parties, the file as a template and the file with tailored information are confidential.

(*See* R. ___-Gaida Aff. Part II.B, ¶ 12.) Yelton "deleted"—or moved; it is impossible to determine which—numerous ScanSource Confidential files after his departure, including but not limited to those identified in the electronic forensics investigation. (R. ___-Gaida Aff. at Ex. C.) Yelton's deleting these files demonstrates that he had access to them after his departure. Yelton also fails to deny that these files were not ScanSource Confidential. (*Cf.* R. ___-Yelton 8//27/12 Aff. ¶ 7(a).)[5]

Also on December 15, 2011, while uploading the ScanSource files to Dropbox, Yelton packed his office and emptied it entirely. (R. ___-Pharr Aff. ¶ 5.) After the TRO was entered, Yelton made these hard copy materials available for ScanSource's inspection. (R. ___-2/14/12 Email.) The materials included Confidential Information, which ScanSource collected, such as a VDC Research memorandum regarding NFC Payments and an Erwin-Penland report named ScanSource Online Community Strategy, both labeled "Confidential." (R. ___-Contempt Mot.) Removing these ScanSource documents from his office contradicts Yelton's sworn statement: "I did not remove from company premises hard copies of ScanSource reports and records or an external hard drive as claimed by ScanSource." (R. ___, Yelton Aff. at ¶ 12.) The acts of removing information from ScanSource also contradict Yelton's sworn statement: "Defendant's suggestion that I took any documents is false." (R. ___ ¶ 5.)

The next day, on December 16, 2011 at 7:41 AM, in his last hours in the office, Yelton installed and ran a program named "KillDisk" on his ScanSource laptop, disabling the laptop and erasing portions of the laptop's data. (R. ___- Gaida Aff. at Part III.) Using KillDisk, Yelton erased the "System Reserve partition," which is necessary for Windows 7 to boot up a computer.

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[5] Further, Yelton's Dropbox account was linked to his personal jyelton215@aol.com account (*see* R. ___-Exhibit C to Gaida Aff.), which is not what he alleged in his affidavit opposing the TRO, in which he said the Dropbox account was tied to his ScanSource email account. (R. ___-Yelton 1/26/12 ¶ 23.)

(*Id.* at Part III, ¶ 7.) Yelton deleted critical system data and rendered the computer incapable of ever being used again. (*Id.*)

Internet history records reveal that Yelton chose KillDisk after his December 15, 2011 internet research into other programs named "Darik's Boot and Nuke" and "White Canyon," both of which destroy data and erase hard drives. (R. ___, Gaida Aff. at Part III, ¶ 4.) KillDisk "allows you to destroy all data on hard disks, USB drives and floppy disks completely, excluding any possibility of future recovery of deleted files and folders." (R.__- *Id.* at Part III, ¶ 5 (quoting www.killdisk.com).) Yelton continues to deny that KillDisk destroyed company data simply because the data also was maintained on ScanSource's servers. (App. Br. at 5; Yelton Aff. at ¶ 10.) Yelton's testimony belies that he used KillDisk to destroy that laptop.

III. ScanSource Demands Yelton Return Its Confidential Information.

Once they learned of his upcoming departure, Yelton's subordinates recognized that his requests for information were out of the ordinary and needed to be reported to management. (R._-Aiken ¶¶ 6-7; R._-Cox ¶¶ 5-7; R._-Spearman ¶¶ 7-9.) On December 30, 2011, several Merchandising Directors met with Scott Benbenek and explained that Yelton had requested the confidential and proprietary QBRs and other data from them after Yelton knew he was leaving but before any of them were aware. (*See* R.__-Aiken ¶ 5; R.__-Benbenek ¶ 12; R.__-Cox ¶ 5; R.__-Spearman ¶¶ 4-6.) In addition to requesting the QBRs, Yelton also had requested from Director of Merchandising Jeanne Aiken a confidential ScanSource customer list, which he referred to as the "Dell list." (R._-Aiken ¶ 5.) He lost interest in the list when she explained that it did not have customer names and contact information. (*Id.*) On January 4, 2012, Mr. Benbenek learned that Yelton's ScanSource laptop would not boot up and that Yelton had emptied his office. (R.__-Benbenek ¶ 13; *see also* R.___-Pharr ¶ 5.)

Based on this information, Scott Benbenek contacted Yelton on January 4, 2012, to confront Yelton about his actions regarding the QBRs and other Confidential Information, the empty office, and the nonfunctioning laptop. (R.__-Benbenek ¶ 13.)[6] Mr. Benbenek alerted Yelton to the possible violation of Yelton's Employment Agreement and Release and inquired about the flash drive's whereabouts. (*Id.*) At the same time or near the time of Yelton and Mr. Benbenek's conversation, Yelton requested from Ms. Aiken "the HP customer list." (R.__-Aiken ¶ 8.) He asked her to send it from her home or on a memory stick, thus outside of ScanSource's network and detection. (*Id.*) Ms. Aiken refused to do so and reminded Yelton that "that type of stuff is ScanSource confidential now." (*Id.*) Later that same day, Yelton emailed Mr. Benbenek, as Yelton characterizes the communication, to "inform ScanSource of [his] plans to start a technology manufacturing outsourcer for education, marketing, and lead generation called VarsGuide." (R.__-Yelton 1/26/12 ¶ 16.) Yelton described this business, attempting to allay Mr. Benbenek's anxieties. (*Id.* at Exhibit.) Mr. Benbenek turned over this information to ScanSource's CEO for him and the general counsel to handle. (R.___-Benbenek Dep. 233:1-9.)

On January 16, 2012, ScanSource's general counsel emailed a letter to Yelton describing what ScanSource had learned of his activities as of that date and asking Yelton to remedy the Company's concerns or ScanSource would be forced to take legal action. (R.__.) On January 18, 2012, Yelton filed his Complaint (R.__), and on January 24, 2012, ScanSource answered, asserting counterclaims (R.___), and moved for a TRO and Preliminary Injunction. (R.___.)

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[6] Yelton disputed Mr. Benbenek's affidavit, but the disputes hinge on inconsequential details. Yelton disputes whether he told Mr. Benbenek that he had the flash drive itself before he knew he was leaving, or whether he said the QBR files were on the flash drive. (R.__-Yelton 1/26/12 Aff. ¶ 18(c).) When he initially possessed the device itself is of no moment—the interesting aspect of Yelton's statement is that he "reviewed [the QBRs] after he knew he was leaving." (*Id.*) His other "disputes" regarding Mr. Benbenek's affidavit do not actually contradict anything in Mr. Benbenek's affidavit. (*See* R.__-¶ 18(a) & (b).)

IV. The Temporary Restraining Order Requires Yelton to Return ScanSource's Confidential Information

At the January 27, 2012 hearing on the TRO Motion, Judge Hill orally granted the TRO with a written order to follow. (Tr. 34:10-35:25.) Following negotiations between the parties regarding the content of the order, Judge Hill issued his written order on February 8, 2012.[7] (R. ___, TRO.) The TRO specifically required the following:

> 1. Plaintiff is prohibited from directly or indirectly contacting ScanSource's employees for the purpose of obtaining Confidential Information.
>
> 2. Plaintiff must return to ScanSource any Confidential Information in his possession, custody, or control within the time period set by the Special Referee. Any disputes concerning the identity of Confidential Information or the form of its return shall be decided by the Special Referee.
>
> 3. Confidential Information or Trade Secrets ("Confidential Information") include but are not limited to information described in Plaintiff's Employment Agreement (attached as Exhibit A to ScanSource's Answer and Counterclaims), ScanSource's Business Ethics and Code of Conduct (attached as Exhibit D to ScanSource's Answer and Counterclaims), the S.C. Trade Secrets Act, and South Carolina law.

(R.___-TRO at 2.) The TRO also required ScanSource to post a $5,000 bond and to keep personally identifiable or financial information about third parties confidential. (*Id.*) Yelton never moved for reconsideration and did not appeal the TRO, which remained in effect until the Special Referee ruled on the Preliminary Injunction. (R.__-2/24/12 Emails among counsel and Quattlebaum; 8/31/12 Tr. 3:17-9:17.)

Yelton began the negotiations to return ScanSource's information days after the TRO hearing, when he described 14 devices that he used while employed at ScanSource and that he possessed, including six computers or hard drives, seven flash drives, and an iPad. (*See* R. ___-1/28/12 Email.) Yelton identified this list of devices 12 days after he received the January 16,

[7] By separate order, Judge Hill appointed Derrick Quattlebaum as Special Referee to supervise the return of ScanSource's information. (R.__-Reference Order.)

2012 letter from ScanSource demanding the return of ScanSource's information. Of these 14 devices, Yelton turned over two flash drives to ScanSource's counsel at the TRO hearing, and ScanSource's counsel sent those flash drives to FTI, an electronic forensic investigation firm retained by ScanSource. (R. __ -Gaida ¶ 10.)

To effect Yelton's return of ScanSource's Confidential Information as required by the TRO, the parties agreed to negotiate a protocol for the return of the information. On February 14, 2012, the parties met with the Special Referee to discuss the Preliminary Injunction and how to return ScanSource's Confidential Information, including the information on the remaining 12 devices and the boxes of documents that Yelton had removed from his office on December 15 and 16, 2011. Yelton produced 11 devices that were turned over to the Special Referee's custody in a sealed box with a label describing the contents of the box to include five computers or hard drives, five flash drives, and an iPad. (R. ___ -Protocol.) Yelton agreed to produce his home desktop computer for examination at a later time. (*Id.* at 1-2.) Thus, by February 14, 2012, of the devices Yelton identified just after the TRO hearing, when he was ordered to return all ScanSource Confidential Information, Yelton had produced 13 of the 14 electronic devices identified just after the TRO hearing and had promised to produce the fourteenth.

V. Yelton Turns Over Some Devices, But Not All.

After seven weeks of negotiations and several presentations to the Special Referee, the parties' Consent Protocol was entered on April 9, 2012. (R.__-Protocol.) Pursuant to the Protocol, the 11 devices were delivered to John Akerman of Rosen Litigation Technology Consulting, Inc., on April 20, 2012. (R ___-Contempt Mot. Ex.) Akerman created forensically sound exact images of the contents of each device (except one that could not be completed), and identified the serial numbers on the 11 devices. (R. ___ Akerman ¶¶ 2-3, ¶ 4.) He also imaged

Yelton's home desktop computer. (*Id.* at ¶¶ 6-7.) Separately from Akerman's work, FTI also identified the serial numbers of the two USB drives that Yelton had turned over at the TRO hearing. (R. ___-Gaida Part II.A, ¶ 10.)

