THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2021-001137

JENNINGS-DILL, INC., ... Respondent,

v.

ERIC ISRAEL, ... Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On July 20, 2021, Respondent Jennings-Dill, Inc. ("JDI" or the "Company"), brought this action against Appellant Eric Israel ("Israel"), a former 11-year employee. JDI did so after discovering Israel had downloaded JDI's confidential and trade secret information immediately upon his resignation, and thereafter began using the information for competitive advantage to recruit JDI employees to come to work for his new employer, Place Services, Inc. ("PSI"). Through this action, JDI sought to enjoin Israel from engaging in wrongful conduct that has irreparably harmed, and continues to irreparably harm JDI due to his misappropriation of JDI's confidential and trade secret information. The Trial Court properly issued a temporary injunction to stop the ongoing irreparable harm, and JDI respectfully submits that this Court should affirm that decision.

JDI's Complaint for Injunctive Relief and Damages ("Complaint") against Israel asserts the following claims: (1) conversion; (2) breach of the duty of loyalty; (3) breach of fiduciary duty; (4) violation of the South Carolina Unfair Trade Practice Act, S.C. Code Ann. §§ 39-5-10, *et seq.*; (5) misappropriation of trade secrets under the South Carolina Trade Secrets Act, S.C. Code Ann. §§ 39-8-10, *et seq.*; (6) civil conspiracy; (7) unjust enrichment/quantum meruit; and (8) tortious interference with contractual relations. The same day JDI filed its Complaint, JDI also filed a Motion for Temporary Injunction ("Motion"), supported by the affidavit of Andy Locklair, JDI's Vice President of Operations, describing Israel's conduct. JDI filed its Memorandum Supporting its Motion for Temporary Injunction on July 29, 2021, supported by the affidavit of David Doser,

JDI's Executive Vice President, detailing the impact Israel's conduct has had, and continues to have, on JDI's business.

On August 2, 2021, Israel filed his Opposition to JDI's Motion for Temporary Injunction, providing affidavits from Israel and Scottie Strickland. On August 2, 2021, JDI submitted a Supplemental Affidavit of Andy Locklair, undermining statements made in Israel's affidavit and providing documentary evidence confirming Israel's misappropriation of JDI's confidential and trade secret information.

On August 3, 2021, the Honorable Alex Kinlaw, Jr., held a hearing on JDI's Motion. Based on JDI's Motion, the Complaint, the affidavits on file, the memoranda of law submitted by both parties, and the oral arguments presented to the Trial Court on August 3, 2021, Judge Kinlaw found that the record supported the issuance of a temporary injunction and ordered such relief on September 9, 2021. Israel now appeals the Trial Court's Temporary Injunction Order ("Order") dated September 9, 2021, granting JDI's Motion and issuing a temporary injunction.

For the reasons stated below, the Trial Court properly issued a temporary injunction and JDI respectfully requests that this Court affirm that decision.

STANDARD OF REVIEW

"Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

FACTUAL BACKGROUND

JDI provides mechanical contracting services to include heating, ventilation and air conditioning, plumbing, and process piping. (Locklair Aff. ¶ 2.) JDI is a full service plumbing and gas piping contractor with the ability to design and install all sizes and types of plumbing

systems. (Locklair Aff. ¶ 3.) JDI's business has separate divisions or departments, one of which is the Plumbing Division. (Complaint ("Compl.") ¶ 12.) The Plumbing Division installs complete systems for various industries, including commercial, industrial, education, healthcare, and religious companies. (Compl. ¶ 13.) JDI's Plumbing Division alone accounts for twenty to thirty percent (20-30%) of JDI's annual revenue. (Compl. ¶ 14.) Between July 2020 and June 2021, JDI's Plumbing Division had between 27 and 33 employees, with 29 employees in June 2021. (Locklair Aff. ¶ 42.) Within three short weeks after Israel's departure from JDI, the Plumbing Division was depleted to just 17 employees. (*Id*.)

Israel started working with JDI through a staffing agency in December 2007. (Locklair Aff. ¶ 6.) On April 19, 2010, Israel became a full-time JDI employee. (*Id*.) Israel held a number of positions during his 11-year employment with JDI, starting as a plumber before progressing up to foreman, and then finally plumbing superintendent. (*Id*. at ¶ 7.)

