

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 4889 (S.C. Ct. App. filed October 20, 2011)

Team IA, Inc.

Respondent,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC,

Defendants,

Of whom Cicero Lucas is

Petitioner,

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc.,

Third-Party Defendants.

APPENDIX
VOLUME II

Terry Richardson, Jr.
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(e) Keep any documents or material relating to these categories of information;

(b) Consciously attempt to memorize or retain any of this information; or

(c) Transfer any such information to Pyrotecnico.

67. At the time of his departure from Zambelli, Wood prepared a list of items that he was returning to Zambelli. In addition to turning in documents and materials such as videos relating to his work, Wood erased all electronic devices, including his Palm Pilot.

68. Ernie Simmons and Jeff Rolfe, another Zambelli employee, verified that the documents, materials and items referenced on Wood's list were actually returned or electronically deleted.

H. State of Competition for Customers and Employees Since Wood Departed

69. Pyrotecnico lost the City of Orlando, Florida as a customer to Zambelli in [*23] the past year.

70. Zambelli lost two casino customers in New York to Pyrotecnico in the past year. Wood was not involved in the process.

71. Pyrotecnico won a fireworks competition in August 2008 in Montreal, Canada. The competition included entrants from ten countries, with each entrant representing its home country. Pyrotecnico represented the United States. Wood did none of the design work on the show, but did work as a technician.

II. CONCLUSIONS OF LAW

A. Preliminary Injunction Standard

1. [HN1] A party which seeks a preliminary injunction must demonstrate the following four factors: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting a preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). "An irreparable injury is one that 'is not remote or speculative, but actual and imminent and for which monetary

damages cannot adequately compensate.'" *Tillery v. Leonard & Sciolla LLP*, 437 F. Supp. 2d 312, 329 (E.D. Pa. 2006) (quoting *FMC Corp. v. Control Solutions, Inc.*, 369 F. Supp. 2d 539, 573 (E.D. Pa. 2005)).

2. [*24] [HN2] "[T]he grant of injunctive relief is an extraordinary remedy . . . which should be granted only in limited circumstances." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988). "The injunction should issue only if the plaintiff produces evidence sufficient to convince the district Court that all four factors favor preliminary relief." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994); see also *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987).

B. General Principles Regarding Employment Restrictive Covenants

3. [HN3] An employer has a right to protect trade secrets, confidential information, goodwill, customer relationships and unique or extraordinary skills through the use of non-competition and non-solicitation agreements. *John G. Bryant Co. Inc. v. Sling Testing & Repair Inc.*, 471 Pa. 1, 369 A.2d 1164, 1167-68 (Pa. 1977); *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007). In addition, a restrictive covenant may be used to prevent a competitor from profiting from the "specialized training and skills" of a former employee. *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838, 846 (Pa. 1957). Because [*25] the injury resulting from the violation of a noncompetition agreement is difficult to quantify, "[t]he great weight of modern authority is to the effect that one who has been or will be injured [by violation of a covenant not to compete] is ordinarily entitled to the equitable remedy of injunction. . . ." *Records Center, Inc. v. Comprehensive Management, Inc.*, 363 Pa. Super. 79, 525 A.2d 433, 436 (Pa. Super. 1987).

4. Through his employment with Zambelli, Wood acquired the specialized knowledge and skills to successfully choreograph major aerial fireworks displays throughout the country. For example, Wood would not have had the opportunity to choreograph the Times Square New Year's Eve fireworks display but for his employment by Zambelli. Wood's choreography was marketed and promoted and Wood developed numerous relationships with Zambelli customers. The protection of Zambelli's customer goodwill is a legitimate business

interest and Zambelli is entitled to safeguard that interest through a reasonable restrictive covenant in Wood's employment agreement. The specialized training, knowledge and skill Wood acquired during his seven years of employment with Zambelli is also a legitimate interest that may be [*26] protected by a reasonable restrictive covenant.

5. [HN4] Restrictive covenants have historically been viewed with disfavor as a trade restraint that prevents an individual from earning a living. *Hess v. Gebhard & Co.*, 570 Pa. 148, 808 A.2d 912, 917-18 (Pa. 2002) (tracing historical development). Nevertheless, restrictive covenants are enforceable under Pennsylvania law if they are: (1) related to the employment or ancillary to the taking of employment; (2) supported by adequate consideration; (3) reasonably limited in time and geographic scope; and (4) reasonably designed to safeguard a legitimate interest of the former employer. *National Business Services Inc. v. Wright*, 2 F. Supp. 2d 701, 707 (E. D. Pa. 1998); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525, 527 (E. D. Pa. 1982); *Thermo-Guard, Inc. v. Cochran*, 408 Pa. Super. 54, 596 A.2d 188, 193-94 (1991) (superseded by rule on other grounds).

6. [HN5] An individual's right to pursue a career and to earn a livelihood is a unique and substantial interest. Thus, the enforcement of restrictive employment covenants is a matter of equity, rather than a pure legal exercise in contractual interpretation. *Hess*, 808 A.2d at 917. In *Morgan's Home Equipment*, 136 A.2d at 846, the Pennsylvania [*27] Supreme Court emphasized that in determining whether to enforce a post-employment restrictive covenant, the Court must balance the interest the employer seeks to protect against the important interest of the employee in being able to earn a living in his chosen profession. *Id.* Thus, a more stringent balancing test is applied when the restrictive covenants are ancillary to employment, as opposed to the sale of a business. *Hess*, 808 A.2d at 920.

7. [HN6] "Blue penciling," or reasonable alteration of the terms of an employment agreement, is permissible if the court deems a restrictive covenant to be broader than necessary to protect the interests of the former employer. Pennsylvania courts have long held that where a restrictive covenant is found to be overbroad and yet the employer is clearly entitled to some measure of protection from the acts of his former employee, the Court may grant such protection by reforming the

restrictive covenant and enforcing it as reformed. *Thermo-Guard*, 596 A.2d at 194 n.9; see also *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250, 254-55 (Pa. 1976). Consequently, if this Court determines that the scope of the 2005 Agreement is broader than necessary to protect Zambelli's [*28] interests, it may "blue pencil" the restrictive covenants.

C. Breach of the 2005 Employment Agreement

8. By failing to give proper three month notice of termination of his employment to Zambelli and by becoming employed by one of Zambelli's most significant competitors in the pyrotechnic industry, Wood has unquestionably breached the express terms of his employment agreement with Zambelli. Indeed, Defendants do not seriously contest that the terms of the 2005 Agreement were breached. Thus, the primary issue in this case is whether the 2005 Agreement is enforceable. [HN7] "The law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful." *John G. Bryant Co.*, 369 A.2d at 1169; *WellSpan Health v. Bayliss*, 2005 PA Super 76, 869 A.2d 990, 999 (Pa. Super. Ct. 2005). The Court turns now to several of the contentions raised by Defendants.

D. Sufficiency of Consideration

9. [HN8] "Pennsylvania law provides that when a restrictive covenant is executed after the commencement of employment, the covenant will not be enforced unless it is supported by new consideration provided at the time of the covenant." *In re Verdi*, 244 B.R. 314, 323-24 (Bankr. E. D. 2000); [*29] *Pres-Co Sys. USA, Inc. v. Bodell*, 2005 U.S. Dist. LEXIS 28140, 2005 WL 3071755, at *3 (E.D. Pa. Nov. 15, 2005). A corresponding benefit to the employee or a change in status or employment responsibilities is sufficient consideration to support a restrictive covenant. *Modern Laundry & Dry Cleaning Co. v. Farrer*, 370 Pa. Super. 288, 536 A.2d 409, 411-12 (Pa. Super. Ct. 1988). If a covenant is signed after employment has commenced a "beneficial change in an employee's status [is] sufficient consideration to support a restrictive covenant agreed to after the taking of employment." *M.S. Jacobs & Assoc. v. Duffley*, 452 Pa. 143, 303 A.2d 921, 922 (1973).

Notably, [HN9], "the Pennsylvania Courts have long held that the adequacy of consideration is not a factor to be considered in determining the validity and

enforceability of a contract." *Adelvision, L.P. v. Groff*, 859 F.Supp. 797, 805 (E.D. Pa. 1994) (distinguishing "adequacy" of consideration from "sufficiency" of consideration); *CertainTeed Corp. v. Williams*, 06-CV-2992, 2006 U.S. Dist. LEXIS 43199, 2006 WL 1762660, at * 7 (N.D. Ill. June 27, 2006) (vacated and remanded on other grounds, 481 F.3d 528 (7th Cir. 2007)) (construing Pennsylvania law to find that a raise of \$ 250.00 per month was sufficient consideration to support noncompete [*30] agreement); *Washovich v. McKeesport Municipal Water Authority*, 94 Pa. Commw. 509, 503 A.2d 1084, 1087 (Pa. Commw. Ct. 1986). The case relied upon by Defendants, *Gagliardi Bros., Inc. v. Caputo*, 538 F. Supp. 525, 538 (E.D. Pa. 1982), is distinguishable because the Court in that case found that the raise was totally unrelated to the restrictive covenant.

10. Wood received a significant raise (from \$ 1,571.81 per pay period to \$ 2,115.39 per pay period) as consideration for signing the 2005 Employment Agreement. Wood's raise, contemporaneous with the signing of the 2005 Employment Agreement, is sufficient consideration to render the agreement valid.²

2 The Court need not reach the question of whether the Uniform Written Obligations Act, as codified at 33 P.S. § 6 (2007), independently provides the necessary consideration to support a restrictive covenant.

E. Whether the "New" Zambelli Can Enforce the Agreement

11. Defendants contend that Plaintiff cannot enforce the restrictive covenants contained in Wood's 2005 Employment Agreement because Zambelli is a "new," or "different," company. Defendants make two related arguments: (1) that the company became "new" as of May 24, 2007, the date of the closing on the [*31] stock purchase/transfer transaction and the replacement of the entire corps of officers and directors of the company such that it was no longer a family-run, close-knit company; and/or (2) that the company became "new" as of the end of 2007, due to the resignation or phasing out of Marcy and Danaboth. Zambelli argues that the entity with which Wood executed the 2005 Agreement remains intact as the same corporation because the transaction was structured as a stock sale and not as an asset acquisition. The contentions of both parties have considerable appeal.

12. The Court has found, as a factual matter, that all

of the officers and shareholders of the corporation and all but one of the directors changed between the time Wood executed the 2005 Agreement and his resignation in February 2007. The Court has further found that the basic character of Zambelli as a family owned and operated business changed substantially. On the other hand, Wood entered into a contract with a corporate entity, Zambelli Fireworks Manufacturing Co., Inc., which has maintained its corporate identity intact throughout the relevant time period. The issue is how to evaluate whether there has been a "change" in the [*32] corporation sufficient to permit an employee to disavow a restrictive covenant in an employment contract. Do employee restrictive covenants constitute an exceptional circumstance in which the Courts should disregard the corporate form and instead evaluate the operational characteristics of the corporation? To put it another way, should the focus of the analysis be on the relationship between the "new" corporation and the alleged *old corporation* or on the relationship between the "new" corporation and the *employee*?

13. The Court concludes that the May 24, 2007 stock sale, by itself, did not invalidate the 2005 Agreement. As a matter of hornbook law, the Zambelli corporation that existed before the stock purchase and the Zambelli corporation that exists after the stock purchase transaction are one and the same corporation. Generally, contracts continue to be valid even if stock ownership of a corporation changes. Indeed, the ownership and management of publicly-traded corporations is constantly changing. [HN10] After a merger or acquisition through the sale of stock, the surviving entity obtains both the assets and liabilities of the former entity because the corporation continues its independent [*33] legal existence.³ An acquisition of stock "vests" contractual rights in the acquiring company as a matter of law and does not require a transfer or assignment to be effective. 15 Pa. C.S.A. § 1929(b) & Amended Committee Comment 2001 (citing *Sante Fe Energy Resources, Inc. v. Manners*, 430 Pa. Super. 621, 635 A.2d 648 (Pa. Super. 1993)). Zambelli Fireworks Manufacturing Co., Inc., is a legal entity that continues to exist in the same form today. Thus, the "new Zambelli" succeeded to the rights and obligations regarding Wood's 2005 employment agreement by operation of law.

3 Vitale testified that he does not acquire companies through stock purchases to avoid successor liability issues. However, there is a

corresponding successor benefit in a stock purchase due to the continuity of existing rights, including contracts.

14. [HN11] Restrictive covenants need not be assigned when there is a sale of the corporate employer's stock. *Siemens Medical Solutions Health Services Corp. v. Carmelengo*, 167 F. Supp. 2d 752 (E. D. Pa. 2001). In *Siemens*, a purchaser acquired all of the stock of Shared Medical Systems Corporation ("SMS") and changed the name of the corporation to Siemens Medical Solutions Health Services Corporation [*34] ("Siemens"). The gravamen of the defendant's argument in *Siemens* was that "the purchase of 100% of SMS's stock by Siemens in July 2000 constituted a de facto change in [the employee's] employer with the result that [the employee] was no longer bound by the terms of his employment agreement." *Id.* at 757. The *Siemens* Court rejected this argument, noting that "[i]t is a basic tenet of corporate law that a change in stock ownership is merely a transfer of shareholder rights which does not, in and of itself, normally affect the existence of the corporate entity." *Id.* at 758. The restrictive covenants in this employment agreement were enforceable because the 'old' and 'new' employer were merely two different names for the same corporate entity. *Id.* at 758-59. The Court held that the 'new' employer could enforce the restrictive covenant that the employee signed with the 'old' employer "because there [had] been no change in the corporate identity of his employer." *Id.* at 759.⁴ This analysis is applicable to this case. The "sale" of Zambelli was merely a transfer of its stock; consequently, there has been no legal change in the "corporate identity of [Wood's] employer." *Accord Corporate Express Office Products, Inc. v. Phillips*, 847 So.2d 406, 414 (Fla. 2003) [*35] ("based on fundamental principles of commercial transactions and the applicable statutes, we hold that, in contrast to an asset purchase, neither a 100 percent purchase of corporate stock nor a corporate merger affects the enforceability of a noncompete agreement").

⁴ Judge O'Neill also noted that "to the extent that this determination conflicts with the decision of the Court in [*Joyner Sports Medicine Institute v. Stejbach*, 45 Pa.D. & C.4th 242 (Duquesne Cty. 1999)], I conclude that the Supreme Court of Pennsylvania would decline to follow that Court's reasoning." 167 F.Supp.2d at 759-60. *Joyner* is distinguishable, as discussed *supra*.

15. Defendants cite *Hess*, 808 A.2d at 922, for the proposition that employment contracts are personal to the performance of both the employer and employee, "the touchstones of which is the trust that each has in the other." The *Hess* Court further explained that an employee's "confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking." *Id.* Thus, Defendants contend that the Court must evaluate the trust, character [*36] and personality of the employer, and whether Doug Taylor was a "stranger to the original undertaking."

Hess is instructive but not dispositive of the instant circumstance. The specific issue in *Hess* was whether the employment contract at issue could be assigned in the absence of a specific assign ability provision in an asset purchase transaction. As Zambelli accurately points out, there was no need, or opportunity, to assign Wood's contract because the corporate identity remained the same. Indeed, *Hess* cited favorably to *Siemens*.

16. The Court concludes that *Joyner Sports Medicine Inst., Inc. v. Stejbach*, 45 Pa. D. & C.4th 242 (Ct. Common Pleas 1999), is also distinguishable. *Joyner* did involve a stock sale but, in addition, the acquiring company unilaterally forced the employees to accept a new, less-favorable employee benefits package. Thus, the new owner significantly changed the employees' conditions of employment. In the instant case, by contrast, the stock sale did not result in substantial changes in Wood's job duties and he received a raise. It was not until Marcy and Danabeth left active employment, some six months later, that Wood actually considered his conditions of employment [*37] to have changed significantly in what he perceived to be a deleterious manner. In summary, the May 2007 transaction involving Zambelli stock did not render Wood's 2005 Employment Agreement to be unenforceable.

17. Wood's alternative argument, that Zambelli had significantly changed as a result of the new ownership and management such that it was no longer a family owned and operated business, is more weighty. The discussion in *Hess* regarding the importance of trust and the expectations of the employer and employee at the time of the contract is persuasive. The Court recognizes that as a practical matter, Wood's expectations regarding his future employment were affected by the change in

ownership and subsequent overall change in management. Wood signed his employment agreement with the legitimate expectation that Zambelli would continue to be a family owned and operated business and Zambelli's character as a family-run business was demonstrably important to Wood. During the course of 2007, not only did a group of non-family investors acquire 50% of Zambelli stock, but Doug Taylor as CEO took effective control over the entire operations of the company. George Zambelli, Sr., had died and [*38] Marcy and Danabeth, the family members with whom Wood had worked closely for virtually his entire career, resigned and appeared to be disgruntled by the transition. Taylor had a financial background and no prior experience whatsoever in the fireworks industry. In sum, the character of Zambelli as a family-run business changed overall in the approximately nine months between the May 2007 stock transfer transaction and Wood's resignation in February 2008.⁵

5 Obviously, if the continuation of Zambelli as a family-owned and operated business was a material condition, it would have been prudent to have expressly articulated that condition in the text of the 2005 Agreement.

18. Nevertheless, the Court concludes that the changes in the stock ownership, management and character of the Zambelli corporation do not render the restrictive covenants in the 2005 Agreement entirely unenforceable. With independent research, the Court has found no case which has disregarded the legal continuity of an employer following a stock transfer transaction and declines to venture into that uncharted legal territory under the facts and circumstances of this case.

19. There was simply no fundamental change in Zambelli [*39] that occurred contemporaneously with Wood's resignation in February 2008. Taylor became CEO in May 2007. Wood's job duties generally remained the same after the stock transfer transaction. Marcy and Danabeth had contemplated reduced work hours after September 2007 and Wood would have been aware that their participation in the business would steadily decline over the ensuing months. Thus, many of the changes to Zambelli of which Wood now complains occurred long before he took steps to resign. Wood's subjective perception that he was being set up for failure does not render his employment agreement unenforceable. To recognize an employee's subjective displeasure with job

conditions as a justifiable basis for the breach of an employment agreement could frustrate the legitimate purposes of restrictive covenants and create a flood of litigation. Moreover, under the facts of this case, Taylor clearly communicated to Wood that he continued to be a valued employee and that message was reinforced by two raises. In summary, the Court concludes that the changes in ownership, management and operation of Zambelli do not render the 2005 Agreement unenforceable.

20. Accordingly, the Court concludes [*40] that the alleged "new" Zambelli may enforce the 2005 Employment Agreement which it had with Wood and therefore Plaintiff is likely to succeed on the merits of its claim against Wood for breach of contract.

21. Based on the testimony and evidence thus far presented, the Court observes that Plaintiff is unlikely to succeed on the merits of its claims for breach of fiduciary duty of loyalty, misappropriation of trade secrets, interference with contractual relations or prospective economic advantages, unfair competition and civil conspiracy as there is a dearth of evidence to support any breach of those duties by either Defendant.

F. Reasonableness of Time and Scope of Restrictions

22. [FN12] To be valid and enforceable, the length of time and scope of a restrictive covenant should be no greater than is reasonably necessary to protect the employer's legitimate business interest. "The reasonableness of the temporal and geographic aspects of a restrictive covenant must be determined in light of the nature of the employer's interest sought to be protected." *Boldt Machinery & Tools, Inc. v. Wallace*, 469 Pa. 504, 366 A.2d 902, 907 (1976). The 2005 Employment Agreement purports to restrict Wood from engaging in or [*41] working for any company in the pyrotechnic business for a period of two years anywhere in the continental United States.

23. The fireworks business is largely seasonal, with the heaviest peak of activity around July 4th. In addition, New Year's Eve shows and other municipal and corporate celebrations occur throughout the year. Shows are booked far in advance and most if not all of the July 4, 2008 shows were booked before Wood left Zambelli. In essence, the two-year time restriction, if enforceable, would prevent Wood from participating in the July 4, 2008 and 2009 seasons and, in large part, the sales process for the July 4, 2009 and 2010 seasons. Wood's

talents are difficult to replace and his loss is likely to impact Zambelli during the July 4, 2009 and 2010 seasons. The Court concludes that a two-year restriction from the date of Wood's cessation of employment with Zambelli, i.e., until February 22, 2010, is reasonable.

24. The 2005 Agreement defines the geographic restriction upon Wood's activities in the pyrotechnic business as the continental United States. [HN13] Courts have upheld covenants not-to-compete with a national scope, where appropriate. See, e.g. *National Business Services Inc. v. Wright*, 2 F.Supp.2d 701, 708 (E.D. Pa. 1998) [*42] ("Although nationwide covenants are disfavored, in this case both ASI and Impact are nationwide businesses, and Wright, while employed by ASI, had extensive contacts with customers all over the nation."); *Graphic Management Associates v. Hatt*, 1998 U.S. Dist. LEXIS 3949, at * 33 (E.D. Pa. March 18, 1998) (upholding restriction covering North America); *Volunteer Firemen's Insurance Services, Inc. v. CIGNA Property and Casualty Insurance Agency*, 693 A.2d 1330, 1338 (Pa. Super. 1997) (upholding nationwide noncompete agreement because the territorial scope of the covenant was comparable to the market actually serviced during the course of the relationship); *Kramer v. Robec, Inc.*, 824 F.Supp. 508, 512 (E.D. Pa. 1992) ("Since competition in the computer market is world-wide and since Robec distributes throughout the nation and overseas, the geographic extent of the covenant—the United States—is reasonable.").

Both Zambelli and Pyrotecnico are nationwide businesses. Wood, while employed with Zambelli, performed services in many regions of the continental United States, and prior to his resignation he was assigned primary responsibility for customers in fourteen states. Most importantly, [*43] Wood can choreograph a fireworks display from his computer in his home office for any customer located anywhere in the United States. Thus, the geographic location is of limited relevance to the choreographing process.

However, a complete bar on the ability of Wood to participate in any activity in the pyrotechnic industry in the entire continental United States, would literally prevent him from engaging in his chosen profession, is not necessary for the protection of Zambelli's legitimate business interests, and therefore, is overbroad under the circumstances of this case. The mere fact that Wood could work on shows for Pyrotecnico customers does not

directly harm Zambelli. For example, the fact that Wood performed a show in New York City Times Square should not give Zambelli a protectible interest in an unrelated show to be performed in Buffalo, New York. The Court is persuaded by the reasoning in *Thermo-Guard*, 596 A.2d at 194, which explained as follows:

the trial court protected Thermo-Guard's interest in customer goodwill generated by appellees by issuing an injunction prohibiting appellees from contacting or developing any relationship with any of Thermo-Guard's present customers [*44] or prospective customers who became known to appellees through their employment with Thermo-Guard. Once this interest was protected, the trial court could perceive no remaining legitimate business interest for Thermo-Guard to protect through a general injunction against competition by appellees. We agree.

The Court concludes that Wood should similarly be enjoined from revealing to Pyrotecnico in any manner whatsoever or from contacting or developing any business relationship with any of Zambelli's present or prospective customers who had contact with or became known to Wood through his employment with Zambelli for the two-year restrictive time period. Wood will also be enjoined from designing or choreographing aerial pyrotechnic displays, which was the specific expertise that he developed while at Zambelli. In addition, Defendants shall be enjoined from promoting Wood's choreography talent and/or accomplishments while employed at Zambelli in its advertising, marketing or sales efforts for the term of the restrictive covenant. A broader restriction would not be reasonable.

G. Irreparable Harm

25. [HN14] Pennsylvania Courts have uniformly recognized that a violation of a noncompetition agreement [*45] results in harm which is not compensable by money damages. *John G. Bryant v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164; (1977); *Records Center, Inc. v. Comprehensive Management, Inc.*, 363 Pa. Super. 79, 525 A.2d 433

(1987). As stated by the Pennsylvania Supreme Court in *Bryant*, 369 A.2d at 1167:

It is not the initial breach of a covenant which necessarily established the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage to the former employer's business that constitutes the justification for equitable intervention.

[HN15] "Harm is irreparable when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exists no certain pecuniary standards for the measurement of damages. *National Business Services, Inc.*, 2 F.Supp.2d at 709 (finding that the potential injury to the former employer's goodwill and the potential use of the former employer's confidential information constituted irreparable harm). In recognizing that an injury which results from the violation of a noncompetition agreement is difficult to quantify, the Pennsylvania [*46] Superior Court has stated that "[t]he great weight of modern authority is to the effect that one who has been or will be injured [by violation of a covenant not to compete] is ordinarily entitled to the equitable remedy of injunction..." *Records Center, Inc.*, 525 A.2d at 436.

26. Wood had a reasonably significant degree of customer contact prior to his departure from Zambelli, he was intimately aware of Zambelli's operations through his close work with Marcy and Danabeth, Zambelli promoted and marketed itself based upon Wood's unique talents and abilities, and Wood's abilities were recognized by some number of Zambelli's clients. The harm Zambelli is suffering as a result of Wood's breach of his employment agreement and subsequent employment by Zambelli's competitor, Pyrotecnico, is not quantifiable. This factor clearly weighs in favor of the Plaintiff.

H. Balancing the Harms

27. Wood will not suffer direct monetary harm if the 2005 Agreement is enforced because Pyrotecnico has agreed to indemnify him for any loss of salary and legal expenses he may incur for the duration of any non-compete restriction. See *National Business Services*, 2 F.Supp.2d at 709 (finding that the former employee [*47] would not suffer greater harm if the injunction was

enforced, in part, because her new employer had indemnified her). On the other hand, Wood has single-mindedly pursued a livelihood in the narrow, specialized fireworks industry throughout his educational and career history. Enforcement of the 2005 Employment Agreement restrictions in toto would bar Wood from pursuing his chosen profession for a period of time. By modifying the restrictive covenants such that Wood is able to maintain his employment at Pyrotecnico, while preventing him from designing or choreographing aerial pyrotechnic displays and from having contact with customers and prospective customers throughout the continental United States whom he met or became aware of through his employment at Zambelli, the interests of both sides are fairly balanced.

28. In reasonably balancing the harms to each side, the Court is influenced by the fact that Wood and Pyrotecnico made a knowing, calculated decision to breach the 2005 Agreement in the hope that it would be unenforceable.

29. Therefore, the Court concludes that the balance of the equities favors the enforcement of the 2005 Employment Agreement as modified above.

I. Public Interest

30. [*48] [HN16] Under appropriate circumstances, "the public interest is best served...by upholding the restrictive covenants freely entered into by [the employee]. Granting a permanent injunction to [the former employer] will discourage unfair competition, the misappropriation and wrongful use of confidential information and trade secrets and the disavowal of freely contracted obligations." *National Business Services*, 2 F.Supp. 2d at 709.

31. Under the facts as found in this case, the public interest will be served by enforcement of the 2005 Agreement as modified.

An appropriate Order follows.

McVerty, J.

ORDER OF COURT

AND NOW this 21st day of January, 2009, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is ORDERED, ADJUDGED and DECREED that Plaintiff's MOTION FOR

PRELIMINARY INJUNCTION (Document No. 4) is GRANTED IN PART. The 2005 Employment Agreement between Zambelli and Matthew Wood is enforceable, however the restrictive covenants are modified as follows: Matthew Wood is hereby enjoined for a period of two years following the cessation of his employment with Zambelli on February 22, 2008 (i.e., until February 22, 2010) from designing or choreographing aerial pyrotechnic [*49] displays; Matthew Wood and Pyrotechnico F/X, LLC are enjoined for the same two-year period from contacting or soliciting business from any customer(s) or client(s) of Zambelli within the continental United States with whom Wood had business contact as an employee, agent or representative of Zambelli during the period of his employment with Zambelli; and Matthew Wood and Pyrotechnico F/X, LLC are enjoined for the same two-year period from publicizing, promoting or referencing Wood's design or choreography talent, experience and/or accomplishments while employed at Zambelli in any advertising, marketing or sales endeavors.

In accordance with the foregoing, Paragraph 7 of the 2005 Employment Agreement is "blue-penciled" and Wood and Pyrotechnico are enjoined as follows:

NON COMPETITION

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

7. During the term of this Agreement and for a period of two years following termination of this Agreement (FEBRUARY 22, 2008), for any cause whatsoever, Matthew Wood shall not directly or indirectly, either as an employee, owner, or otherwise, anywhere within the geographical area of Continental United States engage in any manner [*50] in the DESIGN AND/OR CHOREOGRAPHY OF AERIAL pyrotechnic business DISPLAYS and Matthew Wood AND ANY SUCCESSOR PYROTECHNIC EMPLOYER [O> shall not take any position of employment or ownership with any company or companies engaged in the sale or production of pyrotechnic displays if that company does any

business in the aforementioned geographical area. Matthew Wood<O] for two years following termination of this Agreement shall not contact or solicit business with or from any customer, customers, client, OR clients OF ZAMBELLI, [O> or any other person or entity<O] with whom he WOOD had business contact as an employee, agent or representative of Zambelli during his period of employment. Nor shall Matthew Wood during two years following termination of this Agreement act in any manner either as an employee, owner, consultant, agent, principal, employer, partner, corporate officer, or in any other capacity in any manner INDIVIDUALLY OR PERSONALLY engage or participate in any ACTIVITY business that is in competition, in any manner with the business of Zambelli. During the aforementioned two year period, Matthew Wood shall not directly or indirectly solicit or entice for employment any employee [*51] of Zambelli. Matthew Wood acknowledges that each of the restrictions set forth in this section is a material condition of this Agreement to employee Matthew Wood, and further, that the parties believe such restrictions are reasonable in duration and scope and that a breach thereof will cause irreparable harm to Zambelli and therefore Zambelli will be entitled to temporary and permanent injunctive relief in addition to all other remedies entitled to at law or in equity.

In all other respects, the remaining relevant provisions of the Employment Agreement of June 2, 2005 are in full force and effect.

The Court notes the security provision in *Fed. R. Civ. P. 65(c)*. However, with no party having requested same and the Court seeing no imminent need for bond, security will be waived at this time subject to future request.

BY THE COURT:

/s/ Terrence F. McVerry

United States District Court Judge



LEXSEE 506 SO. 2D 91



Cited

As of: Sep 19, 2009

Marvin E. Marshall, Appellant, v. Fred Gore, a/k/a F. L. Gore and M.R.B., Inc., a
Florida corporation, Appellees

No. 86-1626

Court of Appeal of Florida, Second District

506 So. 2d 91; 1987 Fla. App. LEXIS 7942; 2 LE.R. Cas. (BNA) 318; 1987-1 Trade
Cas. (CCH) P67,555; 12 Fla. L. Weekly 1143

May 1, 1987, Filed

PRIOR HISTORY: [**1] Appeal from the Circuit
Court for Hillsborough County; Robert W. Rawlins, Jr.,
Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former
employee appealed from an order of the Circuit Court for
Hillsborough County (Florida), which enforced a
noncompete clause and enjoined appellant from engaging
in or being employed by any firm involved in the
development and marketing of computer software, or in
any business that competed with appellee former
employer.

OVERVIEW: Appellant developed computer software
for feeding dairy cows. The lower court enforced
appellant's noncompete agreement with appellee, which
prevented appellant from developing or marketing
computer software. On appeal, the court found that the
agreement was overly broad because appellee was not
generally in the business of marketing software, so it
restricted the scope of the agreement to the development
and marketing of computer software for management and

programming of dairy feeding programs.

OUTCOME: The court affirmed the injunction, but
reversed as to its scope, limiting it to marketing or
development of software for the management and
programming of dairy feeding programs, because
appellee was not generally in the business of marketing
software.

LexisNexis(R) Headnotes

*Labor & Employment Law > Employment Relationships
> Employment Contracts > Conditions & Terms >
Trade Secrets & Unfair Competition > Noncompetition
& Nondisclosure Agreements*

[RN1] An employer has a legitimate interest in protecting
its business, and an employee has a legitimate interest in
maintaining a livelihood.

*Criminal Law & Procedure > Criminal Offenses >
Fraud > Computer Fraud > General Overview
Labor & Employment Law > Employment Relationships*

Record on Appeal 301

APP0303

506 So. 2d 91, *; 1987 Fla. App. LEXIS 7942, **1;
2 I.B.R. Cas. (BNA) 318; 1987-1 Trade Cas. (CCH) P67,535

> *Employment Contracts* > *Conditions & Terms* >
Trade Secrets & Unfair Competition > *Noncompetition*
& *Nondisclosure Agreements*

[HN2] An injunction must state with reasonable certainty what the defendant is prohibited from doing. It must not unduly restrict one's livelihood.

COUNSEL: Decann D. Athan of Diaz, Athan & Dee, P.A., for Appellant.

John H. Rains, III of Annis, Mitchell, Cockey, Edwards & Roehm, P.A., for Appellees.

JUDGES: Campbell, Judge. Scheb, A.C.J., and Sanderlin, JJ., concur.

OPINION BY: CAMPBELL

OPINION

[*91] Appellant, Marvin E. Marshall, appeals the trial court order that enforced a noncompete clause and enjoined appellant from engaging in or being employed by any firm involved in the development and marketing of computer software, or in any business that competed with appellee, M.R.B., Inc.

Appellant, a ruminant nutritionist and a computer programmer, developed a formula and computer software for feeding dairy cows. Appellant contracted to work for M.R.B., Inc. The employment contract contained a noncompete agreement that appellant would not engage in the business of development or marketing of computer software, or in any business that competed with M.R.B., Inc. for five years from the date his employment ceased. The five-year period was later reduced to two years.

Appellant argues that the noncompete agreement violates section 542.33, *Florida Statutes* (1981) because the restrictions are not reasonably limited in time and area. We believe that under *Auto Club Affiliates, Inc. v. Donahay*, 281 So. 2d 239 (Fla. 2d DCA 1973), the [HN1] employer had a legitimate interest in protecting its business, and appellant had a legitimate interest in maintaining a livelihood. While we believe that an

injunction was proper and was not an unreasonable restraint of trade, we question the breadth of the restrictions imposed. The evidence is sufficient to warrant the nationwide scope since appellees had sold forty-two software programs to dairies in Pennsylvania, Iowa, Wisconsin, Ohio, Vermont, Missouri and Oregon. It also advertised in a nationwide dairy publication. [*92] However, we believe that the scope of the injunction prohibiting appellant from participating in any computer software business is too broad. Appellant should not be completely prohibited from all participation in the computer software business. See *Capelouto v. Orkin Exterminating Co. of Florida*, 183 So. 2d 532 (Fla. 1966).

[HN2] An injunction must state with reasonable certainty what the defendant is prohibited from doing. *Somerstein v. City of Miami Beach*, 319 So. 2d 158 (Fla. 3d DCA 1975). It must not unduly restrict one's livelihood. *Auto Club Affiliates, Inc.* Appellant here is prohibited from participating in any business that relates to the development and marketing of computer software. Since appellee is not in the general business of developing and marketing computer software, the injunction protects more than appellee's legitimate business interests. The language of both the noncompete agreement and the court order is too broad since it applies to all computer software development; it does not limit its restriction of appellant's activities to those that compete with M.R.B., Inc.

We, therefore, affirm the imposition of an injunction, but reverse as to the scope of the order, and accordingly alter the trial court's order as follows: "Marvin E. Marshall shall not, for two years from the date of entry of the final judgment, directly or indirectly, engage in any business or be employed by any person, firm or corporation in the United States that competes with M.R.B., Inc. in the development and marketing of computer software for management and programming of dairy feeding programs."

SCHUB, A.C.J., and SANDERLIN, JJ., concur.



LEXSBB 2009 S.C. APP. LEXIS 443

Milliken & Company, Appellant/Respondent, v. Brian Morin,
Respondent/Appellant.

Opinion No. 4610

COURT OF APPEALS OF SOUTH CAROLINA

2009 S.C. App. LEXIS 443

March 4, 2009, Heard
August 20, 2009, Filed

NOTICE:

THIS DECISION IS NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARING MOTION AND, IF
FILED DETERMINED.

PRIOR HISTORY: [*1]

Appeal From Greenville County. G. Edward Welmaker,
Circuit Court Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Charles E. Carpenter, Jr., and Carmen V.
Ganjehsani, both of Columbia; and John C. Glancy, L.
Gray Goddard, Jr., and Phillip A. Kilgore, all of
Greenville, for Appellant-Respondent.

C. Mitchell Brown, of Columbia; and William S. Brown,
Giles M. Schanen, Jr., and Dowse B. Rustin, IV, all of
Greenville, for Respondent-Appellant.

JUDGES: SHORT, J. THOMAS and GEATHERS, JJ.,
concur.

OPINION BY: SHORT

OPINION

SHORT, J.: Milliken & Company (Milliken)
appeals from the circuit court's order, arguing the court
erred in denying the equitable relief it requested because
the jury found Brian Morin breached the covenants in his

employment agreement and the verdict was only an
award of nominal damages. In his cross-appeal, Morin
argues the circuit court erred in finding the inventions
assignment and confidentiality provisions of the
employee agreement are enforceable. We affirm.

FACTS

Morin obtained his Ph.D. in Experimental
Condensed Matter Physics from Ohio State University in
1994, and on April 10, 1995, he began working for
Milliken as a research physicist. As a condition of his
employment with Milliken, he was required to sign a
written Associate [*2] Agreement (Agreement). Morin
was promoted to Senior Research Physicist on July 13,
1998. While working at Milliken, he went to a
composites conference in California that Milliken paid
for him to attend to get new applications for their
products. Afterwards, Morin began developing an idea to
create a high modulus multifilament polypropylene fiber,
which is a fiber that has a high resistance to stretching.
Morin testified there was a possible five billion dollar
market for the fiber, but Milliken refused to support
research in multifilament fiber manufacturing when he
presented it with the idea. Milliken does not manufacture
or sell any multifilament fiber to any third parties. Nor
does it possess any production equipment for the
extrusion of multifilament fiber.

Morin resigned from Milliken on May 17, 2004, and
registered his company, Integrity, LLC, with the South
Carolina Secretary of State the same week. ¹ On

November 5, 2004, Morin filed his patent for Innegra-S, a high modulus multifilament polypropylene fiber, and immediately assigned the patent to Innegrity. To promote his new fiber, Morin gave a presentation at InnoVenture in Greenville, South Carolina, in May 2005.² On June [*3] 21, 2005, Milliken's counsel sent Morin a letter demanding he stop his work with the Innegra product because the activity violated Morin's Agreement with Milliken. Furthermore, Milliken asserted Morin's invention, Innegra-S, belonged to Milliken pursuant to the Agreement. In a response letter, Morin claimed he did not experiment with or develop any of his technology using Milliken's equipment, information, or time.³ The letter also proposed a meeting with Milliken to discuss possible resolutions; however, Milliken did not respond and instead filed an action against Morin and Innegrity.

1 Morin testified he is the president of Innegrity and owns thirty percent of the company. He also testified there are thirty-eight other investors.

2 InnoVenture is a convention where entrepreneurial companies can make presentations to prospective investors.

3 Morin also testified he told Milliken his company would not interfere with Milliken's business, and he planned for Innegrity to be a customer of and supplier to Milliken.

Milliken's Amended Complaint alleged nine causes of action: (1) breach of contract (inventions assignment provision); (2) breach of contract (covenant not to compete); (3) breach of [*4] contract (confidentiality provision); (4) misappropriation of trade secrets; (5) unfair trade practices; (6) breach of the implied covenant of good faith and fair dealing; (7) breach of contract accompanied by a fraudulent act; (8) conversion; and (9) breach of the duty of loyalty. The causes of action for conversion and violation of the South Carolina Unfair Trade Practices Act were the only causes of action against both Morin and Innegrity. In his Answer to Milliken's Amended Complaint, Morin asserted nine defenses including claims that the Agreement was unenforceable and was void under public policy. Morin filed an Amended Answer, asserting five counterclaims: (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) breach of the implied covenant of good faith and fair dealing; (4) fraud and misrepresentation; and (5) violation of the South Carolina Unfair Trade Practices Act.

Morin filed a Motion for Summary Judgment arguing, among other things, the Agreement's covenant not to compete provision, the inventions assignment provision, and the confidentiality provision were unenforceable. The motion was denied. Shortly before trial, Milliken voluntarily dismissed [*5] four of its causes of action with prejudice, including its two causes of action against Innegrity for conversion and violation of the South Carolina Unfair Trade Practices Act. Morin filed a Motion for Judgment as a Matter of Law, asserting Milliken's claim for the assignment of several patents currently held by Innegrity fails as a matter of law because Innegrity was dismissed from the case.⁴ After Milliken rested its case, Morin moved for a directed verdict on all causes of action and the relief sought by Milliken relating to the patents and patent applications owned by Innegrity. The court denied the motion.

4 The court did not rule on Morin's motion at that time, stating: "I think we can take care of that matter after we take care of the jury. That would be something that I can hear you on at the end of the verdict. It might not even be an issue, who knows. But if it is, then we will address that later."

At the conclusion of the trial, only four causes of action against Morin were submitted to the jury: (1) breach of the inventions assignment provision of the Agreement;⁵ (2) breach of the confidentiality provision of the Agreement;⁶ (3) violation of the South Carolina Trade Secrets [*6] Act; and (4) breach of the duty of loyalty. The jury found Morin liable for breach of the Agreement, under its inventions assignment and confidentiality provisions, and awarded Milliken \$ 25,324 in actual damages.⁷ The verdict form submitted to the jury contained a single blank for the jury to award actual damages should it find Morin breached the Agreement. Neither party objected to the form or requested a more detailed form. The verdict form did not specify which action by Morin constituted a breach of the Agreement, or what particular invention or confidential information was involved in Morin's breach of the Agreement.

5 Milliken's "Inventions Assignment" provision is found in section A of the Agreement and is as follows:

With respect to Inventions made,

authored and conceived by me, either solely or jointly with others, (1) during my employment, whether or not during normal working hours or whether or not at Milliken's premises; or (2) within one year after termination of my employment; I will:

a. Keep accurate, complete and timely records of such Inventions, which records shall be Milliken property and be retained on Milliken's premises.

b. Promptly and fully disclose and describe [*7] such Inventions in writing to Milliken.

c. Assign (and I do hereby assign) to Milliken all of my rights to such Inventions, and to applications for letters patent, copyright registrations and/or mask work regulations in all countries and to letters patent, copyright registrations and/or mask work registrations granted upon such Inventions in all countries.

d. Acknowledge and deliver promptly to Milliken (without charge to Milliken but at the expense of Milliken) such written instruments and to do such other acts as may be necessary in the opinion of Milliken to preserve property rights against forfeiture, abandonment or loss and to obtain, defend and maintain letters patent, copyright registrations and/or mask work registrations and to vest the entire right and title thereto in Milliken.

NOTICE: This is to notify you that paragraph A of this Milliken "Associate Agreement" you are being asked to sign as a condition of your employment does not apply to an Invention for which no

equipment, supplies, facility or proprietary information of Milliken was used and which was developed entirely on your own time, and (1) which does not relate (a) directly to the business of Milliken or (b) to Milliken's [*8] actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by you for Milliken.

In paragraph 4, the Agreement defines "Inventions" as:

"discoveries, improvements and ideas (whether or not shown or described in writing or reduced to practice), mask works (topography or semiconductor chips) and works of authorship, whether or not patentable, copyrightable or registrable, (1) which relate directly to the business of Milliken, or (2) which relate to Milliken's actual or demonstrably anticipated research or development, or (3) which result from any work performed by me for Milliken, or (4) for which any equipment, supplies, facility or Trade Secret or Confidential Information of Milliken is used, or (5) which is developed on any Milliken time."

6 Milliken's "Confidentiality" provision is found in section B of the Agreement and is as follows:

"I also agree not to use, disclose, modify or adapt any Confidential Information as defined in paragraph 3 hereinabove until three (3) years after the termination of my employment except as authorized in the performance of my duties for Milliken."

In paragraph 3, the Agreement defines "Confidential Information" [*9] as:

"all competitively sensitive information of importance to and kept in confidence by Milliken, which becomes known to me through my employment with Milliken and which does not fall within the definition of Trade Secret above."

7 The jury also found for Milliken on Morin's counterclaims.

Milliken filed a Motion for Equitable Relief and to Alter or Amend Judgment, and Morin filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. After a hearing on the motions, the court denied the motions of both parties. Milliken appeals and Morin cross-appeals.

STANDARD OF REVIEW

An action for breach of contract based on an employment agreement is an action at law. *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995); *Moore v. Crowley & Assoc., Inc.*, 234 S.C. 170, 171, 174 S.E.2d 340, 341 (1970). In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to correct errors of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The factual findings of the jury will not be disturbed on appeal unless the record does not contain any evidence that supports the jury's [*10] findings. *Id.*

LAW/ANALYSIS

I. Milliken's Appeal

Milliken argues the circuit court erred in refusing to grant the equitable relief it requested because the jury found Morin breached the covenants in his Agreement and the verdict was only an award of nominal damages. We disagree.

Generally, equitable relief is available only where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its

administration as the remedy in equity." *Id.* The party seeking an injunction must prove it has no adequate remedy at law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

In its Amended Complaint, Milliken requested actual damages and permanent injunctive relief on its claims for breach of contract. At trial, Milliken presented evidence of past and future money damages it allegedly suffered as a result of Morin's breach of the Agreement, specifically \$ 1,403.26 in travel expenses for the conference Morin attended in California; \$ 81,080.00 in benefits and salary [*11] compensation; \$ 3,862.85 in paid unused vacation days; and an estimated \$ 60 to \$ 65 million in future lost profits from the fiberglass market.

The verdict form submitted to the jury contained a single blank to award actual damages should the jury find Morin breached the Agreement under either the inventions assignment provision or the confidentiality provision. Milliken did not object to the form; however, Milliken asked the judge to charge the jury on nominal damages and suggested \$ 100.00 as a symbolic nominal amount. In his charge to the jury on actual and nominal damages, the judge did not charge the jury with a specific amount for nominal damages, but stated "they have been referred to as a trivial or trifling sum." Neither party objected to the charge. The verdict form did not specify whether the damages were for Morin's breach of the inventions assignment provision, the confidentiality provision, or both.

The jury awarded Milliken \$ 25,324.00 in actual damages, which is far from the \$ 100.00 amount Milliken requested as an example of nominal damages. Also, the amount of damages awarded by the jury appears to be a specific amount that was calculated by the jury in some manner, [*12] as opposed to a general amount such as \$ 25,000.00. Thus, we find Milliken had an adequate remedy at law, and the trial judge correctly found Milliken was not entitled to equitable relief.⁸

8 We do not reach the merits of Milliken's remaining issues because this issue is dispositive of the case. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

II. Morin's Appeal

In his cross appeal, Morin argues the circuit court erred by finding the inventions assignment and confidentiality provisions of Milliken's Agreement were enforceable.⁹ We disagree.

9 Morin also argues that if one provision is found to be unenforceable, the whole Agreement is unenforceable; however, we need not address this issue because we find both provisions to be enforceable. Furthermore, Morin raises this argument for the first time on appeal; thus, the issue is not preserved. *Pye v. Estate of Pax*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been [*13] raised to and ruled upon by the trial court to be preserved.").

On appeal of the denial of a motion for a directed verdict or JNOV, this Court applies the same standard as the trial court and views the evidence in the light most favorable to the non-moving party. *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). "An appellate court will only reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Id.*

In South Carolina, restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). The enforceability of a covenant not to compete depends on whether it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. [*14] *Id.* at 675-76, 301 S.E.2d at 143; *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 293, 471 S.E.2d 721, 723 (Cl. App. 1996).

In *Muckenfuss*, this court determined a covenant not to divulge trade secrets had the effect of a covenant not to compete, and thus, was subject to the same strict scrutiny. *Id.* at 294, 471 S.E.2d at 723. In making its decision, the court found the section substantially restricted

Muckenfuss's competitive employment activities by preventing him from using the general skills and knowledge he acquired at Carolina Chemical; was unlimited in time and territory; was far greater than necessary to protect any legitimate business interest; and was unreasonable from the standpoint of public policy because of its effects on both the employee and the competitive business environment. *Id.* at 294-95, 471 S.E.2d at 723-24. The court also noted the provision defined trade secrets "so broadly that virtually all of the information Muckenfuss acquired during his employment would fall within its definition." *Id.* at 296, 471 S.E.2d at 725.