In a "USB Analysis," FTI determined which USB devices had been connected to the ScanSource Laptop. (R. ___-Gaida Part II.A, ¶ 8.) The USB Analysis shows that five external storage devices were connected to Yelton's ScanSource Laptop in the period from December 9, 2011, the day Yelton met with Scott Benbenek about his resignation, to December 16, 2011, the last day Yelton physically was in his ScanSource office and used the ScanSource Laptop. (*Id.*) The five devices that FTI identified as having been connected during that timeframe were *not* among the 14 devices that Yelton produced. (R. __-Contempt Mot. at 14-15.)

Additional forensic investigation showed that three of these five missing devices were connected to Yelton's personal HP laptop *after* his departure from the Company. (R. ___Gaida ¶ 10.) In fact, these three flash storage devices were attached to that computer as late as the evening of January 17, 2012 (*id.*), the day *after* he received the Company's letter demanding the return of all ScanSource proprietary information and the day before he filed his Complaint. One of these three missing devices that were connected to Yelton's home laptop also was revealed to be the same device that was connected to both Chris Spearman's and Robbie Cox's computers on December 12, 2011, when Yelton asked them to put the particular QBRs onto a flash drive ("QBR Flash Drive"). (R.__-8/28/12 Gaida Supp. Aff.)

Further, a "Link File Analysis" conducted by FTI shows that Yelton accessed ScanSource's Confidential Information from these missing devices during the critical timeframe

of December 9, 2011 to December 16, 2011.[8] (R. ___ Part I.B & Ex. G.) As of the date of filing this brief, Yelton still has not produced these devices, including the QBR Flash Drive. (*See* R.__ ScanSource's Reply to Opp'n Prelim. Injunction at 8.)

VI. Yelton's Business Model Is Set in Motion, then Is Stopped by the TRO.

The evidence before the Special Referee showed that Yelton's actions contradict his January 4 email to ScanSource and his submissions to the Special Referee and Circuit Court, in which Yelton claims to have no need for ScanSource's Confidential Information and that he has no intention of competing with the Company.[9] The Link File Analysis list included two files that Yelton later explained were his own proposal that he shared with companies, including at least two ScanSource vendors (Motorola and Honeywell) immediately following his notice of termination on December 9, 2012. (*See* R.__-Yelton 8/30/12 Aff. ¶ 18; *see also* 8/31/12 Tr.

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[8] Based on the results of the Link File Analysis, the confidential and proprietary files likely on those devices include the following:

1. Motorola_Public_Relations_Resources.zip
2. 2011-11 POS Barcode 6 Mos Comparative Income Statement.xls
3. POS Barcode – Sales by Product Line – Q1 FY12.xls
4. VDC SCSC 2012_Outlook_120611.pdf
5. SCSC_WAREHOUSE_TRENDS_110111.pdf
6. Copy of Worldwide Solution Areas 2011 ScanSource (4).xlsx
7. ScanSource_111021.pptx
8. FuturePathPOS11 (2).ppt
9. SCORE NA POSBC Sept11.pdf
10. SCORE Definitions 1-27-10.doc
11. InvPresent MarketSize nov11.xlsx
12. Registrants_11 30 11_FINAL.xls
13. ALL POS analysis Q3 11.xls
14. OpenTechRhoElementsOverviewNov2011.pptx

(R.__-Contempt Mot. Gaida, Ex. G.) These documents contain confidential and proprietary information of ScanSource, as shown at least by the titles, but definitely by the content. Additionally, the zipped collection of files, Motorola_Public_Relations_Resources.zip, relate to one of ScanSource's largest vendors, Motorola. Shortly after Yelton formed his own company on January 12, 2012, he became a reseller of Motorola's two-way radios. (R. ___-Yelton Aff.)

[9] *See* R.___ Yelton Email Benbenek, attached as an exhibit to Yelton's 1/26/12 Aff.; R.__-Yelton 8/27/12 Aff. ¶ 2 ("I believe that deleting the data was the proper thing to do and I had no need for it").

64:11-20.).) The files were titled "New Distribution Model.doc" and "New Distribution Model for Motorola.doc" ("New Distribution Model"). (*See* R. Contempt Mot.; *see also* R.__-P's Add'l Docs at 17.)

In this letter, Yelton describes a business strategy that is designed to compete directly with the marketing services provided by ScanSource, a distributor, to its vendors. (R.__-New Dis. Model, third list.) Also in the letter, he refers to a target market of "low value customers." (*Id.* at 1, item 1 in second list.) Based on the comparison between low value customers and the contents of the file named "Bottom 1000 Catalog Reciepients.xls," Yelton's target market correlates to the same customers identified in the confidential ScanSource file. This file is one of the files that Yelton accessed in his Dropbox account on January 4, 2012. (R.__-Contempt Mot.) Yelton also does not deny that this is ScanSource's Confidential Information. (*See* R.__-Yelton 8/27/12 Aff. 7(b) (describing Bottom 1000 file).) Addressing Motorola and Honeywell with the proposal, Yelton wrote, "I'm sure you can't believe I'm taking this position," and he "can assure you I wrote this with a lot of trepidation." (R.__, P.'s Add'l Docs at 16-17.)

Additionally, ScanSource received information in response to a subpoena that shows Yelton's intentions before the TRO was issued. Penn Williams worked as a direct subordinate of Yelton and left her employment on December 15, 2011. (R.___ -Resp. Supp. Prelim. Inj.) On January 3, 2012, Plaintiff emailed Penn Williams with his "basic business model for Varsguide." (R. ___ Resp. Supp. Prelim. Inj.) This email is similar to the letter he was sending to Motorola and Honeywell, except by the time he sends it to Ms. Williams, it is his business model. On January 12, 2012, Yelton formed Varsguide, Inc., a South Carolina corporation. (R. ___-Resp. Supp. Prelim. Inj.) Based on the business model for Varsguide and the files taken or accessed after he left ScanSource, Plaintiff can rely on the resources he took from ScanSource to fulfill his

business plan for Varsguide, as he described in the January 3, 2012 email to Ms. Williams. (*See* R. __-Benbenek Dep. 233:15-23.) As noted above, ScanSource demanded Yelton return its information on January 16, 2012. (R.__-Ltr.)

ARGUMENTS

A preliminary injunction is available under Rule 65, SCRCP, and the S.C. Trade Secrets Act, S.C. Code Ann. § 39-8-30(C). "To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005) (citing *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002)). To obtain injunctive relief, ScanSource must show "(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 Co. v. Dunes W. Residential Golf Props.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

On appeal, a preliminary injunction should be upheld unless the trial court abused its discretion. *AJG Holdings, LLC*, 382 S.C. 43, 49, 674 S.E.2d 505, 507 (Ct. App. 2009). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek*, 367 S.C. at 454, 626 S.E.2d at 36. Thus, "[w]hether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." *Compton v. S.C. Dep't of Corrections*, 39 S.C. 361, 363, 709 S.E.2d 639, 640 (2011).

I. The Special Referee correctly decided that Yelton's actions threatened irreparable harm to ScanSource, because the extensive evidence presented to the Special Referee showed that Yelton wrongfully took and retained possession of ScanSource's Confidential Information and likely used or planned to use it.

A. Injunctive relief is based on the *threat* of irreparable harm.

The very purpose of injunctive relief is to prevent the threatened harm: "The only purpose of an injunction is to preserve the status quo *to avoid possible* irreparable injury to a party pending litigation." *Peek*, 367 S.C. at 455, 626 S.E.2d at 37 (emphasis added). The evidence presented to the Special Referee demonstrates that Yelton undertook to gather ScanSource's Confidential Information while at the same time making proposals to ScanSource's vendors that would rely on that information. The Special Referee correctly concluded 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. ___ Preliminary Injunction Order.)

Thus, the party to be enjoined need not have *actually* harmed the movant; immediate and irreparable harm need only be *threatened*. *See HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 639, 699 S.E.2d 699, 707 (Ct. App. 2010) ("An injunction may be granted where some irreparable injury is *threatened* for which the parties have no adequate remedy at law." (emphasis added)). In the context of an injunction against competition, the Supreme Court has explained that an employer "doesn't have to wait for the inevitable. Irreparable injury is impending and threatening." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 64, 119, S.E.2d 533, 538 (1961).

B. The overwhelming evidence presented to the Special Referee shows that Yelton posed a real threat of possessing, using, or disclosing ScanSource's Confidential Information.

As detailed in the Statement of the Facts, *supra*, Yelton has taken numerous actions to acquire ScanSource's information and to cover his tracks. Without the TRO, Yelton would have continued his course of developing a business relying on ScanSource's information. In sum,

1) Yelton uploaded 863 files from his ScanSource laptop to his Dropbox account on his last full day in the office. (R. ___-Contempt Mot.).

2) Yelton then used Killdisk to destroy data and disable the Company's laptop. (*Id.* at p.7.)

3) Yelton *used the same QBR Flash Drive* onto which he had Robbie Cox and Chris Spearman put QBRs on December 12, 2011, in his home computer on January 17, 2012, the day after ScanSource demanded he return its information. (*Id.* at pp. 13-17; 7/26/12 Gaida Aff.; 8/28/12 Gaida Aff.)

4) Yelton *has not turned over three USB flash devices* (including the QBR Flash Drive) that were connected to both his ScanSource laptop the last week he was in the office and his home computer on January 17, 2012, and thus were in his possession the day after ScanSource demanded he return its information. (7/26/12 Gaida Aff. ¶¶ 10-11.) He also has not turned over two additional USB flash devices that were connected to his ScanSource laptop the last week he was in the office.

5) Yelton requested confidential customer lists from Jeanne Aiken, including the HP List and the Dell List. (R.__-Aiken Aff.)

6) Before Yelton left ScanSource but after he knew he was leaving, he submitted the New Distribution Model proposal to ScanSource's largest vendors to develop a business that would have needed to rely on ScanSource's Confidential Information, had the TRO not frustrated his efforts. (R.__-Yelton Aff.)

