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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | | FOR THE ELEVENTH JUDICIAL CIRCUIT |
| COUNTY OF LEXINGTON | ) | |
| | | Civil Action No.: 2011-CP-32-04051 |
| Palmetto Mortuary Transport, Inc., | ) | |
| Plaintiff, | ) | **ORDER** |
| v. | ) | |
| Knight Systems, Inc. and Robert L. Knight, | ) | |
| Defendants | ) | |

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BETH A. CARRIGG
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LEXINGTON, SC

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This matter comes before the court-appointed Special Referee (the "Court") by Consent Order signed by The Honorable Thomas A. Russo, Chief Administrative Judge for Lexington County on May 14, 2013.

**PROCEDURAL BACKGROUND**

This case was initiated by Plaintiff Palmetto Mortuary Transport, Inc. ("Palmetto Mortuary") on October 26, 2011 against Defendants Knight Systems, Inc. ("Knight Systems") and Robert L. Knight ("Knight") (collectively "Defendants").

The case was tried before the Court on December 18, 2013 at the offices of Davis Frawley LLC in Lexington, South Carolina. Palmetto Mortuary was represented by John J. Pringle, Jr. and Lyndey Ritz Zwing of Adams and Reese LLP. Present on behalf of Palmetto Mortuary were its principal owners Mr. Donald Lintal and Mrs. Ellen Lintal. Defendant Robert "Buddy" Knight was present on behalf of himself and Defendant Knight Systems. Both Defendants were represented by Reginald "Reggie" L. Lloyd of The Lloyd Law Firm, LLC and Todd Hagins of Hagins Law Firm.

The Court has carefully considered the testimony of Mr. and Mrs. Lintal on behalf of the Plaintiff and the testimony of Mr. Knight on behalf of Defendants as well as the arguments that have been made to the Court.

"A judge's findings of fact in an action at law tried without a jury have the force of a jury's findings of fact." *Southern Realty and Const. Co. v. Bryan*, 290 S.C. 302, 313, 350 S.E.2d 194, 200 (Ct. App. 1986) (*citing Doe v. Asbury*, 281 S.C. 191, 314 S.E.2d 849 (Ct. App. 1984); *Melton v. Williams*, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984)). "When findings are based on determinations regarding the credibility of witnesses, trial courts are given great deference. *See U.S. v. Hall*, 664 F.3d 546, 462 (4th Cir. 2012). As the special referee, I am charged with weighing the testimony of all witnesses and determining credibility. *See Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) (holding appellate court should not disregard the findings of special referee, "who was in a better position to weigh the credibility of witnesses") (citation omitted).



Based on the evidence and law presented to the Court, the Court makes the following findings and conclusions:

**FACTUAL BACKGROUND**

1. This action arises out of an Asset Purchase Agreement ("APA" or "Agreement"), executed on or about January 5, 2007. *See* Plaintiff's Exhibit 1 (admitted for Donald J. Lintal) ("APA"). The Agreement involved Palmetto Mortuary, as the buyer, and Robert "Buddy" Knight and Knight Systems, as the sellers. *Id.*; *see also* Trial Tr. at 22:14-18. The transaction involved the sale of Defendants' mortuary transport business to Plaintiff.

2. Pursuant to the terms of the APA, Palmetto Mortuary purchased, among other assets specified in Section 1: tangible assets (defined in Section 1.1.1.1 of the Agreement), goodwill (defined in Section 1.1.1.6), customer lists (defined in Section 1.1.1.3). Palmetto Mortuary also obtained mutual covenants from Knight Systems, including a ten-year non-compete agreement which is set forth in Exhibit 3.2.6 to the APA ("Non-Compete Agreement").

3. In exchange for the assets and other contractual terms specified in the APA, including the covenant not to compete, Palmetto Mortuary was obligated to pay Knight Systems a purchase price of Five Hundred and Ninety Thousand Dollars ($590,000.00). Trial Tr. at 24:8-12.



4. Additionally, Palmetto Mortuary agreed to exclusively purchase four types of body bags from Knight Systems. The types of bags are identified in Section 3.4.8 of the APA (the "Exclusivity Provision") as: (1) heavy duty body bags, (2) lightweight body bags, (3) odor-proof body bags, and (4) water-retrieval body bags. Plaintiff agreed to purchase the four stated body bags from Defendants for the ten-year term of the Non-Compete Agreement. *See* APA at Section 3.4.8; *see also* Trial Tr. at pp. 27:18-22.

## ISSUES PRESENTED TO THE COURT

I. Defendants claim that the Non-Compete Agreement at Exhibit 3.2.6 of the Agreement is unenforceable for lack of adequate consideration and because its duration and geographic scope are unreasonable.

II. Defendants claim that Plaintiff breached the Exclusivity Provision at Section 3.4.8 of the APA by purchasing body bags from sources other than Defendants. Defendants assert that Plaintiff's alleged breaches of the Exclusivity Provision entitled Defendants to repudiate the entire Agreement, including the Non-Compete Agreement.

III. Plaintiff claims that Defendants breached the Non-Compete Agreement at Exhibit 3.2.6 of the APA by submitting a competing bid against Plaintiff for mortuary transport on behalf of Richland County and winning said bid. Plaintiff also claims that Defendants materially breached the Exclusivity Provision of the Agreement by refusing to sell Plaintiff odor-proof body bags. Plaintiff asserts entitlement to monetary damages, injunctive relief, and attorney's fees as provided by the Agreement.

## FINDINGS AND CONCLUSIONS



## I. THE PARTIES' NON-COMPETE AGREEMENT IS ENFORCEABLE.

### A. *The Non-Compete Agreement is supported by valuable consideration.*

1. Defendants allege that "the terms of the Non-Compete Agreement alleged by the Amended Complaint to be enforceable between these parties are unsupported by sufficient compensation, separate and apart from the purchase price of the assets set forth in the Asset Purchase Agreement." (Defendants' Answer to Plaintiff's Amended Complaint at ¶ 36). The Court disagrees.

2. The Non-Compete Agreement provides in relevant part: "NOW, THEREFORE, in consideration for the following premises, the promises set forth herein, the consideration of $1,000 specifically allocated to this Agreement in the Purchase Agreement." *See* APA at Exhibit 3.2.6.

3. In South Carolina, covenants not to compete arising out of the sale of a business "will, in conformity with the just and equitable principles of the common law, be generally upheld and enforced if (1) supported by a valuable consideration, (2) reasonably limited as to time, and (3) reasonably restricted as to the place of the territory, that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 7234 (1930) (citations omitted).

4. Consideration is generally considered "a bargained for gain or advantage to the promise or a bargained for detriment or disadvantage to the promisor." *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 464 (N.Y. 1982). Consideration is present when the parties exchange something to which they attach value. Absent a claim of fraud or unconscionability, a court will not concern itself with whether there was adequate consideration. *Campbell v. Carr*, 361 S.C. 258, 265, 603 S.E.2d 625, 628 (Ct. App. 2004); *Spaulding v. Benenati*, 57 N.Y.2d 418, 423 (N.Y. 1982).

"Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract." *Buckingham v. Wray*, 366 N.W.2d 753 (Neb. 1985).



5. In *Lowery v. Callahan*, 210 S.C. 300, 304, 42 S.E.2d 457, 458 (1947), the South Carolina Supreme Court stated: "When the consideration agreed upon . . . is something of value, the courts will generally, in the absence of fraud, coercion, and undue influence, and if the parties are competent, not avoid the [contract] on the ground of the inadequacy of the consideration . . . , for the contracting parties, and not the courts, must determine the quid pro quo." "The inadequacy of price is determined at the date the contract was entered." *Campbell v. Carr*, 361 S.C. at 264, 603 S.E.2d at 628 (citations omitted).

