THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-002318

Millennium Health, LLC, ... Appellant,

v.

Kyle B. Crawford and Unidentified John Does, ... Respondents.

FINAL BRIEF OF APPELLANT

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Did the circuit court err in denying Millennium Health, LLC's motion for a temporary restraining order or preliminary injunction on the ground that Millennium failed to demonstrate a likelihood of success on the merits of its claims against Kyle Crawford?

Statement of the Case

In July 2016, Millennium Health, LLC ("Millennium") filed a verified complaint asserting causes of action for breach of contract and breach of the duty of loyalty against its former employee, Kyle Crawford. (Verified Compl. ¶¶ 50-62, R. 22-23). In the complaint, Millennium alleged Crawford violated the non-solicitation provision of the "Agreement Regarding Confidentiality, Non-Disclosure, and Non-Competition" ("the non-solicitation agreement" or "the agreement") Crawford signed when he began his employment at Millennium. (Verified Compl., R. 18). Millennium also sought an injunction or temporary restraining order prohibiting Crawford from continuing to solicit or accept business from its customers and potential customers pending a resolution of the case on the merits. (Verified Compl. ¶¶ 63-70, R. 24-25; Motion for Injunction, R. 176). In response, Crawford filed a memorandum in opposition to Millennium's motion for injunctive relief. (Memo in Opp., R. 179). The circuit court held a hearing on the motion on August 3, 2016. (Transcript p. 1, R. 122). The circuit court denied Millennium's request for injunctive relief, finding South Carolina courts have not determined that protecting "potential customers" or "prospective customers" is a legitimate business interest of a former employer. (Order dated Sept. 1, 2016 p. 3, R. 3). The court ruled the prohibition in the non-solicitation agreement against contacting potential customers was too broad because it "could encompass all customers in the market even if these customers have never been customers of [Millennium]." (Order dated Sept. 1, 2016 p. 3, R. 3). The court also found that it could not "rewrite the provision or 'blue-pencil' the agreement" to fix the overly broad clause. (Order dated Sept. 1, 2016 p. 3, R. 3). Finally, the court found "the non-compete provision of the . . . agreement is not enforceable." (Order dated Sept. 1, 2016 p. 3, R. 3).

Millennium filed a motion asking the circuit court to reconsider, alter, or amend its order denying Millennium injunctive relief. (Motion to Reconsider, R. 189). The circuit court filed an amended order on November 1, 2016, in which it altered two sentences in its original order to remove its finding that the non-solicitation agreement is unenforceable. (Amended Order p. 3, R. 7). Instead, the court found Millennium "ha[d] not met its burden to establish the enforceability of these provisions in connection with a Motion for Temporary Restraining Order/Preliminary Injunction." (Amended Order p. 3, R. 7). The circuit court otherwise denied Millennium's motion and left the remainder of the order unchanged. (Amended Order dated Nov. 1, 2016, R. 5). Millennium timely appealed both orders on November 17, 2016.

Statement of the Facts

Millennium is a health solutions company that offers multiple types of laboratory services, including urine drug testing, oral fluid testing, and pharmacogenetic testing to healthcare providers throughout the country. (Verified Compl. ¶ 6, R. 13). Millennium is a sales- and service-driven business that relies on a network of well-trained sales professionals to generate new business, manage and grow valuable customer relationships, increase sales volumes, and supervise sales territories. (Verified Compl. ¶¶ 8-10, R. 14). Millennium's business success and competitive position in the industry depend on the strength of its relationships with its customers and the proprietary methods it creates for its business model. (Verified Compl. ¶ 10, R. 14). Millennium considers its customer base and goodwill among its most valuable assets. (Verified Compl. ¶ 14, R. 14). Millennium has spent significant resources to develop its business practices, customer base, and goodwill in the communities it serves. (Verified Compl. ¶ 11, R. 14). Millennium's assets include a variety of confidential and proprietary information, including lists, contacts, preferences, and requirements for customers and potential customers; methods of operation; marketing investigations and strategies; and pricing strategies. (Verified Compl. ¶ 14, R. 14).

To protect its business assets and confidential information—including its contacts with customers and potential customers—from pirating by its competitors, Millennium requires its employees to execute an agreement that restricts them from misappropriating Millennium's confidential and proprietary information. (Verified Compl. ¶ 16, R. 15; Aff. of Brian Fowler ¶ 9, R. 210). Specifically, the agreement prohibits former employees from soliciting Millennium's customers and potential customers with whom they had contact during the final eighteen months of their employment for a period of one year after the termination of employment. (Verified Compl. ¶ 16, R. 15; Aff. of Brian Fowler ¶ 9, R. 210). Millennium also requires certain employees

to enter into non-competition agreements. (Verified Compl. ¶ 16, R. 15; Aff. of Brian Fowler ¶ 9, R. 210).

In 2011, Millennium hired Crawford as a customer support specialist in Tennessee. (Verified Compl. ¶ 20, R. 16). Crawford had not worked in the industry previously. (Second Aff. of Brian Fowler ¶ 6, R. 206). At the beginning of his employment, Crawford signed the non-solicitation agreement, which includes the following provision:

> Employee agrees that Employee will not, directly or indirectly, solicit, accept, or service the business of any customers or potential customers with whom Employee worked or directly contacted during the eighteen (18) months preceding Employee's termination of employment with respect to products or services competitive with those offered by [Millennium] at the close of Employee's employment. Employee agrees that this restriction will last for one (1) year from the effective date of Employee's termination from [Millennium]. Employee agrees that application of this covenant to certain of [Millennium]'s business relationships instead of a geographical area is the most reasonable, and the narrowest, method of protecting [Millennium]'s legitimate business interests, Confidential Information, and goodwill.
>
> Should Employee breach or violate this paragraph . . . of this Agreement, the one (1) year period of Employee's obligations specified in this paragraph of this Agreement will be extended by the period of time for which Employee was in breach or violation so that [Millennium] is provided with the benefit for the full one (1) year period.

