

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-08-1078

Blackhawk Logistics, LLC, ... Respondent,

v.

Jerry Ward, ... Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
BLACKHAWK LOGISTICS, LLC

Plaintiff,

v.

JERRY WARD,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.:

20-11-CP-08-1078

COMPLAINT AND
EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PERMANENT
INJUNCTIVE RELIEF

2011 APR -6 5:02

Jury Trial Demanded

COMES NOW PLAINTIFF, BLACKHAWK LOGISTICS, LLC complaining of DEFENDANT, JERRY WARD and alleges as follows:

PARTIES; JURISDICTION; VENUE

1. Plaintiff Blackhawk Logistics, LLC ("Blackhawk") is a limited liability company organized under the laws of the State of Delaware which maintains its principal place of business at 5801 North Rhett Extension, Hanahan, South Carolina, 29406.

2. At all times pertinent hereto, Blackhawk was in the business of providing warehousing and logistics solutions to outside companies, known as "third party logistics."

3. Defendant Jerry Ward (hereinafter "Ward" or "Defendant") is a citizen of South Carolina and currently resides, upon information and belief, at 104 Abrum Court, Goose Creek, Berkeley County, South Carolina, 29445.

4. This Court has jurisdiction over the subject matter of this case and the Defendants. Venue is proper in this case pursuant to S.C. Code Ann. § 15-7-30. *See also, Jeter v. S.C. Dep't. Transp.*, 633 S.E.2d 143, 148 (S.C. 2006).

FACTUAL ALLEGATIONS

5. Ward was previously a minority member (42.5%) of Blackhawk, but a creditor of Ward foreclosed and took possession of his membership interest. Affidavit of Blackhawk Logistics, LLC by Manager Benjamin Cone III ("Cone Aff."), attached as **Exhibit 1**, ¶6.

6. In addition to his membership, Ward served as President of Blackhawk, beginning in approximately 2006, until the Board of Managers ("Board"), representing the majority in interest of Blackhawk, suspended Ward in December, 2009, then terminated him for "cause," including gross mismanagement, by certified letter from counsel to Ward's prior attorney Brian Hellman, dated April 2, 2010, and attached hereto as **Exhibit 3**. Cone Aff. ¶7-8. Prior to termination, Ward was suspended from his duties as President and General Manager in December, 2009.

7. On January 1, 2007, Defendant, as a condition of his employment and in consideration thereof, executed an employment agreement with Blackhawk to be employed as President and General Manager of Blackhawk. A true and correct copy of this document is attached as **Exhibit 2** ("Employment Agreement").

8. The Employment Agreement contains *inter alia* non-interference, non-compete, and non-solicitation provisions which are of the most critical importance to Blackhawk, and which Ward has flagrantly violated, much to the harm of Blackhawk.

9. Upon information and belief, and despite the non-compete provision in the agreement, Ward is currently employed by and/or working closely with Pratt Industries (U.S.A.),

Inc. ("Pratt"). Pratt is a foreign corporation doing business in South Carolina, with an office in Summerville. Cone Aff. ¶9.

10. Pratt, with the assistance of Ward, is upon information and belief engaging in third party logistics at Pratt's warehouse in Summerville. As described below, Pratt is accepting shipments from third parties and former Blackhawk clients Client F and Client G, and is thus by definition engaged in third party logistics. Cone Aff. ¶17. Craig Aff. ¶ 15.

11. Upon information and belief, Ward's email address is JEWard@prattindustries.com.

12. A Google search performed on March 22, 2011 for "Pratt Industries Summerville" returned the page attached as **Exhibit 4**. Multiple Results list "Pratt Industries USA Inc.; 412 Industrial Rd, Summerville, SC 29483. Moreover, Pratt has a sign at that address, a picture of which is attached as **Exhibit 9**. A call placed that same day to the number listed, 843-695-6005 was answered by a voice recording "Jerry Ward is not available to take your call; please leave a message." See Cone Aff. ¶9

13. Undersigned counsel sent an email to Pratt's general counsel on January 27, 2011, and received a reply email on February 1, 2011 from the Vice President and General Counsel for Pratt, Douglas R. Balyeat, in which Balyeat acknowledged the employment of and/or relationship with Ward. This correspondence is attached hereto as **Exhibit 5**.

14. Defendant also apparently has a relationship with CGM Industries, Inc. and or CGM SC, LLC ("CGM"), a third party logistics company operating locally and a competitor of Blackhawk. CGM is located at 1023 LeGrand Blvd, Charleston, Sc 29492. Ward has very recently been soliciting Client A to move its products from Blackhawk's facility to space leased

by CGM, which has signed a letter of intent with Blackhawk's landlord on 100,000 square feet of space in the same building and just adjacent to Blackhawk's premises in Hanahan.

15. Upon information and belief, subsequent to his termination as President of Blackhawk, Ward has used knowledge and information gained during his time as President of Blackhawk and as a member of Blackhawk, to i) interfere with Blackhawk's relationship with current clients and customers; ii) induce and encourage current Blackhawk customers to give business to his new employer, Pratt, and/or for Ward's own account; and iii) work for himself and/or for a company engaged in third party logistics, Pratt and/or CGM. All of these actions are in direct violation of the Employment Agreement. Cone Aff.

16. These actions by Ward have caused great damage to Blackhawk, and in the current economic circumstances gravely threaten the continued existence of Blackhawk and the employment of its 24 employees. Cone Aff. ¶21.

17. Blackhawk respectfully submits that the "smoking guns" attached hereto and described below clearly demonstrate Ward's flagrant violation of the Employment Agreement, and warrant injunctive relief.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT

a. Breach of Non-Interference clause

18. Blackhawk incorporates all the aforementioned allegations as if restated herein.

19. Section 6 "Trade Secrets/Non-Competition" of the Employment Agreement states:

The parties hereto acknowledge and agree that the Employer's business is that of providing third party logistics, including warehousing and transportation and that the Employer would suffer irrevocable harm if the employee were to disclose Employer's trade secrets or engage in competition against the Employer." (emphasis added) See Exhibit 2.

20. The Employment Agreement further states "*Employee shall not in any manner... interfere or attempt to interfere with any business relationship between employer and its advertisers, suppliers and customers.*" **Exhibit 2** ¶6(c)

21. The term of the non-interference, non-solicitation, and non-competition clauses is set out in Section 6 of the Employment Agreement: these clauses remain in effect for **two years**, or twenty-four (24) months after Ward's termination from Blackhawk, and thus remain valid until April 2, 2012. See **Exhibit 2** ¶6

22. Ward has consistently violated the non-interference clause of the Employment Agreement, by attempting to "poison" Blackhawk's relationships with its current clients, to induce such clients to do business for Ward's own account and/or for the benefit of his current employer or partner Pratt and/or CGM. Ward has contacted Blackhawk clients including customers Client H, Client G, Client I, Client A, Client J, and Client F, in order to disparage and damage Blackhawk for his own financial gain or that of his new employer/partners, all in further violation of the non-interference clause of the agreement. Ward had access to the identity of such customers based solely on his position as President and General Manager of Blackhawk. Cone Aff. ¶11, 22; Affidavit of Blackhawk Logistics, LLC by Operations Manager Jason Craig, attached as **Exhibit 6** ("Craig Aff.") ¶8-15.