6. Even the slightest consideration will be deemed sufficient.[1] "The extent of the duty created by contract is not determined by the kind of consideration on which it is based; consideration consists of what is actually given or suffered and accepted for a promise." 17A Am. Jur. 2d Contracts § 115 (citations omitted). "Mutual promises . . . constitute a good consideration." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) (*quoting Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959)).

7. The consideration in the Non-Compete Agreement is unambiguously stated as $1,000. "If consideration is found at all to support a contract, inquiry into its adequacy is

[1] In *Whitefield v. McLeod*, 2 S.C.L. (2 Bay) 380, 384 (SC Const. Ct. App. 1802), the Constitutional Court of Appeals of South Carolina eloquently stated: "Every man was free to make a contract, and free to refuse it, but when once made, he was bound by it, where there was no fraud, concealment or latent defect. It was the sound policy of the law to support and uphold contracts, and not to destroy or render them uncertain. Inadequacy of consideration, is not alone any ground for setting aside a contract solemnly entered into. The adequacy or inadequacy of consideration, in every contract, depends so much upon the different ideas of men, in relation to the objects of their contracts, and the views and purposes with which they are entered into, that there is no fixing any general standard or rule by which it can be settled; for what one man might think a full and adequate consideration, another might think very inadequate, so that really it is so indefinite and uncertain in itself, that such a doctrine never could be reduced to practical use; as every contract might be impeached, where any advantage is gained on one side or the other, which had not equally been acquired by the opposite party."

forbidden." *Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635, 639 (Minn. Ct. App. 1986). This Court finds that $1,000 is not ambiguous, and therefore, this Court must enforce the terms of the Non-Compete Agreement as written.



8. Defendants seek to show that the events leading up to the execution of the Non-Compete Agreement demonstrate a lack of consideration for it. In considering the adequacy of consideration, the Court must look to the four corners of the document, and cannot consider parol evidence to construe the agreement unless its terms are ambiguous. *See Park Regency, LLC v. R&D Development of the Carolinas, LLC*, 402 S.C. 401, 741 S.E. 528 (Ct. App. 2012) ("the intention of the parties . . . [is] gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument") (citation omitted); *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999) (only if a contract is ambiguous will parol evidence be admissible to ascertain the true meaning and intent of the parties).

9. Defendants do not allege an ambiguity with respect to the language of the Non-Compete Agreement, but even if such an ambiguity existed, the negotiation of the Non-Compete Agreement before the document was executed does not demonstrate a lack of consideration.

10. In October of 2006, Donald and Ellen Lintal met with a broker regarding the purchase of Defendants' business. *See* Trial Tr. at 164:2-9. Shortly after meeting with their broker, in November of 2006, Mr. and Mrs. Lintal visited with Defendant Knight and looked at Knight System's business location for the purpose of informing Plaintiff's final valuation of Defendants' business. *Id.* at 164:17-24; 165:3-13. From November of 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the Agreement. *Id.* at 135:11-136:15; 140:4-141:14; 198:5-9; 200:16-201:5; 245:20-249:19.

11. Mrs. Lintal, Palmetto Mortuary's Chief Financial Officer, testified that one of the drafts of the Notice of Intent to Purchase submitted to Defendants and/or Defendants' agents, including their brokers or attorney, included a Non-Compete Agreement with a term of ten years and a one hundred and fifty mile radius. *Id.* at 139:25-140:3; 165:20-166:11; 167:19-168:10. Mrs. Lintal also testified that she had a discussion with her attorney about having a term of only seven years for the Non-Compete Agreement, but that term was ultimately increased to ten years in the final Agreement. *Id.* at 168:16-169:1. On December 14, 2006, Plaintiff's counsel sent a draft Non-Compete Agreement to Defendants' counsel which was intended by both parties to be included in the final APA. *Id.* at 156:9-12.



12. Closing took place on January 5, 2007. *See* APA. At the closing, the parties for the first time allocated dollar amounts to each of the Agreement's provisions. *Id.* at 98:5-13; 98:25-99:10. Mrs. Lintal testified that prior to closing, she "had discussions with our attorney and we were working with [Defendants' attorney] to get an allocation of assets, because that was never put in the document prior to closing. [I] wanted it in . . . because I wanted to review it. It never got accomplished until we sat down at closing." *Id.* at 157:3-8. There is no dispute that until closing no dollar figure was specifically assigned to the Non-Compete Agreement. *Id.* at 156:13-22.

13. Mrs. Lintal and Mr. Knight both testified that the $1,000 allocation ultimately attributed to the Non-Compete Agreement was primarily driven by Mr. Knight at the instruction of his accountant. *Id.* at 160:1-24; 161:4-19; 201:8-25. Both Mrs. Lintal and Mr. Knight testified that Mr. Knight wanted to allocate $1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize their potential capital gains tax. *Id.* at 162:20-163:2; 179:10-23; 201:6-25.[2] After collectively determining what allocation was best for the parties following the advice of

[2] Mrs. Lintal testified that part of Palmetto Mortuary's goal was to minimize the amount allocated to goodwill for the same reason. *Id.* at 179:10-181:1.

their agents, the parties executed the Agreement. *Id.* at 182:13-16 (Mrs. Lintal testified that negotiations were "a give and take"); 202:4-20 (Mr. Knight testified that there was some discussion" regarding negotiating the amount allocated to the Non-Compete Agreement, but that he did not remember what it was). *See* Trial Tr. p. 250:1-13.



14. Mr. Knight testified that he "appeared at the closing [with his attorney] and . . . read the documents at closing." *See* Trial Tr. at 249:16-19; 246:1-6. Mr. Knight further testified that "after th[e] discussion about the $1,000 that's mentioned as the consideration for the covenant not to compete, [he] did[] [not] object to that provision or any provision of either agreement at the closing." *Id.* at 249:20-25.

15. Defendants did not assert that the Non-Compete Agreement was procured by fraud or that any of its terms were unconscionable. Accordingly, the Court can only consider the bargaining parity of the parties to determine whether there is some consideration exchanged or value placed on the Non-Compete Agreement. "It is not the business of courts to protect parties from the consequences of bad contracts, but to protect them from the consequences of either legal or moral fraud and imposition." *Jackson v. Carter*, 128 S.C. 79, 121 S.E. 559, 563 (1924) (*quoting Goree v. Wilson*, 17 S.C. L. 597 (S.C. Eq. 1830)).

16. The evidence in the record reveals that Defendants negotiated for a $1,000 consideration as stated in the Non-Compete Agreement. *See* Trial Tr. at 160:1-24; 161:4-19; 201:8-25; 162:20-163:2; 179:10-23; 201:6-25. This negotiation was done with the advice and consent of Defendants' accountant and attorney. *Id.* "Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say he got no consideration." *Jackson v. Carter*, 128 S.C. 79, 121 S.E. at 563 (citation omitted).

17. Defendants' claim that $1,000 was an insufficient consideration for the ten-year and 150 mile radius Non-Compete Agreement is without merit. "The inadequacy must not be measured by grains, but it ought to be palpably disproportioned to the real and market value of the property, so as to constitute a hard, unreasonable, and unconscionable contract . . . ." *Campbell v. Carr*, 361 S.C. 258, 264, 603 S.E.2d 625, 628 (Ct. App. 2004) (*quoting Craven v. Williams*, 302 F.Supp. 885 (D.S.C. 1969)). The Court finds that all parties to the APA received mutual promises and consideration for those promises. Defendants' argument that $1,000 was insufficient amounts to a request that this court "measure grains," which is not something the Court is in a position to do. The undisputed evidence shows that the amount of consideration exchanged between the parties was determined after all parties received advice and consent of their agents.