(Non-Solicitation Agreement ¶ 3(b)(i), R. 91; Aff. of Brian Fowler ¶ 9, R. 205; Aff. of Kyle Crawford ¶ 4, R. 99). The agreement does not prohibit employees from leaving Millennium to work for a competing business, but it provides that if an employee seeks or is offered employment by another company, the employee must provide a copy of the agreement to the prospective employer before accepting employment. (Non-Solicitation Agreement ¶¶ 2(i), 3(b)(ii), R. 92). It also prohibits a former employee from using or disclosing Millennium's confidential information

during future employment and states, "Employee agrees that this restrictive covenant protects [Millennium]'s legitimate business interests and that the restrictions in this covenant are reasonable." (Non-Solicitation Agreement ¶ 3(b)(ii), R. 92). Further, the agreement includes an acknowledgement by the employee that "[e]ach and all of the covenants . . . are reasonable and valid and necessary for the protection of the legitimate business interests of [Millennium]." (Non-Solicitation Agreement ¶ 5, R. 93). Finally, the agreement includes an acknowledgement by the employee that Millennium will be entitled to an injunction if the employee breaches the agreement and "monetary damages at law will be an insufficient remedy in view of the irreparable harm which will be suffered by" Millennium in the event of a breach. (Non-Solicitation Agreement ¶ 6, R. 93).

Millennium eventually promoted Crawford to a territory manager position, and Crawford moved to South Carolina. (Aff. of Natalie Brown ¶ 5, R. 71; Aff. of Kyle Crawford ¶ 3, R. 99). As a territory manager, Crawford was responsible for building sales volumes in his assigned territory through relationship management with existing customers and origination of new customers. (Aff. of Natalie Brown ¶ 6, R. 71). During the eighteen months prior to his resignation, Crawford managed 189 Millennium customer accounts, which were located primarily in upstate South Carolina and North Carolina. (Transcript p. 9, R. 130).

On April 8, 2016, Crawford voluntarily resigned his position and informed Millennium employees that he was taking time off or "getting out of the lab business." (Aff. of Natalie Brown ¶ 21, R. 74; Verified Compl. ¶ 42, R. 21; Transcript p. 11, R. 130). Millennium later learned that Crawford in fact remained in the same industry and solicited or accepted the business of Millennium's customers and potential customers in violation of the non-solicitation agreement. (Verified Compl. ¶¶ 44-46, R. 21; Second Aff. of Natalie Brown ¶¶ 16-18, R. 84-85). Crawford

has presented no evidence that he provided a copy of the non-solicitation agreement to his new employer. Moreover, Crawford admitted in an affidavit that he accepted the business of Millennium customers through efforts while still employed with Millennium. (Aff. of Kyle Crawford ¶ 10, R. 102). Crawford also engaged in the following conduct before or immediately after his resignation:

- Restricted other Millennium employees' access to existing Millennium customers. (Aff. of Natalie Brown ¶¶ 13-15, R. 73).

- Told other Millennium employees that he was "taking some time off" and "getting out of the lab business," but he in fact went to work for a competitor of Millennium. (Aff. of Natalie Brown ¶¶ 21, 24-25, 35, 37, R. 74, 75, 78).

- Gave false information to customers and potential customers regarding the nature of a federal investigation involving Millennium to discourage those customers and potential customers from doing business with Millennium. (Second Aff. of Natalie Brown ¶¶ 6-13, R. 82-84).

- Solicited or accepted business from existing Millennium customers *before* leaving Millennium and—on the day of his resignation—had two Millennium customers sign agreements stating they were voluntarily taking their business to Crawford's new employer. (Aff. of Natalie Brown, ¶¶ 27-42, R. 76-78; Second Aff. of Natalie Brown ¶¶ 16-18, R. 84-85; Aff. of Kyle Crawford ¶¶ 10, R. 102; Exhibit 1 to Aff. of Kyle Crawford, R. 106).

After Millennium learned of Crawford's activities, it sent Crawford a cease and desist letter demanding that he stop breaching the non-solicitation agreement. (Verified Compl. ¶ 47, R. 21). Millennium then filed this lawsuit.

Argument

The circuit court erred in denying Millennium's motion for injunctive relief. The purpose of an injunction is to "preserve the status quo and prevent possible irreparable injury to a party pending litigation." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). A plaintiff seeking a preliminary injunction must demonstrate the injunction is "reasonably

necessary to protect the legal rights of the plaintiff pending in the action." *Id.* at 51, 674 S.E.2d at 508. To meet that burden, the plaintiff must show (1) it will suffer irreparable harm unless the injunction is issued, (2) it is likely to succeed on the merits of its claim, and (3) it has no adequate remedy at law. *Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012).

Millennium is not required to prove an absolute legal right to show a likelihood of success on the merits; it must present only "a reasonable question" or a prima facie showing that Crawford breached the non-solicitation agreement. *AJG Holdings*, 382 S.C. at 51, 674 S.E.2d at 509. The determination of whether to grant an injunction "should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made." *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465-66, 626 S.E.2d 38, 42 (Ct. App. 2005), *holding modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). "A temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction." *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003), *holding modified on other grounds by Poynter*, 387 S.C. 583, 694 S.E.2d 15.

An appellate court will reverse the denial of an injunction if the circuit court abused its discretion. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). A circuit court abuses its discretion when its decision is controlled by an error of law or unsupported by the evidence. *Id.*

The circuit court found Millennium failed to meet its burden to establish the enforceability of the non-solicitation agreement and, therefore, Millennium had no likelihood of success on the

merits. (Amended Order p. 3, R. 7). The circuit court ruled the agreement was unenforceable because the protection of potential customers is not a legitimate business interest and is overly broad. (Amended Order p. 3, R. 7). The circuit court's decision was controlled by an error of law and unsupported by the evidence, and this Court should therefore reverse the circuit court's rulings.

I. Millennium met its burden to establish a prima facie case that Crawford breached the non-solicitation agreement

A party seeking to establish the enforceability of a non-solicitation agreement must show that the agreement is (1) supported by valuable consideration, (2) necessary to protect a legitimate interest of the employer, (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood, (4) reasonably limited with respect to time and place, and (5) otherwise reasonable from the standpoint of sound public policy. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013). The reasonableness of a restrictive covenant is a fact-specific, case-by-case analysis. *Almers v. S.C. Nat. Bank of Charleston*, 265 S.C. 48, 56, 217 S.E.2d 135, 139 (1975) ("The ultimate test of reasonableness depends on a sifting and weighing of the individual facts of each case."). At this stage in this litigation, Millennium does not bear the burden of proving the enforceability of the non-solicitation agreement. Rather, Millennium must present only "a reasonable question" or a prima facie showing that Crawford breached the agreement. *AJG Holdings*, 382 S.C. at 51, 674 S.E.2d at 509.

The circuit court based its ruling on only two of the elements of enforceability: whether the agreement is necessary to protect Millennium's legitimate business interest and whether the agreement is reasonably limited with respect to time and place. (Amended Order p. 3, R. 7). The circuit court's finding that Millennium failed to satisfy those elements is controlled by errors of law and should be reversed.

