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A NEW AGE OF DISCOVERY: YOUR TRADE SECRETS ARE SAFE IN SOUTH CAROLINA

I. INTRODUCTION

Maintaining the confidentiality of trade secrets has long been a great concern in the business community. This concern is magnified when a business involved in litigation is served with a discovery request that seeks to access such secret information. While many jurisdictions have adopted legislation designed to help businesses protect trade secrets, few have included provisions requiring courts to take specific measures to provide protection for this type of information during the discovery process. Courts in these jurisdictions rely on existing rules of civil procedure to provide the necessary protection for material that is determined to be a trade secret.

With the enactment of the South Carolina Trade Secrets Act (Trade Secrets Act),¹ South Carolina has crossed into new territory by requiring courts to take several steps before allowing discovery of information that its holder designates as a trade secret. This comment examines the amendments to Chapter 8 of Title 39 of the South Carolina Code of Laws, which effectively repealed South Carolina's adoption of the Uniform Trade Secrets Act² and replaced it with the South Carolina Trade Secrets Act. Specifically, this comment inspects the discovery provisions found in section 39-8-60 of the Trade Secrets Act. Part II begins with a brief discussion of why trade secrets deserve special protection during litigation and an overview of the Uniform Trade Secrets Act. Part III focuses on the discovery provisions in the Trade Secrets Act and how South Carolina's new method of protecting secret information during the discovery process compares to the route taken by other jurisdictions. The final section analyzes the constitutionality of the legislation and whether it infringes upon the South Carolina Supreme Court's power to promulgate rules of practice and procedure.

II. BACKGROUND

A. Trade Secrets and the Need for Protection

The distinction between trade secrets and patented material has long been a source of confusion. Trade secrets and patents share an important similarity:

1. S.C. CODE ANN. §§ 39-8-10 to -130 (Law. Co-op. Supp. 1997).

2. S.C. CODE ANN. §§ 39-8-1 to -11 (Law. Co-op. Supp. 1996) (repealed 1997).

they are both a source of competitive advantage.³ However, they confer this advantage very differently. A valid patent provides a legal monopoly over some property or process, such as an invention, by granting its holder the exclusive right to make, use, or sell the invention in the United States for twenty years.⁴ The inventor is given this monopoly in exchange for full disclosure of the patented material.⁵ The subject matter of the patent becomes public knowledge, but the holder of the patent retains the right to prevent anyone else, even an inventor who subsequently discovers the same idea entirely on his own, from using the patented idea or invention.⁶ This window of absolute protection for a patentee "is the price the public pays for [this] disclosure."⁷

In contrast, a trade secret is information used in one's trade or business that gives its holder an advantage over competitors who do not possess the secret.⁸ However, unlike patented material, information constituting a trade secret is not legally protected from use by others.⁹ Consequently, anyone who discovers the contents of a trade secret by fair means is at liberty to use the information with impunity.¹⁰ However, unlike a patentee's monopoly, a trade secret holder's advantage is not subject to predetermined expiration; instead, the holder of a trade secret "may keep his invention secret and reap its fruits indefinitely."¹¹ But in the final analysis, a trade secret is valuable only so long as its holder can prevent its unlimited disclosure.

Thus, corporations involved in litigation are often concerned that the court will compel disclosure of trade secrets during discovery. Although these secrets may be relevant to the adjudication of a claim, the protection of such secrets is vital to the continuing development of new technology. A company's incentive to invest in research, which is essential to the conception and development of new products, is contingent upon maintaining the confidentiality of information learned during the research process.¹² The United States Supreme Court has recognized that disclosure of this sensitive information in the judicial process threatens continued innovation and competitiveness and strips information

3. See *E.I. Du Pont De Nemours & Co. v. United States*, 288 F.2d 904, 911 (Ct. Cl. 1961).

4. 35 U.S.C. § 154 (1994).

5. *Du Pont*, 288 F.2d at 911.

6. *Id.*

7. 2 ROGER M. MILGRIM, *MILGRIM ON TRADE SECRETS* § 8.02[4] (1997) (citing *Flanigan v. Ditto, Inc.*, 84 F.2d 490, 495 (7th Cir. 1936)).

8. *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 89-90 (Minn. 1979) (citing *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 211 (Tex. Civ. App. 1973)).

9. See *Du Pont*, 288 F.2d at 911.

10. *Id.*

11. *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 225 (2d Cir. 1971) (quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933)).

12. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 472 (1991).

developers of the advantages the trade secret would have provided in the marketplace.¹³ Finally, dissemination of trade secrets during litigation has been blamed for decreases in stock prices¹⁴ and negative effects on a corporation's public image.¹⁵

B. The Uniform Trade Secrets Act

In response to the growing concern over the protection of trade secrets, the National Conference of Commissioners on Uniform State Laws approved the Uniform Trade Secrets Act in 1979.¹⁶ Section five of the Uniform Act addresses the role of courts in protecting trade secrets during the discovery phase of a judicial proceeding.¹⁷ However, it fails to clearly specify how courts should provide this protection. Section five merely states that courts "shall preserve the secrecy of an alleged trade secret by reasonable means."¹⁸ The section then suggests four nonexclusive methods a court may employ to satisfy this requirement.¹⁹ These suggestions include "granting protective orders . . . ,

13. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 486 (1974).

14. See generally *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d. Cir. 1989) (involving an assertion that disclosure of secret information caused stock prices to drop 33%); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986) (evaluating a claim that disclosure of information caused "wide gyrations in the values of the defendants' stock").