23. The first example of Ward's breach of the Employment Agreement is an email attached hereto as **Exhibit 7**. Client A has been a regular customer of Blackhawk since 2009, accounting for an average of **\$30,000** in revenue monthly. Moreover, until Ward contacted them, they had always paid Blackhawk within several days of invoice. Cone Aff. ¶12 This email reads:

From: [Client A Employee CB email address]

To: [Client A Employee JK email address], [Client A Employee WB]

Date: Tue, 15 Mar 2011 18:11:08 -0400

Subject: Re. Blackhawk

[JK]/[WB],

Jerry Ward who used to work for Blackhawk called here looking for YOU [JK]. Said he called & left messages for you but have not heard back from you and does not have [WB's] #.

Wanted to let us know that BH will be evicted this Friday, 03/18.

His cell if you want to call him back - (843) 514-5653

Tks! (emphasis supplied).

24. Blackhawk respectfully submits that this email unquestionably demonstrates that Ward is interfering in Blackhawk's relationship with its customer Client A. There is simply no other logical explanation for Ward contacting Client A to tell them that Blackhawk "*will be evicted this Friday, 3/18,*" other than to damage Blackhawk's relationship with its customer and convert such customer into a customer of Ward's new employer and/or for his own account.

25. Blackhawk was not evicted on Friday, March 18, 2011. Subsequent to two illegal "lockouts" by Blackhawk's Landlord on March 1, and March 2, 2011, subsequent to which Berkeley County law enforcement came to Blackhawk's place of operations while Blackhawk lawfully retook possession of the same, Blackhawk's landlord filed for a Rule to Show Cause. Blackhawk filed a Motion to Remove Proceedings to the Court of Common Pleas, Motion to Dismiss and Quash, and eleven counterclaims against the Landlord and its agent Amos Beason, for conversion, trespass to chattels, tortious interference, loss of business revenue and wrongful dispossession. Blackhawk seeks damages, injunctive relief and a declaratory judgment against Landlord in separate proceedings pending in this Court.

26. After a hearing on the Rule to Show Cause held March 24, 2011, Blackhawk filed a Motion to Amend, Alter, or Reconsider Judgment on March 29, 2011. The Magistrate transferred the action to the Court of Common Pleas, via written order dated April 1, 2011.

27. The damage done by Ward is underscored in a further email attached hereto as **Exhibit 8**. This email, because of its importance quoted in full, directly shows the effect of Ward's meddling:

From: [Client A Employee JK email address]
To: [Client A Employee WB email address]
Date: Mon, 28 Mar 2011 11:36:13 -0400
Subject: Re: BH OPEN!

WHAT ELSE? Jason have some additional information for you yet? Time frame, Plan, Ruling from Judge, etc...?? What does he know??? Jerry calling [BC, President of Client J], etc.. making [TC, President of Client A] nervous, making all of us nervous, making us start to consider other options? Possibly Jerry trying to scare everybody to pull out of BH that will make BH abandon the facility early, who knows at this point?? But if we have the threat of a lockout on our 2 MILLION dollar inventory hanging over us every week, end of month, etc... then we are going to have to do something about it so get some additional information, ps - nice job showing up at 8 this morning.

>>> [WB] 3/28/2011 5:20 AM >>>

As of 810, I have spoken to Amy and Jason and all is well with no expected interruptions.

28. JK is an important regional manager for Client A; he is based in California. WB is a manager of Client A's local operations. "Jerry" refers to Defendant Jerry Ward. BC refers to the President, owner and/or manager of Client J, another client of Blackhawk, and one which has considerable business with Client A. TC refers to the President Client A. "BH" refers to Blackhawk. Craig Aff. ¶ 9

29. This email shows at least the following critical points, *any one of which individually* would merit injunctive relief and an award of damages, but which when taken together demonstrate substantial and *irreparable harm* done to Blackhawk by Ward:

- i. Confirmation that Jerry contacted Client A as set out in **Exhibit 7** to convey the falsehood that Blackhawk was “being evicted on 3/18,” and the conveyance of other false and disparaging information to Blackhawk customers.
- ii. Defendant is “trying to scare everybody to pull out of BH that will make BH abandon the facility early.” The clear import of this statement is that Defendant is “scaring” Blackhawk’s customers, and moreover that Defendant is trying to induce Blackhawk customers to leave Blackhawk so that Blackhawk will be forced to abandon its “facility” in Hanahan. Blackhawk believes that such statement is evidence that Ward is conspiring with others, likely including Blackhawk’s landlord, with whom it is in litigation in this Court, to force Blackhawk from its warehouse facility in Hanahan.
- iii. Defendant contacted another client, BC of Client J, to similarly disparage Blackhawk and interfere in Blackhawk’s relationship with such client.
- iv. Defendant’s disparagement of Blackhawk to its customer Client A is “making all of us [Client A] nervous” and that Client A is considering “other options” and “going to have to do something about it”—a clear reference to Client A finding another third party logistics company other than Blackhawk, which would be a devastating loss for Blackhawk.
- v. The value of Client A’s “2 MILLION dollar” inventory at Blackhawk, and thus the economic effect on Blackhawk’s business by Defendant’s interference.

30. Ward’s meddling has already resulted in Client A paying Blackhawk more slowly than normal. Given the ominous threat to this critical customer, and the fact that Ward has already successfully taken both Client F and Client G from Blackhawk, this Court is warranted in enjoining Ward from any such further conduct.

31. As a result of Ward’s interference with this customer, Blackhawk’s relationship with Client A has been damaged significantly, and Blackhawk is threatened with losing another substantial client, in addition to the loss of Client F and Client G described below, because of

Ward's flagrant breach of the Employment Agreement. Client A represents \$30,000 per month in revenue, which would be a devastating loss to Blackhawk. *See Cone Aff.* ¶12

32. As recently as Monday, April 4, 2011, Ward again contacted Client A local manager WB to disparage Blackhawk. Today, April 6, 2011, at approximately 10 a.m., WB contacted Blackhawk's Jason Craig. WB told Craig that Ward had told WB on Monday to beware of Blackhawk as they are "financially unstable" and that Client A should move its products from Blackhawk's facility to space leased by third party logistics company and Blackhawk competitor called CGM, the President of which is Matt Frey, who has signed a letter of intent with Blackhawk's landlord on 100,000 square feet of space in the same building and just adjacent to Blackhawk's premises in Hanahan. CGM via its agent Matt Frey followed up Defendant's contact of Client A and contacted WB to say that CGM is signing a 5 year lease, and they would like for Client A to begin sending product directly to the space to be leased by CGM. *Craig Aff.* par. 16.

33. Ward has also contacted Client H, a Blackhawk client, to disparage Blackhawk, specifically relating to the Blackhawk client Client F. *Craig Aff.* ¶14

34. Ward has also interfered with Blackhawk's relationship with Client I, another important client of Blackhawk client that represents at least \$25,000 annually in revenue.

35. DO, Sales and Marketing coordinator at Client I, and CK, Director of Sales for Client I, phoned Jason Craig at Blackhawk several weeks ago to say that they were "worried about the future of Blackhawk." Though they would not initially disclose the source of their concern, they met with Craig on March 30, 2011 and told him that Defendant had contacted them in January, 2011, and again in March, 2011 to disparage Blackhawk, and state that i) Blackhawk is in financial difficulty, ii) Client I's property at Blackhawk's facility was in jeopardy; iii)

Blackhawk moved Client I goods from its principal facility to another facility; and iv) that Blackhawk would be evicted from its principal facility. Craig Aff. ¶13

36. As a direct and proximate result of Defendant's interference with customers of Blackhawk, including Client A, Client J, Client G, Client I and Client F, which is in breach of the Employment Agreement signed by Defendant, Blackhawk has sustained damages, including, but not limited to, lost revenue and profits, damages to its business reputation and other consequential damages, in an amount to be proven at trial. Blackhawk respectfully requests that this Court grant judgment for Blackhawk against Ward, and issue a temporary and permanent injunction preventing any further similar misconduct by Ward.

b. Breach of Non-Solicitation Clause

37. The Employment Agreement also contains a non-solicitation clause which states "[e]mployee shall not in any manner induce or attempt to induce any of the Employer's advertisers, suppliers, or customers to withdraw, reduce or divert any of their business from the Employer." **Exhibit 2** ¶6(c).

