THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. D. Quattlebaum, Special Referee

RECEIVED
FEB 27 2013
SC Court of Appeals

Appellate Case No. 2012-213453

2012-CP-23-0314

Jeff Yelton, ...Appellant,

v.

ScanSource, Inc., ...Respondent.

Initial Reply of Appellant

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INTRODUCTION

ScanSource is unable to show its need of a preliminary injunction, or that the one ordered by the Special Referee is anything but clearly erroneous. ScanSource's brief is riddled with misstatements, unsupported insinuation, and outright falsehoods. None of these can mask the fact that the injunction appealed from simply cannot stand under settled precedent and under the principles of Rules 52(a) and 65(d), SCRCP.

ARGUMENTS

I. SCANSOURCE'S STATEMENT OF FACTS SERIOUSLY DISTORTS THE ISSUES BEFORE THIS COURT.

ScanSource begins its lengthy response with a Statement of Facts that contains matters irrelevant to the questions before the Court, unsubstantiationed allegations, so-called "facts" that have been disproved and actually rejected by the Special Referee, and outright misstatements. The three most egregious representations involve ScanSource's claim regarding KillDisk, its previously-rejected argument regarding the "flash drives," and its claim regarding Yelton's intentions to commit wrongdoing that ScanSource claims to have foiled.

ScanSource falsely claims that Yelton used "KillDisk" on his laptop, "disabling" it to "render[] the computer incapable of ever being used again," and that Yelton "used KillDisk to destroy that laptop." (Resp. Brief at 4-5). ScanSource's own witnesses do not claim that the laptop was destroyed or rendered incapable of being used again. ScanSource also provides nothing to show that there was any such intent on the part of Yelton. The website to which ScanSource's witness cites

(www.killdisk.com) clarifies that the product wipes out data, and that is all that it does. (See R. __ [Killdisk.com FAQ]). Yelton has explained that: (1) all company data is backed up on ScanSource servers (a contention ScanSource never refutes); and (2) his purpose in running KillDisk was to wipe out highly-personal information. (R. ____ [Yelton Aff. Jan. 20, 2012 ¶ 15]). In any event, what Yelton did in December of 2011 is hardly relevant to whether injunctive relief is necessary now.

ScanSource attempted, but failed, to have Yelton held in contempt based on its flash drive analysis which, at the end of the day, proves nothing. The notion that ScanSource proved use of the "QBR flash drive" is refuted by ScanSource's own exhaustive testing. ScanSource cannot show that there are five flash drives at issue at all.[1] In fact, ScanSource implies that its reports show what is on a flash drive, but in fact it cannot state what was on any particular drive at any time. Accordingly, ScanSource's "analysis" does not show that any flash drive contained ScanSource information post-employment. Most significantly, there are no relevant QBR files identified on either the link file analysis or any other test result submitted by ScanSource. (See, e.g., R. ___ [Gaida Affidavits]). Simply calling a device a "QBR flash drive" in legal papers proves nothing.

Perhaps most disturbing is ScanSource's argument: "Yelton's Business Model is Set in Motion, then is Stopped by the TRO." (Resp. Brief at 10-11). Without any facts whatsoever, ScanSource argues that Yelton sought to "compete

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[1] Two of the drives were never shown to be plugged into any of Yelton's computers at any time. (R. __ [Gaida Aff. Aug. 28, 2012 ¶ 4]). Of the remaining three on the report, none have been shown to actually contain any confidential information, and certainly not post-employment. (Id.)

directly with the marketing services provided by ScanSource." (Id. at 11). Putting aside the fact that Yelton is under no obligation to not compete in such a fashion, ScanSource misrepresents the Record in stating that "Yelton's target market correlates to the same customers identified in [a] confidential ScanSource file." (Id.) ScanSource not only cannot provide information to substantiate such a claim, but a plain reading of the documents proves that the term "customers" as used in Yelton's business plan focuses on a different segment of the market. In its own brief, ScanSource correctly identifies its clients as value added retailers ("VARS"). (Resp. Brief at 1). Yelton's business plan, however, is focused primarily on end users (i.e. the customers of VARS). (R. ____ [Yelton Aff. Sept. 21, 2012 ¶ 2]).

The statements quoted by ScanSource from Yelton's email to manufacturers simply relate to the fact that Yelton is proposing a *new* model of doing business (after being in the industry for so many years). (R. ___ [Pl.'s Add'l Docs at 16-17]). There is no evidence whatsoever in the Record that the "New Model" document is based on any ScanSource information.

ScanSource concludes with the bald statement that, "[b]ased 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." (Resp. Brief at 11-12). What information? ScanSource has not identified any information that Yelton possesses, and it has admitted that it has no evidence Yelton has used any information belonging to ScanSource. (R. ____ [Def. Resp. to Int. 23; Def. Supp. Resp. to Int. 23; Def. Sec. Supp. Resp. to Int. 23]).

It certainly does not explain how any such unspecified information would have any utility for a business model that is nothing like a two-tiered distribution model.