18. Based on the facts presented at trial, the Court finds that the Non-Compete Agreement contained in the APA was supported by adequate consideration.

**B. *The Non-Compete Agreement is Reasonably Limited in Time and Geographic Scope.***

19. Defendants allege and argue that "[t]he territorial and limitations and length of term of the Non-Compete Agreement are unduly broad and expansive and, therefore, constitute an unenforceable restraint on trade and unenforceable agreement. (Defendants' Answer to Amended Complaint at ¶ 37). The Court disagrees.

20. The Non-Compete Agreement at issue in this case arises out of the sale of a business, and not an employment contract. As such, the Court will not apply the test applicable to covenants not to compete contained in employment contracts.[3] As the Fourth Circuit has recognized, "restrictive covenants not to compete in employment contracts . . . are scrutinized more

[3] Where an employment contract contains a non-compete agreement, the courts strictly construe the terms of the covenant not to compete against the employer. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011) ("Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.") (*quoting Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983)).

rigorously than similar covenants incident to a sale of business." *American Hot Rod Ass'n, Inc. v. Carrier*, 500 F.2d 1269 (4th Cir. 1974) (noting that this is the "general trend of modern authority").[4]



21. In South Carolina, covenants not to compete arising out of the sale of a business "will, in conformity with the just and equitable principles of the common law, be generally upheld and enforced if (1) supported by a valuable consideration, (2) if reasonably limited as to time, and (3) if reasonably restricted as to the place of the territory, that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 7234 (1930) (citations omitted). "[T]he restraint must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may in reason expect to follow from the restrictive features of the contract, and not injurious to the interests of the public." *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942) (citations omitted).

22. "In determining whether a contract in partial restraint of trade is reasonable, the court will look to the whole subject matter of the contract, the kind and character of the business, its location, the purpose to be accomplished by the restriction, and all circumstances which show the intentions of the parties and which must have entered into the making of the contract." *Reeves*, 200 S.C. 494, 21 S.E.2d at 188 (emphasis added). "In determining whether a contract is reasonable in respect to the length of time during which the restriction is to run, as applied to a case like the one before us, it would seem that the fair and full protection of the business, good will and trade name

[4] In *also Alston Studios, Inc. v. Lloyd v. Gress and Associates*, 492 F.2d 279, 284 (4th Cir. 1974), the Fourth Circuit held: "In all events, the law applicable when the sale of a business is involved and that when only an employee is involved, as here, is different. 'The scope of permissible restraint is more limited between employer and employee than between seller and buyer, and the covenant is construed favorably to the employee.'", (*quoting Richardson v. Paxton Co.*, 127 S.E.2d 113 (Va. 1962)). "Conversely, greater latitude is allowed in determining the reasonableness of a restrictive covenant when the covenant relates to the sale of a business than in those ancillary to an employment contract." *Id.* (*citing Day Companies v. Patat*, 403 F.2d 792 (5th Cir. 1968).

from which the vendee has purchased and paid for, may well be accepted as the test. It naturally follows that each case must be governed in the main by its own facts." *Id.*



23. In *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 7234 (1930), the South Carolina Supreme Court upheld a covenant not to compete that was five years and extending to the territorial extent of the corporate limits of the City of Orangeburg. The Court held: "there is nothing to indicate that either the period . . . or the territorial extent . . . considered alone and without regard to surrounding facts and circumstances which might affect a reasonable protection of the rights of the purchasing party, imposes unreasonable limitations in regard to either." *Id.*

24. The South Carolina Supreme Court has also upheld a covenant not to compete which was unlimited in time, but limited in territory:

> We think the reasonableness of the restraint in the case at bar may be demonstrated. In the first place, we consider whether the restriction is more comprehensive than is necessary to secure to the plaintiff the benefits of his purchase. Is the protection afforded the plaintiff larger or wider than is necessary? In this case, the defendant entered into the covenant, not only for the sale of his property, but the contract included the sale of the good will and the use of his name. He realized a large sum of money, and presumably he considered it to his advantage to make the sale. One element of the value of the business transferred by him to the plaintiff was the almost certain probability that his customers would continue to trade with the plaintiff, and this probability was increased and the value of the purchase enhanced by the agreement of the defendant not to engage in the same business in the county of Richland **during his lifetime**. Such an agreement was a strong inducement to the plaintiff to make the purchase, and was based upon a good consideration. . . . . The contract as we view it was in no sense unreasonable or oppressive.
>
> *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184, 188 (1942) (emphasis added).

25. Courts in other jurisdictions recognize that covenants not to compete arising out of the sale of a business are enforced more liberally than covenants arising out of the employer-employee relationship. *See Wells v. Wells*, 400 N.E.2d 1317 (Mass. App. 1980). "Among the considerations which favor more liberal enforcement of buyer-seller covenants are: that a seller of a business interest may not derogate from the value of the business as sold by competing with it; that

the buyer is entitled to the full value of the "benefit and advantages of his purchase"; and that the parties entered into the agreement with the assistance of counsel and without compulsion (an element frequently not present in the employer-employee context)." *Id.* at 1320.



26. The Court finds that the ten-year period and one hundred and fifty mile radius are reasonable and should be enforced. The Agreement at issue involved the complex and complicated sale of a business for a total price of $590,000.00 between two sophisticated businesses and parties.

27. In particular, Mr. Knight received $590,000 in exchange for the Non-Compete, as part of an APA he negotiated with the assistance of counsel and an account. Defendants assigned three (3) body removal contracts to Plaintiff as part of the Agreement, but specifically retained the right to conduct their body bag business. "[I]t is held that the restraint must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may in reason expect to flow from the restrictive features of the contract, and not injurious to the interests of the public." *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184, 187 (1942) (*citing Beam v. Rutledge*, 9 S.E.2d 476 (N.C. 1940) and *Rakestraw v. Lanier*, 30 S.E. 735 (Ga. 1898)).

28. Similar to the seller in *Reeves v. Sargeant*, Knight entered into the covenant not to compete, not only for the sale of his business and his business's assets, but he also realized a large sum of money, and by his execution of the Agreement he considered it to his advantage to make the sale. *Reeves*, 200 S.C. 494, 21 S.E.2d 184, 188. Accordingly, the Court finds that the consideration exchanged for the entire contract together with the consideration exchanged for the Non-Compete Agreement was reasonable and justifies the terms of the Non-Compete in this case.

29. Additionally, the Plaintiff provided testimony regarding the importance of the Non-Compete Agreement to its decision to buy the business. Mr. Lintal testified that the ten-year term of the Non-Compete Agreement was significant to Palmetto Mortuary's decision to purchase Knight's

business. The ten year period was intended by both parties to protect Palmetto Mortuary from competition with Knight Systems for two five-year contract cycles with the University of South Carolina, and Richland and Lexington Counties' Coroners' Offices, contracts which were previously held by Knight Systems for more than fifteen years. See Trial Tr. at 74:25-75:12. The ten year period was selected so that Palmetto Mortuary would be able to get a second term with the Richland County Coroner's Office without the risk of competition by Knight. The Lintals wanted a ten year period to allow Palmetto Mortuary "to get through at least two cycles" of five-year contracts with the Richland and Lexington Coroner's Offices. *See* Trial Tr. at 103:16-25. "The contracts were the whole value to this business in regards to what types of guaranteed revenues that we were going to be able to generate. So we wanted at all costs to try to protect that for as long as we could." *See* Defendants' Exhibit 1 (Lintal Deposition) at 86:2-10. "[T]he value of th[e] contracts made up [the Lintals'] ultimate purchase price" of the business. *Id.* at 86:11-18. Mr. Lintal testified that the Non-Compete Agreement "was very important to [the Lintals' evaluation] because without the non-compete we wouldn't have bought the business." *Id.* at 88:6-10.