Yelton admitted in his affidavits that he requested the QBRs on December 12, 2011, so that he could show vendors he was knowledgeable about their business, preparing to target vendors like Honeywell and Motorola: "I wanted to review the reports because I planned on possibly seeking work with these companies. I wanted to make sure it was clear that I was knowledgeable about the state of their business." (R. ___ Yelton Aff. ¶ 5.) Possibly realizing

the logical connection between saying that he wanted the information to learn about these vendors' business and his subsequent proposals to these vendors, Yelton has begun to retreat from his description of why he wanted the QBRs. In his brief and without citing anything in the record, Yelton professes that he "reviewed such documents before he would call executives at vendors in case they had any questions about the status of their business." (App. Br. at 5.) Yelton's counsel also admitted that Yelton thought he could use ScanSource's vendor information when he was talking to that particular vendor. (1/27/12 Tr. 13:1-3 ("But if Mr. Yelton is talking to Motorola about Motorola, there's no disclosure or misuse of a trade secret in that transaction.").) However, if former employees were entitled to make use of a company's trade secrets for *any* purpose after leaving the company who created, owned, and protected the information, the S.C. Trade Secrets Act and any confidentiality agreement would be rendered ineffective.

Further, although Yelton has said that "Varsguide has not been engaged by anyone in the industry to date and I have done no work for any vendors of ScanSource, VARS, or point-of-sale end users," this statement does not mean that he has not *tried* to be engaged or to do work for ScanSource's vendors, nor does it speak to his plans once this litigation has concluded. (*See* R.__- Yelton 8/30/12 Aff. ¶ 14.) He continues to take this position, contending in his brief that he "has not worked for any competitor, or even in the POS/barcoding industry." (App. Br. at 7.) He contends that "ScanSource has offered no testimony to counter" Yelton's statement that "he has not used or disclosed any trade secrets or confidential information belonging to ScanSource." (*Id.*) He ignores the evidence.

Penn Williams' subpoena responses revealed that in January, Yelton proposed a marketing program to Honeywell for a bioptic scanner, a step towards implementing his

Varsguide business plan that he shopped to Motorola and Honeywell just after he was terminated. (R. ___-9/17/12 Letter.) Yelton's Honeywell proposal in January is directly connected to Yelton's efforts to take information from ScanSource. He admits that he requested the "HP List" from Jeanne Aiken, although she denied his request. (R. ___ Yelton Aff. ¶ 17(b).) He admits that he wanted the HP List because he "was trying to get a better understanding of what possible customers could be served by a *Honeywell product* for which HP has no competitive product." (*Id.* (emphasis added).) Whether or not he wanted the HP List to compete with ScanSource, *he admits that he planned to use it.* The evidence showing that he actually did submit a proposal to Honeywell shortly after this request leaves little doubt that he would have used ScanSource's information for his intended Varsguide business plan.

Although the evidence demonstrates that Yelton more likely than not was using ScanSource's information, Yelton did not actually have to use or disclose the information to warrant an injunction. The *threat* of irreparable harm that would result from the use or disclosure of ScanSource's Confidential Information is sufficient. *See, e.g.*, *Peek*, 367 S.C. at 455, 626 S.E.2d at 37. Yelton also asserts that the "thorough examination of the computer drives and devices Yelton possessed during his employment with ScanSource that were still in his possession" showed "no evidence of any use or disclosure." (App. Br. at 7.) He bases his conclusion on his own view of an initial keyword search for files and not on the complete results of an ongoing investigation; indeed, his conclusory statement ignores all of the other evidence presented to the Special Referee. Further, because a file was not on personal devices that have been turned over does not mean that it is not on another device or in another cloud storage account.[10] Three missing flash drives could contain the information. As doubtful as it is,

[10] After the preliminary injunction was issued, Yelton identified additional devices that had not

Yelton's contention that he has not used or disclosed ScanSource's protected information thus does not lessen the heavy weight of the evidence that supports injunctive relief.

The Special Referee considered this evidence in the briefing and at the hearing on ScanSource's Motion for Contempt, which was incorporated into the evidence before him in deciding to grant the preliminary injunction. Based on this evidence, he concluded that Yelton posed a threat of possessing, using, or disclosing ScanSource's Confidential Information: "Although Plaintiff has assured the Special Referee that all such information has been returned pursuant to the Court's February 8, 2012 TRO, Defendant has presented evidence which suggests that this claim is at the very least in doubt and that the requested injunctive relief is necessary to protect Defendant and to preserve the status quo pending a trial on the merits." (R.__-Preliminary Injunction Order at 2.)

Although Yelton asserts otherwise, the Special Referee's conclusion was not based on any "faulty premises," but was developed based on the exhaustive evidence showing that Yelton's possession and likely use threatened irreparable harm to ScanSource. (*See* App. Br. at 16.) The Special Referee's initial conclusion disputed by Yelton, that Yelton "has acknowledged that [he] 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," is supported by Yelton's affidavits:

> 4. *I agree that QBR (quarterly business review) documents contain information that ScanSource would not want to provide to a competitor* and that, if given to a competitor, it could help them to the disadvantage of ScanSource.
> 5. I do not have any QBR's in my possession of which I am aware and have not had any since I left the Company. I did not take any QBR's when I left. Defendant's suggestion that I took any documents is false. *Prior to the*

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been turned over. These have not been examined yet and thus were not presented to the Special Referee. None of them are flash storage devices, so they cannot be the five missing devices.

termination of my employment, I did request to review the most recent QBR's for Motorola, Honeywell, and Intermec.

(R. ___Yelton's 1/26/12 Aff. (emphasis added).)

1. I am not aware of any confidential information belonging to ScanSource that I possessed as of January 27, 2012 that was not turned over to my attorney by early the next morning.
2. I have never denied that, prior to the Court's order, I would delete ScanSource data off my computer as I came across it. *I believed that deleting the data was the proper thing to do* and I had no need for it.

. . .

8. I do not recall anything about *two* USB devices that could have been plugged into my laptop after I left ScanSource that were not produced.

(R. ___Yelton's 8/27/12 Aff. (emphasis added).)

Yelton claimed to not have any QBRs in his possession and that he did not take any when he left, but the forensic investigation showed that the QBR Flash Drive was plugged into Yelton's home computer the day before he filed the Complaint, casting serious doubt on Yelton's affidavit testimony. Indeed, ScanSource had such doubt that it petitioned for a finding of contempt based on Yelton's apparent violation of the TRO in not turning over the devices and in submitting false testimony. (R.__ - Contempt Mot.) The petition for contempt was denied, but the order did not say that ScanSource failed to prove that Yelton had not turned over the devices. (*Contra* App. Br. at 16.) The Special Referee found that ScanSource "ha[d] not met its burden of proving by clear and convincing evidence that Plaintiff is in violation of the Court's February 8, 2012 [TRO]." (R.__- Contempt Order at 1.) Thus, the Special Referee's conclusion regarding whether a finding of contempt was warranted depended on whether Yelton acted intentionally and whether clear and convincing evidence was presented of his actions and intent. (R.__-Contempt Mot.) In comparison, the evidence showing that Yelton failed to return at least three flash drives that were plugged into his work computer and his home computer speaks for itself. Yelton's August 27, 2012 affidavit refers to only *two* USB devices that he does not recall,

leaving open the obvious question of what he recalls about the third USB device. Regardless of whether he recalls these devices, they certainly were connected to his home computer the day after ScanSource demanded that he return ScanSource's Confidential Information.

Yelton avoided a finding of contempt, but the Special Referee found the evidence sufficient for a prima facie showing to support a preliminary injunction: "Although Plaintiff has assured the Special Referee that all such information has been returned pursuant to the Court's February 8, 2012 TRO, Defendant has presented evidence which suggests that this claim is at the very least in doubt and that the requested injunctive relief is necessary to protect Defendant and to preserve the status quo pending a trial upon the merits." (R.__-Prelim. Injunction Order at 2.) This alleged "second faulty premise" is supported by the evidence showing that Yelton has failed to turn over three flash drives that were connected to his home computer the day after ScanSource demanded that he return its information. (*See supra* Statement of Facts, Part V.) Thus, in contrast to the evidence, Yelton's denials cannot be credited.

C. When Mr. Benbenek's deposition statements are taken in context, Yelton's characterization of them loses force and they support injunctive relief.

Yelton selects excerpts of Mr. Benbenek's deposition that do not represent the complete testimony of his knowledge. (App. Br. at 9-11.) However, the Special Referee considered the fuller and more accurate picture of Mr. Benbenek's deposition. As an initial matter, Yelton asserts that Mr. Benbenek should be the yardstick by which ScanSource's harm is measured. Yelton sought to depose Mr. Benbenek only as a fact witness. Mr. Benbenek ultimately testified that once he reported his concerns about Yelton's apparent theft of Confidential Information on January 4, he actually had little to no involvement in the Company's resulting investigation or the prosecution of this case. (*See* R.__-Benbenek Dep. 179:13-17) (Have you dealt with any Yelton issues since January 4th, other than your affidavit? "None come to mind, No.")) Thus, it

stands to reason that Mr. Benbenek would have limited knowledge of Yelton's actions, especially the evidence as revealed during discovery in this case.

Despite Yelton's characterization of Mr. Benbenek's testimony, Mr. Benbenek actually was critical and suspicious of what Yelton was alleged to have done and acknowledged the threat he posed:

- Did Jeff Yelton say anything untrue on January 4th? "I think so, Yes. I mean, I think that he knows where that thumb drive—I have no proof, but if you just ask me what I was feeling at the time, I think he had or has knowledge where that thumb drive is. I'm not sure why anybody would get a thumb drive for information and keep it for two days and not take it with them, or why they would even want it knowing you're not going to be at the company anymore." (R. __-Benbenek Dep. at 158:22-159:8.)

- Was Jeff Yelton untrue when he said he did not know where the QBR thumb drive was? "If I had to bet, Yes. Like I say, I don't have a videotape of that, but you're asking me, and yes, I think he knows where that thumb drive is or was or whatever." (*Id.* at 159:14-17.)

- What evidence shows that Jeff Yelton was not truthful on January 4th? "No, there is nothing that I know that he said that day that is untrue. Underline know." (*Id.* at 160:5-10.)

- Are QBRs Confidential? "Definitely, yes." (*Id.* at 225:11-13.)