15. *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 79 (N.D. Ga. 1990) (questioning whether disclosure of information would harm the defendant's reputation as a safe blood collector).

16. UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 433 (1990) [hereinafter UNIFORM ACT]. This act provides:

§ 1. Definitions.

As used in this [Act], unless the context requires otherwise:

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

....

§ 5. Preservation of Secrecy.

In an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

17. See UNIFORM ACT § 5, 14 U.L.A. 461 (1990).

18. *Id.*

19. *Id.*

holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.”²⁰

Forty-one states and the District of Columbia have enacted legislation based on the Uniform Act.²¹ With the exception of South Carolina, no jurisdiction has expanded section five, and most jurisdictions have incorporated this section’s general language directing courts to use “reasonable means” to prevent the dissemination of trade secrets during the discovery phase of a judicial proceeding. South Carolina’s trade secret law now includes stringent requirements for courts to follow when discovery requests involve trade secrets. Unlike South Carolina, most jurisdictions that have passed legislation designed to protect trade secrets have relied on existing rules of civil procedure to empower courts to take measures to prevent the dissemination of material that either party considers to be a trade secret.²²

III. ANALYSIS

A. *The South Carolina Trade Secrets Act*

In 1992 the South Carolina General Assembly enacted the predecessor of the Trade Secrets Act, which was virtually identical to the Uniform Act.²³

20. *Id.*

21. See ALA. CODE §§ 8-27-1 to -6 (1993); ALASKA STAT. §§ 45.50.910 to .945 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 44-401 to -407 (West 1956); ARK. CODE ANN. §§ 4-75-601 to -607 (Michie 1996); CAL. CIVIL CODE §§ 3426 to 3426.11 (West 1997); COLO. REV. STAT. §§ 7-74-101 to -110 (1997); CONN. GEN. STAT. ANN. §§ 35-50 to -58 (West 1958); DEL. CODE ANN. tit. 6, §§ 2001 to 2009 (1993); D.C. CODE ANN. §§ 48-501 to -510 (1997); FLA. STAT. ANN. §§ 688.001 to .009 (West 1990); GA. CODE ANN. §§ 10-1-760 to -767 (1994); HAW. REV. STAT. ANN. §§ 482B-1 to -9 (Michie 1995); IDAHO CODE §§ 48-801 to -807 (1997); 765 ILL. COMP. STAT. ANN. 1065/1 to 1065/9 (West 1993); IND. CODE ANN. §§ 24-2-3-1 to -8 (Michie 1996); IOWA CODE ANN. §§ 550.1 to .8 (West 1997); KAN. CIV. PROC. CODE ANN. §§ 60-3320 to -3330 (West Supp. 1996); KY. REV. STAT. ANN. §§ 365.880 to .900 (Michie 1996); LA. REV. STAT. ANN. §§ 51:1431 to :1439 (West 1987); ME. REV. STAT. ANN. tit. 10, §§ 1541 to 1548 (West 1964); MD. CODE ANN., COM. LAW I §§ 11-1201 to -1209 (1990); MINN. STAT. ANN. §§ 325C.01 to .08 (West 1995); MISS. CODE ANN. §§ 75-26-1 to -19 (1972); MO. ANN. STAT. §§ 417.450 to .467 (West Supp. 1997); MONT. CODE ANN. §§ 30-14-401 to -409 (1997); NEB. REV. STAT. §§ 87-501 to -507 (1994); NEV. REV. STAT. ANN. §§ 600A.010 to .100 (Michie 1994); N.H. REV. STAT. ANN. §§ 350-B:1 to -B:9 (1995); N.M. STAT. ANN. §§ 57-3A-1 to -7 (Michie 1995); N.D. CENT. CODE §§ 47-25.1-01 to .1-08 (Supp. 1997); OHIO REV. CODE ANN. §§ 1333.61 to .69 (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 78, §§ 85 to 94 (West 1995); OR. REV. STAT. §§ 646.461 to .475 (1988); R.I. GEN. LAWS §§ 6-41-1 to -11 (1992); S.C. CODE ANN. §§ 39-8-10 to -130 (Law. Co-op. Supp. 1997); S.D. CODIFIED LAWS §§ 37-29-1 to -11 (Michie 1994); UTAH CODE ANN. §§ 13-24-1 to -9 (1996); VT. STAT. ANN. tit. 9, §§ 4601 to 4609 (Supp. 1997); VA. CODE ANN. §§ 59.1-336 to .1-343 (Michie 1992); WASH. REV. CODE ANN. §§ 19.108.010 to .940 (West 1989); W. VA. CODE §§ 47-22-1 to -10 (1996); WIS. STAT. ANN. § 134.90 (West 1989).

22. See *infra* notes 38-73 and accompanying text.

23. S.C. CODE ANN. §§ 39-8-1 to -11 (Law. Co-op. Supp. 1996) (repealed 1997).

Passage of the 1992 legislation reflected the pro-business attitude of the state's leaders in the early 1990s.²⁴ South Carolina's rise as a leading contender for new business development led to a concerted effort by many of the state's leaders to create incentives designed to lure new businesses to the state.²⁵ In 1997, the General Assembly replaced South Carolina's version of the Uniform Act with the Trade Secrets Act. With the exception of section 39-8-60(B), the Trade Secrets Act does not substantially alter the original version. Section 39-8-60(B), an entirely new provision, commands that courts take specific measures and make detailed findings before allowing discovery of information that one party to a judicial proceeding claims is a trade secret.²⁶