A. The non-solicitation agreement is subject only to a review for reasonableness

The circuit court applied the wrong standard to its review of the non-solicitation agreement. The circuit court cast the agreement as a covenant not to compete, which it noted is "generally disfavored and will be strictly construed against the employer." (Amended Order p. 2, R. 6). However, the agreement in this case contains a non-solicitation provision that restricts Crawford's ability to solicit business by using contacts and confidential information he gained during his employment with Millennium, not his ability to work. Our Supreme Court recently explained the difference between a covenant not to compete and a restriction on the disclosure of confidential information: "noncompete agreements are viewed as restraints of trade which limit an employee's freedom of movement among employment opportunities, while nondisclosure agreements seek to restrict disclosure of information, not employment opportunities." *Milliken & Co. v. Morin*, 399 S.C. 23, 32, 731 S.E.2d 288, 292 (2012) (quoting *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999)). The Court noted the rules regarding non-compete agreements do not apply where an employer is not seeking to prevent a former employee from engaging in a similar business, but rather to prevent the former employee from using the "secret knowledge" of the former employer. *Id.* (citing *Hayes-Albion v. Kuberski*, 364 N.W.2d 609, 614 (Mich. 1984)).

The non-solicitation agreement in this case does not restrict Crawford's ability to obtain employment. In fact, Paragraph 3(b)(ii) of the agreement specifically allows Crawford to work for Millennium's competitors: "This covenant does not prohibit Employee from being employed by a business that competes with [Millennium] after the termination of the employment relationship with [Millennium] so long as Employee does so within the parameters of the [non-solicitation] paragraph and *without using or disclosing any of [Millennium]'s Confidential*

Information." (Non-Solicitation Agreement ¶ 3(b)(ii), R. 92) (emphasis added). The paragraph continues, "Employee understands and agrees that this restrictive covenant is designed, among other things, to enforce Employee's promise not to disclose Confidential Information" and provides that Crawford "agrees that this restrictive covenant protects [Millennium]'s legitimate business interests and that the restrictions in this covenant are reasonable." (Non-Solicitation Agreement ¶ 3(b)(ii), R. 92). Thus, the purpose of the agreement is to prohibit solicitation of current customers and contacts (*i.e.*, potential customers) and to prevent the use of confidential information—including business contacts—in the course of same.

Because the agreement is a non-solicitation agreement that does not restrain Crawford from competing with Millennium altogether, it is not to be strictly construed against Millennium and its scope must be determined by "ordinary principles of contract law," although it is still subject to judicial review for reasonableness. *Milliken*, 399 S.C. at 32-33, 731 S.E.2d at 293. To evaluate the reasonableness of the agreement, "courts should look to the more general standard enunciated in *Standard Register*,[1] namely whether the restriction is reasonable in that it is no greater than necessary to protect the employer's legitimate interests, and it is not unduly harsh in that it curtails the employee's ability to earn a living." *Id.* Accordingly, the circuit court erred in construing the agreement against Millennium and finding the agreement facially unenforceable as a matter of law.

[1] *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 60, 119 S.E.2d 533, 536 (1961).

B. The non-solicitation agreement protects Millennium's legitimate interests

The circuit court's ruling that the non-solicitation agreement does not protect Millennium's legitimate business interest is an error of law. *See* (Amended Order p. 3, R. 7). Specifically, the circuit court erred by focusing exclusively on the term "potential customers" and casting that restriction as an unreasonable restraint on competition. *See* (Amended Order pp. 2-3, R. 6-7); *see also* (Motion to Reconsider p. 5-7, R. 193-195). The circuit court's focus on the "potential customers" language caused it to misinterpret South Carolina precedent, and it therefore denied the injunction on the basis that "South Carolina Appellate Courts have not determined that 'potential customers' or 'prospective customers' are legitimate interests of former employers." (Amended Order p. 3, R. 7). The purpose of the restriction was not to restrain all competition; it was to prevent Crawford from *unfairly* competing with Millennium by using contacts he developed through his use of Millennium's resources to take business from Millennium.

South Carolina public policy requires the enforcement of contracts freely entered into by the parties, and the voiding of a contract necessarily impinges upon the expectations of the parties. *Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 108, 420 S.E.2d 217, 221 (Ct. App. 1992); *Almers*, 265 S.C. at 56, 217 S.E.2d at 138 ("We have held that '(I)n the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract . . . Interference would only be justifiable when it was demonstrable that, in some way, the public interests were endangered.'" (alterations in original)). Accordingly, pursuant to public policy, this Court should find the circuit court erred in finding Millennium failed to meet its burden of proving the enforceability of the non-solicitation agreement.

i. South Carolina precedent recognizes the importance of protecting customer contacts

In deciding the prohibition against soliciting potential customers does not protect a legitimate business interest, the circuit court misapplied South Carolina law. South Carolina courts have long recognized the importance to certain businesses of protecting customer contacts from misappropriation by former employees. *See, e.g.*, *Standard Register*, 238 S.C. at 66, 119 S.E.2d at 539; *Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 209, 293 S.E.2d 859, 860 (1982); *Milliken*, 399 S.C. at 37, 731 S.E.2d at 295.

Beginning with *Standard Register*, our Supreme Court recognized the "principle of customer-contact protection" as a legitimate business interest.[2] 238 S.C. at 66, 119 S.E.2d at 539. That principle provides that the point of a non-solicitation agreement is that "employees who come into personal contact with their employer's customers agree not to engage in a competing business within a limited time or area after leaving their employer's service." *Id.* at 62, 119 S.E.2d at 537. The rationale behind the rule is that employees who have direct contact with their employer's customers often obtain "confidential knowledge that should not be divulged or used for [the employee]'s own benefit." *Id.* at 62, 119 S.E.2d at 537-38. The Supreme Court in *Standard Register* noted it is "by reason of this personal, if not confidential, relationship which the parties sustain that contracts to protect the employer by restriction of subsequent employment within reasonable limits of time and of space are permitted and sanctioned, and equity will enjoin the

[2] Although the Supreme Court applied Ohio law in *Standard Register*, it noted the principles it applied comport with South Carolina public policy, and the Court has since reaffirmed those principles. *See, e.g.*, *Milliken*, 399 S.C. at 31, 731 S.E.2d at 292 (noting our Supreme Court has "reaffirmed and expounded upon" the *Standard Register* principles); *Watts*, 278 S.C. at 209, 293 S.E.2d at 860 (applying the principles from *Standard Register*).

employee from competing in violation of his covenant." *Id.* at 62-63, 119 S.E.2d at 538. The Court explained,

> It has been said that the most important single asset of most business is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers. Hence, if the employer can show a need of protection against unfair appropriation of his customers by his employee, the negative restrictive covenant is reasonable as to the employer.