As the plumbing superintendent, Israel oversaw the operations and personnel of JDI's Plumbing Division. (Order ¶ 3.) In that role, Israel had access to JDI's confidential information related to employee payroll and retention and JDI's bidding process. (*Id*.) Specifically, Israel was one of a limited number of managers JDI entrusted with access to its confidential and trade secret electronic data, which he could access through a ShareFile application on a Company-issued iPad. (*Id*. at ¶¶ 11, 13.)

On June 13, 2021, Israel emailed Locklair, stating that he had "been given a good opportunity with another company for change and growth," and tendered an approximately one-month notice of his resignation. (Locklair Supp. Aff. ¶ 4.) On June 24, 2021, Israel and Locklair had a telephone conversation, and despite Locklair's efforts to convince him to stay, Israel resigned but offered to work a two-week notice period. (Locklair Aff. ¶¶ 9, 11; Locklair Supp. Aff. ¶¶ 4,

7.) Locklair told Israel that a two-week notice was not necessary and that Israel's last day with JDI was that day (*i.e.*, June 24, 2021). (Locklair Aff. ¶ 11, Locklair Supp. Aff. ¶ 7.) Locklair also told Israel to return all JDI property first thing the next morning, including the Company-issued iPad, keys, truck, and tools. (Locklair Aff. ¶ 11, Locklair Supp. Aff. ¶ 7.) Given that the telephone conversation between Israel and Locklair occurred after business hours and Locklair had already left the office for the day, Locklair could not terminate Israel's access to JDI's computer systems, which Israel could access through the iPad, until the next morning. (Locklair Aff. ¶ 12.)

Within a few hours of resigning during the call on June 24, 2021, Israel downloaded three (3) confidential and trade secret files. (Locklair Aff. ¶ 20.) Those documents consisted of files named "Personnel Report," "Personnel Report Jan 2021-Dec 2021," and "JD Employee List" (collectively referred to as "Electronic Property"). (Locklair Aff. ¶¶ 20-23.) The Electronic Property contains JDI's confidential and trade secret information, and is exclusively the property of JDI. (Locklair Aff. ¶¶ 24-27.) Specifically, the Electronic Property contains monthly JDI employee headcount information through July 2021, personnel changes, including hires and terminations, and personal contact information and pay rates for all Jennings-Dill employees, not just those in the Plumbing Division. (Locklair Aff. ¶¶ 24-26.) Israel not only "accessed" or simply "viewed" the Electronic Property, but actually performed a "download" that allowed him to transfer the Electronic Property to other sources, such as a personal cell phone, email, or computer, among others. (Locklair Supp. Aff. ¶¶ 10-11, Ex. C. to Locklair Supp. Aff.)

Most of JDI's business opportunities come from submitting bids. (Doser Aff. ¶ 4.) The bidding process involves JDI's evaluation of the proposed project and specifications, projecting the costs of materials, projecting the hours of labor necessary to complete the project and assigning a blended hourly labor rate to the project. (*Id.*) With respect to a plumbing bid, the blended rate

includes wage rates for plumber helpers, plumbers, plumbing foreman, plumbing superintendent, and the project manager. (*Id*.)

JDI considers its wage rates to be highly confidential information because JDI would be unfairly put to a competitive disadvantage if it fell into the hands of a competitor. (*Id.* at ¶ 5.) JDI's ability to participate in project bids is dependent on the number of pending projects and the availability of skilled employees to participate in new projects. (*Id*. at ¶ 8.) Thus, if a competitor learned of JDI's wage rates for its employees, the competitor could easily lure away skilled JDI plumbers with wages above those paid by JDI and directly impact JDI's ability to bid on or continue working on projects. (*Id*. at ¶¶ 5-8.) In short, JDI's wage rates are unique, and provide JDI with a competitive edge during the bidding process and are not available to the public. (*Id*. at ¶ 6.)