The Trade Secrets Act retains the general provisions found in section five of the Uniform Act regarding the courts' role in protecting trade secrets during judicial proceedings.²⁷ This provision bestows upon a court the authority and power to use reasonable means to protect a trade secret.²⁸ Although the new Trade Secrets Act suggests protective measures, the trial judge has discretion to determine which means to use.²⁹ However, with regard to the discovery phase of a proceeding, the Trade Secrets Act goes farther. Section 39-8-60(B) requires that courts take specific action when a party seeks discovery of information that is regarded by its holder as a trade secret.³⁰ This section

24. See generally 1996 S.C. DEP'T COM. ANN. REP. 4 [hereinafter ANNUAL REPORT] (explaining many of the steps taken by the state to attract new business and encourage the growth of existing businesses). The genesis of this effort was the General Assembly's formation of the South Carolina Department of Commerce in 1993. One of the Department's overall goals is to attract and maintain economic growth in the state. The Department comprises five divisions. While each of the five divisions has an impact on attracting new business to the state, two of the divisions have responsibilities that are tied directly to attracting new investment. The Business Development Department is viewed as the front line in the state's efforts to attract new business. *Id.* The Technology Development division is responsible for developing strategies to attract high-tech companies to South Carolina. *Id.* at 5.

25. John Welbes, *Incentives for Aiken Tire Plant Represent Trend as State Lures Industries*, THE STATE (Columbia, S.C.), Oct. 5, 1997, at G1. Welbes highlighted several economic incentives, such as property tax reductions, that South Carolina has used to lure large business projects in recent years. Welbes concludes, "When a large project has beckoned, the state hasn't hesitated to provide substantial economic incentives." *Id.*

26. S.C. CODE ANN. § 39-8-60(B) (Law. Co-op. Supp. 1997).

27. § 39-8-60(A).

28. *Id.*

29. *Id.*

30. Section 39-8-60(B) provides:

In any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is a substantial need by the party seeking discovery for the information.

"Substantial need" as used in this section means:

(1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;

commands courts to determine whether the party seeking discovery has a "substantial need" for the material for purposes of preparing its case.³¹ In essence, the statute establishes a four-part inquiry that the party seeking discovery must satisfy in order to gain access to the information. First, the court must examine the party's initial pleading to determine whether a "factual predicate for or against liability" is established therein.³² Second, the court must determine whether the information being sought is "directly relevant" to the case.³³ Third, the court must find that the party seeking discovery of the information will be "substantially prejudiced" if denied access.³⁴ Finally, the court must conclude that information derived from the trade secret will be admissible at trial.³⁵ This four-part inquiry was absent from South Carolina's version of the Uniform Act, and no similar provision exists in the trade secrets act of any other jurisdiction. The inquiry places the burden squarely on the party seeking discovery to prove it has a substantial need for the information without requiring the company or individual opposing discovery to show why the information should not be revealed.

The General Assembly has a clear motive for incorporating this restrictive provision in the amended version of the Trade Secrets Act. The pro-business provisions go to great lengths to protect information that is allegedly vital to a company's livelihood and competitive edge in the marketplace. This type of legislation furthers the state's efforts to attract relocating businesses, especially in the manufacturing and technology fields, which bring new jobs and investment capital.³⁶ Additionally, the increased protection curbs the risk of lawsuits being filed against businesses for the sole purpose of forcing disclosure of confidential information during the course of litigation.³⁷ However, it also provides a wealth of protection for parties opposing discovery of such information while leaving opposing parties at a distinct disadvantage.

(2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading;

(3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and

(4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.

§ 39-8-60(B).

31. *Id.*

32. § 39-8-60(B)(1).

33. § 39-8-60(B)(2).

34. § 39-8-60(B)(3).

35. § 39-8-60(B)(4).

36. ANNUAL REPORT, *supra* note 24, at A-4. This table shows that in 1996 new manufacturing investment in South Carolina totaled greater than five billion dollars, and the manufacturing sector served as the source of over 19,500 new jobs.

37. See Miller, *supra* note 12, at 471.

B. The Discovery Provisions Contained in the South Carolina Trade Secrets Act Are Not the Most Effective Means of Providing Balanced Protection During Litigation

South Carolina is the first jurisdiction to adopt legislation based on the Uniform Act that adds special provisions targeted at the protection of trade secrets during the discovery phase of a trial. Courts in most jurisdictions have employed existing rules of civil procedure to determine whether discovery of information containing trade secrets should be allowed.³⁸ These jurisdictions typically use an analysis based on Rule 26(c) of the Federal Rules of Civil Procedure³⁹ to achieve the same goals the General Assembly envisioned when it enacted section 39-8-60(B). Like many states, South Carolina has adopted, verbatim, Federal Rule 26(c).⁴⁰ This rule provides in relevant part:

Upon motion by a party or by the person from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.⁴¹

At first blush, section 39-8-60(B) of the Trade Secrets Act appears to provide courts with better guidance because it establishes a rigid test they must follow when evaluating discovery requests. However, Rule 26(c)(7) is a superior mechanism because the rule allows courts to fashion this needed protection based on the individual circumstances of each case. Through years of applying the rule, courts have developed an effective test that balances the rights and interests of both the party seeking discovery of the information and the party desiring to keep the information secret.