ScanSource's "Statement of Facts" is replete with many other unsupportable statements. For example, it argues that Yelton accessed and edited documents (Resp. Brief at 3) when the only competent evidence refutes its argument. (R. __ [Submission on Damages at 4-5]). ScanSource also states that its "Confidential Information can be found among the 863 files that were uploaded on December 15, 2011," (Resp. Brief at 3) when, in fact, the only actual file name that can be proven to have been uploaded at the time is a 2005 document, and ScanSource has made no showing that it contains any trade secrets. (R. ___ [Gaida Aff. July 17, 2012 ¶ II. 9]). In apparent support of its false claim that Yelton had somehow acceded to a use or disclosure injunction, ScanSource states that the TRO in this case was entered into "[f]ollowing negotiations between the parties regarding the content of the order." (Resp. Brief at 7). There were no negotiations at all regarding the content of the TRO. Likewise, ScanSource's continued reliance on the fact that Yelton requested and reviewed QBR's while still employed simply ignores both the unrefuted showing as to the business reasons why he did so, the fact that any disclosure of vendor information to vendors violates nothing, as well as the fact that ScanSource has never shown that any information contained on QBR's is in any way related to any claim in this case.

So, what is left of ScanSource's "Statement of Facts"? A few issues that are irrelevant, which were addressed in January, 2012, and which have been resolved with a Confidentiality Order, the Consent Amended Confidentiality Order, and the

Consent Protocol.[2] ScanSource's hyperbolic and exaggerated representations of the "facts" are simply an effort to confuse and deflect attention from the fact that Yelton has posed no threat to its interests, imminent or otherwise.

II. SCANSOURCE FAILS TO SHOW THAT AN INJUNCTION IS PROPER.

Injunctions should be overturned when clearly erroneous. Atwood Agency v. Black, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007). "A finding is clearly erroneous if it is not supported by the record." State v. Shuler, 344 S.C. 604, 620, 545 S.E.2d 805, 813 (2001); see also Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 309, 454 S.E.2d 320, 321 (1995) (holding that a finding is clearly erroneous if it does not comport with the "substantial evidence on the whole record").

Granting an preliminary injunction based on *no* evidence that Yelton possesses any proprietary ScanSource information, much less that he threatens to use or disclose such information, is clearly erroneous and should be overturned. See Atwood, 374 S.C. at 72-73, 646 S.E.2d at 884. The Special Referee's Order simply ignores the settled principle that "an injunction is a drastic remedy" and should be granted sparingly. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004).

A. Conjecture about information that Yelton may or may not possess is not evidence to support an injunction.

ScanSource admits that it has been unable to find any evidence that Yelton currently possesses or intends to use or disclose any trade secrets. (See R. __

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[2] For example, ScanSource complains about Yelton's desire to see an "HP list" (the contents of which are not in the Record) when there is no dispute that he never had it, never used it, and never disclosed it.

[Def. Sec. Supp. Resp. to Pl. Int. 23]). Yet, ScanSource asserts an injunction is nevertheless warranted because the fact that "a file was not on personal devices that have been turned over [for extensive and protracted forensic analysis] does not mean that it is not on another device or in another cloud storage account." (Resp. Brief at 16). Essentially, ScanSource has argued that, though it can present no evidence that Yelton has acted improperly, he must be enjoined because *maybe* there *might* be something out there somewhere. In essence, ScanSource seeks to create the inference that Yelton really is in contempt with regard to the TRO even though such a showing already has been rejected.

"Equity will not interfere by the granting of the extraordinary remedy of injunction where the anticipated nuisance is doubtful, contingent or conjectural." Welborn v. Page, 247 S.C. 554, 566, 148 S.E.2d 375, 381 (1966). ScanSource presents no evidence Yelton intentionally took anything confidential or proprietary, much less that he used or planned to use it, whatever "it" is. The Special Referee's order, therefore, is not supported by the Record and is clearly erroneous.

B. ScanSource's own arguments belie its claim that it is entitled to a preliminary injunction.

ScanSource has failed to show that the Special Referee's Order establishes any of the three elements necessary for injunctive relief. It certainly does not establish all three. See Scratch Golf, 361 S.C. at 121, 603 S.E.2d at 907-08 (holding that a preliminary injunction requires the moving party to establish irreparable harm, likelihood of success on the merits of the litigation, and an inadequate remedy at law).

1. ScanSource has not demonstrated a threat of irreparable harm.

Injunctions are clearly erroneous "where the anticipated [harm] is doubtful, contingent, or conjectural." Brading v. County of Georgetown, 327 S.C. 107, 115 n.8, 490 S.E.2d 4, 8 n.8 (1997). Indeed, "[h]arm that is highly conjectural cannot be reasonably treated as irreparable for purposes of granting a preliminary injunction." S & S Sales Corp. v. Marvin Lumber & Cedar Co., 457 F. Supp. 2d 903, 908 (E.D. Wis. 2006).

ScanSource relies heavily on rank speculation by the company's CEO, Scott Benbenek, who merely "bets" that Yelton took trade secrets with him when he left ScanSource. (See Resp. Brief at 20; R. ___ [Benbenek Dep. at 159 ("I have no proof, but if you ask me what I was feeling . . . ."]). Mr. Benbenek freely acknowledged, however, ScanSource has no actual evidence that Yelton has misappropriated or intends to use or disclose trade secrets. (See App. Brief at 9-11; see also R. ___ [Benbenek Dep., at 169; 172-73; 173-74; 175-76; 176; 244-45; 247-48]). In a futile effort to overcome these admissions, ScanSource points to testimony regarding Benbenek's impressions and guesses, coupled with completely inapposite hypotheticals about whether doing bad is bad.[3] Such conjecture is not evidence that Yelton possesses or threatens to use or disclose any proprietary information.