30. Mr. Lintal additionally testified that as to the geographic restriction, he believed Palmetto Mortuary would expand its business throughout other counties in the State of South Carolina. *See* Trial Tr. at 104:12-106:14 ("We did not know, but we did not want to limit our options if it was available to us. At the time it did not seem to be an issue on their part. I don't recall any objections to that.").

31. Given Mr. Knight's testimony that he did not intend to get back into the mortuary transport business both before and after the Agreement was executed by the parties (*see* Trial Tr. at 195:25-196:6; 204:1-8 (Mr. Knight testified that he "expressed [his] desire to [Mr. Lintal] how

much I wanted to get out of the business."))[5] and the significant value placed on the restrictions by Palmetto Mortuary, the Court finds that the time and geographic restrictions imposed by the Non-Compete Agreement were reasonable. The Court recognizes that the Non-Compete Agreement was a significant part of the consideration expected by Palmetto Mortuary in exchange for its agreement to purchase Defendants' mortuary transport business for $590,000. As a result of the foregoing evidence, the Court finds that the Non-Compete Agreement is enforceable.



## II. DEFENDANTS BREACHED THE ASSET PURCHASE AGREEMENT BY REFUSING TO MAKE BAGS AVAILABLE TO PLAINTIFF AND BY VIOLATING THE NON-COMPETE AGREEMENT

32. Plaintiff alleges that Defendants breached the Non-Compete Agreement (Exhibit 3.2.6) by submitting a bid for mortuary transport services to the Richland County Coroner's Office on June 17, 2011. Plaintiff also alleges that Defendants breached the Exclusivity Provision (Section 3.4.8) by removing its odor-proof bags from the market.

33. To recover for a breach of contract, the plaintiff must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). As stated more fully above (*see supra* Section I(A) and (B)), the Non-Compete Agreement is enforceable because it is supported by adequate consideration and is reasonable in time and geographic scope.

34. The Non-Compete Agreement provides in relevant part:

For a period of ten (10) years after the date hereof:

[5] This case can be distinguished from *Milliken & Co. v. Morin*, 399 S.C. 23, 32, 731 S.E.2d 288 (2012), where the South Carolina Supreme Court held that "noncompete agreements are viewed as restraints on trade which limit an employee's freedom of movement among employment opportunities." Here, Knight intended to get out of the mortuary transport business, and therefore, the parties' intention with the instant Non-Compete Agreement was not necessarily to restrain Knight's freedom of movement among employment opportunities.

A. **Customers, etc.** Seller shall not, directly or through Affiliate, (i) call upon or contact (or assist another person(s) or business entity to call upon or contact) any Customer for the purpose of furnishing the same or similar services provided or offered at any time by the Business to any Customer, or (ii) solicit or divert (or assist another person(s) or business entity to solicit or divert) any Customer from purchasing or using any of the Buyer's services, or (iii) provide or attempt to provide (or assist another person(s) or business entity to provide or attempt to provide) to any Customer the same or similar services provided or offered by the Business. For purposes of this Section 2(A), the term "Customer" shall mean any customer or client of the Business and shall include (without limitation) every such person(s) to which the Business or Seller has provided services prior to the date hereof.



B. **Territory**. In addition to (but not in limitation of) the restrictions of Section 2(A), Seller shall not, directly or through an Affiliate engage in, or assist another person or entity to engage in, providing services similar to those furnished by the Business or Seller at any time prior to Closing (as such term is defined in the Purchase Agreement) in competition with Buyer anywhere within 150 miles of the present location of the Business (the "Territory").

35. In early 2011, the Richland County Coroner's office issued a Request for Proposal ("RFP") seeking bids to provide mortuary transport services for a period of five years. At that time, Palmetto Mortuary held the mortuary transport services contract with Richland County as a result of the Agreement. *Id.* at 58:24-59:3; 61:18-62:5. The deadline for submission of bids was June 17, 2011 at 3:00pm. *Id.* at 58:12-22. Palmetto Mortuary prepared a bid and timely submitted it for Richland County's consideration. *Id.* at 59:4-5.

36. Defendants also submitted a bid to the Richland County Coroner's Office.

37. Additionally, after the RFP closed on June 17, 2011, Mr. Knight emailed Ms. Christie Swofford at the Richland County Procurement Office, seeking a determination that Knight Systems be chosen to provide mortuary transport services because Knight System is the "sole provider" of odor-proof body bags required by the RFP. *See* Trial Tr. at 62:6-64:13; 137:14-24; 242:14-243:25. There is no dispute that Richland County required odor-proof bags as part of the RFP. Mr. Knight stated in his email to Richland County that he was taking all of his odor-proof

bags off of the market, despite the Exclusivity Provision's requirement that Knight Systems provide "odor-proof body bags" to Palmetto Mortuary. According to Mr. Lintal, he "was [not] aware of" needing any alternative to an odor proof bag for his bid to Richland County "[b]ecause [he] still was under the existing contract . . . with Knight Systems." *Id.* at 136:24-137:1. That contract gave Palmetto Mortuary "the rights to buy th[e] odor proof bag [from Knight], as well as these other[] [types] of bags" in Section 3.4.8 of the Agreement. *Id.* at 137:2-5.



38. Despite the fact that Palmetto Mortuary submitted a bid with the lowest price for services and received the highest total of points from the Procurement Office as part of the review of the RFP, Richland County selected Knight Systems for the five-year contract. *Id.* at 122:1-14; 64:14-25; 137:2-24. There is evidence in the record supporting the contention that without Defendants' claim that they were the sole provider of odor-proof body bags, the Richland County contract would have been awarded to Palmetto Mortuary. *See* Trial Tr. at 122:1-14; 64:14-25; 137:2-24. (Q: "And if [Knight] hadn't [sent the letter], there wouldn't have been an issue?" A: "I should have won the contract.").

39. Defendants' suggestion that they were the sole providers of odor-proof body bags contradicts the clear language of Section 3.4.8 of the parties' Agreement which required Defendants to provide odor-proof body bags to Palmetto Mortuary for a price of $50.00 per bag.[6] *See* APA at Section 3.4.8. This Court concludes that the "shall provide" language in the Exclusivity Provision required Defendants to provide Palmetto Mortuary with odor-proof body bags at the time of the parties' submission of bids to Richland County. *Id.*[7]

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[6] In 2011 Knight implemented a price increase of 10%, raising the cost of odor-proof disaster bags to $55.00 each.

[7] The Court rejects Defendants' counsel's arguments that the "shall provide" language in APA Section 3.4.8 refers only to the obligation that *if* Defendants provided body bags that they were required to provide them at the rates indicated below. The language of Section 3.4.8 requires that "Knight . . . shall provide to [Palmetto Mortuary] body bags at a discounted rate." The clause mandates two separate requirements: (1) that Knight shall provide bags to Palmetto Mortuary and (2) that Knight shall provide bags to Palmetto Mortuary at a discounted rate.