Also, in *Nucor Corporation v. Bell*, 482 F.Supp. 2d 714, 729-30 (D.S.C. 2007), the South Carolina District Court found a non-disclosure agreement [*15] was subject to the same requirements as a non-compete covenant. Using this standard, the court determined the agreement was unenforceable because it defined "confidential information" so broadly that virtually all of the information Bell acquired during his employment would fall within its definition" and "forbid[] Bell from engaging in any employment similar to his employment with Nucor." *Id.*

Morin asserts that both the inventions assignment and confidentiality provisions should be scrutinized under the standards of a covenant not to compete because both provisions were overly broad; harsh and oppressive in curtailing his legitimate efforts to earn a livelihood; inappropriate as they prevent him from using the general skills and knowledge he acquired at Milliken; and unreasonable from the standpoint of sound public policy. However, the inventions assignment provision limited the inventions to those made, authored, and conceived by Morin, either solely or jointly with others, during his employment, whether or not during normal working hours or whether or not at Milliken's premises, or within one year after termination of his employment with Milliken. It did not apply to inventions [*16] for which no equipment, supplies, facility, or proprietary information of Milliken were used; that were developed entirely on an employee's own time; that did not relate directly to the current or anticipated business of Milliken; or that were not the result of any work performed for Milliken. Thus, the inventions assignment provision was narrowly drafted to restrict the category of inventions that were assigned to Milliken to those related to Milliken's business or research, or that were created using Milliken's

resources. Furthermore, the inventions assignment provision was limited to one year and to subject matter that Morin worked on or had knowledge of during his employment with Milliken.

Milliken's confidentiality provision limits the information to all competitively sensitive information of importance to and kept by Milliken for three years.¹⁰ The three-year provision did not prohibit Morin from disclosing or using any and all information he learned working at Milliken, or using the general knowledge and skills he learned while working there. Furthermore, Morin testified he could have obtained other jobs without violating the confidentiality provision. Thus, the confidentiality [*17] provision did not substantially restrict Morin's competitive employment activities.

10 The confidentiality provision is limited to three years, and the inventions assignment provision is limited to one year after employment. In *Dudley*, the court found a three-year time restraint was not unreasonable. *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143.

Additionally, Morin argues the provisions were unenforceable because they were unlimited in territory. In *Dudley*, our supreme court found a "geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the

employee was able, during the term of his employment, to establish contact with his employer's customers." *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143. Furthermore, "[w]hile 'the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business . . . [p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation.'" *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp. 2d 681, 689 (D.S.C. 2003) (quoting *Wolf v. Colonial Life and Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992)). [*18] Here, the provisions were limited to competitors of Milliken, which is reasonably necessary to protect Milliken's business. Therefore, we find the trial judge correctly found the confidentiality and inventions assignment provisions of Milliken's Associate Agreement were enforceable.

CONCLUSION

Therefore, we affirm the circuit court's denial of Milliken's request for equitable relief and the circuit court's finding that the inventions assignment and confidentiality provisions of Milliken's Associate Agreement are enforceable.

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.



LEXSEE 2001 U.S. DIST. LEXIS 26194



Cited
As of: Sep 19, 2009

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Plaintiff, v. EDWARD A. SCHULTZ, III, Defendant

Civ. No. 01-0402(TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2001 U.S. Dist. LEXIS 26194

February 26, 2001, Decided

February 27, 2001, Filed

COUNSEL: [*1] For MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Plaintiff: Frank W. Dunham, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER FOR THE EASTERN DISTRICT OF VA, Alexandria, VA.

For EDWARD A. SCHULTZ, III, Defendant: Christopher P. Stief, LEAD ATTORNEY, CHRISTOPHER P. STIEF, RUBIN & ASSOCIATES, P.C., Paoli, PA.

JUDGES: Thomas F. Hogan, United States District Judge.

OPINION BY: Thomas F. Hogan

OPINION

CORRECTED MEMORANDUM OPINION

Pending before the Court is the plaintiffs, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), motion for a temporary restraining order and preliminary injunction. Merrill Lynch has brought this motion to enjoin its former employee Edward Schultz, and his new

employer Morgan Stanley Dean Witter ("Dean Witter"), from soliciting any business from the clients he had while working for Merrill Lynch and from using confidential information Schultz gained during his employment with Merrill Lynch. After careful consideration of the arguments made before the Court at the hearing held on February 23, 2001, the plaintiffs motion and complaint, the attachments thereto, the defendant's declaration, and the supplemental authority provided at the hearing, the Court will grant the plaintiffs motion.

I. [*2] BACKGROUND

From February 1987 until February 16, 2001, Mr. Schultz was employed by Merrill Lynch as a Financial Consultant in the company's D.C. office. On Friday, February 16, 2001 he abruptly ended his employment with Merrill Lynch by tendering a letter of resignation. See Affidavit of Christian Williams, Attachment A. He has now gone to work for one of Merrill Lynch's competitors, Dean Witter.

According to Christian Williams's Affidavit,¹ the defendant gained extensive sales opportunities, support, and training as part of his employment with Merrill Lynch, and he acquired accounts representing millions of

dollars in assets that generated over \$ 1.1 million in revenue in Year 2000. Affidavit of Christian Williams P 5. As part of his employment, the defendant was bound by three instruments he signed: (1) an Account Executive Trainee Agreement; (2) the Merrill Lynch Compliance Outline for Financial Consultants; and (3) Guidelines for Business Conduct. Complaint, Exs. A-C. The plaintiff believes that, in violation of these agreements, the "Defendant has solicited, is soliciting, and plans to continue soliciting Merrill Lynch clients ... to transfer their Merrill Lynch accounts to Dean [*3] Witter." Affidavit of Christian Williams P 7. Moreover, the plaintiff "believe[s] that, in violation of paragraph 1 of his Agreement and the other agreements ... Defendant has retained and now is using confidential information pertaining to some or all of the Merrill Lynch customers he formerly serviced." Id. P 12.

1 Christian Williams is the District Sales Manager of Merrill Lynch with responsibility for Washington, D.C. office where the defendant was previously employed.

II. DISCUSSION

In considering an application for preliminary injunctive relief, courts in the D.C. Circuit examine whether (1) there is a substantial likelihood that the plaintiff will succeed on the merits of its claims; (2) the plaintiff will suffer irreparable injury if an injunction does not issue; (3) an injunction will substantially injure other parties; (4) the public interest will be furthered by interim injunctive relief. See *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841, 842-43 (D.C. Cir. 1977); see also *American Bankers Ass'n v. National Credit Union Admin.*, 38 F. Supp.2d 114, 120 (D.D.C. 1999).

With respect to likelihood of success on the merits, the primary argument advanced by [*4] the plaintiff is that by contacting his Merrill Lynch customers, the plaintiff is violating the nonsolicitation clause of his contract with Merrill Lynch. Specifically, the plaintiff points to paragraphs 1-2 of his Account Executive Trainee Agreement:

1. All records of Merrill Lynch, including the names and addresses of its clients are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after

termination of my employment for any reasons with Merrill Lynch. None of such records, nor any part of them is to be removed by me from the premises of Merrill Lynch either in original form or in computerized, duplicated, or copied form except with the permission of an office manager for the purpose of conducting the business of Merrill Lynch and the names, addresses, and other facts in such records are not to be transmitted verbally, in writing, or in computerized form by me except in the ordinary course of conducting business for Merrill Lynch. All of said records or any part of them are the sole property information of Merrill Lynch and shall be treated by me as confidential information of Merrill Lynch.

2. In the event of termination of [*5] my services with Merrill Lynch for any reason, I will (i) not solicit, for a period of one year from the date of termination of my employment, any of the clients of Merrill Lynch whom I served or other clients of Merrill Lynch whose names became known to me while in the employ of Merrill Lynch in the office of Merrill Lynch in which I was employed, and who reside within one hundred miles of the Merrill Lynch office in which I was employed, and (ii) return any original records and purge or destroy any computerized, duplicated, or copied records referred to in paragraph 1 which have been removed from the premises of Merrill Lynch in any form. In the event that any of the provisions contained in this paragraph and/or paragraph 1 above are violated, I understand that I will be liable to Merrill Lynch for any damage and/or injury, including but not limited to reasonable attorney's fees, caused thereby and, in the event that damages are an inadequate remedy, Merrill Lynch will be entitled to injunctive or other equitable relief.

Complaint, Ex. A PP 1-2 (emphasis in original).²

The calls made by the defendant to his Merrill Lynch customers, and the unauthorized use of customer information [*6] to make those calls, argues the plaintiff, clearly violates the terms of his contract, and Merrill Lynch will thus succeed on the merits.

2 It is undisputed in this case that such nonsolicitation clauses are fully enforceable under D.C. law. See, e.g., *Ellis v. James Hurson Ass'n*, 565 A.2d 615, 620 (D.C. 1989).

The defendant concedes that he has personally called customers he had at Merrill Lynch. See Def.'s Declaration P 7. ³ But he counters that he merely "announced" his resignation and "did not solicit any customer to move his or her account to Dean Witter." Id. 17 ("In light of the fiduciary duties I owe to my customers, after I resigned from Merrill Lynch, I have contacted my customers to announce my resignation from Merrill Lynch and my new business affiliation with [Dean Witter]. In making these announcements to my clients, I did not solicit any customer to move his or her account to Dean Witter.").

3 And he states that "the only information I have relating to my clients consists of addresses and telephone numbers which I have accumulated among my personal records over the years or which are in my memory." Id. P 10.

The Court finds that the plaintiff has made a substantial showing [*7] that it is likely to prevail on the merits. The central dispute here is one familiar to the courts in this type of case: whether the defendant's initiation of contact with his customers constitutes "solicitation," which is prohibited by the nonsolicitation clause in the parties' contract. The Court has reviewed all of the cases submitted by the parties addressing this issue. Compare, e.g., *Merrill Lynch v. Strycharz*, No. 00-1850 (D.D.C. 2000) (Roberts, J); *Merrill Lynch v. Shreves*, No. 00-1634 (D.D.C. 2000) (Roberts, J.); *Merrill Lynch v. Zogorin*, No. 00-1525 (D.D.C. 2000) (Kennedy, J.); *Merrill Lynch v. Sival*, No. 99-185 (D. Md. 1999) (Garbis, J.), with *Merrill Lynch v. Fowler*, No. 99-3000 (D.D.C. 1999) (Robertson, J.); *Merrill Lynch v. Wilkinson*, No. 98-1470 (D.D.C. 1998) (Robertson, J.); *Merrill Lynch v. Updike*, No. 99-111 (D. Md. 1999) (Nickerson, J.); *Merrill Lynch v. Keitz*, No. 96-2441 (D. Md. 1996) (Kaufman, J.); *Merrill Lynch v. Strauss*, No. 99-1571-A (B.D. Va. 1999) (Hilton, J.).

The Court is unpersuaded by the subtle distinction the defendant attempts to draw in this case between his action, which he labels an announcement, and solicitation, which is prohibited by his contract [*8] with Merrill Lynch. It is a distinction without a difference in this case. Even if the defendant merely calls his clients and states that he has resigned from Merrill Lynch and now works for Dean Witter, the Court finds that his initiation of targeted contact through the use of client information gained through his employment with Merrill Lynch constitutes prohibited solicitation. Despite the "announcement" label the defendant places on it, such initiated, targeted contact is tantamount to solicitation because there is no reason to believe that a customer on the receiving end of such a phone call does not assume that the broker wishes for him to transfer his account. A genuine announcement, by contrast, has a broader, general nature, such as a newspaper or trade paper advertisement. Such an announcement simply does not have the same level of intrusive, proactive communication of such tacit expectations. The Court recognizes the awkwardness that can be created by nonsolicitation clauses. See, e.g., *Strauss*, No. 99-1571-A, Tr. at 13 ("It's kind of embarrassing, perhaps even inconsiderate, position to be in with you clients. You talk to them every day, have people trading every day, and [*9] all of a sudden you just disappear.") (Hilton, J.). However, such situations are created volitionally by the defendants when they accept employment and enter agreements containing such nonsolicitation clauses. The defendant here counters that he had a "fiduciary duty" to contact his clients upon leaving Merrill Lynch. Def.'s Declaration 17. But he has proffered no authority to substantiate such a specific duty. For those reasons, the Court finds that the plaintiff has shown a substantial likelihood of success on the merits.

Although the plaintiff's showing of irreparable harm is much weaker than its showing with respect to its likelihood of success, it is sufficient. The plaintiff claims that there is no adequate remedy at law because damages will be impossible (or at least extremely difficult) to measure. It also argues that without injunctive relief, the misuse of confidential information will result in lost trust and confidence between Merrill Lynch and their clients, the loss of goodwill, and the loss of reputation. The Court finds it difficult to see how one stockbroker alone can bring such grave harm to Merrill Lynch. However, the Court ultimately agrees with Merrill Lynch that [*10] the difficulty in calculating damages can be great. And as

evidenced by the number of cases involving brokers who leave their employer to work for a competitor, solicitation is a recurring problem that, without adequate equitable relief, can ultimately cause attrition in companies such as Merrill Lynch.

By contrast, an injunction will not cause substantial injury to the defendant. Such relief will maintain the status quo while the parties proceed to arbitration and will not prevent the defendant from functioning as a broker with his new firm. It will not harm Merrill Lynch customers because nothing has been presented to the Court to show that their right to choose a brokerage firm or an individual broker—even if it is the defendant—will be impeded by the injunction granted here. 4 And such an injunction is important in promoting the public interest because it protects the confidentiality of company trade secrets and consumer information, and gives recognition to valid contractual provisions entered into knowingly and voluntarily by parties that create legitimate expectations in business relationships.

Toward this end, the Court particularly notes the representations of the plaintiff's [*11] counsel to this Court that if the customers call to speak to the defendant broker, they will be informed fully and truthfully not only that he no longer works for Merrill Lynch, but also, at least if the customer asks, where the defendant broker now works (i.e., Dean Witter). In Wilkinson, for example, the plaintiff's counsel took part in the following colloquy with this Court:

The Court: And if the customer calls Merrill Lynch and asks—calls [the defendant's] number and they say, 'Who are you asking for?' and the customer says '[the defendant],' what response do they get?

Mr. Stief: I would expect they would get that he has left the firm. If they asked where he was, I would expect they would be told he's at Dean Whitter [sic] at this point. He's at Dean Whitter [sic] here in D.C. That's certainly consistent with the policy of the firm. So that if a customer was asking where he was, the customer would be answered truthfully.

Wilkinson, No. 98-1470, Tr. at 14. The plaintiff's counsel

has represented the same to other courts:

Mr. Nachmanoff: I would submit that it is not just the fact that he made the telephone calls, but it's the timing of those calls. Why would he have to call, on [*12] the same day that he resigns, his clients unless it is to induce them to switch their accounts?

The Court: Well, to keep somebody from calling him the next morning and saying, 'He's not here. He left.'

Mr. Nachmanoff: And they would then say, 'He's now at Dean Witter.'

Strauss, No. 99-1571-A, Tr. at 13. Due to such prior representations to this Court, in cases on which the plaintiff now asks the Court to rely, and because the plaintiff has made no contrary representations before the Court in this case, the Court relies on such representations as part of its decision in this case.

III. CONCLUSION

For the reasons stated above, the Court will grant the plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. An appropriate Order will accompany this Opinion.

February 26th, 2001

Thomas F. Hogan

United States District Judge

ORDER

For the reasons stated from the bench at the hearing held in open court on Friday, February 23, 2001 and in the accompanying Memorandum Opinion, it is hereby

ORDERED that the plaintiff's Emergency Motion for a Temporary Restraining Order is **GRANTED**. It is further

ORDERED that a Temporary Restraining Order issue immediately and that security [*13] in the amount of \$ 100,000 be posted no later than February 27, 2001. It is further

ORDERED that the defendant is enjoined and

restrained, directly or indirectly, and whether alone or in concert with others, including any officer, agent, representative, and/or employee of his new employer, Morgan Stanley Dean Witter ("Dean Witter"), for ten (10) days from the date of this Order or until further Order of this Court from:

1. soliciting any business from any customer of Merrill Lynch whom the defendant served or whose name became known to him while in the employ of Merrill Lynch ("clients" or "customers"), including by initiating any contact with any of the clients regarding the defendant's new employment with Dean Witter; and, further, from accepting any business or account transfers from any clients with whom the defendant has initiated contact at any time in the past regarding his new employment at Dean Witter (excluding (i) the defendant's immediate family, and (ii) any clients who reside more than one hundred miles from the Washington, D.C. office of Merrill Lynch); and

2. using, disclosing, or transmitting for any purpose, including contacting the clients, the information contained [*14] in the records of Merrill Lynch, including, but not limited to, the names, addresses, and financial information of the clients, and further, from accepting any business or account transfers from any clients whose records or information the defendant, or anyone acting on the defendant's behalf, has disclosed to Dean Witter or used for the purpose of doing or attempting to do business on behalf of Dean Witter (excluding (i) the defendant's immediate family and (ii) any customers who reside more than one hundred miles from the Washington, D.C. office of Merrill Lynch);

3. destroying, erasing or otherwise making unavailable for further proceedings in this matter, or in any arbitration proceeding between the parties, any records or documents (including data or information maintained in computer media) in the defendant's possession or

control which were obtained from or contain information derived from any Merrill Lynch records, which pertain to Merrill Lynch customers, or which relate to any of the events alleged in the complaint in this action. It is further

ORDERED that the defendant, and anyone acting in concert or participation with the defendant, including the defendant's counsel and [*15] any agent, employee, officer or representative of Dean Witter, shall return to Merrill Lynch any and all records, documents and/or information pertaining to Merrill Lynch customers, whether in original, copied, computerized, handwritten or any other form, and shall purge any and all such information from their possession, custody, or control within twenty-four (24) hours of notice to the defendant or his counsel of the terms of this Order, provided, however, that any information so purged shall be printed prior to purging and be returned to Merrill Lynch pursuant to this paragraph and consistent with paragraph 3 above. It is further

ORDERED that this Order shall remain in full force for no longer than ten (10) days from the date of this Order. Moreover, it is further

ORDERED that the plaintiff's request for discovery is **DENIED**. Accordingly, it is further

ORDERED that pursuant to the requirements of sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3-4, the parties are directed to proceed immediately toward an expedited arbitration hearing on the merits before a duly appointed panel of arbitrators pursuant to Rule 10335(g) of the National Association of Securities [*16] Dealers ("NASD") Code of Arbitration Procedure. Thus, it is further

ORDERED that all further proceedings before this Court are stayed pending the outcome of the arbitration proceeding.

SO ORDERED.

February 26th, 2001

Thomas F. Hogan

United States District Judge



LEXSEE 1998 U.S. DIST. LEXIS 3188



Cited
As of: Sep 19, 2009

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Plaintiff, v. GEORGE H. CROSS, III, Defendant.

98 C 1435

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 3188

March 12, 1998, Decided

DISPOSITION: [*1] Merrill Lynch's renewed motion for a temporary restraining order granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff investment firm filed an action against defendant employee alleging violations of an employment agreement and of the Illinois Trade Secrets Act, 765 Ill. Comp. Stat. 1065/1 et seq. The investment firm filed a motion for a temporary restraining order pending an arbitration hearing.

OVERVIEW: The employee signed an employment agreement with the investment firm, and the agreement included a provision prohibiting the employee from soliciting clients of the investment firm for a period of one year after leaving employment there. He later left the investment firm and began working for one of its competitors. He wrote letters to his former clients so that they would know how to reach him and included paperwork for them to sign if they wanted to transfer their accounts to his new firm. The investment firm claimed that this conduct constituted solicitation, and the parties agreed to submit the matter to arbitration. The

court held that the investment firm was entitled to a temporary restraining order pending arbitration. The court ruled that (1) the investment firm showed a better than negligible chance of prevailing on the merits; (2) the affidavits submitted by the investment firm supported its assertions of irreparable harm, an inadequate remedy at law, and that the balance of hardships was in its favor; and (3) issuing a temporary restraining order would preserve the status quo until the arbitration panel decided the case on the merits.

OUTCOME: The court granted the investment firm's motion for a temporary restraining order.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

[FN1] A party seeking a temporary restraining order has the burden of establishing each of the following: a better than negligible chance of prevailing on the merits; the

absence of an adequate remedy at law; and irreparable harm if the temporary restraining order is not granted. Once the movant establishes these three elements, the court must balance the harm to the movant if the injunction is not issued with the harm to the defendant if it is issued improvidently. The equitable purpose of a temporary restraining order is to minimize hardship to the parties pending the ultimate resolution of the lawsuit.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Former Employer's Customers

[HN2] There is a significant distinction between mere contact and solicitation. The direct solicitation of customers, as opposed to general advertisement, suggests a private communication directed at a person known by the solicitor to have an immediate or potential need for insurance.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets Trade Secrets Law > Protected Information > Customer Lists

[HN3] Customer lists are entitled to trade secret protection under Illinois law.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN4] District courts are not precluded from issuing preliminary injunctive relief pending arbitration. Pro-arbitration policies are furthered by permitting a district court to preserve the meaningfulness of the arbitration by granting injunctive relief.

COUNSEL: For MERRILL LYNCH PIERCE FENNER & SMITH INC, plaintiff: John H. Anderson, Jerome F. Buoh, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, IL.

For GEORGE H CROSS, III, defendant: Lawrence Andrew Brehm, Jeffrey Ray Rosenberg, Schuyler, Roche & Zwimer, P.C., Chicago, IL.

JUDGES: Charles P. Kocoras, United States District

Judge.

OPINION BY: Charles P. Kocoras

OPINION

MEMORANDUM OPINION AND ORDER

CHARLES P. KOCORAS, District Judge:

This matter is before the court on the plaintiff's renewed motion for a temporary restraining order pending an arbitration hearing on the merits of the plaintiff's case against the defendant. For the foregoing reasons, the court grants the plaintiff's motion.

DISCUSSION

Plaintiff Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), filed suit against George H. Cross, III, for alleged violations of the express provisions of his employment agreement with Merrill Lynch, for violations of the Illinois Trade Secrets Act, 765 ILCS 1065/1 *et seq.*, for breach of the duty of loyalty, and unfair competition. Merrill Lynch claims that Cross solicited Merrill Lynch [*2] clients and retained confidential client information and other trade secrets after he resigned from Merrill Lynch on March 9, 1998. Merrill Lynch seeks a temporary restraining order ("TRO") to prevent Cross from soliciting clients that he serviced while employed at Merrill Lynch. The parties agreed to submit their dispute to arbitration and intend to have the merits of this case resolved at an arbitration hearing before a panel of arbitrators in accordance with Rule 12335(g) of the National Association of Securities Dealers Code of Arbitration Procedure.

Merrill Lynch claims that Cross violated the express provisions of his employment agreement. Specifically, the agreement provides:

In the event of termination of my services with Merrill Lynch for any reason, I will not solicit for a period of one year from the date of termination of my employment in any community or city served by the office of Merrill Lynch, ... at which I was employed at any time, any of the clients of Merrill Lynch whom I served or whose names became known to

me while in the employ of Merrill Lynch.

[HN1] A party seeking a TRO has the burden of establishing each of the following: (1) a better than negligible [*3] chance of prevailing on the merits; (2) the absence of an adequate remedy at law; and (3) irreparable harm if the TRO is not granted. *Artipresent GmbH Vertrieb Internationaler Collectionen für den Wohnbereich v. Emruss Corp.*, 1997 U.S. Dist. LEXIS 12923, No. 97 C 5130, 1997 WL 534358 (N.D. Ill. 1997). Once the movant establishes these three elements, the court must balance the harm to the movant if the injunction is not issued with the harm to the defendant if it is issued improvidently. *Id.* Similar to a preliminary injunction, the equitable purpose of a TRO is to minimize hardship to the parties pending the ultimate resolution of the lawsuit. *Faheem-El v. Kltncar*, 841 F.2d 712, 717 (7th Cir. 1988).

In this case, Merrill Lynch has provided the court with strong reasons for granting a TRO. First, Merrill Lynch has provided evidence, by way of affidavits, showing that Cross has contacted Merrill Lynch customers that he served while employed at Merrill Lynch. Merrill Lynch contends that the purpose of Cross' contact with Merrill Lynch customers is to induce them to move their accounts to his new employer, Dain Rauscher, in violation of Cross' employment agreement with Merrill Lynch. Cross admits that [*4] he has contacted Merrill Lynch clients, but disputes that such contact was in fact solicitation. Cross claims that he merely advised these customers that he had resigned from Merrill Lynch in order to work for Dain Rauscher in Chicago.

[HN2] Although there is a significant distinction between mere contact and solicitation, courts have found conduct similar to Cross' conduct in this case to be solicitation. In *Tomei v. Tomei*, 235 Ill. App. 3d 166, 602 N.E.2d 23, 26, 176 Ill. Dec. 716 (Ill. App. Ct. 1992), the court explained: "The direct solicitation of ... customers, as opposed to general advertisement, suggests a private communication directed at a person ... known by the solicitor to have an immediate or potential need for insurance." In this case, Cross personally contacted Merrill Lynch customers and admits that these customers have a need for his financial services. Moreover, Cross did not simply contact previous customers to provide them with information as to his whereabouts. In one

affidavit the affiant states that Cross sent a letter to a Merrill Lynch customer, enclosing a form for the customer to complete to transfer his account to Dain Rauscher. Thus, it appears that Cross [*5] is engaging in conduct that clearly constitutes solicitation. Further, we find significant that Cross personally phoned the Merrill Lynch customers, using confidential records and information he obtained from Merrill Lynch. [HN3] Customer lists are entitled to trade secret protection under Illinois law. See *IDS Financial Services, Inc. v. Smithson*, 843 F. Supp. 415, 418 (N.D. Ill. 1994). Based on the foregoing, the court finds that Merrill Lynch has shown a better than negligible chance of prevailing on the merits of their claims.

The affidavits provided by Merrill Lynch also support their assertion of irreparable harm, an inadequate remedy at law, and that the balance of hardships is in their favor. The affiants state that Cross has contacted Merrill Lynch customers, has used confidential customer information to do so, and has used Merrill Lynch's computer system to generate financial records. As stated previously, one affiant states that Cross sent a form to a Merrill Lynch customer which would transfer the customer's account to Dain Rauscher if completed. Merrill Lynch will suffer irreparable harm from the disclosure of trade secrets, customer lists, and other information because [*6] Merrill Lynch may lose clients and suffer loss to its goodwill and business reputation from Cross' actions. See e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (Merrill Lynch faced "irreparable non-compensable harm in the loss of its customers"). If clients discover that Merrill Lynch has somehow permitted their "confidential" information to be disclosed to Dain Rauscher, they may lose trust and confidence in Merrill Lynch. See e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Krumer*, 816 F. Supp. 1242, 1247 (N.D. Ohio, 1992) ("irreparable and immeasurable harm lies in the fact that Merrill Lynch clients when they discover that their financial information ... have been disclosed, will lose trust and confidence in Merrill Lynch.") The balance of hardships, in this case, also favors the plaintiff. The harm to Merrill Lynch from the defendant's use and disclosure of confidential, customer information and trade secrets clearly outweighs any harm to Cross from refraining, for a very limited period of time, from contacting such customers and using Merrill Lynch's trade secrets and customer information.

In a similar case involving Merrill Lynch, [*7] the Seventh Circuit found that the district court did not abuse its discretion in granting a TRO enjoining the defendants, two account executives for Merrill Lynch, from disclosing Merrill Lynch records and soliciting clients of Merrill Lynch. See *Merrill Lynch, Pierce, Fenner & Smith v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993). The Seventh Circuit found that evidence indicating that the defendants took documents and information regarding Merrill Lynch customers and used that information to solicit customers was sufficient to support the district court's determination that irreparable harm would result to Merrill Lynch. *Id.* This evidence also supported the district court's determination that there was an inadequate remedy at law. *Id.* Although the defendants would suffer some harm during the pendency of the TRO, the Seventh Circuit stated that the district court was right in finding that the denial of the TRO would inflict greater injury on Merrill Lynch. *Id.* Significantly, the Seventh Circuit noted that "the TRO served to maintain the status quo without prejudice to the merits of any of the parties' claims or defenses until an arbitration panel could consider the [*8] issues presented."

Likewise, in this case, a TRO would preserve the status quo without prejudice to either party until an arbitration panel considers the merits of Merrill Lynch's case. We note that the Seventh Circuit said in *Salvano* that [HN4] "district courts are not precluded from issuing preliminary injunctive relief pending arbitration." *Salvano*, 999 F.2d at 214. To the contrary, the pro-arbitration policies increasingly reflected in cases "are furthered ... by permitting a district court to preserve the meaningfulness of the arbitration" by granting injunctive relief." *Id.* Accordingly, the court grants Merrill Lynch's motion for a temporary restraining order.

IT IS HEREBY ORDERED AND DECREED: A temporary restraining order shall issue immediately and stay in effect until March 22, 1998.

1. The defendant is restrained, directly or indirectly,

whether alone or in concert with others, from:

(a) contacting any client of Merrill Lynch whom defendant served or whose name became known to defendant while in the employ of Merrill Lynch;

(b) accepting any business or account transfers from any customers of Merrill Lynch whom defendant, or anyone acting on defendant's behalf, [*9] has already contacted for the purpose of doing business with defendant's present employer; and

(c) using, disclosing, or transmitting for any purpose, the information contained in the records of Merrill Lynch, including, but not limited to, the names, addresses, and financial information of said clients.

2. Pending a preliminary injunction hearing before this court, and pursuant to the requirements of sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3-4, the parties are directed to proceed toward an expedited arbitration hearing on the merits before a duly appointed panel of arbitrators in accordance with Rule 10335(g) of the National Association of Securities Dealers Code of Arbitration Procedure.

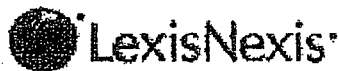
CONCLUSION

For the reasons set forth above, the court grants Merrill Lynch's renewed motion for a temporary restraining order.

Charles P. Kocoras

United States District Judge

Dated: March 12, 1998



LEXSEE 2002 U.S. DIST. LEXIS 20028



Analysis
As of: Sep 19, 2009

**PETER HENRY and O'KEEFE-HENRY DIRECT, INC., Plaintiffs, vs. JEAN
O'KEEFE and O'KEEFE DIRECT MARKETING, INC., Defendants.**

Case No. 01 C 8698

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

2002 U.S. Dist. LEXIS 20028

October 18, 2002, Decided

DISPOSITION: [*1] Judgment entered in favor of plaintiffs on Count 1, Count 2 voluntarily dismissed and judgment entered in favor of defendants on Counts 3 through 6.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a catalog consulting company and its president, sued defendants, a competing company and its president, alleging breach of contract, trademark infringement and unfair competition under the Lanham Act and common law, and violation of various Illinois state statutes relating to deceptive trade practices. A trial was had, and the court was ready to rule.

OVERVIEW: The competitor's president was formerly a business partner with the catalog company president, and they formed the catalog company together, with the name of the company being a combination of their names. In the buyout agreement, the competitor's president signed a non-compete agreement for two years. Before the expiration of that period, she formed a new company, using her name in the title, and wrote letters to catalog company clients advising them of her new company, and

that when the non-compete period had expired, she would like to do business for them. The court held that (1) the letters constituted solicitations in violation of the covenant not to compete; (2) plaintiffs failed to show secondary meaning to the name of the catalog company under the Lanham Act, as there was no evidence of consumer confusion, and the evidence regarding advertising, length of use, and sales volume was insufficient; (3) even if they had showed secondary meaning, there was no evidence of the likelihood of consumer confusion; and (4) the claims under the state statutes governing deceptive trade practices and unfair competition failed as they were based on the same grounds.

OUTCOME: Plaintiffs voluntarily dismissed one count. Judgment was entered for plaintiffs on the breach of contract claim and for the defendants on the remaining claims. The court entered an injunction prohibiting further solicitation of plaintiffs' clients for the remainder of the covenant period, plus an extension of the covenant for a reasonable period with regard to the four clients that defendants improperly solicited.

LexisNexis(R) Headnotes

Contracts Law > Contract Interpretation > General Overview

[HN1] There is a difference between the terms "solicitation" and "contact" in an agreement containing a non-compete clause, and an agreement's prohibition on solicitation does not prevent all contact.

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Contract Interpretation > General Overview

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN2] Under Illinois law, whether a particular client contact constitutes a solicitation, which is in violation of a covenant not to compete, depends upon the method employed and the intent of the solicitor to target a specific client in need of his services. The law does not require an express request for business in order for a solicitation to occur.

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Contract Interpretation > General Overview

[HN3] A solicitation that occurs during a period covered by a non-solicitation agreement violates that agreement even if the person is only soliciting the recipient to give him business after the non-solicitation period expires.

Computer & Internet Law > Internet Business > General Overview

Contracts Law > Contract Interpretation > General Overview

Criminal Law & Procedure > Criminal Offenses > Fraud > Computer Fraud > General Overview

[HN4] In determining whether a breach of a covenant not to compete has occurred, a court must look at the intent of the accused party. But, the court must also analyze how a particular contact was reasonably understood by the recipient. The law generally deems a person to have intended the natural and probable consequences of her actions. Thus, if a recipient would have understood a

particular contact as a solicitation for business, that suffices to show solicitation even absent direct evidence of the party's intent and even in the face of a denial of an intent to solicit.

Trademark Law > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > Federal Unfair Competition Law > False Designation of Origin > Elements

Trademark Law > Federal Unfair Competition Law > Trade Dress Protection > General Overview

[HN5] See 15 U.S.C.S. § 1125(a)(1).

Real Property Law > Financing > Secondary Financing > Lien Priorities

Trademark Law > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > Federal Unfair Competition Law > Trade Dress Protection > General Overview

[HN6] To succeed in a claim under 15 U.S.C.S. § 1125(a), a plaintiff has to show that it has a prior, protectable trademark, and that the defendant's use of the mark is likely to cause confusion.

Trademark Law > Conveyances > General Overview

Trademark Law > Subject Matter > Secondary Meaning > General Overview

[HN7] A mark acquires secondary meaning when it has been used so long and so exclusively by one company in association with its products or services in that particular industry that the word, term, name, symbol, or device has come to mean that those products or services are the company's trademark. To establish secondary meaning, a court may consider several factors to decide whether secondary meaning has been acquired or established: (1) the amount and manner of advertising; (2) the sales volume; (3) the length and manner of use; (4) consumer testimony; and (5) consumer surveys.

Trademark Law > Likelihood of Confusion > Consumer Confusion > Circuit Court Factors > 7th Circuit Court

Trademark Law > Likelihood of Confusion > Intent > General Overview

Trademark Law > Likelihood of Confusion > Similarity > Appearance, Meaning & Sound > General Overview

[HN8] In determining whether there is a likelihood of confusion, the United States Court of Appeals for the

Seventh Circuit has considered several factors to be important: (1) similarity of the marks; (2) similarity of the products; (3) area and manner of advertising and use; (4) degree of care likely to be used by consumers; (5) strength of plaintiff's mark; (6) whether any actual confusion exists; and (7) defendant's intent to palm off its goods as those of plaintiff.

Trademark Law > Federal Unfair Competition Law > General Overview

Trademark Law > Infringement Actions > Burdens of Proof

Trademark Law > Likelihood of Confusion > General Overview

[HN9] Under the Illinois common law of unfair competition, a plaintiff must prove the same elements to recover for trademark infringement as under the Lanham Act: (1) the existence of a protectable trademark, and (2) a likelihood of confusion.

COUNSEL: For PETER HENRY, O'KEEFE-HENRY DIRECT, INC., plaintiffs: Michael R. Levinson, Charles Chajfec, Seyfarth Shaw, Chicago, IL.

For JEAN O'KEEFE, O'KEEFE DIRECT MARKETING, defendants: Raymond R. Pesavento, Stone & Moore, Chicago, IL.

JUDGES: MATTHEW F. KENNELLY, United States District Judge.

OPINION BY: MATTHEW F. KENNELLY

OPINION

AMENDED

1

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 The amendment involves a typographical error on page nine of the original entry.

The Court makes the following findings of fact and conclusions of law pursuant to *Federal Rule of Civil Procedure 52(a)*.

Plaintiff O'Keefe-Henry Direct provides catalog

consulting services to companies which sell products through catalogs. Plaintiff Peter Henry is the President and sole shareholder of O'Keefe-Henry. Defendant O'Keefe Direct Marketing, now known as O'Keefe Marketing Group, Inc., also [*2] provides catalog consulting services to companies which sell products through catalogs. Defendant Jean O'Keefe is the President and sole shareholder of O'Keefe Marketing.

Henry and O'Keefe founded O'Keefe-Henry in 1993. Each owned 50% of the stock of the company and shared equally in its net income. In January 1999, Henry unexpectedly informed O'Keefe that he wanted to own his own company and thus either wanted to buy her out or split the company.

On January 18, 1999, Henry, O'Keefe, and O'Keefe-Henry entered into an Agreement by which O'Keefe agreed to sell to Henry all of her shares in O'Keefe-Henry in return for \$ 1000 -- the amount she had paid for the stock at the time the corporation was founded. The Agreement provided that O'Keefe would transfer all of her shares in O'Keefe-Henry on December 31, 2000. It also provided that O'Keefe was to work on a schedule "as defined by O'Keefe" until December 31, 2000, when her employment would terminate.

The Agreement also provided that through December 31, 2000, O'Keefe and Henry would each receive 50% of the corporation's net income and dividends and would equally divide the net accounts receivable as of December 31, 2000 (as was, of [*3] course, her entitlement as 50% owner of the corporation). The Agreement also provided that on December 31, 2000, O'Keefe would receive title to a BMW automobile owned by O'Keefe-Henry.

The Agreement also contained the following provision:

Restrictive covenant: For a period of two (2) years after the date of her termination of employment from North Shore Direct, Inc. and O'Keefe-Henry Direct, Inc., O'Keefe shall not (a) solicit customers or clients of either North Shore Direct, Inc. and O'Keefe-Henry Direct, Inc. existing at the time of her employment with North Shore Direct, Inc. and O'Keefe-Henry Direct, Inc. terminates (b) disclose, make known, or divulge to any person or entity,

either directly or indirectly, the names or addresses of any customers, clients, suppliers or other, confidential or proprietary information of either North Shore Direct, Inc. or O'Keefe-Henry Direct, Inc.

Pursuant to the Agreement, O'Keefe set her own work schedule following January 18, 1999, and in September, 2000, O'Keefe stopped working altogether, though her employment, as provided by the agreement, did not terminate until December 31, 2000. During this period from January 1999 through [*4] December 2000, O'Keefe-Henry paid O'Keefe a total of approximately \$ 600,000, representing her share of the net income and accounts receivable as provided by the Agreement. O'Keefe-Henry also transferred title to the BMW to O'Keefe as the Agreement provided.

As of December 31, 2000, O'Keefe-Henry had 19 clients, including among other J-P Cycles, Dickson Company, Elvis Presley Enterprises, Inc., and Anheuser-Busch.

Since its inception, O'Keefe-Henry has used the name "O'Keefe-Henry Direct" (sometimes with a hyphen, sometimes without) in connection with its catalog consulting services.

. The name appears on the letterhead of all correspondence from the company.

. Each of the corporation's professionals (currently 4) has business cards that bear the name.

. O'Keefe-Henry sends out 2500 direct mail packages per year that contain materials prominently featuring the name.

. O'Keefe-Henry regularly attends or participates in industry conferences -- including the catalog conference and the Direct Marketing Association Conference -- at which it distributes promotional material prominently bearing the company's name.

. O'Keefe-Henry is a member of professional organizations, [*5] such as

the Direct Marketing Association and the Chicago Association of Direct Marketing, which list the company by the name "O'Keefe-Henry Direct" in their directories, newsletters, and other publications.

. O'Keefe-Henry regularly issues press releases about its business successes which prominently display and feature the company's name.

. O'Keefe-Henry produces and distributes to clients and potential clients various "giveaways" bearing the company's name.

. O'Keefe-Henry has held golf outing for clients and prospects at which it displays a banner bearing the company's name.

Since its inception, O'Keefe-Henry has spent approximately \$ 100,000 (or an average of about \$ 11,000 per year) promoting, listing and advertising its services and doing business under the name "O'Keefe-Henry Direct." O'Keefe-Henry's sales have grown from approximately \$ 175,000 in 1993 to \$ 1.5 million in 2001. Defendants have admitted in their answer to the complaint that O'Keefe-Henry provides consistently high quality services and enjoys valuable and extensive good will and a very favorable reputation in the catalog consulting business, and that O'Keefe-Henry has long standing relationships [*6] with many of its customers.

O'Keefe remained retired until approximately mid-October 2001, when she decided to get back in to the catalog consulting business and formed her own catalog consulting company. She chose the name "O'Keefe Direct Marketing" for the company and began conducting business under that name. O'Keefe included the name "O'Keefe" in the company name because it was her last name and she wanted prospective clients to know the company was her company. She testified that she chose the name "O'Keefe Direct Marketing" to distinguish that company from "O'Keefe-Henry Direct."

In March 2002, O'Keefe changed the name of her company to "O'Keefe Marketing Group, Inc." O'Keefe

Marketing Group has been conducting business under that name in catalog consulting since that time. On company literature and letterhead, the word "O'Keefe" is displayed in the name "O'Keefe Marketing Group" more prominently than the other words.

There are thousands of potential customers for the types of catalog consulting services offered by O'Keefe-Henry and O'Keefe Marketing. Catalog consulting companies procure new clients in a variety of ways, including referrals from existing or past clients and [*7] others, and direct contact of entities which may be interested in catalog consulting services. It can take up to two years or more after initially contacting a potential new client before a catalog consulting company like O'Keefe-Henry or O'Keefe Marketing gets business from that source.

Beginning in October, 2001, O'Keefe and O'Keefe Marketing (at that time under the name "O'Keefe Direct Marketing") contacted numerous companies about providing catalog consulting services to them. O'Keefe and O'Keefe Marketing sent letters to contacts at companies with whom she had worked previously and to persons at companies who were members of the Chicago Association of Direct Marketing.

O'Keefe and O'Keefe Marketing also contacted several companies that were among the 19 clients at the time O'Keefe's employment at O'Keefe-Henry ended, including J-P Cycles, Dickson Company, Elvis Presley Enterprises, and Anheuser-Busch. O'Keefe spoke by telephone with several of these representatives, e-mailed some of them, and met with two of them.

On October 29, 2001, O'Keefe sent an e-mail to John Parham of J-P Cycles after failing to reach him by phone which, after some personal pleasantries, stated the following: [*8]

I've decided to come out of full retirement for now and start up a new company O'Keefe Direct Marketing, Inc. I'll be doing the same work as before, but just on my own. Unfortunately, I can't work for you ... in the same capacity for another year, but I can talk with you and go from there. I thought if you were going to be in Chicago any time soon, I'd love to buy you lunch or whatever. If that isn't possible, perhaps I could come out to

Anamosa and meet with you directly.

O'Keefe testified that her contacts with all of the O'Keefe-Henry clients were similar; she inquired if she could use them as references, and she told each of them that she could not work for them for approximately a year because of her agreement with Henry and O'Keefe-Henry.

In March 2002, O'Keefe sent letters to contacts at O'Keefe-Henry clients J-P Cycles and Dickson Company, but different people than the individuals she had contacted by phone or e-mail in October 2001. The letters announced O'Keefe's new company, asked the recipients to "let me know when you come upon a company looking for help from someone like me," and invited the recipients to contact O'Keefe. O'Keefe testified that the purpose [*9] of these letters was not to solicit business from those companies, but rather to persuade them to promote her to other companies. However, the letters also attached a "statement of my firm's capabilities for your use," which was a one-page promotional piece on O'Keefe Marketing, which ends with the statement: "We would like the opportunity to hear about your marketing needs and to explore how our services will assist you in furthering your goals."

The Chicago Association of Direct Marketing is an association of persons and companies involved in direct marketing in the Chicago area. O'Keefe sent in a "2002 Membership Directory Update Form" to the Association on behalf of O'Keefe Direct Marketing, Inc. That update form included the company's name and address, but no phone number. On page 89 of the Association's 2002 Membership Directory which was subsequently published, "O'Keefe Direct Marketing, Inc." is listed immediately above "O'Keefe-Henry Direct, Inc." However, the entry for O'Keefe Direct Marketing, Inc. sets forth a phone number registered to O'Keefe-Henry. No evidence was presented regarding how this error was made.

Henry and O'Keefe filed this lawsuit against O'Keefe and [*10] O'Keefe Marketing for breach of contract (Count), statutory trademark infringement and unfair competition under the Lanham Act (Count 3), violation of the Illinois Deceptive Trade Practices Act (Count 4), violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count 5), and common law trademark and trade name infringement and unfair

competition (Count 6). Count 2 of the complaint has been voluntarily dismissed.

Count 1. To recover for breach of contract, a plaintiff must prove the existence of a contract between the plaintiff and the defendant, performance by the plaintiff of the conditions imposed on him by the contract, breach of the contract by the defendant, and the existence of damages as a result of the breach. *See, e.g., Payne v. Mill Race Inn*, 152 Ill. App. 3d 269, 504 N.E.2d 193, 196, 105 Ill. Dec. 324 (Ill. App. 1987). Defendants have not attacked the enforceability of the restrictive covenant.

The only disputed issue is whether O'Keefe breached the restrictive covenant through her contacts with O'Keefe-Henry clients in October 2001 and March 2002. O'Keefe contends that her contacts did not violate the restrictive covenant [*11] because she informed each of them that could not work with them for the term of the restrictive covenant and she, in fact, has done no work for them during that period. O'Keefe also testified that she contacted O'Keefe-Henry clients only for references. Plaintiffs contend that O'Keefe's contacts constituted solicitations, though not for immediate work.

The process of winning new business in the catalog consulting field can require a lengthy period, sometimes a period of years. It involves, among other things, "getting your name in front of" the prospective client and making sure that the prospect knows your capabilities and skills.

Though the Agreement perhaps could have been a bit clearer, the Court finds that it was intended to prohibit solicitation for solicitation for business. That is how the term "solicit" is and would have been commonly understood in this context. The Court is not persuaded that the parties intended any special meaning of the term that differs from this common understanding -- such as a prohibition on all contact, no matter what the contact involves. Henry obviously understood how one gets business in his field, and if he had wanted to prohibit all [*12] contact, he could have insisted on having such a provision in the Agreement.

[HN1] There is, in fact, a difference between "solicitation" and "contact," and the Agreement's prohibition on solicitation does not prevent all contact. *See Profile Products LLC v. Soil Management Technologies, Inc.*, 155 F. Supp. 2d 880, 885 (N.D. Ill. 2001). On the other hand, if a so-called contact was part

an effort to solicit the recipient for business, then it is prohibited by the Agreement. Put another way, the Agreement prohibits those contacts that were part of or are fairly construed as an attempt to solicit an O'Keefe-Henry client for business.

[HN2] Under Illinois law, which the parties agree applies in this case, "whether a particular client contact constitutes a solicitation, depends upon the method employed and the intent of the solicitor to target a specific client in need of his services." *Tomei v. Tomei*, 235 Ill. App. 3d 166, 602 N.E.2d 23, 26, 176 Ill. Dec. 716 (Ill. App. 1992). The law does not require an express request for business in order for a solicitation to occur. *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Cross*, 1998 U.S. Dist. LEXIS 3188, at *4 (N.D. Ill. 1998) [*13], in which Judge Kocoras concluded that a former Merrill Lynch broker who claimed that he "merely advised these [former] customers that he had resigned from Merrill Lynch," violated a non-solicitation covenant because he personally contacted the former customers who he knew had a need for his financial services and he informed them that he had joined a competitor.

[HN3] A solicitation that occurs during a period covered by a non-solicitation agreement violates that agreement even if the person is only soliciting the recipient to give him business after the non-solicitation period expires. *Tomei*, 602 N.E.2d at 26. As the court stated in *Tomei*, "To exempt the solicitation of future business from the covenant would virtually nullify its very purpose." 602 N.E.2d at 26-27.

Tomei requires [HN4] a court to look at the intent of the accused party. But the Court must also analyze how a particular contact was reasonably understood by the recipient. The law generally deems a person to have intended the natural and probable consequences of her actions. Thus if a recipient would have understood a particular contact as a solicitation for business, that suffices [*14] to show solicitation even absent direct evidence of the party's intent and even in the face of a denial of an intent to solicit.

After reviewing the evidence, the Court finds that O'Keefe in fact made some contacts that constituted prohibited solicitation for business. Her initial contact with I-P Cycles, as reflected in the e-mail of October 25, 2001, constituted a solicitation for business even though it included a disclaimer. The e-mail was fairly understood, and the Court believes it was intended, as a

solicitation for a business relationship that would take effect following the prohibited period in the Agreement -- and thus was a prohibited solicitation whether or not O'Keefe subjectively intended to violate the Agreement's terms. This is, in the Court's view, the only fair construction of the e-mail's statement that "I can't work for you in the same capacity for another year, but I can talk with you and go from there."

O'Keefe argues that she was just looking for references, but there is no indication of that whatsoever in the e-mail, and that explanation did not surface until after Henry complained that O'Keefe was violating the agreement. O'Keefe, to her credit, quickly [*15] followed up Henry's complaint with a complete disclaimer of solicitation for business, but that was not entirely sufficient to unring the bell.

There is no written record of O'Keefe's October 2001 contacts with the other three O'Keefe-Henry clients (Anheuser-Busch, Dickson Co., and Elvis Presley Enterprises), but it can be fairly and reasonably inferred that they were similar to her initial contact with J-P Cycles, which the Court has found was a prohibited solicitation for future business.