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[3] See Resp. Brief at 20. ("'Would it be appropriate in your mind for Mr. Yelton to start a business . . . using ScanSource Proprietary information?' 'No.'") ([citing R. ___. Benbenek Dep., at 233]); see also R. ___ [Benbenek Dep., at 254] ("'If I stole your TV set and didn't watch it, have I still stolen your TV set?' 'Yes.'").

ScanSource also misstates the findings of its own exhaustive forensic analysis when making baseless claims such as a "QBR flash drive" was plugged into Yelton's computer post-employment when, in fact, it has no evidence as to what was on any particular flash drive. (Resp. Br. at 18). As ScanSource details in its brief, ScanSource hired two forensic analysis firms to investigate the contents of Yelton's electronic devices in an attempt to decipher what, if any, proprietary information they contained and whether any such information had been used or disclosed. (See Resp. Brief at 8-10). This thorough analysis of Yelton's devices has produced *no* evidence that Yelton either accessed, used, threatened to use, or that he disclosed any trade secrets. ScanSource does not argue otherwise.

While Dean Gaida testified in an affidavit that a flash drive that, at one time, *might* have contained ScanSource QBRs was plugged into one of Yelton's devices after his termination, Gaida does not opine that any of those devices contained proprietary information at the time they were plugged in. Nor does Gaida insinuate that Yelton has used or disclosed any proprietary information. (See R. ___. [Gaida Affidavits]). This, however, does not deter ScanSource from asserting in baseless fashion that Yelton accessed confidential information. (Resp. Brief at 9-10). ScanSource is completely unable to state what information was on any device plugged into Yelton's devices; it does nothing more than provide a list of files

ScanSource believes is "likely" on the device based on files he accessed on another computer at work while employed by ScanSource. (Id. at 10 n.8).[4]

Despite admitting that it does not know whether Yelton possesses or has used or disclosed any confidential information, ScanSource further misrepresents testimony and its own forensic analysis to suggest that Yelton would already be using ScanSource trade secrets and proprietary information but for the TRO (which contained no prohibition on use or disclosure). (Resp. Brief at 10-11).[5]

ScanSource makes note of Yelton's business presentations to Motorola and Honeywell and suggests that Yelton could not have made these presentations without ScanSource trade secrets. (E.g. Resp. Brief at 10-12, 14-16, 24, 25 ("Yelton is taking material that has been acquired by ScanSource."). ScanSource provides no basis for this assertion. It does not even attempt to articulate how one could draw such a conclusion with Record evidence. Likewise, ScanSource's fiction that documents related to Yelton's work with ScanSource show the attempted use of ScanSource information (Resp. Br. at 24) is unfounded as the documents themselves show that information used to market services was obtained from other sources. (R. ____ [Yelton 9/21 Aff ¶ 6 & attachment]).

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[4] ScanSource further notes that one of the files it believes might be on one of Yelton's devices contains information relevant to Motorola, one of ScanSource's largest vendors. (Id.). ScanSource's fails to mention that its computer analysis apparently unearthed no Motorola QBR. (R. ____ [Yelton Oct. 19 Aff. ¶]). Nonetheless, ScanSource attempts to suggest Yelton is using trade secrets simply because Yelton is now selling Motorola two-way radios–a wholly uncompetitive enterprise involving completely different personnel and technology than the barcoding devices ScanSource distributes. (See R. ___ [Yelton Aff. Oct. 19, 2012).

[5] While erroneous, this argument is particularly perplexing. If ScanSource asserts that the TRO adequately protected its confidential information, why did it not simply agree to extend the TRO's terms?

ScanSource also suggests that Yelton is directly competing with ScanSource for marketing dollars because of a nonexistent correlation of the terms "low value customers" and ScanSource's "Bottom 1000 Catalog Recipients" list. These two "lists" discuss completely different groups: VARs and end users. (See R, ___. [Yelton Aff. Sept. 21, 2012 ¶ 2.]). Even if Yelton did have access to the Bottom 1000 list after his termination, it would not benefit his presentations to Motorola and Honeywell. More importantly, however, ScanSource's own computer tests indicate that Yelton never accessed such a file post employment and it was detected only in a deleted backup zip file. (R. ___ [Yelton 10/19 aff ¶ 9]) This is merely another example of ScanSource distorting evidence to escape the fact that the Special Referee had no support in the Record to grant an injunction.

ScanSource next accuses Yelton of "standing in the way" and "hamper[ing]" this case. (Resp. Br. At 21). Yelton made all information he could locate available within 24 hours of the TRO hearing, has attempted to comply fully with the TRO, consented to the computer search protocol, consented to two confidentiality orders, and did not object to ScanSource's initial lengthy list of search terms. His cooperation is so extensive that ScanSource has the audacity to argue that it constitutes a waiver of his right to appeal. (Resp. Br. at 33-35). Of course, ScanSource once again fails to offer any Record support for its allegation.