Courts have recognized that “there is no absolute privilege for trade secrets and similar confidential information.”⁴² However, courts have

38. See *infra* notes 42-73 and accompanying text.

39. FED. R. CIV. P. 26(c).

40. See S.C. R. CIV. P. 26(c).

41. *Id.*

42. Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 362 (1979) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2043, at 300 (1970)); see *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981); *Gohler v. Wood*, 162 F.R.D. 691, 693 (D. Utah 1995); *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 507 (E.D.N.Y. 1987); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985); *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316, 1319 (Colo. 1984) (en banc); *Beta Squared, Inc. v. Thor Designs*, No. 307139, 1993 WL 128530, at *2 (Conn. Super. Ct. Apr. 19, 1993); *Philadelphia Gear Corp. v. Power Transmission Servs., Inc.*, No. CIV.A.11364, 1991 WL 29957, at *2 (Del. Ch. Mar. 6, 1991).

generally recognized the need to provide protection for this type of information and have used a three-prong balancing test based on Rule 26(c) to determine when such protection is necessary. The first two prongs of the test are derived from the "good cause" requirement⁴³ found in Rule 26(c)(7), which requires a party resisting disclosure to establish why protection is necessary.⁴⁴ The first prong requires the party resisting disclosure to demonstrate that the requested information actually constitutes a trade secret.⁴⁵ Most jurisdictions adopting the Uniform Act's definition⁴⁶ have relied on four factors to determine whether material is a trade secret.⁴⁷ These factors include: "(1) the extent to which information is known outside the business; (2) the extent to which information is known to those inside the business; (3) the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors."⁴⁸

The second prong of the test looks at whether disclosure of the information would result in "cognizable harm" to the party opposing discovery.⁴⁹ The objecting party must show that disclosure is likely to result in a serious and identifiable injury.⁵⁰ Although hard and fast rules concerning this showing have

43. Although many courts treat this as a two-prong test, some consolidate and rely on one six-factor test to determine whether the party opposing discovery has proven that good cause for protection exists. The first four factors are identical to the factors used in the first prong of the two-part test. However, courts using the consolidated approach also consider "[t]he amount of effort or money expended by the defendant in developing the information" and "[t]he ease or difficulty with which the information could be properly acquired or duplicated by others." *State ex rel. Arrow Concrete Co. v. Hill*, 460 S.E.2d 54, 57 (W.Va. 1995) (quoting *State ex rel. Johnson v. Tsapis*, 419 S.E.2d 1, 3 (W. Va. 1992)).

44. See FED. R. CIV. P. 26(c)(7).

45. See *Gohler*, 162 F.R.D. at 693.

46. See UNIFORM ACT § 1(4), *supra* note 16.

47. See, e.g., *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (finding that plaintiff failed to satisfy four factors required for information to be considered a trade secret). The South Carolina Trade Secrets Act attempts to clarify the Uniform Act's definition:

A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. CODE ANN. § 39-8-20(5)(b) (Law. Co-op. Supp. 1997).

48. *Barron's*, 428 F. Supp. at 203.

49. *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 507 (E.D.N.Y. 1987); see *Pulsecard, Inc. v. Discover Card Servs., Inc.*, No. CIV.A.94-2304-EEO, 1995 WL 526533, at *5-6 (D. Kan. Aug. 31, 1995) (quoting *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981)).

50. Jacqueline S. Guénégou, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 FORDHAM L. REV. 541, 554

been labeled inappropriate, courts have found that conclusory statements about generalized harm are not sufficient to satisfy this part of the test.⁵¹ Mere allegations will not guarantee protection under this test.⁵² When litigation involves a competitor, a corporation has an easier time establishing a defined injury to its business if it can demonstrate a threat to financial well-being.⁵³

The burden of satisfying the first two prongs of this test rests with the party opposing disclosure of the information.⁵⁴ Placing the burden on this party is proper for two reasons. First, because evaluation of these factors determines whether good cause for protection exists, the party attempting to prevent discovery should be required to prove why protection is necessary. Second, the party resisting discovery is in the best position to prove these factors because it is likely to be the only party with ready access to necessary documentation.

If the party challenging discovery satisfies its burden of proving good cause for protection, the third prong of the test then shifts the burden to the party seeking discovery to prove the information is relevant and necessary to the action.⁵⁵ This component is not satisfied if the party's arguments consist primarily of supposition; rather, the party must demonstrate "a particularized showing of substantial need."⁵⁶ This demonstration requires the party to illustrate how the information requested will provide a necessary or essential component in its case.⁵⁷ Because "[r]elevancy is construed more broadly during discovery than at trial,"⁵⁸ the party seeking discovery need only show that the

(1991) (citing *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).

51. See, e.g., *Pulsecard*, 1995 WL 526533, at *7 ("[I]n order to show good cause, the injury which allegedly will result from disclosure must be shown with specificity, and that conclusory statements to this effect are insufficient." (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981))).

52. See *IBM Corp.*, 67 F.R.D. at 47-48 (finding an allegation that disclosure of information would be of value to its competitors to be too speculative).

53. See *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989) ("In a competitive market, an entity's commercial information, its strategies, techniques, goals and plans can be its life blood."); Guénégo, *supra* note 50, at 554-55.

54. See *Automation Sys. Integration, Inc. v. Autoswage-Products, Inc.*, No. 128808, 1996 WL 278275, at *3-4 (Conn. Super. Ct. May 6, 1996) (finding that the party seeking protection of the information failed to prove the information was a trade secret or that good cause existed to protect the alleged trade secret).