38. Defendant Ward has repeatedly solicited Blackhawk customers in violation of the Employment Agreement. Ward's contact of Client A, and **Exhibits 7 and 8** described above are (in addition to interference) also all evidence of Ward's *solicitation* of Blackhawk clients.

39. Upon information and belief, Ward has wrongfully solicited and/or converted other existing Blackhawk customers for his own account and/or for the benefit of Pratt, including Client F, Client J, Client I, and Client G, as described herein.

40. Up until October, 2010, Client F was an important client of Blackhawk, representing monthly revenue of \$20,000. Cone Aff. ¶15

41. KK and RK , both of whom work for Client H, a client and vendor of Blackhawk, and both of whom have a close personal relationship with Jason Craig, informed Craig that Ward was contacting Blackhawk clients, including Client F, and soliciting business for his new employer. KK and RK informed Craig that Ward had contacted Client H to pick up Client F's unique blue containers from the Port of Charleston and deliver them to Pratt's warehouse in Summerville. Photos of these containers are attached as **Exhibit 9**. Craig Aff. ¶10

42. Prior to such event, the only third party logistics company used by Client F was Blackhawk. Upon information and belief, Client F had no relationship with Pratt prior to Ward joining Pratt. Cone Aff. ¶17

43. **Exhibit 10** is evidence that Ward solicited and converted such client to become a client of Pratt: it is a bill of lading showing that Client H picked up Client F containers and moved them from the Port of Charleston into Pratt's warehouse.

44. Client F, prior to moving its business to Pratt, represented \$20,000 in revenue on a monthly basis for Blackhawk. Cone Aff. ¶14

45. Similarly, Ward successfully converted Client G into a client of Pratt. Up until March, 2010, which was after Ward's suspension but prior to his termination, Client G was an important client of Blackhawk, representing \$35,000 to \$40,000 of annual revenue. Client G had been a client of Blackhawk for a number of years.

46. In March, 2010, Client G terminated its relationship with Blackhawk. Subsequently, in a personal meeting between EB and Blackhawk's Jason Craig, EB informed Craig that Client G was moving its business to Pratt.

47. In the past several months Ward upon information and belief solicited Blackhawk employee Matthew Levell to leave Blackhawk's employment and to work with Ward and/or

CGM on Client A products. WB told Blackhawk's Jason Craig this morning, April 6, 2011 at 10 am. that Ward had solicited former Blackhawk employee Levell.

48. Levell was terminated from Blackhawk approximately ten days ago, but upon information and belief Ward solicited him prior to his termination to work with Ward and/or CGM on Client A products in the space to be obtained by CGM. Craig Aff. par. 17. In fact, the day Blackhawk terminated Levell, Ward told WB that Ward was going to "hire Matt Levell back to run Sunset."

49. Craig states that "I believe Ward has contacted every single Blackhawk customer to disparage them in the fashion described herein." Craig Aff. par. 18.

50. As a direct and proximate result of Defendant's breach of the Agreement and solicitation of Blackhawk customers and employees, Blackhawk has sustained damages, including, but not limited to, lost revenue and profits, damages to its business reputation and other consequential damages. Blackhawk respectfully requests that this Court grant judgment for Blackhawk against Ward, and issue a temporary and permanent injunction preventing any further similar misconduct by Ward.

c. Breach of Non-Compete Clause

51. Section 6(a) of the Agreement between Blackhawk and Ward contains a non-competition clause which states "[e]mployee shall not directly or indirectly, individually or as a partner, employee, stockholder, consultant, agent, officer, director, advisor or in any other capacity, compete with the Employer in any business engaged in outsourced medical billing or outsourced collections of medical invoices." See **Exhibit 2**.

52. The parties designed the non-compete agreement to protect Blackhawk's single most important asset--its customers.

53. This non-competition clause remains valid for two year, or twenty-four (24) months after Ward's termination from Blackhawk, and thus until April, 2012. Two-year restrictions have consistently been held valid in South Carolina. *See, e.g., Delmar Studios of the Carolinas v. Kinsey* 233 S.C. 313 (1958).

54. The non-competition clause of the employment agreement prohibits Ward from competing with Blackhawk in "any county which is home to a sea port or any county directly adjoining a county which is home to a sea port in the States of South Carolina, Georgia or Virginia." **Exhibit 2 ¶6.**

55. The geographic scope of the clause was necessary and as narrow in scope as reasonably necessary to protect Blackhawk's legitimate business interests, because in third party logistics, Blackhawk competitors located in other deep water sea ports, such as Savannah or Norfolk, or at warehouse facilities in counties adjacent to such ports, may easily take national customers away from Charleston. Cone Aff. ¶18-20.

56. Upon information and belief, Ward began working with Pratt in the Converting Division in July 2010 in violation of the non-competition clause of the agreement as Dorchester County borders the seaport of Charleston. *See* Deposition of Jerry Ward ("Ward Dep."), attached as **Exhibit 11**, p. 87: 4-7.

57. Ward has also clearly been working with and/or brokering for CGM. Craig Aff. par. 17.

58. Ward believes his scenario at Pratt is "all the same kind of scenario of what was at Blackhawk." *See* Ward Dep. 86: 5-6. Accordingly, the non-competition clause does not unduly curtail Ward's effort to earn a livelihood as his new position is essentially the same as the old.

59. Upon information and belief, the business services that CGM, Pratt and Pratt's subsidiaries provide to customers in the logistics, packaging, and shipping industries are so similar as to be inherently competitive with those of Blackhawk. Thus Ward's employment is per se in violation of the non-competition clause of the Agreement. Pratt is accepting goods from third parties such as Client F, storing them in their warehouse, and thus they are by definition working in third party logistics, whatever else they might also be doing. Cone Aff. ¶17 CGM is also a competitor of Blackhawk, so Ward brokering deals for CGM, Craig Aff. par. 17, also is in violation of the Employment Agreement.

60. It is undisputed that Blackhawk is not involved in the business of "outsourced medical billing or outsourced collections of medical invoices." As set out above, at another line in the agreement the parties agreed that Blackhawk is in the business of "third party logistics, including warehousing and transportation."

61. Upon information and belief Ward was involved in drafting the Employment Agreement.

62. This error in drafting constitutes a mutual mistake as both Blackhawk and Ward intended to contract a non-competition clause against Ward being employed by third party warehousing and/or logistics companies.

63. In the alternative, Blackhawk requests the court correct the scrivener's error in the employment agreement. Such a reformation would not be 'blue penciling' the agreement, but correcting a clear misstatement of the parties' agreement.

64. As a direct and proximate result of Defendant's breach of the Agreement, Blackhawk has sustained damages, including, but not limited to, lost revenue and profits, damages to its business reputation and other consequential damages.

65. Defendant's violation of his contractual agreement has caused Blackhawk damages in excess of \$300,000 in an amount to be proven at trial. Blackhawk respectfully requests that this Court grant judgment for Blackhawk against Ward, and issue a temporary and permanent injunction preventing any further similar misconduct by Ward.