Id. at 66, 119 S.E.2d at 539.

Our Supreme Court has since expanded upon the principles developed in *Standard Register*. In *Watts*, the Court cited the *Standard Register* opinion's recognition of "the necessity for an employer to protect himself where the nature of the employment brings the employee in personal contact with the customers of the employer." 278 S.C. at 209, 293 S.E.2d at 860. In that case, the Court analyzed the validity of a non-solicitation agreement between an employee and an insurance agency and noted that in the insurance business, "customer relations is an essential working asset the agency possesses." *Id.* The Court explained, "The nature of appellant's employment exposed him not only to clients personally, but also to confidential information and files of the agency. Thus, here respondent served a legitimate public policy by protecting his business interests." *Id.*

The Supreme Court has also applied these principles to a covenant that prohibited an employee from competing within the geographic area in which the employee operated for his former employer. *See Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). The Court in *Dudley* noted that although covenants not to compete are generally disfavored and will be strictly construed against an employer, geographic restrictions on

competition are reasonable if they are "limited to the territory in which the employee was able, during the term of his employment, to *establish contact with his employer's customers*." *Id.* at 676, 301 S.E.2d at 143 (emphasis added).

This Court has recently applied the same principles. In *Baugh*, this Court analyzed a restrictive covenant preventing a group of cardiologists from practicing or assisting another person to engage in the practice of cardiology within a 20-mile radius of their former employer. 402 S.C. at 8-9, 738 S.E.2d at 484-85. Like the Supreme Court in prior cases, this Court focused on the purpose of the restriction—to prevent the cardiologists from treating their former employer's patients and using the former employer's referral sources and goodwill. *Id.* at 16, 738 S.E.2d at 488. The Court noted the restriction was "limited to areas where [the cardiologists] primarily dealt with [the former employer]'s patients" and found the covenant was necessary to protect the former employer's legitimate interest. *Id.* at 16, 20, 738 S.E.2d at 488, 490. In *Baugh*, this Court found the agreement enforceable by focusing on the primary purpose of the restriction—to protect contacts developed by the cardiologists during their employment with the former employer and the former employer's referral sources and goodwill. *Id.* at 16, 738 S.E.2d at 488.

Thus, South Carolina precedent provides that an employer has a legitimate interest in protecting the contacts given to and developed by an employee during his employment. Although the issue has often arisen in the context of agreements that contain restrictions preventing a former employee from engaging in any competitive business within a particular geographic area, a geographic restriction is only one method of protecting client contacts. The focus, therefore, is not on the size of a geographic restriction or the nature of the employee's contacts. For example, the cases do not focus on whether the contact is an existing customer or potential customer, but rather the importance of customer contacts to a particular business. Accordingly, the reason the

Supreme Court upheld the geographic restriction in *Dudley* was not the geographic nature of the restriction or the size of the territory. Instead, the Court upheld the restriction because the *purpose* of the restriction was to protect the *contacts* developed by the employee during his employment, and the best way to achieve that purpose under the facts of that case was to prevent the employee from competing in the geographic area in which he developed those contacts. *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 ("A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers."). Because the former employee operated only in a specific area during his employment, the Court held a prohibition on all competition within that area reasonably protected the company from the risk of the former employee using his existing contacts to take business away from the company. *Id.*; *see also, e.g.*, *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 339 (1980) (finding "no good reason for limiting the activity of the employee throughout the entire state of South Carolina" because the employee worked and contacted customers "primarily within a fifty-mile radius of Greenville").

Applying these well-settled principles to the non-solicitation agreement executed by Millennium and Crawford, this Court should find the agreement is enforceable and Millennium is entitled to a preliminary injunction. Like the insurance company in *Watts* and the businesses in *Standard Register* and *Dudley*, Millennium's business is dependent on the strength of the relationships it develops with customers. (Verified Compl. ¶¶ 8, 10, R. 14). Millennium spends considerable resources in developing its customer base and has developed confidential information related to that customer base, including lists of customers and potential customers and the preferences and requirements of those customers. (Verified Compl. ¶¶ 11-14, R. 14). Millennium

considers its confidential lists of customers and potential customers and information related to those customers among its most valuable assets. (Verified Compl. ¶¶ 15-16, R. 15). During Crawford's employment, Millennium provided him access to and contact with contacts on its confidential customer and potential customer lists, and Crawford derived a personal benefit from that access. (Verified Compl. ¶ 17, R. 15). Moreover, Crawford obtained that access solely through his employment with Millennium; the lists of customers and potential customers are not otherwise obtainable from public sources. (Verified Compl. ¶ 18, R. 16).

The purpose of the agreement executed by Millennium and Crawford was to protect a valuable asset—the contacts Millennium provided to Crawford. Paragraph 3(b)(i) provides Crawford "will not . . . solicit, accept, or service the business of any customers or potential customers with whom [Crawford] *worked or directly contacted* during the eighteen (18) months preceding [Crawford]'s termination." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) (emphasis added). Crawford agreed that the "application of this covenant to certain of [Millennium]'s business relationships is the most reasonable . . . method of protecting [Millennium]'s legitimate business interests, Confidential Information, and goodwill." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91). The agreement expressly provided that its purpose was to "protect the *information*" described in the provision—such as Crawford's contacts with potential customers. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) (emphasis added).

The agreement complies with our Supreme Court's long-standing recognition of the "principle of customer-contact protection" as a legitimate business interest. *Standard Register*, 238 S.C. at 66, 119 S.E.2d at 539. Like the agreements in *Standard Register* and *Watts* and the geographic restrictions in *Dudley* and *Baugh*, the purpose of the non-solicitation agreement in this case is to protect the *contacts* Crawford obtained during his employment.

As Crawford contractually agreed when he signed the agreement, Paragraph 3(b)(i) is not intended to prevent competition or preserve all potential customers for Millennium, including those not yet contacted. Rather, the agreement is intended to prevent Crawford from unfairly competing with Millennium by using contacts he gained during his Millennium employment to take business away from Millennium. Thus, the agreement is analogous to the agreements upheld in *Standard Register*, *Watts*, *Dudley*, and *Baugh*—each of which was designed to protect an employer from the possibility of a former employee soliciting business from a contact he developed while working for the employer. The circuit court, therefore, misinterpreted both the non-solicitation agreement and South Carolina precedent, and this Court should reverse the circuit court's ruling.

ii. South Carolina courts also recognize the protection of confidential information as a legitimate interest

The circuit court is incorrect; our courts have opined that business contacts are a protected, legitimate business interest. Its ruling to the contrary must be reversed.