O'Keefe's March 2002 letters that were sent to Dickson and J-P present a slightly closer case, but these nonetheless were also prohibited solicitations. They were not sent to the same people she had contacted earlier who had knowledge of her disclaimer; they included no disclaimer in the body of the letter; and they included a brochure that was itself a solicitation for business from the recipient. Even though the thrust of the letter was to ask the recipient to promote O'Keefe's new company with third parties, I think it was fairly understood and intended as a form of solicitation for the recipient's business as well.

In sum, O'Keefe violated the non-solicitation agreement in her October [*16] 2001 contacts with J-P Cycles, Dickson Companies, Anheuser-Busch, and Elvis Presley Enterprises, and her March 2002 contacts with J-P and Dickson.

Plaintiffs have not sustained any current injury, and they do not seek damages for the breach. Indeed, any actual injury would not be expected to surface until some point in the future, as the solicitations were for future business. The Court concludes, however, that plaintiffs have made a case for entry of an injunction prohibiting

further solicitation of prohibited O'Keefe-Henry clients for the remainder of the period of the covenant, plus an extension of the covenant for a reasonable period with regard to the four clients that O'Keefe improperly solicited. See *Loewen Group Int'l, Inc. v. Habertichter*, 1998 U.S. App. LEXIS 28514, at *21-22. The Court will therefore enter such an injunction and extend by twelve months the period in which defendants cannot solicit J-P Cycles, Dickson Companies, Anheuser-Busch, and Elvis Presley Enterprises for business -- that is, through December 31, 2003. An extension of that amount is reasonable and sufficient to remove any taint arising from O'Keefe's breach of the Agreement. Plaintiffs [*17] are not entitled to an extension of the covenant with regard to other customers, as that would constitute an unfair windfall to them.

Count 3. The Lanham Act provides as follows:

[HNS] Any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which - (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). [HN6] To succeed in a claim under § 1125(a), the plaintiff has to show that it has a prior, protectable trademark, and that the defendant's use of the mark is likely to cause confusion.

"O'Keefe-Henry Direct" is a descriptive mark and thus is protectable if it has [*18] acquired secondary meaning. See *Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 727 (7th Cir. 1998). [HN7] "A mark acquires secondary meaning when it has been used so long and so exclusively by one company in association with its products or services in that particular industry that the 'word, term, name,

symbol or device' has come to mean that those products or services are the company's trademark." *Id.* at 728 (quoting *Gimix, Inc. v. JS & A Group, Inc.*, 699 F.2d 901, 907 (7th Cir. 1983)). "To establish secondary meaning, a court may consider several factors to decide whether secondary meaning has been acquired or established: (1) the amount and manner of advertising; (2) the sales volume; (3) the length and manner of use; (4) consumer testimony; and (5) consumer surveys." *Id.*

Plaintiffs have failed to establish secondary meaning. There is an utter absence of consumer evidence, and the evidence regarding advertising, length of use, and sales volume is not sufficient to show secondary meaning.

Even if, however, plaintiffs had shown secondary meaning, they have failed to prove likelihood of confusion by defendants' [*19] use of the name "O'Keefe Marketing Group." [HN8] In determining whether there is a likelihood of confusion, the Seventh Circuit has considered several factors to be important: (1) similarity of the marks; (2) similarity of the products; (3) area and manner of advertising and use; (4) degree of care likely to be used by consumers; (5) strength of plaintiff's mark; (6) whether any actual confusion exists; and (7) defendant's intent to palm off its goods as those of plaintiff. *See, e.g., Ty, Inc. v. The Jones Group, Inc.*, 98 F. Supp. 2d 988, 998 (N.D. Ill. 2000).

The name "O'Keefe Direct Marketing" is facially similar to O'Keefe-Henry Direct, but the name O'Keefe Marketing Group is not. Even though the latter includes the name "O'Keefe," the mark must be examined as a whole, and when that is done the name used by defendants since March 2002 lacks any significant similarity to the plaintiff's name. The services produced by O'Keefe-Henry and O'Keefe Marketing are identical, and the area and manner of advertising and use of the "O'Keefe-Henry Direct" and the "O'Keefe Direct Marketing" and "O'Keefe Marketing Group" names are also essentially identical.

The evidence shows, however, [*20] that customers and potential customers use, and are likely to use, a significant degree of care in contacting and dealing with catalog consulting companies. No evidence has been presented reflecting that "O'Keefe-Henry Direct" is a strong mark in the catalog consulting industry, and there is no evidence of actual confusion. The evidence regarding the CADM directory fails on this score, absent any explanation of how the error occurred. Finally, there

is no evidence suggesting an intent by O'Keefe to palm off her services as those of O'Keefe-Henry Direct. The Court found defendant's testimony in this regard to be credible.

On balance, plaintiff has failed to prove a likelihood of confusion between "O'Keefe-Henry Direct" and "O'Keefe Marketing Group." The Court therefore finds in favor of defendants on Count 3.

Counts 4 & 5. Counts 4 and 5 are claims under the Illinois Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Practices Act. Plaintiffs' theory is that defendants' conduct violates these statutes based on the same grounds they urged violated the Lanham Act, and because defendants engaged in deceptive acts or practices. They have failed [*21] to prove either aspect of these claims for the reasons previously stated, and they do not argue that a breach of the non-solicitation covenant violates either of these statutes.

For these reasons, the Court finds in favor of defendants on Counts 4 and 5.

Count 6. [HN9] Under the Illinois common law of unfair competition, a plaintiff must prove the same elements to recover for trademark infringement as under the Lanham Act: (1) the existence of a protectable trademark; and (2) a likelihood of confusion. For the reasons stated with regard to Count 3, plaintiffs have failed to prove their common law claim. The Court finds in favor of defendants on Count 6.

Conclusion

In sum, judgment is entered in favor of plaintiffs on Count 1, Count 2 has been voluntarily dismissed, and judgment is entered in favor of defendants on Counts 3 through 6. The Court directs the parties to prepare a proposed form of injunction on Count 1 and sets the case for a status hearing for entry of the injunction on October 25, 2002 at 9:30 a.m. Finally, on Count 1, Plaintiffs will be entitled to their attorneys' fees under the fee-shifting provision of the Agreement. However, the Court expects the fee [*22] award to constitute a fraction of the fees for the entire case, as plaintiffs did not prevail on their other claims, which were clearly distinct from the breach of contract claims. The Court waives compliance with N.D. Ill. LR 54.3 and directs plaintiff to submit a fee petition on or before November 15, 2002, defendant to respond

by December 6, 2002, and plaintiff to reply by December
13, 2002. The Court will rule by mail.

United States District Judge

Date: October 18, 2002

MATTHEW F. KENNELLY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

2009 OCT -5 P 12:20

TEAMIA, INC.,

Plaintiff,

v.

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants;

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

C.A. No. 2009-CP-32-01078

SUPPLEMENTAL AFFIDAVIT OF BRENT YARBOROUGH

COMES NOW Brent Yarborough, who upon being duly sworn, states as follows:

1. My name is Brent Yarborough. I am over the age of eighteen, and I state the following based upon my own personal knowledge.
2. I am the majority owner and President of Team IA, Inc. ("Team IA").
3. Cicero Lucas engaged in sales activities in South Carolina on behalf of Team IA. Mr. Lucas's activities in this regard included assisting and selling products and services to Team IA customers and prospective customers as well as pre-sales and post-sales account/prospect management. For example, Mr. Lucas was involved in some facet of sales with each of the following customers/prospective customers in South Carolina: Palmetto Health, Francis Marion University, Kershaw County Hospital, Georgetown Hospital, Fairfield Memorial Hospital, Mary

Record on Appeal 327

APP0329

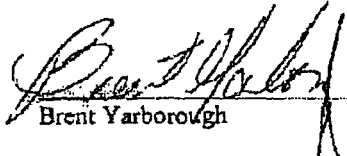
Black Hospital, Founders Federal Credit Union, South Carolina Retirement System, South Carolina Employee Insurance Program, South Carolina Comptroller General's Office, South Carolina Department of Mental Health, South Carolina Secretary of State, and the South Carolina Insurance Reserve Fund. Additionally, Mr. Lucas engaged in the following conferences on Team IA's behalf: SC GFOA (6 years), SCITDA (5 years), SC HFMA, and SC HIMMS.

4. Mr. Lucas engaged in sales activities in North Carolina on behalf of Team IA. Mr. Lucas's activities in this regard included assisting and selling products and services to Team IA customers and prospective customers as well as pre-sales and post-sales account/prospect management. For example, Mr. Lucas was involved in some facet of sales with each of the following customers/prospective customers in North Carolina: Mecklenburg County, New Hanover County, numerous other North Carolina Counties, and Wake Forest University Physicians. Additionally, Mr. Lucas attended the NCARD conference on Team IA's behalf.

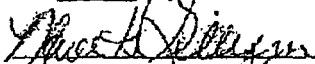
5. Mr. Lucas engaged in sales activities in Alabama on behalf of Team IA. Mr. Lucas's activities in this regard included assisting and selling products and services to Team IA customers and prospective customers as well as pre-sales and post-sales account/prospect management. For example, Mr. Lucas was involved on some facet of sales with each of the following customers/prospective customers in Alabama: Listerhill Credit Union, UAB hospital, Jefferson County, and several Alabama State Agencies.

6. Mr. Lucas engaged in sales activities in Georgia on behalf of Team IA. Mr. Lucas's activities in this regard included assisting and selling products and services to Team IA customers and prospective customers as well as pre-sales and post-sales account/prospect management. For example, Mr. Lucas was involved in some facet of sales with each of the following customers/prospective customers in Georgia: DeKalb County, Fulton County, Fayette County, Gwinnett County, Morgan County, Fayette County, Richmond County, DeKalb County, Columbia County, Cherokee County, Dade County, Glynn County, Hall County, Walton County, McDuffie County, numerous other GA counties, the Georgia Superior Court Clerks Cooperative Authority ("GSCCCA"), and several GA State agencies. Additionally, Mr. Lucas attended the COAG Annual Conferences, GSCCCA quarterly meetings, GSCCCA New Clerks Training Conference and GSCCCA Annual Conferences on Team IA's behalf.

I have read the Affidavit and swear or affirm that it is true and correct.


Brent Yarborough

SWORN to and subscribed before me
this 5th day of October, 2009.

 (SEAL)

Notary Public for State of South Carolina
My commission expires: June 23, 2013

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

2009 OCT -6 P 4:06

TEAM IA, INC.,

Plaintiff,

BETH A. CARRIGE
CLERK OF COURT
LEXINGTON SC

Case No. 2009-CP-3201078

v.

CICERO LUCAS,
GEORGE LAWSON, IV,
AND 5 POINT SOLUTIONS, LLC,

Defendants,

CICERO LUCAS,
GEORGE LAWSON, IV,

Third-Party Plaintiffs

v.

BRENT YARBOROUGH
TEAM IA

Third-Party
Defendants

Motion and Memorandum to Strike After Hearing Affidavit

This matter is currently before the Court by motion of the Defendant and Third-Party Plaintiff Cicero Lucas (hereinafter "Lucas"), pursuant to Rule 56, SCRCP, for partial summary judgment. On August 27, 2009 Lucas filed for partial summary judgment on Team IA's First Cause of Action only with respect to the covenant not to compete portions of that cause of action. On Wednesday, September 16, 2009, an affidavit by Lucas was served upon Team IA setting forth the fact that Lucas only serviced Team IA customers in Georgia and Pennsylvania. On Friday, September 18,

2009 an affidavit by Brent Yarborough was sent to counsel for Lucas that only identified two Georgia governmental entities that were Team IA clients serviced by Lucas. The matter was heard on Monday, September 21, 2009.

On October 5, 2009, a full two weeks after the hearing on the partial summary judgment motion, Team IA has filed a "supplemental" affidavit that is clearly out-of-time and improper. Additionally, the affidavit fails to carry the burden of creating an issue of material fact to prevent summary judgment against Team IA. Lucas files this motion pursuant to Rule 56(c) and (g), SCRCP, and asks the Court to strike the untimely affidavit.

DISCUSSION

I. The Post-Hearing Affidavit is Untimely Under Rule 56, SCRCP

Rule 56(c), SCRCP, provides:

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ...

(emphasis added). Lucas filed the motion on August 27th, more than 10 days before the September 21st hearing. The original affidavit submitted by Team IA was dated September 18, 2009, the Friday before the Monday hearing and after having received the affidavit of Lucas in which he set forth that Lucas had no Team IA customers in Alabama, North Carolina, or South Carolina.

Based on the two affidavits before the Court for the September 21st hearing there is no dispute of fact that Lucas only serviced Team IA customers in Georgia. This detail

is significant because under controlling South Carolina precedent a covenant not to compete is only valid if it is limited to the geographic region in which the employee was able to establish a relationship with the employer's customers. *See Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961)). As a matter of law, Team IA failed to set forth specific facts showing there is a genuine issue for trial and, thus, summary judgment against Team IA on the covenant not to compete was (and still is) proper.

II. Even if the Court Considers the Untimely Affidavit, Partial Summary Judgment is Still Proper.

The post-hearing affidavit is a clear attempt to manufacture a factual dispute over the geographic location of Lucas' Team IA customers in light of the failure to produce a genuine issue for trial at the hearing. However, a close reading of the affidavit reveals there still remains no genuine factual dispute over where Lucas actually serviced Team IA customers. The affidavit fails to create a dispute of fact because none of the entities listed are identified as *actual* customers of Team IA *served by Lucas*.

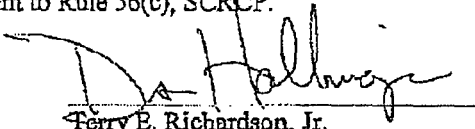
In each of the operative paragraphs of the post-hearing affidavit, the entities listed are described as "customers/prospective customers" of Team IA for which Lucas allegedly had "some facet" of involvement. Whether the affidavit is drafted to be intentionally vague (or just an error of drafting), the affidavit still fails to identify a single actual "customer" that Lucas as a Team IA employee was responsible for servicing. Team IA has no "legitimate interest" to protect by a covenant not to compete with respect to all non-customers of Team IA, "prospective" or otherwise. *See Dudley*, 278 S.C. at

675-676, 301 S.E.2d at 143 (1983) (stating that a covenant not to compete must be necessary for the protection of the legitimate interest of the employer). Likewise, South Carolina courts do not uphold covenants not to compete that would cover customers of the employer with whom the employee did not have personal contact while employed. *See Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533, 540 (1961).

As the affidavit is written, the Court is not able to point to a single entity listed and identify whether that entity was an actual customer of Team IA and whether Lucas had any personal contact with that entity so as to be the appropriate subject of a covenant not to compete.

CONCLUSION

Rule 56(c), SCRCP requires that affidavits in opposition to summary judgment be submitted at least two days prior to the hearing. The post-hearing affidavit submitted two weeks later is not timely. Additionally, the affidavit is worded so as to be too vague to identify whether the entities were actual customers of Team IA, and if so, whether Lucas had any direct involvement with them. As such, Lucas respectfully requests this Court strike the post-hearing affidavit pursuant to Rule 56(c), SCRCP.


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October 5, 2009

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

TEAM IA, INC.,

Plaintiff,

v.

C.A. No. 2009-CP-32-01078

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants;

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

**MEMORANDUM IN OPPOSITION TO
DEFENDANT LUCAS'S MOTION TO STRIKE**

COMES NOW Plaintiff, Team IA, Inc. ("Team IA"), by and through its undersigned counsel, and files this Memorandum in Opposition to Defendant Lucas's Motion to Strike After Hearing Affidavit.

I. INTRODUCTION

Defendant Lucas's Motion to Strike After Hearing Affidavit must be denied because Rule 56(e), SCRPC, provides the Court with discretion in deciding whether to allow a party to

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supplement an affidavit in opposition to a motion for summary judgment with a further affidavit. The Supplemental Affidavit of Brent Yarborough ("Supplemental Affidavit") did not present new facts not already before the Court but merely clarified the original Affidavit of Brent Yarborough ("Original Affidavit"), rendering the Supplemental Affidavit permissible for consideration under Rule 56(e), SCRCP.

Moreover, Defendant Lucas failed to comply with the plain language of Rule 6(d), SCRCP, by submitting his affidavit in support of his Motion for Partial Summary Judgment almost three full weeks after serving his Motion for Partial Summary Judgment, as Rule 6(d) requires parties to contemporaneously serve a motion and an affidavit in support thereof. Thus, the Court must not allow Defendant Lucas to seek strict enforcement of one rule while, at the same time, shirking the requirements of a similar rule.

II. STATEMENT OF THE CASE AND FACTS RELEVANT TO THIS MOTION

Team IA initiated this action on March 17, 2009, by filing claims against Defendants that stemmed from the improper and illegal actions that Defendants have taken after their voluntary resignations from Team IA. On April 17, 2009, Defendants/Third-Party Plaintiffs (hereinafter referred to collectively as "Defendants") filed their Answer and Third Party Complaint. On August 27, 2009, Defendant Lucas filed a Motion for Partial Summary Judgment with respect to two of Team IA's breach of contract claims against Defendant Lucas.

On September 16, 2009—nearly three full weeks after filing his Motion for Partial Summary Judgment—Defendant Lucas provided Team IA with a copy of Defendant Lucas's affidavit in support of his Motion for Partial Summary Judgment.¹ Team IA responded quickly,

¹ Significantly, Defendant Lucas executed his affidavit on August 21, 2009—nearly four full weeks before providing Team IA with a copy of the same. A copy of Defendant Lucas's affidavit was attached to Defendant Lucas's Memorandum in Support of Partial Summary Judgment as Exhibit 2.

serving the Original Affidavit of Mr. Yarborough on Defendant Lucas on September 18, 2009.² The Court held a hearing on Defendant Lucas's Motion for Partial Summary Judgment on September 21, 2009. After hearing Defendant Lucas's oral argument and reviewing and analyzing Defendant Lucas's Memorandum in Support of Partial Summary Judgment, Team IA perceived an apparent misunderstanding of several facts set forth in the Original Affidavit of Mr. Yarborough. Accordingly, on October 5, 2009, Team IA supplemented Mr. Yarborough's Original Affidavit with the Supplemental Affidavit, which clarified the scope of Defendant Lucas's activities within several specific states while employed at Team IA.³

III. LEGAL ARGUMENTS AND AUTHORITIES

A. Rule 56(e) Allows The Court To Consider Team IA's Supplemental Affidavit.

With respect to affidavits in support of or in opposition to motions for summary judgment, Rule 56(e), SCRCP, provides as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. *The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.*

Rule 56(e), SCRCP (*emphasis added*). Thus, the plain language of Rule 56(e) demonstrates that consideration of affidavits that simply supplement the information contained in an initial affidavit is well within the discretion of the Court. Furthermore, Rule 56(e) creates no deadline by which a party must file and serve such supplemental affidavits, suggesting that the Court has

² A copy of Mr. Yarborough's Original Affidavit was attached to Team IA's Memorandum in Opposition to Defendant and Third-Party Plaintiff Lucas's Motion for Partial Summary Judgment as Exhibit A.

³ A copy of Mr. Yarborough's Supplemental Affidavit was filed separately on October 5, 2009.

discretion to consider supplemental affidavits that a party serves any time prior to the Court's ruling on the motion in question.

Team IA's Supplemental Affidavit falls within the parameters of Rule 56(e). Team IA's Original Affidavit provided, in pertinent part, each of the following: (1) Defendant Lucas was engaged in sales activities on behalf of Team IA on a nationwide basis (Yarborough Aff. at ¶ 9); (2) "Team IA serviced and solicited customers from across the United States (and had at least one prospect in Canada)" during Defendant Lucas's employment (*id.* at ¶ 10); and (3) Defendant Lucas was actively involved in projects with two specific customers near the end of his tenure with Team IA, and both of those customers pulled their projects from Team IA and awarded them to Defendant Lucas after his resignation from Team IA (*id.* at ¶¶ 12-13).

After Team IA heard Defendant Lucas's oral argument on the Motion for Partial Summary Judgment and had the opportunity to review Defendant Lucas's Memorandum in Support of Partial Summary Judgment, Team IA perceived that Defendant Lucas misinterpreted the Original Affidavit as stating that Defendant Lucas performed work for only the two specific Team IA customers identified in Mr. Yarborough's Original Affidavit.⁴ Contrary to Defendant Lucas's misunderstanding, Mr. Yarborough's Original Affidavit stated clearly that Defendant Lucas performed sales activities on behalf of Team IA on a nationwide basis. (Yarborough Aff. at ¶ 9.) In fact, Team IA even included with the Original Affidavit an attachment that demonstrated a sample of Defendant Lucas's nationwide sales activities. (*Id.* at ¶ 9 & Attach. 4.) However, to ensure clarity and correct any misunderstandings, Team IA filed and served the Supplemental Affidavit of Mr. Yarborough.

⁴ Defendant Lucas further displays this misunderstanding in the present motion and memorandum in support thereof, stating as follows: "Based on the two affidavits before the Court for the September 21st hearing there is no dispute of fact that Lucas only serviced Team IA customers in Georgia." (Mot. & Mem. to Strike After Hearing Aff. at 2.)

In his Supplemental Affidavit, Mr. Yarborough describes Defendant Lucas's involvement with specific Team IA customers and prospective customers in South Carolina, North Carolina, Alabama, and Georgia. (Yarborough Supp. Aff. at ¶¶ 3–6.) Thus, Team IA's Supplemental Affidavit does nothing more than clarify and more thoroughly describe several facts contained in the Original Affidavit. As such, the Court clearly has the discretion to consider the Supplemental Affidavit within the parameters of Rule 56(e), SCRPC, and Defendant Lucas's Motion to Strike must be denied.

B. Defendant Lucas's Affidavit Fails To Comply With Rule 6(d), SCRPC.

While Defendant Lucas takes great pain to attack and attempt to strike from the record Team IA's Supplemental Affidavit, he apparently forgets that his own affidavit is procedurally improper. Rule 6(d) contains a straight-forward requirement that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion." Rule 6(d), SCRPC. However, Defendant Lucas did not serve Team IA with a copy of his affidavit in support of his Motion for Partial Summary Judgment until nearly three full weeks after he filed and served the motion. Thus, Defendant Lucas's affidavit—the only affidavit or evidence of any kind that Defendant Lucas has brought forward in support of his motion—is procedurally improper under Rule 6(d). Conversely, Rule 56(e) provides the Court with discretion in considering supplemental affidavits such as that of Team IA. Any argument that the Court must strike Team IA's Supplemental Affidavit and, at the same time, continue to consider Defendant Lucas's facially deficient affidavit is simply disingenuous. Accordingly, Defendant Lucas's Motion to Strike must be denied.

C. Team IA's Affidavits Create A Genuine Issue Of Material Fact As To The Scope Of Defendant Lucas's Activities While Employed At Team IA.

Unlike Defendant Lucas, Team IA will not use this Memorandum as an opportunity to rehash its arguments regarding Defendant Lucas's Motion for Partial Summary Judgment. However, Team IA must identify a critical misstatement of law that Defendant Lucas has set forth in his Motion to Strike. Defendant Lucas contends that "South Carolina courts do not uphold covenants not to compete that would cover customers of the employer with whom the employee did not have personal contact while employed." (Mot. & Mem. to Strike After Hearing Aff. at 4.) This is simply not true.

As Team IA discussed in its memorandum in opposition to the Motion for Partial Summary Judgment, the South Carolina Supreme Court has upheld restrictive covenants that preclude a former employee from competing "only in the area in which [the former employee] worked or to which he was assigned at any time during his employment." *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983) (internal quotation marks omitted). This type of restriction does not focus on specific customers with which the former employee has had personal contact, but instead focuses on the territory to which the employer assigned the former employee to perform services and the territory in which the former employee actually worked.

The Original and Supplemental Affidavits of Mr. Yarborough demonstrate that Team IA assigned Defendant Lucas to solicit and sell within a nationwide territory, and that Defendant Lucas did in fact solicit and sell on a nationwide basis. Therefore, contrary to Defendant Lucas's assertions, Team IA's Original and Supplemental Affidavits create a genuine issue of fact as to the propriety of the non-competition covenant that Defendant Lucas has challenged.

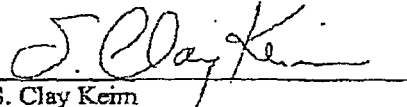
IV. CONCLUSION

Based on the foregoing facts and authorities, Defendant Lucas's Motion to Strike After Hearing Affidavit must be denied, as consideration of Team IA's Supplemental Affidavit is within the Court's sound discretion under Rule 56(e). Moreover, this Court must not allow Defendant Lucas to seek enforcement of a procedural requirement with which he himself has failed to comply. Team IA prays that the Court award its costs and attorneys' fees incurred in defending this motion and any further relief this Court deems appropriate.

Dated this the 19th day of October, 2009.

Respectfully submitted,

FORD & HARRISON LLP

BY: 

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
TEAM IA, INC.,	)	
	)	
Plaintiff,	)	Case No. 2009-CP-32-01078
	)	
v.	)	
	)	
CICERO LUCAS,	)	
GEORGE LAWSON, IV,	)	
AND 5 POINT SOLUTIONS, LLC,	)	
	)	
Defendants,	)	
	)	
CICERO LUCAS,	)	
GEORGE LAWSON, IV,	)	
	)	
Third-Party Plaintiffs	)	
	)	
v.	)	
	)	
BRENT YARBOROUGH	)	
TEAM IA	)	
	)	
Third-Party	)	
Defendants	)	

Order

This matter is before the Court by motion of the Defendant and Third-Party Plaintiff Cicero Lucas (hereinafter "Lucas"), pursuant to Rule 56, SCRCF for partial summary judgment. Lucas has moved for summary judgment on Plaintiff Team IA's First Cause of Action alleging Breach of Contract with respect to alleged violations of Section 5 of the employment agreement entitled "Non-Solicitation and Non-Competition". For the reasons set forth below, the Court grants the motion for partial summary judgment.

PROCEDURAL BACKGROUND

On March 17, 2009 Plaintiff Team IA filed a complaint against Lucas, George Lawson, and 5 Point Solutions, LLC. Lucas answered and counterclaimed on April 17, 2009. Team IA's First Cause of Action in the complaint asserts "Breach of Contract" alleging, among other allegations, the breach of an Employment Agreement by Lucas (Lawson signed no employment agreements with Team IA) with respect to a non-solicitation/non-compete provision. On August 27, 2009 Lucas filed for partial summary judgment on Team IA's First Cause of Action only with respect to the covenant not to compete portions of that cause of action. The matter was heard on September 21, 2008.

STATEMENT OF FACTS

Lucas submitted an affidavit setting forth the following information:

1. Lucas worked for Team IA from approximately March 2001 until February 3, 2009.
2. During Lucas' employment at Team IA he only performed work for customers in the states of Georgia and Pennsylvania.
3. Lucas performed no work for customers in Alabama, South Carolina, or North Carolina.
4. At the time he left Team IA, the company itself only had clients in South Carolina, Georgia, one customer in Pennsylvania, and one customer in North Carolina.

Brent Yarborough, owner of Team IA, also submitted an affidavit. In his affidavit, Yarborough identifies two Team IA customers serviced by Lucas. Both customers identified by Yarborough are Georgia governmental entities.

Lucas's Partial Summary Judgment Motion challenges a provision from the 2001 Employment Agreement. Lucas disputes the enforceability of the following "Non-Solicitation and Non-Competition" provision:

A) Non-Solicitation Agreement

1) Employee agrees and acknowledges by signing below, that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services.

...

B) Covenant Not to Compete

1) In order to prevent the improper disclosure or use of confidential and proprietary information and other trade secrets, and to protect the Employer from unfair competition, Employee agrees that, absent the prior express written consent of the Employer, while employed by Employer and for twelve (12) months immediately following the resignation or termination of his employment with the Employer, regardless of who initiates separation from employment, Employee shall not, directly or indirectly, by himself, or through or on behalf of any other person, firm, partnership, company, corporation, representative or agent, within the geographical territory (hereinafter, the "RESTRICTED TERRITORY") set forth below, solicit, attempt to solicit, sell, or attempt to sell, provide, or attempt to provide COMPETING SERVICES as defined below.

Recognizing that Team IA competes on a nationwide basis, the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court of other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

Lucas argues the "Covenant Not to Compete" provision is unenforceable because it bans Lucas from working anywhere in the continental United States. Furthermore, Lucas argues that even if the "RESTRICTED TERRITORY" is redefined to cover only South Carolina, North Carolina, Georgia, and Alabama, as set forth in the Agreement, the covenant still fails because Lucas never had clients in 3 of the 4 states listed.

Additionally, Lucas argues the “Non-Solicitation” provision is unenforceable on its face because it would prohibit Lucas from accepting business from unsolicited customers of Team 1A, especially governmental entities.

The Court agrees with Lucas and grants his motion for partial summary judgment with respect to the non-solicitation/non-competition provision.

ANALYSIS

A. Standard for Summary Judgment

The standard for the granting of summary judgment pursuant to Rule 56 of the S.C. Rules of Civil Procedure is set forth in *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 644 S.E.2d 730 (2007):

The circuit court may properly grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”

RWE NUKEM, at 195, 644 S.E.2d at 733 (citing Rule 56(c), SCRCP). Thus the plaintiff, as the party with the burden of proof at trial, must present affirmative evidence that places a material fact in dispute in order to resist a defendant’s motion for summary judgment. *Estate of Cantrell v. Green*, 302 S.C. 557, 560, 397 S.E.2d 777, 779 (Ct. App. 1990).

B. The non-compete provisions of the Employment Agreement are unenforceable

Under well established South Carolina precedent, the non-compete provision of the Employment Agreement is unenforceable because it is overly broad. Non-compete restrictive covenants are disfavored and are to be strictly construed against the employer. *Sermans v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 508, 273 S.E.2d 338, 339

(1980); *Almers v. S.C. Nat'l Bank of Charleston*, 265 S.C. 48, 51, 217 S.E.2d 135, 136 (1975). South Carolina courts will strike the entire non-compete clause where just one part is found unenforceable. See *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42 (Ct. App. 1995) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434 (1972)).

According to South Carolina precedent, a covenant not to compete must pass over five separate hurdles in order to be valid. The covenant must be:

- (1) necessary for the protection of the legitimate interest of the employer;
- (2) reasonably limited in its operation with respect to time and place;
- (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) reasonable from the standpoint of sound public policy; and
- (5) supported by valuable consideration.

Stringer v. Herron, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992); *Rental Uniform Service of Florence v. Dudley*, 278 S.C. 674, 675-676, 301 S.E.2d 142, 143 (1983). The non-compete restrictive covenant in this case has significant flaws which render it unenforceable under our precedent.

- (1) The geographic scope of the Covenant Not to Compete is not reasonably limited in its operation with respect to time and place

The contract's covenant not to compete places a nationwide geographical restriction on competition. This provision is overbroad and unenforceable because it fails to meet the requirements that any restriction in a covenant not to compete must be "reasonably limited in its operation with respect to time and place" and must not be "unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." See *Stringer*, 309 S.C. at 531, 424 S.E.2d at 548. As our Supreme Court stated in *Standard Register Co. v. Kerrigan*:

The general rule is that the restraint as to territory, in order to be reasonable, must not be unduly harsh and oppressive on the employee....

The most important single factor entering into the determination of the reasonableness as to the employee of the territorial extent of the restraint, is its economic consequences to the employee. The limitation as to the territory, in a restrictive covenant not to compete, is unreasonable in the sense that it is unduly harsh and oppressive when the contract tends to deprive the employee the opportunity of supporting himself and his family.

238 S.C. 54, 67, 119 S.E.2d 533, 540 (1961). The Court went on to establish that the "necessity that employee change his calling or residence" is one element the court should focus upon in determining reasonableness. *Id.* A nationwide ban that would require Lucas to leave the country to continue his line of work is *per se* unreasonable, because it is unduly harsh and oppressive in curtailing his legitimate efforts to earn a living.

The nationwide geographical restriction also offends the second hurdle of the analysis because it is unduly harsh and oppressive in curtailing Lucas' legitimate efforts to earn a livelihood.

(2) The geographic scope of the Covenant Not to Compete covers an area broader than is necessary to protect Team IA's legitimate business interest, because it is greater than the geographic area in which Lucas actually worked.

The non-compete agreement is glaringly deficient in that the geographic restriction is more broad than necessary for the protection of Team IA's legitimate business interests. South Carolina law is clear that a territorial restriction must not cover an area any broader than is necessary to protect the employer's legitimate business interests. *Stringer*, 309 S.C. at 531, 424 S.E.2d at 548 (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961)).

South Carolina courts have held that non-compete restrictive covenants that impose a geographic restriction greater than the geographic area in which the employee actually worked are unenforceable because they are unnecessary to protect the

employer's legitimate interests. See *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961)); see also, *Sermons*, 275 S.C. 506, 273 S.E.2d 388 (holding that a non-compete provision that covered all of South Carolina was too broad because the employee only worked within a 50-mile radius of Greenville, S.C.); *Delmar Studios v. Kinsey*, 233 S.C. 313, 104 S.E.2d 344 (1958) (holding that restricting an employee from competing in any location where the employer operates, including South Carolina and parts of North Carolina and Georgia, was too broad because the employee only worked in several South Carolina and Georgia counties bordering the Savannah River).

Applying the rule that "[a] geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers," the South Carolina Supreme Court specifically upheld a covenant which only restricted competition to locations where the employee worked for the employer. *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 (emphasis added). In that case, the covenant not to compete was limited in scope to a six-county area in which employee worked. *Id.* The court pointed to the narrow scope of the covenant as the reason for finding that it was enforceable. *Id.* (stating that "[t]he area limitation of the agreement falls within the guidelines of the *Standard Register* case since respondent is restricted only in the area 'in which [respondent] worked or to which he was assigned at any time during his employment'").

In this case, the nationwide geographical restriction in the covenant not to compete is unenforceable because it is undisputed by Team IA that Lucas only performed

work for customers in Georgia and Pennsylvania. Team IA failed to provide any evidence that it had customers or performed work for customers in every single state in the nation. Additionally, the nationwide geographical restriction far exceeds any legitimate business interest of Team IA because it covers states in which Lucas has never performed any customer work for Team IA. *See Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983). This covenant not to compete is unenforceable as a matter of law because it is more broad than necessary for the protection of the legitimate interest of Team IA.

(3) Even if the Employment Agreement is re-written, pursuant to the Employment Agreement's "RESTRICTED TERRITORY" provision, the resulting geographical restriction is still unenforceable.

The Employment Agreement's covenant provision provides the following:

Recognizing that Team IA competes on a nationwide basis, the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court of other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

As set forth above, the only evidence before the Court is that Lucas had customers in Georgia and Pennsylvania. Even if the Court were to rewrite the scope for the benefit of Team IA as set forth in the "RESTRICTED TERRITORY" provision, the resulting geographical restriction is unenforceable because Lucas only performed work for customers in Georgia and Pennsylvania. A re-written contract would provide for a geographical restriction on Lucas working in South Carolina, North Carolina, Georgia, and Alabama. Lucas has serviced no Team IA customers in South Carolina, North Carolina, or Alabama. "A geographic restriction is generally reasonable if the area

covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143. The restriction is unenforceable and Plaintiff's claim fails as a matter of law, because Lucas had no customers in three of the four states that would be listed in a re-written geographical restriction.

Additionally, Team IA has identified by affidavit only two counties in which Lucas serviced Team IA customers. Prohibiting Lucas from working in counties in Georgia where Lucas had no Team IA customers would still be too broad of a restriction.

(4) The Severability Provision Cannot be Used to Redefine the Geographic Limitations.

The Employment Agreement contains a severability provision. However, the Court cannot redefine the geographic limitations of the Agreement even if the agreement provides for severability. *See e.g., Ascension Hospice, Inc. v. Sikes*, C/A No. 2006-CP-32-4055 (Court of Common Pleas, Lexington County, S.C. Apr. 10, 2008) (order of the Hon. R. Knox McMahon granting summary judgment). At most, the provision allows the Court to redefine the restricted territory to the four states discussed above. Lucas had no customers in three of those four states so the geographic restriction would still be too broad to survive.

The restricted geographic territory is too broad for the provision to survive because it includes territory in which Team IA has no customers and states in which Team IA may have had customers but that Lucas never worked.

C. The non-solicitation provision of the Employment Agreement is unenforceable

(1) Under South Carolina law, the enforceability of the non-solicitation provision for Georgia customers is governed by Georgia law.

The Employment Agreement contains a "choice of law" provision that provides the contract it is to be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina." The contract is in harmony with South Carolina's common law choice of law principles and Defendants have not disputed that South Carolina law governs the validity of this contract. Under South Carolina law, when a contract's interpretation is at issue courts are to apply "the substantive law of the place where the contract . . . was formed." *Witt v. American Trucking Ass'n*, 860 F. Supp. 295, 300 (D.S.C. 1994), "However, where performance is at issue . . . the law of the place of performance governs." *Id.*; see also *Livingston v. Atl. Coast Line R.R. Co.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 144-45, 494 S.E.2d 449, 455-56 (Ct. App. 1997).

The only evidence before the Court is that Lucas serviced customers for Team IA in Georgia. Whether or not Lucas breached his employment agreement by an alleged breach of the non-solicitation provision would be a question of performance, or lack thereof, under the Agreement. As such, the law of the place of performance governs the interpretation of the non-solicitation clause.

(2) The non-solicitation provision is unenforceable on its face because it prohibits Lucas's acceptance of business from *unsolicited* customers.

Team IA's breach of contract claim based upon the non-solicitation provision fails as a matter of law because the provision on its face attempts to prohibit Lucas's acceptance of business from *unsolicited* customers in Georgia. In Georgia, a covenant not to solicit that prohibits a former employee from accepting business from unsolicited customers is *per se* unenforceable as a matter of law. See e.g., *Waldeck v. Curtis*, 583

S.E.2d 266, 268 (Ga. App. 2003); *Pregler v. C & Z, Inc.*, 575 S.E.2d 915, 916 (Ga. App. 2003). In this case, the customer non-solicitation agreement provides that Lucas cannot "solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER..." (emphasis added). On its face, the provision prohibiting Lucas from accepting orders from former Team IA customers is unreasonable. While a prohibition involving some affirmative act on the part of the former employee, such as solicitation or diversion may be reasonable, a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable. See *American Gen. Life & Ins. Co. v. Fisher*, 430 S.E.2d 166 (Ga. App. 1993).¹

The non-solicitation covenant in this case prohibits not only solicitation of Lucas's former clients, but also the acceptance of business from unsolicited former clients of Team IA, regardless of who initiated the contact. Such a provision is an unreasonable restraint on trade. In addition to overprotecting Team IA's interests, it has an unreasonable impact on Lucas and most importantly on the public's ability to choose the business it prefers.

(3) The Non-Solicitation provision offends public policy because the former customers identified by Team IA are Government Agencies

By affidavit, Team IA identified the Fulton County Clerk of Court and the Fayette County Clerk of Court, both of Georgia, as customers. A court reviewing a covenant provision must ensure the agreement is "reasonable from the standpoint of public policy." *Rental Uniform Service of Florence v. Dudley*, 278 S.C. 674, 675-676, 301 S.E.2d 142, 143 (1983). This Court finds it would be unreasonable from the standpoint of public

¹ See also, 2 Callmann on Unfair Competition, Trademarks, & Monopolies, § 16:31 (4th Ed. 2009) (stating that: "A postemployment covenant which prevents a salesperson from accepting any business from customers of the employer, even though the business is not solicited by the salesperson, is unreasonable because it limits the public's ability to select the goods or services it prefers").

policy for a South Carolina court to prohibit Lucas from accepting unsolicited business from a governmental entity in Georgia to perform work in Georgia. A state has little to no interest in enforcing a restriction on who another sovereign state may contract with because denying the government its contractor of choice is by definition against the public interest.

CONCLUSION

Based on the foregoing, the motion by Defendant Lucas is GRANTED.

The Honorable R. Knox McMahon
Eleventh Judicial Circuit Court

October _____, 2009

COPY

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2009 DEC 7

ELEVENTH JUDICIAL CIRCUIT

TEAM IA, INC.,

BETH A. CARRIGE
CLERK OF COURT
LEXINGTON SC

Plaintiff,

v.

C.A. No. 2009-CP-32-01078

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants;

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

**PLAINTIFF'S MOTION TO ALTER OR AMEND
ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

COMES NOW Plaintiff, Team IA, Inc. ("Team IA"), by and through its undersigned counsel and pursuant to Rule 59(c), SCRCP, and files this Motion to Alter or Amend Order Granting Partial Summary Judgment. Team IA shows the following grounds in support of this Motion:

1. This Court entered an Order on Thursday, November 19, 2009 ("Order"), in which it granted Defendant Lucas's Motion for Partial Summary Judgment.

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2. Team IA received written notice of the entry of the Order via electronic mail on Monday, November 23, 2009, placing Team IA's deadline to serve a motion under Rule 58(a), SCRCF, on Thursday, December 3, 2009.

BETH A. CARRIGG
CLERK OF COURT
JANUARY 1, 2010

3. The Order incorrectly applies the standard under which a motion for summary judgment must be considered by accepting as true the facts alleged in Defendant Lucas's Affidavit, which are disputed by the facts and evidence set forth in the Affidavit of Brent Yarborough and the Supplemental Affidavit of Brent Yarborough;

4. The Order incorrectly applies Georgia law to determine the validity of the Non-Solicitation provision at issue:

- (a) Defendant Lucas's Employment Agreement contains a Choice of Law provision that demonstrates the parties' express intention that the Agreement be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina";
- (b) Notwithstanding the Agreement's Choice of Law provision, South Carolina choice-of-law principles require application of the substantive law of the place where the contract at issue was formed where a contract's formation, interpretation, or validity is at issue, and Defendant Lucas's Motion for Partial Summary Judgment attacks the validity of two provisions in the Agreement, which was formed in South Carolina;
- (c) Even assuming that performance of the Agreement is at issue in Defendant Lucas's Motion for Partial Summary Judgment and that the law of the place of performance governs the Agreement, the Court was required to analyze the provisions at issue under South Carolina law in that both parties primarily performed the Agreement in South Carolina;

5. The Order incorrectly concludes that the Non-Solicitation provision at issue "is an unreasonable restraint on trade," because South Carolina case law—which applies to the Non-Solicitation provision at issue for each of the reasons set forth above—has on multiple occasions upheld as valid and enforceable restrictive covenants nearly identical to that in the Non-Solicitation provision at issue;

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6. The Order incorrectly concludes that "it would be unreasonable from the standpoint of public policy for a South Carolina court to prohibit Lucas from accepting unsolicited business from a governmental entity in Georgia to perform work in Georgia," as there is no statutory or common-law authority for such a conclusion, and novel questions are not proper for summary adjudication;

7. The Order incorrectly concludes that the Non-Competition provision at issue "is unduly harsh and oppressive in curtailing Lucas' legitimate efforts to earn a livelihood," as there remains a genuine dispute as to this material fact, and Defendant Lucas has presented no evidence to support such a conclusion;

8. The Order incorrectly concludes that the Non-Competition provision at issue "is unenforceable because it is undisputed by Team IA that Lucas only performed work for customers in Georgia and Pennsylvania," as Team IA has presented evidence that Defendant Lucas worked on a nationwide basis and has provided specific examples of Team IA customers with which Defendant Lucas worked in South Carolina, North Carolina, Georgia, and Alabama;

9. Even Assuming the nationwide geographic restriction contained in the Non-Competition provision at issue is unreasonable, the Order fails to properly apply the Agreement's Severability provision to enforce the Non-Competition provision at issue in one or more of the states listed in the Agreement's express, bargained-for, alternative geographic restriction;

- (a) The Order incorrectly concludes that the alternative geographic restriction in the Non-Competition provision at issue "is unenforceable because Lucas only performed work for customers in Georgia and Pennsylvania," as Team IA has presented evidence that Defendant Lucas worked on a nationwide basis and has provided specific examples of Team IA customers with which Defendant Lucas worked in each of the four states listed in the alternative geographic restriction—South Carolina, North Carolina, Georgia, and Alabama; and

- (b) The Order incorrectly concludes that, “[a]t most, the [Agreement’s severability] provision allows the Court to redefine the restricted territory” of the Non-Competition provision at issue to South Carolina, North Carolina, Georgia, and Alabama, as such a conclusion is in direct conflict with established precedent as well as this Court’s Order in *Ascension Hospice, Inc. v. Sikes*, No. 2006-CP-32-4055 (Ct. Com. Pl., Lexington County, S.C. Apr. 10, 2008), which allow the Court to enforce the Non-Competition provision at issue in any one or more of the four states listed in the alternative geographic restriction—South Carolina, North Carolina, Georgia, and Alabama.

This Motion is supported by the documents already on file in this matter and Team IA’s Memorandum in Support of Plaintiff’s Motion to Alter or Amend Order Granting Partial Summary Judgment, which Team IA will file shortly hereafter.

WHEREFORE, Plaintiff respectfully requests that this Court grant Plaintiff’s Motion to ~~Alter or Amend Order Granting Partial Summary Judgment, thereby revising the Court’s~~ November 19 Order by denying Defendant Lucas’s Motion for Partial Summary Judgment and allowing Plaintiff’s claims at issue in Defendant Lucas’s Motion for Partial Summary Judgment to proceed through discovery in this matter.

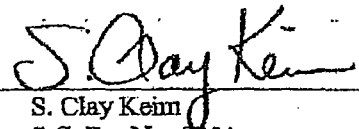
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CLERK OF COURT
LEXINGTON SC

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Dated this the 3rd day of December, 2009.

Respectfully submitted,

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BY: 

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CLERK OF COURT
LEXINGTON SC

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

TEAM IA, INC.,

Plaintiff,

v.

C.A. No. 2009-CP-32-01078

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants;

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

BETH A. CARRIGS
CLERK OF COURT
LEXINGTON, SC

2009 DEC 29 P 4:13

FILED

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO
ALTER OR AMEND ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

COMES NOW Plaintiff, Team IA, Inc. ("Team IA"), by and through its undersigned
counsel, and files this Memorandum in Support of Plaintiff's Motion to Alter or Amend Order
Granting Partial Summary Judgment.

Record on Appeal 357

APP0359

A. Standard under which to consider a Rule 59(e) motion.

The South Carolina Supreme Court has noted the following with respect to motions under Rule 59(e), SCRPC:

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehearing all or part of an argument previously presented.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id.* at 22, 602 S.E.2d at 779. The *Elam* court further clarified the instances in which a motion under Rule 59(e), SCRPC, is proper:

A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id. at 24, 602 S.E.2d at 780.

B. The Order incorrectly applies the standard under which a motion for summary judgment must be considered.

Rule 56(c) of the South Carolina Rules of Civil Procedure allows a trial court to grant a motion for summary judgment only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the

evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 329-30, 673 S.E.2d at 802 (citing *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

"Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991) (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law." *Id.* (citing *Abrams v. Wright*, 262 S.C. 141, 202 S.E.2d 859 (1974)); see also *Brooks v. Motsenbocker Advanced Devs., Inc.*, 242 Fed. App'x 889, 890 (4th Cir. 2007) ("Summary disposition should not be made based on conflicting affidavits. . . . [S]ummary judgment is inappropriate when affidavits present conflicting facts requiring credibility determinations."); *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 294, 417 S.E.2d 631, (Ct. App. 1992) ("[S]ummary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful." (citing *Rothrock*, 305 S.C. 402, 409 S.E.2d 366)); *L&W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) ("[A]t the summary judgment stage of litigation, 'the judge does not weigh conflicting evidence with respect to a disputed material fact . . . Nor does the judge make credibility determinations with respect to statements made in affidavits, . . . or depositions.'" (quoting *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987))).

The Order incorrectly applies the above-described standard by accepting as true the facts set forth in Defendant Lucas's Affidavit and disregarding the facts set forth in the Affidavit of Brent Yarborough and the Supplemental Affidavit of Brent Yarborough. The "Statement of Facts" set forth in the Order contains nothing more than a verbatim recitation of Defendant

Lucas's Affidavit, the contractual provisions that Defendant Lucas has challenged, and a summary of Defendant Lucas's argument. (Order at 2-4.) The only reference in the Order to the Affidavit of Mr. Yarborough—a representative of the non-moving party—is an incomplete statement that Mr. Yarborough's Affidavit "identifies two Team IA customers serviced by Lucas. Both customers identified by Yarborough are Georgia governmental entities." (Order at 2.) While two of the twelve paragraphs of Mr. Yarborough's Affidavit did, in fact, reference the two customers noted above, the Order fails to address any of the remaining ten paragraphs, including the most relevant statements for the purpose of Defendant Lucas's Motion for Partial Summary Judgment—that Defendant Lucas engaged in nationwide sales activities on behalf of Team IA and that Team IA serviced and solicited customers on a nationwide basis during Defendant Lucas's employment and through the date of his resignation. (Yarborough Aff. at ¶¶ 9-10.) Moreover, the Order fails to recognize in any way the Supplemental Affidavit of Mr. Yarborough, which lists specific Team IA customers and prospective customers with which Defendant Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (Yarborough Supplemental Aff. at ¶¶ 3-6.)