40. Defendants' bid submission and subsequent award of a mortuary transport contract with Richland County violates the terms of the Non-Compete Agreement as it represents "providing" body removal services to a "Customer" within the geographic territory and during the time period specified therein. Palmetto Mortuary's principal place of business is Lexington County, South Carolina and the contract at issue was for Richland County, South Carolina, a county within one hundred and fifty (150) miles of Palmetto Mortuary's business in Lexington County. Additionally, at the time Defendants submitted the bid to Richland County, there remained five years and seven months on the parties' ten-year Non-Compete Agreement.

41. In addition, the Court concludes that Defendants breached the APA's Exclusivity Provision by refusing to sell odor-proof body bags to Plaintiff as required by Section 3.4.8 of the Non-Compete Agreement and by claiming to Richland County that it was the "sole provider" of odor-proof body bags in order to increase its changes of receiving the Richland County Coroner's Office contract.

## III. PLAINTIFF'S CONDUCT DID NOT CONSTITUTE A MATERIAL BREACH OF THE PARTIES' AGREEMENT SUCH THAT DEFENDANTS WERE EXCUSED FROM PERFORMANCE OF THEIR CONTRACTUAL OBLIGATIONS.

42. Defendants assert that "Plaintiff's breach of the agreement with Defendants negated all terms, conditions and responsibilities of the Defendants under the Asset Purchase Agreement and the Non-Compete Agreement." (Defendants' Answer to Amended Complaint, ¶ 42). The Court disagrees.

43. The Exclusivity Provision, Section 3.4.8 of the Agreement, provides:

> Knight, through his related body bag business (the "Related Business"), shall provide to Buyer body bags at a discounted rate and buyer shall for the term of the non-compete agreement buy all of their body bags from the Seller. Below are the current charges for different types of body bags. The prices cited below shall not be increased by more than ten percent (10%) in any calendar year.

| | |
|---|---|
| Heavy Duty body bags: | $20.00 |
| Lightweight body bags: | $8.00 |
| Odor-Proof body bags: | $50.00 |
| Water-Retreival body bags: | $30.00 |



44. In construing the Exclusivity Provision the Court is guided by South Carolina's contract law. "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958). "The parties' intention must, in the first instance, be derived from the language of the contract." *Schulmeyer v. State Farm Fire & Cas. Co.*, 323 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters., Inc. v. S.C. Human & Health Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intention of the parties."). Contractual interpretation requires the Court to look at the language of the entire contract "and not . . . isolated portions" thereof. *See Buice v. WMA Securities, Inc.*, 380 S.C. 149, 156, 668 S.E.2d 430, 434 (Ct. App. 2008) (*citing Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975)). "Further, in determining the intent of the contracting parties, the court should . . . read together different provisions dealing with the same subject matter." *Id.* (citations omitted).

45. Plaintiff claims that the Exclusivity Provision obligated Plaintiff to buy those categories of bags listed in Section 3.4.8 of the Agreement from the Defendants (including heavy duty bags, lightweight bags, odor-proof bags, and water-retrieval bags only). Contrarily, Defendants assert that the Exclusivity Provision prevented Plaintiff from buying any body bag from any source other than Defendants. The Court agrees with Plaintiff's interpretation of Section 3.4.8.

46. Defendants are correct that the Exclusivity Provision states that Plaintiff "shall for the term of the non-compete agreement buy all of their body bags from the Seller." However, Defendants' focus on such language in isolation overlooks provisions providing context for that

phrase. Significantly, preceding language in that same sentence requiring Defendants to "provide to Buyer body bags at a discounted rate . . ." would be meaningless without all of those discounted rates being enumerated within the Agreement. Accordingly, the Exclusivity Provision subsequently lists the types of bags actually offered by Defendants and the prices at which Plaintiff could purchase those bags.



47. Reading the Exclusivity Provision as a whole and considering all of its provisions demonstrates that the parties intended the term "all of their body bags" to mean "all" bags in the listed categories and priced accordingly. "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citation omitted).

48. While Defendants allege that they were "at all relevant times, capable and willing to manufacture and/or provide Plaintiff with any desired or needed body bags," (Defendants' Answer to Plaintiff's Amended Complaint at ¶ 41), that reading of the Exclusivity Provision could lead to unreasonable results not intended by the parties. "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted). For example, the Exclusivity Provision as construed by Defendants is silent with respect to how a type of bag not specifically listed therein would be priced. The Plaintiff's reading, on the other hand, memorializes both the Plaintiff's obligation to buy certain bags, and the Defendant's obligation to sell those bags at specific, discounted prices.

**A. *Bag Purchases by Plaintiff***

49. Palmetto Mortuary purchased one infant body bag from Southland Medical Corporation on or about April 3, 2008 for the purchase price of $5.25, and on April 9, 2008 purchased one case containing thirty infant bags for a total price of $187.50. *Id.* at 45:22-46:12; *see also* Plaintiff's Exhibit 4 (admitted through Donald J. Lintal) at p. 1. Mr. Lintal testified that after receipt of the first infant body bag (a "pediatric" size bag) and demonstration to the Lexington County Coroner, he purchased thirty of the larger sized infant bags. "[W]e, being Randy Martin and myself, [determined] that the larger size would be more versatile for [our] use." *Id.* at 49:7-13.



50. On March 6, 2009, Palmetto Mortuary additionally purchased six water-retrieval bags from Evident at a purchase price of $45.00 a piece, for a total of $270.00. *See* Trial Tr. at 49:25-50:5; 50:24-51:23. The price paid by Palmetto Mortuary for the water retrieval bags from Evident was fifty percent more than the guaranteed discounted rate in the Exclusivity Provision of the Agreement, Section 3.4.8. *Id.* at 50:24-51:22; *see also* APA at Section 3.4.8 ("Water-Retreival [sic] body bags: $30.00").

51. On July 14, 2010, Palmetto Mortuary purchased a total of ten body bags from Medical Products Limited, including four extra-large body bags, and six heavy-duty body bags. *See* Trial Tr. at 52:2-11. Extra-large body bags are not included in the list of "different types of body bags" required by the Exclusivity Provision to be purchased by Palmetto Mortuary, but "Heavy Duty body bags" are included. *Id.* at 52:12-24; *see also* APA Section 3.4.8. The total purchase price for the bags from Medical Products Limited was $208.50. *See* Trial Tr. at 53:21-54:1. Palmetto Mortuary paid more for the heavy duty bags purchased from Medical Products Limited ($34.75 per bag) than the $20.00 per heavy duty bag set out in the Exclusivity Provision. *Id.* at 54:2-9; *see also* APA at Section 3.4.8.

52. This Court finds that the total amount of bags purchased by Palmetto Mortuary from sources other than Knight Systems totaled Eight Hundred and Eighty-Four Dollars and Ninety-Seven Cents ($884.97). *See* Trial Tr. at 54:9-17. This total amount includes thirty-one (31) infant bags at a total price of 192.75, four (4) extra-large body bags at a price of $213.72, six (6) heavy duty body bags at a total price of $208.50, and six (6) water-retrieval bags at a total price of $270.00. *Id.* at 48:5-25; 49:21-50:10; 52:4-23.



53. Infant body bags and extra-large body bags are not within the types of bags Palmetto Mortuary was required to purchase from Knight pursuant to Section 3.4.8. Therefore, the Court does not consider Plaintiff's purchases of such bags from manufacturers other than Defendants to be a breach of the APA. However, heavy-duty body bags and water-retrieval bags are included in the type of bags subject to the Exclusivity Provision of the APA. The total amount Palmetto Mortuary paid for bags that were included in the Exclusivity Provision was Four Hundred Seventy Eight Dollars and Fifty Cents ($478.50). *See* Trial Tr. at 49:21-50:10; 52:4-23.