55. *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (requiring the plaintiff to prove the necessity and relevance of defendant's sales data to the case); *ITT Electro-Optical Prods. Div. v. Electronic Tech. Corp.*, 161 F.R.D. 228, 231 (D. Mass. 1995) (finding that because the defendant met its burden of proving the first two prongs of the inquiry, the burden shifted to the opposing party to prove that the information was relevant and necessary to the action); *Goodyear Tire & Rubber Co. v. Cooley*, 359 So. 2d 1200, 1202 (Fla. Dist. Ct. App. 1978) ("Once the party seeking a protective order has shown good cause therefore the party seeking the discovery then has the burden . . . of demonstrating reasonable necessity.").

56. *In re Independent Serv. Orgs. Antitrust Litig.*, 162 F.R.D. 355, 358 (D. Kan. 1995).

57. *Id.* (finding that the defendant did not satisfy its burden of showing how the names of the plaintiffs' suppliers were necessary or essential components of its defense).

58. *ITT Electro-Optical*, 161 F.R.D. at 231 (citing *Centurion Indus., Inc. v. Warren Steurer*

information sought will be admissible or appear reasonably certain to lead to the discovery of admissible evidence.⁵⁹ Although the party seeking discovery need not prove the information will be used at trial, the test does act as a judicial screen by serving to reject discovery requests aimed solely at obtaining trade secrets that do not have any logical relationship to the case.

This third prong serves as the final weight in this balancing test. If the party promoting discovery fails to prove relevancy and need, the trade secrets should not be disclosed. On the other hand, the trade secrets should be disclosed if that party does meet its burden, and the injury that might result is not proven by its holder.⁶⁰ However, when both parties satisfy their respective burdens, the court must then balance the need for disclosure with the severity of the injury that will result if discovery is allowed.⁶¹

Once a court concludes the trade secrets should be disclosed, the inquiry has not ended. The court must then determine in what manner and to whom the information should be disclosed.⁶² At this point, the court must determine whether widespread dissemination of the trade secret will result in "annoyance, embarrassment, oppression, or undue burden or expense" to the trade secret's holder.⁶³ This requires balancing the potential harm to the party seeking protection and the importance of public disclosure.⁶⁴ Courts have "broad discretion to control the scope of discovery,"⁶⁵ and, therefore, a great deal of flexibility in crafting the contents and scope of protective orders.⁶⁶ This allows courts to use protective orders to limit dissemination of information to the parties in the case and restrict the use of such information to litigation purposes.⁶⁷ Although courts have broad discretion under rule 26(c)(7) to craft

& Assocs., 665 F.2d 323, 326 (10th Cir. 1981)).

59. *See id.*; *East Colonial Refuse Serv., Inc. v. Velocci*, 416 So. 2d 1276, 1277 (Fla. Dist. Ct. App. 1982); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 216 S.E.2d 379, 381 (N.C. Ct. App. 1975).

60. *ITT Electro-Optical*, 161 F.R.D. at 231.

61. *Id.*

62. *Miller*, *supra* note 12, at 434 ("Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should be disclosed only in a designated way . . .").

63. FED. R. CIV. P. 26(c).

64. *Miller*, *supra* note 12, at 434-35.

65. JAMES F. FLANAGAN, *SOUTH CAROLINA CIVIL PROCEDURE* 225 (2d ed. 1996) (citing *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 319 S.E.2d 695 (1984)).

66. *Miller*, *supra* note 12, at 435.

67. *Gohler v. Wood*, 162 F.R.D. 691, 697 (D. Utah 1995) (stating that a protective order limiting disclosure of information to those who were necessarily involved in the case, and limiting the use of the information to purposes of the litigation, properly protected the confidentiality concerns of the defendant). *See, e.g., Bank of N.Y. v. Meridien Biao Bank Tanz. Ltd.*, 171 F.R.D. 135, 144-45 (S.D.N.Y. 1997) (finding that an order requiring the party seeking discovery to identify any experts to whom it planned to show the information was adequate to protect the interests of the holder).

and issue protective orders, this freedom is not without boundaries. For example, courts cannot delegate their responsibility to oversee the discovery process by fashioning protective orders that allow the parties to determine what information will be released to the public.⁶⁸

Protective orders are often criticized as violative of the First Amendment right to free speech.⁶⁹ However, the United States Supreme Court has rejected this argument and upheld the use of judicial discretion to restrict dissemination of confidential information during pretrial civil discovery.⁷⁰ The Court reasoned that pretrial discovery is not a public component of a civil trial, and thus restrictions on dissemination of this information do not deny access to truly public information.⁷¹

In conclusion, the test used by most jurisdictions is a better method than the discovery provisions found in the Trade Secrets Act for determining whether to allow discovery of material one party claims is a trade secret. Section 39-8-60(B) of the Trade Secrets Act strips courts of their discretion by commanding them, when faced with a discovery request that seeks access to information that may contain a trade secret, to require parties seeking discovery to prove a substantial need for the information.⁷² The statutory rule further limits judicial flexibility by providing a four-part definition of substantial need.⁷³ While section 39-8-60(B) goes to great lengths to provide much needed protection for businesses and individuals possessing trade secrets, it fails to address the concerns of an opposing party who legitimately needs the information in order to prepare for trial.

In contrast, the test based on Rule 26(c) balances the interests of both the party seeking discovery and the party opposing disclosure and also provides adequate protection for the sensitive information. The test first requires the party opposing discovery to prove that the information should be protected,

68. See *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (requiring modification or vacation of a protective order that allowed the parties to control access to court papers by deciding between themselves what information to release to the public); *Aetna Cas. & Sur. Co. v. George Hyman Constr. Co.*, 155 F.R.D. 113, 116 (E.D. Pa. 1994) (rejecting a protective order that gave each party the power to select which documents should be treated as confidential because the order resulted in judicial discretion yielding to private judgment).