The above-described statements from Mr. Yarborough's Affidavit and Supplemental Affidavit are in direct conflict with statements in Defendant Lucas's Affidavit. Thus, there can be no question that there exists conflicting evidence with respect to material facts in dispute regarding Team IA's customer base and the scope of Defendant Lucas's activities while employed at Team IA. In the presence of such conflicting evidence, summary judgment is inappropriate under the above-described, well-established precedent.

Moreover, the South Carolina Supreme Court has recently held "that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to

submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Team IA has unquestionably met this burden by producing the Affidavit of Mr. Yarborough, the exhibits attached thereto, and the Supplemental Affidavit of Mr. Yarborough. Viewing the information contained in these documents and the inferences that can be reasonably drawn therefrom in a light most favorable to Team IA—which is required under Rule 56, SCRC—Team IA has submitted far more than “a mere scintilla of evidence” that supports their position in opposition to Defendant Lucas’s Motion for Partial Summary Judgment.

Additionally, the fact that Defendant Lucas filed his Motion for Partial Summary Judgment prior to Team IA having the opportunity to take a single deposition with respect to this case must not be overlooked.¹ To award summary judgment to Defendant Lucas, relying on his own Affidavit for the “facts” necessary to enter such an award, is premature as a matter of law when considering the mountain of conflicting evidence that is present in this case and the fact that Team IA has not yet “had a full and fair opportunity to complete discovery.” *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (“Since it is a drastic remedy, summary judgment ‘should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.’ This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” (quoting *Watson v. S. Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975))).

¹ As the Court is well aware, Team IA was unable to conduct depositions in this matter prior to Defendant Lucas’s Motion for Partial Summary Judgment due to Defendants’ abuse of the discovery process in this matter. Defendants did not provide responses to the majority of Team IA’s written discovery requests until after (1) Team IA filed a motion to compel; (2) the Court ordered Defendants to respond; and (3) Team IA filed a motion to hold Defendants in contempt for their failure to comply with the Court’s Order compelling them to respond. By the time Defendants finally complied with the Court’s Order and provided Team IA with a large number of responsive documents—on the eve of the hearing on Team IA’s motion to hold Defendants in Contempt—Defendant Lucas had already submitted his Motion for Partial Summary Judgment.

Therefore, the Order's entry of summary judgment— which relies nearly exclusively on Defendant Lucas's position with respect to the material facts in dispute and which prevents Team IA from being able to conduct discovery on the claims at issue—violates the clear mandates of South Carolina law regarding the standard under which a court is to analyze a motion for summary judgment. Team IA accordingly requests that the Court reconsider its Order and alter and amend the same by allowing Team IA's claims to proceed through discovery in this matter.

C. The Order incorrectly applies Georgia law to determine the validity of the Non-Solicitation provision at issue.

1. The Order fails to properly apply the Agreement's Choice of Law provision.

Defendant Lucas's Employment Agreement with Team IA ("Agreement") contains a Choice of Law provision that demonstrates the parties' express intention that the Agreement be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina." (Lucas Empl. Agmt. at ¶ V.I.E.) Notwithstanding this provision, the Order ultimately holds that Georgia law applies to the analysis of the Non-Solicitation provision at issue. Such a holding is incorrect in that it fails to properly recognize the parties' express intent that a court apply South Carolina law to such an analysis.

"Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (citing *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 569 S.E.2d 349, 358 (2002)); see also *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) ("[T]he [United States] Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity, rejecting the 'parochial concept' that 'notwithstanding solemn contracts . . . all disputes must be resolved under our laws and in our courts.'" (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972))). Thus, the

Court was required to honor the parties' express intention that the Agreement be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina." (Lucas Empl. Agmt. at ¶ V.I.E.)

The only exception under South Carolina law to enforcing a choice-of-law clause such as that in Defendant Lucas's Agreement is where "application of foreign law results in a violation of South Carolina public policy." *Bell*, 482 F. Supp. 2d at 728 (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961)). This exception is clearly inapplicable to the case at bar, as the Choice of Law provision in the Agreement mandates the application of South Carolina law. If anything, this exception precludes the application of Georgia law, as application of Georgia law results in a finding that the Non-Solicitation provision at issue—which would be enforceable under well-established South Carolina precedent—is unenforceable. Such a result violates South Carolina public policy—South Carolina citizens must be allowed to form a contract in South Carolina, to provide in said contract that the same be governed by and construed and interpreted under South Carolina law, and to anticipate that a court will not apply the law of a foreign state to said contract in order to declare the same invalid.

Significantly, Defendant Lucas—and, ultimately, the Order—applies South Carolina law in analyzing every aspect of the Agreement other than the issue of whether the Non-Solicitation provision at issue violates public policy. This alone demonstrates the parties' agreement that South Carolina law applies to the determination of whether the Non-Competition and Non-Solicitation provisions at issue are valid and enforceable. Accordingly, Team IA respectfully requests that the Court alter and amend its Order by applying South Carolina law to the analysis

of the Non-Solicitation provision at issue in accordance with the express intentions of Team IA and Defendant Lucas.

2. South Carolina choice-of-law principles mandate the use of South Carolina law because the issue involved is one surrounding the validity of the Non-Solicitation provision at issue.

Notwithstanding the Agreement's Choice of Law provision, the Order incorrectly applies Georgia law to analyze the Non-Solicitation provision at issue under South Carolina's common law choice-of-law principles. "In contract actions, South Carolina courts apply the substantive law of the place where the contract at issue was formed." *Witt v. Am. Trucking Ass'ns, Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994) (citing *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241, 243 (1983)). "This rule applies where a contract's formation, interpretation or validity is at issue."² *Id.* There can be no dispute that the Agreement was formed in South Carolina. Neither can there be a dispute that Defendant Lucas's Motion for Partial Summary Judgment attacks the validity of two provisions within the Agreement. In fact, the Order expressly recognizes this second point: "Lucas argues the 'Non-Solicitation' provision is unenforceable on its face because it would prohibit Lucas from accepting business from unsolicited customers of Team IA, especially governmental entities." (Order at 4.) A facial challenge to the enforceability of a contractual provision unquestionably places at issue the

² Defendant Lucas's proposed Order conveniently truncates this principle of law, citing the same incompletely as follows: "Under South Carolina law, when a contract's interpretation is at issue courts are to apply 'the substantive law of the place where the contract . . . was formed.'" (Def. Lucas's Proposed Ord. at 10 (quoting *Witt*, 860 F. Supp. at 300).) Thus, while Defendant Lucas has correctly identified South Carolina choice-of-law principles with respect to issues of contract interpretation, he disregards the clear rule of law that courts are also to apply "the substantive law of the place where the contract . . . was formed" when analyzing issues of contract formation and validity. *Witt*, 860 F. Supp. at 300 (citing *O'Briant*, 279 S.C. 254, 305 S.E.2d at 243). Significantly, Defendant Lucas correctly cites this entire proposition in his Memorandum in Support of Partial Summary Judgment. (Mem. in Supp. of Partial Summ. J. at 9 ("In disputes involving a contractual formation, interpretation or validity, South Carolina courts generally apply the substantive law of the place of contract formation." (citing *Witt*, 860 F. Supp. 295))). However, Defendant Lucas eliminates the references to contract formation and validity from his proposed Order and discusses only contract interpretation. (Def. Lucas's Proposed Ord. at 10.) As the issue involved in Defendant Lucas's Motion for Partial Summary Judgment is clearly one of contract validity, this omission appears strikingly disingenuous.

validity of said provision. Therefore, even in the absence of the Agreement's Choice of Law provision, the Court was required to apply South Carolina law in analyzing the Non-Solicitation provision at issue.

3. Team IA and Defendant Lucas performed the Agreement primarily in South Carolina.

South Carolina courts have recognized one exception to the choice-of-law principles discussed above in Section B.2., holding that "where performance [of a contract] is at issue, . . . the law of the place of performance governs." *Witt*, 860 F. Supp. at 300 (citing *Livingston v. Atl. Coast Line R.R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (1935)). Team IA does not dispute the legitimacy of this proposition; however, as discussed above, this rule of law is entirely inapplicable to the analysis of Defendant Lucas's Motion for Partial Summary Judgment, which expressly challenges the facial validity of a Non-Solicitation provision and a Non-Competition provision contained in the Agreement. Such a challenge does not involve an issue of performance, as the challenge precludes the Court from even considering whether Defendant Lucas has properly performed under the Agreement. Thus, the law of the alleged place of performance—Georgia—can have no bearing whatsoever on the Court's determination of whether the Agreement is valid under the law of the place in which the parties formed the Agreement—South Carolina.

Even assuming, *arguendo*, that Defendant Lucas's Motion for Partial Summary Judgment does involve issues of contract performance, the Court would still be required to apply South Carolina law due to the fact that both Team IA and Defendant Lucas performed the Agreement primarily in South Carolina. Defendant Lucas cannot dispute any of the following facts: (1) Team IA is a business that operates out of Lexington, South Carolina; (2) Defendant Lucas is a resident of Lexington, South Carolina; (3) Defendant Lucas worked as a salesman for Team

IA; (4) Defendant Lucas and Team IA entered into the Agreement in South Carolina; and (5) Defendant Lucas's office—out of which he worked—was located at the office of Team IA in Lexington, South Carolina. (Compl. at ¶¶ 1–2, 6, 11, 13–15, 24–25; Def.'s Ans. & Third Party Compl. at ¶¶ 175, 177, 197.d–e, 197.g.) These undisputed facts demonstrate that Defendant Lucas performed the Agreement primarily in South Carolina.

The Order concludes that Defendant Lucas “performed” the Agreement in Georgia by finding that “[t]he only evidence before the Court is that Lucas serviced customers for Team IA in Georgia.” (Order at 10.) This finding misstates the evidence before the Court, particularly when viewing such evidence in a light most favorable to Team IA. The Affidavit and Supplemental Affidavit of Mr. Yarborough demonstrate that Defendant Lucas worked on a nationwide basis on behalf of Team IA and identify specific Team IA customers with which Defendant Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (Yarborough Aff. at ¶¶ 9–10; Yarborough Supplemental Aff. at ¶¶ 3–6.) Moreover, Defendant Lucas has himself admitted that he performed work for customers in Georgia and Pennsylvania. (Lucas Aff. at ¶ 3.) Thus, under the Order's reasoning, Defendant Lucas actually “performed” the Agreement in South Carolina, North Carolina, Georgia, Alabama, and Pennsylvania, and the Agreement should be analyzed under the law of each of these five states. Such a conclusion demonstrates the illogical nature of the conclusion that Defendant Lucas “performed” the Agreement in the locations of the Team IA customers with which he worked. The more logical conclusion is that Defendant Lucas performed the Agreement in the location that was central to his activities with Team IA—Lexington, South Carolina. Thus, even assuming that Defendant Lucas's Motion for Partial Summary Judgment did involve an issue of performance, the Court

was required to apply South Carolina law to analyze the same.³ See *Witt*, 860 F. Supp. at 300 (citing *Livingston*, 176 S.C. 385, 180 S.E. at 345).

Furthermore, the Order contains an internal inconsistency in its discussion of what law it should apply in analyzing the Non-Solicitation provision at issue. The Order first acknowledges that “[u]nder South Carolina law, when a contract’s interpretation is at issue courts are to apply ‘the substantive law of the place where the contract . . . was formed.’” (Order at 10 (quoting *Witt*, 860 F. Supp. at 300).) The Order then finds that “[w]hether or not Lucas breached his employment agreement by an alleged breach of the non-solicitation provision would be a question of performance, or lack thereof, under the Agreement.” (*Id.*) However, the pertinent portion of the Order concludes as follows: “As such, the law of the place of performance governs the interpretation of the non-solicitation clause.” (*Id.* (emphasis added).) Thus, the Order holds that South Carolina law would apply if the issue was one of contract interpretation but rules that Georgia law governs this issue of contract interpretation. While Team IA asserts that the true issue before the Court is one of contract validity—which requires application of South Carolina law—the Order’s conclusion that the issue is one of contract interpretation also leads to a requirement that South Carolina law govern.

For each of the foregoing reasons, the Court must alter and amend its Order by applying South Carolina law to the analysis of the Non-Solicitation provision at issue, denying Defendant Lucas’s Motion for Partial Summary Judgment as to this provision, and allowing Team IA’s claims to proceed at this stage of the litigation.

³ At the very least, the conflicting evidence regarding the alleged place of performance creates a genuine dispute as to a material fact that precludes summary judgment on this issue. See discussion *supra*, Section A.

D. The Order incorrectly concludes that the Non-Solicitation provision at issue "is an unreasonable restraint on trade," because South Carolina courts have on multiple occasions upheld and enforced restrictive covenants nearly identical to that in the Non-Solicitation provision at issue.

Relying on Georgia law, the Order concludes that the "non-solicitation provision is unenforceable on its face because it prohibits Lucas's acceptance of business from *unsolicited* customers." (Order at 10 (emphasis in original).) However, as discussed above, Georgia law is inapplicable to the analysis of whether the Non-Solicitation provision at issue is enforceable because the Agreement was formed in South Carolina. See *Witt*, 860 F. Supp. at 300 ("South Carolina courts apply the substantive law of the place where the contract at issue was formed . . . where a contract's formation, interpretation or validity is at issue."). Thus, the Court was required to determine the validity of the Non-Solicitation provision at issue under South Carolina law. *Id.* Applying South Carolina law, the Non-Solicitation provision at issue is clearly not an unreasonable restraint on trade in that South Carolina courts have repeatedly upheld restrictive covenants nearly identical to that in the Non-Solicitation provision at issue.

The South Carolina Supreme Court has noted the following with respect to covenants such as the Non-Solicitation provision at issue: "[T]he most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers." *Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539. On the basis of this well-established rule of law, courts in South Carolina have repeatedly upheld and enforced agreements containing restrictions against both soliciting and accepting business from the employer's customers. For example, the South Carolina Supreme Court has enforced an agreement precluding a former employee from "selling to the accounts or in the territory in which he ha[d] been performing his duties as [a]

sales representative." See *Kerrigan*, 238 S.C. at 59, 119 S.E.2d at 535 (emphasis added). Similarly, the South Carolina Court of Appeals has upheld as enforceable a restriction that precluded the former employee from "[s]olicit[ing] or accept[ing] sales of competing services in any account in which" the employer had already established payroll deduction procedures. See *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 105, 420 S.E.2d 217, 220 (Cl. App. 1992) (emphasis added). Likewise, the United States District Court for the District of South Carolina has upheld an agreement that prohibited the former employee from "soliciting or accepting business from any of [the employer's] dealers, vendors, clients, or customers whose identity was obtained through use of [the employer's] confidential information." See *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 690 (D.S.C. 2003).

Thus, courts at each level of the judicial system in South Carolina have upheld and enforced restrictive covenants nearly identical to the Non-Solicitation provision at issue. Accordingly, any finding that the Non-Solicitation provision at issue is an unreasonable restraint on trade is improper at this stage of the litigation. The Order must therefore be altered and amended by denying Defendant Lucas's Motion for Partial Summary Judgment with respect to the Non-Solicitation provision at issue and allowing Team 1A's claim under the same to proceed.

E. There is no statutory or common-law authority supporting the conclusion that the status of customers as governmental entities of a foreign state affects the determination of whether a restrictive covenant violates public policy, and novel questions are not proper for summary adjudication.

The Order rules that "it would be unreasonable from the standpoint of public policy for a South Carolina court to prohibit Lucas from accepting unsolicited business from a governmental entity in Georgia to perform work in Georgia." (Order at 12.) However, the Order cites no statutory or common-law authority for such a conclusion, as this ruling represents a novel issue under South Carolina law. As this Court noted in its Order of September 4, 2009, with respect to

Team IA's Motion to Dismiss and Motion to Strike, "South Carolina courts have long recognized that a novel issue such as this one is best decided in light of the testimony to be adduced at trial." (Order, Sept. 4, 2009, at 3 (citing *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980)).) Thus, precedent that this Court has cited with respect to an earlier motion in this matter precludes the entry of summary judgment on the basis of a novel issue such as that quoted above. *See id.* Additionally, the case law is clear that "[c]ourts should not annul contracts on doubtful grounds of public policy." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (quoting *Warren v. Pilgrim Health & Life Ins. Co.*, 217 S.C. 453, 456, 60 S.E.2d 891, 893 (1950)). As a novel issue certainly constitutes "doubtful grounds of public policy," summary judgment is improper for this reason as well.

Moreover, existing precedent demonstrates that the identity of the customers at issue is entirely irrelevant with respect to an analysis of whether the Non-Solicitation provision at issue is unreasonable on public policy grounds. The public policy element that a court is to consider in its analysis of whether to enforce a restrictive covenant focuses on whether the impact on the defendant and on the applicable market is such that public policy will not allow enforcement of the covenant. *See Wolf*, 309 S.C. at 109, 420 S.E.2d at 221-22. The public policy element thus considers whether the defendant will be unable to support himself and whether the relevant market will suffer a serious void as a result of enforcing the covenant. *See id.* Defendant Lucas simply cannot demonstrate either of these things.

First, the Affidavit of Mr. Yarborough clearly states that the industry in which Team IA and Defendant Lucas are engaged is "a competitive industry with many competitors offering the same or substantially similar services." (Yarborough Aff. at ¶ 3.) The relevant market will therefore not suffer from the temporary absence of Defendant Lucas. Additionally, Defendant

Lucas is in no way precluded from earning a living as a result of the Non-Solicitation provision at issue, which merely precludes Defendant Lucas from soliciting or selling to Team IA's customers—an extremely limited and isolated portion of the universe of entities to which Defendant Lucas could sell his products and services. Accordingly, the Non-Solicitation provision at issue is not unreasonable on public policy grounds.

In direct opposition to the holding of the Court, the United States District Court for the District of South Carolina has upheld a non-solicitation provision that precluded the former employee from “directly or indirectly calling upon, causing to be called upon, communicating with or otherwise attempting to bring about any transaction to the detriment of [the former employer’s] business between a [competing] organization and a customer” of the former employer, where the former employer’s customers included “governmental and commercial customers” throughout North America. *Hagemeyer N. Am. Inc. v. Thompson*, No. 2:05-3425, 2006 U.S. Dist. LEXIS 19468, at *1, *3, *13, *17 (D.S.C. Mar. 1, 2006) (emphasis added). Thus, the status of customers as governmental entities in no way affects the analysis of whether the Non-Solicitation provision at issue violates public policy. *See id.*; *see also Intelus Corp. v. Barton*, 7 F. Supp. 2d 635, 637–38, 643 (D. Md. 1998) (enforcing a restrictive covenant requiring that the former employee “not call upon or cause to be called upon, or solicit or assist in the solicitation of any person, firm, governmental entity, or corporate entity listed as a customer or account of [the former employer] on the date of the termination of his employment” (emphasis added)).

Furthermore, a brief consideration of the implications of the Court’s Order further demonstrates the need to alter and amend the same. Under the reasoning of the Order, restrictive covenants in South Carolina would never be enforceable if the customers a business seeks to

protect are governmental entities in another state. Such a result would itself violate the public policy of this State, under which courts have upheld and enforced restrictive covenants nearly identical to the Non-Solicitation provision at issue. For each of these reasons, the Order must be altered and amended by denying Defendant Lucas's Motion for Partial Summary Judgment.

F. The Order incorrectly concludes that the Non-Competition provision at issue "is unduly harsh and oppressive in curtailing Lucas' legitimate efforts to earn a livelihood," as there remains a genuine dispute as to this material fact and Defendant Lucas has presented no evidence to support such a conclusion.

Without any evidentiary support, the Order concludes that the Non-Competition provision at issue "offends the second hurdle of the analysis because it is unduly harsh and oppressive in curtailing Lucas' legitimate efforts to earn a livelihood." (Order at 6.) The Order bases this ruling on a conclusory statement that the Non-Competition provision at issue "would require Lucas to leave the country to continue his line of work." (*Id.*) However, such a conclusion could not be farther from the truth.⁴

As counsel for Team IA identified during oral argument on Defendant Lucas's Motion for Partial Summary Judgment, the Non-Competition provision at issue only precludes Defendant Lucas from soliciting, selling, or providing "Competing Services" for a period of twelve months. (Lucas Empl. Agmt. at ¶ V.B.1.) The Agreement expressly defines "Competing Services" as follows: "[A]ny service, product, or process of any person, firm, or corporation in existence, which competes with a service, product or process upon which [Defendant Lucas] worked or which he sold or serviced during his employment by [Team IA] or concerning matters which he has acquired confidential information through his work with [Team IA]." (*Id.*) Thus,

⁴ Significantly, Defendant Lucas's Affidavit makes no mention whatsoever of the impact that enforcement of the Non-Competition provision at issue will have on his ability to earn a livelihood. Thus, even if the Court were to accept Defendant Lucas's position on this issue in its entirety—which would be improper under the parameters of Rule 56, SCRCP—there exists no facts in the record to support the conclusion that the Non-Competition provision at issue is "unduly harsh and oppressive."

the Non-Competition provision at issue in no way precludes Defendant Lucas from continuing in his chosen line of work—the provision simply precludes Defendant Lucas from selling and providing services, products, and processes that compete with those on which he worked and acquired confidential information while at Team IA. Moreover, the Non-Competition provision at issue only prevents Defendant Lucas from engaging in these activities for a short duration—twelve months.

The Agreement allows Defendant Lucas to develop, sell, and provide any services, products, or processes within the applicable industry that do not qualify as “Competing Services” under the Agreement. Accordingly, the Non-Competition provision at issue does not curtail Defendant Lucas’s legitimate efforts to earn a livelihood within his chosen line of work, and the Order must be altered and amended by denying Defendant Lucas’s Motion for Partial Summary Judgment.

- G. The Order incorrectly concludes that the Non-Competition provision at issue “is unenforceable because it is undisputed by Team IA that Lucas only performed work for customers in Georgia and Pennsylvania,” as Team IA has presented evidence that Defendant Lucas worked on a nationwide basis and has provided specific examples of Team IA customers with which Defendant Lucas worked in South Carolina, North Carolina, Georgia, and Alabama.

Through the Affidavit of Mr. Yarborough, Team IA has demonstrated that Team IA both allowed and expected Defendant Lucas to solicit new business for Team IA on a nationwide scale throughout his employment. (Compl. at ¶ 24; Yarborough Aff. at ¶ 9.) To this end, Team IA paid for Defendant Lucas to travel around the country to visit customers and prospects, attend tradeshows, and sell Team IA’s products and services. (Compl. at ¶ 24; Yarborough Aff. at ¶ 9 & Attach. 4.) Defendant Lucas’s nationwide sales activity on behalf of Team IA is evidenced by a sample of Defendant Lucas’s expense reports, a summary of which Team IA provided to the Court as an Attachment to Mr. Yarborough’s Affidavit. (Yarborough Aff. at Attach. 4.)

Furthermore, Team IA has presented evidence through the Supplemental Affidavit of Mr. Yarborough identifying specific Team IA customers and prospects with which Defendant Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (Yarborough Supplemental Aff. at ¶¶ 3–6.) Thus, the Court's determination that "it is undisputed by Team IA that Lucas only performed work for customers in Georgia and Pennsylvania" misstates the evidence before the Court—particularly when viewed in a light most favorable to Team IA. The Order's ruling that the Non-Competition provision at issue is unenforceable on the basis of this erroneous determination must therefore be altered and amended.

To summarize Team IA's position with respect to the reasonableness of the Non-Competition provision at issue, the primary geographic restriction contained in the covenant—a nationwide restriction—is reasonably limited in that the same is directly related to Defendant Lucas's activities at Team IA and only limits Defendant Lucas's activities "in the area in which [Defendant Lucas] worked or to which he was assigned at any time during his employment." *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983) (internal quotation marks omitted). As such, "[t]he area limitation of the agreement falls within the guidelines of the *Standard Register* case" and must be enforced, particularly at this early stage of the litigation. *Id.* The Court must alter and amend the Order accordingly, denying Defendant Lucas's Motion for Partial Summary Judgment.

H. Even assuming the nationwide geographic restriction set forth in the Non-Competition provision at issue is unreasonable, the Order incorrectly fails to limit the provision in accordance with the bargained-for alternative geographic restriction or some smaller portion thereof.

Even assuming that the nationwide geographic restriction contained in the Non-Competition provision at issue is not reasonable, Team IA and Defendant Lucas expressed their intention that the "Restricted Territory" shall instead "be defined as the states of South Carolina,

North Carolina, Georgia, and Alabama." (Lucas Empl. Agmt. at ¶ V.B.1.) This internal revision is something that Team IA and Defendant Lucas—after both parties first considered and negotiated the Agreement (Yarborough Aff. at Attach. 3)—voluntarily decided to include in the Non-Competition provision at issue. A review of a sample of Defendant Lucas's sales activities—based on expense reports that Defendant Lucas submitted to Team IA for reimbursement—shows direct activities in each of the states listed in the alternative geographic restriction. (Yarborough Aff. at ¶ 9 & Attach. 4.) The Supplemental Affidavit of Mr. Yarborough lists numerous customers and prospects within each of the states listed in the alternative geographic restriction with which Defendant Lucas worked. Thus, there can be no doubt that the alternative geographic restriction is limited to areas in which Defendant Lucas was "able, during the term of his employment, to establish contact with [Team IA's] customers." *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 (citing *Kerrigan*, 238 S.C. 54, 119 S.E.2d 533).

The Severability clause of the Employment Agreement makes clear that the parties intended for a court to enforce the alternative geographic restriction if the nationwide restriction is deemed unreasonable. (Lucas Empl. Agmt. at ¶ VII.A.) Such express intentions that a court enforce what is a severable and reasonable covenant must be recognized. *See Bennet*, 296 F. Supp. 2d at 687 ("[A]lthough an *indivisible* covenant may not be enforced even to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions." (emphasis in original)). Therefore, the Non-Competition provision at issue must be enforced to the extent of the alternative geographic restriction if the Court determines that the nationwide restriction is unreasonable.

Furthermore, considering the language of the Severability clause in conjunction with established case law and this Court's holding in *Ascension Hospice, Inc. v. Sikes*, No. 2006-CP-

32-4055, slip op. (Ct. Com. Pl., Lexington County, S.C., Apr. 10, 2008), the Court clearly has the ability to eliminate any provision of the Non-Competition provision at issue, or portion thereof, that the Court deems necessary in order to render the provision reasonable. See *Bennet*, 296 F. Supp. 2d at 687 (“Both [*Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972), and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958),] can be reasonably read to conclude that although an *indivisible* covenant may not be enforced even to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions.” (emphasis in original)); *Ascension Hospice*, No. 2006-CP-32-4055, slip op. at 6 (“Two hurdles must be overcome before a court can sever provisions from an agreement that is otherwise unenforceable. First, the agreement must have independent clauses which can be severed and, second, it must be apparent from the agreement itself that the parties intended the agreement to be severable.” (citing *Bennet*, 296 F. Supp. 2d 681)); see also *Slonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 161, 621 S.E.2d 352, 354 (2005) (noting that South Carolina law disallows reformation of contracts where the court would be required to add “a term not negotiated and agreed upon by the parties”).

For example, if the Court was to determine that the Non-Competition provision at issue would be reasonable if the geographic restriction was limited to South Carolina, North Carolina, Georgia, Alabama, or any combination these states, the Severability clause, coupled with the independent nature of the states listed in the alternative geographic restriction, empowers the Court to so limit the provision. *Ascension Hospice*, No. 2006-CP-32-4055, slip op. at 6 (“[A] court can sever provisions from an agreement that is otherwise unenforceable [where] the agreement [has] independent clauses which can be severed and . . . it [is] apparent from the agreement itself that the parties intended the agreement to be severable.” (citing *Bennet*, 296 F.

Supp. 2d 681)). This type of action would be analogous to Judge Duffy's ruling that a court could easily sever one or more of the "Affiliated Companies" from the agreement at issue in *Bennet* "without disrupting the integrity, continuity, or intent of the remaining provisions."⁵ See 296 F. Supp. 2d at 686-89.

Like the list of "Affiliated Companies" in *Bennet* that Judge Duffy determined to be severable, the states listed in the alternative geographic restriction in Defendant Lucas's Agreement are listed individually, rendering each state an independent covenant for the purposes of severability. See *id.* This type of covenant is easily distinguishable from those that courts have found to be improper for severance, which tend to contain geographic restrictions such as "within a 100-mile radius." See, e.g., *Kistler*, 258 S.C. at 432-34, 189 S.E.2d at 23-24. A court is unable to strike through the phrase "100-mile radius" and write in an alternative geographic restriction, as doing so would result in the court creating a new agreement for the parties. See *Bennet*, 296 F. Supp. 2d at 688 ("This conclusion is necessarily predicated on the indivisible quality of the '100 mile radius' restriction. There is no smaller unit of space which the supreme court might have identified as representing an expression of the intent of the parties. The choice was either between a 100-mile radius or none at all.") Conversely, the Court here is certainly able to strike through one or more of the states listed in the alternative geographic restriction while still preserving the express agreement of the parties. Therefore, in accordance with

⁵ The agreement at issue in *Bennet* precluded the former employee therein from soliciting "employers, customers, and dealers of [the former employer] or any 'Affiliated Company.'" *Bennet*, 296 F. Supp. 2d at 686, n.1. The agreement went on to define "Affiliated Company" and listed ten distinct entities that were currently included in the definition. *Id.* Because the parties chose to list the Affiliated Companies individually, Judge Duffy held that each Affiliated Company was an independent covenant because the parties had "manifested an intention regarding each company individually, by choosing to list them by name. Such an expression makes it possible, logistically, to extricate those companies, without a legitimate interest, from the more global intent concerning all 'Affiliated Companies,' while leaving intact the covenant as to those companies which do have a legitimate interest, knowing with full confidence that the intention of the parties has been expressed and preserved in the remainder of the abridged covenant." *Id.* at 688.

established case law and this Court's own prior holding in *Ascension Hospice*, the Court must enforce the Non-Competition provision at issue to the greatest extent it deems reasonable within one or more of the states listed in the alternative geographic restriction. The Order must be altered or amended accordingly by denying Defendant Lucas's Motion for Partial Summary Judgment.

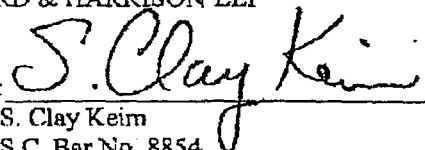
II. CONCLUSION

Based on the foregoing facts and authorities, together with those set forth in Team IA's Memorandum in Opposition to Defendant Lucas's Motion for Partial Summary Judgment, the Order must be altered or amended by denying Defendant Lucas's Motion for Partial Summary Judgment. The Non-Solicitation and Non-Competition provisions at issue in Defendant Lucas's Motion for Partial Summary Judgment are reasonable, valid, and enforceable, and Team IA's claims for breach of the same must be allowed to proceed at this stage of the litigation.

Dated this the 24th day of December, 2009.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
TEAM IA, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 2009-CP-3201078
	)	
v.	)	
	)	
CICERO LUCAS,	)	
GEORGE LAWSON, IV,	)	
AND 5 POINT SOLUTIONS, LLC,	)	
	)	
Defendants,	)	
	)	
CICERO LUCAS,	)	
GEORGE LAWSON, IV,	)	
	)	
Third-Party Plaintiffs	)	
	)	
v.	)	
	)	
BRENT YARBOROUGH	)	
TEAM IA	)	
	)	
Third-Party	)	
Defendants	)	

**Memorandum in Opposition to Alter or Amend
Order Granting Partial Summary Judgment**

COME NOW Defendant and Third Party Plaintiff Cicero Lucas (hereinafter "Lucas") by and through his undersigned counsel file this memorandum in opposition to Plaintiff Team IA's motion to alter or amend.

INTRODUCTION/BACKGROUND

Lucas worked for Team IA from approximately March 2001 until February 3, 2009. Lucas alleges in his counterclaim Complaint that during his employment, Team IA promised Lucas specific compensation and stock ownership options. Team IA breached

those promises. As a result of those breaches, Team IA owed Lucas a significant amount of unpaid compensation. Team IA's failure to pay promised compensation contributed to other unendurable working conditions at Team IA, forcing Lucas to leave employment at Team IA. See Answer of Cicero Lucas et al and Third Party Complaint against Brent Yarborough and Team IA, ¶¶ 175-194).

Team IA filed suit against Lucas, his partner George Lawson, and 5 Point Solutions LLC asserting 12 separate causes of action. Team IA's First Cause of Action asserts "Breach of Contract" alleging, among other allegations, the breach of an Employment Agreement by Lucas with respect to non-solicitation and non-compete provisions. On August 27, 2009 Lucas filed for partial summary judgment on Team IA's First Cause of Action with respect to only the covenant not to compete portions of that cause of action. On September 21, 2008 a hearing on the motion was held with argument presented by both sides. On November 19, 2009, this Court granted Lucas' motion with respect to only the covenant not to compete portions of the breach of contract cause of action. On December 3, 2009 Team IA filed this current motion for reconsideration pursuant to Rule 59(c), SCRPC.

ANALYSIS

Historically, all covenants not to compete were simply void as against public policy. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). Although some such restrictive covenants are enforceable today, such covenants not to compete are still strongly disfavored and always will be strictly construed against the employer. See *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). Any doubts about the scope or enforceability of Team IA's

Non-Solicitation Covenant must be resolved against Team IA. *Dudley*, 301 S.E.2d at 143. Moreover, because Team IA drafted the Non-Solicitation Covenant, any deficiencies or ambiguities in the Agreement must be construed against it. *Myrtle Beach Lumber Co. v. Willoughby*, 274 S.E.2d 423, 426 (S.C. 1981).

It is well established that a restrictive covenant that fails to satisfy all of the following criteria will be invalid:

1. It must be necessary for the protection of the legitimate interest of the employer;
2. It must be reasonably limited in its operation with respect to time and place;
3. It must not be unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
4. It must be reasonable from the standpoint of sound public policy; and
5. It must be supported by valuable consideration.

Rental Unif. Serv. of Florence, Inc. v. Dudley, 301 S.E.2d 142, 143 (S.C. 1983).

The covenants in this matter fail because the geographic restrictions are far too broad to protect any legitimate business interest of Team IA. Team IA did not identify customers with whom Lucas had contact in each and every state to justify a nationwide ban on Lucas working in them. Furthermore, Team IA failed to show that Lucas serviced any Team IA customers in Alabama, South Carolina, or North Carolina covered by the covenant's fall back provision. Additionally, a covenant barring Lucas from accepting unsolicited work from former Team IA customers does not protect a legitimate interest of Team IA and under the circumstances would be against public policy.

I. The Court Properly Applied the Standard of Summary Judgment

It is true that genuine disputes of material fact preclude the granting of summary judgment. However, construing the provisions of a contract is a question of law for the court. See *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299, 302-03 (S.C. 2001); *Pearson v. Church of God*, 325 S.C. 45, 478 S.E.2d 849, 853 (S.C. 1996). In this case, the Court viewed the contract through the lens of South Carolina's standard for non-competition agreements and made a determination on whether the covenant at issue was enforceable. Nothing about this analysis was out of the ordinary or improper.

Two affidavits were before the Court at the hearing on Lucas' motion for partial summary judgment. In the Lucas affidavit, he stated that he only performed work for Team IA customers in Georgia and Pennsylvania. He denied performing work for Team IA customers in Alabama, South Carolina, or North Carolina. In Yarborough's affidavit, he testified that while Team IA had nationwide "marketing" activities, he only identified two customers of Team IA that Lucas actually serviced. Both customers Yarborough identified were Georgia governmental entities.

The two affidavits before the Court at the hearing were harmonious with respect to where Lucas actually serviced customers for Team IA. Lucas identified customers he serviced in Georgia and Pennsylvania. Yarborough only identified customers in Georgia serviced by Lucas. It has long been the law of South Carolina that:

A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.

Standard Register Company v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961)(emphasis

added). As the court went on to explain:

“[T]he most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.”

Standard Register Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961)

(emphasis added). Lucas emphasizes our precedent's focus on customers because with respect to actual customers of Team IA serviced by Lucas himself, the affidavits are entirely consistent that Lucas only serviced actual Team IA customers in the state of Georgia.

The challenged provisions set forth a nationwide geographical restriction with a 4 state “fall-back provision” limiting the geographic territory to South Carolina, North Carolina, Alabama, and Georgia. Since the affidavits were harmonious with respect to where Lucas actually had contact with real Team IA's customers, the Court properly found that both the nationwide and 4 state fall-back restrictions were geographically far too broad to support any legitimate business interest of Team IA.

Two weeks after the hearing on the merits of this motion, Team IA sought to supplement its Memorandum with a second affidavit from Team IA's owner Brent Yarborough. As set forth in Lucas's October 6, 2009 “Motion to Strike after Hearing Affidavit”, Lucas believes the affidavit is untimely and should not be considered. The Court certainly has the authority to dismiss the affidavit entirely as untimely. See *Jerrigan v. King*, 312 S.C. 331, 334 n. 1, 440 S.E.2d 379, 381 n. 1 (Ct.App.1993).¹

¹ See also *McQuate v. Brown*, 270 S.C. 512, 242 S.E.2d 688 (1978) (finding that where affidavit opposing summary judgment was not timely served and not considered by trial court, appellate court could not

Lucas would clearly be prejudiced by the submission of the affidavit if the Court determines that the affidavit creates a question of fact that Team IA failed to present at either the briefing or argument stage of this motion. In addition to being untimely, the affidavit fails to create a genuine issue of material fact that would justify denying partial summary judgment for Lucas.

At the September 21, 2009 hearing on the merits of this motion, it was obvious that Team IA failed to create an issue of fact with regards to where Lucas actually serviced Team IA customers. As set forth above, both affidavits before the Court were harmonious that Lucas did not actually service real Team IA customers nationwide and that Georgia was the only state covered by the 4 state fallback provision in which Lucas serviced actual Team IA customers. Since the only evidence before the Court was that Lucas did not service Team IA customers in 3 of the 4 fall-back provision states, the only conclusion reachable is that the geographical restriction is overbroad and must be struck down.

Even if the Court affords Team IA a "second bite at the apple" with the untimely affidavit, Team IA still fails to establish that Lucas was servicing any actual Team IA customer in any state beyond Georgia when his relationship with Team IA ended. The supplemental affidavit:

properly consider matter contained in affidavit); *Slaughter v. Southern Talc Co.*, 919 F.2d 304 (5th Cir.1990)(tactical decision not to introduce affidavits at summary judgment motion did not constitute excusable neglect justifying late filing of affidavits); *Seiscasi v. Board of Pub. Instruction of Pinellas County*, 156 So.2d 652 (Fla.Ct.App.1963)(where affidavits were not timely filed, they were properly excluded from consideration at summary judgment motion); *Herzlsar v. Yorkshire Condominium Assn.*, 201 Ga.App. 185, 410 S.E.2d 455 (1991)(finding party was not entitled to have affidavits considered in summary judgment motion where they were not timely filed and party made no showing of excusable neglect); *Bonnette v. Century Ready-Mix Corp.*, 369 So.2d 1201 (La.Ct.App.) (court did not err in failing to consider party's affidavits where affidavits were not timely served), writ denied, 373 So.2d 525 (La.1979); *Chaplain v. Chaplain*, 101 N.C.App. 557, 400 S.E.2d 121 (no error in refusing to consider untimely affidavits where no showing of excusable neglect), rev. denied, 328 N.C. 570, 403 S.E.2d 508 (1991).

1. Fails to state whether the identified entities were ever actual customers of Team IA or merely "prospective" customers;
2. Fails to state whether the identified entities were current or former customers with whom Team IA no longer has a protectable relationship;
3. Fails to state the service, if any, actually performed by Lucas for the entity that would establish Lucas had actual contact with the entity that could justify upholding a ban.

The vague and ambiguous language of the affidavit fails the requirement of Rule 56(e), SCRCF, that to deny summary judgment the respondent "*must set forth specific facts* showing that there is a genuine issue for trial." (Emphasis added).

With the exception of the two Georgia governmental entities listed in the original Yarborough affidavit, every single named entity in the Yarborough affidavit is identified as a "customer and/or prospective customer" or "customer/prospective customer". As a result, with the exception of the two Georgia entities, the Court is unable to point to a single entity listed and say that Team IA is asserting that entity was an actual customer of Team IA. For example, looking at both Yarborough affidavits can the Court say that Team IA is representing that there is a single current customer of Team IA that Lucas ever even met in the state of Alabama? The answer is "no".

The untimely affidavit also fails to state whether the entities listed were current customers or former customers with whom Team IA no longer has any protectable relationship. This omitted fact is extremely significant since a covenant not to compete cannot prohibit the solicitation or acceptance of business from an employer's former clients with whom the employer no longer has a working relationship. See e.g., *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 WL 512261 (D.S.C.) (J. Joe Anderson). In *Fournil*, District Judge Joe Anderson stated: "Soliciting business from former clients of

[employer] is not unfair or improper; [Employer] has no relationship with these customers whatsoever."

The untimely affidavit fails to set forth the status of the relationship between Team IA and the entities listed. The status of the relationship is most likely omitted because for all of the entities listed in Alabama no relationship was ever established (the affidavit's use of the term "prospective customer" is addressed above) or if a relationship was established, the relationship ended years ago. See Memorandum in Support of Partial Summary Judgment Exhibit 2, Affidavit of Cicero Lucas, ¶ 5 ("At the time of my leaving Team IA, the company only had clients in South Carolina, Georgia, 1 customer in Pennsylvania, and 1 customer in North Carolina.").

Likewise, the affidavit describes Lucas' relationship with the customer as "involved in some facet of sales" to the "customer/prospective customer". The Court is not provided any information describing what the alleged "some facet" might involve. For instance, based on the Yarborough affidavits, the Court cannot say that Lucas *ever even met* the "customer/prospective customer" or had any involvement the nature of which could support a covenant not to compete.

It has been stated that summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a party must show what evidence it has that would convince the trier of fact to accept its version of events." *Hammel v. Eau Galle Cheese Factory*, 407 P.3d 852, 859 (7th Cir. 2005). Team IA, as the employer and business entity, would have all the evidence and persons necessary to establish where company has actual customers that Lucas serviced in the 3 of the 4 fallback states where Lucas set forth he had no such customers. While no discovery from Lucas (as the

departed former employee) that is not part of the business records of Team IA would shed light on this issue, obviously Team IA would have such information and failed to set it forth.

Related to this issue, should the Court choose to consider the untimely affidavit with all its deficiencies, Lucas requests the Court further consider the affidavit in light of Team IA's discovery responses in which Team IA refused to provide information necessary to justify its non-compete provisions. See Attachment 1, Third-Party Defendants' Responses to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Production of Documents. Team IA objected to and refused to answer the following discovery questions:

-For entities Team IA contends are covered by the non-compete provision, Team IA refused to provide:

1. The product or service Team IA provided to the customer;
2. The dates for which those products or services were provided;
3. The amount of money paid to Team IA for each product or service;

See Attachment 1, p. 4-5, Response to Request No. 6.

-For the services Team IA contends are covered by the non-compete, Team IA refused provide:

1. Each customer Team IA has provided that service in the past 10 years.

See Attachment 1, p. 5-6, Response to Request No. 8.

-For the states Team IA contends are covered by the non-compete provision, Team IA refused to provide:

1. The customers of Team IA located in that state;
2. The service provided by Team IA to those customers;

3. The dates the customer was a customer if no longer a customer of Team IA.

See Attachment 1, p. 6, Response to Request No. 9.

Lucas believes Team IA's failure to provide this necessary information (both in discovery and to the Court in support of its motion) is related to the phrasing it has chosen to include in the untimely affidavit. Team IA seeks the impression that it is a nationwide company doing business across the country, including the 4 states of the non-compete's fall-back provision. In fact, at the time Lucas left Team IA, the company only had active clients in South Carolina and Georgia along with 1 customer in all of North Carolina along with 1 customer in Pennsylvania as set forth in the Lucas affidavit that was before the Court at the September hearing.

For close to 50 years it has been the law in South Carolina that "A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961)(emphasis added). Except for the two Georgia governmental entities, the original affidavit at the hearing and the later affidavit submitted by Team IA fail to set forth that Team IA had any current customer relationships in the fall-back states or that Lucas had a relationship with those customers that could be protected by the geographical restriction.

Rule 56(c), SCRPC sets forth:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is

a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Team IA has failed to set forth "specific facts" that would support denial of summary judgment. The two affidavits fail to identify any actual customers of Team IA for whom Lucas performed work that could conceivably support enforcement of the covenants not to compete.

II. Georgia Substantive Law Controls the Interpretation of the Performance of the Non-Solicitation Provision With Respect to Georgia Entities Soliciting Work to be Performed in Georgia

Lucas does not dispute that the contract contains a Choice of Law provision requiring the Court to apply South Carolina law. However, the Court correctly noted that applying South Carolina law to the contract results in Georgia law governing the performance of the contract in Georgia with respect to Georgia entities. In disputes involving a contractual formation and interpretation South Carolina courts generally apply the substantive law of the place of contract formation. See *Witt v. American Trucking Associations, Inc.*, 860 F. Supp. 295 (D.S.C. 1994) (citations omitted). However, "[m]atters connected with its performance are regulated by the law prevailing at the place of performance." See *Livingston v. Atlantic Coast Line R.R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (1935)(quoting *Scudder v. Union National Bank*, 91 U.S. 406, 412 (1875)). There is no dispute that under Georgia law a non-solicitation provision that precludes accepting unsolicited business is void as against public policy. See e.g., *Waldeck v. Curtis*, 583 S.E.2d 266, 268 (Ga. App. 2003); *Pregler v. C & Z, Inc.*, 575 S.E.2d 915, 916 (Ga. App. 2003). If the issue before the Court is, as alleged by Team IA in its Complaint and Memorandum, Lucas' *performance* of this non-solicitation provision in Georgia with respect to Georgia entities, the law of Georgia applies.

It has long been the standard practice of courts to review the law of the state where the covenant not to compete is to be performed even when there is a contractual choice of law provision specifying a different state. See e.g., *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). In the seminal *Standard Register* case, the contract contained the following provision:

(d) This agreement shall be considered an Ohio contract and construed according to the laws of Ohio.

After taking note of this language, the South Carolina Supreme Court held: "The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it." *Id.*, 119 S.E.2d at 541-42 (emphasis added).

The court's approach in *Standard Register* to apply the law of the place of performance of the non-compete even if a choice of law provision sets forth a different state is consistent with the principle of Restatement (Second) of Conflicts § 187(2)(b) (1971) that establishes the basic principle under contemporary choice-of-law doctrine that parties cannot by contract override public policy limitations on contractual power applicable in a state with materially greater interests in the transaction than the state whose law is specified in the contract. Team IA's former customers in Georgia are neither parties to, nor are they contractually bound by, any agreement between Team IA and Lucas. Should Team IA's customers in Georgia choose to leave Team IA without any affirmative act by Lucas, they have every right to do so. This Court should not effectively enjoin those Georgia entities from seeking to hire whomever they want to perform work in Georgia. A covenant provision that prohibits Lucas from accepting

unsolicited business from Georgia entities is overly broad and it is proper to strike down as a matter of law the restrictive covenant.²

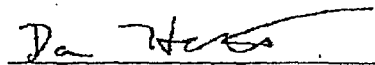
Additionally, while no court in South Carolina has directly addressed the reach of a non-solicitation covenant to obstruct the public's ability to choose the business professional they prefer, the weight of the authority agrees with Georgia on this issue. See *Palmer & Coy, Inc. v. Meathe*, 303 F.3d 1297 (11th Cir. 2005)(holding that a provision that prevents the employee from accepting unsolicited business from former clients of the employer was invalid and could not be saved because Georgia law [like South Carolina] does not allow blue-penciling); *1st Am. Sys. v. Rezatto*, 311 N.W.2d 51, 59 (S.D. 1981)(striking covenant because language restricting the acceptance of business placed an undue burden on the former employee and on the public.); *Evans Laboratories, Inc. v. Melder*, 562 S.W.2d 62 (Ark. 1978)(ruling that provision which prohibits employee from accepting business from the employer's former customers whom the employee had formerly serviced was undue interference with the public's right to the availability of a serviceman it prefers to use); *Wachovia Ins. Servs. v. Paddison*, 2006 U.S. Dist. LEXIS 66463 (S.D. Ga. 2006)("[e]mbedding the word 'accept' in restrictive covenants is fatal because that can reach unsolicited former clients (i.e., customers with whom the employee never had any contact)").

The law in this state has been consistent that valid non-solicitation covenants may prohibit some affirmative acts by the former employee, such as soliciting, inducing or pirating existing customers. See *Oxman v. Profitix*, 126 S.E.2d 852, 854 (S.C.

² To the extent that the Order states it would be against public policy to uphold a restriction against Georgia governmental entities, the Order is limited to Georgia governmental entities where, based upon representations made by Team 1A counsel at the hearing, both sides agree that Georgia law prohibits covenants from barring unsolicited business.