ScanSource states that Yelton's "initial steps to implement his Varsguide business included the marketing proposal to Honeywell, which was one of the very QBR's Plaintiff took." (Resp. Br. at 24). There is absolutely no connection shown

between a Honeywell QBR (reviewed during employment) and a later proposal to help market a flatbed scanner. ScanSource never even attempted such a showing.

Likewise, ScanSource quotes Benbenek's deposition for the proposition that he "testified then about the potential for harm from use of ScanSource's information in relation to the marketing functions." (Resp. Br. at 24). The actual testimony, appearing on page 162 of Benbenek's deposition, did not relate to his speculation as to Yelton's use of ScanSource confidential information. It related only to his concerns that Yelton might engage in another business even though "it's not obviously the same business that we're in." (R. ____ [Benbenek dep. 162]). ScanSource also fails to disclose that, on the very next page, Benbenek acknowledges that Yelton engaging in Varsguide violates no duty owed to ScanSource. (R. ___ ll. 8-22 [Benbenek Dep. 163]). Like the refuted arguments regarding Penn Williams (Resp. Br. at 24), this misleading representation by ScanSource simply highlights that what is really at issue in this case is ScanSource's bullying attempt to keep Plaintiff out of the industry – and not an effort to protect any proprietary information. ScanSource's position, if adopted, would simply allow large corporations to keep South Carolinians from ever working in their fields of employment on the theory that it's not what they actually do that matters, it's what they might think about that warrants an injunction. (See Resp. Br. at 22).

2. ScanSource has presented no evidence to justify a showing of success on the merits.

a. ScanSource cannot present a prima facie showing of entitlement to relief.

ScanSource incorrectly accuses Yelton of demanding a showing "that he actually used or disclosed [information]." (Resp. Brief at 26).[6] The Special Referee does not tie his statement: "Plaintiff is clearly bound not to use or disclose Defendant's proprietary confidential information . . ., and Plaintiff has no right to make use or disclosure of this information," (R. ___ [Preliminary Injunction Order at 2]), to any indication that Yelton has even has attempted to use or disclose anything. ScanSource summarily quotes this assertion to support its claim of "'a fair question . . . as to the existence' of a legal right." (Resp. Brief at 26). How can the Special Referee have found that ScanSource will likely prevail on such issues as use or disclosure when ScanSource can point to no evidence to support such claims?

Yelton's past possession and use of ScanSource proprietary information during and within the scope of his employment with ScanSource has no bearing on whether ScanSource will prevail on the issue of whether Yelton has improperly used or disclosed any trade secrets since his termination. Likewise, citation to the terms of Yelton's Code of Conduct and "Agreement" protecting Confidential Information

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[6] See Resp. Brief at 26 (citing Compton v. S.C. Dep't of Corr., 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Compton involved the allegedly improper forwarding of SCDC records to a parole board. Compton is distinguishable from the present case because there both parties acknowledged that the records were sent. Here, however, ScanSource provides no evidence that Yelton intentionally absconded with any confidential information, or that he intends to use or disclose anything, thus there is no "fair question . . . as to the existence of such a right." (Id.).

in no way suggests that Yelton has done anything to violate either. (See Resp. Brief at 27). Therefore, to the extent one can speculate that the Special Referee relied on these documents, his Order is not supported by any Record evidence.

b. ScanSource simply dodges the Special Referee's violation of Rule 52(a).

The Special Referee quite simply ignored the mandate of Rule 52(a), SCRCP, providing that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." He simply signed off on ScanSource's proposed order, which ScanSource's own counsel stated at the time did not include any detailed findings. (R. ____ [email of Foster dated October 8 with draft]). In other words, the decision to not include findings was a conscious one that simply cannot be squared with the mandates of Rule 52(a).

Because the lack of compliance is inarguable, ScanSource merely asserts that "substantial compliance" with Rule 52(a) is adequate and that the Special Referee "refers" to evidence alleged by ScanSource without saying what the evidence is that serves as the basis for the extraordinary relief granted. (See Resp. Brief at 28-29). None of ScanSource's cited cases, however, support the notion that a complete absence of findings is "substantial compliance."[7] As ScanSource

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[7] ScanSource's own authority undercuts its argument. In In re Treatment & Care of Luckabaugh, the court found substantially compliance with Rule 52(a) where the Judge detailed its findings regarding Luckabaugh's propensity toward sexually violent acts but left out the legal conclusion that the State had therefore not carried its burden of proof. 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002). By contrast, the Special Referee provided no findings of fact or conclusion of law whatsoever. This Order is therefore not in compliance with more of ScanSource's authority. (See Resp. Brief at 28-29) ("The purpose of articulating the specific findings 'is to allow a reviewing court to determine from the record whether the judgment . . . represent[s] a correct application of the law."

points out, the Order merely contains a rote recitation of "the elements of an injunction . . . the resources relied upon by the Special Referee . . . and his conclusion regarding each element required for injunctive relief." (Resp. Brief at 29). It is not clear what is meant by "resources," but it clearly does not mean "facts." Without *any* findings of fact upon which to base its Order, the Special Referee simply cannot have substantially complied with Rule 52(a) and the Order is therefore clearly erroneous. To hold otherwise would simply vitiate the clear mandate of the Rule.[8]

(quoting Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)).