69. See *Miller*, *supra* note 12, at 436 ("[M]any courts and commentators argued that the First Amendment itself limited a court's power to issue a protective order, regardless of the content of the applicable procedural rules.").

70. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) ("[W]here . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.").

71. *Id.* at 33; see also *Howard Publications, Inc. v. Lake Mich. Charters, Ltd.*, 649 N.E.2d 129, 132 (Ind. Ct. App. 1995) (applying the reasoning of *Seattle Times* to uphold a protective order that prohibited disclosure of confidential material to parties not involved in the litigation).

72. S.C. CODE ANN. § 39-8-60(B) (Law. Co-op. Supp. 1997).

73. *Id.*

thus preventing that party from avoiding discovery of damaging information simply by asserting that it contains trade secrets when it does not. Only when the party has established that the information is a trade secret does the burden then shift to the party seeking discovery to prove that it truly needs the information to adequately prepare its case. This final burden is the most difficult to satisfy. Essentially, the party seeking discovery is required to establish the relevancy of material to which it has never been privileged. In the interest of judicial efficiency, a party should not be saddled with such a burden until the court has been convinced the information is a trade secret. In the final analysis, the majority rule balances the rights of both parties by requiring each to prove its contentions.

C. The Discovery Provisions of the South Carolina Trade Secrets Act May Infringe upon the South Carolina Supreme Court's Authority to Promulgate Rules of Practice and Procedure.

Discovery has long been considered a procedural device; therefore, courts have exercised their power to promulgate rules governing this phase of judicial proceedings.⁷⁴ The South Carolina Supreme Court's power to establish rules of procedure and practice is derived from three sources: (1) statutory authority;⁷⁵ (2) the South Carolina Constitution;⁷⁶ and (3) the inherent powers

74. See *Hickman v. Taylor*, 329 U.S. 495, 505 (1947) ("The deposition-discovery rules create integrated procedural devices."); see also *Cole v. Cole Tomato Sales, Inc.*, 310 So. 2d 210, 212 (Ala. 1975) (recognizing Rule 26(c) as an efficient procedural mechanism by which to limit discovery); *Kutzgar v. Purcell*, 691 So. 2d 264, 265 (La. Ct. App. 1997) ("Discovery is a procedural device in pursuit of relief. It does not exist in the absence of a request for relief or for perpetuation of testimony in contemplation of potential litigation.").

Legislation infringing upon this power of the courts has frequently been met by constitutional challenges. See *Miller, supra* note 12, at 443-44. Miller discusses two instances when legislation dealing with protective orders was questioned because it allegedly infringed upon the authority of the judiciary to promulgate rules of practice and procedure. First, in 1991, the Florida legislature passed a bill that prohibited Florida courts "from entering orders that might have the effect of concealing 'public hazards' or any information that may be useful to the public in protecting against 'public hazards.'" *Id.* at 443. Although the legislature enacted the law with very little opposition, questions about the Act's constitutionality subsequently arose. *Id.* Concern developed over whether the legislature had overstepped its authority and intruded on the Florida Supreme Court's "exclusive authority over matters of civil practice and procedure." *Id.*

Second, in Louisiana, the legislature enacted a law that would have made it difficult for manufacturers in the state to protect trade secrets and other proprietary information. However, the Governor vetoed the bill because it unnecessarily interfered with judicial authority. *Id.* at 444.

75. S.C. CODE ANN. § 14-3-640 (Law. Co-op. 1976).

76. S.C. CONST. art. V, § 4.

of the judicial branch.⁷⁷

1. Statutory Authority

The statutory source of the South Carolina Supreme Court's rule-making power was first found in the Practice Act of 1791,⁷⁸ which gave the court power to implement rules governing procedure as long as such rules were not inconsistent with legislative enactments.⁷⁹ The current statutory grant of power provides that "[t]he court may establish and promulgate such rules and regulations as may be necessary to carry into effect the provisions of this article and to facilitate the work of the court."⁸⁰ This statutory provision and its historical predecessors have been labeled a delegation of the rule-making power from the General Assembly to the courts.⁸¹ Like any delegation of power, "the power conferred by such enabling legislation is not permanent and may be recalled, or the legislature may expunge, modify, or supersede particular court rules, even without the express reservation of that right."⁸²

2. Constitutional Rule-Making Authority

The constitutional source for the South Carolina Supreme Court's power over practice and procedure is found in article V of the South Carolina Constitution.⁸³ Section four of article V provides in pertinent part: "The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."⁸⁴ This section of article V unequivocally grants rule-making power to the supreme court, but it also limits this power by including language that presumably subordinates the court's power to that of the General Assembly.⁸⁵ Evidence of this subordination

77. See *infra* notes 104-19 and accompanying text.

78. No. 1491, § IV, 7 S.C. Stat. 260, 262 (McCord 1840) [hereinafter Practice Act].

79. Thomas DeWitt Rogers, III, Comment, *The Procedural Rule-Making Power of the South Carolina Supreme Court*, 30 S.C. L. REV. 625, 628 (1979) (citing § IV of The Practice Act of 1791). The Practice Act provided: "[T]he . . . courts may . . . make such just and reasonable rules and orders for the more regular and convenient conducting and effectual dispatch of business therein, as to them shall seem necessary and proper . . ." Practice Act, *supra* note 78, § IV.

80. S.C. CODE ANN. § 14-3-640 (Law. Co-op. 1976).

81. See Rogers, *supra* note 79, at 628.

82. *Id.* at 629 (footnotes omitted).