***B. Plaintiff's Breaches of the Exclusivity Provision Were Not Material***

54. Plaintiff's acts of purchasing body bags from other sources do not constitute *material* breaches of the Agreement which would excuse Defendants' performance under the Agreement. Rather, Defendants are only entitled to monetary damages which are proximately caused by Plaintiff's breach, a total damages amount of $478.50.[8] *See* Trial Tr. at 49:21-50:10; 52:4-23.

55. A breach of contract by nonperformance gives rise to merely a cause of action for damages. Monetary damages in a breach of contract action are intended to place the non-breaching

[8] Defendants have put forth no testimony or documentary evidence of any other damages amount and therefore this court relies on the testimony of Mr. Lintal regarding the total amount paid to manufacturers other than Defendants from 2008 to 2011. *See also* Trial Tr. 255:20-24 (Q: "And your knowledge of how many bags he's purchased from sources other than you is limited to what's produced in this case; is that right?" A: "That's correct.").

party in the position he would have been in had there been no breach and the contract was performed. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875, 879 (Ct. App. 1997). The proper measure of compensation is the loss actually incurred as the result of the breach. *Willms Trucking Co., Inc. v. JW Construction Co., Inc.*, 314 S.C. 170, 442 S.E.2d 197, 202 (Ct. App. 1994) (*citing In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 897 (1937)).



56. Typically the non-breaching party is not automatically excused from the future performance of contract obligations every time the other party commits a breach. Rescission or repudiation may only be granted when there is a breach which is so fundamental and substantial that it defeats the purpose of the contract. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). If the breach is relatively minor and not of the essence, the non-breaching party is still bound by the contract and may not abandon performance and obtain damages for a total breach by the defendant. *Williston on Contracts* 63:3. "Otherwise stated, a nonperforming party is liable for any breach of contract, but the other party is discharged from further performance, and is entitled to substantial damages only when there is a material breach." *Id.* (*citing In re Krueger*, 192 F.3d 733 (7th Cir. 1999)). The determination of whether a material breach has occurred is generally a question of fact.

57. Under South Carolina law, "[i]n order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract." *Ackerman v. McMillan*, 314 S.C. 268, 442 S.E.2d 618 (Ct. App. 1994) (*citing Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993)). "Where the breach is not so material as to defeat the purpose of the contract, the non-breaching party is compensated by damages." *Ackerman* at 271, 442 S.E.2d at 620 (citing *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957)). Similarly, "[a] breach of contract warranting rescission of the contract must be so substantial and fundamental as to

defeat the purpose of the contract." *Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009) (*citing Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989)). "Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." *Id.*



58. The Restatement (Second) of Contracts sets forth "circumstances significant in determining whether a failure is material" in Section 241. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981) (adopted by South Carolina Supreme Court in *Kiriakides v. United Artists Comm'n*, 312 S.C. 271, 440 S.E.2d 364 (1994), in the context of breach of a commercial lease); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).

59. The first element regards ensuring the parties' reasonable expectation of an exchange of performances. In determining whether a failure is material, the Court must consider the extent to which the non-breaching party (Defendants) will be deprived of the benefit which was

reasonably expected from the exchange. Defendants' obtained their reasonable expectations from the contract, including the total purchase price ($590,000.00).



60. Additionally, it is undisputed that from January 2008 to June 2011, Palmetto Mortuary purchased more than forty five thousand dollars' worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. *See* Trial Tr. at 56:10-20; *see also* Plaintiff's Exhibits 2 and 3. These purchases from Knight Systems occurred both before and after Palmetto Mortuary's purchases of body bags from sources other than Knight Systems. *Id.* at 56:10-20; *see also* Plaintiff's Exhibits 2 and 3.

61. Under the second element, Defendants can be adequately compensated by the receipt of the monetary damages described above, as they are entitled only to the monetary benefit of the body bags Palmetto Mortuary purchased from other vendors but should have purchased from Defendants.

62. The third Restatement element is the extent to which the party failing to perform or make an offer to perform (Plaintiff) will suffer forfeiture if the failure is treated as material. The South Carolina Supreme Court has made abundantly clear that "in the liberally related rule of contracts . . . the law abhors a forfeiture and . . . contractual provisions of forfeiture are looked upon with disfavor by the Courts." *See Harris-Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275; 701 S.E.2d 742 (2010) (citation omitted). For this reason a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance.

63. In this case, Palmetto Mortuary will suffer a significant forfeiture if Defendants are able to repudiate the remaining five years and seven months of the Non-Compete Agreement. Under the terms of the Non-Compete Agreement, Defendants were prohibited from competing

against Palmetto Mortuary for a period of ten years that began on January5, 2007. *See* APA. At the time of Knight System's breach in June of 2011, five years and seven months remained on the Non-Compete Agreement. Additionally, at that time Palmetto Mortuary had significantly complied with the terms of the parties' Agreement, by paying the full purchase price, $590,000.00, and purchasing significantly all of its body bags from Knight Systems pursuant to the Exclusivity Provision, a total amount of more than $45,000.00. *See* Trial Tr. at 56:10-20; *see also* Plaintiff's Exhibits 2 and 3.



64. A material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances. *See* 14 Williston on Contracts § 43:5 (4th ed.). To the extent that the expectation is already reasonably secure, in spite of the failure, there is less reason to conclude that the failure is material. Here, Defendants already had security for Palmetto Mortuary's performance; in fact, Defendants were already paid the full purchase price for their mortuary transport business. *See* Trial Tr. at 237:9-20.

65. Additionally, Defendants had reasonable assurances of performance given by Palmetto Mortuary after its non-performance. On June 16, 2011, one day before the Richland County Coroner's bid was due, Mr. Knight tape-recorded a conversation between he and Mr. Lintal ("Tape Recording"). *Id.* at 59:8-60:2; 211:18-212:15. At the time of the conversation, Mr. Lintal was not aware that he was being recorded.[9] *Id.* at 59:17. Throughout the tape-recorded discussion,

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[9] The Court finds that the South Carolina Homeland Security Act ("SC Wiretap Act"), S.C. Code Ann. 17-30-10, *et seq.* (Supp. 2010) applies to the determination of whether the recording is admissible evidence in this lawsuit. *See* Trial tr. at 219:2-7 (ruling from the Court admitting the Tape Recording into evidence).

The SC Wiretap Act was enacted in 2002 and was modeled significantly after the Omnibus Crime Control and Safe Streets Act of 1968 ("Federal Wiretap Act"), 18 U.S.C. 2210-2522, *et seq.* (Supp. 2006). Under Section 17-30-30(C), when one party to a communication gives consent for the communication to be intercepted, such recording does not violate the law. Therefore, because Mr. Knight, one of the parties to the communication, consented to the recording of the conversation, the recording does not violate the SC Wiretap or Federal Wiretap Act, even though the recording was "surreptitiously" performed as Plaintiff's counsel argued. Based on this Court's review of the SC Wiretap Act, *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808,811 (Ct. App. 1996) (holding "where one party to a conversation consents to the call being taped, there is no violation of the Fourth Amendment"), and *State v. Whitner*, 339 S.C. 547, 732 S.E.2d 861 (2012), this Court finds that the recording is admissible evidence.