- Was Plaintiff allowed to take QBRs when he left? "No." *Id.* at 225:14-17.

- There is no legitimate reason for a former employee to have QBRs? "Correct." *Id.* at 226:6-11.

- Was it unethical for Plaintiff to download KillDisk on his ScanSource laptop to wipe his hard drive and disable the computer? "Yes." *Id.* at 228:6-15.

- "Q. Would it be appropriate in your mind for Mr. Yelton to start a business such as the business described in Plaintiff's Exhibit 3, Varsguide, using ScanSource proprietary information?" "No." *Id.* at 233:10-14.

- "Q. The business that's described as VarsGuide, if you had the vendor QBR's and customer lists that were ScanSource proprietary information, you could use that information to solicit business, correct?" "Mr. Murphy: Object to the form." "The Deponent: Correct." *Id.* at 233:15-23.

- "Q. And you don't know where that thumb drive is today, do you?" "A. No." "Q. Does that create a risk to ScanSource that that thumb drive that Mr. Yelton obtained

is somewhere unbeknownst to you?" "A. Yes, it can be a risk, yes, if it were to get in the wrong hands." *Id.* at 254:23-255:5.

Thus, contrary to Yelton's representation of Mr. Benbenek's testimony, Mr. Benbenek *actually* testified that he thinks Yelton still has the QBR Flash Drive, that Yelton lied about that fact and the whereabouts of this information, that the information is confidential and sensitive, and that Yelton's misconduct poses the very real threat of irreparable harm to ScanSource.[11] Yelton's characterization of Mr. Benbenek's testimony is contradicted by the full context of the excerpts, which ultimately support the need for injunctive relief to prevent irreparable harm from the use or disclosure of ScanSource's information.

D. In focusing on the discovery responses, Yelton ignores the evidence considered by the Special Referee, especially in light of Yelton's role in hampering ScanSource's investigation.

As shown by the transcript of the motion to compel hearing addressed in Yelton's brief (App. Br. 13), Yelton was dissatisfied with ScanSource referring to the existing and detailed Chris Spearman and Robbie Cox affidavits as evidence that Yelton misappropriated trade secrets. (R._-6/19/12 Tr. 17:4-20:24.) Instead of referring to the affidavits, Yelton wanted ScanSource to restate the facts explained in the affidavits in its written responses. (*Id.*) Yelton would fault ScanSource for not showing proof of actual use or actual irreparable harm (which, again, confuses the issue before the Special Referee and this Court) , yet Yelton stood in the way of that proof. Before and since the action was filed, ScanSource has moved steadily to protect its interests and remedy Yelton's wrongdoing. (R. ___-Reply to Opp'n Prelim. Inj.-Timeline.) In spite of Yelton's efforts to hamper ScanSource's case, ScanSource has provided more than

[11] Further, the excerpts relied upon by Yelton support the distinction Mr. Benbenek articulated between having absolute certainty and having some awareness and personal belief as to Yelton's actions and the consequences of those actions. Because someone is literally "not aware" of a fact does not mean that the fact is not true and does not speak to their personal belief. And because someone does not *know* something with absolute certainty does not mean that he is comfortable with Yelton's actions or that he *thinks* Yelton has engaged in wrongdoing.

sufficient evidence to demonstrate the threat of irreparable harm, and just as Judge Hill originally held, there is no legitimate question that *any* use of ScanSource's Confidential Information poses irreparable harm. (R. ___ TRO.)

E. Without injunctive relief, Yelton's actions with ScanSource's Confidential Information threaten irreparable harm to ScanSource.

"Courts consistently have recognized that . . . the misappropriation of proprietary information constitutes irreparable harm to an employer." *IPS Packaging Supplies, Inc. v. Martin*, C.A. No. 6:12-713-HMH, 2010 U.S. Dist. LEXIS 43580, at *17 (D.S.C. Mar. 29, 2012) (granting preliminary injunction barring defendant from using or disclosing confidential information). Further, "[d]isclosure of non-trade secret confidential information is similarly recognized as a serious harm" that is "sufficient to meet the irreparable injury requirement for a preliminary injunction." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006). In addition, the loss of business goodwill is considered to be irreparable harm warranting injunctive relief. *See Peek*, 367 S.C. at 455 n.2, 626 S.E.2d at 37 n.2; *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). Even if no files were in Yelton's possession, a finding of irreparable harm is appropriate in circumstances where the non-moving party "cannot eradicate the[] trade secrets and . . . confidential information from his mind." *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 632 (E.D.N.Y 1996).

The status of ScanSource's Confidential Information with Yelton threatens irreparable harm to ScanSource. ScanSource's primary assets are its non-public information that it has created or used in support of its distribution business. (R. ___ Answer ¶ 59.) The information that has been collected over a number of years relates to ScanSource's vendors, VARs, customers, suppliers, business partners, and employees, as well as ScanSource's competitive position, business strategies, and data regarding business negotiations. (R. ___ Answer ¶¶ 59,

61.) The information about vendors, whose products ScanSource distributes, and customers, who buy the vendor's products from ScanSource, includes their products, needs, preferences, purchasing habits, prices, margins, and other similar information, all of which are ScanSource's Confidential Information. (*Id.* ¶ 60.) ScanSource's competitive edge is the collection, analysis, and protection of this information. (*Id.* ¶ 53.) Yelton admits or does not dispute that at least the QBRs, Bottom 1000 Catalog Recipients, and BU 01 Forecasting Worksheet contain Confidential Information, and the evidence shows that he possessed these and many other ScanSource Confidential files after he left ScanSource.

The use or disclosure of this information would cause ScanSource irreparable harm, as found by the Special Referee. (R. ___ Preliminary Injunction Order.) Exposing this information or allowing it to be used by someone who had not developed it effectively would destroy its value as well as ScanSource's business in ways that cannot be measured or reversed. Especially for the information in QBRs and other reports about vendor results, ScanSource's vendors expect the information to be confidential. As explained in ScanSource's Verified Answer and Counterclaims (¶ 67), QBRs contain information concerning vendors and VARs that, if other vendors and VARs in competition with them were to access such QBRs, it would be damaging not only to the former vendors' and VARs' business, but also to ScanSource's business, as competing vendors and competing VARs could unfairly use this Confidential Information to determine how and where they should focus their competitive efforts.

In addition, ScanSource's employees testified by affidavit that the "QBRs contain detailed background information on purchases made by each ScanSource customer over at least twelve (12) quarters; this information includes sales, margin, profit, revenue, market share, long term plans, etc." (R. ___ Spearman Aff. ¶ 6; *see also* R. ___Cox Aff. ¶ 5.) "Were this

information to fall into the hands of a competitor, it would enable that competitor to target specific customers with significant revenue through ScanSource, gain insight to the ScanSource business plan for Motorola products, and margins and strategy for specific customers purchasing Motorola product from ScanSource, among other things." (R. ___ Spearman Aff. ¶ 10; *see also* R. ___ Cox Aff. ¶ 8.) Yelton sought the QBRs because of the wealth of information in them and their value to him. His initial steps to implement his Varsguide business plan included the marketing proposal to Honeywell, which was one of the very QBRs Plaintiff took. (*See* R. ___ Spearman Aff. ¶ 5 ("In that conversation, Mr. Yelton asked Mr. Fowler to provide him with the quarterly business report for Honeywell.").)

Although at the time of his deposition he did not know the extent of Plaintiff's Varsguide business plan, Mr. Benbenek testified then about the potential for harm from use of ScanSource's information in relation to the marketing functions provided by ScanSource:

> Not trying to be a wise aleck or whatever. I think it's not true from the sense of this will be noncompetitive with ScanSource. I think that in some ways it's competing for the same money, marketing money, at times that we do. So vendors have discretionary marketing funds that if their customers, and in our case we're a distributor, come up with good ideas, they will give you extra money in addition to their contractual obligation with you for marketing money. So my point is that could be competitive, that could be competing with the same dollars, and so that's the only statement I'm making is in that sense it could be competitive, but it's not obviously the same business that we're in.

(R. ____ 169:9-24.) Plaintiff's use of the information through a business model like he described to Penn Williams on January 3rd thus would harm ScanSource by detracting from ScanSource's own marketing services to vendors. (*See* R. ___ Resp. Supp. Prelimin. Inj.)

Mr. Benbenek also testified about ScanSource's obligations to protect the information related to its vendors:

> Q: Isn't it accurate that not only does company policy forbid an employee to take ScanSource or vendor or customer proprietary information with them when they leave –

A: Yes.
Q: – it's also our obligation to our customers, correct, to the Motorola to the Intermec to not let that information leave, correct?
Mr. Murphy: Object to the form.
The Deponent: That's correct.
Reexamination resumed by Mr. Foster:
Q: By contract?
A: Most of the time by contract, yes.

(R. ___ 252.) ScanSource would be harmed by Yelton's solicitation, possession, and use of its Confidential Information, because ScanSource is obligated by contract to protect that information and is required to take steps to stop Yelton. Further, based on these contracts, ScanSource's goodwill would be harmed if Yelton possessed, used, or disclosed its vendors' protected information. As president of ScanSource's largest business unit, Yelton knew of the confidentiality obligations to ScanSource's business partners, and he even signed nondisclosure agreements with these major vendors on ScanSource's behalf. (*See* R. ___1/27/12 Tr. 7:24-8:4.)

Yelton "is taking material that has been acquired by [ScanSource] as the result of organization and the expenditure of labor, skill, and money, and which is salable by [ScanSource] for money" in the form of its services to vendors and customers. *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 473, 189 S.E.2d 305, 309 (1972) (internal quotations omitted) (quoting *Int'l News Service v. Assoc. Press*, 248 U.S. 215 (1918)). Because Yelton "is not burdened with any part of the expense of gathering" the information, he enjoys a "special advantage." *Id.* In light of his New Distribution Model plan, this competitive advantage also harms ScanSource, because Yelton has information that ScanSource spent its resources to create. (*See* R.__-Answer ¶¶ 60, 63, 68.) Based on the evidence proving that Yelton threatens irreparable harm to ScanSource, the Special Referee appropriately enjoined Yelton from using or disclosing ScanSource's Confidential Information.

II. The Special Referee correctly decided that ScanSource likely would succeed on the merits, because ScanSource made a prima facie showing of evidence and arguments that sufficiently supported its claims.