83. See S.C. CONST. art. V, § 4.

84. *Id.*

85. Rogers, *supra* note 79, at 630 (concluding that the "subject to the law" limitation indicates that the court's exercise of its rule-making power is not unchecked). Moreover, in *Stokes v. Denmark Emergency Medical Services*, 315 S.C. 263, 433 S.E.2d 850 (1993), the supreme court recognized that "[t]he clause 'subject to the statutory law' establishes the intent

of the court's authority also may be found in the requirements imposed by section 4A of article V.⁸⁶ This provision requires the supreme court to submit all proposed rules and amendments governing practice and procedure to the General Assembly for approval.⁸⁷ Indeed, in *Stokes v. Denmark Emergency Medical Services*,⁸⁸ the supreme court recognized that this provision does not grant exclusive rule-making authority to the court.⁸⁹ In *Stokes*, the plaintiff asserted that the General Assembly's enactment of section 15-33-125 of the South Carolina Code unconstitutionally infringed upon the court's rule-making authority.⁹⁰ The supreme court rejected this argument and noted that the General Assembly also has rule-making authority.⁹¹ The court found that section 4A "merely sets forth the procedure for the Court to follow when it promulgates rules and amendments. It does not restrict promulgation only to the Court."⁹² Therefore, even though the legislation had an impact on an existing procedural rule, the General Assembly's action did not infringe upon the court's authority to promulgate procedural rules and thus did not violate the constitution.⁹³

Although the *Stokes* opinion may be read so that the court's rule-making power is completely subordinate to the General Assembly, the supreme court has not actually defined the parameters of this subordination. Some jurisdictions have addressed this same issue and concluded that the power to promulgate truly procedural rules, such as rules governing discovery, is not subordinate to legislative action.⁹⁴ In *Winberry v. Salisbury*⁹⁵ the New Jersey

to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." *Id.* at 267, 433 S.E.2d at 852.

86. S.C. CONST. art. V, § 4A.

87. *Id.* This section provides:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

Id.

88. 315 S.C. 263, 433 S.E.2d 850 (1993).

89. *Id.* at 266, 433 S.E.2d at 852.

90. *Id.* at 266, 433 S.E.2d at 851.

91. *Id.* at 266, 433 S.E.2d at 852.

92. *Id.*

93. *Id.* at 267, 433 S.E.2d at 852.

94. See, e.g., *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1047 (Alaska 1981) (finding that an existing rule of civil procedure promulgated by the court prevailed over a statute that was procedural in nature); *Winberry v. Salisbury*, 74 A.2d 406, 414 (N.J. 1950) ("[T]he rule-making power of the [New Jersey] Supreme Court is not subject to overriding legislation, but . . . it is confined to practice, procedure and administration as such."); see also Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH.

Supreme Court examined the implications of a phrase in the New Jersey Constitution that similarly subordinated the court's rule-making authority.⁹⁶ This phrase provided: "The Supreme Court [of New Jersey] shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts."⁹⁷ In the court's opinion, the phrase "subject to law" refers to substantive law as distinguished from pleading and practice.⁹⁸ In fact, the phrase "serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such."⁹⁹ Although *Winberry* has been extensively debated,¹⁰⁰ application of that court's approach to the discovery provisions of the Trade Secrets Act would render these provisions unconstitutional because discovery is arguably a purely procedural mechanism and should be reserved for the judiciary.¹⁰¹ Such an approach may also be reconciled with the South Carolina Supreme Court's holding in *Stokes* because the legislation at issue in that case implicated the denial of the right to a jury,¹⁰² which arguably has substantive considerations and is not purely procedural.¹⁰³

3. *Inherent Rule-Making Power*

Courts in many jurisdictions have claimed an inherent power over practice and procedure,¹⁰⁴ however, these courts have failed to indicate the source of this power.¹⁰⁵ One court has stated that "[t]he inherent power of a court is an unexpressed quantity and an undefinable term, and courts have indulged in more or less loose explanations concerning it."¹⁰⁶ Although the source of this inherent power is vague, the following three theories of its origins have been advanced: "authority by necessity or implication, authority by historical

L. REV. 623, 630 (1957) ("[W]hen the purpose of the rule is to provide for the establishment and maintenance of the machinery essential for the efficient administration of judicial business, and it does only that, the scope of the inherent power vested in the courts is complete and supreme.").

95. 74 A.2d 406 (N.J. 1950).

96. *Id.* at 408.

97. N.J. CONST. art. 6, § 2, ¶ 3.

98. *Winberry*, 74 A.2d at 410.

99. *Id.*

100. See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 26 & n.119 (1958).

101. See Joiner & Miller, *supra* note 94, at 648-49.

102. *Stokes v. Denmark Emergency Med. Servs.*, 315 S.C. 263, 266, 433 S.E.2d 850, 851 (1993).

103. See Levin & Amsterdam, *supra* note 100, at 19.

104. Rogers, *supra* note 79, at 233 (citing Annot., 158 A.L.R. 705 (1945); Annot., 110 A.L.R. 22 (1937)).

105. See, e.g., *Bollinger v. National Fire Ins. Co.*, 154 P.2d 399, 405 (Cal. 1944) ("[T]his court is not powerless to formulate rules of procedure when justice demands it." However, the court never provided a source for this power.).