In more recent cases, South Carolina courts have recognized safeguarding *confidential information*—which may include business contacts and potential customers—as a legitimate business interest. Our Supreme Court's decision in *Milliken* is comparable to this case. In *Milliken*, the Supreme Court analyzed an agreement between an employer and employee in which the employee agreed not to disclose confidential information he learned during his employment. 399 S.C. at 27-28, 731 S.E.2d at 290. The Court stated it "is widely recognized that an employer may 'restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship.'" *Id.* at 37, 731 S.E.2d at 295. In support of its analysis,

the Court cited cases from other jurisdictions that explained, "[l]egitimate interests of an employer that may be protected from competition include . . . confidential information other than trade secrets communicated by the employer to the employee, such as . . . an employee's special influence over the employer's customers, obtained during the course of employment[,] [and] contacts developed during the employment." *Id.* (quoting *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 923 A.2d 1076, 1084-85 (N.H. 2007)). The Court found the agreement was reasonable because the employer had "a legitimate business interest it can protect through the use of the confidentiality agreement, and the agreement does not sweep any broader than this on its face." *Id.* at 38, 731 S.E.2d at 296. Therefore, the agreement was enforceable because it was "designed to strike an appropriate balance between protecting an employer's valuable interest in its proprietary information and permitting an employee to find gainful employment in his chosen field." *Id.* at 39, 731 S.E.2d at 296.

Similarly, in *Team IA, Inc. v. Lucas*, an employer and employee entered into a non-solicitation agreement similar to the one at issue in this case. 395 S.C. 237, 241, 717 S.E.2d 103, 104-05 (Ct. App. 2011). The agreement provided that for twelve months after the termination of employment, the employee would "neither directly [n]or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services." *Id.* at 241, 717 S.E.2d at 104 (alteration in original). The agreement defined a "customer" as any person or entity who purchased services or products from the employer *or* "who has been contacted and offered business services by Employer or its employees within the last twelve (12) months." *Id.* at 241, 717 S.E.2d at 105. Thus, like the agreement between Millennium and Crawford, the agreement in *Team IA* prohibited an employee from soliciting or accepting

business from "former prospective customers" contacted by the employer during the last twelve months of employment. *Id.* at 241 n.1, 717 S.E.2d at 105 n.1. Unlike the circuit court here, however, this Court declined to find the *Team IA* agreement invalid on its face. *Id.* at 247 n.2, 250, 717 S.E.2d at 108 n.2, 109.

In *Wolf*, this Court analyzed the enforceability of an agreement that prevented an employee from soliciting or accepting sales from his former employer's customers. 309 S.C. at 105, 420 S.E.2d at 200. The Court focused on the issue of whether the agreement "reasonably protected [the former employer]'s legitimate interest in protecting its business contacts and trade secrets, an interest shared by all businesses." *Id.* at 108, 420 S.E.2d at 221. The Court held the agreements legitimately sought to protect only the former employee's "knowledge of [the employer]'s products and operations." *Id.* at 108, 420 S.E.2d at 221-22. Therefore, the Court found the agreement enforceable and noted,

> During his employment, [the employee] obtained information about [the employer]'s products and sales methods that would be "useful" to him in selling to existing policyholders or payroll deduction accounts. To the extent this information is "useful" to [the employee], it is detrimental to [the employer]. We do not consider it unfair for [the employer] to prohibit the use of this information . . . .

Id. at 109-10, 420 S.E.2d at 222. The Court emphasized the agreement was "not a blanket prohibition against competition," but instead prohibited "only the unfair competition of contacting [the former employer']s existing customers and using the information and training provided to [the employee] by [the former employer] to 'pirate' the customers." *Id.* at 110, 420 S.E.2d at 223.

In interpreting South Carolina law, South Carolina federal district courts have also upheld the validity of agreements prohibiting the use of confidential information, including business contacts. *See Vessel Medical, Inc. v. Elliott*, No. 6:15-CV-00330-MGL, 2015 WL 5437173, at *4

(D.S.C. Sept. 15, 2015) (applying South Carolina law). In that case, an employee signed an agreement that prohibited him from soliciting his former employer's "prospective customers" or using or disclosing any of his former employer's confidential information for eighteen months after the termination of his employment. *Id.* at *4-5. The agreement included a prohibition against contacting *prospective customers* "in recognizing that [the former employer]'s list of current and prospective customers is a valuable property interest developed at great expense." *Id.* The employee acknowledged in the agreement that "certain *lists of customers*, . . . pricing and supply policies, and strategic and marketing plans[] are special assets and trade secrets" of his employer. *Id.* (emphasis added). The district court found the agreement was "carefully aimed at protecting [the employer]'s legitimate business interests and information, [was] reasonably limited in time, and [did not] purport to preclude an employee from finding gainful employment in his chosen field." *Id.* The district court also found the prohibition on soliciting prospective customers was "limited in scope and duration" and, therefore, the agreement was not facially unenforceable. *Id.*

Similarly, in *Hagemeyer North America Inc. v. Thompson*, No. C/A 2:05-3425, 2006 WL 516733, at *5 (D.S.C. Mar. 1, 2006) (applying South Carolina law), a federal district court analyzed an agreement that prohibited an employee from soliciting or accepting business from any customer (1) "who was served by Employee at any time during Employee's employment with [the former employer]," (2) "whose names and/or addresses were furnished to Employee by [the former employer] in the furtherance of [the former employer]'s Business," or (3) "with whom Employee had any contact, written or verbal, in connection with the furtherance of [the former employer]'s Business while in the employ of [the former employer]." *Id.* at *1. The district court found the former employer had a legitimate business interest in protecting "its existing business contacts,

customer goodwill, trade secrets, and proprietary information," and "[t]he customers subject to the nonsolicitation agreement are also appropriately limited." *Id.* at *4, 5.

Like the agreements in each of those cases, the present agreement freely entered into by Millennium and Crawford seeks only to protect Millennium's legitimate interest in maintaining the confidentiality of its customer lists and business contacts. The non-solicitation agreement is not a restraint on trade, does not prohibit Crawford from competing with Millennium, and does not prohibit Crawford from soliciting business from all potential customers in the market. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91). Rather, it merely prohibits Crawford from soliciting business and accepting business by using business contacts he gained and information he learned through his employment and his use of Millennium's resources against Millennium after terminating his employment. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91).