SECOND CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACT

66. Blackhawk incorporates all the aforementioned allegations as if restated herein.

67. Defendant is aware and has been aware of the existence of contractual relations between Blackhawk and its clients from his intimate exposure to Blackhawk's internal business. Ward was President and General Manager of Blackhawk from 2006 until April, 2010.

68. Defendant intentionally pursued Client A, Client F, Client J, Client I, Client G, Client H and other clients in an effort to disrupt, sever and terminate the contractual relationships between Blackhawk and these clients for his own financial and professional gain and/or that of his new employer/partner Pratt and/or CGM.

69. As a direct result of Defendant's interference, Blackhawk's contractual relationships with these clients have been strained or destroyed.

70. Defendant's tortious conduct has caused damages excess of \$300,000, in an amount to be proven at trial.

71. Insomuch as Defendant's interference was willful, wanton, and in reckless disregard of Blackhawk's contractual relations with its customers and clients, Blackhawk hereby requests punitive damages in an amount determined by a jury to punish such egregious conduct.

MOTION FOR TEMPORARY AND PERMANENT INJUNCTION

72. Blackhawk incorporates all the aforementioned allegations as if restated herein.

73. Courts generally will examine the validity of a non-compete agreement before issuing an injunction. See e.g. *Standard register co v. Kerrigan* 238 S.C. 54 (1961).

74. Enforceability of non competition agreements in South Carolina turns on whether the covenant at issue is:

- (i) necessary for the protection of the legitimate interest of the employer;
- (ii) reasonably limited in its operation with respect to time and place;
- (iii) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (iv) reasonable from the standpoint of sound public policy; and
- (v) supported by valuable consideration. *Rental Uniform Services of Florence, Inc. V. Dudley*, 278 S.C. 674, 675-76 (1983). The burden is on the employer to establish the reasonableness of the covenant. *Delmar Studios of the Carolinas v. Kinsey*, 233 S.C. 313, 319 (1958).

i. Protection of the legitimate interest of the employer: To satisfy this element, Blackhawk must simply show that its interest in the non-compete agreement is the protection of its customers. "It has been said that the most important single asset of most business 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. Hence, if the employer can show a need of protection against unfair appropriation of his customers by his employee, the negative restrictive covenant is reasonable as to the employer." *Standard Register Co. v. Kerrigan* 238 S.C. 54, 66 (1961).

The very purpose of the Employment Agreement was to protect Blackhawk's vital and secret customer lists and prospective customer lists. Cone Aff. par. 7. Accordingly, this first requirement is met.

ii. (a) Reasonably limited in its operation with respect to time: Blackhawk's 24 month time restriction is reasonable under South Carolina Law. See *Delmar* 233 S.C. at 319; see also *Sermons v. Caine & Estes Insurance Agency, Inc.*, 275 S.C. 506, (1980).

(b) Territorial Restriction: The territory covered by the non-competition agreement is reasonable under the circumstances here, given the fact that Ward was President of Blackhawk. The restricted area may be broader the restraint than simply the territory in which the employee worked or was assigned to during employment if the employee is a manager, because they acquire more knowledge than an ordinary salesman/employee. *Delmar* 233 S.C. at 323. The *Delmar* court relied on a North Carolina case, which upheld a covenant restricting competition in 49 counties based on the fact that the employee was a district manager. *Id* at 324.

Accordingly, as Ward was President and General Manager of Blackhawk, the geographic restriction is reasonable. Moreover, given the very specific nature of the third party logistics business, where a former employee such as Ward could do great damage to Blackhawk simply by relocating to a port such as Norfolk or Savannah, and then soliciting Blackhawk customers to move from Charleston to such other port, the geographic restriction is valid. Cone Aff. ¶18-20.

iii. Not Unduly Harsh and Oppressive In Curtailing The Legitimate Efforts of Employee to Earn A Livelihood: The non-competition agreement must allow the former employee to pursue a livelihood through legitimate means. See *Faces Boutique, Ltd. V. Gibbs* 318 S.C. 39, 43 (1995). There are many other areas in which Ward could obtain a living, but he is restricted from working in third party logistics in a very narrow geographical area. He could

even work in third party logistics in South Carolina, just not in a county adjacent to a deep water sea port.

iv. Reasonable Under Public Policy: Courts have recognized the public policy interest in an employer protecting his legitimate business interests. *Caine & Estes Ins. Agency, Inc. v. Watts* 278 S.C. 207, 209 (1982).

v. Adequate consideration: “It is well settled that a restrictive covenant not to engage in competitive business ancillary to a contract of employment, will be upheld and enforced, if inter alia, it is supported by a valuable consideration. *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382 (2001). Covenants not to compete may be enforced where the consideration is based solely on at-will employment. *Id.* Here, the parties executed the Employment Agreement at the commencement of a new term of employment on January 1, 2007, Cone Aff. par. 7, and therefore there was consideration flowing to both Blackhawk and to Ward: Ward received payment, and Blackhawk received his services and other benefits of set out in the Employment Agreement.

75. To obtain a temporary injunction, Blackhawk must show that 1) without such relief it will suffer irreparable harm, 2) that it has a likelihood of success on the merits, and that 3) there is no adequate remedy at law. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). There is no need to “balance the equities” in a preliminary injunction case where the three requirements are well established. *Poynter Invs., Inc. v. Century Builders of Piedmont Inc.*, 387 S.C. 583, 588 (2010) (modifying Court of Appeals’ decisions to the extent they include a separate ‘balancing the equities’ requirement).

76. To obtain an injunction, the plaintiff must first show that he will suffer irreparable harm absent the issuance. *See Generally* 42 Am. Jur. 2d Injunctions § 35 (2010). Whether “a

wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules.” *Levine v. Spartanburg Reg'l Services Dist., Inc.*, 367 S.C. 458, 464, 626 S.E.2d 38, 41 (S.C. Ct. App. 2005) *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (invalidating ‘balancing the equities’ requirement).

77. With regard to “irreparable harm,” Ward’s actions have already cost Blackhawk at least two major customers, Client F and Client G, and threatens its relationship with others, including Client A, Client J, and Client I. Cone Aff. ¶¶12-17; Craig Aff. ¶8-14. The loss of Client A and Client G has had a drastic effect on Blackhawk, and the loss of these other clients would likely put Blackhawk out of business, which constitutes irreparable harm.

78. As to likelihood of success on the merits, “It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made.” *Mailsources LLC v. MA Bailey and Associates*, 356 S.C. 363, 368 (2003). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Levine*, 367 S.C. at 458.

79. The attached exhibits referenced above demonstrate 1) Ward has interfered with Blackhawk’s relationship with its customers; 2) Ward has solicited Blackhawk’s customers, and 3) Ward is working in third party logistics for his own account and/or for Pratt, and thus is a Blackhawk competitor. These documents demonstrate that Ward has breached the Employment Agreement, and that Blackhawk has a likelihood of success on the merits.

80. With regard to whether Blackhawk has an “adequate remedy at law” -- “An injunction is an equitable remedy; as such, it is available only where no remedy at law exists or where the legal remedy would fail to make the party whole.” *Mailsource* 356 S.C. at 369-70. Though injunctions for breach of a non-compete have been denied in South Carolina on the basis that monetary damages would be adequate, courts have also held that while monetary damages may be available, an injunction may be issued when it is the more appropriate remedy. *See Peek v. Spartanburg Reg’l Healthcare Sys.* 367 S.C. 450, 457 (2005).