"In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *See Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). "[T]he plaintiff need not prove an absolute legal right; the plaintiff need only present 'a fair question to raise as to the existence of such a right.'" *Levine v. Spartanburg Reg'l Serv. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E.2d 705, 710 (1912)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

A. ScanSource has made beyond a prima facie showing that it will succeed on the merits of its claims against Yelton.

Arguing that ScanSource has not demonstrated a likelihood of success on the merits, Yelton imposes on ScanSource a burden that does not exist in the law—he wants ScanSource to prove "that he actually used or disclosed [information]." (App. Br. at 18.) Considering the evidence before him of ScanSource's rights and Yelton's obligations to protect its Confidential Information, the Special Referee found that "Plaintiff is clearly bound not to use or disclose Defendant's proprietary confidential information pursuant to the parties' agreements and South Carolina law, and Plaintiff has no right to make any use or disclosure of this information." (R. ___-Preliminary Injunction Order.) These agreements present more than "a fair question to raise as to the existence" of a legal right.

First, Yelton was bound by ScanSource's Business Ethics and Code of Conduct, which he acknowledged by signature on July 15, 2010, certifying that he would "adhere to and advocate" the Code of Conduct. (R. ___-Answer.) In addition to including certain policies, the Acknowledgment itself states that Yelton affirmed "that confidential information acquired in the course of business is not to be *used* for personal advantage." (*Id.* at 1 (emphasis added).) Further, the Confidentiality policy explains that "[e]mployees must maintain the confidentiality of information entrusted to them by ScanSource, its customers, vendors or consultants, except when disclosure is authorized or legally required." (R. ___ Answer.)

Second, as a condition of his employment, Yelton signed an Agreement that protects the Confidential Information. (R.__-Agreement, § 11(c)(v).) This Agreement provides that during employment and for at least two years after his employment terminates, Yelton "will not, either directly or indirectly, for his own behalf or otherwise, *use* in any manner the Company's Confidential Information or Trade Secrets." (*Id.* § 11(c)(vi) (emphasis added).) Additionally, he agreed that for at least a two-year period, he would not "publish, disseminate, provide, or otherwise *disclose* any Confidential Information or Trade Secrets to any third party . . . ." (*Id.* § 11(c)(vi) (emphasis added).)

In addition, ScanSource's Confidential Information is protected by the S.C. Trade Secrets Act. An injunction is a remedy for appropriation, disclosure, use, or wrongful acts pertaining to trade secrets. *See* S.C. Code Ann. § 39-3-80(C). "Misappropriation" includes "disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret." *Id.* at section 39-8-20(2)(v)(i). Yelton's litany of actions described herein conclusively show "improper means," which include but are not limited to "*theft*, bribery, *misrepresentation, breach or inducement of a breach of a*

duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or *espionage through electronic or other means*." *Id.* at section 39-8-20(1) (emphasis added). The evidence relied upon by the Special Referee shows that Yelton has misappropriated trade secrets in a variety of improper ways.

B. The Preliminary Injunction Order sufficiently explains the Special Referee's conclusions regarding ScanSource's likelihood of success.

The Preliminary Injunction Order meets the requirements of Rule 52(a), SCRCP, which requires the court to indicate its findings of fact and conclusions of law in orders granting an interlocutory injunction, and Rule 65(d), SCRCP, which requires that the order "set forth the reasons for its issuance [and] shall be specific in terms." Although the Special Referee adequately explained the reasons for issuing the order, Plaintiff argues the Order violates these rules. (App. Br. at 18.) Even so, "[t]he rule is directorial in nature so 'where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.'" *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 132-33, 568 S.E.2d 338, 343 (2002) (quoting *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)); *see also Pawley's Island Civic Assoc. v. Johnson*, 292 S.C. 208, 209-10, 355 S.E.2d 541, 542 (Ct. App. 1996) (requirement for findings of fact and conclusions of law under repealed statute was "directory merely and provides no basis for invalidating a judgment"). The purpose of articulating the specific findings "is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (N.C. 1980) (cited in *Luckabaugh*, 351 S.C. at 133, 568 S.E.2d at 343) (applying equivalent North Carolina

rule). The reasons for the injunction must not be left to speculation. *Luckabaugh*, 351 S.C. at 133, 568 S.E.2d at 343. Although an order must identify facts supporting the findings, according to the Supreme Court in *Luckabaugh*, a court is not required "to set out findings on all the myriad factual questions arising in a particular case." *Id.* Thus, an order is sufficient without "specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision. *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145, 719 S.E.2d 703, 706 (Ct. App. 2011). A four-page order has been found to comply with these requirements because it expressly addressed the elements of the claims for relief and found specifically regarding the absence of certain disputes. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010); *see also Burton v. York County Sheriff's Dep't.*, 358 S.C. 339, 355-56, 594 S.E.2d 888, 897 (Ct. App. 2004) (approving injunction order because, as a whole, "the reasons for the injunction and the acts it intends to proscribe are amply clear").

The Preliminary Injunction Order explains the elements of an injunction (R. ___, p.1), the resources relied upon by the Special Referee (R. ___, p.1), and his conclusion regarding each element required for injunctive relief (R. ___, p.2). The Order refers specifically to the evidence presented by ScanSource which suggested that Yelton had not returned all the Confidential Information in his possession. (R. ___, p.2.) Considering that the Special Referee's findings should be upheld absent an abuse of discretion, the findings of fact and conclusions of law explain the reasons for the injunctive relief and, therefore, meet the requirements of Rule 52(a) and Rule 65(d).

III. The Special Referee correctly decided that ScanSource had no adequate remedy at law, because use or disclosure of ScanSource's information could not be retracted or remedied by money damages.

No adequate remedy at law exists for ScanSource if Yelton were to use or disclose its Confidential Information. Like the showing for the irreparable harm element of injunctive relief, no adequate remedy exists due to the logical consequences of disclosing the Confidential Information—it cannot be undone.

A. The use or disclosure of Confidential Information is not remediable by an action at law.

ScanSource seeks to protect its Confidential Information from use or disclosure. (R.__-Answer ¶ 79.) Yelton avers that ScanSource is seeking a remedy for theft of its business. (App. Br. at 19.) However, even if ScanSource were seeking such relief, it would not protect the Confidential Information from use or disclosure. *See Grosshuesch v. Cramer*, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (finding attachment was not adequate remedy at law and it did not preserve the funds that were the subject of the dispute); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009) (finding that criminal law resolutions and award of money damages "to be inadequate remedies for the intrusions on Respondents' property rights"). "Whether a wrong is irreparable in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules." *Cartee v. Lesley*, 286 S.C. 249, 256, 333 S.E.2d 341, 345 (Ct. App. 1985) (internal citations omitted).

"[T]he quintessential hallmark of an injunction [is] preservation of the property at issue until the matter has been adjudicated." *Grosshuesch*, 367 S.C. at 5, 623 S.E.2d at 835. The damages to ScanSource from releasing its Confidential Information cannot be repaired, and an injunction is necessary to preserve them. *See Strategic Resources Co. v. BCS Life Ins. Co.*, 367

S.C. 540, 545, 627 S.E.2d 687, 689-90 (2006) (finding appeal of arbitration results was adequate remedy at law because, among other reasons, the right to appeal provided "an opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator"). An action at law for theft of business does not preserve the Confidential Information.

Plaintiff relies only on *MailSource, LLC v. M.A. Bailey & Associates*, 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003), for the proposition that a claim for theft of business is an adequate remedy at law. (App. Br. at 19.) The court in *MailSource* found that MailSource "seeks and should be able to prove money damages from any breach by the Baileys." *Id.* at 369, 588 S.E.2d at 639. The question in *MailSource*, however, was whether the Baileys were breaching a contractual noncompete clause. *Id.* at 366, 588 S.E.2d at 637. The protection of Confidential Information was not at issue in *MailSource*, and the case is not instructive here.

"The fact that [ScanSource] may litigate hereafter and seek damages is not a basis for denying a [preliminary] injunction under the facts of this case." *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. at 478, 189 S.E.2d at 312; *see also Peek*, 367 S.C. at 457, 626 S.E.2d at 38 (recognizing that "monetary damages are not the only option, and injunctive relief is a better remedy because it would allow Peek to retain both her patient base and her expertise while also retaining her income"). The only adequate solution to preserve the Confidential Information is by way of injunction against possession, use, or disclosure of the information.

B. The existing Consent Amended Confidentiality Protective Order does not protect ScanSource's Confidential Information.

Yelton's claim that ScanSource is protected from irreparable harm by virtue of the parties' Consent Amended Confidentiality Order is disingenuous. (App. Br. at 19.) By its terms, the Confidentiality Order applies only to documents produced by the parties in discovery (R.__-

Order ¶ 1), and it has no application to Confidential Information misappropriated by Yelton. *See Haught v. Louis Berkman LLC*, 417 F. Supp. 2d 777, 787-88 (N.D. W.Va. 2006) (granting injunctive relief for all information outside the scope of the confidentiality protective order, which captured only the documents disclosed for discovery purposes). Injunctive relief is necessary to reach the information Yelton took and retains and to prevent him from possessing, using, or disclosing the information.

IV. Yelton waived his right to appeal the preliminary injunction order on the basis of noncompliance with Rule 65(d), but even with no waiver, the preliminary injunction order complied with Rule 65(d), because it specified the acts enjoined and then defined the information affected by the enjoined acts by incorporating documents to which Yelton had agreed to be bound.

Yelton complains that the Preliminary Injunction Order does not provide an itemized list of the information and documents to which it applies. (*See* App. Br. p.22 (arguing that the order must "specif[y] what, specifically, ScanSource considers to be confidential"); *see also* App. Br. p.27.) Yelton makes this argument even though his attorney already has admitted that the Court cannot "give [the parties] a concrete list of what every document might constitute confidential information." (R. _, 1/27/12 Trans. 39:17-19.) Indeed, only Yelton knows what information is in his possession, and therefore, if the order is overly precise, it would not prevent Yelton from using Confidential Information that ScanSource has not yet been able to identify as being in his control. *See Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998) ("Rule 65(d) requires only that the enjoined conduct be described in reasonable, not excessive, detail—particularly in cases like this when overly precise terms would permit the very conduct sought to be enjoined."). Additionally, given the sensitive nature of the information at issue, it is important that the terms of the injunction order do not disclose the very information that it is supposed to protect. *See PLC Trenching Co. v. Newton*, No. 6:11-cv-0515, 2012 U.S. Dist.