Further, ScanSource's reliance on Wilder, Mathis, and Burton is misplaced. (Resp. Brief at 29). Wilder involves an action in Default and is governed by Rule 55, not 52(a). Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 145, 719 S.E.2d 703, 706 (Ct. App. 2011). Mathis upheld a four-page order, but only because it "expressly addressed the existence of a valid employment contract, the terms of the contract, breach of the contract, mitigation, Mathis's damages, and the applicability of the Payment of Wages Act. Mathis v. Brown & Brown of S. Carolina, Inc., 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010). Finally, the order in Burton was upheld because it, "in its findings of fact and conclusions of law, discussed at length the FOIA violation and the records ultimately subject to disclosure." Burton v. York County Sheriff's Dept., 358 S.C. 339, 356, 594 S.E.2d 888, 897 (Ct. App. 2004). All the precedent relied upon by ScanSource here is either inapplicable or contradicts its own position.

[8] The closest the Special Referee comes to making a finding of fact under Rule 52(a) is summarily stating "Plaintiff is clearly bound not to use or disclose Defendant's proprietary confidential information . . . ." (R. ___ [Preliminary Injunction Order, at 2]). The Special Referee apparently uses this principle to justify entering an injunction without any evidence or support from the Record that Yelton has, or threatens, to do so. This is nothing more than an attempt to craft an improper "no harm, no foul" injunction, positing that because Yelton should not use or disclose proprietary information, there is no harm in issuing an injunction compelling him not do so. Courts have rejected such an approach time and again. See, e.g., Paoli Peaks, Inc. v. Weeks, 4:11-CV-00078-RLY, 2012 WL 5178183 (S.D. Ind. Oct. 18, 2012) (finding no support for Defendant's "no harm, no foul" argument); In re McClure, 430 B.R. 358, 363 (Bankr. N.D. Tex. 2010) (rejecting "no harm, no foul" injunction rationale); Tenneco Auto. Operating Co. Inc. v. Kingdom Auto Parts, 08-CV-10467, 2008 WL 4388899 (E.D. Mich. Sept. 25, 2008)("[T]his court rejects a "no harm, no foul" policy of granting injunctive relief), aff'd sub nom. Tenneco Auto. Operating Co., Inc. v. Kingdom Auto Parts, 410 F. App'x 841 (6th Cir. 2010); French v. Providence Everett Med. Ctr., C07-0217RSL, 2008 WL 4186538, at n.9 (W.D. Wash. Sept. 8, 2008) (rejecting "no harm, no foul" approach); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 649 (D.N.J. 2007) ("This Court has already addressed and dismissed [Defendant's] "no harm, no foul" argument."); HUB Group, Inc. v. Clancy, CIV.A. 05-2046, 2006 WL 208684 (E.D. Pa. Jan. 25, 2006) (rejecting "no harm, no foul" argument in injunction request).

3. ScanSource cannot show the absence of an available remedy at law.

ScanSource relies on precedent that does not apply to the action at hand while failing to distinguish MailSource, LLC. No authority relied on by ScanSource to assert an adequate remedy at law is applicable to alleged violations of employment contracts and disclosure of trade secrets.[9] With respect to the actual issues presented here, this Court has recognized that alleged breaches of confidentiality agreements and Trade Secret Act allegations are compensable by money damages and has denied equitable relief because an adequate remedy exists at law. Milliken & Co. v. Morin, 386 S.C. 1, 6-7, 685 S.E.2d 828, 831-32 (Ct. App. 2009), modified on other grounds, 399 S.C. 23, 731 S.E.2d 288 (2012).

4. ScanSource's arguments regarding confidentiality orders and Yelton's representations are misleading.

ScanSource argues that the existing confidentiality order does not protect ScanSource because it applies only to documents. (Resp. Br. at 31). The notion that a confidentiality order does not protect the disclosure of the contents of designated documents is bizarre, and Yelton certainly has never taken that position. In any event, what other information does ScanSource claim to be at issue other than what is in the QBR's? It simply never says.

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[9] Grosshuesch concerned a suit by property owners to set aside transfers made by a care giver/trustee for undue influence and fraud. Grosshuesch v. Cramer, 367 S.C. 1, 623 S.E.2d 833 (2005). The Court found no adequate remedy at law in Grossheusch, but only because "attachment would be inappropriate in this case because ownership of the property has not been established." Id. at 6, 623 S.E.2d at 835. AJG Holdings found no adequate remedy at law where the Defendant's operation of a bed and breakfast would present a nuisance that inhibited resident's enjoyment of their own properties. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009).

ScanSource's representation that counsel for Yelton conceded that not every document could be identified in an injunction (Resp. Br. at 32) is highly misleading. The portion of the transcript cited involved only a discussion regarding the return of documents in January, 2012, under the TRO. Nobody expected Judge Hill to know from the filings what documents were at issue in terms of the undisputed issue of return and, to facilitate matters, Yelton simply provided everything he could find and Judge Hill never granted a use or disclosure prohibition. The notion that Yelton has taken the position that he conceded anything is misleading at best.

Finally, ScanSource argues that the injunction cannot disclose the trade secrets themselves. (Resp. Br. at 32). Identifying the information at issue is not the same as divulging the substance of the trade secret, and nobody has suggested otherwise. ScanSource's argument simply is disingenuous.