106. *In re Waugh*, 72 P. 710, 710 (Wash. 1903).

analogy, and authority by separation of powers."¹⁰⁷

The South Carolina Supreme Court has defined its inherent powers as "powers included within the scope of a court's jurisdiction which a court possesses irrespective of specific grant by Constitution or legislation. Such powers can neither be taken away nor abridged by the legislature."¹⁰⁸ Like many courts, the South Carolina Supreme Court has failed to identify the source of this power. However, in *Williams v. Bordon's, Inc.*,¹⁰⁹ the supreme court relied on the separation of powers doctrine to find a law that dictated when courts should grant continuances unconstitutional.¹¹⁰ The court found that its adjudicative power "carries with it the inherent power to control the order of its business to safeguard the rights of litigants."¹¹¹ According to the court, "[t]he authority to determine whether a continuance should be granted or denied" is within the inherent power of the court, and such judicial power cannot be exercised by the General Assembly without violating the constitution.¹¹²

The court's reasoning in *Williams* has been criticized because it is not in harmony with the court's historically flexible interpretation of the separation of powers clause.¹¹³ Moreover, one commentator described the court's holding as a "broad extension of the judicial power coupled with a strict interpretation of the separation of powers clause."¹¹⁴ However, the existence of such inherent judicial power has been recognized by many courts¹¹⁵ and commentators,¹¹⁶ so

107. Rogers, *supra* note 79, at 633.

108. *State ex rel. McLeod v. Hite*, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979) (citing 20 AM. JUR. 2D *Courts* § 78 (1995)); see *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965) ("The inherent powers of a court, which are essential to its existence and protection and to the due administration of justice . . . do not depend upon express constitutional or legislative grant."); *Hamaas v. State*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

109. 274 S.C. 275, 262 S.E.2d 881 (1980).

110. *Id.* at 280, 262 S.E.2d at 884. The separation of powers clause of the South Carolina Constitution provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8.

111. *Williams*, 274 S.C. at 279, 262 S.E.2d at 883.

112. *Id.* at 280, 262 S.E.2d at 884.

113. See Belton T. Zeigler, Survey, *Constitutional Law—Separation of Powers*, 33 S.C. L. REV. 21, 32 (1981).

114. *Id.*

115. See, e.g., *Kunkel v. Walton*, No. 81176, 1997 WL 720867, at *3 (Ill. Nov. 20, 1997) (deriving the court's inherent powers from "the undisputed duty of the court to protect its judicial powers from encroachment . . . and thus preserve an independent judicial department" (quoting *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952))); *People v. Bainter*, 533 N.E.2d 1066, 1070 (Ill. 1989) (stating that legislative action may not infringe upon the judiciary's inherent powers); *Goldberg v. Eighth Judicial Dist. Court*, 572 P.2d 521, 522 (Nev. 1977) ("[I]t is clear that the judiciary, as a coequal branch of government, has inherent powers

future reliance on this power to control procedure is not as misplaced as some might conclude.

In addition to the legal arguments, the policy arguments for vesting the court with the sole power to control procedure outweigh the advantages of sharing this power with the General Assembly. For example, judicial rules may be molded and changed by courts as needed, whereas rigid statutes require "all the pomp and circumstance of repeal or of legislative amendment before they can be abrogated or improved."¹¹⁷ Therefore the rule-making authority should rest in the judiciary because judicially promulgated rules grow out of the experiences of judges rather than out of "the ax-grinding desires of particular law-makers."¹¹⁸ Regular review and revision of procedural rules is required, and the General Assembly has neither the time nor the resources to carefully consider all of the implications such rules may have on the daily administration of justice.

Because the supreme court in South Carolina has not yet clearly defined the extent of its power to promulgate rules of practice and procedure, the outcome of a constitutional challenge to the discovery provisions of the Trade Secrets Act is unclear. The discovery provisions appear to be piecemeal legislative tinkering with judicially promulgated procedural rules.¹¹⁹ This tinkering diminishes the judicial wisdom and experience reflected in the rules of civil procedure.

IV. CONCLUSION

The South Carolina Trade Secrets Act provides much needed, general protection for information that can serve as a cornerstone for the vitality of businesses, especially in the manufacturing and technology industries. However, the special discovery provisions of the Trade Secrets Act fail to account for the rights and needs of parties that require access to such information in order to prepare for trial. By extending such one-sided protection to holders of trade secrets during the discovery process, the South Carolina General Assembly may have gone too far in its attempt to further the state's goal of becoming a leader in new business development. Statistics show that the realization of this goal has had, and is continuing to have, positive

to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice." (citations omitted)); *Maples v. State*, 791 P.2d 788, 790 (N.M. 1990) (explaining that the inherent powers of the court include the right to set the time period in which appeals are to be heard).

116. See Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 635 (1935); Joiner & Miller, *supra* note 94, at 629.

117. Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926).

118. *Id.*

119. See Levin & Amsterdam, *supra* note 100, at 38.

economic effects in South Carolina.¹²⁰ However, in attempting to complete this task, the General Assembly has ignored the importance of safeguarding litigants' interests.

Although the extent of the South Carolina General Assembly's control over judicial procedure is not clear, the legislature should yield to the wisdom of the judiciary in the area of discovery. Instead of following the rigid test set forth in the Trade Secrets Act, South Carolina courts should be permitted to follow the well-paved route blazed by the majority of jurisdictions in the United States. This avenue of providing protection accounts for the rights and needs of both the parties seeking discovery of the trade secrets and the holders of the information. Consequently, this method—based on existing procedural rules—provides a balanced approach, while at the same time affording sufficient protection for trade secrets.

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120. See ANNUAL REPORT, *supra* note 24, at A-4 (showing that new and expanding business investment in South Carolina totalled nearly \$6 billion in 1996).