81. Monetary damages would not be sufficient here because they would be difficult if not impossible to ascertain, given that the loss of the clients business must be calculated over a period of multiple years, Cone Aff. par. 21, and the danger of Ward’s continuing actions, which pose a mortal threat to Blackhawk, Craig Aff. par. 18, are so substantial that he should be enjoined from any further such actions. Moreover, as Ward is essentially upon information and belief without assets, and is thus “judgment proof” against any judgment of damages, it is unlikely that an award of damages against Ward will make Blackhawk “whole.” Accordingly, equitable relief is possibly the only relief of any value to Blackhawk.

82. To protect its customers confidentiality, and to protect Blackhawk’s business interest in those customers, the clients referenced herein are referred to only by letters. Blackhawk will provide the identities of these clients and the employees working for them referenced herein, to the Court under seal for in camera inspection, and will provide the same to opposing counsel upon the execution of a Confidentiality Order.

WHEREFORE, Blackhawk respectfully prays for the following relief:

- (i) Judgment in favor of Blackhawk and against Ward;
- (ii) Award of compensatory damages in an amount determined by a jury for Ward's tortious conduct;
- (iii) Entry of an order temporarily restraining and enjoining Ward from a) soliciting Blackhawk's employees, customers, and suppliers; b) interfering with Blackhawk's relationships with customers and suppliers; and c) competing with Blackhawk during the term of the Employment Agreement;
- (iv) Award of reasonable attorneys' fees and costs of prosecuting this action;
- (v) Interest on damages as allowed by law;
- (vi) Punitive damages to punish Ward for his egregious conduct; and
- (vii) Any such other and further relief as the Court deems just and appropriate.

April 6, 2011

Respectfully Submitted,

Ben Whaley Le Clercq
SC BAR # 65754
353 N. Shelmore, Suite 260
Mt. Pleasant, SC 29464
843-722-3523
leclercqb@bellsouth.net

CERTIFICATE OF SERVICE

I, Ben Le Clercq, certify that I will serve the foregoing documents upon opposing counsel via electronic mail this 6th day of April, 2011.

Ben Whaley Le Clercq
SC BAR # 65754
353 N. Shelmore, Suite 260
Mt. Pleasant, SC 29464
843-722-3523
leclercqb@bellsouth.net

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: _____
	)	
BLACKHAWK LOGISTICS, LLC	)	
	)	
Plaintiff,	)	AFFIDAVIT OF BLACKHAWK LOGISTICS,
	)	LLC, BY MANAGER BENJAMIN CONE III
v.	)	
	)	
JERRY WARD	)	
	)	
Defendant.	)	
_____	)	

COMES NOW AFFIANT, Blackhawk Logistics, LLC, by Manager BENJAMIN CONE III, and after being duly sworn, does hereby affirm and state as follows:

1. I am a manager of Defendant Blackhawk Logistics, LLC, ("Blackhawk"). I have personal knowledge of the matters set out herein, and know them to be true, except as to those matters stated on information and belief.

2. I have worked with Blackhawk since December, 2009, and for much of that time have been its General Manager.

3. Blackhawk is a third party logistics company located in Hanahan, SC.

4. Blackhawk employs twenty four employees.

5. Blackhawk has occupied the Premises at 5801 North Rhett Extension, Hanahan, South Carolina, 29406 since 2006.

6. Jerry Ward was previously a minority member of Blackhawk. Ward pledged and delivered his membership interest in Blackhawk as security in a settlement involving a creditor of Blackhawk and Ward named Charlotte Dome, LLC. Charlotte Dome had filed a fraudulent conveyance action against Ward and his wife to attack and "unwind" a transfer of Ward's house to his wife subsequent to Ward's

guarantee of certain obligations to Charlotte Dome. Charlotte Dome's successor, Dome Funding, LLC subsequently took possession of Ward's membership interest. Based on my knowledge of Mr. Ward, including the various transfers by Ward referenced in this paragraph, I believe that Ward is largely without assets and is thus "judgment proof."

7. Ward served as President of Blackhawk, beginning in approximately 2006, until his position was terminated by the Board of Managers ("Board") representing the majority in interest of Blackhawk on April 2, 2010. Prior to termination, Ward was suspended from his duties as President and General Manager in December, 2009. As President and General Manager, Ward had an extremely privileged position with Blackhawk, with great access to secret, confidential, and vital information of Blackhawk, including customers lists, prospective customer lists, and the like. It is for this reason that the Company insisted that Ward execute the Employment Agreement at the beginning of a new term of employment on January 1, 2007—to protect this vital, confidential and secret information..

8. Prior to his termination as President of Blackhawk, Ward began to disregard his duties and engage in egregious mismanagement of Blackhawk.

9. Ward is now employed by Pratt Industries (USA) Inc., with warehouse space in Summerville, SC. A Google search performed on March 22, 2011 for "Pratt Industries Summerville" returned the page attached to the complaint as **Exhibit 4** as the third result, which lists "Pratt Industries USA Inc.; 412 Industrial Rd, Summerville, SC 29483. A call placed that same day to the number listed, 843 695-6005 was answered by a voice recording "Jerry Ward is not available to take your call; please leave a message." Ward is providing his email address as JEWard@prattindustries.com. Pratt is a foreign corporation, incorporated under the laws of the State of Delaware and upon information and belief has its principal place of business in Georgia at 1800C Sarasota Business Parkway North, Conyers, GA, 30013

10. Third party logistics is an extremely competitive business in this state, and in Berkeley County in particular. Even in good times, third party logistics is a cyclical business characterized by

periods of “feast and famine.” Not surprisingly, this business has been seriously affected by the recent recession and general economic downturn. CGM is a competitor of Blackhawk.

11. Ward has consistently attempted to interfere, damage and destroy Blackhawk’s relationships with its current clients, very likely to induce such clients to do business with his current employer Pratt. Ward has frequently contacted Blackhawk current clients including customers Client H, Client A, Client I, Client G, Client J, and Client F since his termination. Ward had access to the identity of all Blackhawk customers based solely on his prior employment as President and General Manager of Blackhawk.

12. The first example of Ward’s breach of the Employment Agreement is an email attached to the Complaint as **Exhibit 7**. Client A has been a regular customer of Blackhawk since 2009, and accounting for an average of \$30,000 in revenue monthly. Moreover, until Ward contacted them, they had always paid Blackhawk within several days of invoice, which was a very important part of Blackhawk’s cashflow, and used frequently to make payroll. The email attached, dated March 15, 2011, is from CB, a Client A employee, to WB and JK, other Client A employees with management responsibilities. WB forwarded it to Blackhawk employee Jason Craig. It clearly demonstrates that Ward contacted Client A with false information, clearly an attempt to poison Blackhawk’s relationship with Client A for Ward’s own gain and/or that of Pratt. The email, dated March 15, 2011, is from CB, a Client A employee to WB, a Client A district manager, and JK, a Client A regional manager. It states:

Jerry Ward who used to work for Blackhawk called here looking for YOU [JK]. Said he called & left messages for you but have not heard back from you and does not have [WB’s] #.

Wanted to let us know that BH will be evicted this Friday, 03/18.

His cell if you want to call him back - (843) 514-5653

Tks! (emphasis supplied)..

13. The damage done by Ward is underscored in a further email attached to the Complaint as **Exhibit 8**. This message, an internal email of Client A, further demonstrates the great damage intentionally done by Ward to Blackhawk. It states:

From: [Client A Employee JK email address]
To: [Client A Employee WB email address]
Date: Mon, 28 Mar 2011 11:36:13 -0400
Subject: Re: BH OPEN!