III. SCANSOURCE OFFERS NO EXCUSE FOR THE SPECIAL REFEREE'S VIOLATION OF THE BASIC TENETS OF RULE 65(d).

A. Yelton has not waived his 65(d) argument against the Special Referee's injunction simply because he did not take issue with Judge Hill's TRO.

1. Yelton timely objected to the definition of "Confidential Information" at the first point the ruling affected his rights.

ScanSource improperly suggests that, simply because Yelton did not object to the TRO issued by Judge Hill, Yelton has somehow waived the ability to object to the Special Referee's failure to state with specificity what acts are enjoined by the preliminary injunction. (See Resp. Brief at 33). There was no need to take issue with the TRO because that order did not contain a use or disclosure provision, or

a requirement that covers every imaginable type of "device." (See App. Brief at 21-22 & n.11). The TRO simply ordered Yelton to refrain from contacting ScanSource employees to solicit confidential information, which is not at issue, and to return all confidential information currently in his possession. Rather than quibble over the definition of "confidential," Yelton simply made everything available to ScanSource. (See R. ___ [Email from Brian P. Murphy to Corky Harper (Jan. 28, 2012]).

Yelton did not appeal the TRO because he had no need to. Likewise, Yelton would not have objected to the lack of specificity in the preliminary injunction had it, as ScanSource suggests, merely "incorporated" the prior order. (See Resp. Brief at 34). However, the injunction did not simply "incorporate" the TRO; it went far beyond it.[10]

The scope of the TRO and the preliminary injunction are wildly divergent, despite an apparent overlap in the definition of "confidential information." Rule 65(d) requires specificity in the "acts" to enjoined. Rule 65, SCRCP. Because the preliminary injunction adds use and disclosure provisions not present in the TRO, the "acts" enjoined are very different. Any uncertainty regarding what the court or parties considered to be confidential was inconsequential when all that was required of Yelton was to return information he had and to refrain from contacting ScanSource employees for certain purposes. However, when the order suddenly restricts what information Yelton is allowed to "use" in his business dealings, significantly more specificity about what the Special Referee considers "confidential"

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[10] Because the Preliminary Injunction did not merely incorporate the prior Order, ScanSource's citation to Leopold is inapposite. (Resp. Brief at 34).

is required. Therefore, as soon as the need arose, Yelton took the first opportunity to object. (See R. ___ [Email from Brian P. Murphy Bill Foster and Derrick Quattlebaum (Oct. 8 2012); Plaintiff's Submission on Damages, at 3). ScanSource's reliance on Combs, which involved an attempted objection to a term the parties helped to craft, is misplaced. (Resp. Brief at 34 (citing Combs v. Ryan's Coal Co. Inc., 785 F.2d 970 (11th Cir. 1986)).[11]

2. The parties have never agreed to the Special Referee's definition of Confidential Information.

a. Yelton did not consent to ScanSource's interpretation of "Confidential Information" in the Consent Order on Protocol.

ScanSource incorrectly suggests that Yelton consented to the definition of confidential information by means of his assent to the process by which discovery will be governed under the Consent Order on Protocol. (See Resp. Brief at 34-35). The Consent Order on Protocol only mentions the TRO in the context of the agreement to identify cloud-based servers that might be subject to the TRO. (See R. __ [Consent Order on Protocol ¶ 29]). Yelton agreed to this because the limitation to cloud based servers was clear enough, and he has fully complied with the Protocol. Simply because Yelton agreed to an earlier process by which ScanSource could search Yelton's devices in no way suggests that Yelton assented

[11] ScanSource's references to United States v. McAndrew, and SEC v. SBM Inv. Cert. are similarly not instructive. Unlike those cases, Yelton is not objecting to the Injunction based solely on reference to outside documents of which he has knowledge and understanding. (See Resp. Brief at 33). To the contrary, Yelton objects to this document which references other outside documents which are also deficient in their terms.

to the Special Referee's subsequent definition of confidential information in a use or disclosure injunction.

b. Yelton's compliance with a Court Order does not waive his objection to the Special Referee's vague and overly-broad definition of Confidential Information.

ScanSource's suggestion that Yelton's compliance with the TRO has somehow waived his ability to object to the terms of the injunction is absurd. (See Resp. Brief at 34 n.12, 35, 44). Leopold and Combs, upon which ScanSource relies are inapplicable. First, Yelton is not appealing the TRO; he is appealing the improper preliminary injunction. ScanSource's representation that the two orders contain the "exact same terms" (Resp. Br. at 36) simply is not an honest one.

Second, going "above and beyond" the terms of the TRO in an effort to assuage any sincere concerns is not assent to its definition of confidential information in a use and disclosure injunction that was not in existence at the time. The assertion that Yelton cannot object to the Special Referee's sweeping Order simply because Yelton attempted to adhere to Judge Hill's more limited ruling is unsupportable. Surely, equity does not punish those who do their best to respect court orders.