At approximately 6:30 a.m. on June 25, 2021, the morning following Israel's resignation, Locklair accessed JDI's computer systems to deactivate Israel's privileges. (Locklair Aff. ¶ 18, Locklair Supp. Aff. ¶ 10.) Locklair discovered that Israel had accessed JDI's electronic data storage and downloaded JDI's confidential and trade secret Electronic Property, despite his resignation the night before. (Locklair Aff. ¶ 18, Locklair Supp. Aff. ¶ 10, Exhibit C to Lockair Supp. Aff.) Immediately thereafter, Locklair disabled Israel's access and reported the breach to Doser. (Locklair Aff. ¶ 19.)

The purpose behind Israel's unauthorized access of JDI's Electronic Property later became clear. On July 13, 2021, Phillip Dobbins ("Dobbins"), a former JDI Plumbing Superintendent who also is currently employed by PSI, sent an email to Israel using Israel's old JDI email address. (Locklair Supp. Aff. ¶ 14.) In the email, Dobbins was giving direction to Israel, who had since become employed by PSI, about the training for a former JDI employee. (Locklair Supp. Aff. ¶

14.) At that point, JDI discovered that Israel and some of the other plumbers who had recently left JDI, and were named in the email, were all employed by PSI. (*Id*. at ¶ 15.)

Other evidence also demonstrates that Israel has used JDI's Electronic Property to recruit other individuals to leave their employment with JDI and join PSI. At least four (4) JDI employees have informed Locklair that Israel has solicited JDI employees to leave JDI and to go work for PSI. (Locklair Aff. ¶ 36.) Two of those employees have since resigned from JDI, with one of them specifically saying he had accepted a position with PSI after Israel solicited him to do so. (*Id*. at ¶ 37.) Moreover, nine other employees within JDI's Plumbing Division resigned in the month of July 2021; most of whom were relatively long-term employees and had never expressed displeasure with their employment at JDI. (Locklair Aff. ¶¶ 40-41.)

JDI is using its best efforts to hire replacements for the plumbing employees who have left as a result of Israel's conduct. (Doser Aff. ¶ 33.) Most of the plumbers that JDI has been able to hire have backgrounds in the residential plumbing field, which is quite different than the commercial and industrial plumbing fields in which JDI specializes. (*Id*.) Consequently, it will take years for these new plumbers to achieve the same level of productivity as those solicited by Israel and hired by PSI. (*Id*.) This also will have an impact on JDI's ability to take on new projects. (*Id*. at ¶ 34.)

Israel's actions with respect to JDI's workforce have irreparably harmed JDI's business and its reputation and continues to do so. Indeed, as of the time the Motion was under consideration, JDI had to withdraw from three (3) plumbing projects because of its decreased manpower since Israel left JDI. (Locklair Aff. ¶ 43.) Specifically, JDI had to inform three (3) of its long-terms customers (Brasfield & Gorrie, DPR, and Triangle Construction) that it had to withdraw from three (3) separate contracts because its plumbing division had suffered an abrupt

and unexpected loss of employees (approximately one third of its plumbing staff) and, therefore, was severely understaffed. (Locklair Aff. ¶¶ 44-45; Doser Aff. ¶¶ 11-23.) Israel's actions in forcing JDI to withdraw from these projects has not only had a significant monetary impact on JDI's business (to the tune of roughly $2,500,000 in lost revenue), but has caused and continues to cause serious damage to JDI's reputation and customer relationships that go well beyond these three projects. (Locklair Aff. ¶ 45; Doser Aff. ¶¶ 18, 25.)

In fact, since the dramatic loss of JDI's plumbing staff, Doser has had to have difficult discussions with existing customers. (Doser Aff. ¶ 24.) For instance, Bryant Nixon at Triangle Construction complained about JDI's inability to timely complete its scope of work at the Charter High School building on the Greenville Tech campus. (*Id.*) Nixon informed Doser that Triangle Construction missed two inspections due to delays caused by JDI's lack of capacity to complete the job. (*Id.*) Complaints of such a nature will certainly have a negative impact on JDI's ability to successfully bid on and be awarded projects with these companies in the future. (Locklair Aff. ¶ 45.)