WHAT ELSE? Jason have some additional information for you yet? Time frame, Plan, Ruling from Judge, etc...?? What does he know??? Jerry calling [BC, President of Client J], etc.. making [TC, President of Client A] nervous, making all of us nervous, making us start to consider other options? Possibly Jerry trying to scare everybody to pull out of BH that will make BH abandon the facility early, who knows at this point?? But if we have the threat of a lockout on our 2 MILLION dollar inventory hanging over us every week, end of month, etc... then we are going to have to do something about it so get some additional information, ps - nice job showing up at 8 this morning.

>>> [WB] 3/28/2011 5:20 AM >>>

As of 810, I have spoken to Amy and Jason and all is well with no expected interruptions.

Clearly, Ward's actions "making all of us nervous, making us start to consider other options" is of ominous importance for this critical client of Blackhawk.

14. Ward has wrongfully converted other existing Blackhawk customers for his own benefit and/or the benefit of Pratt, including Client F.

15. Up until October, 2010, Client F was an important client of Blackhawk, and had been a client for several years, representing an average of \$20,000 per month of revenue.

16. KK and RK, employees of Client H, a client and vendor of Blackhawk, and who have a close relationship with Blackhawk employee Jason Craig, informed Craig that Ward was contacting Blackhawk clients, including Client F and Client G and soliciting business for his new employer and/or brokering business for Blackhawk competitor CGM. He informed Craig that Ward had contacted Client H to pick up Client F's unique blue containers from the Port of Charleston and deliver them to Pratt's warehouse in Summerville. A bill of lading relating to such shipments is attached to the complaint as **Exhibit 10**. Photos of these containers are attached as **Exhibit 9**.

17. Prior to such event, the only third party logistics company used by Client F was Blackhawk. Upon information and belief, Client F had no relationship with Pratt. Exhibit 10 is evidence that Ward solicited and converted such client to become a client of Pratt. Pratt is accepting goods from third parties such as Client F and Client G, and storing such goods in their warehouse. Thus Pratt is by definition working in third party logistics, whatever else they might also be doing.

18. I believe that the geographic limitation in the Employment Agreement was narrowly tailored, and as narrow in scope as reasonably necessary to protect Blackhawk's legitimate business interests. The "market" for third party logistics services in deep water ports is unique. The services sought by national customers in ports like Charleston can also easily be filled by competitors in cities with other deep water ports—Savannah and Norfolk are good examples.

19. Blackhawk faces stiff competition from such competitors located locally, but also in Savannah and Norfolk, and at warehouse facilities in counties located adjacent to such ports. Such competitors can take national customers away from operations like Blackhawk in Charleston, and thus the need to prevent a critical employee like Ward from leaving Blackhawk and working with such competitors or setting up his own competitor entity.

20. There are many such examples of such business leaving the Port of Charleston and "going South" to Savannah or North to Norfolk. For example, for many years "banana ships" were frequently sighted in the Port of Charleston. This entire business was taken away from Charleston by the Port of Savannah, along with all of the related third party logistics work.

21. Ward's actions have caused great damage to Blackhawk, and in the current economic circumstances gravely threaten the continued existence of Blackhawk and the employment of its 24 employees. Though the damages are huge, they are difficult to estimate because of the fact that they must be calculated over a period of many years.

22. Client I represents \$2,000 in monthly revenue. Ward has continuously contacted Client I in an attempt to take this client away from Blackhawk.

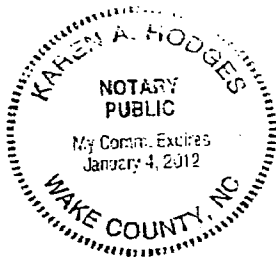
Client I repres : \$2,000 in monthly revenue. Ward ha continuously contacted Client I

in an attempt to take this client away from Blackhawk.

23. I have reviewed Blackhawk's Complaint against Jerry Ward, and I hereby verify that all of the allegations in the complaint are true, accurate and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Date: April 13, 2011



Blackhawk Logistics, LLC

By: _____

Benjamin Cone III, Manager

The State of North Carolina

County of Wake

I, the undersigned notary, certify that Benjamin Cone III personally appeared before me this 13th day of April, 2011 and executed the above instrument in my presence.

Subscribed and sworn before me on April 13, 2011.

[Signature of notary public with seal]

Karen A. Hodges

My Commission Expires:

1-4-2012



Blackhawk Logistics, LLC

Employment Agreement

Agreement made this 1st day of January, 2007 between Blackhawk Logistics, LLC (Employer") and Jerry Ward, ("Employee"), whose social security number is 048-54 9270. This agreement supersedes and replaces all prior employment or compensation, whether written or verbal, between Employer and Employee.

1. EMPLOYMENT - The Company hereby employs the Employee as the President and General Manager of Blackhawk Logistics, LLC.

2. TERM OF EMPLOYMENT - Unless this agreement is sooner terminated as hereinafter provided, the term of employment will begin as of the effective date and will continue for a period of twenty four (24) months. The term of employment shall be automatically renewed, after the initial term is completed, on the anniversary of the effective date unless either party gives written notice of termination to the other by no later than one hundred eighty (180) days prior to the end of the term then expiring, in which event the term of employment shall cease at the end of the term in which such notice is given. The effective date of this Agreement is the date first written above.

3. DUTIES - Employee agrees to use his or her best efforts to manage the business of the Employer, so that the maximum amount of cash is produced for its Members. The duties include, but are not limited to administration, operations, sales and marketing.

4. COMPENSATION - The employee will receive a base salary of Six Thousand Two Hundred Fifty Dollars (\$6,250.00) per month for the period of January 1, 2007 through June 30, 2007, which will be replaced by a base salary of Nine Thousand Two Hundred Fifty Dollars (\$9,250.00) for the period of July 1, 2007 through December 31, 2007, which will be replaced by a base salary of Twelve Thousand Two Hundred Fifty Dollars (\$12,250.00) for the period of January 1, 2008 through December 31, 2008. In the event the Term of this Agreement is automatically renewed pursuant to the terms described in Section 1, the base salary shall be increased by 5% for each successive term.

5. EXPENSES - Employee will be reimbursed for all travel, lodging and entertainment expenses related to the duties as outlined in this agreement.

TEST 12

6. TRADE SECRETS/NON-COMPETITION - The parties hereto acknowledge and agree that the Employer's business is that of providing third party logistics, including warehousing and transportation and that the Employer would suffer irrevocable harm if the employee were to disclose Employer's trade secrets or engage in competition against the Employer. Accordingly, during the term of this agreement and for a period of twenty-four months (24) after the termination hereof for any reason in any county which is home to a sea port or any county directly adjoining a county which is home to a sea port in the States of South Carolina, Georgia or Virginia:

a. Employee shall not directly or indirectly, individually or as a partner, employee, stockholder, consultant, agent, officer, director, advisor or in any other capacity, compete with the Employer in any business engaged in outsourced medical billing or outsourced collections of medical invoices.

b. Employee shall not directly or indirectly divulge, disclose, or communicate to any person, firm, corporation, or other entity in any manner whatsoever any information concerning any matters affecting or relating to the business of the Employer, including without limitation, the names of any of its customers, the prices it obtains or has obtained from the sale of, or at which it sells or has sold, its products and services, or any other information concerning the business of the Employer, its manner of operation, its plans, processes, or other data without regard to whether any or all of the above-stated matters would be deemed confidential, material, or important, the undersigned parties specifically and expressly stipulating that as among them, such matters are important, material, and confidential and gravely affect the effective and successful conduct of the business of Employer, and Employer's goodwill, and that any breach of this Contract; this provision shall not, however, prevent Employee disclosing to future, prospective employers, with whom the Employee is then eligible for employment under the terms of this agreement and with whom the Employee is then applying for work, such non-confidential information concerning the general nature and term of the Employee's agreement with the Employer as may be reasonably necessary to secure employment with such employer;

c. Employee shall not in any manner induce or attempt to induce any of the Employer's advertisers, suppliers, or customers to withdraw, reduce or divert any of their business from the Employer or other wise interfere or attempt to interfere with any business relationship between the Employer and its

advertisers, suppliers, or customers; and

d. Employee shall not in any manner induce or attempt to induce any of the Employer's other employees to leave the employment of the Employer.