Mr. Knight repeatedly references infant body bags Palmetto Mortuary purchased from another vendor in 2008, nearly three years prior to the conversation. *See* Trial Tr. at 60:14-61:5; *see also* Defendant's Exhibit 1 (admitted for Robert L. Knight) ("Tape Recording"); *see* Trial Tr. at 220:14-221:12. In response to the allegations, Mr. Lintal stated that he did not believe his purchases of body bags from other manufacturers were "significant," specifically stating that he was "not trying to breach" the parties' Agreement. *See* Tape Recording; *see also* Trial Tr. at 221:11-14; 221:19; 222:22; 223:5-9; 223:19-224:9; 225:4-9; 225:18-24.



66. Mr. Lintal assured Mr. Knight during the tape recorded conversation in July of 2011: "If you're willing to make them, I'm going to order them." *Id.* Mr. Knight responded: "I can make them." *Id.* After Palmetto Mortuary purchased body bags from other manufacturers, Palmetto Mortuary continued to purchase body bags from Knight Systems. It is undisputed that from January 2007 to June 2011, Palmetto Mortuary purchased more than $45,000.00 dollars' worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. *See* Trial Tr. at 56:10-20; *see also* Plaintiff's Exhibits 2 and 3.

67. Moreover, "[ a] party's adherence to standards of good faith and fair dealing will not prevent his failure to perform a duty from amounting to a breach" entitling the non-breaching party to damages, but "[t]he extent to which [his] behavior . . . comports with standards of good faith and fair dealing is a significant circumstance in determining whether the failure is material." Restatement (Second) of Contracts § 241, cmt. f. Here, Palmetto Mortuary adhered to standards of good faith and fair dealing. There is testimony in the record that before each occasion when Palmetto Mortuary purchased bags from other sources, Mr. Lintal spoke with Mr. Knight about Knight System's ability to sell certain bags when it needed them for business. *See* Trial Tr. at 46:25-48:9; 50:9-23; 53:1-20.

68. Moreover, considering the context in which the Tape Recording took place and the timing of the Richland County Coroner's contract bid, the Court accepts Mr. Lintal's testimony that Mr. Knight knew or should have known that Palmetto Mortuary previously purchased body bags from other manufacturers. However, instead of bringing the breaches to Mr. Lintal's attention when he was aware of such allegations[10], Knight held onto the information until a time that was beneficial to him.[11] *Id.* at 239:9-240:21. Additionally, Mr. Knight's conduct on June 16, 2011, including surreptitiously tape-recording Mr. Lintal, bringing up Palmetto Mortuary's purchases of body bags from other manufacturers after more than three years after the purchases, and immediately placing a bid for the Richland County contract one day following the parties' discussion, evidences something less than good faith with respect to adhering to the terms of the APA.



69. Rescission and restitution are equitable remedies which will not be provided when another party has acted in bad faith. A court of equity, in applying the principle of "unclean hands," will not lend its aid to a litigant who has been guilty of any reprehensible conduct directly connected with the subject-matter of the litigation before the court. *See Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943); *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000); *Aaron v. Mahl*, 381 S.C. 585, 674 S.E.2d 482 (2009); *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.2d 35 (2013). In this case, Defendants are requesting the right of rescission and/or repudiation of their obligations under the Non-Compete Agreement and Exclusivity Clause as a result of Plaintiff's alleged wrongful purchases of bags from other manufacturers. This court finds that Defendants are not entitled to any equitable relief as a result of their actions.

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[10] Mr. Knight admitted at trial that he heard from at least one other person as early as 2009 or 2010 that Plaintiff was purchasing body bags from other sources, but did not bring the rumors to Plaintiff's attention until June of 2011. *See* Trial Tr. at 239:9-22; 257:23-258:25; 259:11-261:6.

[11] Mr. Knight testified that sometime in 2009 and 2010 he was informed by a competitor that Palmetto Mortuary had purchased body bags from another source. *See* Trial Tr. at 210:12-210:17. Mr. Knight testified that he did not take any action or discuss the allegations with Mr. Lintal, despite the fact that he may have believed such purchase would have been in violation of the parties Agreement. *Id.*

70. Based on the evidence presented, the Court finds that Plaintiff's purchases of certain bags from sources other than the Defendants do not constitute material breaches of the APA. As a result, Defendants were not excused from performance under the Agreement, including the Non-Compete Agreement. Defendants are only entitled to monetary damages that naturally flow from Plaintiff's breaches.

## IV. PLAINTIFF IS ENTITLED TO MONETARY DAMAGES, INJUNCTIVE RELIEF, AND AN AWARD OF ATTORNEY'S FEES AS A RESULT OF DEFENDANTS' BREACH OF THE NON-COMPETE AGREEMENT

71. The remedies provided in Section 3 of the Non-Compete Agreement provide for an accounting of lost profits *and* injunctive relief. *See* APA at Exhibit 3.2.6 at Section 2. These two potential remedies are not exclusive of one another. *Id.* The Non-Compete Agreement also provides for an award of attorneys' fees to the prevailing party in the event of litigation. *See* Exhibit 3.2.6, Section 5(L); *see also* Trial Tr. at 148:6-16.

### A. *Plaintiff is Entitled to Lost Profit Damages*

72. Defendants' breach of the Non-Compete Agreement entitles Plaintiff to monetary damages, pursuant to Section 3(A) of Exhibit 3.2.6 to the Agreement:

> Accounting for Lost Profits. If Seller shall violate any of the provisions of Sections 1 or 2, Buyer shall be entitled to recover any non-speculative profits incurred by Buyer as a result of, growing out of, or in connection with, any such violation by Seller. This remedy shall be in addition to, and not in limitation of, any injunctive relief or other rights, remedies, or damages, to which Buyer is or may be entitled as a result of this Agreement.

73. "Under current South Carolina law, the standard of admissibility for evidence of future damages is 'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent." *Burroughs v. Worsham*, 352 S.C. 382, 396, 574 S.E.2d 215, 222 (Ct. App. 2002) (*quoting Pearson v. Bridges*, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (*quoting Martin v.*

*Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969))). "Whether future damages are 'reasonable certain to occur is the standard of proof for future damages, not the standard of admissibility.'" *Id.* (*quoting Pearson v. Bridges*, 344 S.C. at 371-72, 544 S.E.2d at 619) (emphasis omitted). *See also Western Insulation, LP v. Moore*, 242 Fed. Appx. 112 (4th Cir. 2007) (*citing Saks Fifth Ave., Inc. v. James, Ltd.*, 630 S.E.2d 304, 311 (Va. 2006) (explaining that to prove entitlement to damages, "a plaintiff must prove the amount of those damages by using a proper method and factual foundation for calculating damages.")).



74. This Court finds that Mrs. Lintal, as Palmetto Mortuary's CFO, is competent to testify as to Palmetto Mortuary's future damages from Defendants' breach as a result of their competition with Palmetto Mortuary in violation of the Non-Compete Agreement. *See* Rule 602, SCRE (lay testimony must be based on personal knowledge) and Rule 701, SCRE (lay opinions must be formed as a result of the witness' rational perception). Additionally, the Court finds that Mrs. Lintal's testimony is admissible because it "tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts." *See Burroughs v. Worsham*, 352 S.C. at 397, 574 S.E.2d at 222. Finally, the Court finds that the damages of Palmetto Mortuary, as introduced through Mrs. Lintal were "reasonably certain to occur" and were not challenged by Defendants. Therefore, the Court accepts Mrs. Lintal's testimony and finds that Palmetto Mortuary adequately submitted proof of damages under the *Burroughs* test.

75. Mrs. Lintal testified that Plaintiff's damages included "the overall profit that [the company] lost due to the fact of not having this business, with [the Richland County] contract." *See* Trial Tr. at 142:10-17. This amount represents the revenue Palmetto Mortuary would have received if it had won the Richland County contract in 2011 and performed that contract for a five-year term.