1962)(enforcing covenant that provided the former employee would not "induce any policyholder of the Company to terminate his or her insurance with the Company."); *Collins Music Co., Inc. v. Parent*, 340 S.E.2d 794, 795 (S.C. 1986)("The provision merely prohibits pirating of Collins' customers."). While Team IA has correctly noted that several South Carolina cases have upheld covenants containing similar "non-acceptance" language, the former employee was not challenging the "non-acceptance" language in those cases and therefore not illustrative on this issue. "As Chief Judge Alex Sanders so aptly stated, '[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'" *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001). Should the Court decide that South Carolina law applies to the issue of performance of the contract in Georgia, then the Court should follow the majority rule and strike down the covenant.

Respectfully submitted,


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December 26, 2009

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on the 28 day of December, 2009, Bamwell, S.D.

Michael J. Stueck

ATTACHMENT A

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

TEAM IA, INC.,

Plaintiff,

v.

C.A. No. 2009-CP-32-01078

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants,

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

**THIRD-PARTY DEFENDANTS' RESPONSES TO THIRD-PARTY
PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS TO THIRD-PARTY DEFENDANTS**

COME NOW Third-Party Defendants, by and through their undersigned counsel and pursuant to Rules 33 and 34 of the South Carolina Rules of Civil Procedure, and hereby serve their Responses to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Production of Documents as follows:

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REQUEST NO. 1:

Produce all documents that relate to any allegation in the Complaint.

RESPONSE TO REQUEST NO. 1:

Third-Party Defendants object to Request No. 1 on the grounds that it is overly broad, unduly burdensome, and not narrowly tailored as to time and subject matter, and to the extent that it requests information protected by the attorney-client privilege, the work product doctrine, or both.

Subject to Third-Party Defendants' objections, see all documents included in Exhibit A and all other Exhibits attached hereto.

Third-Party Defendants also respond to Request No. 1 by noting that Third-Party Defendants are in possession of seven boxes of materials retrieved from Mr. Lucas's office at Team 1A containing customer information, product information, industry information, etc. Upon Third-Party Plaintiffs' request, Third-Party Defendants will make these seven boxes available at a mutually agreed upon time and place so that Third-Party Plaintiffs can review the materials contained therein.

REQUEST NO. 2:

Produce all written or recorded statements that have been taken from any person concerning the allegations and claims in the Complaint that in any way concern Plaintiff and Defendants.

RESPONSE TO REQUEST NO. 2:

Third-Party Defendants object to Request No. 2 to the extent that it requests information protected by the attorney-client privilege, the work product doctrine, or both.

Subject to Third-Party Defendants' objections, Third-Party Defendants are aware of no documents responsive to this request at this time.

REQUEST NO. 3:

Produce all documents in your possession which refer directly or indirectly to the Defendants or this lawsuit.

RESPONSE TO REQUEST NO. 3:

Third-Party Plaintiffs withdrew Request No. 3 at the September 2, 2009 hearing in Lexington, South Carolina, before Judge R. Knox McMahon.

REQUEST NO. 4:

Produce all documents you sent to or received from any third-party which references directly or indirectly the Defendants of this lawsuit.

RESPONSE TO REQUEST NO. 4:

Third-Party Plaintiffs limited Request No. 4 at the September 2, 2009 hearing in Lexington, South Carolina, before Judge R. Knox McMahon by restricting the Request to seek only those responsive documents that Third-Party Defendants sent or received after Third-Party Plaintiffs resigned their employment with Team IA on February 3, 2009.

Subject to Third-Party Plaintiffs' limitation, see all documents included in Exhibit B attached hereto.

REQUEST NO. 5:

For each employee of Team IA that has left employment from Team IA for any reason over the past 10 years provide the former employee's:

- a. Name;
- b. Dates of employment;

- c. Reason employment ended;
- d. Last known mailing address; and
- e. Last known phone number.

RESPONSE TO REQUEST NO. 5:

Third-Party Plaintiffs limited Request No. 5 at the September 2, 2009 hearing in Lexington, South Carolina, before Judge R. Knox McMahon by restricting the Request to seek the requested information about only the former employees listed as potential witnesses in the responses to Interrogatories that Third-Party Plaintiffs provided to Third-Party Defendants.

Third-Party Defendants object to Request No. 5, as limited by Third-Party Plaintiffs, on the grounds that it is not narrowly tailored as to time and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to Third-Party Plaintiffs' limitation and Third-Party Defendants' objections, see all documents contained in Exhibit C attached hereto.

REQUEST NO. 6:

For all Team IA customers the Plaintiff contends are covered by any alleged non-solicitation agreement between the parties state:

- a. The customer's name;
- b. The product or service Team IA provided to the customer;
- c. The dates for which those products or services were provided; and
- d. The amount of money paid to Team IA for each product or service.

RESPONSE TO REQUEST NO. 6:

In response to subpart a. of Request No. 6, see all documents contained in Exhibit D attached hereto. Please note that this response is limited to the general inquiry and addresses such inquiry only. Nothing in this response should be construed as addressing the entire realm of protected interests under Mr. Lucas's Employment Agreement.

Third-Party Defendants object to subparts b., c., and d. of Request No. 6 on the grounds that they are not narrowly tailored as to time and seek information that is not relevant in the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 7:

Produce all documentation that supports your responses in the preceding paragraph.

RESPONSE TO REQUEST NO. 7:

See response to Request No. 6.

REQUEST NO. 8:

For all Team IA services that the Plaintiff contends are covered by any alleged covenant not to compete agreement between the parties state:

- a. What is the covered service; and
- b. Each customer Team IA has provided that service in the past 10 years.

RESPONSE TO REQUEST NO. 8:

In response to subpart a. of Request No. 8, see all documents contained in Exhibit E attached hereto.

Third-Party Defendants object to subpart b. of Request No. 8 on the grounds that it is not narrowly tailored as to time and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 9:

For all states Team IA contends are covered by the non compete agreement between the parties state:

- a. What is the state;
- b. Who is the customer;
- c. What is the service provided by Team IA; and
- d. The dates the customer was a customer if no longer a customer.

RESPONSE TO REQUEST NO. 9:

In response to subpart a. of Request No. 9, Third-Party Defendants respond by reiterating the language contained in the Employment Agreement that Mr. Lucas negotiated and entered into voluntarily: "[T]he 'RESTRICTED TERRITORY' shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama."

Third-Party Defendants object to subparts b., c., and d. of Request No. 9 on the grounds that they are not narrowly tailored as to time and seek information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 10:

Produce all documentation that supports your responses in the preceding 2 paragraphs.

RESPONSE TO REQUEST NO. 10:

See all documents contained in Exhibit P attached hereto.

REQUEST NO. 11:

Produce all federal and state tax returns filed by Team IA for the years 2002-2008.

RESPONSE TO REQUEST NO. 11:

Third-Party Defendants object to Request No. 11 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

In the event that Third-Party Plaintiffs are able to establish a reasonable likelihood that Third-Party Defendants will be liable for punitive damages, Third-Party Defendants will provide appropriate financial information as ordered by the Court.

REQUEST NO. 12:

Produce all federal and state tax returns filed by Brent Yarborough for the years 2002-2008.

RESPONSE TO REQUEST NO. 12:

Third-Party Defendants object to Request No. 12 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

In the event that Third-Party Plaintiffs are able to establish a reasonable likelihood that Third-Party Defendants will be liable for punitive damages, Third-Party Defendants will provide appropriate financial information as ordered by the Court.

REQUEST NO. 13:

Produce all federal and state tax returns filed by Lori Yarborough for the years 2002–2008.

RESPONSE TO REQUEST NO. 13:

Third-Party Defendants object to Request No. 13 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

In the event that Third-Party Plaintiffs are able to establish a reasonable likelihood that Third-Party Defendants will be liable for punitive damages, Third-Party Defendants will provide appropriate financial information as ordered by the Court.

REQUEST NO. 14:

Produce Internal financial statements for years 2002–2008.

RESPONSE TO REQUEST NO. 14:

Request No. 14 is subject to Third-Party Defendants' Motion to Stay Discovery Pending Ruling on Team IA's Motion to Dismiss ("Motion to Stay").

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 14 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

In the event that Third-Party Plaintiffs are able to establish a reasonable likelihood that Third-Party Defendants will be liable for punitive damages, Third-Party Defendants will provide appropriate financial information as ordered by the Court.

REQUEST NO. 15:

Identify all youth sports teams sponsored by Team IA for the years 2002–2008.

RESPONSE TO REQUEST NO. 15:

Request No. 15 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 15 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 16:

For the years 2002–2009, identify all commercial fishing trips taken by Yarborough including:

- a. Date of the trip;
- b. Include all people paid for by Team IA on the trip to include airfare, meals, whether or not they actually went fishing or not;
- c. All other persons who also were on the boat;
- d. Who paid for each individual on the boat; and
- e. How these payments were charged in accounting.

RESPONSE TO REQUEST NO. 16:

Request No. 16 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 16 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 17:

For the years 2002–2009, identify every stay at The Lodge at Sea Island in St. Simons Island, Georgia which was paid for by either Yarborough or Team IA including:

- a. In whose name the reservation was made;
- b. Who stayed at the resort for that trip; and
- c. How amounts charged in accounting.

RESPONSE TO REQUEST NO. 17:

Request No. 17 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 17 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 18:

For the years 2002–2009, identify every stay at The Grove Park Inn in Asheville, North Carolina which was paid for by either Yarborough or Team IA including:

- a. In whose name the reservation was made;
- b. Who stayed at the resort for that trip; and
- c. Include all meal receipts.

RESPONSE TO REQUEST NO. 18:

Request No. 18 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 18 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 19:

For the years 2002-2009, identify all tickets to sporting events purchased by either Yarbrough or Team IA, or purchased at Lancaster SC football fundraiser "Friday Night Football" and state whether those tickets were ever used by a person employed or ever employed by the State of South Carolina. Including but not limited to Professional Football, College Football and College Basketball, College Baseball. Examples of events include but are not limited to Super Bowls, and College World Series events. Provide the name and employment position, including state agency of every state employee identified in response to this request; and how those amounts were charged in accounting.

RESPONSE TO REQUEST NO. 19:

Request No. 19 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 19 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 20:

Please provide documentation relating to any and all Gamecock Football tailgate both home and away, to include hotels expenses for all persons in party paid for by Team IA.

RESPONSE TO REQUEST NO. 20:

Request No. 20 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 20 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and

subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 21:

For the years 2002–2009 state whether or not Team IA has paid royalties and/or licensing fees to the following:

- a. Microsoft;
- b. Kodak; and
- c. LeadTools

RESPONSE TO REQUEST NO. 21:

Request No. 21 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 21 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 22:

If the answer to the previous question is that Team IA has paid such royalties, provide all documentation that supports that contention.

RESPONSE TO REQUEST NO. 22:

Request No. 22 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 22 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 23:

Provide all documentation related to the purchase, use, rental, and/or change of ownership of the Prevost motor coach purchased by Team IA. Including but not limited to all drivers expense reports, drivers last known address and phone number, mileage logs, Carolina Executive Motorcoach Credit card statements, Loan documents and payment schedule, Insurance premiums, etc., and how charged in accounting.

RESPONSE TO REQUEST NO. 23:

Request No. 23 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 23 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 24:

Provide all documentation for expenses paid by Team IA for Yarrowborough trips to Italy (multiple), South Africa, Park City Utah (multiple), South America, Montana, Canada (Goose hunting).

RESPONSE TO REQUEST NO. 24:

Request No. 24 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 24 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 25:

Provide all documentation related to the purchase, use, rental, and/or change of ownership of any Chevy 3500 truck purchased by Team IA.

RESPONSE TO REQUEST NO. 25:

Request No. 25 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 25 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 26:

Provide all documentation related to the purchase, use, rental, and/or change of ownership of any Chevy Z71 Avalanche purchased by Team IA.

RESPONSE TO REQUEST NO. 26:

Request No. 26 is subject to Third-Party Defendants' Motion to Stay.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 26 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 27:

Produce all letters of offers of employment with Team IA made in the past 8 years.

RESPONSE TO REQUEST NO. 27:

Third-Party Defendants object to Request No. 27 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to Third-Party Defendants' objection, see all documents contained in Exhibit G attached hereto.

REQUEST NO. 28:

Produce all correspondence with the McNair law firm regarding the employee stock option plan for Team IA.

RESPONSE TO REQUEST NO. 28:

Third-Party Defendants object to Request No. 28 on the grounds that it clearly requests information protected by the attorney-client privilege and the work product doctrine.

REQUEST NO. 29:

For the past 5 years, produce all monthly statements for American Express and Founders Federal Credit Union and all other credit cards held by Brent Yarborough or Team IA.

RESPONSE TO REQUEST NO. 29:

Request No. 29 is subject to Third-Party Defendants' Motion to Stay Discovery Pending Ruling on Team IA's Motion to Dismiss.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 29 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 30:

Produce all accounting ledgers for Team IA for the past 8 years.

RESPONSE TO REQUEST NO. 30:

Request No. 30 is subject to Third-Party Defendants' Motion to Stay Discovery Pending Ruling on Team IA's Motion to Dismiss.

Notwithstanding the Motion to Stay, Third-Party Defendants object to Request No. 30 on the grounds that it seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 31:

Set forth the amounts of all bonus payments made to all employees from 2005 to the present.

RESPONSE TO REQUEST NO. 31:

Third-Party Defendants object to Request No. 23 on the grounds that it is overly broad, unduly burdensome, not narrowly tailored as to time and subject matter, and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to Third Party Defendants' objection, see all documents included in Exhibit H attached hereto, which contain information related to the bonus payments Team IA made to Third-Party Plaintiffs.

REQUEST NO. 32:

Produce all documents/memos/e-mails since 2000 to the present on any stock option considerations by Team IA, Mr. or Mrs. Yarbrough.

RESPONSE TO REQUEST NO. 32:

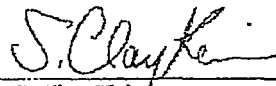
Third-Party Defendants object to Request No. 32 on the grounds that it is unduly burdensome and seeks information that is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence, and to the extent that it requests information protected by the attorney-client privilege and the work product doctrine.

Subject to Third Party Defendants' objection, see all documents included in Exhibit I
attached hereto.

Dated this the 17th day of September, 2009.

Respectfully submitted,

FORD & HARRISON LLP

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third-Party Defendants' Responses to Third-party Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Third-Party Defendants has been served upon Third-Party Plaintiffs by placing a copy of same by Federal Express properly addressed to:

Terry E. Richardson, Jr., Esquire
Daniel S. Haliwanger, Esquire
Richardson, Patrick, Westbrook & Brickman, LLC
Post Office Box 1368
Barnwell, South Carolina 29812

Dated this the 17th day of September, 2009.

FORD & HARRISON LLP

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COPY

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

TEAM IA, INC.,

Plaintiff,

v.

C.A. No. 2009-CP-32-01078

CICERO LUCAS, GEORGE
LAWSON, IV, AND 5 POINT
SOLUTIONS, LLC,

Defendants;

CICERO LUCAS, GEORGE
LAWSON, IV,

Third-Party
Plaintiffs,

v.

BRENT YARBOROUGH
TEAM IA,

Third-Party
Defendants.

BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

2010 JAN -6 P 12:04

FILED

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO
ALTER OR AMEND ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

COMES NOW Plaintiff, Team IA, Inc. ("Team IA"), by and through its undersigned counsel, and files this Reply Memorandum in Support of Plaintiff's Motion to Alter or Amend Order Granting Partial Summary Judgment.

Record on Appeal 413

APP0415

A. Conflicting evidence in the record precludes the entry of summary judgment.

When considering the evidence set forth in the Affidavit of Brent Yarborough, the Affidavit of Defendant Lucas, and the Supplemental Affidavit of Mr. Yarborough,¹ together with the conclusions that can be reasonably drawn from that evidence—especially when viewing such evidence and conclusions in a light most favorably to Team IA—the presence of a dispute as to genuine issues of material fact is unquestionable. The Order's entry of partial summary judgment in the face of such conflicting evidence was improper. See, e.g., *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991) ("Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976))); *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 294, 417 S.E.2d 631, (Ct. App. 1992) ("[S]ummary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful" (citing *Rothrock*, 305 S.C. 402, 409 S.E.2d 366)); see also *Brooks v. Motsenbocker Advanced Devs., Inc.*, 242 Fed. App'x 889, 890 (4th Cir. 2007) ("Summary disposition should not be made based on conflicting affidavits. . . . [S]ummary judgment is inappropriate when affidavits present conflicting facts requiring credibility determinations.").

¹ Defendant Lucas uses his Memorandum in Opposition to Alter or Amend Order Granting Partial Summary Judgment as an opportunity to re-argue his Motion to Strike After Hearing Affidavit. Rather than re-stating his own argument on this subject in its entirety, Team IA refers the Court's attention to Team IA's Memorandum in Opposition to Defendant Lucas's Motion to Strike, which can be summarized as follows: (1) Rule 56(e), SCRCP, provides the Court with discretion in deciding whether to allow a party to supplement an affidavit in opposition to a motion for summary judgment with a further affidavit; (2) the Supplemental Affidavit of Mr. Yarborough did not present new facts not already before the Court but merely clarified the original Affidavit of Mr. Yarborough, rendering the Supplemental Affidavit permissible for consideration under Rule 56(e), SCRCP; (3) Defendant Lucas failed to comply with the plain language of Rule 6(d), SCRCP, by submitting his affidavit in support of his Motion for Partial Summary Judgment almost three full weeks after serving his Motion for Partial Summary Judgment, as Rule 6(d) requires parties to contemporaneously serve a motion and an affidavit in support thereof; and (4) the Court must not allow Defendant Lucas to seek strict enforcement of one rule while, at the same time, shirking the requirements of a similar rule.

Defendant Lucas attempts to overcome this conflicting evidence by noting that "[i]nterpretation of an unambiguous agreement is for the court." *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (S.C. 1996) (citing *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983)). Team IA does not dispute this clear principle regarding the standard of review. However, Defendant Lucas disregards the fact that, beyond merely interpreting the unambiguous Employment Agreement between Team IA and Defendant Lucas, the Court was primarily required in its consideration of Defendant Lucas's Motion for Partial Summary Judgment to determine whether the provisions in question were reasonable in light of the surrounding facts and circumstances. Such a determination required the Court to consider the Affidavit and Supplemental Affidavit of Mr. Yarborough together with the Affidavit of Defendant Lucas and discern whether there existed conflicting evidence as to the issues that would make the provisions in question reasonable or unreasonable. Such issues include, among other things, the scope of Defendant Lucas's activities while employed at Team IA and the scope of Team IA's business activities as a whole. The statements and supporting attachments set forth in the Affidavit and Supplemental Affidavit of Mr. Yarborough with respect to these issues are in direct conflict with the statements set forth in Defendant Lucas's Affidavit with respect to these issues. In the face of such conflicting evidence, "Summary judgment [was] not appropriate [because] further inquiry into the facts [was] desirable to clarify the application of the law." *Rothrock*, 305 S.C. at 405, 409 S.E.2d at 368 (citing *Abrams v. Wright*, 262 S.C. 141, 202 S.E.2d 859 (1974)). The Order must be altered or amended accordingly by denying Defendant Lucas's Motion for Partial Summary Judgment.

B. Defendant Lucas's activities at Team IA warrant the protection included in the Non-Competition provision at issue.

Throughout his arguments in support of his Motion for Partial Summary Judgment, Defendant Lucas has continually made arguments regarding the location of customers that he served while employed by Team IA. However, the customers that Defendant Lucas served during his tenure with Team IA is in no way the turning point with respect to whether the geographic restriction at issue is reasonable. Such an analysis in actuality turns on whether Team IA assigned Defendant Lucas to engage in business activities within the area included in the geographic restriction. *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143.

As Defendant Lucas correctly identifies, "the territorial restraint in a covenant not to compete will, generally speaking, be considered reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (S.C. 1961) (citation omitted). The South Carolina Supreme Court has more recently clarified this principle, holding that the "area limitation of [an] agreement falls within the guidelines of the *Standard Register* case [where the former employee] is restricted only in the area in which [the former employee] worked or to which he was assigned at any time during his employment." *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 (internal quotation marks omitted).

The Affidavit and Supplemental Affidavit of Mr. Yarborough make clear that Team IA assigned Defendant Lucas to engage in sales activities on behalf of Team IA within a nationwide territory (or, at the very least, throughout the four states listed in the alternative geographic restriction—South Carolina, North Carolina, Georgia, and Alabama). The Affidavit of Defendant Lucas does not dispute this fact; it merely contends that Defendant Lucas only

"performed work" for customers in Georgia and Pennsylvania. (Def. Lucas's Aff. at ¶¶ 3-4.) Defendant Lucas's Affidavit contains no allegation that he did not participate in the solicitation of customers on a nationwide basis or throughout the alternative geographic restriction. Thus, when viewed in a light most favorable to Team IA, the evidence in the record and the conclusions that can be reasonably drawn therefrom preclude a finding at this stage of the case that the Non-Competition provision at issue is unenforceable as a matter of law. The Order must therefore be altered or amended by denying Defendant Lucas's Motion for Partial Summary Judgment.

C. The validity of the entire Employment Agreement must be analyzed under South Carolina law.

Defendant Lucas takes great pain in his continued attempts to argue for the application of Georgia law to the determination of whether the Non-Solicitation provision at issue is enforceable. However, Defendant Lucas continues to misconstrue important points of law in the process. First, Defendant Lucas continues to disregard the clear rule of law that "South Carolina courts apply the substantive law of the place where the contract at issue was formed . . . where a contract's formation, interpretation or validity is at issue." *Witt v. Am. Trucking Ass'ns, Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994) (emphasis added) (citing *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241, 243 (1983)). Instead, Defendant Lucas continues to conveniently truncate the same by eliminating the reference to issues of contractual validity and referencing only "disputes involving a contractual formation and interpretation." (Memo. Opp'n Mot. Alter or Amend Order Granting Partial Summ. J. at 11.) As the issue involved in Defendant Lucas's Motion for Partial Summary Judgment is clearly one of contractual validity, the Court is required to "apply the substantive law of the place where the contract at issue was formed"—here, South Carolina. *Witt*, 860 F. Supp. at 300 (citing *O'Briant*, 279 S.C. 254, 305 S.E.2d at 243).

Additionally, Defendant Lucas misconstrues the holding of *Standard Register* as supporting his argument for the application of Georgia law. (See Memo. Opp'n Mot. Alter or Amend Order Granting Partial Summ. J. at 12.) To the contrary, the portion of *Standard Register* to which Defendant Lucas cites stands for the proposition that there exists "no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void." *Standard Register*, 238 S.C. at 70, 119 S.E.2d at 542 (quoting *Wiggins v. Postal Telegraph Co.*, 130 S.C. 292, 125 S.E. 568, 569 (1924)). Team IA does not seek for the Court to recognize the validity of a contract that is against the public policy of South Carolina. Conversely, Team IA seeks for the Court to enforce an Employment Agreement that was entered into in South Carolina, that contains a South Carolina choice-of-law provision, and that complies with existing precedent regarding such agreements and the public policy of this state. Thus, *Standard Register* supports the conclusion that South Carolina law must be applied to the Court's analysis of whether the Non-Solicitation provision at issue is valid.

Moreover, the implications of Defendant Lucas's argument that "Georgia law govern[s] the performance of the contract in Georgia with respect to Georgia entities," (Memo. Opp'n Mot. Alter or Amend Order Granting Partial Summ. J. at 11), demonstrates the illogical nature of the same. Under Defendant Lucas's argument, a court in South Carolina would be forced to analyze a restrictive covenant such as that set forth in the Non-Solicitation provision at issue under the law of each state in which the covenant seeks to protect a customer of the former employer. In the event of a former employer with demonstrable, protectable customer interests across the world, a court in South Carolina would be forced to consider the enforceability of a restrictive covenant such as the Non-Solicitation provision at issue under the laws of countless nations. The

law of South Carolina with respect to restrictive covenants contains no such requirement, as any such requirement would be utterly nonsensical. Accordingly, the Court was required to apply South Carolina law to its determination of whether the Non-Solicitation provision at issue complies with public policy. The application of South Carolina law, in turn, requires the denial of Defendant Lucas's Motion for Partial Summary Judgment, as numerous South Carolina courts have upheld and enforced restrictive covenants nearly identical to that set forth in the Non-Solicitation provision at issue.² See, e.g., *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535 (enforcing an agreement that precluded the former employee from "selling to the accounts or in the territory in which he ha[d] been performing his duties as [a] sales representative" (emphasis added)); *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 105, 420 S.E.2d 217, 220 (Ct. App. 1992) (upholding a restriction that precluded the former employee from "[s]olicit[ing] or accept[ing] sales of competing services in any account in which" the employer had already established payroll deduction procedures (emphasis added)); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 690 (D.S.C. 2003) (enforcing an agreement that prohibited the former employee from "soliciting or accepting business from any of [the employer's] dealers, vendors, clients, or customers whose identity was obtained through use of [the employer's] confidential information" (emphasis added)). Accordingly, the Order must be altered or amended by denying Defendant Lucas's Motion for Partial Summary Judgment.

² Even assuming that Defendant Lucas is correct in his contention that no South Carolina court has directly addressed the issue of whether a restrictive covenant that prevents the former employee from accepting unsolicited business from former clients of the employer violates the public policy of South Carolina, (Memo. Opp'n Mot. Alter or Amend Order Granting Partial Summ. J. at 13), this point further supports the conclusion the summary judgment is not proper on this issue, as summary adjudication is never proper with respect to novel issues. (Order, Sept. 4, 2009, at 3 ("South Carolina courts have long recognized that a novel issue such as this one is best decided in light of the testimony to be adduced at trial." (citing *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980))).)

CONCLUSION

Based on the foregoing facts and authorities, together with those set forth in Team IA's Memorandum in Support of Plaintiff's Motion to Alter or Amend Order Granting Partial Summary Judgment and Team IA's Memorandum in Opposition to Defendant Lucas's Motion for Partial Summary Judgment, the Order must be altered or amended by denying Defendant Lucas's Motion for Partial Summary Judgment and allowing Team IA's claims at issue in the same proceed at this stage of the litigation.

Dated this the 5th day of January, 2009.

Respectfully submitted,

FORD & HARRISON LLP

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1 (The following proceedings are reported on
2 September 21, 2009).

3 THE COURT: This is 09-CP-32-1078, Team I.A.
4 versus Lucas. Mr. Keim, Mr. Haltiwanger.

5 Mr. Haltiwanger, this is your motion for
6 partial summary judgment?

7 MR. HALTIWANGER: Yes, it is, Your Honor. I
8 know you are familiar with the parties. We have been in
9 front of you a few times before, so I won't bother with
10 formal introductions.

11 But this case involves a number of causes of
12 action that have been asserted against my client,
13 Mr. Cicero Lucas, who is here today next to me on my
14 right. What we are in front of you today is solely on a
15 portion of the breach of contract claims.

16 Part of the breach of contract allegations
17 against Mr. Lucas involve a non-compete,
18 non-solicitation provision of an employment agreement.
19 I don't know if it was clear from my original motion or
20 not, but we are not seeking to strike the entire first
21 cause of action for breach of contract, only the
22 portions of those that are based upon the non-compete,
23 non-solicitation portion of the provision.

24 Your Honor, we filed a memo in this case this
25 morning. If I may approach, I have a copy for Your

1 Honor.

2 THE COURT: Yes, sir.

3 (Hands to Court).

4 MR. HALTIWANGER: As I was saying, there are
5 some breach of contract claims that would survive, but
6 what we are focused on today are the non-compete
7 provisions, which as Your Honor may know and I believe
8 does know, these are restraints on trade that are
9 greatly disfavored by our Courts.

10 Under English common law, they are actually
11 void as a matter of public policy. That's because they
12 prevent a person from earning a living and also prohibit
13 the public from hiring who it wants to hire.

14 As a result of that disfavor, our Courts have
15 put five high hurdles in front of these agreements that
16 they must meet in order to be valid. They must be
17 necessary for the protection of the legitimate interests
18 of the employer.

19 Second, they must be reasonably limited in
20 operation with respect to time and place. Third, they
21 must not be unduly harsh and oppressive in curtailing
22 the legitimate efforts of the employee to earn a living.
23 And, fourth, reasonable from the standpoint of sound
24 public policy. Fifth, they must be supported by
25 valuable consideration.

1 Even though we believe it fails multiple
2 hurdles and that is addressed in our brief, what I would
3 like to focus on first today is the geography. The
4 geographical restrictions as set forth in the covenant
5 not to compete provide for a nationwide ban. It is
6 defined as the restricted territory in this agreement is
7 one that applies to the continental United States.

8 THE COURT: Where is that in the agreement?

9 MR. HALTIWANGER: That would be, if you look
10 in the contract -- it's attached as Exhibit 1 to the
11 agreement. It is on, I believe -- let me see which
12 page. I believe it's about the sixth or seventh page
13 into there, Subsection 5.

14 THE COURT: All right.

15 MR. HALTIWANGER: Yes, it is the sixth page
16 there. As you can see, it sets forth a non-solicitation
17 and then a covenant not to compete portion. Look at the
18 very, very bottom of that page, being the definition of
19 restricted territory.

20 If you follow forth onto the next page, it
21 gives the restricted territory shall consist of the
22 entire continental United States. Then it goes on, in
23 the alternative, and I will address that later in my
24 argument.

25 I wanted to begin by focusing on the

1 nationwide band that Team I.A. attempts to assert
2 against Mr. Lucas. Our case law, specifically the
3 Standard Register case, says that when you are looking
4 at the test of whether it's reasonable in geography as
5 far as the impact on the employee, you look to see if
6 it's necessary that the employee change his calling or
7 residence.

8 Obviously if you were to uphold a nationwide
9 ban on Mr. Lucas, he would either have to change his
10 calling or the residence of even his country. I believe
11 that is -- even though there is not in our State a per
12 se rule against nationwide bans on covenants not to
13 compete, I think that this case, as you will hear later,
14 it would be completely inappropriate to do so in this
15 case because Team I.A. does not have customers
16 nationwide.

17 There are many states that Team I.A. has no
18 presence in and certainly no customers in, which is the
19 heart of the concern of a covenant not to compete.
20 Related to that very closely is the protection of a
21 legitimate business interest of the employer.

22 When you look at the geography restrictions
23 with regard to the legitimate business interests of the
24 employer as set forth in the Dudley case by our Supreme
25 Court, the restriction must be limited to the geographic

1 area in which the employee actually worked and had
2 contact with the employer's customers.

3 That goes back to: What is the legitimate
4 business interest of the employer? It's about
5 customers. It's about having an unfair advantage of
6 having worked at the employer.

7 Now, you will see that we have attached an
8 affidavit from Mr. Lucas as Exhibit 2 to this
9 memorandum. During his time at Team I.A., and this is
10 under paragraph 3, he only performed work for customers
11 in the states of Georgia and Pennsylvania.

12 He may have attended trade shows, may have
13 done some work trying to solicit businesses in other
14 states, but it's clear that I believe the only evidence
15 in the record before Your Honor, based on the affidavit
16 we received Friday from the opposition, would be that
17 the only companies Mr. Lucas ever serviced were in
18 Georgia and one formerly in Pennsylvania.

19 So we believe that the geographic restriction
20 of a nationwide ban is too broad because Mr. Lucas
21 never did any other work in the other 46 contiguous
22 states which Team I.A. seems to ban him from working in.

23 Moving on to the non-solicitation portion of
24 that and if you look back in the contract, you see it is
25 two sections, a non-compete and a non-solicitation

1 portion.

2 Our challenge here is that, first of all, as
3 we go through in our memo, Mr. Lucas really only had
4 customers in Georgia for Team I.A. The contract itself
5 has a provision that South Carolina law should apply to
6 the contract.

7 However, I believe under South Carolina law
8 that you can look to the place of performance of the
9 contract, and that law will also govern. In this case I
10 don't believe there is a difference between South
11 Carolina and Georgia.

12 I don't believe that South Carolina has spoken
13 to it as clearly as the Georgia courts have. Clearly in
14 this case if a non-solicitation provision is to be
15 applied, it would be applied against a Georgia entity,
16 specifically a Georgia governmental entity in Georgia.

17 So we do believe that the precedent which we
18 have included in our memo should be persuasive. Again,
19 I don't think it's any different under South Carolina
20 law, but I do believe with the facts of this case and
21 with the precedent that is out there, Georgia law
22 definitely provides guidance.

23 Under Georgia law with regard to
24 non-solicitation agreements, you will see in the
25 agreement that Mr. Lucas is prohibited under it from not

1 only soliciting or attempting to solicit business but
2 also selling to.

3 There is a prohibition under the agreement if
4 Mr. Lucas never made any contact with anybody in
5 Georgia, was doing his own business and a former
6 customer of Team I.A. who found out that Mr. Lucas was
7 no longer in the employ of Team I.A. but wanted to have
8 Mr. Lucas do their work, seeks out Mr. Lucas and
9 contacts him and attempted to hire him, under this
10 agreement that would be prohibited.

11 Under Georgia law it is clear that is a
12 violation per se. You cannot contract away somebody's
13 ability to accept unsolicited business. We believe that
14 in this case attempting to prohibit Mr. Lucas from
15 receiving former customers of Team I.A. who find him,
16 seek him out, and attempt to hire him to perform work
17 for them, overstretches the legitimate business
18 interests of the employer.

19 We would contend that there would have to be
20 some sort of affirmative action taken by Mr. Lucas that
21 would be applicable to any sort of non-solicitation
22 agreement.

23 As Your Honor is familiar with under the law
24 of non-competes, if any portion of a non-compete is
25 invalid, the entire non-compete agreement is invalid.

1 We would believe that would strike the entire
2 non-solicitation portion of the agreement.

3 And, finally, I do want to address the fact
4 that there is a severability clause in this contract.
5 That is an issue which we address as well in our
6 memorandum, but I would like to point out, Your Honor,
7 earlier you asked where the restricted territory was.
8 We said it was nationwide.

9 Following that, I believe in obvious
10 recognition that a nationwide ban would be per se
11 basically unreasonable, especially to a company as small
12 as Team I.A., it has a fallback.

13 It says in the alternative and only if such
14 territory -- the nationwide band -- is deemed by a Court
15 or other proceeding to be unreasonable or otherwise
16 invalid or enforceable, then such territory shall be
17 defined as the states of South Carolina, North Carolina,
18 Georgia, and Alabama.

19 So, Your Honor, if we were to go ahead and
20 just grant that that portion of the agreement, the
21 nationwide ban, was stricken from the agreement and we
22 had a fallback of those four states, the same analysis
23 applies.

24 The facts of the matter are that Mr. Lucas
25 never had any customers, never serviced any companies in

1 South Carolina, North Carolina or Alabama. So three out
2 of the four states of the fallback position, Mr. Lucas
3 never serviced any customers.

4 Just a nationwide band, it would be
5 unreasonable because he didn't have customers in all 48
6 contiguous states. The fallback provision provided by
7 the contract is also unreasonable because he never had
8 customers in three of those four states.

9 Again, looking at the impact on Mr. Lucas,
10 enforcing those four states would clearly force him and
11 his family to either relocate or change the calling of
12 his profession.

13 If the other side decides or attempts to argue
14 that, Well, on those four states, you can then apply the
15 severability clause again and sever South Carolina and
16 North Carolina and Alabama states out of that and
17 enforce the provision only against Georgia, I would seek
18 to quote Your Honor to Your Honor.

19 As we have attached as Exhibit 3 is your order
20 in the case of Ascension Hospice versus Allison Sikes.
21 In that case there wasn't specifically a severability
22 order, but in addressing it, the Court stated: The
23 Court cannot redefine the geographic limitations of the
24 agreement even if the agreement provided for
25 severability.

1 That's what the situation is we have here.
2 The law as it is set up under our precedent is not such
3 that you can use a severability clause to strike
4 everything down and carve it down to where, okay, he is
5 not nationwide, he is not in three of the four fallback
6 states, but he is in Georgia, so we are going to sever
7 it down to Georgia.

8 We believe that the overbroad nationwide band
9 is followed up by the only thing that Your Honor would
10 be able to sever it to under our precedent would be the
11 four states listed in the agreement.

12 Mr. Lucas had no clients in three of those
13 four states. So therefore the agreement is overly broad
14 with respect to geography, and it overprotects any
15 interests of Team I.A. because obviously Mr. Lucas
16 cannot unfairly compete in three states that he never
17 had customers in. Thank you.

18 THE COURT: Thank you, Mr. Haltiwanger.
19 Mr. Keim.

20 MR. KEIM: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. KEIM: We have been together enough that
23 the introductions are unnecessary. As Mr. Haltiwanger
24 stated, we are here prior to any depositions being
25 taken, very limited discovery being engaged in. We are

1 here on a partial summary judgment motion.

2 As you know, Your Honor, it's a high burden on
3 the Defendants in this instance where all we have to
4 establish is a mere scintilla of evidence in order to
5 withstand the motion for summary judgment.

6 I will focus my attention simply on the two
7 provisions that Mr. Haltiwanger focused on. First,
8 nationwide. Your Honor, at the time of contracting with
9 Mr. Lucas, Team I.A. sat down and negotiated back and
10 forth with Mr. Lucas on what his arrangement would be.

11 Over the course of that arrangement, Mr. Lucas
12 was paid \$1 million. And at the time of contracting, as
13 it is today, Team I.A.'s business was very much
14 nationwide.

15 Mr. Lucas represented Team I.A. on a
16 nationwide basis. And how so? He attended trade shows.
17 His call reports are full of contacts from different
18 states. Mr. Lucas has expense reports covering many
19 different states, and, Your Honor, we are talking about
20 a 12-month restriction.

21 We are not talking about 24 months. We are
22 not talking about 36 months. It didn't matter whether
23 the individual was in Oregon, didn't matter whether the
24 individual was in Washington State, we have the same
25 systems and ability to design and implement software

1 solutions in Pennsylvania just as we would, for example,
2 in Arizona.

3 He accepted the money, he accepted the expense
4 report, he accepted the opportunity to go in and
5 establish relationships with these various clerks of
6 court and that type of thing. It was on a nationwide
7 basis.

8 Your Honor, we are learning new information
9 every day in terms of Mr. Lucas' contact on a nationwide
10 basis. We believe we are entitled to sit down with
11 Mr. Lucas in deposition and ask him about the extent of
12 these contacts on a nationwide basis.

13 Your Honor, there are cases cited in our
14 brief, and with your permission to approach, I will hand
15 up our brief.

16 THE COURT: Yes, sir.

17 (Hands to Court.)

18 MR. KEIM: It goes into detail on cases in
19 neighboring states where Courts have found that
20 nationwide restrictions under similar circumstances to
21 those as Mr. Lucas are appropriate. We cite that for
22 you, Your Honor, on page 18 of our brief.

23 We don't think that it's inappropriate, nor do
24 I think that South Carolina law will find it
25 inappropriate, for Mr. Lucas to be restricted as such.

1 He could go to Georgia, for example, Your Honor, or go
2 to Florida, for example, and be on the verge of selling
3 a system and then run out, if you believe what
4 Mr. Haltiwanger on Mr. Lucas' behalf just detailed.

5 We don't think that is right. Again, I stress
6 we are only talking about the 12-month limitation. When
7 Team I.A. entered into this deal, they understood full
8 well that non-competes are difficult to enforce.
9 Non-solicitation is not under the same scrutiny.

10 They were prepared to pay Mr. Lucas change of
11 control money and give him opportunities that he hadn't
12 otherwise had. We don't think it's proper for him to
13 run out after accepting the benefit of the bargain and
14 not be held to the same restrictions that he agreed to.

15 By example, in the Wolfe case, a 1992
16 appellate court case, it is a non-solicitation case, but
17 the Court there recognized the nationwide restriction.
18 Your Honor, we would ask that you would consider our
19 cases cited, and there are four or five cited there on a
20 nationwide basis at page 18 of the brief.

21 We also believe that Mr. Haltiwanger in his
22 discussion sets forth some great disputes of fact for
23 this case saying that Mr. Lucas would have to move out
24 of the country to engage in his chosen profession. That
25 is not true at all.

1 This non-compete was very much limited in a
2 defined term, competing services. Mr. Lucas can sit
3 right where he is today, wherever it may be, I think
4 Lexington County, and operate a business that does not
5 qualify and does not compete and provide competing
6 services.

7 Those definitions are very narrowly defined in
8 Section 5(b) which provides the definition of competing
9 services as a service, product or process of any person,
10 firm or corporation in existence which competes with the
11 service, product or process or upon which employee
12 worked -- very limited -- or which he sold -- very
13 limited -- or serviced during his employment and
14 concerning matters which he had confidential
15 information.

16 So to say that Mr. Lucas can't find employment
17 in this country is just not accurate. In fact, it
18 points out a great dispute of fact which that alone --
19 and it's a relevant fact -- that alone should result in
20 Mr. Lucas' motion being denied.

21 The allegation he never did work in 46
22 contiguous states, Your Honor, we believe that when we
23 were paying Mr. Lucas this \$1.1 plus million dollars
24 over the years and why we were paying his fees to be out
25 in Las Vegas and while he is contacting prospects with

1 our confidential information, Oh, by the way, he knew
2 nothing about this business when he showed up, we are
3 very much entitled to the limited 12-month restriction
4 in this instance.

5 Now, I will point out to the Court and I'm
6 sure you are aware that these cases are decided on a
7 case-by-case basis. Although South Carolina does look
8 at these covenants and they are strictly construed,
9 South Carolina also has strong public policy in
10 sophisticated business individuals who negotiate terms
11 of contracts, who are paid considerable sums, live up to
12 what they signed on to do and not run out under cover of
13 darkness and take at this point \$800,000 worth of
14 Team I.A.'s business.

15 Moving on -- and I will go ahead and hit these
16 together, Your Honor, as it relates to the fallback
17 provision. Your Honor, these cases that have come out
18 are so seldom in South Carolina at the appellate level
19 as it relates to the non-compute arena and caused
20 concern for Team I.A. when they drafted the agreement,
21 so the parties, Mr. Lucas and Team I.A., agreed to a
22 fallback provision.

23 This fallback provision is not blue pencil.
24 It's not severability. It a negotiated term of the deal
25 that Mr. Lucas and Mr. Yarborough sat down and

1 negotiated. It's not blue pencil. It doesn't even
2 remotely approach blue pencil.

3 It's the intent of the parties concerning a
4 severable component, an independent component, the
5 geographic restriction, South Carolina, North Carolina,
6 Georgia, and Alabama.

7 The extent of Mr. Lucas' activities in those
8 State, we don't have the record before us through
9 deposition, through additional discovery. That alone
10 creates a dispute of fact. I will address the
11 severability component after addressing the
12 non-solicitation component.

13 Your Honor, I want to stress the non-compete
14 addresses the geographic area and is an activity issue;
15 whereas, non-solicitation is a customer-based issue. We
16 are talking about Team I.A. customers as defined in the
17 agreement as a negotiated term between Mr. Lucas and
18 Mr. Yarborough.

19 Now, Mr. Haltiwanger offers up Georgia law.
20 Your Honor, I had brown hair when I started in the
21 non-compete area. I now see why my partners suggested I
22 get involved in it instead of them.

23 I will tell you that I am very familiar with
24 Georgia law. It is more difficult to get a non-compete
25 enforced in Georgia than it is in South Carolina, in

1 part because there are so many decisions at the
2 appellate court level. They have churned them out one
3 after another.

4 But it's important to note for our purposes
5 today that we don't have to look to Georgia for
6 persuasive authority. By the way, this agreement was
7 negotiated by a South Carolina resident, working for a
8 South Carolina company, who performed the most extensive
9 part of his day-to-day operations in his office in South
10 Carolina.

11 So we may have stumbled on another important
12 dispute of fact as to what law applies and what facts
13 are around that law to determine which law. It's our
14 position that South Carolina law applies. Your Honor,
15 we are not in Georgia. Georgia law doesn't apply.

16 It talks about accepting business. That may
17 not be okay in Georgia to say, but in South Carolina
18 fortunately for us our appellate courts have spoken to
19 this. In 1992 the Wolfe case, Wolfe versus
20 Colonial Life, here is the provision that was upheld:
21 Solicit or accept sales of competing products.

22 So we know what South Carolina law says about
23 that. Then continuing even our Supreme Court spoke to
24 this issue in 1961 in Standard Register, a very popular
25 case.

1 Our Supreme Court has already spoken on this,
2 whether you can say accept or sell to. A provision
3 upheld in that instance: In selling to the accounts or
4 in the territory in which he has been performing his
5 duties as a sales rep.

6 So our Supreme Court has spoken to this issue
7 of whether it's okay to say accept in South Carolina.
8 And by persuasive authority, more so than Georgia, I
9 looked to see what the District Court had to say on this
10 issue.

11 The South Carolina District Court in Rockford
12 versus Bennett, a 2003 decision, upheld soliciting or
13 accepting business from any plaintiff -- from any of
14 Rockford Manufacturing's customers.

15 So there are three excellent cases there in
16 our friendly confines of South Carolina, two by way of
17 precedent and one by way of persuasion, that says what
18 we have as the non-solicitation at 5(a), particularly
19 5(a)(1), is enforceable.

20 Then the last issue that Mr. Haltiwanger on
21 Mr. Lucas' behalf addressed was the severability
22 provision. The severability provision once again
23 reflects concern over the many years and many different
24 decisions that came out of various appellate courts in
25 this State.

1 Because these cases are decided on a
2 case-by-case basis which provides very differing
3 messages to the attorneys who draft these covenants. In
4 Rockford v. Bennett, by way of persuasion, the South
5 Carolina Court of Appeals did go in where a defined
6 term, for example in that instance affiliates was in the
7 agreement, and struck affiliates one by one.

8 Your Honor, I'm not suggesting that you go in
9 and strike anything, especially at this early stage of
10 the proceeding at a partial motion for summary judgment,
11 but, Your Honor, there is persuasive authority in this
12 State to allow you to do that.

13 In fact, we are not asking you to do anything
14 that the parties didn't negotiate. What happens so
15 often is it's silent as to severability. The problems
16 that South Carolina Courts have had is by adding a term,
17 adding a geographic restriction, where the covenant says
18 a hundred miles, the Court doesn't want go in in South
19 Carolina and say, Well, it's 50 miles.

20 There is no basis. There is no underlying
21 intent expressed how to handle that for the State of
22 South Carolina. There is no underlying intent of the
23 parties how to narrow that down. But the parties in
24 this instance provided specific language as to their
25 intent.

1 With that said, Your Honor, I think there are
2 sufficient disputes of fact on relevant issues and in
3 fact disputes of fact as it relates to the actual law in
4 this case that provides us sufficient grounds to survive
5 this motion for summary judgment.

6 As a final point, I want to bring the Court's
7 attention, from the beginning Mr. Lucas has talked
8 about, Well, I didn't solicit. I just contacted. I
9 didn't solicit. I just contacted.

10 We have seen that on several occasions. In
11 fact, he says he contacted -- and this came up in our
12 last hearing -- he contacted our customers which he
13 regularly calls his customers. That's okay for the
14 purposes of argument. We will just disagree on that.

15 Mr. Lucas' position is that Brett Yarborough
16 told him to go out and call Team I.A.'s customers and
17 let them know he wasn't there anymore. Mr. Yarborough
18 maintains that he didn't, clearly a dispute of fact.

19 Oh, by the way and by way of persuasive
20 authority at page 29 of our brief, we go into great
21 detail about how contact has been equated to
22 solicitations in recent cases.

23 Your Honor, we believe that you will find
24 those cases instructive as it relates to Mr. Lucas,
25 allegedly at Mr. Yarborough's direction, contacting Team

1 I.A.'s customers to tell them he is no longer there.

2 Let me wrap up by saying, Your Honor, these
3 provisions would not cause Mr. Lucas to go look for a
4 job somewhere else. In fact, he hasn't done that. He's
5 just going to compete head to head with us on things
6 that he is already doing.

7 We are talking about for a very limited time.
8 The agreement certainly provides him opportunity to stay
9 right where he is and work and not violate the agreement
10 and earn a livelihood.

11 It's just 12 months. In fact, we are six
12 months into it. It's our position there is a sufficient
13 dispute of facts to deny the motion for summary
14 judgment. Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Keim. Anything in
16 response, Mr. Haltiwanger?

17 MR. HALTIWANGER: Just briefly, Your Honor. I
18 think while there may be many factual disputes as to who
19 told what and who said what and what may have been done,
20 we made the motion for partial summary judgment on a
21 very clear contention.

22 The point is that Mr. Lucas only had customers
23 in Georgia and formerly had one in Pennsylvania. The
24 geographic restriction is nationwide. The fallback
25 provision is four states, three of which he never worked

1 in.

2 All it would take would be for Mr. Yarborough
3 to have signed an affidavit saying Mr. Lucas worked
4 customers in those three states. We have a dispute of
5 fact. That was not done.