C. ScanSource fails to rebut the showing that the Special Referee's Order violates Rule 65(d).

1. ScanSource falsely claims that Yelton did not preserve issues.

ScanSource poses two spurious preservation claims. First, it states that Yelton never previously argued that merely incorporating statutes into an injunction

creates an impermissible "follow the law" injunction." (Resp. Br. at 40-41). That simply is not true. (See R. _____ [Resp. Opp to Motion for Prelim. Inj. at 11-12]).[12]

Second, ScanSource falsely argues that Plaintiff never objected to the computer device issue (i.e. "paragraph 4"). (Resp. Br. at 41-43). As counsel for ScanSource is well aware, the parties had a conference call with the Special Referee. (R. ____ [Quattlebaum e-mail]). Afterwards, counsel for ScanSource drafted a proposed order which, for the first time, contained the provision that became paragraph 4 of the Preliminary Injunction. (R. _____ [Foster 10/8 email with draft order]). Yelton took this first opportunity to object to this language ten days before the Special Referee issued his Order. (R. ____ [Murphy Oct 8 email of 1:59p.m.]). In fact, ScanSource counsel even accused the Undersigned of attempting to "re-litigate" issues. (R. ___ [Foster email 10/16 2:11]). The Special Referee indicated he did not intend to entertain further argument (ten days before he signed the Order). (R. ____ [Quattlebaum email 10/16]). It is not clear how ScanSource can claim to this Court that Yelton never argued the point to the Special Referee when ScanSource counsel participated in the argument.

2. The Preliminary Injunction provides no specificity regarding the acts to be enjoined.

The Special Referee's Order cannot be said to describe in reasonable detail what acts are enjoined if it does not state at all what Yelton cannot use or disclose.

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[12] Even if Yelton had not specifically argued "follow the law," there is no requirement of using actual names of legal doctrines in order to preserve issues. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

Millennium Laboratories, Inc. v. Rocky Mountain Tox, LLC, No. 10-CV-2734-MSK-KMT, 2011 WL 843935, at *11 (D. Colo. Mar. 8, 2011) ("The proscription against incorporating by reference documents outside of the four corners of the court's order protects those who are enjoined by informing them of the specific conduct regulated by the injunction and subject to contempt.").[13] Without a specific and objective standard to apply to his conduct, Yelton is potentially subject to another contempt motion anytime he attempts to do business in the barcoding or point-of-sale industry. This is especially true when ScanSource has argued that Yelton's own entrepreneurial ventures, wholly unrelated to ScanSource's business, are subject to the injunction. (See R. _____ [Resp. Brief at 10-12, 14]; see also R. ___ [Benbenek Dep. at 159, 162]).

Moreover, ScanSource's citation to its own definitions of Confidential Information and Trade Secrets from the Employee Agreement and Code of Conduct is equally unhelpful. (See Resp. Brief at 37-40). Those categories of information

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[13] ScanSource relies on two inapplicable cases in supporting its claim the Special Referee complied with Rule 65(d). (See Resp. Brief at 36-37). The first, H-D Michigan, LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 843 (7th Cir. 2012) allowed for acts to be enjoined by reference to another document but only because "[the enjoined party] does not argue that it suffered from any confusion or uncertainty concerning the definition of 'Licensed Trademarks' or any other aspect of the district court's language." Id. at 843. Indeed, Yelton's whole complaint stems from the uncertainty surrounding the definition of Confidential Information. Likewise, though Gordon Johnson Co. v. Hunt, 109 F. Supp. 571 (N.D. Ohio 1952), permitted "substantial compliance" with Rule 65(d) and allowed reference to an outside document, the outside reference was to interrogatory exhibits that neither side objected to and "[t]he acts sought to be restrained are described in detail and with particularity." Id. at 575. Finally, ScanSource's reliance on Mayfield Eng'g, Inc. v. Ohio Turnpike Comm. to argue that Yelton cannot now object to a definition he has previously agreed to is misplaced and inapposite. (See Resp. Brief at 37). That case enjoined the defendant "from using or disclosing" confidential information during the pendency of the case that was "considered by both parties to be trade secrets." Not only do the parties here not share such an understanding, nobody will even tell Yelton what "confidential information" means other than by threats of contempt. Yelton has never consented to the approach taken by the Special Referee. (See R. ___ [Plaintiff Submission on Damages, at 3]).

are all-encompassing and provide no reasonable basis for Yelton to know whether ScanSource will again attempt to hold him in contempt for violating an Order prohibiting him from using information "including but not limited to" a mere characterization of types of information. (Id. at 37, 39-40).

D. The Special Referee's violation of Rule 65(d) is not harmless error.

The defects in the Special Referee's Order are not "merely technical." (See Resp. Brief at 44). Nor are they "niceties" whose absence does not prejudice Yelton. In fact, the lack of specificity in the Special Referee's Order makes it impossible to know what acts are or are not enjoined and Yelton cannot hope to engage in the industry for fear of being charged again with contempt. Finally, it is ridiculous for ScanSource to argue that Yelton understands his "obligations under the injunction" (id.) when neither ScanSource nor the Special Referee will specify what they are. As discussed above in Section III(A)(2)(b), Yelton has taken this process most seriously and, at every turn, endeavored not only to comply but to go beyond the strict confines of rulings even if he has disagreed with them. Equity calls for adherence to the Rules in a way that allows Yelton to be able to work in his field with a clear understanding as to the courts' expectations. The game of "gotcha" attempted by ScanSource should not be countenanced.