ARGUMENT

THE TRIAL COURT PROPERLY ISSUED A TEMPORARY INJUNCTION AFTER ANALYZING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION, THE AFFIDAVITS ON FILE, THE MEMORANDA OF LAW SUBMITTED BY BOTH PARTIES, AND ORAL ARGUMENT.

A. Standards Applicable to the Issuance of a Temporary Injunction

In order for a court to grant a temporary injunction, "[t]he plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50-51, 674 S.E.2d 505, 508 (Ct. App. 2009) (citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005)). For a temporary

injunction to be granted, the moving party must establish that: "(1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *AJG Holdings, LLC*, 382 S.C. at 51, 674 S.E.2d at 508 (citing *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004)).

"The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right." *AJG Holdings, LLC*, 382 S.C. at 51, 674 S.E.2d at 509 (citing *Peek*, 367 S.C. at 456, 626 S.E.2d at 37)). Upon a showing that the plaintiff is entitled to injunctive relief, '"a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.'" *Id*. (quoting *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)). Whether to grant a temporary injunction is committed to the sound discretion of the judge who granted it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973); *Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993).

B. The Trial Court Properly Found That JDI Has a Likelihood of Success on the Merits

JDI's Complaint and other evidence in the record before the Trial Court allege facts sufficient to constitute a cause of action for injunctive relief, and to show that such relief is reasonably necessary to protect its legal rights pending the outcome of the action. Israel has not contested the Trial Court's conclusion that JDI has satisfied two out of the three elements – namely (1) irreparable harm if the injunction is not granted and (3) inadequate remedy at law – to obtain injunctive relief. (*See generally*, Initial Brief of Appellant) (challenging only the finding that JDI has a likelihood of success on the merits).

Given that Israel has waived appellate review of the Trial Court's findings on the first and third elements, JDI will focus its arguments only on the second element – JDI has a likelihood of success on the merits. *Hughes on behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, No. 2018-001443, 2021 WL 4770165, at *6 (S.C. Ct. App. Oct. 13, 2021) ('"An argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief."') (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001)).

The Trial Court held that JDI has a likelihood of success on the merits of the claims for which it sought temporary injunctive relief. (Order, p. 6, ¶ 25.) The claims for which JDI sought injunctive relief include: (1) misappropriation of trade secrets under the South Carolina Trade Secrets Act, S.C. Code Ann. §§ 39-8-10, *et seq.*; (2) unfair trade practices in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*; (3) conversion; and (4) unjust enrichment/quantum meruit. For the reasons explained below, the Trial Court's Order should be affirmed.

Israel raises two arguments on appeal as to how the Trial Court purportedly erred in finding that JDI had a likelihood of success on the merits. First, Israel argues that "[t]he trial court erred by finding [JDI] had a likelihood of success on the merits despite the record not containing *any evidence* Israel possessed or misappropriated any trade secret or other confidential information belonging to [JDI]." (Initial Brief of Appellant at pp. 4-6, emphasis added.) Israel then submits that the Trial Court's finding is reversible because it relied "*exclusively*" on hearsay and speculative statements in affidavits. (*Id.* at pp. 7-9, emphasis added.) Israel's liberties with the record are easily discernable and should not disturb the Trial Court's legal and factual findings entitling JDI to a temporary injunction.

1. The Record Contains First-Hand Evidence Demonstrating That Israel Possessed and Misappropriated JDI's Trade Secret and Confidential Information

Israel asserts that "Jennings-Dill failed to put forward *any evidence* that Appellant possessed or misappropriated any trade secret or other confidential information belonging to Jennings-Dill." (Initial Brief of Appellant at p. 6, emphasis added.) The record shows that JDI's Electronic Property is entitled to protection. First, the Electronic Property constitutes "trade secret" information because it is a "compilation" of "information" that "derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure." *See* S.C. Code. Ann. § 39-8-20(5)(a)(i); Locklair Aff. ¶ 26; Doser Aff. ¶¶ 5-8. Second, JDI has implemented well-known procedures to maintain the secrecy of its Electronic Property. *See* S.C. Code Ann. § 39-8-20(5)(a)(ii); Locklair Aff. ¶¶ 14-16, 24, 26.