6 Team I.A. did not meets it burden of coming
7 forth with just a scintilla of evidence showing that
8 Mr. Lucas had employees in three or the four fallback
9 provision states.

10 It's very clear, and again I will quote Your
11 Honor to Your Honor from the Ascension order that we
12 attached. The South Carolina Supreme Court and Court of
13 Appeals have held that non-compete clauses imposing a
14 geographic restriction greater than the geographic area
15 in which the employee worked are unreasonable and
16 unnecessary to protect the employer's interests.

17 That is, we believe, something that could have
18 been resolved here today because Mr. Lucas didn't have
19 customers in three of the four fallback states.
20 Mr. Yarborough has put forth no affidavit saying he did
21 or he didn't.

22 So it's undisputed before Your Honor today
23 that Mr. Lucas had no customers in three of the four
24 fallback states, and as a result the geographic
25 restriction is unnecessarily broad to protect the

1 interests of Team I.A. and as such under our precedent,
2 it says strike the whole thing.

3 Our argument would be that the whole thing
4 would include not just the covenant not to compete but
5 also the non-solicitation provision. They are lumped
6 together in the contract.

7 However, if under the severability clause you
8 believe they can be severed, there is no question that
9 the geographic restriction is in no way able to survive.
10 There isn't a dispute of fact about where Mr. Lucas did
11 or didn't have customers.

12 As a result -- and solicitation, whether he
13 solicited customers in those states is irrelevant. It's
14 not a legitimate interest of the employer if there is
15 not a customer there, and I believe that is established
16 under our case law, Your Honor.

17 THE COURT: Thank you. Thank you very much.

18 MR. KEIM: Your Honor, just very briefly. We
19 have been digging through eight boxes or ten boxes of
20 Mr. Lucas' materials. I have discovered this this
21 morning. We were paying Mr. Lucas to go and establish
22 these relationships.

23 He was part of an association, and I am
24 looking at a trade show that he attended. More than 20
25 or 25 states were represented there. We paid him to go

1 and establish those.

2 Your Honor, we are still working on the
3 discovery in this case. It's still early in this case,
4 and we think we are entitled to talk to Mr. Lucas under
5 oath about his activities on a nationwide basis. Thank
6 you.

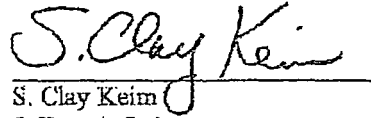
7 THE COURT: If y'all would please submit
8 proposed orders within ten days.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 23, 2010



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Record on Appeal 445

APP0447

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2009-CP-32-01078

Team IA, Inc.

Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC,

Defendants,

Of whom Cicero Lucas is

Respondent,

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc.,

Third-Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT INCORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD AND PREMATURELY GRANTED SUMMARY JUDGMENT?
- II. WHETHER THE TRIAL COURT ERRED IN APPLYING GEORGIA LAW TO DETERMINE THE VALIDITY OF THE NON-SOLICITATION PROVISION AT ISSUE?
- III. WHETHER THE TRIAL COURT ERRED IN ITS CONCLUSION THAT THE NON-SOLICITATION PROVISION AT ISSUE "IS AN UNREASONABLE RESTRAINT ON TRADE" AND VIOLATES PUBLIC POLICY?
- IV. WHETHER THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE NON-COMPETITION PROVISION AT ISSUE VIOLATES PUBLIC POLICY AND IS OVERBROAD GEOGRAPHICALLY?
- V. WHETHER THE TRIAL COURT ERRED IN FAILING TO LIMIT THE NON-COMPETITION PROVISION AT ISSUE IN ACCORDANCE WITH THE PARTIES' BARGAINED-FOR ALTERNATIVE GEOGRAPHIC RESTRICTION OR SOME SMALLER PORTION THEREOF?

STATEMENT OF THE CASE

Team IA, Inc. ("Team IA"), initiated this action on March 17, 2009, by filing claims against two former employees—Cicero Lucas ("Lucas") and George Lawson, IV ("Lawson")—and the business entity that the former employees have formed—5 Point Solutions, LLC ("5 Point"). Team IA asserted claims against Lucas for breach of contract, breach of the duty of loyalty, and conversion; asserted a claim against Lawson for fraud; asserted a claim against Lucas and 5 Point for defamation; and asserted claims against all Defendants for tortious interference with contractual relations, tortious interference with prospective contractual relations, violation of the South Carolina Trade Secrets Act, civil conspiracy, unjust enrichment, and constructive trust. All of Team IA's claims stem directly from the improper activities in which Lucas and Lawson have engaged surrounding their resignation from Team IA on February 3, 2009, and their business activities thereafter. On April 17, 2009, Defendants filed their Answer and Third Party Complaint. On August 27, 2009, Lucas filed a Motion for Partial Summary Judgment with respect to two of Team IA's breach of contract claims against Lucas, which involved Team IA's allegations that Lucas had breached a non-solicitation provision and a non-competition provision that was set forth in the Employment Agreement between Team IA and Lucas.

The parties engaged in extremely limited discovery in this matter prior to Lucas's Motion for Partial Summary Judgment. Both Team IA and Defendants submitted and responded to written discovery requests, but the completeness of said responses remained an area of contention at the time of Lucas's motion. Neither party had conducted a single deposition in this matter prior to Lucas's Motion for Partial Summary Judgment, as the

parties had only recently submitted their responses to the other's written discovery requests. In fact, Team IA did not receive responses to subpoenas that it issued to three of the primary customers at issue in this matter until more than one month after the trial court had ruled on Lucas's motion.

The Honorable R. Knox McMahon held a hearing on September 21, 2009, with respect to Lucas's Motion for Partial Summary Judgment. At the conclusion of the hearing, Judge McMahon requested that the parties submit proposed orders. Judge McMahon entered an Order on Thursday, November 19, 2009 ("Order"), in which he accepted Lucas's proposed order in its entirety and granted Lucas's Motion for Partial Summary Judgment. The Order held that both the non-competition provision and the non-solicitation provision at issue were invalid and unenforceable as a matter of law. This striking of two of the most important provisions of the contract at issue, in turn, precludes Team IA's ability to conduct any further discovery or pursue a remedy for what Team IA contends to be Lucas's breach of the provisions at issue.

Team IA received written notice of the Order on Monday, November 23, 2009. Team IA filed a Motion to Alter or Amend the Order on December 3, 2009. On January 20, 2010, Judge McMahon signed an Order denying Team IA's Motion to Alter or Amend ("January Order"). Team IA received a copy of Judge McMahon's January Order on February 1, 2010. Team IA served its Notice of Appeal on February 24, 2010, and filed the same on February 25, 2010.

STATEMENT OF THE FACTS

A. Background Information.

Team IA conducts business in the microfilm, data entry, software, hardware, consulting and related services industry. (R. p. 23, ¶ 10; R. p. 166, ¶ 3.) Team IA markets its business on a nationwide basis through electronic and print media, including the internet, attendance at tradeshow, submission of bids, direct sales, and other means. (*Id.*) Team IA operates in a competitive industry with many competitors offering the same or substantially similar services. (*Id.*)

B. Events Leading Up To Lucas's Employment With Team IA.

In early-2001, Team IA and Lucas engaged in discussions regarding Lucas possibly becoming employed at Team IA. During these discussions, Lucas negotiated many specific terms of his eventual employment relationship with Team IA, as evidenced by a letter that Lucas provided to Brent Yarborough—the majority owner and President of Team IA—in late-February 2001. (R. p. 24, ¶ 14; R. p. 167, ¶ 6; R. p. 184–86.) Team IA consented to a number of Lucas's negotiated items—examples being salary, discretionary bonus, change-of-control payment, confidentiality, and health coverage—and incorporated the same into the Employment Agreement. (R. pp. 52–61; R. p. 167, ¶ 6.)

On March 2, 2001, Lucas acknowledged and executed a letter offer from Team IA. (R. pp. 23–24, ¶¶ 12–13; R. pp. 49–50; R. p. 167, ¶ 4.) This letter offer provided as follows: "In addition to those already mentioned, an employment agreement with non-competition, non-disclosure, ownership of work, and other clauses as identified attached must be executed. In other words, acceptance of this offer is contingent on agreement of an employment agreement being executed." (*Id.*)

Also on March 2, 2001, Lucas executed the Employment Agreement referenced in the letter offer discussed above ("Agreement"). (R. pp. 52-61.) The Agreement sets forth a Non-Solicitation Agreement in Paragraph V.A., which provides as follows:

A) Non-Solicitation Agreement.

1) Employee agrees and acknowledges by signing below, that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services.

For the purposes of this Agreement, the term "CUSTOMER" shall mean any person, firm, or business entity who currently has a system or product which was designed or installed by or is being serviced by Employer; or who has purchased goods or services or who has contracted to purchase goods or services from Employer during the twelve (12) months prior to Employee's separation from employment; or who is an Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months.

2) Employee agrees not to induce or attempt to influence any person or entity which has a business relationship with the Employer to terminate or otherwise alter that relationship with the Employer.

3) Employee agrees that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly or indirectly, for himself or on behalf of any other person, firm, or business entity, employ, attempt to employ, solicit, or attempt to solicit the employment of any individual who is, or who has been an employee of Employer at any time in the twelve (12)

complete calendar months immediately preceding Employee's separation from employment.

4) Employee agrees that for a period of twelve (12) months following the end of his employment by the Employer, whether or not this contract is otherwise in force, and regardless of the reasons for terminating the employee/employer relationship, the Employee will not, directly or indirectly, hire, attempt to hire, or encourage agents and/or independent contractors of Employer to cease their relationships with Employer.

(R. p. 57, ¶ V.A. (emphasis in original).) Also in keeping with the requirements of the letter offer, Paragraph V.B. of the Agreement contained a Covenant Not to Compete in which Lucas agreed as follows:

B) Covenant Not to Compete.

1) In order to prevent the improper disclosure or use of confidential and proprietary information and other trade secrets, and to protect the Employer from unfair competition, Employee agrees that, absent the prior express written consent of the Employer, while employed by Employer and for twelve (12) months immediately following the resignation or termination of his employment with the Employer, regardless of who initiates separation from employment, Employee shall not, directly or indirectly, by himself, or through or on behalf of any other person, firm, partnership, company, corporation, representative or agent, within the geographical territory (hereinafter, the "RESTRICTED TERRITORY") set forth below, solicit, attempt to solicit, sell, or attempt to sell, provide, or attempt to provide COMPETING SERVICES as defined below.

Recognizing that Team IA competes on a nationwide basis, the Parties to this Agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

For the purposes of this Agreement, "COMPETING SERVICES" shall mean any service, product, or process of any person, firm, or corporation in existence, which competes with a service, product or process upon which the Employee worked or which he sold or serviced during his employment by Employer or concerning matters which he has acquired confidential information through his work with Employer.

2) Employee agrees that during a period of twelve (12) months following the end of Employee's employment, whether or not this contract is otherwise in force, Employee will not, directly or indirectly, participate (on Employee's own behalf or on behalf of any other corporation, venture or enterprise) in any matters which were the subject of Employer's bids submitted or in preparation during or prior to the Employee's employment.

3) Employee agrees that during a period of twelve (12) months following the end of Employee's employment, whether or not this contract is otherwise in force, Employee will not enter into a relationship (employee/employer, independent contractor, or otherwise) to provide a CUSTOMER or "STRATEGIC PARTNER" with the same or substantially similar services which Employee was performing for Employer. For the purposes of this agreement, "STRATEGIC PARTNER" shall mean a third party that Employer formed a business relationship with, formerly or informally, to jointly accomplish a task for a fee. For example, Employer engages ABC Company to assist it with the implementation of software for a customer.

(R. p. 57-58, ¶ V.B. (emphasis in original).) Both Team IA and Lucas agreed in Paragraph VII.F. of the Agreement that the limitations contained in the Agreement were "reasonable with respect to scope and duration, and [were] properly required for the protection of the legitimate business interests of [Team IA]." (R. p. 61, ¶ VII.F.) Additionally, both Team IA and Lucas expressly intended that each of the provisions contained in the Agreement, as well as the portions of each provision, be covenants

independent of one another. Team IA and Lucas incorporated an expression of these intentions in Paragraph VII.A. of the Agreement, which states the following:

A) **Severability.** The covenants in this Agreement shall be construed as covenants independent of one another and as obligations distinct from any other contract between Employee and Employer. Any claim that Employee may have against Employer shall not constitute a defense to enforcement by Employer of this Agreement. The Parties to this Agreement expressly acknowledge that the provisions, or portions thereof, of this Agreement shall be deemed severable and the invalidity of or unenforceability of any provision, or portion thereof, shall not affect the validity or enforceability of the other provisions hereof. If any provision, or portion thereof, of this Agreement is unenforceable for any reason, it is the express intent of the Parties that such provision, or portion thereof, shall be appropriately limited and given effect to the extent that it may be enforceable in the discretion of the court or, in the alternative, such provision shall be severed in its entirety, if a court of competent jurisdiction determines a lesser limitation than what is stated is not appropriate.

(R. p. 60, ¶ VII.A.)

C. **Lucas's Employment With Team IA.**

Lucas began his employment with Team IA on April 2, 2001. (R. p. 23, ¶ 11; R. p. 167, ¶ 7.) Lucas acted as a sales representative for Team IA for the duration of his employment. (R. pp. 25–26, ¶¶ 20–25; R. p. 167, ¶ 7.) Through his employment with Team IA, Lucas was aware of and involved with Team IA's customers, prospective customers, and trade secret information, including, but not limited to, details regarding Team IA's pricing and product information as well as contact and relationship information related to Team IA's customers and prospective customers. (*Id.*) Lucas served as the "face of Team IA" with respect to many of the customers and prospective customers that he serviced and developed relationships with on behalf of Team IA. (*Id.*)

At the time he was hired, Lucas did not have experience or knowledge of the microfilm, data entry, software, hardware, consulting, and related services industry, and did not have any formal sales training or experience. (R. p. 25, ¶ 20; R. p. 167, ¶ 8.) Accordingly, Team IA spent a substantial amount of money training and developing Lucas as a sales representative. (R. pp. 25–26, ¶¶ 20–25; R. p. 167, ¶ 8.) Team IA also compensated Lucas considerable sums related to his actions in developing customers and prospects on behalf of Team IA. (R. p. 167, ¶ 8.)

Team IA both allowed and expected Lucas to solicit new business for Team IA on a nationwide scale. (R. p. 25, ¶ 24; R. p. 167, ¶ 9.) A review of a sample of Lucas's sales activities—based on expense reports he submitted to Team IA for reimbursement—demonstrates Lucas's nationwide sales activities on behalf of Team IA. (R. p. 25, ¶ 24; R. p. 167, ¶ 9; R. pp. 188–90.) Lucas also attended and participated in tradeshow, on behalf of Team IA, which took place across the country and included attendees representing a nationwide prospective customer base. (R. p. 167, ¶ 9; R. pp. 188–90.) During Lucas's employment and through the date of his resignation, Team IA serviced and solicited customers from across the United States (and had at least one prospect in Canada). (R. p. 25, ¶ 24; R. p. 167, ¶¶ 9–10; R. pp. 188–90.)

Team IA has performed extensive services for and aggressively solicited further business opportunities with the offices of various Clerks of Superior Court in Georgia. (R. p. 26, ¶ 27.) As part of its business plan, Team IA assigned Lucas the task of further developing business with the various Counties in the State of Georgia and with the Georgia Superior Court Clerks' Cooperative Authority ("GSCCCA"). R. p. 26, ¶ 28.)

Through this assignment, Lucas developed extensive contacts and relationships with key employees in the offices of the various Clerks of Superior Court.

During the months leading up to Lucas's resignation, Lucas was actively involved on behalf of Team IA in soliciting business from the Fulton County Clerk of Superior Court ("Fulton County"), including a large microfilm creation project. (R. p. 31, ¶¶ 63–65; R. p. 168, ¶ 12.) In November 2008, Team IA and Fulton County reached an agreement for Team IA to perform the project in question. (R. p. 31, ¶¶ 64–65; R. p. 168, ¶ 12.)

Also during the months leading up to Lucas's resignation, Lucas was similarly involved on behalf of Team IA securing business from the Fayette County Clerk of Superior Court ("Fayette County") with regard to a scanning project. (R. p. 31, ¶¶ 68–69; R. p. 168, ¶ 13.) Prior to Lucas's resignation, a representative for Fayette County orally committed to allow Team IA to perform the scanning project, and the parties were finalizing the language of the Statement of Work that would govern the services. (R. p. 31, ¶ 68; R. p. 168, ¶ 13.)

D. Lucas's Resignation From Team IA And Improper Activities Thereafter.

On February 3, 2009, Lucas resigned his employment with Team IA. (R. p. 28, ¶ 43.) Both prior to and after Lucas's resignation, Mr. Yarborough reminded Lucas that Team IA expected Lucas to honor his obligations under the Agreement. (R. p. 28, ¶ 44.)

During the two weeks immediately following Lucas's resignation, phone records show that Lucas contacted representatives of no fewer than eight Team IA customers with whom he had worked extensively while employed with Team IA, with Lucas making seven of these eight contacts within six days of his resignation. (R. pp. 241–53.)

Lucas admits as much in his supplemental responses to Team IA's First Set of Interrogatories, stating as follows: "In the two weeks following his departure from Team IA, Lucas believes he contacted all of his personal customers with the exception of Grace Ruane and informed them that he had left Team IA." (R. p. 256, ¶ 14, 2d Supplemental Resp.) Lucas himself identifies eleven specific customers that he "contacted by telephone to inform of his departure." (*Id.*)

The following example of Lucas's post-resignation customer contact highlights Defendant Lucas's brazen violation of the non-solicitation covenants contained in his Employment Agreement: During the two weeks following Lucas's resignation from Team IA, Lucas spoke on the phone with Sheila Studdard—Clerk of Superior Court for Fayette County and a long-time customer of Team IA who was then in negotiations with Team IA regarding a new project—no fewer than fifty-one times. (R. pp. 241–53.) Lucas initiated twenty-seven of these fifty-one calls. (*Id.*) In total, Lucas spent at least twelve hours and thirty-three minutes on the phone with Ms. Studdard during these two weeks. (*Id.*) This is simply one example of Lucas's improper post-resignation customer contact. During the two weeks following Lucas's resignation, he also engaged in each of the following acts; among others: (1) had at least thirteen phone calls with representatives of Fulton County, with Lucas placing twelve of those thirteen calls; (2) had at least four calls with representatives at the GSCCCA, with Lucas placing three of those four calls; and (3) had at least eighteen calls with representatives at DeKalb County, with Lucas placing sixteen of those eighteen calls. (*Id.*)

By February 9, 2009, less than one week after Lucas's resignation, Lucas—together with Lawson—had established and was an owner and operator of 5 Point. (R. p.

22, ¶ 4; R. p. 29, ¶ 49.) 5 Point offers and performs services identical to—or, at the very least, substantially similar to—the services that Team IA offers and performs.

On February 10, 2009, only one day after Lucas formed 5 Point—and on the same day that Lucas’s phone records place him in Atlanta, Georgia (R. pp. 248–49)—Fulton County designated 5 Point as Fulton County’s designated microfilm vendor. (R. p. 259.) This designation resulted in 5 Point obtaining the same microfilm creation project that Lucas worked extensively to procure on behalf of Team IA prior to his resignation—the same project on which Team IA and Fulton County had reached an agreement, prior to Lucas’s resignation, for Team IA to perform. As of the date of Lucas’s Motion for Partial Summary Judgment, Team IA was aware of at least \$612,969.75 in invoices that 5 Point had submitted to the GSCCCA with respect to the microfilm creation project in question. (R. pp. 261–63.)

On March 2, 2009, less than one month after Lucas resigned from Team IA and formed 5 Point, Lucas submitted a Statement of Work to Fayette County with regard to a scanning project valued at over \$200,000. (R. pp. 265–74.) This Statement of Work was related to the same scanning project that Lucas worked extensively in procuring on behalf of Team IA prior to his resignation—the same project that Fayette County had orally agreed, prior to Lucas’s resignation, to allow Team IA to perform. On March 12, 2009, Ms. Studdard executed this Statement of Work, officially contracting with 5 Point to perform the scanning project in question. (*Id.*) As of the date of Lucas’s Motion for Partial Summary Judgment, Team IA was aware of at least \$119,804 in invoices that 5 Point had submitted to Fayette County with respect to the scanning project in question. (R. pp. 276–81.)

ARGUMENTS

STANDARD OF REVIEW

The trial court granted summary judgment to Lucas on two of Team IA's claims against Lucas for breach of contract. Specifically, the trial court ruled that the first non-solicitation provision listed above (Paragraph V.A.1. of the Agreement, R. 57) and the first non-competition provision listed above (Paragraph V.B.1. of the Agreement, R. pp. 57-58) are invalid and unenforceable as a matter of law. Accordingly, the standard of review is as follows:

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008).

I. THE TRIAL COURT INCORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD BY ACCEPTING AS TRUE THE FACTS ALLEGED IN LUCAS'S AFFIDAVIT, WHICH ARE DISPUTED BY THE FACTS AND EVIDENCE SET FORTH IN THE AFFIDAVIT AND SUPPLEMENTAL AFFIDAVIT OF BRENT YARBOROUGH.

Rule 56(c) of the South Carolina Rules of Civil Procedure allows a trial court to grant a motion for summary judgment only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law.” Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009) (citing *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

“Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.” *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991) (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). “Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law.” *Id.* (citing *Abrams v. Wright*, 262 S.C. 141, 202 S.E.2d 859 (1974)); see also *Brooks v. Motsenbocker Advanced Devs., Inc.*, 242 Fed. App’x 889, 890 (4th Cir. 2007) (“Summary disposition should not be made based on conflicting affidavits. . . . [S]ummary judgment is inappropriate when affidavits present conflicting facts requiring credibility determinations.”); *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992) (“[S]ummary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful.” (citing *Rothrock*, 305 S.C. 402, 409 S.E.2d 366)); *L&W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) (“[A]t the summary judgment stage of litigation, ‘the judge does not weigh conflicting evidence with respect to a disputed material fact . . . Nor does the judge make credibility determinations with respect to statements made in affidavits, . . . or depositions.’” (quoting *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987))).

The trial court incorrectly applied the above-described standard by accepting as true the facts set forth in Lucas's Affidavit and disregarding the facts set forth in the Affidavit of Brent Yarborough and the Supplemental Affidavit of Brent Yarborough. The "Statement of Facts" set forth in the Order—which was drafted by Lucas—contains nothing more than a verbatim recitation of Lucas's Affidavit, the contractual provisions that Lucas challenged, and a summary of Lucas's argument. (R. pp. 5–7.) The only reference in the Order to the Affidavit of Mr. Yarborough—a representative of the non-moving party—is an incomplete statement that Mr. Yarborough's Affidavit "identifies two Team IA customers serviced by Lucas. Both customers identified by Yarborough are Georgia governmental entities." (R. p. 5.)

While two of the twelve paragraphs of Mr. Yarborough's Affidavit did, in fact, reference the two customers noted above, the Order fails to address any of the remaining ten paragraphs, including the most relevant statements for the purpose of Lucas's Motion for Partial Summary Judgment—that Lucas engaged in nationwide sales activities on behalf of Team IA, and that Team IA serviced and solicited customers on a nationwide basis during Lucas's employment and through the date of his resignation. (R. p. 167.) Moreover, the Order fails to recognize in any way the Supplemental Affidavit of Mr. Yarborough, which lists specific Team IA customers and prospective customers with which Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (R. pp. 327–28.)

The statements from Mr. Yarborough's Affidavit and Supplemental Affidavit are in direct conflict with statements in Lucas's Affidavit. Thus, there can be no question that there exists conflicting evidence with respect to material facts in dispute regarding

Team IA's customer base and the scope of Lucas's activities while employed at Team IA. In the presence of such conflicting evidence, summary judgment was inappropriate under the above-described, well-established precedent.

Moreover, the South Carolina Supreme Court has recently drawn attention to the strictness of the summary judgment standard, holding "that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. Team IA unquestionably met this burden by producing the Affidavit of Mr. Yarborough, the exhibits attached thereto, and the Supplemental Affidavit of Mr. Yarborough. Viewing the information contained in these documents and the inferences that can be reasonably drawn therefrom in a light most favorable to Team IA—which is required under Rule 56, SCRPC—Team IA submitted far more than "a mere scintilla of evidence" that supported its position in opposition to Lucas's Motion for Partial Summary Judgment.

Additionally, the fact that Lucas filed his Motion for Partial Summary Judgment prior to Team IA having the opportunity to take a single deposition with respect to this case must not be overlooked. While the facts present in the record at the time of Lucas's motion should have been sufficient standing alone to preclude an entry of summary judgment, they also should have made clear the need for further development of discovery to illuminate and clarify the critical facts surrounding Team IA's claims. To award summary judgment to Lucas—relying on Lucas's own Affidavit for the "facts" necessary to enter such an award—was premature as a matter of law when considering the mountain of conflicting evidence that is present in this case and the fact that Team IA

has not yet “had a full and fair opportunity to complete discovery.” *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (“Since it is a drastic remedy, summary judgment ‘should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.’ This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” (quoting *Watson v. S. Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975))).

Because the trial court awarded Lucas summary judgment at the stage of the litigation in which it did, Team IA was never even afforded the opportunity to depose Lucas with respect to the facts surrounding Team IA’s claims. Similarly, Team IA has never had the opportunity to depose representatives of the customers—Fulton County, Fayette County, and the GSCCCA primarily—that Lucas improperly solicited upon his resignation from Team IA. Accordingly, the trial court has improperly deprived Team IA of “a full and fair opportunity to complete discovery” on the claims on which the trial court granted Lucas summary judgment.

Therefore, the trial court’s entry of summary judgment—which relies nearly exclusively on Lucas’s position with respect to the material facts in dispute and which prevents Team IA from being able to conduct discovery on the claims at issue—violates the clear mandates of South Carolina law regarding the standard under which a court is to analyze a motion for summary judgment. Team IA accordingly requests that this Court reverse the Order and allow Team IA to engage in full and fair discovery in this matter with respect to the claims at issue.

II. THE TRIAL COURT INCORRECTLY APPLIED GEORGIA LAW TO DETERMINE THE VALIDITY OF THE NON-SOLICITATION PROVISION AT ISSUE AT THE SAME TIME IT APPLIED SOUTH CAROLINA LAW TO ALL OTHER PROVISIONS IN THE AGREEMENT.

A. The Trial Court's Order Is In Error Because It Failed To Properly Apply The Agreement's Choice Of Law Provision.

Paragraph VII.E. of the Agreement contains a Choice of Law provision that demonstrates the parties' express intention that the Agreement be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina." (R. p. 61.) Notwithstanding this provision, the trial court held that Georgia law applied to its analysis of the non-solicitation provision at issue. Such a holding is incorrect in that it fails to properly recognize the parties' express intent that a court apply South Carolina law to such an analysis.

"Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (citing *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 569 S.E.2d 349, 358 (2002)); see also *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) ("[T]he [United States] Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity, rejecting the 'parochial concept' that 'notwithstanding solemn contracts . . . all disputes must be resolved under our laws and in our courts.'" (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972))). Thus, the trial court was required to honor the parties' express intention that the Agreement be "governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina." (R. p. 61.)

The only exception under South Carolina law to enforcing a choice-of-law clause such as that in the Agreement is where “application of foreign law results in a violation of South Carolina public policy.” *Nucor Corp.*, 482 F. Supp. 2d at 728 (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70–71, 119 S.E.2d 533, 541–42 (1961)). This exception is clearly inapplicable to the case at bar, as the Choice of Law provision in the Agreement mandates the application of South Carolina law. If anything, this exception precludes the application of Georgia law, as application of Georgia law results in a finding that the non-solicitation provision at issue—which would be enforceable under well-established South Carolina precedent—is unenforceable. Such a result violates South Carolina public policy—South Carolina citizens must be allowed to form a contract in South Carolina, to provide in said contract that the same be governed by and construed and interpreted under South Carolina law, and to anticipate that a court will not apply the law of a foreign state to said contract in order to declare the same invalid.

Significantly, Lucas’s proposed order—which the trial court adopted in its entirety—applies South Carolina law in analyzing every aspect of the Agreement other than the issue of whether the non-solicitation provision at issue violates public policy (to which the proposed order and the trial court’s Order applied Georgia law). This demonstrates the parties’ and the trial court’s understanding that South Carolina law applies to the determination of whether the provisions of the Agreement at issue are valid and enforceable. This also demonstrates the illogical end result embodied in the Order, which applied South Carolina law to analyze one portion of the Agreement while applying Georgia law to analyze a second. Accordingly, Team IA respectfully requests that the Court reverse the Order and mandate that the trial court apply South Carolina law

to the analysis of the non-solicitation provision at issue in accordance with the express intentions of Team 1A and Lucas.

B. The Trial Court's Order With Respect To The Application Of Georgia Law Is In Error Because South Carolina Choice-Of-Law Principles Mandate The Use Of South Carolina Law Due To The Issue Involved Surrounding The Validity Of The Non-Solicitation Provision At Issue.

Notwithstanding the Agreement's Choice of Law provision, the trial court incorrectly applied Georgia law to analyze the non-solicitation provision at issue under South Carolina's common law choice-of-law principles. "In contract actions, South Carolina courts apply the substantive law of the place where the contract at issue was formed." *Witt v. Am. Trucking Ass'ns, Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994) (citing *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241, 243 (1983)). "This rule applies where a contract's formation, interpretation or validity is at issue." *Id.* Lucas's proposed order conveniently truncated this principle of law, citing the same incompletely as follows: "Under South Carolina law, when a contract's interpretation is at issue courts are to apply 'the substantive law of the place where the contract . . . was formed.'" (Def. Lucas's Proposed Ord. at 10 (quoting *Witt*, 860 F. Supp. at 300).) Thus, while Lucas correctly identified South Carolina choice-of-law principles with respect to issues of contract interpretation, he disregarded the clear rule of law that courts are also to apply "the substantive law of the place where the contract . . . was formed" when analyzing issues of contract formation and validity. *Witt*, 860 F. Supp. at 300 (citing *O'Briant*, 279 S.C. 254, 305 S.E.2d at 243). Significantly, Lucas correctly cited this entire proposition in his Memorandum in Support of Partial Summary Judgment. (R. p. 98 ("In disputes involving a contractual formation, interpretation or validity, South Carolina courts generally apply the substantive law of the place of contract formation." (citing *Witt*, 860

F. Supp. 295))). However, Lucas eliminated the references to contract formation and validity from his proposed Order and discussed only contract interpretation. (R. p. 349.) As the issue involved in Lucas's Motion for Partial Summary Judgment is clearly one of contract validity, this omission appears strikingly disingenuous.

There can be no dispute that the Agreement was formed in South Carolina. Neither can there be a dispute that Lucas's Motion for Partial Summary Judgment attacks the validity of two provisions within the Agreement. In fact, the trial court expressly recognized this second point: "Lucas argues the 'Non-Solicitation' provision is unenforceable on its face because it would prohibit Lucas from accepting business from unsolicited customers of Team IA, especially governmental entities." (R. p. 7.) A facial challenge to the enforceability of a contractual provision unquestionably places at issue the validity of said provision. Therefore, even in the absence of the Agreement's Choice of Law provision, the trial court was required to apply South Carolina law in analyzing the non-solicitation provision at issue.

C. **The Order Of The Trial Court With Respect To The Application Of Georgia Law Is In Error Because Team IA And Defendant Lucas Performed The Agreement Primarily In South Carolina.**

South Carolina courts have recognized one exception to the choice-of-law principles discussed above in Section II.B., holding that "where performance [of a contract] is at issue, . . . the law of the place of performance governs." *Witt*, 860 F. Supp. at 300 (citing *Livingston v. Atl. Coast Line R.R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (1935)). However, this rule of law is entirely inapplicable to the analysis of Lucas's Motion for Partial Summary Judgment, which expressly challenges the facial validity of two provisions contained in the Agreement. Such a challenge does not involve an issue of performance, as the challenge precludes the Court from even considering whether

Lucas has properly performed under the Agreement. Thus, the law of the alleged place of performance—Georgia—can have no bearing whatsoever on the Court's determination of whether the Agreement is valid under the law of the place in which the parties formed the Agreement—South Carolina.

Even assuming, *arguendo*, that Lucas's Motion for Partial Summary Judgment does involve issues of contact performance, the trial court was still required to apply South Carolina law due to the fact that both Team IA and Lucas performed the Agreement primarily in South Carolina. Lucas cannot dispute any of the following facts: (1) Team IA is a business that operates out of Lexington, South Carolina; (2) Lucas is a resident of Lexington, South Carolina; (3) Lucas worked as a salesman for Team IA; (4) Lucas and Team IA entered into the Agreement in South Carolina; and (5) Lucas's office—out of which he worked—was located at the office of Team IA in Lexington, South Carolina. (R. pp. 21–26, 74, 79–80.) These undisputed facts demonstrate that Lucas performed the Agreement primarily in South Carolina.

The Order concludes that Lucas “performed” the Agreement in Georgia by finding that “[t]he only evidence before the Court is that Lucas serviced customers for Team IA in Georgia.” (R. p. 13.) This finding misstates the evidence before the court, particularly when viewing such evidence in a light most favorable to Team IA. The Affidavit and Supplemental Affidavit of Mr. Yarborough demonstrate that Lucas worked on a nationwide basis on behalf of Team IA and identify specific Team IA customers with which Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (R. p. 167, ¶¶ 9–10; R. p. 327–28.)

Moreover, Lucas has himself admitted that he performed work for customers in Georgia and Pennsylvania. (R. p. 112, ¶ 3.) Thus, under the Order's reasoning, Lucas actually "performed" the Agreement in South Carolina, North Carolina, Georgia, Alabama, and Pennsylvania, and the Agreement should be analyzed under the law of each of these five states. Such a conclusion demonstrates the illogical nature of the finding that Lucas "performed" the Agreement in the locations of the Team IA customers with which he worked. The more logical conclusion is that Lucas performed the Agreement in the location that was central to his activities with Team IA—Lexington, South Carolina. Thus, even assuming that Lucas's Motion for Partial Summary Judgment did involve an issue of performance, the Court was required to apply South Carolina law to analyze the same. *See Witt*, 860 F. Supp. at 300 (citing *Livingston*, 176 S.C. 385, 180 S.E. at 345). At the very least, the conflicting evidence regarding the alleged place of performance creates a genuine dispute as to a material fact that precludes summary judgment on this issue. *See* discussion *supra*, Section II.A

Furthermore, the Order contains an internal inconsistency in its discussion of what law it should apply in analyzing the non-solicitation provision at issue. The Order first acknowledges that "[u]nder South Carolina law, when a contract's interpretation is at issue courts are to apply 'the substantive law of the place where the contract . . . was formed.'" (R. p. 13 (quoting *Witt*, 860 F. Supp. at 300).) The Order then finds that "[w]hether or not Lucas breached his employment agreement by an alleged breach of the non-solicitation provision would be a question of performance, or lack thereof, under the Agreement." (*Id.*) However, the pertinent portion of the Order concludes as follows: "As such, the law of the place of performance governs *the interpretation* of the non-

solicitation clause.” (*Id.* (emphasis added).) Thus, the Order holds that South Carolina law would apply if the issue was one of contract interpretation but rules that Georgia law governs this issue of contract interpretation. While Team IA asserts that the true issue before the court is one of contract validity—which undoubtedly requires application of South Carolina law—the Order’s conclusion that the issue is one of contract interpretation also leads to a requirement that South Carolina law govern.

To summarize, Team IA requests that the Court reverse the Order and require the trial court to apply South Carolina law to the analysis of the non-solicitation provision at issue for each of the following reasons: (1) The choice-of-law provision in the Agreement itself mandates the application of South Carolina law; (2) South Carolina choice-of-law principles require the application of South Carolina law because the issue involved is one surrounding the validity of the non-solicitation provision at issue; and (3) South Carolina choice-of-law principles require the application of South Carolina law because Team IA and Lucas performed the Agreement primarily in South Carolina.

III. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE NON-SOLICITATION PROVISION AT ISSUE IS AN UNREASONABLE RESTRAINT ON TRADE AND VIOLATES PUBLIC POLICY, AS SOUTH CAROLINA COURTS HAVE REPEATEDLY UPHELD SIMILAR RESTRICTIVE COVENANTS, AND THE STATUS OF CUSTOMERS AS GOVERNMENTAL ENTITIES OF ANOTHER STATE DOES NOT IMPACT THE ENFORCEABILITY OF THE COVENANT.

A. South Carolina Courts Have On Multiple Occasions Upheld And Enforced Restrictive Covenants Nearly Identical To That In The Non-Solicitation Provision At Issue.

Relying on Georgia law, the trial court concluded that the “non-solicitation provision is unenforceable on its face because it prohibits Lucas’s acceptance of business from *unsolicited* customers.” (R. p. 13 (emphasis in original).) However, Georgia law does not apply to the analysis of whether the non-solicitation provision at issue is

enforceable, because the Agreement was formed in South Carolina. *See Witt*, 860 F. Supp. at 300 ("South Carolina courts apply the substantive law of the place where the contract at issue was formed where a contract's formation, interpretation or validity is at issue."). Thus, the Court was required to determine the validity of the non-solicitation provision at issue under South Carolina law. *Id.* Applying South Carolina law, the non-solicitation provision at issue is not an unreasonable restraint on trade. South Carolina courts have repeatedly upheld restrictive covenants nearly identical to that in the Non-Solicitation provision at issue.

A restrictive covenant is valid and enforceable as long as the covenant: (1) "is necessary for the protection of the legitimate interests of the employer," (2) "is reasonably limited in its operation with respect to time and place," (3) "is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood," (4) is reasonable from the standpoint of sound public policy," and (5) "is supported by a valuable consideration." *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (citing *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 273 S.E.2d 338 (1980)).

The South Carolina Supreme Court has noted the following with respect to covenants such as the non-solicitation provision at issue:

[T]he most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.

Standard Register, 238 S.C. at 66, 119 S.E.2d at 539. On the basis of this well-established rule of law, courts in South Carolina have repeatedly upheld and enforced

agreements containing restrictions against both soliciting and accepting business from the employer's customers.

For example, the South Carolina Supreme Court has enforced an agreement precluding a former employee from "selling to the accounts or in the territory in which he ha[d] been performing his duties as [a] sales representative." See *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535 (emphasis added). Similarly, this Court has upheld as enforceable a restriction that precluded the former employee from "[s]olicit[ing] or accept[ing] sales of competing services in any account in which" the employer had already established payroll deduction procedures. See *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 105, 420 S.E.2d 217, 220 (Ct. App. 1992) (emphasis added). Likewise, the United States District Court for the District of South Carolina has upheld an agreement that prohibited the former employee from "soliciting or accepting business from any of [the employer's] dealers, vendors, clients, or customers whose identity was obtained through use of [the employer's] confidential information." See *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 690 (D.S.C. 2003).

Thus, courts at each level of the judicial system in South Carolina have upheld and enforced restrictive covenants nearly identical to the non-solicitation provision at issue. Accordingly, any finding that the non-solicitation provision at issue is an unreasonable restraint on trade was improper at the summary judgment stage of the litigation.

Based on the foregoing facts and authorities, the trial court's ruling that the non-solicitation provision at issue is an unreasonable restraint on trade must be reversed.

B. There Is No Statutory Or Common-Law Authority Supporting The Conclusion That The Status Of Customers As Governmental Entities Of A Foreign State Affects The Determination Of Whether A Restrictive Covenant Violates Public Policy, And Novel Questions Are Not Proper For Summary Adjudication.

The trial court concluded that “it would be unreasonable from the standpoint of public policy for a South Carolina court to prohibit Lucas from accepting unsolicited business from a governmental entity in Georgia to perform work in Georgia.” (R. p. 15.) However, the trial court cited no statutory or common-law authority for such a conclusion, as this ruling represents a novel issue under South Carolina law.

As the trial court noted in its Order of September 4, 2009, with respect to Team IA’s Motion to Dismiss and Motion to Strike, “South Carolina courts have long recognized that a novel issue such as this one is best decided in light of the testimony to be adduced at trial.” (R. p. 18 (*citing Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980)).) Thus, the very precedent that the lower court cited with respect to an earlier motion in this matter precluded the entry of summary judgment on the basis of a novel issue such as that quoted above. *See id.*

Additionally, the case law is clear that “[c]ourts should not annul contracts on doubtful grounds of public policy.” *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (*quoting Warren v. Pilgrim Health & Life Ins. Co.*, 217 S.C. 453, 456, 60 S.E.2d 891, 893 (1950)). As a novel issue certainly constitutes “doubtful grounds of public policy,” summary judgment was improper for this reason as well.

Moreover, existing precedent demonstrates that the identity of the customers at issue is entirely irrelevant with respect to an analysis of whether the non-solicitation provision at issue is unreasonable on public policy grounds. The public policy element that a court is to consider in its analysis of whether to enforce a restrictive covenant

focuses on whether the impact on the defendant and on the applicable market is such that public policy will not allow enforcement of the covenant. *See Wolf*, 309 S.C. at 109, 420 S.E.2d at 221–22. The public policy element thus considers whether the defendant will be unable to support himself and whether the relevant market will suffer a serious void as a result of enforcing the covenant. *See id.* Lucas simply did not, and cannot, demonstrate either of these things.

First, the Affidavit of Mr. Yarborough clearly states that the industry in which Team IA and Lucas are engaged is “a competitive industry with many competitors offering the same or substantially similar services.” (R. p. 166, ¶ 3.) The relevant market will therefore not suffer from the temporary absence of Lucas. Additionally, Lucas is in no way precluded from earning a living as a result of the non-solicitation provision at issue, as this provision merely precludes Lucas from soliciting or selling to Team IA’s customers—an extremely limited and isolated portion of the universe of entities to which Lucas could sell his products and services, and even this for only a limited period of time. Accordingly, the non-solicitation provision at issue is not unreasonable on public policy grounds.

The United States District Court for the District of South Carolina has upheld a non-solicitation provision that precluded the former employee from “directly or indirectly calling upon, causing to be called upon, communicating with or otherwise attempting to bring about any transaction to the detriment of [the former employer’s] business between a [competing] organization and a customer” of the former employer, where the former employer’s customers included “governmental and commercial customers” throughout North America. *Hagemeyer N. Am. Inc. v. Thompson*, No. 2:05-3425, 2006 U.S. Dist.

LEXIS 19468, at *1, *3, *13, *17 (D.S.C. Mar. 1, 2006) (emphasis added). Thus, the status of customers as governmental entities in no way affects the analysis of whether the non-solicitation provision at issue violates public policy. *See id.*; *see also Intelus Corp. v. Barton*, 7 F. Supp. 2d 635, 637–38, 643 (D. Md. 1998) (enforcing a restrictive covenant requiring that the former employee “not call upon or cause to be called upon, or solicit or assist in the solicitation of any person, firm, *governmental entity*, or corporate entity listed as a customer or account of [the former employer] on the date of the termination of his employment” (emphasis added)).

The implications of the trial court’s Order demonstrates the need to reverse the same. Under the trial court’s reasoning, restrictive covenants in South Carolina would never be enforceable if the customers a business seeks to protect are governmental entities in another state. Such a result would itself violate the public policy of this State, under which courts have upheld and enforced restrictive covenants nearly identical to the non-solicitation provision at issue.

Accordingly, the Order should be reversed due to the fact that there is no statutory or common law authority to support the proposition that the existence of some government customers from another state determines whether a restrictive covenant violates public policy, and, if there is any doubt on this issue, novel questions are not proper for summary adjudication.

IV. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE NON-COMPETITION PROVISION AT ISSUE VIOLATES PUBLIC POLICY AND IS OVERBROAD GEOGRAPHICALLY, AS LUCAS HAS NOT PRESENTED ANY EVIDENCE THAT THE PROVISION WOULD IMPROPERLY CURTAIL HIS EFFORTS TO EARN A LIVELIHOOD, AND THE EVIDENCE SHOWS THAT LUCAS WORKED ON A NATIONWIDE BASIS.

A. The Trial Court Erred In Ruling That The Non-Competition Provision At Issue Is Unduly Harsh And Oppressive In Curtailing Lucas' Legitimate Efforts To Earn A Livelihood. As There Remains A Genuine Dispute As To This Material Fact, And Lucas Has Presented No Evidence To Support Such A Conclusion.

Without any evidentiary support, the trial court concluded that the non-competition provision at issue "offends the second hurdle of the analysis because it is unduly harsh and oppressive in curtailing Lucas' legitimate efforts to earn a livelihood." (R. p. 9.) The trial court based this ruling on a conclusory statement that the non-competition provision at issue "would require Lucas to leave the country to continue his line of work." (*Id.*) However, such a conclusion contradicts the evidence that was before the trial court. Significantly, Lucas's Affidavit makes no mention whatsoever of the impact that enforcement of the non-competition provision at issue will have on his ability to earn a livelihood. Thus, even if the trial court were to accept Lucas's position on this issue in its entirety—which would be improper under the parameters of Rule 56, SCRCF—there existed no facts in the record to support the conclusion that the non-competition provision at issue is "unduly harsh and oppressive."

The non-competition provision at issue in no way precludes Lucas from continuing in his chosen line of work—the provision simply precludes Lucas from selling and providing services, products, and processes that compete with those on which he worked and acquired confidential information while at Team IA. Moreover, the non-

competition provision at issue only prevents Lucas from engaging in these activities for a short duration—twelve months.

As counsel for Team IA identified during oral argument on Lucas's Motion for Partial Summary Judgment, the non-competition provision at issue only precludes Lucas from soliciting, selling, or providing "Competing Services" for a period of twelve months. (R. p. 431, line 6–p.434, line 20.) Paragraph V.B.1. of the Agreement expressly defines "Competing Services" as follows: "[A]ny service, product, or process of any person, firm, or corporation in existence, which competes with a service, product or process upon which [Defendant Lucas] worked or which he sold or serviced during his employment by [Team IA] or concerning matters which he has acquired confidential information through his work with [Team IA]." (R. pp. 57–58.)

The Agreement allows Lucas to develop, sell, and provide any services, products, or processes within the applicable industry that do not qualify as "Competing Services" under the Agreement. Accordingly, the non-competition provision at issue does not curtail Lucas's legitimate efforts to earn a livelihood within his chosen line of work, and the trial court's ruling on this issue should be reversed.

B. The Trial Court Incorrectly Concluded That It Is Undisputed By Team IA That Lucas Only Performed Work For Customers In Georgia And Pennsylvania, As The Evidence Demonstrates That Lucas Worked On A Nationwide Basis.

Through the Affidavit of Mr. Yarborough, Team IA demonstrated that it both allowed and expected Lucas to solicit new business for Team IA on a nationwide scale throughout his employment. (R. p. 25, ¶ 24; R. p. 167, ¶ 9.) To this end, Team IA paid for Lucas to travel around the country to visit customers and prospects, attend tradeshow, and sell Team IA's products and services. (R. p. 25, ¶ 24; R. p. 167, ¶ 9; R.

pp. 188–90.) Lucas's nationwide sales activity on behalf of Team IA is evidenced by a sample of Lucas's expense reports, a summary of which Team IA provided to the trial court as an Attachment to Mr. Yarborough's Affidavit. (R. pp. 188–90.)

Furthermore, Team IA presented evidence through the Supplemental Affidavit of Mr. Yarborough identifying specific Team IA customers and prospects with which Lucas worked in South Carolina, North Carolina, Georgia, and Alabama. (R. pp. 327–28.) Thus, the trial court's determination that "it is undisputed by Team IA that Lucas only performed work for customers in Georgia and Pennsylvania" misstates the evidence that was before the court—particularly when viewed in a light most favorable to Team IA. The trial court's ruling that the non-competition provision at issue is unenforceable on the basis of this erroneous determination must therefore be reversed.

Team IA's position with respect to the reasonableness of the non-competition provision at issue can be summarized as follows: The primary geographic restriction contained in the covenant—a nationwide restriction—is reasonably limited in that the same is directly related to Lucas's activities at Team IA and only limits Lucas's activities "in the area in which [Lucas] worked or to which he was assigned at any time during his employment." *Rental Uniform*, 278 S.C. at 676, 301 S.E.2d at 143 (internal quotation marks omitted). As such, "[t]he area limitation of the agreement falls within the guidelines of the *Standard Register* case" and must be enforced, particularly at this early stage of the litigation. *Id.*

Therefore, Team IA requests that this Court reverse the Order and allow Team IA's claim for breach of the non-competition provision at issue to proceed through discovery, as the evidence demonstrated that Lucas performed work on a nationwide

basis and directly contradicted the Order's conclusion that Lucas performed work for only customers in Georgia and Pennsylvania.