Employee acknowledges and agrees that the recovery of damages by the Employer may not be an adequate means to redress a breach of this section and, accordingly, the parties specifically agree that the Employer shall have the right to injunctive relief or specific performance hereof. Nothing contained in this section, however, shall prohibit the Employer from pursuing any remedies in addition to injunctive relief or specific performance, including recovery of damages. If any provision contained in this section shall for any reason be held invalid, illegal or unenforceable shall not affect any other provision of this section or this agreement, but this section shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. The parties agree that in the event a court should determine that this section or any of the provisions herein are unreasonable, void or invalid, for any reason, then the duration, geographical or other limitation imposed herein should be as the court, or jury if applicable, should determine to be fair and reasonable, IT BEING THE INTENT OF THE PARTIES HERETO TO BE SUBJECT TO AN AGREEMENT FOR THE REASONABLE AND NECESSARY PROTECTION OF THE LEGITIMATE BUSINESS INTERESTS OF THE EMPLOYER WHICH IS NOT UNDULY HARSH IN CURTAILING THE LEGITIMATE RIGHTS OF THE EMPLOYEE. The Employee represents and affirms to the Employer that their experience and capabilities are such that the provisions of this section will not prevent either from earning a livelihood.

7. ASSIGNMENT - Employee acknowledges that his services are unique and personal and that he may not assign his rights or obligations under this agreement. The rights and obligations of the Employer hereunder shall inure to the benefit of and shall be binding upon the successors and assigns of the Employer. Upon any assignment hereof by the Employer to a new corporation which may be formed to own the business, which Employee shall manage hereunder, the present Employer shall automatically be relieved of any further, personal liability hereunder.

8. NOTICE - Any notice or document given hereunder shall be in writing and shall be delivered either personally or by first class, certified mail, postage prepaid and return receipt requested.

EST 12

addressed to the following:

Notices to Employer: Blackhawk Logistics, LLC
5801 N. Rhett Ext.
North Charleston, SC 29406

Notice to Employee: Mr. Jerry Ward
104 Abram Court
Goose Creek, SC 29445

9. COMPLETE AGREEMENT - This Contract contains the entire agreement among the parties. Any modification hereof shall be in writing and signed by the party against whom enforcement of such modification is sought. In the event of any dispute arising out of the terms hereof, this Contract shall be governed by and interpreted in accordance with the laws of the State of Delaware; jurisdiction and, the Employer shall be entitled to recover any reasonable costs and expenses incurred in such dispute, including reasonable attorney's fees.

10. PARAGRAPH HEADINGS - The titles to the paragraphs to this Contract are solely for the convenience of the parties and shall not be used to explain, modify, or aid in the interpretation of the provisions hereof.

IN WITNESS WHEREOF, the parties have entered into this Contract on the date written below.

WITNESSES:

William L. Howard
James M. Howard

EMPLOYER:

Blackhawk Logistics, LLC

By: [Signature]

1/1/07
Date

Its: Member

WITNESSES:

[Signature]
Rebecca A. Thompson

EMPLOYEE:

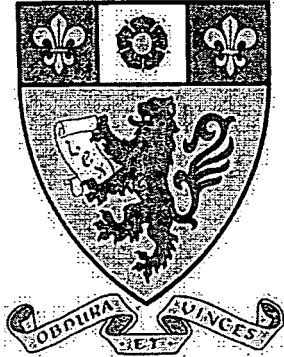
Jerry Ward

Print or Type Name

[Signature]
Signature

1/1/07
Date

LE CLERCQ LAW FIRM



April 2, 2010

Via Email Only

Brian Hellman, Esquire
145 King Street Suite 102
Charleston, South Carolina 29401

Reference: Termination For Cause of Jerry Ward by Blackhawk Logistics, LLC

Dear Brian,

Blackhawk Logistics, LLC hereby terminates for cause the Employment Agreement between Jerry Ward and the Company, dated January 1, 2007, effective immediately. An employment agreement of a definite term may be terminated for cause. Shivers v. John H. Hartland Company, 423 S.E.2d 105 (S.C. 1992).

The Company is still reviewing financial and other records from Mr. Ward's tenure as General Manager, and continues to uncover evidence of gross mismanagement, dereliction of duty, and egregious errors in judgment. The following errors in judgment and other issues are more than sufficient to constitute cause for immediate termination of Mr. Ward:

- As set out in the attached letter dated January 20, 2010, Mr. Ward owes the Company \$127,092. He took advantage of his inside position as Manager of the Company to pay amounts to himself to which he was not entitled. He paid himself at a time when Company creditors, such as the Landlord and the Estate of Powers, were not being paid, which has led to serious financial consequences for the Company.

353 North Shelmore Suite 260
Mount Pleasant, SC 29464
LeClercqB@bellsouth.net
(843) 722-3523
Fax: (843) 720-3197

- Mr. Ward allowed Moulton, Blackhawk's largest customer, to vacate the facility without settling its outstanding debt, which is in direct violation of Blackhawk's standard policy and the basic established rule of third party logistics (you don't allow a client to remove inventory until the Company is paid in full). Additionally, Mr. Ward allowed Moulton to "acquire" several key employees with no compensation paid to Blackhawk.
- Mr. Ward allowed the insurance policy for Company trucks to be cancelled due to non-payment, even though he was notified of this issue via certified letter on November 23rd, 2009.
- As of December 8, 2009, Company bank accounts had not been reconciled since July, yet Mr. Ward issued financial statements anyway to members and to a prospective acquirer. Mr. Ward thus issued financials for the months of August, September and October that were inaccurate, needed to be restated and if allowed to remain uncorrected would have been potentially actionable by an acquirer post closing.
- Mr. Ward incorrectly booked revenue related to board fees charged to Blackhawk by its former (non-member) board of managers and published financials based on this inaccurate revenue.
- Mr. Ward failed to adequately collect Company receivables and failed to employ a competent controller. The average days outstanding for the accounts receivable at the end of August was 42 days and at the end of November was 75 days.
- Mr. Ward failed to retain a CPA to prepare and file tax returns in 2008 for the Company. The tax returns he prepared and subsequently signed were inaccurate. The 2008 return had to be addressed as part of the 2009 tax preparation.
- Mr. Ward failed to properly manage other important Blackhawk accounts. Specifically, M. Hidary, one of the Company's largest clients, has a broker who had not been paid since August; they were very angry that Mr. Ward was not returning phone calls, thus jeopardizing this account.
- As of December 8, 2009, Company servers had not been backed up since July of 2007. Evidently the hard drive to back up the servers was removed so that Mr. Ward's daughter Rosy Mallard could store family pictures on it.
- Mr. Ward directed that the Company inappropriately subsidize the health insurance for Ward's daughter Rosy Mallard and/or her family, in violation of the Company policy.
- Mr. Ward failed to exercise options to decrease the space leased by the Company when he had the opportunity. As a result, Blackhawk for much of 2008 and 2009 was paying

Brian Hellman, Esquire

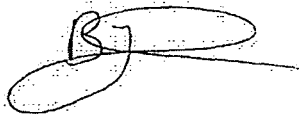
Page 3

April 2, 2010

for much more space than its revenue justified. This single issue has been an important cause of the Company's financial problems:

- Mr. Ward failed to make a portion of the October rent payment, failed to pay the November rent payment, and his mismanagement of the Company led to the Company's not being able to make the December rent payment after his suspension on December 8. Because of these failures, the landlord filed ejectment proceedings against the Company.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Le Clercq", with a large, stylized initial "B" and a horizontal line extending to the right.