The circuit court and Crawford mistakenly focused on the difference between agreements that prevent solicitation of an employer's existing customers and those that prevent solicitation of potential customers. The focus must be on the purpose of the agreement and the specific asset the employer seeks to protect through the agreement. The purpose of the agreement in this case is to prevent the exact harm suffered by Millennium due to Crawford's actions. After leaving Millennium, Crawford solicited or accepted business from several of Millennium's existing customers. He did so because he had contact with and access to those customers. Thus, it is the *contacts* that Millennium must protect—including those with whom Millennium did not ultimately do business—not just its existing customers.

Crawford asserted in an affidavit that he did not solicit any Millennium customers to bring their business to his new employer. (Aff. of Kyle Crawford ¶ 10, R. 102). He stated, "I simply informed these customers that I was leaving. Several of them asked me where I was going, and

when I told them, they decided to go with me. . . . *They after all, knew me and were comfortable with me, not Millennium.*" (Aff. of Kyle Crawford ¶ 10, R. 102) (emphasis added). On the day of his resignation, Crawford accepted business from at least two of Millennium's existing customers by having them sign agreements stating they were "voluntarily" choosing to do business with Crawford and his new employer. (Aff. of Kyle Crawford ¶ 10, R. 102; Exhibit 1 to Aff. of Kyle Crawford, R. 106). In the months after his resignation, he had several other customers sign the same agreements. (Exhibit 1 to Aff. of Kyle Crawford, R. 106). It is exactly that relationship—which Crawford developed through his contacts with those customers using Millennium's resources—that the non-solicitation agreement seeks to prevent Crawford from using to unfairly compete with Millennium. The extension to potential customers that Crawford *directly contacted* during the final eighteen months is similarly designed to protect the contacts and relationships Crawford began developing during his employment. Millennium cannot quantify the level of relationship Crawford developed with each potential customer whom he contacted. Therefore, the only way to realistically protect those contacts and relationships from misappropriation is to restrict Crawford from soliciting or accepting business from all customers and contacts with whom he had contact during that period. The protection of those contacts and relationships is permitted under both the *Standard Register* line of cases recognizing the "principle of customer-contact protection" and the *Wolf* line of cases protecting confidential information. Accordingly, this Court should follow its own precedent and the precedent of our Supreme Court and hold the non-solicitation agreement reasonably sought to protect Millennium's legitimate business interest in its business contacts and confidential information.

Finally, the agreement—which Crawford signed—states "Employee agrees that application of this covenant to certain of [Millennium]'s business relationships . . . is the most

reasonable, and the narrowest, method of protecting [Millennium]'s *legitimate business interests*, Confidential Information, and goodwill." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) (emphasis added). Crawford therefore agreed by contract that the protection of Millennium's confidential information and potential customers is a legitimate business interest, and he cannot now assert otherwise. *See Hagemeyer*, 2006 WL 516733, at *5 (finding a non-solicitation agreement reasonable and noting the former employee "signed the Agreement, which specifically states that 'he considers each and every restriction reasonable with respect to the subject matter, length of time and territory covered, and that this Agreement does not restrict his ability to earn a livelihood'").

C. The restriction on contacting identifiable potential customers with whom Crawford had contact is reasonable

The circuit court committed an error of law when it construed the prohibition against soliciting potential customers as "too broad" and "difficult to determine" and found the provision "could encompass all customers in the market even if these customers have never been customers" of Millennium. (Amended Order p. 3, R. 7). The circuit court's finding is wrong.

Courts must look first to the plain language of a contract when interpreting the meaning of the contract. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007). When the plain language is unambiguous, a court must construe the contract in accordance with its plain language. *Id.* at 499, 649 S.E.2d at 502. If the parties define the words or terms used in the contract, "the contract will be interpreted according to such definitions if free from ambiguity." *C.A.N. Enters., Inc. v. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988).

As detailed, our Supreme Court has held that restrictive covenants that are not in restraint of trade should be evaluated for reasonableness. *Milliken*, 399 S.C. at 32-33, 731 S.E.2d at 293. To evaluate reasonableness, a court must consider three criteria: (1) "Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?"; (2) "From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?;" and (3) "Is the restraint reasonable from the standpoint of a sound public policy?" *Id.* at 31, 731 S.E.2d at 292 (quoting *Standard Register*, 238 S.C. at 60, 119 S.E.2d at 536). The non-solicitation agreement between Millennium and Crawford satisfies all three criteria.

First, the restriction is no greater than necessary to protect a legitimate business interest of Millennium. As addressed above, the agreement protects a legitimate business interest. The agreement is also narrowly tailored to the protection of that interest. The agreement defines "potential customers" as "those with whom Employee worked or directly contacted during the eighteen (18) months preceding Employee's termination of employment." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91). Such contacts are not "all customers in the market" as inaccurately depicted by the circuit court. A court must apply that definition to determine the scope of the agreement. *C.A.N. Enters.*, 296 S.C. at 378, 373 S.E.2d at 587. Therefore, the agreement unambiguously defines potential customers as those with whom Crawford worked, contacted, or interacted in the final eighteen months of his employment, and it cannot be construed as applying to "all customers in the market." *See* (Non-Solicitation Agreement ¶ 3(b)(i), R. 91; Amended Order p. 3, R. 7). Thus, the agreement applies only to a readily identifiable pool of potential customers, and Millennium explained to the circuit court that discovery would reveal a complete

list of those customers and potential customers with whom Crawford worked, contacted, and interacted during his final eighteen months as a Millennium employee. (Transcript pp. 9, 52-53, R. 130, 173-74; Second Aff. of Brian Fowler ¶ 8-9, R. 206-207).

Non-solicitation agreements limited to the protection of contacts developed by an employee during his employment, like the agreement in this case, are reasonable. *See, e.g.*, *Team IA*, 395 S.C. at 245, 717 S.E.2d at 107 (focusing on a former employee's ability to use contacts developed during employment, finding geographic restrictions are reasonable "if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers," and noting "South Carolina has enforced a non-solicitation agreement precluding a former employee from 'selling to the accounts or in the territory' in which he had been performing his duties as a sales representative"); *Hagemeyer*, 2006 WL 516733, at *5 ("South Carolina courts have struck down statewide restrictive covenants, but not for that reason alone; a particular geographic scope is 'generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.'"); *Vessel*, 2015 WL 5437173, at *5 ("[T]hat the non-solicitation provision also extends to prospective clients of Plaintiffs would not render it void automatically, given that the restrictions are limited in scope and duration.").