JDI's confidential Electronic Property, including the pay rates of all its employees, are not known outside the Company, and such information allows JDI to remain competitive during the bidding process on which its business relies. As explained above, most of the business JDI receives comes from submitting bids. (Doser Aff. ¶ 4.) The bidding process involves JDI's evaluation of the proposed project and specifications, projecting the cost of materials, projecting the hours of labor needed to complete the project, and assigning a blended hourly rate to the project. (*Id*.) In the case of a plumbing bid, the blended rate includes wage rates for plumber helpers, plumbers, plumbing foremen, plumbing superintendent, and the project manager. (*Id*.) JDI considers what it pays its employees to be highly confidential information because, in the hands of a competitor, it would place JDI at a competitive disadvantage, or give the competitor an unfair advantage. (*Id.* at ¶ 5.) If a competing business had access to the collective pay rates of JDI employees, it would

be able to pull away JDI's employees with wages above what JDI is paying, undermining its ability to competitively bid on projects. (*Id.*) In sum, JDI's collective wage rates are confidential and unique, provide the Company with a competitive edge during the bidding process, and are kept confidential and are not available to the public. (*Id.* at ¶ 6.)

Given that such information is not known outside JDI, and it allows JDI to remain competitive during the bidding process, such information is properly considered a trade secret assuming reasonable efforts are in place to maintain its secrecy. *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 650, 813 S.E.2d 696, 700 (S.C. 2018) (citing S.C. Code Ann. § 39-8-20(5)(a)(ii)). Here, there is no doubt that JDI has made reasonable efforts to maintain the secrecy of its Electronic Property. JDI maintains strict policies that prohibit the unauthorized or misuse of its electronically-stored data. (Locklair Aff. ¶¶ 13-16.) JDI permitted only a limited number of its employees, with whom it has confidence and trust, to access the Electronic property within its databases, and required those employees to sign acknowledgments agreeing not to misuse the data. (*Id.*)

The record also demonstrates that Israel misappropriated JDI's Electronic Property. "Misappropriate" includes acquiring a trade secret of another through improper means. S.C. Code Ann. § 39-8-20(2)(a). Specifically, on June 24, 2021, well after his normal working hours and shortly after JDI accepted his resignation, Israel logged onto the iPad issued by JDI, accessed JDI's electronic data storage, and downloaded JDI's confidential information. (Locklair Aff. ¶¶ 8, 20-23; Locklair Supp. Aff. ¶¶ 10-11.)[1] To be clear, Israel did not simply "access" or "view" JDI's

[1] Israel asserts that "the *only* evidence in the record" regarding JDI's Electronic Property is the affidavit of Israel, and that "[n]one of the affidavits filed by [JDI] state that Mr. Israel ever copied, *downloaded*, or otherwise removed these files from [JDI's] iPad . . . . (Initial Brief of Appellant, p. 6.) Clearly, that inaccurate assertion is based on a selective, blind-sided view of the record. (*See* Locklair Supp. Aff. ¶¶ 10-11.)

Electronic Property; instead, he performed a "download" permitting him to transmit the confidential information to other sources. (Locklair Supp. Aff. ¶¶ 10-11.) In light of compelling evidence of Israel's misappropriation of JDI's trade secret information, the Trial Court properly issued a temporary injunction.

2. Israel Has Used JDI's Electronic Property to Solicit Employees to Leave Their Employment With JDI and Go Work for a Competitor

Israel next asserts that the Trial Court erred in relying on the affidavits presented for the record. JDI has offered significant reliable evidence. As stated with specificity in the Complaint, Israel has used JDI's Electronic Property to solicit and recruit current and former JDI employees to come to work for PSI, a competitor of JDI. (Compl. ¶¶ 27-37.) Additional evidence submitted to the Trial Court further demonstrates that, after resigning from his employment and downloading JDI's confidential Electronic Property, Israel has used JDI's Electronic Properly to recruit JDI employees to PSI.[2]