LEXIS 69999, at *17 (N.D.N.Y. May 18, 2012) ("An injunction against disclosure of trade secrets need not specify the precise details of the secret."). As explained herein, the Preliminary Injunction Order provides injunctive relief against specific acts, and no part of the relief granted risks confusion by the parties. Accordingly, the order should be affirmed.

A. Yelton waived any argument as to the Preliminary Injunction Order's scope and specificity.

As an initial matter, Yelton has waived any argument that the order does not comply with Rule 65(d) because (1) he never sought clarification of the TRO's terms; (2) he consented to the TRO being extended and incorporated into other orders involved in this action; (3) he has repeatedly certified his compliance with the TRO, thus undercutting his argument that he is incapable of understanding its scope; and (4) he has knowledge of both the Preliminary Injunction Order and its incorporated definitions.

In *United States v. McAndrew*, relied upon by Yelton (App. Br. at 21 n.10), the court explained that the "requirements [of Rule 65(d)] may be waived . . . if it is shown that the defendants had knowledge or were chargeable with knowledge of the terms of that order and the incorporated provisions, and that they consented to the form of the order, or were in privity with persons who so consented, at the time the order was entered." 480 F. Supp. 1189, 1193 (E.D. Va. 1979) (rejecting, as waived, defendant's argument that an injunction order was invalid because it ordered the parties to "comply with the terms of [an outside document called the Consent Agreement]"); *see also SEC v. SBM Inv. Cert.*, No. 06-0866, 2012 U.S. Dist. LEXIS 28175, at *16 (D. Md. Mar. 2, 2012) (rejecting argument that an order violated Rule 65(d) by referencing an outside contract and the District of Columbia's Insurance Code because the court found that the defendant had knowledge that the order existed and of its terms).

Where a party fails to object to the scope of an injunction order that later is incorporated into another injunction order, the party has waived its right to object on the grounds of Rule 65(d). *Leopold v. Szego*, No. 93-2082, 1994 U.S. App. LEXIS 11090, at *6 (7th Cir. 1994) (rejecting Rule 65(d) challenge because, *inter alia*, the order merely "incorporated . . . previous injunctions, which clearly spelled out the acts enjoined and the reasons for doing so. No appeal for lack of specificity was made upon issuance of those previous injunctions").[12] Further, an objection under Rule 65 may be rendered stale where the party demonstrates its ability to understand an injunction's scope by complying with its terms. *See Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 979 (11th Cir. 1986) (holding that where appellants complied with their obligations under an injunction order for three months, "any possible objection they might have to the decree [was] stale").

The definition of Confidential Information that is affected by the Preliminary Injunction Order is exactly the same as the TRO definition. Yelton did not file a motion for reconsideration or for clarification, and he did not appeal the TRO. In fact, on February 14, 2012, Yelton, through his counsel, consented to the TRO being extended past its initial ten-day expiration date, and he did so with "no objection" and with no request for a clarification as to the TRO's terms. (R. __-2/14/12 Email.) Not only did Yelton consent to the TRO's extension, he agreed to incorporate a reference to it into the Consent Order on Protocol for Conducting Discovery as to Certain Hardware Produced by Plaintiff ("Consent Order on Protocol"). (R. ___ ("Within ten (10) days from the entry of this order, Plaintiff will identify any online cloud-based server accounts . . . which may be subject to the TRO.").) Importantly, the Consent Order on Protocol

[12] In *Leopold*, the appellant initially consented to the form of the injunction order and only later appealed on the basis for Rule 65 after he had been held in contempt. Likewise, as discussed *infra*, Yelton repeatedly affirmed his compliance with the TRO, which had the same form and applied to the same scope of information as the Preliminary Injunction Order.

was drafted jointly by counsel for both parties. (*See* R. ___-4/5/12 Email); *see also Am. Angus Assoc. v. Sysco Corp.*, 829 F. Supp. 807, 815 (W.D.N.C. 1992) (holding that Rule 65(d)'s "requirements are not controlling where there has been an agreement among counsel as to the language of the order").

Further Yelton has repeatedly certified that he has complied with the TRO's terms. (*See* R. ___ Yelton Aff. ¶¶ 1, 11, 12, 13, 16; R.__ 2/14/12 Email ("My client has gone far beyond the TRO order in locating, disclosing, and resolving issues raised."); App. Br. p. 22 n.11 (arguing that there was no need to appeal the TRO because Yelton had complied with it).) Because Yelton admits that he has been able to comply with the terms of the TRO for the eight-month period spanning from February 8 to October 26, 2012, he has waived any objection to that same scope and form being used in the Preliminary Injunction Order. *See Combs*, 785 F.2d at 979.

Finally, as president of ScanSource's largest business unit for five years, Yelton was intimately familiar with the documents that the Preliminary Injunction Order incorporates. (*See* R. __-Compl. ¶ 3(citing Employment Agreement that the parties entered into in 2008 as the basis of all three of his claims); R. __-Answer, Agreement pp. 9-11 (showing Yelton's initials on pages that contain definitions for "Confidential Information" and "Trade Secrets"); R. __-Answer, Special Handbook Acknowledgment.) Thus, because Yelton had actual and constructive knowledge of the terms incorporated by the Preliminary Injunction Order, and because he consented to being enjoined by the exact same terms under the TRO, he has waived any objection he may have had under Rule 65(d). *See McAndrew*, 480 F. Supp. at 1193.

B. The Preliminary Injunction Order satisfies the specificity requirements of Rule 65(d).

1. The Preliminary Injunction Order specifies the acts to be retrained.

By its terms, Rule 65(d) requires that the injunction order describe "the ***act or acts*** sought to be restrained." Thus, Yelton's Rule 65(d) arguments also fail because the Preliminary Injunction Order describes, in detail, the specific ***acts*** that Yelton is enjoined from taking. For instance, Paragraphs 1 and 2 state that "Plaintiff is ***prohibited from . . . contacting*** ***ScanSource's employees and customers*** "to provide Plaintiff with Confidential Information." Paragraph 3 requires Yelton to "***immediately return*** to [ScanSource] any Confidential Information remaining in Plaintiff's possession. Paragraph 4 requires Yelton to "***identify*** . . . all computer systems and data storage devices of any kind . . . to which [Yelton] has had access . . . since December 16, 2011." Paragraph 5 prohibits Yelton from "intentionally . . . ***using, disclosing, or transmitting*** any ScanSource Confidential Information." (R. __, Prelim. Injunction Order ¶¶ 1-5 (emphasis added).)

Despite this clarity as to the enjoined acts, Yelton complains the Preliminary Injunction Order is invalid because it defines the term "Confidential Information" by referencing the TRO. (App. Br. pp. 20-25.) Yelton's argument is without merit, however, because Rule 65(d) requires only that every injunction order "describe in reasonable detail, and not by reference to the complaint or other document, the ***act or acts*** sought to be restrained." Rule 65(d), SCRCP (emphasis added). The rule does not prevent a court from incorporating other documents in order to define specific *terms* that shape the scope of information affected by the enjoined acts. *See H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 834 (7th Cir. 2012) (holding that a TRO satisfied Rule 65(d) by "describing the enjoined acts 'by reference to a definition of the capitalized term "Licensed [Trademarks]" as it appeared in the [Harley-

Davidison]/Elmec Agreement,' which was under seal at the time" (alterations in original)); *see also Gordon Johnson Co. v. Hunt*, 109 F. Supp. 571, 575 (N.D. Ohio 1952) ("The proposed order appears to comply substantially with the requirements of Rule 65(d). While there are references to defendant's interrogatory exhibits, they are made only for the purpose of identifying the accused devices [that infringe upon defendant's patents]."); *Mayfield Eng'g, Inc. v. Ohio Turnpike Comm.*, No. 97-4474, 1999 U.S. App. LEXIS 5987, at *6 (6th Cir. 1999) (holding that the following language in an injunction order satisfied Rule 65(d): "[D]uring the pendency of this action, the [defendant is] enjoined from using or disclosing to anyone . . . any trade secret, confidential or proprietary information the [defendant] has received from [plaintiff] pursuant to the agreement entered into by the parties."). Therefore, because the Preliminary Injunction Order describes each specific ***act*** that is enjoined, it satisfies the notice requirements of Rule 65(d).

2. The Employee Agreement and Business Ethics and Code of Conduct sufficiently define "Confidential Information" and "Trade Secrets."

Additionally, to the extent that Yelton claims the order's incorporated definitions are ambiguous, that argument is also without merit because the terms are defined in documents of which Yelton had notice and was bound. The Employment Agreement and ScanSource's Business Ethics and Code of Conduct, which were incorporated into the Preliminary Injunction Order, provide straightforward and specific notice of what constitutes "Confidential Information" and "Trade Secrets." Contrary to Yelton's conclusory and unsupported arguments, these documents provide a detailed description of the information that is subject to the Preliminary Injunction Order. Specifically, the Employment Agreement states the following:

> "Confidential Information" means any and all information of the Company that has value and is not generally known to the Company's competitors. This includes, but is not limited to, any information or documents about: the

Company's accounting practices; financial data; financial plans and practices; the Company's operations; its future plans (including new products, improved products, and products under development); its methods of doing business; internal forms, checklists, or quality assurance testing; programs; customer and supplier lists or other such related information as pricing or terms of business dealings; supply chains; shipping chains and prices; packaging technology or pricing; sourcing information for components, materials, supplies, and other goods; employees; pay scales; bonus structures; contractor information and lists; marketing strategies and information; product plans; distribution plans and distribution processes; costs; margins for products; prices, sales, orders and quotes for the Company's business that is not readily attainable by the general public; existing and future services; testing information (including methods and results) related to materials used in the development of the Company's products or materials that could be used with the Company's products; development information (including methods and results) related to computer programs that design or test products or that track information from a central database; and the computer or electronic passwords of all employees and/or firewalls of the Company. Notwithstanding the definitions stated above, the term Confidential Information does not include any information which (i) at the time of disclosure to Executive, was in public domain; (ii) after disclosure to Executive, is published or otherwise becomes part of the public domain through no fault of Executive; (iii) without a breach of duty owed to the Company, was already in Executive's possession at the time of disclosure; (iv) was received after disclosure to Executive from a third party who had a lawful right to the information other than through a relationship of trust and confidence with the Company, and without a breach of duty to the Company, disclosed the information to Executive; or (v) where Executive can show it was independently developed by Executive on non-Company time without reference to, or reliance upon, other Confidential Information or Trade Secrets.