If Palmetto Mortuary had been awarded the Richland County contract, Palmetto Mortuary's total revenue over the five year cycle would have been $437,900.00. *Id.* at 144:17-145:6.



76. Mrs. Lintal also testified that Palmetto Mortuary's total expenses, if it would have won the Richland County contract and performed it for five years, equaled $64,635.54. *Id.* at 145:7-147:6 (explaining calculation of expenses). The estimate of expenses calculated by Mrs. Lintal was based on the last contract year Palmetto Mortuary had with Richland County." *Id.* at 184:13-185:13.

77. Accordingly, Palmetto Mortuary's total lost profits for the five-year period "using [Palmetto Mortuary's] revenues" and expenses equal total revenues less total expenses, or $373,264.54. *Id.* at 147:10-12.

78. However, as more fully discussed above, Defendants are entitled to a set-off of the total amount of body bags purchased by Palmetto Mortuary which should have been purchased from Knight Systems pursuant to Section 3.4.8 of the Agreement ($478.50).

**B. *Plaintiff is Entitled to Injunctive Relief***

79. Plaintiff has also requested a permanent injunction against Defendants.[12] Injunctive relief is available under Section 3 of the Non-Compete Agreement. *See* APA at Exhibit 3.2.6. Plaintiff seeks an injunction prohibiting Defendants from competing against Plaintiff pursuant to the terms of the parties' Non-Compete Agreement, and specifically to prevent a breach by Defendants. The injunction Plaintiff seeks would last for five year and seven months, the length of time

[12] Defendants allege that Plaintiff's failure to file a request for injunctive relief with the Court prior to filing the instant lawsuit precludes it from seeking injunctive relief now. Plaintiff requested injunctive relief in its Complaint. *See* Prayer for Relief at (2). Plaintiff is entitled to injunctive relief as a remedy as specified by the Non-Compete Agreement. *See* APA § 3.2.6 at ¶ 3(B). Plaintiff's ability to recover monetary damages is "in addition to, and not in limitation of any injunctive relief or other rights, remedies, or damages, to which [Palmetto Mortuary] is or may be entitled as a result of this Agreement." *Id.* at ¶ 3(A). This Court finds that Plaintiff timely requested injunctive relief and that its request for monetary damages does not stand in the place of or in any way limit Plaintiff's request for injunctive relief under the Non-Compete Agreement.

remaining on the parties' Non-Compete Agreement at the time Defendants submitted the competing bid to Richland County.[13]



80. "A covenant not to compete is enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by a valuable consideration." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961) (*citing* 36 Am.Jur., Monopolies, Combinations, and Restraints of Trade, Sections 52, 53, 54, 55, 56; *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734; *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184; *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344). In this case, the award of a permanent injunction is necessary to give the Plaintiff the benefit of its bargain and to ensure Defendants' compliance with the Non-Compete Agreement. Although monetary damages are sufficient to put Plaintiff in the position it would have been in had Plaintiff held the Richland County contract for a five-year term, enforcement of the restrictive covenant is necessary to enforce the remaining term of the Non-Compete Agreement and to avoid a forfeiture of the contract as a whole.

81. The Court is not ordering specific relief with respect to the remaining terms of the APA, including the exclusive purchase clause in Section 3.4.8 of the APA. "Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Campbell v.* Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 628 (Ct. App. 2004) (*quoting Ingram v. Kasey's Assocs.*, 340 S.C. 98, 104, 531 S.E.2d 287, 291 (2000)). The Court finds that the Non-Compete Agreement was a separately executed contract

[13] The APA, including the Non-Compete Agreement was executed on January 5, 2007 and was to last until January 5, 2017 (ten years). *See* APA. On June 17, 2011, Defendants' breached the Non-Compete Agreement by submitting a competing bid on a contract held by Palmetto Mortuary on behalf of the Richland County Coroner's Office. At the time of Defendants' breach, the parties were into the term of the non-compete agreement by 4 years, five months, and seven days. Accordingly, there remained on the contract period a term of five years, and seven months at the time of the alleged breach.

which is supported by adequate consideration. Plaintiff is only seeking specific performance of the parties' Non-Compete Agreement and no one is seeking specific performance of the entire APA.



82. Additionally, specific performance of the APA, including Section 3.4.8, would not be equitable as between these parties. Requiring Palmetto Mortuary to purchase the types of body bags stated would be unjust, especially considering evidence that Defendants have removed at least one type of bag, the odor-proof disaster bag, from the market and refuses to sell the odor-proof disaster bags to Palmetto Mortuary. "Specific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." *Campbell v. Carr*, supra (*citing Amick v. Hagler*, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985)).

83. The Non-Compete Agreement is enforceable and the Court finds as a matter of fact that there are five years and seven months remaining on the original ten-year term. Accordingly, Plaintiff is entitled to an injunction enforcing the remainder of the Non-Compete Agreement. The injunction will begin as of the date of this order and will continue for five years and seven months.

84. However, because the Court has awarded monetary damages to the Plaintiff for the five-year term of the Richland County contract, the Defendants' performance of its contract with the Richland County Coroner for that time period does not violate the permanent injunction ordered by the Court.

## CONCLUSION

For the foregoing reasons, the Court orders as follows:

(1) (A) Defendants are ordered to pay Palmetto Mortuary Three Hundred Seventy Three Thousand, Two Hundred Sixty Four Dollars and Fifty Four Cents ($373,264.54), which constitutes Plaintiff's lost profits as a result of Defendants' wrongful competition in Richland County over the five-year term of the Defendants' contract with Richland County;

(B) Plaintiff is ordered to pay Four Hundred Seventy Eight Dollars and Fifty Cents ($478.50) in damages proximately caused by Plaintiff's breaches of Section 3.4.8 of the Agreement by purchasing body bags from sources other than Defendants. This amount may be set-off from the amount owed by Defendants for their breach of the Non-Compete Agreement;



(2) The Court finds that the Non-Compete Agreement is a separately executed contract for which adequate consideration was exchanged. The Court additionally finds that the term and scope of the Non-Compete Agreement is reasonable. Defendants are required to comply with the terms of the parties' Non-Compete Agreement in Exhibit 3.2.6 of the parties' Agreement for a term of five-years and seven months, beginning from the date of this Order, with the exception of their performance of the Richland County contract described above; and

(3) Defendants are ordered to pay Plaintiff's attorneys' fees and direct costs of litigation pursuant to Exhibit 3.2.6, Section 5(L) of the Agreement as Plaintiff is the prevailing party in this action. Plaintiff's counsel is to submit an affidavit of attorneys' fees and costs to the Court within ten (10) days of the date of this Order for the Court's consideration and the Court will issue a supplemental Order awarding attorneys' fees as reasonable and appropriate.

**AND IT IS SO ORDERED.**

James Randall Davis, Special Master/Referee

July 22, 2014
Lexington, South Carolina.

**FORM 4**

**STATE OF SOUTH CAROLINA**
**COUNTY OF LEXINGTON**
**IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE**
**CASE NUMBER 2011CP3204051**

| **Palmetto Morturary Transport Inc** | **Knight Systems Inc** **Robert L Knight** |
|---|---|
| **PLAINTIFF(S)** | **DEFENDANT(S)** |

**Submitted by:** **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

**This order** ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

7/25/2014

**Circuit Court Judge** **Judge Code** **Date**

## For Clerk of Court Office Use Only

This judgment was entered on **7/22/2014**, and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

Beth A. Carrigg

**Court Reporter**

**Beth A. Carrigg - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.