At least four (4) JDI employees have witnessed Israel solicit JDI employees to leave JDI and to go work for PSI since he voluntarily ended his employment with JDI. (Locklair Aff. ¶ 36.) Two of those four employees have resigned from JDI. (*Id*.) One individual, Scottie Strickland, who is a former JDI Plumbing Foreman, resigned from JDI to work with Israel at PSI, after being nudged to do so by Israel. (*Id*. at ¶¶ 37-38.) Israel has also contacted four other JDI employees. (*Id*. at ¶ 39.) Israel solicited one of the individuals to leave employment with JDI, he probed another employee about a former JDI employees' non-compete agreement, he asked another JDI employee if he "needed anything" or if he could "help him," and he called another JDI employee's

[2] While discovery up to the time of this appeal has been limited, JDI is aware of numerous examples of Israel's solicitations, and more are sure to come as discovery develops.

wife. (*Id*.) Israel used his own phone in some instances to contact these JDI employees and, presumably to cover his tracks, used his girlfriend's phone in the other instances. (*Id*.)

In the month following Israel's resignation, several other JDI plumbing employees resigned. Specifically, in July 2021 alone, nine other members of JDI's Plumbing Division resigned from their employment. (*Id*. at ¶ 40.) To JDI's surprise, most of these resignations were tendered by relatively long-term JDI employees, none of whom had ever displayed any sort of dissatisfaction with their employment at JDI. (*Id*. at ¶ 41.)

The allegations of the Complaint, bolstered by the testimony in affidavits submitted to the Trial Court, set forth facts sufficient to demonstrate that Israel has misappropriated JDI's confidential Electronic Property and solicited JDI employees to leave their employment for PSI. Yet, Israel argues the Trial Court erred by relying on hearsay statements. (Initial Brief of Appellant, pp. 7-9.) Indeed, what Israel is suggesting is that, even at this early pleading stage of the case, JDI must present evidence that would be admissible at trial. That is certainly not the standard:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at the preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981). Indeed, affidavits based on belief or hearsay statements may be considered by trial courts in evaluating a request for preliminary injunctive relief. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725-26 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017) ("Because

preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted."); *see also Synthes USA, LLC v. Davis*, No. 4:17-CV-02879-RBH, 2017 WL 5972705, at *3 n.7 (D.S.C. Dec. 1, 2017) (rejecting argument that supplemental affidavit "rife with hearsay" submitted in support of a motion for preliminary injunction should be disregarded because "it is permissible to consider hearsay evidence in ruling on a motion for a preliminary injunction.").

Israel relies on cases for the incorrect proposition that courts may not rely on statements in affidavits that may constitute hearsay when deciding whether to issue a temporary injunction. (Initial Brief of Appellant, p. 7.) Two of those cases were issued in the context of motions for summary judgment and have no bearing on the issue present here.[3] First, in *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993), this Court held that an affidavit, which failed to set forth the affiant's knowledge or belief, or any basis for such knowledge or belief, amounts to inadmissible hearsay and cannot be relied on to establish the existence of a fact for the purposes of summary judgment. Likewise, in *Jones v. Doe*, 372 S.C.

[3] In addition to the two cases referenced in this paragraph, Israel also relies on a third case from the Western District of North Carolina. (*See* Initial Brief of Appellant, p. 7) (citing *Fairfield Resorts, Inc. v. Fairfield Mountains Prop. Owners Ass'n Inc.*, 2007 WL 186537 (W.D.N.C. Jan. 22, 2007). While the North Carolina District Court found the plaintiff failed to establish a need for an injunction by relying "purely" on hearsay and speculation, that decision was issued prior to, and is inconsistent with, the Fourth Circuit's holding in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d at 726, noted above, and as followed by other courts in South Carolina. *Synthes USA, LLC*, 2017 WL 5972705 at *3; *S.C. Progressive Network Educ. Fund v. Andino*, 493 F. Supp. 3d 460, 466 (D.S.C. 2020). In any event, JDI relied on more than pure hearsay and speculation, as detailed above.

53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006), this Court found that hearsay testimony is insufficient for purposes of summary judgment.

JDI acknowledges the well-established rule that hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment. *Trustees of Erskine Coll. v. Cent. Mut. Ins. Co.*, 270 S.C. 118, 123, 241 S.E.2d 160, 163 (1978) (unsworn statements containing hearsay evidence are not to be considered in a motion for summary judgment); *Hall v. Fedor,* 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (hearsay that does not fall under any hearsay exception would be inadmissible at trial and is also inadmissible at the summary judgment stage). But JDI has not moved for summary judgment.