. . . .

"Trade Secrets" means information related to the business or services of the Company which (1) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reasonable reverse engineering processes by persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts by the Company and affiliated third parties that are reasonable under the circumstances to maintain its secrecy. Assuming the foregoing criteria in clauses (1) and (2) are met, Trade Secret encompasses business and technical information including, without limitation, know-how, designs, formulas, patterns, compilations, programs, devices, inventions, methods, techniques, drawings processes, finances, actual or potential customers and suppliers, and existing and future products and services of the Company. Notwithstanding the definitions stated above, the term Confidential Information does not include any information which (i) at the time of disclosure to Executive, was in the public domain; (ii) after disclosure to Executive, is published or otherwise becomes part of the public domain through no fault of Executive; (iii) without a breach of duty owed to the

> Company, was already in Executive's possession at the time of disclosure; (iv) was received after disclosure to Executive from a third party who had a lawful right to the information through some avenue other than through a relationship of trust and confidence with the Company, and without a breach of duty to the Company, disclosed the information to Executive; or (v) where Executive can show it was independently developed by Executive on non-Company time without reference to, or reliance upon, other confidential Information or Trade Secrets.

(R. __, Employment Agreement pp. 9-11.) This language describes the information that is confidential and the information that is not confidential. Therefore, Yelton's assertion that it "simply lists general categories of information" is unfounded. (*See* App. Br. p. 22.)

Additionally, ScanSource's Business Ethics and Code of Conduct explains as follows:

> **Confidentiality**
>
> ***Confidential information includes all non-public information that might be of use to competitors or harmful to ScanSource or its customers, if disclosed.*** The Company owns all information, in any form (including electronic information) that is created or used in support of its activities. This information is a valuable asset and the Company expects employees to protect it from unauthorized disclosure. This information includes ScanSource customer, supplier, business partner, and employee data. Federal and state law may restrict the use of this information and may penalize the employee if the person uses or discloses it. Each employee should protect information relating to negotiations with employees or third parties and share it only with employees who need to know it in order to perform their jobs.
>
> . . . .
>
> Confidential information includes, but is not limited to, the following examples:
>
> - Compensation data
> - Computer Processes
> - Computer Programs and codes
> - Customer lists
> - Customer preferences
> - Financial information
> - Labor relations strategies
> - Marketing strategies
> - New materials research
> - Pending projects and proposals
> - Technological data
> - Technological prototypes

(R. __, Business Ethics and Code of Conduct p. 6 (emphasis added).) Yelton claims that the policy "does not even attempt to exempt information obtained from others or that is generally known or ascertainable by other means." (App. Br. p. 22.) However, Yelton's claim is

contradicted by the very first sentence in the above-quoted paragraph which states that it applies to "non-public information."[13]

Moreover, Yelton was intimately familiar with the terms of these documents, and he did not object to them being used in the TRO to define the scope of what constitutes Confidential Information or Trade Secrets.[14] Therefore, because the Employment Agreement and Ethics Policy specify the information affected by the injunction, and because Yelton had knowledge of and was bound by those definitions, the Court should reject his arguments and affirm the Preliminary Injunction Order. *See McAndrew*, 480 F. Supp. at 1193 (holding that where appellants were knowledgeable of the terms of a document that was incorporated into an injunction order, they could be charged with an "understanding of [the outside document's] import," and therefore had no basis to argue that the injunction order was vague).

3. Yelton's "follow the law" argument was not preserved and is invalid.

"Preserving issues for appellate review is a fundamental component of appellate practice." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). Our

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[13] The cases cited by Yelton do not support a different conclusion because neither of them addressed detailed definitions for confidential information and trade secrets like the ones incorporated into the Preliminary Injunction Order. *See Union Pac. R.R. Co. v. Mower*, 219 F. 3d 1069, 1072-73 (9th Cir. 2000) (reversing injunction that referred generally to "any information of a confidential nature . . . that he acquired, learned, or helped to generate" while working for the company, and which cross-referenced another section of the order that described only two specific documents); *Sanford v. RDA Consultants, Ltd.*, 535 S.E.2d 321, 325 (Ga. Ct. App. 2000) (reversing portion of injunction against disclosure of "proprietary materials" because it lacked sufficient detail since it did not incorporate a more detailed definition and the agreement protected "any information pertaining to clients such as their plans, products, and financial information"). Therefore, these cases are not persuasive.

[14] In fact, during the TRO hearing, Judge Hill responded to Yelton's attorney's inquiry about the specificity of the TRO by stating, "Well, I mean, he knows what his contract says, and so do they. So I'm not going to get involved in that. I'm just going to say that whatever he agreed to in the contract to not take, he needs to return." (R. ___-Tr. 40:4-9.) After Judge Hill explained this position, Yelton's attorney did not object with that decision or give any indication that Yelton did not understand what the court was ordering him to do. (R.__-Tr. 40:10-16.)

appellate error preservation rules definitively require two elements before an issue is preserved for appellate review: an issue must be raised to and ruled upon by the circuit court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *see also Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court).

In his brief, Yelton argues for the first time that the Preliminary Injunction Order's reference to "the S.C. Trade Secrets Act, and South Carolina law" transformed the order into "an unspecific 'follow the law' injunction." (App. Br. p. 23.) However, Yelton did not raise this issue before the Special Referee. Therefore, because Yelton did not raise this specific issue below, it is not preserved for appellate review and should be ignored.[15] *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("[A]n objection must be sufficiently specific to inform the court of the point being urged by the objector.").

4. Yelton did not preserve his objection to Paragraph Four of the Preliminary Injunction Order.

Yelton also argues for the first time that the Preliminary Injunction Order is overly broad because it requires him to identify certain computer systems and data storage devices. (R. _,

[15] Additionally, even if Yelton had raised this issue, it still fails because Yelton's own authority establishes that the Preliminary Injunction Order is not a "follow the law" injunction. Specifically, Yelton cites *S.E.C. v. Sky Way Global, LLC*, 710 F. Supp. 2d 1274, 1277-78 (M.D. Fla. 2010). (App. Br. p. 23.) However, in a subsequent order, the *Sky Way Global* court explained that it used the "term 'obey-the-law injunction' to mean an injunction that compels a person to refrain from violating—in any manner and at any time or at any place—one or more statutes that, in turn, prohibit an array of categories of action." 710 F. Supp. 2d 1274, 1287-88. The court further explained that an injunction is permissible if it merely prohibits "some adequately identified act or omission that is against the law." *Id.* Yelton's citation to *Ward v. Process Control Corp.* also is not persuasive because, unlike in the instant case, the injunction order in *Ward* did not provide any definition for the term "trade secret." 277 S.E.2d 671, 673 (Ga. 1981). Because the Preliminary Injunction Order incorporated a specific definition for the term "trade secret," *Ward* is distinguishable.

Preliminary Injunction Order ¶ 4; App. Br. p. 24.) However, Yelton did not raise this issue before or after the Preliminary Injunction Order was entered.

In these briefs, Yelton's objections under Rule 65(d) were limited to the scope and definition of Confidential Information. (*See* R. ___, Pl.'s Opp. to Def.'s Req. for PI pp. 10-12; R. __,Pl.'s Resp. to Def.'s Submission Regarding PI 9/17/12 pp. 9-10.) He did not raise any objection to the scope of the computer systems and data storage devices that ScanSource was asking the Special Referee to order him to identify. Therefore, because this specific issue was not raised and ruled upon, it is not preserved. *See McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504 n.3, 719 S.E.2d 660, 662 n.3 (2011) (holding that it would consider appellants' due process argument but that their protection and privacy challenges were not preserved for appellate review because "the circuit court's ruling did not specifically address those grounds, and Appellants failed to make a Rule 59(e), SCRCP, motion").

Further, Yelton's opposition briefs to ScanSource's motion for a preliminary injunction did not raise any objection to him having to identify the computer systems and data storage devices as set forth in Paragraph 4 of the Preliminary Injunction Order. (R. __, Pl.'s Opp. to Def.'s Req. for Preliminary Injunctive Relief; R. __, Pl.'s Resp. to Def.'s Submission Regarding Preliminary Injunctive Relief Dated 9/17/12.) As a result, the Special Referee never ruled on this argument. Accordingly, this issue is not preserved for review by this Court.

Additionally, Yelton's argument against Paragraph 4 of the Preliminary Injunction Order is a thin attempt to parse out certain language to create an ambiguity where none exists. In relevant part, Paragraph 4 states:

> Plaintiff shall identify . . . . all computer systems and data storage devices of any kind, including third-party operated personal accounts such as Drop Box or other accounts with cloud based servers or the like, to which Plaintiff has had access, directly or indirectly, since December 16, 2011.

(R. __, Order ¶ 4.) However, when a court reviews an injunction order for compliance with Rule 65(d), the "language of the order cannot be considered in isolation." *McAndrew*, 480 F. Supp. at 1193. Rather, "the court should consider the entire background behind the order including the conduct that the order was meant to enjoin or secure, the interests that it was trying to protect, the manner in which it was trying to protect them, and any past violations and warnings." *Id.* at 1194 (citation omitted).

In addition to his preservation problems, Yelton has not presented any evidence to show that compliance with this order would be overly burdensome or difficult. Moreover, he has failed to explain what about Paragraph 4's language is beyond his comprehension. When read as a whole and in light of the circumstances surrounding this litigation, Paragraph 4 notifies Yelton that he is to identify every computer system and data storage device that he has had access to since December 16, 2011, so that ScanSource can inspect it pursuant to the terms of the parties' Consent Protocol. Yelton is the only person who knows what information is in his possession and where that information is located. Therefore, if the Special Referee had tried to enumerate the specific devices to which Paragraph 4 applies, the Preliminary Injunction Order would not cover all of the information it is intended to protect. *See Reliance*, 159 F.3d at 1316 (recognizing that reasonable detail is appropriate "when overly precise terms would permit the very conduct sought to be enjoined"). Therefore, the Court should reject Yelton's argument and affirm the Preliminary Injunction Order.