The primary cases finding non-solicitation agreements unreasonable, *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), and *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987), are distinguishable from this case. In each of those cases, this Court found the agreements unreasonable because they would prevent the former employee from working in any capacity for any employer engaged in any of the activities

encompassed by the former employer's business. *Faces Boutique*, 318 S.C. at 43, 455 S.E.2d at 709 (noting the former employee "would be in violation of the covenant not to compete if [she] became employed at any place of business engaged in the selling of cosmetics or giving facials, even if [she] herself did not participate in these activities"); *Preferred Research*, 292 S.C. at 548, 357 S.E.2d at 490 ("[T]he clause in question prevents [the former employee] from working 'alone or in association with others, in a similar business, in any capacity.'"). The agreement here allows Crawford to work for a competitor; therefore, *Faces Boutique* and *Preferred Research* are inapplicable. Moreover, the one-year term of the prohibition on soliciting or accepting business from the defined contacts is reasonable as a matter of law. *See Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 (noting two-year and three-year restraints have been found reasonable). Because the agreement narrowly defines the scope of "potential customers" as those Crawford contacted during the last eighteen months of his employment, the circuit court erred in finding the agreement is too broad.

Second, the agreement is not unduly harsh and oppressive in curtailing Crawford's legitimate efforts to earn a livelihood. As the agreement itself provides, the focus of the non-solicitation provision is on protecting Millennium's confidential information and the business contacts Crawford identified, targeted, and developed through Millennium's resources during his employment. *See* (Non-Solicitation Agreement pp. 1, 5-7, R. 88, 92-94). The provision is not designed to broadly prevent Crawford from competing with Millennium. The agreement provides that Crawford is permitted to work for a competing business and can, in fact, engage in competition with Millennium, so long as he does not use contacts developed during his final eighteen months at Millennium or confidential information he learned from Millennium for one year after termination. (Non-Solicitation Agreement ¶ 3(b)(i), (ii), R. 91, 92).

When faced with a similar issue in *Wolf*, this Court upheld an agreement that did not place a "blanket prohibition on competition," but rather prohibited "only the unfair competition of contacting [the employer]'s existing customers and using the information and training provided to [the employee] by [the employer] to 'pirate' the customers." 309 S.C. at 110, 420 S.E.2d at 223. Like the *Wolf* agreement, the agreement here prohibits only *unfair* competition—specifically, Crawford's use of business contacts he developed while working for Millennium to compete with Millennium. Similarly, in *Baugh*, this Court held restrictions on working in any capacity for a competing business are overbroad, but tailored restrictions are enforceable. 402 S.C. at 18, 738 S.E.2d at 489. The *Baugh* court—considering an agreement prohibiting doctors from practicing in a particular subspecialty within a geographic radius of their former employer—also held the practical effect that the territory restriction made it difficult for the doctors to practice their subspecialty did not indicate that the restriction was unnecessary for the protection of their former employer's legitimate interests. *Id.* at 19-21, 738 S.E.2d at 490-91. Although the prohibition in this case may make it more difficult for Crawford to compete because he cannot use contacts he previously developed using Millennium's resources to generate business for his new employer, the prohibition does not unreasonably restrict Crawford's ability to work for the new employer.

Finally, the restraint is reasonable as a matter of public policy. As explained in detail above, South Carolina courts have long recognized the "principle of customer-contact protection" as a legitimate business interest. *Standard Register*, 238 S.C. at 66, 119 S.E.2d at 539. The non-solicitation agreement in this case is designed to serve that principle—it is narrowly drawn to prohibit only Crawford's use of client contacts he developed during his employment at Millennium. Accordingly, the circuit court committed an error of law in denying Millennium's motion for an injunction on the ground that the non-solicitation agreement is "too broad."

II. In the alternative, this Court should sever the prohibition on soliciting potential customers and find the remainder of the non-solicitation agreement enforceable

If this Court determines the prohibition against soliciting potential customers is unenforceable, it should strike that provision from the agreement, find the remainder of the agreement enforceable, and reverse the circuit court's denial of an injunction. In its amended order, the circuit court found it could not "re-write the provision or 'blue-pencil' the agreement." (Amended Order p. 3, R. 7). The circuit court cited two cases in support of its conclusion: *Poynter*, 387 S.C. 583, 694 S.E.2d 15, and *Faces Boutique*, 318 S.C. 39, 455 S.E.2d 707. Although the court in each of those opinions declined to "blue pencil" agreements, South Carolina law has not foreclosed a court's ability to strike severable provisions from a contract. For example, in *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972), and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958), our Supreme Court declined to "blue pencil" restrictive covenants only because each covenant had a geographic restriction that was "clearly indivisible." *Somerset*, 233 S.C. at 332, 104 S.E.2d at 348; *E. Bus. Forms*, 258 S.C. at 434, 189 S.E.2d at 24. The Court did not hold in either case that it did not have the authority to "blue pencil" an agreement. *See id.*

A South Carolina federal district court has interpreted South Carolina precedent to allow courts to "blue pencil" agreements in certain circumstances. In *Rockford Manufacturing, Ltd. v. Bennet*, 296 F. Supp. 2d 681 (D.S.C. 2003), the district court explained, "Defendants contend that South Carolina does not permit courts to 'blue pencil' unreasonable provisions of an agreement and enforce reasonable ones. A survey of South Carolina law suggests otherwise." *Id.* at 687. The district court noted "South Carolina has not wholly rejected the 'blue pencil' test." *Id.* Instead, South Carolina precedent "can be reasonably read to conclude that although an indivisible

covenant may not be enforced even to a reasonable extent, a severable and reasonable covenant may be enforced independent of any unreasonable provisions." *Id.* Thus, *Eastern Business Forms* and *Somerset* established two principles for determining whether a non-solicitation agreement is enforceable in spite of an unreasonable or unenforceable provision: "First, . . . the contract must be severable. Second[,] the severability must be apparent from the contract itself—in language and subject matter." *Bennet*, 296 F. Supp. 2d at 688.

If this Court finds the prohibition against soliciting potential customers or contacts unenforceable, it should apply the federal court's reasoning in *Bennet* and sever that provision from the agreement because the agreement meets both requirements for "blue-penciling." First, the agreement contains an express severability clause:

> The invalidity or unenforceability of any part, term, portion or provision of this Agreement will in no way affect the validity or enforceability of any other part, term, portion or provision. In the event that any part, term, portion or provision of this Agreement is held to be invalid or unenforceable, [Millennium] and [Crawford] agree that the remaining parts, terms, portions or provisions will be deemed in full force and effect as if they had been executed by both [Millennium] and [Crawford] subsequent to the expungement of the invalid or unenforceable part, term, portion or provision.