Moreover, ScanSource's assertion that the Order cannot be specific because ScanSource cannot know what information Yelton might have merely admits that the Special Referee's findings are not supported by the Record. (See Resp. Brief at 32-33, 43).

IV. SCANSOURCE DOES NOT ADDRESS THE INJUNCTION'S VIOLATION OF FUNDAMENTAL NOTIONS OF DUE PROCESS.

Yelton complained time and again about the "moving target" of relief ScanSource has sought and the Special Referee erroneously granted. (R. _____ [App. Brief at 25-26; Pl. Resp. to Def. Submission re Prelim Inj. § II(A); Murphy email of October 16]). ScanSource acknowledges its failure to request a use or disclosure injunction in its Motion for Preliminary Injunction. (Resp. Brief at 45). Indeed, it is not until a hearing in August of 2012 that ScanSource first mentions its intent to seek provision enjoining "use." (See App. Brief at 25-26 (citing R. __ [8/31/12 hearing at 85-86])). And it was not until after all the briefing that ScanSource revealed its complete request in the form of a proposed order, which included, for example, the contested paragraph four of the Preliminary Injunction.

Amazingly, ScanSource now claims that it requested this provision and Yelton did not object. (Resp. Br. at 42). Nowhere was a request for such relief in Defendant's submission to the Special Referee. It simply appeared after-the-fact in terms of a draft order to which Yelton vehemently objected. (R. ____ [Foster email with draft order, October 16 email chain].

As Yelton discussed in his initial brief, notions of due process guide requests for extraordinary relief. This case has been more like a game of whack-a-mole than anything resembling due process.

V. SCANSOURCE FAILS TO PROVIDE A LEGAL OR FACTUAL BASIS FOR AN INJUNCTION AGAINST OBTAINING INFORMATION FROM THIRD PARTIES.

ScanSource has no basis for stopping a Motorola or Honeywell from providing Yelton with Motorola or Honeywell information. Again, this is merely a transparent effort to keep Yelton out of the industry.

To the extent ScanSource is arguing that Yelton should be enjoined from seeking ScanSource information from customers or vendors, there are two problems. First, there is no suggestion in the Record of Yelton even attempting to do so. Second, there are no confidentiality agreements in the Record that would allow a court to review ScanSource's protected interests. The complete absence of any basis for ScanSource's argument is further proof that the Special Referee's Order is not supported by the Record and is clearly erroneous.

CONCLUSION

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

Respectfully submitted,

February 25, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. D. Quattlebaum, Special Referee

Case No. 2012-CP-23-0314

Jeff Yelton,

Appellant,

v.

ScanSource, Inc., Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply of Appellant on Respondent ScanSource, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2013, addressed to its attorney of record, William H. Foster, Ninth Floor, 104 S. Main Street, Greenville, South Carolina 29601.

February 25, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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J. D. Quattlebaum, Special Referee

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FEB 27 2013
SC Court of Appeals

Appellate Case No. 2012-213453

2012-CP-23-0314

Jeff Yelton, ...Appellant,

v.

ScanSource, Inc., ...Respondent.

Supplemental Designation of Matter to Be
Included in Record on Appeal

Appellant proposes the following be included in the Record on appeal.[1]

1. August 31, 2012 transcript of hearing 1, 49-82, 86-88.

2. October 1, 2012 e-mails between counsel and D. Quattlebaum.

3. Email chain of October 8 and October 16 emails between counsel and D. Quattlebaum.

4. Wm. Foster email October 8 with proposed order.

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[1] Unless otherwise noted, references to party submissions includes exhibits attached to the submissions.

5. Benbenek Dep. pp. 159, 162.

6. 8/29/12 submission by Yelton re Motion for Contempt.

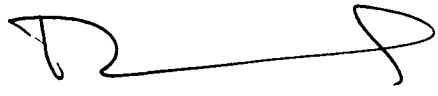
7. 8/30/12 supplemental submission by Yelton re Motion for Contempt.

8. 9/21/12 Yelton Affidavit and exhibits.

I certify that the above designation does not include matters that are irrelevant to the appeal.

Respectfully submitted,

February 25, 2012



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THE STATE OF SOUTH CAROLINA
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J. D. Quattlebaum, Special Referee

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PROOF OF SERVICE

I certify that I have served Appellant's Supplemental Designation of Matter to Be Included in Record on Appeal on Respondent ScanSource, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2013, addressed to its attorney of record, William H. Foster, Ninth Floor, 104 S. Main Street, Greenville, South Carolina 29601.

February 25, 2013

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February 25, 2013

Jenny Abbott Kitchings
Clerk of Court
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FEB 27 2013
SC Court of Appeals

RE: Jeff Yelton v. ScanSource, Inc.
Appellate Case No. 2012-213453
C.A. No.: 2012-CP-23-0314

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply of Appellant, and our Supplemental Designation of Matter to Be Included in Record on Appeal. Please return the additional filed copies to me in the enclosed self-addressed, stamped envelope. By copy of this letter, we are hereby serving opposing counsel.

Thank you in advance for your attention to this matter.

Sincerely,

Brian Murphy

Brian P. Murphy

Enclosures

cc: William H. Foster, Esq. (w/enclosures)