V. EVEN ASSUMING THE NATIONWIDE GEOGRAPHIC RESTRICTION IN THE NON-COMPETITION PROVISION AT ISSUE IS UNREASONABLE, THE TRIAL COURT INCORRECTLY FAILED TO LIMIT THE PROVISION IN ACCORDANCE WITH THE BARGAINED-FOR ALTERNATIVE GEOGRAPHIC RESTRICTION OR SOME SMALLER PORTION THEREOF.

The South Carolina Supreme Court has recently addressed the issue of territorial restrictions in non-competition agreements. See *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, Op. No. 26821 (S.C. Sup. Ct. filed May 24, 2010) (Shearouse Adv. Sh. No. 20 at 11). The non-competition agreement at issue in *Poynter Investments* contained a primary geographic restriction—a seventy-five mile radius surrounding the former employer's facility—and two alternative geographic restrictions—(1) Greenville County and all bordering counties; and (2) Greenville County. *Id.* The trial court held that the agreement was unenforceable within the geographic territories set forth by the parties, but enforced the agreement within a fifteen mile radius surrounding the former employer's facility. *Id.* In other words, the trial court chose to create a fourth geographic restriction rather than enforcing the agreement within any of the three alternatives set forth in the agreement. *Id.*

The issue before the Supreme Court in *Poynter Investments* was whether the "trial court erred in 'blue penciling' [a non-competition agreement] by replacing the unreasonable territorial restriction in the agreement with one of its own." *Id.* The Supreme Court noted that existing precedent makes clear that "the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties agreement, but must stand or fall on their own terms." *Id.* Accordingly, the Court held "that the trial

judge erred in rewriting the territorial restriction in the parties' contract. . . . [and] reverse[d] the [trial court's] order which purports to enforce a non-competition agreement on terms other than those agreed upon by the parties." *Id.*

Team IA is not requesting that this Court rewrite the territorial restriction in the non-competition provision at issue—and did not request that the trial court engage in such action. Team IA is simply seeking judicial enforcement of the non-competition provision at issue in accordance with the terms set forth in the Agreement. All relief that Team IA is seeking herein is found in the four corners of the Agreement. Such enforcement is entirely consistent with the Supreme Court's recent decision, which made clear that "the restrictions in a non-compete clause . . . must stand or fall on their own terms." *Id.*

A. Team IA Set Forth Sufficient Evidence To Require The Trial Court To Enforce The Non-Competition Provision At Issue Within The Alternative Geographic Restriction.

Even assuming, for argument, that the broader geographic restriction contained in the non-competition provision at issue is not reasonable, Team IA and Lucas expressed their intention in Paragraph V.B.1. of the Agreement that the "Restricted Territory" shall instead "be defined as the states of South Carolina, North Carolina, Georgia, and Alabama." (R. pp. 57–58.) This internal revision is something that Team IA and Lucas—after both parties first considered and negotiated the Agreement (R. pp. 184–86)—voluntarily decided to include in the non-competition provision at issue.

Because the parties expressly agreed to this alternative geographic restriction as a term of the non-competition provision at issue, the trial court was required to enforce the provision to this extent if it found the nationwide restriction to be unreasonable. *See Poynter Invs., Op. No. 26821 (S.C. Sup. Ct. filed May 24, 2010) (Shearouse Adv. Sh.*

No. 20 at 11) (“[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall *on their own terms*.” (emphasis added)). The enforcement of the non-competition provision at issue within the alternative geographic restriction did not require the trial court to rewrite the provision or require the parties to agree to any after-the-fact limitation of the provision—the alternative geographic restriction was a key term within the original Agreement and must be recognized accordingly.

A review of a sample of Lucas’s sales activities—based on expense reports that Lucas submitted to Team IA for reimbursement—shows direct activities in each of the states listed in the alternative geographic restriction. (R. p. 167, ¶ 9; R. pp. 188–90.) The Supplemental Affidavit of Mr. Yarborough lists numerous customers and prospects within each of the states listed in the alternative geographic restriction with which Lucas worked. (R. pp. 327–28.) Thus, there can be no doubt that the alternative geographic restriction is limited to areas in which Lucas was “able, during the term of his employment, to establish contact with [Team IA’s] customers.” *Rental Uniform*, 278 S.C. at 676, 301 S.E.2d at 143 (citing *Standard Register*, 238 S.C. 54, 119 S.E.2d 533). Accordingly, the evidence before the trial court at the time of Lucas’s motion—particularly when viewed in a light most favorable to Team IA—required the court to enforce the non-competition provision at issue at least to the extent of the alternative geographic restriction set forth therein.

B. The Agreement's Severability Clause And The Independent Nature of The States Set Forth In The Alternative Geographic Restriction Required The Trial Court To Enforce The Non-Competition Provision At Issue Within Any One Or More Of The States Set Forth In The Alternative Geographic Restriction That The Trial Court Deemed Reasonable.

Considering the language of the Severability clause in conjunction with established case law (as well as the trial court's own holding in *Ascension Hospice, Inc. v. Sikes*, No. 2006-CP-32-4055, slip op. (Ct. Com. Pl., Lexington County, S.C., Apr. 10, 2008), R. pp. 113-19), the trial court was required to eliminate any provision of the non-competition provision at issue, or portion thereof, that the trial court deemed necessary in order to render the provision reasonable. See *Rockford Mfg.*, 296 F. Supp. 2d at 687 ("Both [*Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972), and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958),] can be reasonably read to conclude that although an *indivisible* covenant may not be enforced even to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions." (emphasis in original)); *Ascension Hospice*, No. 2006-CP-32-4055, slip op. at 6 ("Two hurdles must be overcome before a court can sever provisions from an agreement that is otherwise unenforceable. First, the agreement must have independent clauses which can be severed and, second, it must be apparent from the agreement itself that the parties intended the agreement to be severable." (citing *Rockford Mfg.*, 296 F. Supp. 2d 681)), R. p. 118; see also *Poynter Invs., Inc.*, Op. No. 26821 (S.C. Sup. Ct. filed May 24, 2010) (Shearouse Adv. Sh. No. 20 at 11) ("[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."); *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 161, 621 S.E.2d 352, 354 (2005)

(noting that South Carolina law disallows reformation of contracts where the court would be required to add “a term not negotiated and agreed upon by the parties”).

For example, if the trial court determined that the non-competition provision at issue would be reasonable if the geographic restriction was limited to South Carolina, North Carolina, Georgia, Alabama, or any combination these states, the Severability clause, coupled with the independent nature of the states listed in the alternative geographic restriction, required the Court to so limit the provision. *Ascension Hospice*, No. 2006-CP-32-4055, slip op. at 6 (“[A] court can sever provisions from an agreement that is otherwise unenforceable [where] the agreement [has] independent clauses which can be severed and . . . it [is] apparent from the agreement itself that the parties intended the agreement to be severable.” (citing *Rockford Mfg.*, 296 F. Supp. 2d 681)), R. p. 118. This type of action would be analogous to Judge Duffy’s ruling in *Rockford Manufacturing* that a court could easily sever one or more of the “Affiliated Companies” from the agreement at issue “without disrupting the integrity, continuity, or intent of the remaining provisions.”¹ See 296 F. Supp. 2d at 686–89.

Like the list of “Affiliated Companies” in *Rockford Manufacturing* that Judge Duffy determined to be severable, the states listed in the alternative geographic restriction

¹ The agreement at issue in *Rockford Manufacturing* precluded the former employee therein from soliciting “employees, customers, and dealers of [the former employer] or any ‘Affiliated Company.’” *Rockford Mfg.*, 296 F. Supp. 2d at 686, n.1. The agreement went on to define “Affiliated Company” and listed ten distinct entities that were currently included in the definition. *Id.* Because the parties chose to list the Affiliated Companies individually, Judge Duffy held that each Affiliated Company was an independent covenant because the parties had “manifested an intention regarding each company individually, by choosing to list them by name. Such an expression makes it possible, logistically, to extricate those companies, without a legitimate interest, from the more global intent concerning all ‘Affiliated Companies,’ while leaving intact the covenant as to those companies which do have a legitimate interest, knowing with full confidence that the intention of the parties has been expressed and preserved in the remainder of the abridged covenant.” *Id.* at 688.

in the Agreement at issue here are listed individually, rendering each state an independent covenant for the purposes of severability. *See id.* This type of covenant is easily distinguishable from those that courts have found to be improper for severance, which tend to contain geographic restrictions such as "within a 100-mile radius." *See, e.g., Kistler*, 258 S.C. at 432-34, 189 S.E.2d at 23-24. A court is unable to strike through the phrase "100-mile radius" and write in an alternative geographic restriction, as doing so would result in the court creating a new agreement for the parties. *See Rockford Mfg.*, 296 F. Supp. 2d at 688 ("This conclusion is necessarily predicated on the indivisible quality of the '100 mile radius' restriction. There is no smaller unit of space which the supreme court might have identified as representing an expression of the intent of the parties. The choice was either between a 100-mile radius or none at all.") Conversely, the trial court was certainly able to strike through one or more of the states listed in the alternative geographic restriction while still preserving the express agreement of the parties. Therefore, in accordance with established case law as well as the trial court's prior holding in *Ascension Hospice*, the trial court was required to enforce the non-competition provision at issue to the greatest extent it deemed reasonable within one or more of the states listed in the alternative geographic restriction. The Order should be reversed accordingly.

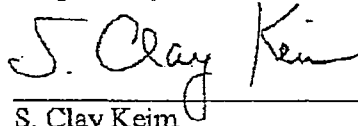
CONCLUSION

The trial court erred in granting summary judgment to Lucas on the non-competition provision and the non-solicitation provision at issue for each of the following reasons: (1) the trial court misapplied the summary judgment standard and prematurely granted summary judgment; (2) the trial court improperly applied Georgia law to analyze

the validity of the non-solicitation provision at issue; (3) the trial court erred in concluding that the non-solicitation provision at issue is an unreasonable restraint on trade and violates public policy; (4) The trial court incorrectly concluded that the non-competition provision at issue violates public policy and is overbroad geographically, as Lucas has not presented any evidence that the provision would improperly curtail his efforts to earn a livelihood, and the evidence shows that Lucas worked on a nationwide basis; and (5) the trial court erred in its failure to limit the non-competition provision at issue in accordance with the bargained-for alternative geographic restriction or some smaller portion thereof. Accordingly, Team 1A respectfully requests that this Court reverse the Order of the trial court and allow the claims at issue to proceed at this stage of the litigation.

September 14, 2010

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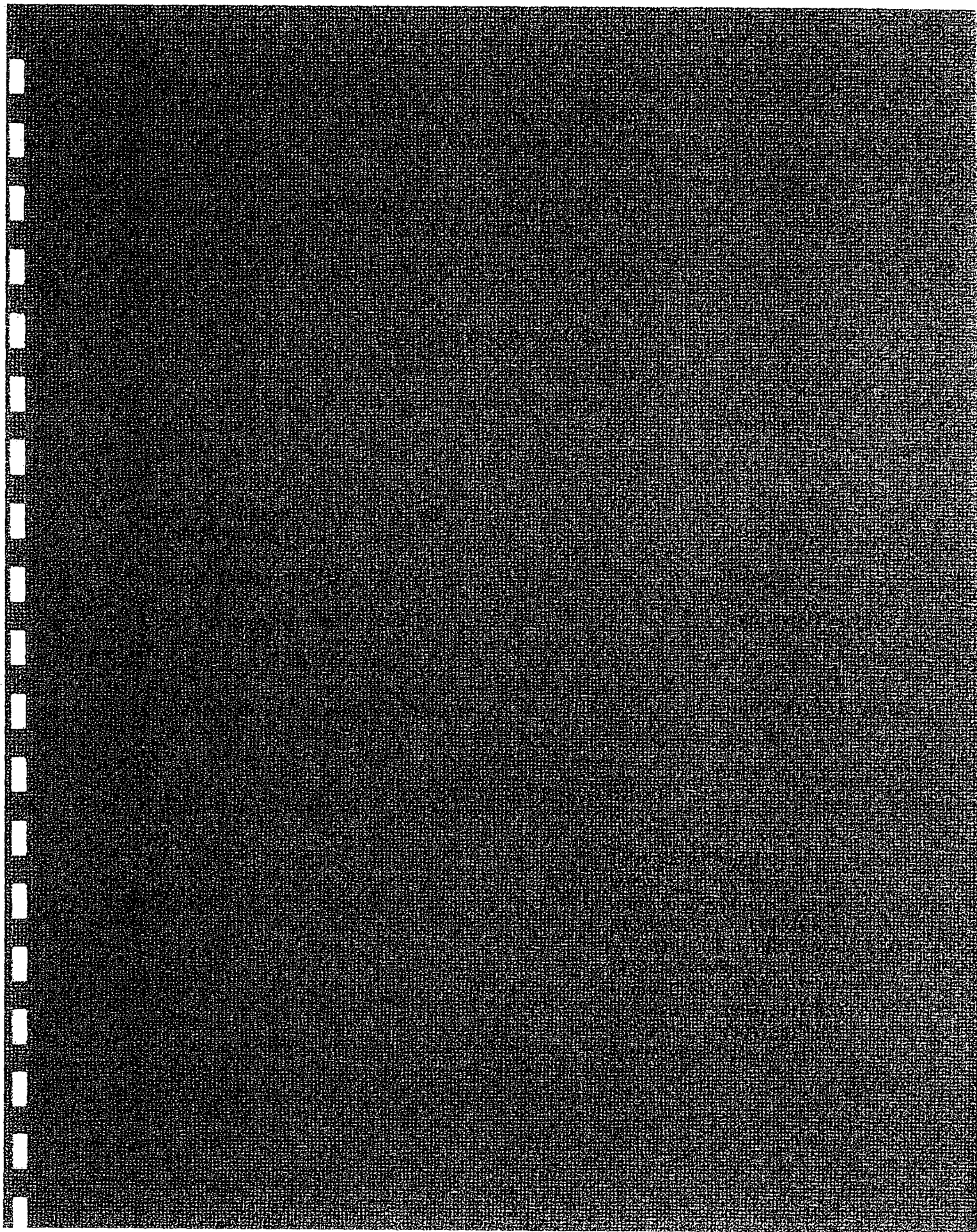


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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT WAS CORRECT TO HOLD THE PLAINTIFF TO RULE 56, SCRPC'S BURDEN TO "SET FORTH SPECIFIC FACTS SHOWING THAT THERE IS A GENUINE ISSUE FOR TRIAL?"

II. WHETHER THE TRIAL COURT WAS CORRECT TO LOOK TO GEORGIA LAW TO DETERMINE IF THE NON-SOLICITATION PROVISION WAS ENFORCEABLE WHERE PERFORMANCE OF THE NON-SOLICITATION CLAUSE WOULD OCCUR IN GEORGIA?

III. WHETHER THE TRIAL COURT WAS CORRECT TO CONCLUDE THE NON-SOLICITATION PROVISION WAS AN UNREASONABLE RESTRAINT ON TRADE AND VIOLATED PUBLIC POLICY?

IV. WHETHER THE TRIAL COURT WAS CORRECT IN REFUSING TO "BLUE PENCIL THE EMPLOYMENT AGREEMENT?"

STATEMENT OF THE CASE

On March 17, 2009, the Plaintiff, Team IA, brought suit against Cicero Lucas, George Lawson, and 5 Point Solutions, LLC asserting 12 separate causes of action. In its complaint, Team IA's First Cause of Action asserts "Breach of Contract" alleging, among other allegations, the breach of an Employment Agreement by Lucas with respect to non-solicitation and non-compete provisions. Lucas and Lawson answered and counterclaimed asserting causes of action for constructive termination, fraud, misrepresentation, violation of the S.C. Payment of Wages Act, promissory estoppel, quantum meruit, and unjust enrichment. On March 26, 2009, Plaintiff filed a Motion to Expedite Discovery. Lucas and Lawson did not oppose this Motion.

On August 27, 2009, Lucas filed for partial summary judgment on Team IA's First Cause of Action with respect to only the covenant not to compete portions. On September 21, 2009, a hearing on the motion was held with argument presented

by both sides. On October 6, 2009, Lucas filed a Motion to Strike After Hearing Affidavit. On November 19, 2009, this Court granted Lucas' motion for partial summary judgment only with respect to the covenant not to compete portions of the breach of contract cause of action (hereinafter "the Order"). On December 3, 2009, Team IA filed for a Motion to Alter or Amend pursuant to Rule 59(e), SCRCp. On January 20, 2010, the trial court denied Team IA's Motion to Alter or Amend. Plaintiff then appealed with its remaining 11 causes of action and portions of the first "Breach of Contract" cause of action untouched.

STATEMENT OF FACTS

In 2001, Team IA induced Cicero Lucas to leave his employment with Palmetto Health to join the corporation. (R.p.75 at ¶ 185). Lucas agreed to join Team IA and receive a salary \$14,000.00 less than he received at Palmetto Health in exchange for stock in Team IA. (*Id.* at ¶ 186). Upon joining Team IA in 2001, Yarborough assigned Lucas the task of drafting a Stock Option Plan for Team IA so that the company could meet its stock obligations to Lucas, Lawson, and other employees of Team IA. (R.p. 76 at ¶ 187). In 2001, Lucas presented to Yarborough and Team IA a Stock Option Plan that would fulfill the company's obligations to Lucas and Lawson. (*Id.* at ¶ 188). Throughout Lucas' employment at Team IA, Yarborough made repeated representations and promises that Lucas was going to receive Team IA stock in return for his work for the company. (*Id.* at ¶ 189). No stock option plan was ever implemented.

Throughout Lucas' employment at Team IA, Yarborough promised significant financial bonuses would be paid to Lucas in addition to his salary and the

company stock that he was supposed to receive. (*Id.* at ¶ 190). In March 2008, Yarborough represented to Lucas that Lucas would have an income for that year between \$400,000 and \$500,000. (*Id.* at ¶ 191). Mr. Lucas was paid \$145,237 in 2008. (*Id.*) As of February 2009, Yarborough and Team IA had failed to meet their obligations with regard to issuing stock and paying bonuses to both Lucas and Lawson. (*Id.* at ¶ 193).

In February 2009, Lucas and Lawson both resigned from Team IA. (R.p. 77 at ¶ 196). The resignation by Lucas and Lawson was the result of unendurable working conditions which had become so intolerable that a reasonable person in their position would have felt compelled to resign. (*Id.* at ¶ 197). In addition to the actions set forth above, Yarborough and Team IA sought to have Lucas and Lawson engage in violations of S.C. Code Ann. § 8-13-705. (*Id.* at ¶ 197(a)). Additionally, for years Yarborough and Team IA failed to pay required royalties and license fees for several third party vendors, including Microsoft, Kodak, and LeadTools that Lawson and Lucas used to service their customers. (R.p.78 at ¶ 197(b)). As a result of Yarborough's refusal to pay the required fees and licenses, the customers Lucas and Lawson serviced were also in violation of Federal Piracy laws. (*Id.*)

ARGUMENT

Standard of Review

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law.” Rule 56(c), SCRPC. “An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC.” *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009).

“In order to resist a motion for summary judgment, the nonmoving party must come forward with *specific facts* showing genuine issues necessitating trial.” *Nationsbank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (emphasis added). It is true that genuine disputes of material fact preclude the granting of summary judgment. However, construing the provisions of a contract is a question of law for the court. See *South Carolina Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622-31, 550 S.E.2d 299, 302-03 (2001); *Pearson v. Church of God*, 325 S.C. 45, 53-4, 478 S.E.2d 849, 853 (1996). In this case, the trial court viewed the contract through the lens of South Carolina’s standard for non-competition agreements and made a determination on whether the covenant at issue was enforceable. Nothing about this analysis was out of the ordinary or improper.

Introduction

Historically, all covenants not to compete in employment agreements were void as repugnant to public policy. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 59-60, 119 S.E.2d 533, 536 (1961). Courts simply refused to prevent individuals in a free market from pursuing employment to support themselves and their families. Likewise, such restrictions can deprive the purchasing public their first choice for goods or services. Over time, corporate interests have prevailed in having some such contracts enforced, but courts still require the restrictions to be limited in nature. In

fact, covenants not to compete are still strongly disfavored and will always be strictly construed against the employer seeking to prevent former employees from working. *See Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

In this case, precedent requires that any doubts about the scope or enforceability of Team IA's Non-Solicitation Covenant must be resolved against Team IA. *Id.* Moreover, because Team IA drafted the Non-Solicitation Covenant, any deficiencies or ambiguities in the Agreement must be construed against it. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981).

It is well established that a restrictive covenant that fails to satisfy all of the following criteria will be invalid:

1. It must be necessary for the protection of the legitimate interest of the employer;
2. It must be reasonably limited in its operation with respect to time and place;
3. It must not be unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
4. It must be reasonable from the standpoint of sound public policy; and
5. It must be supported by valuable consideration.

Dudley, 278 S.C. at 675-76, 301 S.E.2d at 143.

The covenants in this matter fail because the geographic restrictions are far too broad to protect any legitimate business interest of Team IA. It has long been the law of South Carolina that:

A geographic restriction is generally reasonable "if the area covered by the restraint is limited to the territory in which the employee was

able, during the term of his employment, to establish contact with his employer's customers."

Standard Register Co., 238 S.C. at 66, 119 S.E.2d at 539 (emphasis added). As the court went on to explain:

"[T]he most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers."

Id. (emphasis added). As shown below, Lucas prevailed in his summary judgment motion because Team IA failed to carry its burden of showing a single Team IA customer serviced by Lucas in all but one of the states covered by either the nationwide restriction or the four state fall-back provision. Additionally, a covenant barring Lucas from accepting unsolicited work from former Team IA customers does not protect a legitimate interest of Team IA and is against public policy.

I. THE COURT PROPERLY APPLIED THE STANDARD OF SUMMARY JUDGMENT

A. Team IA Failed to Identify Actual Customers in the States Necessary to Justify The Geographical Restriction

For a geographical restriction in a covenant not to compete to be enforceable, it must protect a legitimate interest of the employer. *See Dudley*, 278 S.C. at 675, 301 S.E.2d at 143. An employer only has a legitimate business interest in protecting a geographical area in which the employee he is trying to restrict has interacted with actual customers of the employer. *See Standard Register Co.*, 238 S.C. at 66, 119 S.E.2d at 539. In the present case, the employment agreement had a

nationwide ban with a "fall-back" provision that should the nationwide ban be ruled unreasonable by a court, a four state ban would be in place.

To prevail in enforcement of the geographical restriction, Team IA had to first establish Lucas interacted with actual Team IA customers nationwide. If Team IA could not do so, the corporation had to establish Lucas interacted with actual Team IA customers in the four states of the fall-back provision. If Team IA did not establish Lucas interacted with actual customers in each of the four fall-back states, the geographical restrictions are too broad to protect any legitimate interest of Team IA and the entire restrictive covenant fails.

To avoid summary judgment, a litigant "must set forth specific facts showing that there is a genuine issue for trial." See Rule 56(e), SCRPC. Team IA was required to come forth with *any* evidence that Lucas serviced actual customers of Team IA either nationwide or in all four of the fall-back states. Taken in a light most favorable to Team IA, the affidavits submitted to the trial court did not contain such evidence. The trial court properly applied Rule 56, SCRPC, in ruling the geographical restriction unreasonable because Team IA failed to set forth any "specific facts" making the issue debatable.

Two affidavits were before the trial court at the hearing on Lucas' motion for partial summary judgment. In the Lucas affidavit, he stated that he only performed work for Team IA customers in Georgia and Pennsylvania. (R.p. 112 at ¶ 3). Lucas denied performing work for Team IA customers in Alabama, South Carolina, or North Carolina. (*Id.* at ¶ 4). In Yarborough's affidavit before the court at the hearing, he stated that while Team IA had nationwide "marketing" activities, he

only identified two actual customers of Team IA that Lucas interacted with so as to have a relationship. (R.p. 168 at ¶ 12 and 13). Both customers Yarborough identified were in Georgia and governmental entities.

Yarborough only identified actual customers in Georgia serviced by Lucas while Lucas identified Georgia and Pennsylvania. The two affidavits, taken in a light most favorable to Team IA, would establish actual customers of Team IA whom Lucas interacted with in Georgia and Pennsylvania. Under South Carolina precedent, any covenant not to compete could at most be limited geographically to Georgia and Pennsylvania.¹ The covenant not to compete at issue impermissibly sought a nationwide ban. (R.p. 108). The covenant's fall-back provision covered South Carolina, North Carolina, Georgia, and Alabama which includes three states where no evidence was put forth that Lucas serviced any actual Team IA customers. (R.p. 108). Lucas did not dispute Team IA's assertions that it made attempts at nationwide marketing activities, but the existence of such marketing activities such as having a company website or sending Lucas to trade shows are irrelevant to the enforceability of a nationwide ban.

The challenged covenant set forth a nationwide geographical restriction with a four state fall-back provision limiting the geographic territory to South Carolina, North Carolina, Alabama, and Georgia. (R.p. 108). Since the affidavits were harmonious with respect to where Lucas actually had contact with and serviced actual Team IA's customers, the trial court properly found that both the nationwide

¹ In fact, such a covenant would need to be further limited to the areas inside those states in which Lucas had actual Team IA customer contact.

and four state fall-back restrictions were geographically far too broad to support any legitimate business interest of Team IA.

B. The Untimely Affidavit Still Failed to Set Forth Specific Facts Preventing Summary Judgment

Two weeks after the hearing on the merits of this motion, Team IA sought to supplement its response with a second affidavit from Team IA's owner Brent Yarborough. (R.p. 327). On October 6, 2009 Lucas filed a Motion to Strike after Hearing Affidavit, because the affidavit was untimely and should not have been considered. (R.p. 329). The Court had the authority to dismiss the affidavit entirely as untimely. *See Jernigan v. King*, 312 S.C. 331, 334 n.1, 440 S.E.2d 379, 381 n.1 (Ct. App. 1993).² However, by the time this appeal deprived the trial court of jurisdiction, an order had not been entered on Lucas's motion to strike. The untimely affidavit does not impact the outcome of the motion because in addition to being untimely the affidavit failed to create a genuine issue of material fact that would have justified denying partial summary judgment.

² *See also McQuaig v. Brown*, 270 S.C. 512, 242 S.E.2d 688 (1978) (finding that where affidavit opposing summary judgment was not timely served and not considered by trial court, appellate court could not properly consider matter contained in affidavit); *Slaughter v. Southern Talc Co.*, 919 F.2d 304 (5th Cir. 1990) (tactical decision not to introduce affidavits at summary judgment motion did not constitute excusable neglect justifying late filing of affidavits); *Settecasti v. Board of Pub. Instruction of Pinellas County*, 156 So. 2d 652 (Fla. Ct. App. 1963) (where affidavits were not timely filed, they were properly excluded from consideration at summary judgment motion); *Hershiser v. Yorkshire Condominium Ass'n*, 201 Ga. App. 185, 410 S.E.2d 455 (1991) (finding party was not entitled to have affidavits considered in summary judgment motion where they were not timely filed and party made no showing of excusable neglect); *Bonnette v. Century Ready-Mix Corp.*, 369 So.2d 1201 (La. Ct. App. 1979) (court did not err in failing to consider party's affidavits where affidavits were not timely served), *writ denied*, 373 So. 2d 525 (La. 1979); *Chaplain v. Chaplain*, 101 N.C. App. 557, 400 S.E.2d 121 (N.C. Ct. App. 1991) (no error in refusing to consider untimely affidavits where no showing of excusable neglect), *rev. denied*, 328 N.C. 570, 403 S.E.2d 508 (1991).

At the September 21, 2009 hearing on the merits of this motion, Team IA failed to demonstrate an issue of fact about where Lucas serviced actual Team IA customers. As set forth above, both affidavits before the Court were harmonious that Lucas did not actually service Team IA customers nationwide and that Georgia was the only state covered by the four state fall-back provision in which Lucas serviced actual Team IA customers. Since the only evidence before the Court was that Lucas did not service Team IA customers in three of the four fall-back states, the only conclusion reachable was that the geographical restriction is overbroad and the covenant had to be struck down because without actual customers the restriction would not protect a legitimate interest of Team IA.

Even when Team IA attempted a "second bite at the apple" with the untimely affidavit, Team IA failed to establish that Lucas was servicing any actual Team IA customer in any state beyond Georgia when his relationship with Team IA ended. The supplemental affidavit:

1. Fails to state whether the identified entities were ever actual customers of Team IA or merely "prospective" customers with whom Team IA would not have a protectable relationship;
2. Fails to state whether the identified entities were current or former customers with whom Team IA no longer has a protectable relationship;
3. Fails to state the service, if any, actually performed by Lucas for the entity that would establish Lucas had any actual contact with the entity that could justify upholding a ban on his being hired by them.

With the exception of the two Georgia governmental entities listed in the original Yarborough affidavit, every single named entity in the untimely affidavit is identified as a "customer and/or prospective customer" or "customer/prospective

customer.” (R.pp. 327-328). As a result, with the exception of the two Georgia entities, this Court cannot point to a single entity listed in the untimely affidavit and say that Team IA is testifying that entity was an actual customer of Team IA. For example, looking at both Yarborough affidavits, can the Court say that Team IA is representing to the trial court that there is a single current customer of Team IA that Lucas ever even met in the state of Alabama? The answer is no.

The untimely affidavit also fails to state whether the entities listed were current customers or former customers with whom Team IA no longer had any legally protectable relationship. (R.pp. 327-328). This omitted fact is extremely significant since a covenant not to compete cannot prohibit the solicitation or acceptance of business from an employer’s former clients with whom the employer no longer has a working relationship. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, C/A No. 3:07-3836-JFA, 2009 U.S. Dist. LEXIS 16303, at 14-15 (D.S.C. March 2, 2009). In *Fournil*, District Judge Joe Anderson stated: “Soliciting business from former clients of [employer] is not unfair or improper; [Employer] has no relationship with these customers whatsoever.” *Id.*

The untimely affidavit fails to set forth the status of the relationship between Team IA and the listed entities as either current or terminated. Likewise, the untimely affidavit describes Lucas’ relationship with the customer as “involved in some facet of sales” to the “customer/prospective customer.” (R.pp. 327-328). Team IA failed to provide any information describing what the alleged “facet” might involve. For instance, based on the statements in the vague Yarborough affidavit, this

Court cannot say that Lucas *ever even met* a "customer/prospective customer" or had any interaction that could arguably support a covenant not to compete.

It has been stated that summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a party must show what evidence it has that would convince the trier of fact to accept its version of events." *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005). Team IA, as the employer and business entity, would have all the evidence necessary to establish where the corporation had actual customers with whom Lucas interacted. While no discovery *from* Lucas (as the departed former employee) that is not part of the business records of Team IA would shed light on this issue, obviously Team IA would readily have available all such information if it existed. Team IA offered no such evidence to the trial court.

Team IA's assertion that the affidavits of Yarborough and Lucas contradict each other is simply not accurate. A straightforward reading of the Yarborough affidavits reveals that except for the two Georgia governmental entities, the affidavits do not identify a single actual customer of Team IA that Lucas had a relationship with justifying a nationwide ban on working. The trial court properly applied this standard in holding that Team IA failed to provide specific facts showing the geographical restriction was defensible.

Additional discovery would not aid Team IA on this issue. From the beginning Team IA would have in its possession all evidence related to where the corporation had customers and what services it provided and who at Team IA provided them. As discussed below, Lucas asked for this very information in

discovery to show Team IA does not have the customers necessary to support the ban. Team IA failed to answer the discovery. Lucas filed for summary judgment to force Team IA to come forth with whatever evidence it had to support the geographical restriction. Team IA failed to present any such evidence to the trial court during the summary judgment proceedings. The reason Team IA has not, and cannot, produce this evidence is obvious: it simply does not exist.

C. Team IA's Discovery Responses Support the Trial Court's Grant of Summary Judgment

Like the late, intentionally vague affidavit, Team IA's discovery responses reveal it does not possess any evidence to support the overly broad geographical restrictions. See R.p. 395 Third-Party Defendant's Responses to Third Party Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Third Party Defendants. Team IA failed to provide any answers or evidence to the following discovery requests:

-For the states Team IA contends are covered by the non-compete provision, Team IA refused to provide:

1. The customers of Team IA located in that state;
2. The service provided by Team IA to those customers;
3. The dates the customer was a customer if no longer a customer of Team IA.

See R.p. 400, Response to Request No. 9.

-For entities Team IA contends are covered by the non-compete provision, Team IA refused to provide:

1. The product or service Team IA provided to the customer;
2. The dates for which those products or services were provided;
3. The amount of money paid to Team IA for each product or service;

See R.pp. 398-399, Response to Request No. 6.

-For the services Team IA contends are covered by the non-compete, Team IA refused provide:

1. Each customer Team IA has provided that service in the past 10 years.

See R.pp. 399-400, Response to Request No. 8.

Team IA has failed to provide the information necessary to support the ban both to Lucas in discovery and to the Court at the summary judgment hearing.

Having provided no evidence of actual customers, the trial judge properly concluded that Team IA did not have the necessary customer relations through Lucas that would support the geographical restrictions in the covenant not to compete. Rule 56(e), SCRCP sets forth:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP (emphasis added). The vague and ambiguous language of the untimely affidavit wholly fails to "*set forth specific facts* showing that there is a genuine issue for trial" as required by our rules. Rule 56(e), SCRCP (emphasis

added). The trial court did not ignore the materials presented to it; Team IA simply failed to respond with the "specific facts" necessary to defeat summary judgment.³

D. The Trial Court Also Properly Found The Covenant Was Unduly Harsh On Lucas's Ability to Earn A Living

The non-competition clause at issue here, if enforced, would prevent Lucas from using any of the general skills and knowledge he acquired at Team IA under a nationwide ban.

The right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right. Our society is extremely mobile and our free economy is based upon competition. One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience. These skills are valuable to such employee in the market place for his services. Restraints cannot be lightly placed upon his right to compete in the area of his greatest worth.

Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 294-295, 471 S.E.2d 721, 724 (Ct. App. 1996) (declining to enforce a covenant) (emphasis added). If the covenant drafted by Team IA is enforced as written, Lucas would not be able to perform the type of work he has been doing for the past decade anywhere in America. Such a ban would be unduly harsh and not protect any legitimate interest of Team IA who failed to provide evidence of actual customers in all 48 contiguous states. See *Almers v. South Carolina Nat'l Bank of Charleston*, 265 S.C. 48, 59, 217 S.E.2d 135, 140 (1975) ("[An employer] cannot lawfully prohibit employment by competition as a 'legitimate commercial interest' in itself.").

³South Carolina courts will strike the entire non-compete clause where just one part is found unenforceable. See *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 707, 709 (Ct. App. 1995) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972)).

II. GEORGIA LAW CONTROLS THE INTERPRETATION OF THE PERFORMANCE OF THE NON-SOLICITATION PROVISION WITH RESPECT TO GEORGIA ENTITIES SOLICITING WORK TO BE PERFORMED IN GEORGIA

In disputes involving contractual formation and interpretation, South Carolina courts generally apply the substantive law of the place of contract formation. *See Witt v. Am. Trucking Ass'n, Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994) (internal citations omitted). However, “[m]atters connected with its performance are regulated by the law prevailing at the place of performance.” *See Livingston v. Atlantic Coast Line R.R. Co.*, 176 S.C. 385, 392, 180 S.E. 343, 345 (1935) (quoting *Scudder v. Union Nat’l Bank*, 91 U.S. 406, 412 (1875)). Team IA does not dispute that under Georgia law a non-solicitation provision that precludes accepting unsolicited business is absolutely void as against public policy. *See, e.g., Waldeck v. Curtis*, 261 Ga. App. 590, 592, 583 S.E.2d 266, 268 (Ga. Ct. App. 2003); *Pregler v. C&Z, Inc.*, 259 Ga. App. 149, 150, 575 S.E.2d 915, 916 (Ga. Ct. App. 2003). Because Team IA challenged Lucas’ *performance* of this non-solicitation provision in Georgia with respect to Georgia entities, the law of Georgia applies.

Lucas has never disputed that the employment agreement contains a “choice of law” provision requiring the application of South Carolina law. It is that very provision that requires the court to look to Georgia law to govern the performance, in Georgia, of the non-competition clause with respect to solicitation, by Georgia entities, of work to be performed in Georgia. (R.p. 111 at ¶ E). Team IA’s request that this Court reverse the case and “mandate that the trial court apply South Carolina law” would not change the result because it is the very application of South Carolina

law that instructs the court to look to the place of performance of the non-solicitation clause to test its enforceability.

It has long been the standard practice of courts to review the law of the state where the covenant not to compete is to be performed even when the contract includes a choice of law provision specifying a different state. *See, e.g., Standard Register Co.*, 238 S.C. at 70, 119 S.E.2d at 542. In the seminal *Standard Register* case, the employment contract contained the following provision:

(d) This agreement shall be considered an Ohio contract and construed according to the laws of Ohio.

Id. at 59, 119 S.E.2d at 535. After taking note of this language, the South Carolina Supreme Court held: “The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.” *Id.* at 70, 119 S.E.2d at 541-42 (emphasis added). The Supreme Court’s approach in *Standard Register* is consistent with the principle of Restatement (Second) of Conflicts § 187(2)(b) (1971) that under contemporary choice-of-law doctrine, parties cannot by contract override public policy limitations on contractual power applicable in a state with materially greater interests in the transaction than the state whose law is specified in the contract.

As Team IA has made clear in its Brief and argument to the trial court, the reason for the corporation’s suit against Lucas is his performance under the non-solicitation provision involving two governmental entities in Georgia. Team IA’s former customers in Georgia are neither party to, nor could they be contractually bound by, any agreement between Team IA and Lucas. Should Team IA’s customers

in Georgia choose to leave Team IA, they have every right to do so and Team IA cannot enjoin them. Team IA seeks to have a South Carolina court effectively enjoin these Georgia governmental entities from seeking to hire Lucas to perform work for them in Georgia even if Lucas has not sought them out.

Lucas argued, and the trial court agreed, that the law of the state where the former customers would be soliciting Lucas to perform the work would govern the analysis of whether the non-solicitation provision should be enforceable with respect to those entities. Team IA argues that the state where the covenant was entered into and specified by a choice of law provision (in this case South Carolina) should govern the enforceability of the provision. Team IA's position is opposite of the holding of *Standard Register Co.*, 238 S.C. at 70, 119 S.E.2d at 541-42 (applying law of the state of performance to a covenant subject to a choice of law provision specifying another state formed in another state). The trial court, following well established precedent, found that the state where the work would be performed if the former employee accepted an unsolicited offer should control as that state would have materially greater interests in a transaction occurring within its borders. (R.p. 13).

Even if Georgia law is not applied to review the non-solicitation clause with respect to Georgia entities, the provision should be struck down because South Carolina should adopt the majority rule that bans on accepting unsolicited work are simply unenforceable. Team IA correctly notes that several South Carolina cases have upheld covenants that contain somewhat similar "non-acceptance" of business language. *See, e.g., Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217 (Ct. App. 1992); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681

(D.S.C. 2003). However, in those cases the former employee was not actually challenging the "non-acceptance" language and the issue of a former employee accepting unsolicited work from former customers was not before the courts. "As Chief Judge Alex Sanders so aptly stated, 'Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'" *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). Should the Court choose to evaluate the performance of the covenant in Georgia with respect to former Georgia customers by looking to South Carolina law only, then South Carolina should join the majority rule on this issue and strike down the covenant.

While no court in South Carolina has directly addressed the reach of a provision prohibiting a former employee from accepting unsolicited work, the weight of the authority agrees with Georgia on this issue. *See Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1306 (11th Cir. 2005) (holding that a provision that prevents the employee from accepting unsolicited business from former clients of the employer was invalid and could not be saved because Georgia law [like South Carolina] does not allow blue-penciling); *1st Am. Sys. v. Rezatto*, 311 N.W.2d 51, 59 (S.D. 1981) (striking covenant because language restricting the acceptance of business placed an undue burden on the former employee and on the public); *Evans Labs., Inc. v. Melder*, 262 Ark. 868, 871, 562 S.W.2d 62, 64 (1978) (ruling that provision which prohibits employee from accepting business from the employer's former customers whom the employee had formerly serviced was undue interference

with the public's right to the availability of a serviceman it prefers to use); *Wachovia Ins. Servs. v. Paddison*, 406CV083, 2006 U.S. Dist. LEXIS 66463, at 40-41 (S.D. Ga. 2006) (“[e]mbedding the word “accept” in restrictive covenants is fatal because that can reach unsolicited former clients (i.e., customers with whom the employee never had any contact)”). This majority rule is consistent with South Carolina's already well-established precedent that such restrictions on the free market are “strongly disfavored” and will always be strictly construed against the employer seeking to prevent former employees from working. *See Dudley*, 278 S.C. at 675; 301 S.E.2d at 143.

III. PUBLIC POLICY OPPOSES ENFORCEMENT OF THE NON-COMPETITION CLAUSE

The trial court correctly ruled the covenant not to compete offended public policy because it prohibited Georgia public agencies from hiring the contractor of their choice to perform work in, and for the people of, Georgia. The trial court then held: “This Court finds it would be unreasonable from the standpoint of public policy for a South Carolina court to prohibit Lucas from accepting unsolicited business *from a governmental entity in Georgia to perform work in Georgia*.” (R.p. 15) (emphasis added). The trial court had already found the non-solicitation provision invalid with respect to Georgia entities seeking to hire Lucas for work to be performed in Georgia. Lucas argues this should be the case whether viewed under Georgia or South Carolina law.

While the public interest in a covenant not to compete case can be most often viewed through the general purchasing public's ability to access the goods or services involved, it is obvious that prohibiting the government from being able to

select the vendor of its choosing also greatly impacts the public interest. This impact comes from the government being the representative of the interests of the community as a whole. The trial court had to consider whether this particular restriction on commerce was "reasonable from the standpoint of sound public policy." *Dudley*, 278 S.C. at 675, 301 S.E.2d at 143. If enforced, this particular covenant not to compete would not only prohibit Lucas from seeking out Georgia governmental entities as customers, it could effectively enjoin Georgia governmental officials from hiring the contractor they have determined will best serve the public's interest. Team IA's sole, narrow focus on whether there are competitors in the market place ignores the strong public interest in the government's ability to hire the contractor of its choosing.

IV. THE TRIAL COURT PROPERLY REFUSED TO "BLUE PENCIL" THE GEOGRAPHIC RESTRICTION

A covenant not to compete must protect a legitimate interest of the employer. *Dudley*, 278 S.C. at 675, 301 S.E.2d at 143. An employer has a legitimate business interest in protecting a geographical area in which the employee he is trying to restrict has interacted with actual customers of the employer. *See Standard Register Co.*, 238 S.C. at 66, 119 S.E.2d at 539. The trial court found the only actual customers serviced by Lucas constituting a legitimate interest for Team IA to protect were the Fulton and Fayette County Clerks of Court. The Employment Agreement calls for a nationwide restriction on Lucas working in competing services. (R.p. 108). Most likely in recognition that such a ban could not be enforced by Team IA, the Agreement sets forth a four state fall-back provision covering South Carolina, North

Carolina, Alabama, and Georgia. (R.p. 108). The Employment Agreement also contains a severability cause. (R.p. 110).

“[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms.” *Poynter Invs. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). South Carolina courts will not modify or ‘blue pencil’ a non-competition clause so as to restate its terms in a way to make the agreement enforceable.” *Lampman v. DeWolff Boberg & Assocs., Inc.*, 319 Fed. Appx. 293, 300 (4th Cir. 2009). If any provision is unenforceable because it does not satisfy the requirements of a covenant not to compete “then the entire non-competition clause is void as a matter of law, although the clause may be severable from unrelated parts of a broader contract.” *Id.*

Since the Fulton and Fayette County Clerks of Court are the only customers Team IA identified to the trial court as actual current Team IA customers that had a working relationship with Lucas, a geographic restriction covering those areas would reasonably protect the employer’s interest. However, the Employment Agreement sets forth a nationwide ban. (R.p. 108). That nationwide ban is followed by a four state fall-back provision.⁴ (Id.) Team IA set forth no actual customers of Team IA who were serviced by Lucas in three of the four fall-back states. Even though one of the fall-back states is Georgia, Team IA did not come forth with actual customers

⁴ In addition to indicating Team IA knew it could not have a nationwide ban upheld, the four state fall-back provision is evidence Team IA knew a court could not create a geographic limit not in the agreement. Limiting the fall-back provision to just Georgia would do just that: create a new geographic limit not in the contract.

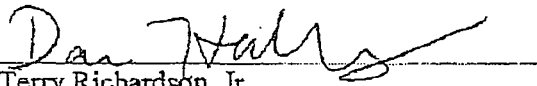
served by Lucas that would justify covering all 159 counties of that state in which Team IA did not identify actual customers with whom Lucas interacted.

Recently our Supreme Court held "that it would violate public policy to allow a court to insert a geographical limitation where none existed." *Poynter Invs*, 387 S.C. at 588, 694 SE2d 15. Team IA failed to present "specific facts" to support either a nationwide ban or the 4 state fall-back provision. Creating any other new geographical limitation so as to allow this covenant to survive would run counter to all of South Carolina precedent on this issue.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court.

Respectfully submitted,


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September 10, 2010
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Trial Court Case No. 2009-CP-32-01078

Team IA, Inc.

Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC,

Defendants,

Of whom Cicero Lucas is

Respondent,

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

v.

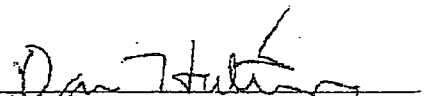
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule
211(b).

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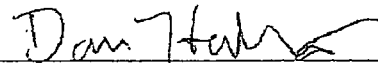
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ARGUMENTS IN RESPONSE TO THOSE OF RESPONDENT

I. CONFLICTING EVIDENCE IN THE RECORD REGARDING THE SCOPE OF LUCAS'S ACTIVITIES AND THE EXTENT OF TEAM IA'S CUSTOMER BASE DURING LUCAS'S EMPLOYMENT PRECLUDED THE ENTRY OF SUMMARY JUDGMENT.

A. The Affidavit And Supplemental Affidavit Of Brent Yarborough Directly Contradict The Affidavit Of Lucas.

When considering the evidence set forth in the Affidavit of Brent Yarborough, the Affidavit of Lucas, and the Supplemental Affidavit of Mr. Yarborough, together with the conclusions that can be reasonably drawn from that evidence—especially when viewing such evidence and conclusions in a light most favorably to Team IA—the presence of a dispute as to genuine issues of material fact is unquestionable. The trial court thus erred in granting summary judgment.

Lucas attempts to overcome the conflicting evidence that is present in this matter by noting that “construing the provisions of a contract is a question of law for the court.” (Initial Br. of Resp’t at 4 (*citing S.C. Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622–31, 550 S.E.2d 299, 302–03 (2001); *Pearson v. Church of God*, 325 S.C. 45, 53–54, 478 S.E.2d 849, 853 (1996).) Team IA does not dispute this principle regarding the standard of review. However, Lucas disregards the fact that, beyond merely construing the provisions of the Employment Agreement between Team IA and Defendant Lucas (“Agreement”), the trial court was primarily required in its consideration of Lucas’s Motion for Partial Summary Judgment to determine whether the provisions in question were reasonable in light of the surrounding facts and circumstances. Such a determination required the trial court to consider the Affidavit and Supplemental Affidavit of Mr. Yarborough together with the Affidavit of Lucas and

discern whether there existed conflicting evidence as to the issues that would make the provisions in question reasonable or unreasonable.

The issues that the trial court was required to consider in making its determination of whether the provisions in question were reasonable include, among other things, the scope of Defendant Lucas's activities while employed at Team IA and the scope of Team IA's business activities as a whole. The statements and supporting attachments set forth in the Affidavit and Supplemental Affidavit of Mr. Yarborough with respect to these issues are in direct conflict with the statements set forth in Lucas's Affidavit with respect to these issues. In the face of such conflicting evidence, "Summary judgment [was] not appropriate [because] further inquiry into the facts [was] desirable to clarify the application of the law." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991) (citing *Abrams v. Wright*, 262 S.C. 141, 202 S.E.2d 859 (1974)).

For example, Lucas's Affidavit alleges that he only performed work for Team IA customers in Georgia and Pennsylvania and that Team IA only had customers in South Carolina, North Carolina, Georgia, and Pennsylvania during his tenure. (R. p. 112.) Conversely, the facts set forth in the Affidavit of Mr. Yarborough and the conclusions that can be drawn therefrom establish that Lucas was assigned to work in a nationwide territory and that "during Mr. Lucas's employment and through the date of his resignation, Team IA serviced and solicited customers from across the United States (and had at least one prospect in Canada)." (R. p. 167, ¶¶ 9-10.)

Similarly, Lucas's Affidavit alleges that he performed no work for customers in Alabama, South Carolina or North Carolina. (R. p. 112.) While this statement may simply demonstrate a creative choice of words, it certainly conflicts directly with the

statements included in Mr. Yarborough's Supplemental Affidavit regarding Lucas's sales activities in South Carolina, North Carolina, Alabama, and Georgia. In fact, Paragraphs 3 through 6 of the Supplemental Affidavit identify specific customers and prospective customers that Lucas assisted and solicited, for which Lucas engaged in pre-sales and post-sales prospect/account management. (R. pp. 327–28.)