Instead, JDI has moved for and obtained a temporary injunction to preserve the status quo until a trial on the merits can occur. The Trial Court properly considered the information presented to it in issuing a temporary injunction. Israel seeks to impose the full rigors of the rules of evidence applicable to trials, or at least the heightened rules applicable to summary judgment, to apply with full force to the early informal stages of a preliminary injunction. Based on the above, that is not the correct standard and the Trial Court's Order should be affirmed.

C. The "Balancing the Equities" Consideration is "Subsumed" Within the Three-Part Test for Establishing Preliminary Injunctive Relief

Finally, Israel argues that the Trial Court erred by weighing the relative harms to each party to determine if an injunction was warranted. (Initial Brief of Appellant, pp. 9-10.) While the Trial Court clearly examined each of the three factors required to issue a preliminary injunction, even assuming the Trial Court "balanced the equities," it was not reversible error for it to do so, as demonstrated by the very case cited by Israel.

In *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, the appellant argued the trial court committed reversible error by refusing to balance the equities before enforcing a non-

complete agreement. 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). In the end, the Supreme Court of South Carolina reversed on other grounds, finding the trial court erred by replacing, or "blue penciling," an unreasonable territorial restriction in the agreement with one of its own. As to the issue of whether the trial court erred by not balancing the equities, the Supreme Court of South Carolina simply "clarif[ied] that there is no *separate requirement* that a judge perform such a balancing before deciding to issue a preliminary injunction." *Poynter*, 387 S.C. at 586, 694 S.E.2d at 17 (emphasis added). Instead, "the balancing requirement is *subsumed* by the irreparable harm and inadequate remedy at law components of the three-part test." *Poynter*, 387 S.C. at 587, 694 S.E.2d at 17 (emphasis added).

In short, the *Poynter* case did not eliminate the balancing factor, or otherwise declare its consideration to be forbidden or reversible error. Instead, the Supreme Court of South Carolina simply found that it is "subsumed" by, or part of, the three-factor test that the Trial Court here found JDI satisfied for injunctive relief.

Here, the Trial Court simply observed, as it was sitting in equity, that it appeared that granting the temporary injunction would have little impact on Israel. (Order, pp. 5-6, ¶ 23.) This was not only permissible, but the Trial Court was doing nothing more than simply reflecting on a factor that might have a bearing on the amount of the required surety bond. (*See* Order, p. 9, ¶ 8.) Indeed, Rule 65(c), SCRCP, requires a movant awarded temporary injunctive relief to post a security bond, "*in such sum as the court deems proper*" to pay the "costs and damages as may be incurred or suffered by any party who is found to have been *wrongfully enjoined or restrained*." Thus, in order to comply with the mandate of Rule 65(c), a court will necessarily need to assess the potential harm to a party in order to require the posting of a security bond in an amount the court deems sufficient to protect the other party in the event the injunction is ultimately deemed

improper.[4] Certainly, the Trial Court did not err by considering a factor that is already incorporated into the requirements for obtaining equitable relief. Accordingly, this Court should affirm the Trial Court's Temporary Injunction Order.

CONCLUSION

For the reasons explained above, JDI respectfully requests that the Court affirm the Circuit Court's Temporary Injunction Order.

February 11, 2022

Respectfully submitted,

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[4] Assessing the potential harm to an enjoined party is inevitable given that a bond in a nominal amount does not satisfy Rule 65(c). Instead, the security bond must provide "an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper." *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007). In order to meaningfully protect a potentially wrongfully enjoined party, the court must consider the potential harm to that party as a result of an injunction.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2021-001137

JENNINGS-DILL, INC., ... Respondent,

v.

ERIC ISRAEL, ... Appellant.

PROOF OF SERVICE

I certify that I have served Respondent Jennings-Dill, Inc.'s Initial Brief of Respondent on the Appellant by sending his attorney of record a copy of the same via electronic mail and first class mail, properly addressed, postage prepaid at the following address:

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