C. Any violation of Rule 65(d) is a harmless error that does not render the Preliminary Injunction void.

Even if the Preliminary Injunction Order is found to not fully comply with Rule 65(d)'s specificity requirements, the violation does not render the order void. The Fourth Circuit Court

of Appeals has explained that "'[w]here it gives fair warning of the act that it forbids, an injunction may not be avoided on merely technical grounds.'" *See, e.g.*, *SEC v. Dowdell*, No. 3:01cv00116, 2002 U.S. Dist. LEXIS 18982, at *10 (W.D. Va. Sept. 30, 2002) (quoting *United States v. Fuller*, 919 F.2d 139 (4th Cir. 1990)).[16] Further, "[t]he Court's inherent power to vindicate its authority, necessary to the preservation of the judicial institution, should not be inflexibly bound by procedural niceties where no actual prejudice to the defendants results." *McAndrew*, 480 F. Supp. at 1192.

As explained above, the documents incorporated into the Preliminary Injunction Order provide a detailed explanation of what constitutes Confidential Information, and Yelton is intimately familiar with the terms of both the Employment Agreement and the Ethics Code. Moreover, Yelton did not object to the scope of the TRO but instead consented to its extension and has certified numerous times that he complied with its terms. Accordingly, the Preliminary Injunction Order should be affirmed. *See Combs v. Ryan's Coal Co.*, 758 F.2d 970, 978 (11th Cir. ("A court may also disregard [a Rule 65(d)] defect if it is clear from the totality of the language in the various documents that the contemnors understood their obligations under the injunction.").

V. The preliminary injunction proceedings complied with due process, because Yelton had notice of the requested relief.

[16] *See also Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000) (holding that appellant could be held in contempt of a permanent injunction that incorporates by reference the terms of a preliminary injunction, because "[w]hen the terms of an injunction, although not set forth in a separate document as [Rule 65(d)] requires, can be inferred from the documentary record with sufficient clarity to enable a violation of those terms to be punished as a contempt, the injunction is enforceable"); *SEC v. SBM Investment Cert.*, No. 06-0866, 2012 U.S. Dist. LEXIS 28175, at *13 (D. Md. Mar. 2, 2012) (rejecting appellants "last-ditch attempt to avoid the [injunction's] requirements on 'technical grounds'" under Rule 65(d) where the appellants failed "to articulate how brief references to three external sources would render the [order] . . . uncertain and confusing").

The TRO and Preliminary Injunction Motion sufficiently notified Yelton of the relief ScanSource sought. Furthermore, ScanSource's September 17, 2012 letter to the Special Referee supporting the preliminary injunction was even more specific, including a request to prohibit the use, disclosure, or transmission of Confidential Information. However, even before the motion was decided, the Answer and Counterclaims requested a preliminary and permanent injunction against "***using and/or disclosing*** ScanSource's trade secrets or taking any action that would permit or require him to ***use and/or disclose*** ScanSource's trade secrets." (R. ___, Answer ¶ 161.) Thus, Yelton had notice of the request for an injunction against use and disclosure, and the injunction proceedings complied with due process.

A. A request for general relief is sufficient because the facts show that an injunction against use and disclosure was warranted.

In addition to the specific request in the Counterclaims, the motion for TRO and preliminary injunction requested several actions be enjoined, including requiring Yelton to return ScanSource's information. In addition, ScanSource requested "any other and further relief as the Court may deem just and equitable." (R. ___, TRO Motion at 23.) This general request for relief is a sufficient basis for a court to award relief not specified in the motion. *See McMaster v. Strickland*, 322 S.C. 451, 472 S.E.2d 623 (1996); *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 242 S.E.2d 407 (1978) (holding that a deficiency judgment, even though not specifically requested in complaint, was justified by the general prayer for relief); *Mortgage Loan Co. v. Townsend*, 156 S.C. 203, 225, 152 S.E. 878, 886 (1930) ("If the facts alleged are broad enough to warrant relief, it matters not how narrow the specific prayer may be if the bill contains a prayer for general relief.").

The requirement that a motion "set forth the relief or order sought" arises from Rule 7(b), SCRCP, and "is to be read flexibly in recognition of the peculiar circumstances of the case."

Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). The purpose of the requirement is to "reduc[e] prejudice to either party and assur[e] that the court can comprehend the basis of the motion and deal with it fairly," but "when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1)." *Lucey v. Meyer*, Shearouse Adv. Sh. Op. No. 4960 (Ct. App. Mar. 28, 2012) (internal citations and quotations omitted) (rehearing granted Oct. 24, 2012).

Looking at the relief requested in the motion, if the TRO effectively ordered all of the information to be returned, the information logically could not be used or disclosed. However, all of the information has not been returned, including at least the five missing flash devices that were connected to Yelton's ScanSource laptop in his last week of work and to his home laptop the day after ScanSource demanded the return of its Confidential Information. (*See supra* Statement of Facts, Part V.) Further, Yelton already had acted on some of the information he took by submitting the bi-optic scanner proposal to Honeywell. (*Supra* Part I.B.) Thus, based on the facts as they evolved from ScanSource's investigation, the initial request for general relief in the motion captured the injunctive relief against use or disclosure that ultimately was granted.

B. The September 17, 2012 letter to the Special Referee provided even more specific notice regarding an injunction against use and disclosure.

Even without the specific request in the Counterclaims and the general request in the motion, Yelton had notice of the request for an injunction against use and disclosure because ScanSource briefed this request. In its September 17, 2012 letter to the Special Referee supporting the preliminary injunction, ScanSource specified that it sought preliminary injunction that "Plaintiff is prohibited from using, disclosing, or transmitting any ScanSource Confidential Information, Trade Secrets, and proprietary information." (R. ___.) Yelton acknowledges that ScanSource specified that it sought an injunction against use of its information. (App. Br. at 25-

26.) This request was not a moving target (App. Br. at 25, 26), which implies that the relief sought was constantly changing. The request was made initially in ScanSource's Counterclaims.

C. Yelton was not prejudiced by any lack of notice of the requested relief.

When a party claims that a motion provided insufficient notice, it must show prejudice resulted from the allegedly insufficient specificity of the motion. *See Chastain v. Hiltabidle*, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) ("As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP.") (citing *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 474, 666 S.E.2d 262, 265 (Ct. App. 2008)). A party can demonstrate prejudice only by showing that, had the motion been more specific, he would have done something different and thereby affected the trial court's ruling. *Id.* (citing *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003)).

As explained above, Yelton had notice of ScanSource's request for an injunction against use and disclosure of Confidential Information. Further, he was subject to the TRO's requirement to return any Confidential Information, and he could have had no prejudice because he already was bound by the TRO to not possess the information. He also was bound by the Employment Agreement's confidentiality terms and the Ethics Code not to misuse or disclose the information. These several obligations show that Yelton had notice of the requested relief.

VI. The Special Referee correctly granted a preliminary injunction to prevent Yelton from seeking ScanSource Confidential Information from ScanSource customers or vendors, because information shared with certain third parties is protected by confidentiality agreements.

Plaintiff's conclusive allegations aside, Yelton knows that ScanSource enters confidentiality agreements with its vendors regarding certain information exchanged between the vendor and ScanSource—he even has signed some of these on ScanSource's behalf. (R. __, TRO Motion p.17; 1/27/12 Tr. 7:23-8:4.) His contention—that "any information a vendor or

customer might possess and choose to provide to Yelton would not be information to which ScanSource could claim a proprietary interest" (App. Br. at 26)—rings hollow. Sharing information with parties "who are under obligations of confidentiality do[es] not alter the [confidential or] trade secret status" of the information. *See ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1334 (N.D. Ill. 1990); *see also Picker Int'l Corp. v. Imaging Equip. Serv's.*, 9331 F. Supp. 18, 42 (D. Mass. 1995). Similarly, the purported conflict between the Employment Agreement and the Preliminary Injunction Order ignores that the Confidential Information at issue here is protected by agreements. Yelton's dealings with ScanSource customers or vendors regarding non-confidential information are not subject to the Preliminary Injunction Order.

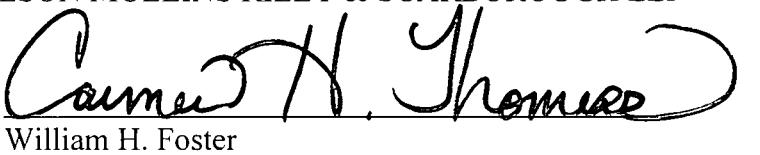
Yelton also argues against the prohibition against him seeking Confidential Information from vendors and customers based on an alleged lack of evidence. (App. Br. p.27.) The evidence supporting this element of relief is the same as the evidence offered for the other restrictions. Because ScanSource shares some Confidential Information with its vendors or customers pursuant to confidentiality agreements, these parties are alternative sources by which Yelton could seek this valuable information. An injunction requiring him to return all of ScanSource's Confidential Information would be futile if he could try to get it from another source.

CONCLUSION

The evidence of Yelton's wrongful actions with regard to ScanSource's information is technical, but it is overwhelming. He requested key Confidential Information from employees on a flash drive that is one of five he has not turned over for investigation; he uploaded 863 files from his ScanSource laptop to his online Dropbox account on his last full day in the office; he

ran KillDisk in his last moments in the office to hide his maneuvers; he continued to ask ScanSource employees for Confidential Information after he left; and he initiated a business plan before he left ScanSource that he attempted to implement before the TRO was issued. The record before the Special Referee demonstrated that continuing injunctive relief is necessary to prevent the irreparable harm to ScanSource that would result from Yelton's possession, use, or disclosure of ScanSource's confidential, trade secret, or proprietary information. The Preliminary Injunction Order adequately specifies the acts to be enjoined and is sufficient to put Yelton on notice. For these and the other reasons explained above, the Preliminary Injunction Order should be affirmed.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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February 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J.D. Quattlebaum, Special Referee, Circuit Court Judge

Appellate Case No. 2012-213453
Common Pleas Case No. 2012-CP-23-0314

Jeff Yelton., ... Appellant,

v.

ScanSource, Inc., ... Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for ScanSource, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Respondent
Respondent's Designation of Matter to be Included in Record on Appeal

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February 4, 2013