The Order's entry of partial summary judgment in the face of such conflicting evidence was improper. *See Rothrock*, 305 S.C. at 405, 409 S.E.2d at 368 (“Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.” (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976))). As the United States Court of Appeals for the Fourth Circuit has recently noted, “Summary disposition should not be made based on conflicting affidavits. . . . [S]ummary judgment is inappropriate when affidavits present conflicting facts requiring credibility determinations.” *Brooks v. Motsenbocker Advanced Devs., Inc.*, 242 F. App'x 889, 890 (4th Cir. 2007).

Significantly, Lucas continues to disregard the requirement that the facts and reasonable inferences that can be drawn therefrom must be viewed in a light most favorable to Team IA. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009) (citing *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)). Lucas's misapplication of this standard is evident on the face of all of his filings surrounding his Motion for Partial Summary Judgment at both the trial court level and in this appeal. The “facts” that Lucas sets forth in all of his filings—as well as in his proposed order granting his Motion for Partial Summary Judgment, which the trial court adopted in its entirety—are all transcribed in a manner that is beneficial to

himself and that is prejudicial to Team IA. In fact, the only citations to the record in Lucas's Statement of Facts in his Initial Brief herein are citations to his own Answer and Third Party Complaint. (Initial Br. of Resp't at 2-3.) This is a critical misapplication of the standard that must be applied at the summary judgment stage of litigation.

Applying the correct standard—an analysis that views all facts and reasonable inferences in the light most favorable to Team IA—there can be no doubt that there exists a dispute as to genuine issues of material fact that precluded summary judgment. The trial court's entry of partial summary judgment on the basis of conflicting facts viewed under the incorrect standard was improper. Accordingly, the Order's award of partial summary judgment should be reversed.

B. This Court Is Permitted To Consider The Supplemental Affidavit Of Mr. Yarborough In Analyzing The Propriety Of The Trial Court's Entry Of Partial Summary Judgment.

The Supplemental Affidavit of Mr. Yarborough is properly before this Court because it forms part of the record that the trial court acknowledges having reviewed in deciding the issue that Team IA now appeals. Lucas filed a Motion to Strike with respect to Mr. Yarborough's Supplemental Affidavit. (R. pp. 329-32.) In response, Team IA filed a memorandum in opposition, which contended that consideration of the Supplemental Affidavit was well within the trial court's discretion under Rule 56(e), SCRCp. (R. pp. 333-39.) The trial court did not enter an order on Lucas's Motion to Strike. However, the trial court noted in its order denying Team IA's Motion to Alter or Amend that it had "considered the issues, reviewed the arguments, documents, and pleadings submitted by all parties and reviewed the Court's file extensively." (R. p. 3.)

Team IA filed the Supplemental Affidavit on October 5, 2009 (R. pp. 327-28)—one and one-half months before the Order granting partial summary judgment, and four

and one-half months prior to the January 20, 2010 Order denying Team IA's Motion to Alter or Amend. The trial court in no way stated in its January Order that it excluded the Supplemental Affidavit of Mr. Yarborough from the documents and pleadings that it considered in reviewing Team IA's Motion to Alter or Amend. Conversely, the trial court stated generally that it had reviewed everything that either party had submitted and everything in the file, both of which clearly include the Supplemental Affidavit. Thus, the Supplemental Affidavit is properly before this Court as part of the record that the trial court acknowledges having reviewed in deciding the issue that Team IA now appeals.¹ Accordingly, the Court is entitled to review the Supplemental Affidavit in analyzing this matter on appeal.

Furthermore, Lucas did not serve Team IA with his affidavit—the only affidavit or evidence of any kind that Lucas has brought forward in support of his Motion for Partial Summary Judgment—until nearly three full weeks after serving the motion itself. Lucas's Affidavit is thus procedurally improper on its face under Rule 6, SCRCp, which requires moving parties to serve supporting affidavits contemporaneously with the motions they support. Any argument that this Court should not consider Mr. Yarborough's Supplemental Affidavit is simply disingenuous considering the fact that Lucas's own affidavit is facially deficient.

The trial court misapplied the summary judgment standard. There existed conflicting evidence in the record with regard to the scope of Lucas's duties at Team IA and the scope of Team IA's business activities, and the trial court failed to view this

¹ Significantly, Lucas has taken no action to preserve or appeal the issue of whether the trial court should have considered the Supplemental Affidavit notwithstanding the trial court's statement in its January Order that indicates the trial court reviewed the Supplemental Affidavit in making its decision.

conflicting evidence on critical issues in a light most favorable to Team IA. The Order granting partial summary judgment should be reversed accordingly.

II. THE VALIDITY OF THE NON-SOLICITATION PROVISION AT ISSUE MUST BE ANALYZED UNDER SOUTH CAROLINA LAW, WHICH RESULTS IN A FINDING THAT THE PROVISION AT ISSUE IS ENFORCEABLE AS A MATTER OF LAW.

A. South Carolina Law Governs The Analysis Of Whether The Non-Solicitation Provision At Issue Is Enforceable.

Lucas sticks to his guns in his continued attempts to argue for the application of Georgia law to the determination of whether the Non-Solicitation provision at issue is enforceable. However, Lucas continues to misconstrue important points of law in the process. First, Lucas has again disregarded the clear rule of law that "South Carolina courts apply the substantive law of the place where the contract at issue was formed . . . where a contract's formation, interpretation *or validity* is at issue." *Witt v. Am. Trucking Ass'ns, Inc.*, 860 F. Supp. 295, 300 (D.S.C. 1994) (emphasis added) (citing *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241, 243 (1983)). Instead, Lucas continues to conveniently truncate the same by eliminating the reference to issues of contractual validity and referencing only "disputes involving a contractual formation and interpretation." (Initial Br. of Resp't at 16.) As the issue involved in Lucas's Motion for Partial Summary Judgment is clearly one of contractual validity, the trial court was required to "apply the substantive law of the place where the contract at issue was formed"-- here, South Carolina. *Witt*, 860 F. Supp. at 300 (citing *O'Briant*, 279 S.C. 254, 305 S.E.2d at 243).

Furthermore, Lucas's brief itself demonstrates that South Carolina law should control the determination of whether the non-solicitation provision at issue is valid. Lucas opens the section of his brief in which he argues for the application of Georgia law

by noting that “[i]n disputes involving contractual formation and *interpretation*, South Carolina courts generally apply the substantive law of the place of contract formation.” (Initial Br. of Resp’t at 16 (*citing Witt*, 860 F. Supp. at 300) (*emphasis added*)). Lucas has never disputed that South Carolina is the place of contract formation for the Agreement at issue in this litigation. However, the heading of the very same section of his brief is titled, “Georgia Law Controls the *Interpretation* of the Performance of the Non-Solicitation Provision with Respect to Georgia Entities Soliciting Work to be Performed in Georgia.” (*Id.* (*emphasis added*)). Thus, identical to the internal inconsistency contained in the trial court’s Order (*see* R. p. 13), Lucas is willing to admit that South Carolina law would apply here if the issue involved was one of contractual interpretation but contends that Georgia law should apply to this issue of contractual interpretation (when Georgia law is far more favorable to his position). While Team IA asserts that the issue herein is one of contractual validity (which unquestionably requires the application of South Carolina law), Lucas’s self-contradicting statements regarding the correct law under which to analyze the non-solicitation provision at issue should not be overlooked.

Lucas also misconstrues the holding of *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961), as supporting his argument for the application of Georgia law. (*See* Initial Br. of Resp’t at 17.) To the contrary, the portion of *Standard Register* to which Lucas cites stands for the proposition that there exists “no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void.” *Id.* at 70, 119 S.E.2d at 542 (*quoting Wiggins v. Postal Tel.*

Co., 130 S.C. 292, 125 S.E. 568, 569 (1924)). This provision simply does not provide support for Lucas's argument for the application of Georgia law when this matter is before a South Carolina court and the Agreement expressly requests that such a court apply South Carolina law.

Team IA does not seek for this Court—and did not seek for the trial court—to recognize the validity of a contract that is against the public policy of South Carolina. Conversely, Team IA requests that the Court enforce an Employment Agreement (1) that was entered into in South Carolina, (2) that contains a South Carolina choice-of-law provision, and (3) that complies with existing precedent regarding such agreements and the public policy of this state, *see Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535; *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 105, 420 S.E.2d 217, 220 (Ct. App. 1992); *Rockford Mfg., Ltd. v. Bennei*, 296 F. Supp. 2d 681, 690 (D.S.C. 2003). Thus, *Standard Register* supports the conclusion that South Carolina law—and not Georgia law—should be applied to the Court's analysis of whether the Non-Solicitation provision at issue is valid.

Ironically, Lucas has never attempted to argue that Georgia law should apply to the analysis of any contractual provision at issue other than the non-solicitation provision. Under Lucas's reasoning, Lucas allegedly "performs" under the Agreement in Georgia—and also in all other states in which he provides products and performs services in violation of the Agreement. If Lucas truly interpreted South Carolina law as requiring the application of Georgia law to the analysis of the non-solicitation provision at issue, he should likewise interpret South Carolina law as requiring the application of Georgia law to the analysis of the non-competition provision at issue. However, Lucas has never

made such an argument, which demonstrates his own understanding of the flaws in his reasoning.

Moreover, a consideration of the implications of Lucas's contention that Georgia law should apply because several of the customers that Team IA is seeking to protect are located in Georgia demonstrates the illogical nature of the same. If Lucas's argument were the law in South Carolina, a court in South Carolina would be forced to analyze a restrictive covenant such as that set forth in the non-solicitation provision at issue under the law of each state in which the covenant seeks to protect a customer of the former employer. In the event of a former employer with demonstrable, protectable customer interests across the world, a court in South Carolina would be forced to consider the enforceability of the restrictive covenant under the laws of countless nations. The law of South Carolina with respect to restrictive covenants contains no such requirement, as any such requirement would be utterly nonsensical. The Court should thus apply South Carolina law in analyzing the non-solicitation provision at issue.

B. The Non-Solicitation Provision At Issue Is Consistent With Established Bounds Of South Carolina Public Policy.

Numerous South Carolina courts have upheld and enforced restrictive covenants nearly identical to that set forth in the non-solicitation provision at issue. *See, e.g., Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535 (enforcing an agreement that precluded the former employee from "selling to the accounts or in the territory in which he ha[d] been performing his duties as [a] sales representative" (emphasis added)); *Wolf*, 309 S.C. at 105, 420 S.E.2d at 220 (upholding a restriction that precluded the former employee from "[s]olicit[ing] or accept[ing] sales of competing services in any account in which" the employer had already established payroll deduction procedures (emphasis

added)); *Rockford Mfg.*, 296 F. Supp. 2d at 690 (enforcing an agreement that prohibited the former employee from “soliciting or accepting business from any of [the employer’s] dealers, vendors, clients, or customers whose identity was obtained through use of [the employer’s] confidential information” (emphasis added)). Thus, the application of South Carolina law to the analysis of the non-solicitation provision at issue required the denial of Lucas’s Motion for Partial Summary Judgment.

Lucas recognizes the South Carolina cases that enforce provisions similar to the one he seeks for the Court to invalidate but attempts to overcome these holdings by arguing that “the weight of the authority [from other jurisdictions] agrees with Georgia on th[e] issue” of whether a restrictive covenant violates public policy by preventing the former employee from accepting unsolicited business from the employer’s customers or former customers. (Initial Br. of Resp’t at 19–20.) However, we need not look to foreign jurisdictions such as South Dakota and Arkansas—the only jurisdictions that Lucas has cited in support of his claim that the “weight of authority agrees with Georgia”—due to the fact that South Carolina courts have repeatedly upheld and enforced restrictive covenants nearly identical to that set forth in the non-solicitation provision at issue. See *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535; *Wolf*, 309 S.C. at 105, 420 S.E.2d at 220; *Rockford Mfg.*, 296 F. Supp. 2d at 690.

While the courts in *Standard Register*, *Wolf*, and *Rockford Manufacturing* may not have directly addressed the issue of whether a restrictive covenant that prevents the former employee from accepting unsolicited business from the employer’s customers or former customers violates the public policy of South Carolina, their decisions to uphold the agreements at issue in those cases as enforceable demonstrates that such a covenant

does not violate the public policy of South Carolina. Even assuming that Lucas is correct in his contention that this precise issue remains undecided (Initial Br. of Resp't at 19), this point further supports the conclusion that summary judgment was not proper on this issue, as summary adjudication is not proper with respect to novel issues. *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980); (see also R. p. 18 ("South Carolina courts have long recognized that a novel issue such as this one is best decided in light of the testimony to be adduced at trial." (citations omitted)).)

Lucas's public policy argument surrounding the impact that enforcement of the non-solicitation provision would have on the customers that Team IA is seeking to protect through the same—some of whom are Georgia governmental entities—is similarly misplaced. Lucas demonstrates his misunderstanding of the actual effect of the non-solicitation provision in that he contends as follows: "Team IA's former customers in Georgia are neither party to, nor should they be contractually bound by, any agreement between Team IA and Lucas. . . . Team IA seeks to have a South Carolina court effectively enjoin these Georgia governmental entities from seeking to hire Lucas to perform work for them in Georgia even if Lucas had not sought them out." (Initial Br. of Resp't at 17–18.)

Team IA agrees wholeheartedly with the fact that none of Team IA's customers or former customers can be "contractually bound by" the Agreement between Team IA and Lucas. However, this fact in no way impacts or impairs the contractual obligations that Lucas owes to Team IA as a result of his Agreement with Team IA. Likewise, this fact does not affect the law in South Carolina surrounding restrictive covenants, under which courts have repeatedly upheld non-solicitation provisions that contain nearly

identical restrictions to those at issue herein. See *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535; *Wolf*, 309 S.C. at 105, 420 S.E.2d at 220; *Rockford Mfg.*, 296 F. Supp. 2d at 690. Team IA has never alleged that its customers cannot contact Lucas as a result of the Agreement—Team IA simply seeks to enforce Lucas’s contractual obligations not to improperly solicit or accept business in violation of the Agreement. South Carolina public policy supports the relief Team IA is seeking through its claim for breach of the non-solicitation provision at issue; the trial court’s Order should be reversed due to its failure to allow Team IA to seek that relief.

The trial court’s Order should be reversed because of its improper application of Georgia law in analyzing an issue of contractual validity with respect to a contract that Lucas and Team IA entered into in South Carolina, and because application of South Carolina law required the trial court to uphold the non-solicitation provision at issue due to its conformance with accepted limits of South Carolina public policy.

III. LUCAS’S ACTIVITIES AT TEAM IA WARRANT THE GEOGRAPHIC RESTRICTIONS INCLUDED IN THE NON-COMPETITION PROVISION AT ISSUE, AS TEAM IA ASSIGNED LUCAS TO WORK ON A NATIONWIDE BASIS AND THROUGHOUT THE FOUR-STATE ALTERNATIVE RESTRICTED TERRITORY.

Lucas opens the first section of his argument in his Initial Brief with a critical misstatement—or rather, incomplete statement—of the law. Lucas asserts that “[a]n employer only has a legitimate business interest in protecting a geographical area in which the employee he is trying to restrict has interacted with actual customers of the employer.” (Initial Br. of Resp’t at 6.) Lucas relies on this assertion throughout his brief in arguing against the non-competition provision at issue. However, Lucas’s assertion is simply not entirely accurate under South Carolina law.

While an employer certainly has a legitimate business interest in restricting a former employee's post-separation activities within a geographic area in which the employee had interactions with the employer's customers, the South Carolina Supreme Court has made clear that this is not the only geographic area that an employer's legitimate business interests may protect. In *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983), the Supreme Court held that the geographic restriction in a non-competition agreement was proper where it restricted the former employee from competing "in the area in which [he] worked or to which he was assigned at any time during his employment." *Id.* at 676, 301 S.E.2d at 143 (internal quotation marks and alterations omitted). Notably, the *Rental Uniform* Court interpreted the very principle on which Lucas relies as it held that the restriction at issue in that case was valid and enforceable. *See id.*

Throughout his arguments in support of his Motion for Partial Summary Judgment and in opposition to this appeal, Lucas has continually focused on the location of customers that he served while employed by Team IA. However, the location of customers that Lucas serviced during his tenure with Team IA is in no way the turning point with respect to whether the geographic restriction at issue is reasonable. In actuality, such an analysis turns on whether Team IA assigned Lucas to engage in business activities within the area included in the geographic restriction. *Id.* at 676, 301 S.E.2d at 143.

Lucas has never disputed the fact that Team IA both allowed and expected him to solicit business for Team IA on a nationwide basis, as Mr. Yarborough's Affidavit makes clear. (R. p. 167.) Lucas's Affidavit does not contradict this fact; it merely contends that

Lucas only "performed work" for customers in Georgia and Pennsylvania. (R. p. 112.) Lucas's Affidavit contains no allegation that he did not participate in the solicitation of customers on a nationwide basis. Thus, Lucas cannot dispute that Team IA assigned him to engage in sales activities—the activities that Team IA hired, trained, and employed Lucas to perform—on a nationwide basis. (R. p. 167, ¶¶ 7–10.) As such, the evidence in the record precluded an entry of summary judgment on the issue of whether the nationwide restriction in the non-competition provision at issue is unenforceable as a matter of law.

Even assuming that the evidence in the record does not support a finding that a nationwide restriction is appropriate, there can be no question that the Affidavit and Supplemental Affidavit of Mr. Yarborough establish a protectable interest of Team IA within the alternative, four-state geographic restriction. Lucas's arguments against the validity of the alternative restriction rely on his contention that he did not service any Team IA customers in Alabama, South Carolina, or North Carolina. However, Lucas's Affidavit contains no allegation that he did not participate in the solicitation of customers throughout the alternative geographic restriction; his affidavit simply alleges that he only "performed work" for customers in Georgia and Pennsylvania. (R. p. 112.) When considering Mr. Yarborough's Affidavit, the attachments thereto, Mr. Yarborough's Supplemental Affidavit, and Lucas's Affidavit in combination and in the light most favorable to Team IA, there is simply no room to doubt the conclusion that Team IA, at the very least, assigned Lucas to work and engage in sales activities in each of the four states set forth in the alternative geographic restriction. Therefore, the evidence before

the trial court mandated a denial of Lucas's Motion for Partial Summary Judgment based on the holding of *Rental Uniform*.

When viewed in the light most favorable to Team IA, the evidence demonstrates that Team IA assigned Lucas to work on a nationwide basis and that Team IA assigned Lucas to work throughout the four states in the alternative geographic restriction. Regardless of the light in which the evidence is viewed, the record demonstrates that there remains a genuine dispute as to the geographic extent of Lucas's activities at Team IA. Therefore, the trial court's finding that the non-competition provision at issue was overbroad in terms of its geographic scope was improper and should be reversed accordingly.

IV. TEAM IA IS NOT REQUESTING THAT THIS COURT "BLUE-PENCIL" THE NON-COMPETITION PROVISION AT ISSUE. AND THE ALTERNATIVE RELIEF THAT TEAM IA SEEKS COMPORTS WITH ESTABLISHED CASE LAW.

Notwithstanding Team IA's explanation in its Initial Brief of the distinction between "blue-penciling" and the relief that Team IA seeks in the alternative with respect to the geographic restriction in the non-competition provision at issue, Lucas argues in his brief that the trial court properly refused to "blue-pencil" the restriction. (Initial Br. of Resp't at 21.) Team IA has already acknowledged in its Initial Brief that recent precedent makes clear that "the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties agreement, but must stand or fall on their own terms." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, Op. No. 26821 (S.C. Sup. Ct. filed May 24, 2010) (Shearouse Adv. Sh. No. 20 at 11). Team IA does not dispute this holding and does not attempt to argue against the same. However, Team IA is not asking

the Court to rewrite the geographic restriction through the relief that Team IA seeks in the alternative with respect to the non-competition provision at issue.

To the contrary, in the event that the Court determines that the geographic restriction would only be reasonable if limited to one or more of the states included in the alternative geographic restriction, Team IA asks the Court to sever from the Agreement the one or more states that render the geographic restriction unreasonable. The Court is permitted to take such action under established precedent—which the Supreme Court did not overrule in *Poynter Investments*—in conjunction with the language of the Agreement’s Severability clause. As Judge Duffy noted in *Rockford Manufacturing*,

Both [*Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972), and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958),] can be reasonably read to conclude that although an *indivisible* covenant may not be enforced even to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions.

296 F. Supp. 2d at 687. Considering the language of the Severability clause in the Agreement (R. p. 60; Initial Br. of Appellant at 7)—which expressed the parties’ intention that a court sever any provision, or portion thereof, that rendered the Agreement unenforceable—the holdings of *Eastern Business Forms* and *Somerset* allowed the trial court to eliminate any provision of the non-competition provision at issue, or portion thereof, that the trial court deemed necessary in order to render the provision reasonable.

For example, if the trial court determined that the non-competition provision at issue would be reasonable if the geographic restriction was limited to South Carolina, North Carolina, Georgia, Alabama, or any combination these states, the Severability clause, coupled with the independent nature of the states listed in the alternative geographic restriction, allowed the Court to so limit the provision without rewriting the

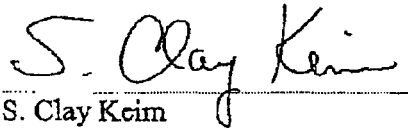
agreement of the parties. This is precisely the type of action that Judge Duffy took in *Rockford Manufacturing*, where he ruled that a court could sever one or more of the "Affiliated Companies" from the agreement at issue "without disrupting the integrity, continuity, or intent of the remaining provisions." See 296 F. Supp. 2d at 686-89.

Team IA is not requesting that the trial court or this Court "blue-pencil" the Agreement. Instead, Team IA is simply seeking enforcement of one or more independent covenants in accordance with the Agreement's Severability clause and existing precedent. The Order should be reversed accordingly, as the relief Team IA seeks comports with established case law and does not contradict the Supreme Court's recent holding in *Poynter Investments*.

CONCLUSION

Based on the foregoing facts and authorities, together with those set forth in Team IA's Initial Brief, Team IA respectfully requests that this Court reverse the Order of the trial court and allow the claims at issue to proceed at this stage of the litigation.

Respectfully Submitted,



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September 14, 2010

Spartanburg:87096.1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Team IA, Inc.,

Appellant,

v.

Cicero Lucas, George Lawson,
IV, and 5 Point Solutions, LLC,

Defendants,

Of whom Cicero Lucas is

Respondent,

Cicero Lucas and George
Lawson, IV,

Third-Party Plaintiffs,

v.

Brent Yarborough and Team
IA, Inc.,

Third-Party Defendants.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4889
Submitted June 1, 2011 – Filed September 14, 2011
Withdrawn, Substituted and Refiled October 20, 2011

REVERSED AND REMANDED

Joel W. Collins, Jr., Robert F. Goings, and Christian Bosel, all of Columbia; and S. Clay Keim, Jeffrey A. Lehrer, and Lucas J. Asper, all of Spartanburg, for Appellant.

Terry Richardson, Jr., Daniel S. Haltiwanger, and Christopher J. Moore, all of Barnwell, for Respondent.

GEATHERS, J.: This is an appeal from a circuit court order granting partial summary judgment to Respondent Cicero Lucas on the grounds that the non-competition and non-solicitation clauses in an employment agreement he signed were overly broad and unenforceable. Appellant Team IA, Inc. (Team IA) argues the circuit court erred in granting partial summary judgment to Lucas, when (1) material facts were in dispute as set forth in the Supplemental Affidavit of Brent Yarborough; (2) the circuit court applied Georgia law despite the presence of a choice of law provision in the agreement signed by the parties requiring the application of South Carolina law; (3) the circuit court arguably would have reached a different result had it applied South Carolina law to evaluate whether the non-solicitation clause was an unreasonable restraint on trade; (4) no evidence was presented that the non-competition provision would improperly curtail Lucas's efforts to earn a livelihood; and (5) the circuit court could have limited the nationwide geographic restriction in the non-competition clause to the less expansive restricted territory alternatively defined in the employment agreement as South Carolina, North Carolina, Georgia, and Alabama. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Team IA conducts business in the microfilm, data entry, software, hardware, consulting, and related services industries. Team IA markets its business on a nationwide basis through electronic and print media, including the internet, attendance at trade shows, submission of bids, direct sales, and other means. In April of 2001, Team IA hired Lucas as a sales representative

for the company. The parties signed an employment agreement, which contained the following clauses:

A) Non-Solicitation Agreement

1) Employee agrees and acknowledges by signing below, that while employed by Employer and for a period of twelve (12) months following termination of Employee's employment with Employer, regardless of who initiates said termination, that he will neither directly [n]or indirectly, for himself or on behalf of any other person, firm, or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer products or services.

2) For the purposes of this Agreement, the term "CUSTOMER" shall mean any person, firm, or business entity who currently has a system or product which was designed or installed by or is being serviced by Employer; or who has purchased goods or services or who has contracted to purchase goods or services from Employer during the twelve (12) months prior to Employee's separation from employment; or who is an Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months.¹

.....

B) Covenant Not to Compete

1) In order to prevent the improper disclosure or use of confidential and proprietary

¹ We note that the non-solicitation clause in this agreement appears to prohibit contact with both former customers and former prospective customers of Team IA.

information and other trade secrets, and to protect the Employer from unfair competition, Employee agrees that, absent the prior express written consent of the Employer, while employed by Employer and for twelve (12) months immediately following the resignation or termination of his employment with the Employer, regardless of who initiates separation from employment, Employee shall not, directly or indirectly, by himself, or through or on behalf of any other person, firm, partnership, company, corporation, representative or agent, within the geographical territory (hereinafter, the "RESTRICTED TERRITORY") set forth below, solicit, attempt to solicit, sell, or attempt to sell, provide, or attempt to provide COMPETING SERVICES as defined below.

Recognizing that Team IA competes on a nationwide basis, the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama.

(emphasis added) (footnote added).

The employment agreement also contained the following choice of law provision:

This Agreement shall be governed by, and construed and interpreted in accordance with the domestic laws of the State of South Carolina. Any dispute concerning or arising under this Agreement must be

submitted to a court of competent jurisdiction, either state or federal, within the State of South Carolina, and the Parties hereby voluntarily submit to the jurisdiction of such court.

(emphasis added).

Lucas resigned from Team IA in February of 2009. Subsequent to his resignation, Lucas contacted all but one of the customers with whom he had worked while employed at Team IA. Phone records supplied by Lucas and attached as an exhibit to Team IA's memorandum in opposition to summary judgment indicate Lucas contacted at least eight Team IA customers with whom he worked extensively while he was employed. In a second supplemental response to Team IA's interrogatories, Lucas admitted he contacted "all of his personal customers" by telephone to inform them of his departure, and he listed eleven Team IA customers by name.

Within one week of his resignation, Lucas established and became part owner and operator of 5 Point Solutions, LLC, a company that performed services similar to those provided by Team IA. The Fulton County, Georgia, Clerk of Superior Court had previously reached an agreement with Team IA for a large microfilm creation project. The day after Lucas formed 5 Point Solutions, Fulton County pulled the project from Team IA and designated Lucas's new company as its microfilm vendor. The Fayette County, Georgia, Clerk of Superior Court also pulled a scanning project from Team IA and awarded the same project to 5 Point Solutions. Lucas had been actively involved in securing business from both of these customers while he worked for Team IA.

Team IA filed a lawsuit for breach of contract, breach of duty of loyalty, tortious interference with contractual relations, and nine other causes of action, alleging inter alia that Lucas breached the terms of his employment agreement. Lucas filed a motion for partial summary judgment on the breach of contract action with respect to the non-solicitation and non-competition provisions contained therein, and the circuit court held a hearing on the motion.

Two weeks after the hearing on the summary judgment motion, Team IA filed the Supplemental Affidavit of Brent Yarborough. In that document, Yarborough listed numerous "customers/prospective customers" with whom Lucas had worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA. On October 5, 2009, Lucas filed a Motion to Strike the Supplemental Affidavit as untimely. On October 19, 2009, Team IA filed a Memorandum in Opposition to Lucas's Motion to Strike. The circuit court neglected to expressly rule on the motion to strike, and the November 19, 2009 order granting summary judgment did not mention the supplemental affidavit.

The circuit court granted partial summary judgment to Lucas on the grounds that (1) the restricted territory set forth in the non-competition clause was overly broad as Team IA did not have clients in three of the four states listed, and (2) the non-solicitation provision was unenforceable as it prohibited Lucas from accepting business from unsolicited customers of Team IA. The circuit court applied Georgia law to evaluate the validity of the non-solicitation provision and South Carolina law to evaluate the validity of the non-competition clause. Team IA filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. In its motion, Team IA argued the circuit court erred in failing to consider the facts and evidence set forth in Yarborough's affidavit and supplemental affidavit.

The circuit court denied Team IA's motion to alter or amend, noting, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively." The order did not specifically mention Yarborough's supplemental affidavit. This appeal followed.

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e), SCRCF, further provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In ascertaining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Application of the Summary Judgment Standard

Team IA argues the trial court erred in accepting as true the facts set forth in Lucas's affidavit while disregarding the facts set forth in Yarborough's initial affidavit and supplemental affidavit. We agree.

A covenant not to compete will be upheld only if it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983).

"Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer." Id. at 675, 301 S.E.2d at 143. "A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App. 1995). Nonetheless, "agreements not to compete, while looked upon with disfavor, critically examined, and construed against any employer, will be upheld as enforceable if such agreement is reasonable as to territorial extent of the restraint and the period for which the said restraint is to be imposed." Almers v. S.C. Nat'l Bank of Charleston, 265 S.C. 48, 51, 217 S.E.2d 135, 136 (1975).

"A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." Dudley, 278 S.C. at 676, 301 S.E.2d at 143. South Carolina has enforced a non-solicitation agreement precluding a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative. Standard Register Co. v. Kerrigan, 238 S.C. 54, 59, 74, 119 S.E.2d 533, 535, 544 (1961) (emphasis added).

Recently, our supreme court held that "the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). The supreme court further noted "it would violate public policy to allow a court to insert a geographical limitation where none existed." Id. at 587-88, 694 S.E.2d at 17 (emphasis added).

In reaching its conclusion, the Poynter court analyzed this court's Faces Boutique opinion. Id. at 588, 694 S.E.2d at 18 (citing Faces Boutique, 318 S.C. at 43-44, 455 S.E.2d at 709). In Faces Boutique, this court concluded an employer's willingness to stipulate at trial to an interpretation of a non-competition provision that would render it proper in scope does not rectify the invalidity of the covenant as initially written. 318 S.C. at 43-44, 455 S.E.2d at 709. Therefore, we interpret the supreme court's holding in Poynter to mean that (1) a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by

the parties in order to make it valid and enforceable, and (2) the parties may not of their own accord convert an overly broad territorial restriction into an enforceable one by entering into a subsequent agreement that artificially limits the actual terms used in the parties' original contract.

Here, we believe the nationwide territorial restriction contained in the non-competition provision at issue was overly broad on its face. However, we conclude the alternative territorial restriction contained in the parties' original agreement (South Carolina, North Carolina, Georgia, and Alabama) would remain valid and enforceable to the extent it is not overly broad after further development of the facts.

Yarborough's initial affidavit stated:

Team IA both allowed and expected Mr. Lucas to solicit new business for Team IA on a nationwide scale. A review of a sample of Mr. Lucas's sales activities – based on expense reports he submitted to Team IA for reimbursement – demonstrates Mr. Lucas's nationwide sales activities on behalf of Team IA. (See Attachment 4 Attached Hereto.) This summary also shows examples of Mr. Lucas's attendance at and participation in tradeshow, on behalf of Team IA, which took place across the country and included attendees representing a nationwide prospective customer base.

The expense report attached to Yarborough's initial affidavit reflects Lucas conducted sales activity in South Carolina, North Carolina, Georgia, Alabama, Kansas, California, Illinois, Pennsylvania, and Florida. However, Lucas's own affidavit conflicts with Team IA's assessment. Lucas's affidavit averred, "I performed no work for customers in Alabama, South Carolina, or North Carolina." We hold further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Specifically, whether the "sales activity" Lucas conducted as documented in

the expense report included contact with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama is unclear. See Standard Register Co., 238 S.C. at 59, 119 S.E.2d at 535 (enforcing a non-solicitation agreement that precluded a former employee from "selling to the accounts or in the territory" in which he had been performing his duties as a sales representative) (emphasis added).

In his supplemental affidavit, Yarborough listed numerous "customers/prospective customers" with whom Lucas worked in South Carolina, North Carolina, Alabama, and Georgia while employed by Team IA.² However, the circuit court did not expressly rule on whether this supplemental affidavit was timely. The Record on Appeal is unclear as to whether the circuit court considered Yarborough's supplemental affidavit when ruling on Team IA's motion to reconsider; the order did not specifically mention the supplemental affidavit, nor any of the facts set forth within it. Nonetheless, the order denying Team IA's motion to reconsider noted, "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively."

Under the circumstances, regardless of whether or not the circuit court considered the facts set forth in Yarborough's supplemental affidavit, we hold summary judgment was premature. See Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992) ("Accordingly, summary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful."). Our decision is based on a genuine issue of material fact in dispute as to whether or not Lucas interacted with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama during the term of his employment. See Dudley, 278 S.C. at 676, 301 S.E.2d at 143 ("A geographic restriction is generally reasonable if [it] is limited to the territory in which the employee was able,

² We decline to rule on whether a non-solicitation agreement's prohibition on contact with former prospective customers of a former employer is overly broad and unenforceable on its face as that particular issue is not yet ripe for our review. Specifically, the Record on Appeal is unclear as to whether Lucas contacted former customers or former potential customers of Team IA.

during the term of his employment, to establish contact with his employer's customers.").

Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. See Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) ("Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law."). We also direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough prior to entering an order on the Motion for Partial Summary Judgment.

II. Choice of Law

Team IA contends the circuit court erred in applying Georgia law to determine the validity of the non-solicitation clause at issue despite the presence of a choice of law provision in the employment agreement requiring the application of South Carolina law. We agree.

Choice of law clauses are generally honored in South Carolina. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 336 (2003) ("We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored."); see also Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.").

In Livingston v. Atlantic Coast Line Railroad, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935), our supreme court discussed traditional choice of law rules in the absence of a choice of law provision: "It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs." (emphasis added). "If the contract be silent thereabout, the presumption is

that the law governing the enforcement is the law of the place where the contract is made." Id. (emphasis added). Therefore, traditional choice of law rules apply only in the absence of an express provision regarding the applicable law to govern the contract.

In the present matter, the circuit court applied traditional choice of law rules despite the presence of a choice of law provision designating South Carolina law. Specifically, the circuit court relied upon Witt v. American Trucking Ass'ns, 860 F. Supp. 295, 300-01 (D.S.C. 1994) (applying South Carolina common law choice of law rules when determining what law should govern a contract that did not contain a choice of law provision), Livingston, 176 S.C. at 391, 180 S.E. at 345, and Lister v. NationsBank of Delaware, 329 S.C. 133, 144-45, 494 S.E.2d 449, 455-56 (Ct. App. 1997) (applying South Carolina law to a breach of contract accompanied by fraudulent act action when the contract did not contain a choice of law provision, when the contract was performed in South Carolina, and when the breach occurred in South Carolina). These cases regarding choice of law in the absence of a choice of law provision are not applicable to this contract because it contained a choice of law provision.

The only recognized exception to adhering to the parties' choice of law provision does not apply here because the contract designated South Carolina law, and it is being interpreted here in South Carolina. See Nucor Corp., 482 F. Supp. 2d at 728 ("However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy."). Finally, neither party disputes the validity of the choice of law provision. Therefore, the circuit court should have applied South Carolina law.

We need not reach the merits of the final two issues on appeal given our reversal on the previously stated grounds. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive).

CONCLUSION

We conclude further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable. Accordingly, we reverse and remand for further development of the facts in order to clarify application of the law. We direct the circuit court to rule on Lucas's Motion to Strike the Supplemental Affidavit of Brent Yarborough. Finally, we instruct the circuit court to apply South Carolina law in evaluating the non-solicitation provision contained in this employment agreement. Accordingly, the decision of the circuit court is

REVERSED AND REMANDED.³

SHORT and KONDUROS, JJ., concur.

³ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2009-CP-32-01078

Team IA, Inc.

Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC,

Defendants,

Of whom Cicero Lucas is

Respondent,

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc.,

Third-Party Defendants.

PETITION FOR REHEARING

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TABLE OF AUTHORITIES

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BACKGROUND/INTRODUCTION

Team IA sued Cicero Lucas on March 17, 2009, claiming breach of an employment agreement. On August 19, 2009, Lucas filed for summary judgment on two issues arguing: (1) the covenant not to compete was too broad geographically; and (2) the non-solicitation provision was too restrictive because it prohibited Lucas from accepting unsolicited business from former Team IA customers. A hearing on the summary judgment motion was held on September 21, 2009.

At the hearing, Team IA failed to identify any customers Lucas serviced in any states other than Georgia. The covenant not to compete had a nationwide geographical restriction in addition to a four state "fallback" covering Alabama, Georgia, North Carolina, and South Carolina. Furthermore, the employment agreement contained a choice of law provision providing that South Carolina law would apply to the interpretation of the agreement. The evidence before the Court of only two Team IA customers in Georgia meant that Lucas could only perform the non-solicitation provision with respect to those two governmental entities in Georgia.

Team IA filed an untimely affidavit by its owner Brent Yarborough two weeks after the hearing. The untimely affidavit does not identify a single actual customer of Team IA that Lucas had contact with during his employment in any state other than Georgia. Mr. Lucas also made a motion to strike the untimely affidavit. The trial court entered summary judgment against Team IA on November 19, 2009. Team IA filed a motion to reconsider that was denied January 20, 2010. In its Order denying reconsideration, the trial judge stated: "This Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed

the Court's file extensively." The Court's language did not exclude consideration of the untimely affidavit. This appeal followed.

ARGUMENT

1. Team IA's Failure to Produce Any Evidence of Customer Interaction in the Covered Territory Warranted Summary Judgment

The Court of Appeals erred in reversing and remanding this matter because, as the Opinion itself recognizes, there was no question of material fact in dispute. The opinion states:

Our decision is based on a genuine issue of material fact potentially in dispute as to whether or not Lucas interacted with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama during the term of his employment. (Emphasis added).

Whether or not Lucas serviced actual Team IA customers in any other state was already the critical question at the summary judgment hearing because Team IA cannot enforce the "fallback" geographical restriction unless Lucas performed *actual* work with *actual* customers of Team IA in the four listed states. *See Renial Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983). Without customer interaction, an employer has no legitimate interest to protect with a covenant and the agreement fails as a matter of law.

To defeat summary judgment Team IA had the burden to bring forth evidence that Lucas had the type of customer relationships that created a "legitimate interest" to be protected by a covenant not to compete. Team IA did not bring forth such evidence. The Opinion recognizes this fact. Instead, taken in a light most favorable to the adverse party, Team IA brought forth evidence that Mr. Lucas went on reimbursable company business trips to the places listed in attachment 4 to Yarborough's initial affidavit.¹

¹ Attachment 4 relied upon in the Opinion also fails Rule 1006, SCRPC, with respect to summaries of evidence. The originals are not voluminous and Team IA made no showing that the underlying data even exists, much less that it would be admissible into evidence.

A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Team IA submitted a summary of business travel. Taken in a light most favorable to Team IA, that evidence fails to establish the existence of actual Team IA customers, much less the type of customer relationships with Lucas that can support a covenant not to compete.

At the end of the summary judgment hearing, there was "an absence of proof" because Team IA failed to "designate specific facts" showing Lucas had customer relationships or interaction necessary to support the covenant not to compete. The Court of Appeals and trial court correctly recognized that the summary of business travel does not establish Lucas had working contact with any Team IA customers in South Carolina, North Carolina, and Alabama. This conclusion should result in summary judgment being awarded to Lucas, not a remand to find out if Team IA might possess some evidence of actual customer interaction that it chose not to provide the trial court. To survive summary judgment, Team IA had the burden to provide evidence of Lucas's interaction with customers of Team IA. With the exception of Georgia, Team IA did not provide any such evidence.

The Court of Appeals held "further inquiry into the nature of Lucas's assigned territory and contact with customers/potential customers was needed in order to clarify whether the alternative territorial restriction in the non-competition clause of the employment agreement was overly broad and unenforceable." That inquiry was done *prior to* summary judgment. Team IA produced no evidence.

In fact, Team IA was asked for the very information the Court of Appeals inquires about and Team IA provided no evidence in response. Team IA was specifically asked to provide:

- (1) all the states alleged to be covered by the covenant not to compete;
- (2) to identify the customers,
- (3) the services provided by Team IA to those customers, and
- (4) the dates the customer was a customer.

Team IA provided nothing in response. *See* R. p. 400.

Team IA was also asked for:

- (1) all customers it contended were covered by the covenant not to compete with Lucas,
- (2) the product or service Team IA provided the customer,
- (3) the dates for which those products or services were provided, and
- (4) the amount paid Team IA.

Team IA provided nothing in response. *See* R. pp. 398-99. Team IA provided nothing *because nothing exists* with respect to 3 of the 4 states at issue. Team IA could only establish that Lucas had visited those states on business for Team IA; it could not establish Lucas had any customer relationships to sustain a covenant not to compete. Lucas is not held to the standard of proving a negative at summary judgment. Team IA had the burden to come forth with evidence and since that evidence simply does not exist, Team IA failed to do so.

Mr. Lucas stated in his affidavit that he worked with Team IA customers in Georgia and Pennsylvania. Due to his relationships with customers in Georgia, Team IA was able to provide the trial court documentation of contracts and communications between Lucas and Georgia state

officials. In stark contrast, Team IA could only provide a "summary" of travel dates with respect to Alabama, North Carolina, and South Carolina.²

Taken in a light most favorable to Team IA, the plaintiff showed that Lucas went on reimbursable business travel to a number of states. The Court of Appeals wants to know whether or not on that business travel Lucas interacted in such a way with Team IA customers such that a covenant not to compete could be supported. Team IA has already been asked for such evidence. Team IA did not provide any evidence. In responding to a motion for summary judgment, Team IA did not provide any evidence. If Team IA had evidence that could support its claim, the evidence should have been produced in discovery and in opposition to summary judgment.

The Court of Appeals' decision puts Lucas in the exact position summary judgment is intended to prevent. "The manifest purpose of summary judgment is to obviate delay where there is no real material issue of fact." *Hammond v. Scott*, 268 S.C. 137, 143, 232 S.E.2d 336 (1977). Team IA sued Lucas claiming that he had relationships with Team IA clients that would support the covenant. Team IA was asked in discovery for evidence to support this claim and Team IA produced none. Lucas then made a motion for summary judgment to force Team IA to come forth with just "a scintilla" of evidence that it could support its claims, Team IA produced none.

The inquiry requested by the Court of Appeals implicitly recognizes it currently does not have before it any evidence of Lucas actually interacting with any Team IA customers in the covered territory. That lack of evidence before the Court warrants summary judgment, not a

² In fact, the only mention of Alabama is for travel in 2004, more than 4 years older than the 1 year look back provided by the definition of a customer in the employment agreement. Except for three days of travel in 2004, there is no evidence Team IA had a customer in Alabama or that Lucas ever went there again. These facts alone defeat the fallback provision.

reversal which would allow Team IA for a third opportunity to come forth with any evidence at all that can support its lawsuit against Mr. Lucas.

II. Summary Judgment is Appropriate Even Considering the Untimely Affidavit

The resolution of the motion to strike the untimely Yarborough affidavit is not necessary to uphold the trial court's proper granting of summary judgment on the issue of the covenant not to compete. The trial court either considered the untimely affidavit or it did not. If the trial court did not, then it is not able to be considered on appeal. *See McQuaig v. Brown*, 270 S.C. 512, 516-17, 242 S.E.2d 688 (1978). As shown above, the trial court had before it no evidence of any interaction between Lucas and Team IA customers in 3 of the 4 fallback states. Even with the untimely affidavit, the Court still had before it no evidence of any interaction between Lucas and Team IA customers in 3 of the 4 fallback states. The affidavit is drafted such that no entity listed can be identified as a customer of Team IA that actually interacted with Lucas. Even with the untimely affidavit, the Court cannot point to a single actual customer of Team IA and state that Lucas ever even met the entity.

Rule 56(e), SCRCP sets forth:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The untimely affidavit lacks specific facts because not one entity listed is identified as an actual Team IA customer with whom Lucas interacted.

Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events."

Schacht v. Wisconsin Dep't of Corr., 175 F.3d 497, 504 (7th Cir. 1999). Team IA provided no

evidence at the hearing of any Team IA customers Lucas interacted with except two entities in Georgia. The untimely affidavit also fails to provide the identity of any actual Team IA customers with whom Lucas had a relationship that could support a covenant not to compete. Summary judgment is the appropriate mechanism to eliminate claims made against a defendant where the plaintiff fails to produce any evidence to support the claim on multiple occasions.

III. The Trial Court Properly Applied South Carolina Law To The Employment Agreement.

The Court of Appeals erred in finding the trial court did not properly apply South Carolina law to the employment agreement. Specifically, *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961), dictates how South Carolina courts will apply South Carolina law when analyzing covenants not to compete. Under *Standard Register*, in applying South Carolina law to a covenant not to compete, the South Carolina court will look to the place of the performance of the covenant to see if it is enforceable in that jurisdiction. In *Standard Register*, the covenant expressly provided that Ohio law would apply to the contract. The company seeking to enforce the covenant was an Ohio company with an employee who worked throughout the country, including South Carolina, for the company. Our South Carolina Supreme Court held:

The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, *but if it is invalid under the law of the State where it is to be performed* and contrary to our public policy, we will not enforce it.

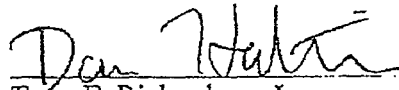
Id. at 541 (emphasis added).

At the hearing, the only identified customers of Team IA serviced by Lucas were two governmental agencies in Georgia. There is no dispute Georgia law deems the employment agreement invalid because it restricts Mr. Lucas from accepting unsolicited business of ex-Team IA customers. See *Waldeck v. Curtis*, 261 Ga. App. 590, 592, 583 S.E.2d 266, 268 (Ga. Ct. App.

2003); *Pregler v. C&Z, Inc.*, 259 Ga. App. 149, 150, 574 S.E.2d 915, 916 (Ga. Ct. App. 2003).

The trial court did not apply Georgia law to the covenant, it applied South Carolina law and looked to the place of performance of the covenant (Georgia) to determine its validity.

The trial court did not apply Georgia law to the agreement as stated in the Opinion, it applied South Carolina law. Specifically the trial court followed the approach set forth in *Standard Register* to look to the place of performance of the covenant to see if the covenant should be upheld. Since no dispute exists that this agreement is void where it would be performed, a South Carolina court applying South Carolina law as set forth in *Standard Register* must find the agreement void.



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ATTORNEYS FOR DEFENDANTS
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Barnwell, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Trial Court Case No. 2009-CP-32-01078

Team IA, Inc.

Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC,

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Of whom Cicero Lucas is

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Cicero Lucas and George Lawson, IV,

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v.

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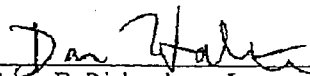
PROOF OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing on the above-listed Appellant and Third-Party Defendants by depositing a copy of the same in the United States Mail, certified, return receipt requested, and postage prepaid, on September 27, 2011, addressed to their attorney of record as shown:

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September 27, 2011

The South Carolina Court of Appeals

Team IA, Inc.,

Appellant,

v.

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5 Point Solutions, LLC,

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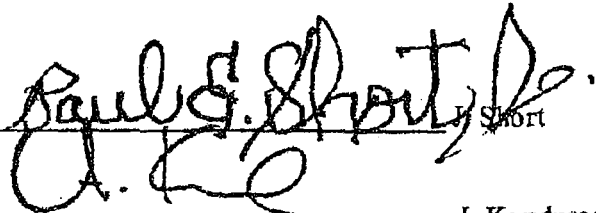
The Honorable R. Knox McMahon
Lexington County
Trial Court Case No. 2009-CP-32-01078

ORDER DENYING PETITION FOR REHEARING

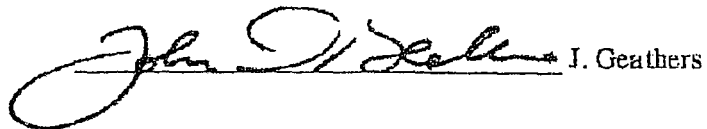
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied. However, Unpublished Opinion Number 4889, filed September 14, 2011, is withdrawn and the attached opinion is substituted.

FILED

OCT 20 2011


Paul G. Short, Jr.

J. Konduros


John I. Geathers

RECEIVED

NOV 23 2011

S.C. Supreme Court