(Non-Solicitation Agreement ¶ 10, R. 94). Moreover, the agreement also mandates that a court sever or reform the provisions to render the agreement enforceable:

> It is [Millennium]'s intention to restrict [Crawford]'s activities only to the extent necessary for the protection of the legitimate business interests of [Millennium], and both [Millennium] and [Crawford] specifically agree that should any of the parts, terms, portions or provisions . . . under any set of circumstances . . . be deemed too broad for that purpose, said parts, terms, portions or provisions will nevertheless be reformed by the court and will be valid and enforceable . . . .

(Non-Solicitation Agreement ¶ 10, R. 94). Such would uphold the prohibition against soliciting customers.

Unlike the geographic restrictions in the cases cited by the circuit court, *Poynter* and *Faces Boutique*, the "potential customers" restriction in this case is severable from the rest of the agreement. If this Court strikes "potential customers" from the agreement, the agreement will prohibit Crawford only from soliciting Millennium's existing customers, which is a valid prohibition under South Carolina law. *See Baugh*, 402 S.C. at 12, 738 S.E.2d at 486; *Wolf*, 309 S.C. at 110, 420 S.E.2d at 223. Accordingly, should this Court find the "potential customers" prohibition unenforceable, it should abide by the intention of the parties by severing that term and enforcing the remainder of the agreement.

Finally, the circuit court in fact rewrote the agreement to reach its conclusion that the agreement is overly broad. The circuit court altered the plain language of Paragraph 3(b)(i) of the agreement by finding it prohibited Crawford from soliciting "all customers in the market." (Amended Order p. 3, R. 7). As explained in detail in the previous section of this brief, the prohibition against soliciting potential customers is expressly limited to those "potential customers with whom [Crawford] worked or directly contacted during the eighteen (18) months preceding [Crawford]'s termination of employment." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91). This is an identifiable pool of contacts which the circuit court wrongly broadened by finding it was limitless.. (Second Aff. of Brian Fowler ¶ 8, R. 206). Millennium was careful to narrowly tailor the restriction to an identifiable list of potential customers, but the circuit court broadened the language to include an unlimited range of possible customers and ignored the proffer of the contacts had by Crawford.

It would be inequitable to allow Crawford to poach Millennium's existing customers—in violation of the agreement he signed at the beginning of his employment—because the non-solicitation agreement contains a single provision that the circuit court broadened to declare unlawful. South Carolina precedent is clear that the protection of existing customers is a legitimate business interest, and Crawford has admitted accepting business from Millennium's existing customers by having them sign agreements stating they were "voluntarily" moving their business with Crawford to his new employer. *See Baugh*, 402 S.C. at 12, 738 S.E.2d at 486; *Wolf*, 309 S.C. at 110, 420 S.E.2d at 223; (Aff. of Kyle Crawford ¶ 10, R. 102). Therefore, if this Court finds the "potential customers" provision unenforceable, it should strike that provision and enjoin Crawford from soliciting or accepting the business of Millennium's existing customers.

III. Millennium will suffer irreparable harm that cannot be repaired by damages alone if it does not receive a preliminary injunction

The circuit court denied Millennium's motion for injunctive relief on the ground that Millennium did not establish a likelihood of success on the merits of its breach of contract claim, but the court did not address the remaining elements required for a preliminary injunction. *See Hook Point*, 397 S.C. at 511, 725 S.E.2d at 683 (providing a party seeking an injunction must show (1) it will suffer irreparable harm unless the injunction is issued, (2) it is likely to succeed on the merits of its claim, and (3) it has no adequate remedy at law).

Millennium will suffer irreparable harm if an injunction is not granted. Crawford has admitted accepting business from existing Millennium customers while working for his new employer. (Aff. of Kyle Crawford ¶ 10, R. 102). Therefore, Millennium has suffered and continues to suffer the exact type of harm it intended to prevent by entering into the non-solicitation agreement with Crawford—loss of its customers and use of its confidential information. *See*

Levine, 367 S.C. at 465 n.3, 626 S.E.2d at 42 n.3 (noting "the loss of a business or business goodwill," economic loss that threatens the existence of a plaintiff's business, and "loss that is not easily calculated in pecuniary terms" as examples of irreparable harm); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456 n.2, 626 S.E.2d 34, 37 n.2 (Ct. App. 2005), *holding modified by Poynter*, 387 S.C. 583, 694 S.E.2d 15 (same).

Millennium also has no adequate remedy at law. "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Milliken*, 386 S.C. at 8, 685 S.E.2d at 832. The damage to Millennium's goodwill and its customer relationships cannot be remedied by damages alone, and damages for the misappropriation of business contacts and confidential information are incalculable. Damages, therefore, are an incomplete remedy. *See, e.g.*, *Levine*, 367 S.C. at 465 n.3, 626 S.E.2d at 42 n.3; *Peek*, 367 S.C. at 456 n.2, 626 S.E.2d at 37 n.2; *Z-Man Fishing Prod., Inc. v. Renosky*, 790 F. Supp. 2d 418, 422 (D.S.C. 2011) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." (alteration in original)).

Further, Crawford acknowledged when he signed the non-solicitation agreement that a breach of the agreement would cause Millennium irreparable harm and Millennium would have no adequate remedy at law:

> Employee acknowledges that monetary damages at law will be an insufficient remedy in view of the irreparable harm which will be suffered by [Millennium] if Employee should breach . . . any of the terms of this Agreement and . . . Employee hereby irrevocably agrees that [Millennium] may apply for and have temporary injunctive and other equitable relief . . . specifically to enforce any such terms upon the breach . . . thereof.

(Non-Solicitation Agreement ¶ 6, R. 93). Crawford should be bound by that acknowledgement. *See Hagemeyer*, 2006 WL 516733, at *5. Therefore, Millennium has no adequate remedy at law and is entitled to a preliminary injunction.

Conclusion

This Court should reverse the circuit court's denial of Millennium's motion for injunctive relief and order the circuit court to grant an injunction in favor of Millennium. In the alternative, this Court should reverse and remand this case to the circuit court for findings as to whether Millennium will suffer irreparable harm in the absence of an injunction and whether Millennium has an adequate remedy at law.

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May 24, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Case No. 2016-CP-23-04218
Appellate Case No. 2016-002318

Millennium Health, LLC,..... Appellant,

v.

Kyle B. Crawford and Unidentified John Does, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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