Ben Le Clercq
Counsel to Blackhawk Logistics, LLC

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"Pratt Industries Summerville" X Search

Instant is on ▼

Advanced search

No results found for "Pratt Industries Summerville".

Everything

Images

Videos

News

Shopping

Places

More

Charleston, SC 29412

Change location

Show search tools

Results for **Pratt Industries Summerville** (without quotes):

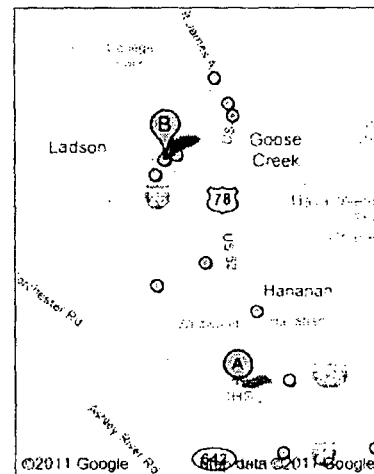
Places for "Pratt Industries near Summerville, SC"

Pratt & Whitney - Place page
maps.google.com - Charleston Air Force Base, North Charleston - (843) 760-5707

Pratt & Co Inc - Place page
www.prattandco.com - 9209 University Boulevard, North Charleston - (843) 576-2710

Pratt & Co Inc: Pratt Robert - Place page
maps.google.com - 9209 University Boulevard, North Charleston - (843) 576-2710

More results near Summerville, SC »



Pratt Industries Inc. Harvesting the Urban Forest for Better ...

100% Recycled Corrugated Boxes and Packaging. All your packing needs from an environmental conscious company. We recycle paper, glass, aluminum and others.
Locations - Contact Us - Company Overview - Recycling
www.prattindustries.com/ - Cached - Similar

Pratt Industries USA Inc - Summerville, SC - Manufacturer in ...

412 Industrial Rd, Summerville, SC, 29483-3409. Phone: (843)695-6005. Category: Manufacturers. View detailed profile, contacts, maps, reports and more.
www.manta.com/c/mvr75hq/pratt-industries-usa-inc - Cached

Industry Services Co Inc - Summerville, SC - Manufacturer in ...

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www.manta.com/c/mt82lmk/industry-services-co-inc - Cached

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Pratt Industries USA Inc in Summerville, SC - yellowbot

Pratt Industries USA Inc at 412 Industrial Rd, Summerville, SC 29483.
www.yellowbot.com/pratt-industries-usa-inc-summerville-sc.html - Cached

**Pratt Industries, 412 Industrial Rd Summerville
Sc 29483 Us ...**



Dec 7, 2010
Find objective information on **Pratt Industries**, including details on their suppliers, capabilities, credit, and more.
panjiva.com/Pratt-Industries/4661237

**Corrugated & Fiber Boxes - Summerville SC,
South Carolina Local ...**

Pratt Industries USA Inc PO Box 1514Summerville, SC
29484-1514 (843) 695-6005; UPS Store The 717 Old Trolley
Rd Ste 6Summerville, SC 29485-5287 ...
www.yellowbook.com/yellow-pages/?what=corrugated...sc -
Cached

**Contact Us - Carolina Commercial, LLC - Real
Estate Solutions ...**

Pratt Industries ADDRESS: 412 Industrial Ave AREA:
Summerville TRANSACTION: Industrial Lease BROKER:
Charlie Moore, CCIM, SIOR. CR Solutions North America ...
www.carolinacre.com/recent_transactions.html - Cached

**Memos & Distinctions | The Post and Courier,
Charleston SC - News ...**

Nov 1, 2010... LLC represented the tenant, **Pratt Industries**,
in the lease of 63000 square feet of warehouse space at 412
Industrial Drive, Summerville. ...
[www.postandcourier.com/news/2010/nov/01/memos-](http://www.postandcourier.com/news/2010/nov/01/memos-distinctions/)
distinctions/ - Cached

**Zapp Usa in Summerville, South Carolina
company profile**

Akama.com - Zapp Usa of Summerville 29483 South
Carolina company information. Includes data about company
address, phone number ... **Pratt Industries (USA)** ...
www.akama.com/company/Zapp_Usa_a3548440741.html -
Cached

**Pratt & Co. REMAX Pro Realty - The
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Mar 1, 2011 ... At Pratt and Co., we go above and beyond to
help you achieve your goals. Our innovative marketing and
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(without quotes) »**

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EXHIBIT 5 REDACTED

Dear Doug,

It was a pleasure speaking with you today. As we discussed, I represent Blackhawk Logistics, LLC, the former employer of Jerry Ward. Mr. Ward is party to an employment agreement with Blackhawk, a copy of which is attached hereto. Blackhawk terminated Ward in December, 2009. This agreement contains non-compete and non-solicitation clauses, which we understand that Ward has violated with the knowledge and complicity of Pratt.

Specifically, we believe that Ward has wrongfully converted existing Blackhawk customers for the benefit of Pratt, including without limitation [Client H], [Client G], and [Client F]. We understand that Ward took these Blackhawk customers for Pratt and that Pratt has invoiced these Blackhawk customers for services. We are told that the address of the Pratt location is Pratt Industries, 412 Industrial Road, Summerville, SC 29483. Our sources have seen the [Client A product] containers in that facility.

My sources inform me that Jerry Ward is representing that he is currently employed by Pratt, and that his email address is JEWard@prattindustries.com.

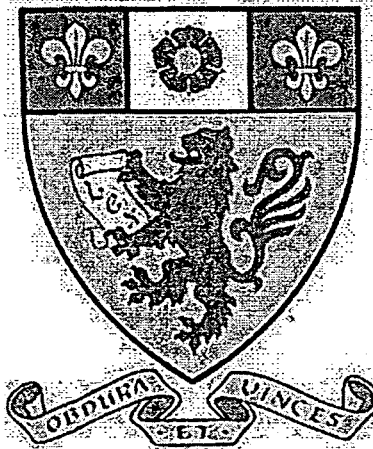
If this is true: 1) Blackhawk has been substantially damaged by this breach of the employment agreement; 2) Blackhawk intends to hold both Ward and Pratt responsible for damages; and 3) As an initial step, Pratt must immediately cease and desist from all such activity.

I look forward to discussing this matter with you at your earliest convenience.

With kind regards, I am

Respectfully,

Ben Whaley Le Clercq, J.D., LL.M.
353 North Shelmore Suite 260
Mount Pleasant, South Carolina 29464
(843) 722-3523
(843) 720-3197 fax
www.LeClercqlaw.com



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Legal Department
Fax: 770 206 2293
Email: dbalyeat@prattindustries.com

February 1, 2011

VIA ELECTRONIC MAIL

Benjamin Scott Whaley Le Clercq, J.D., LL.M.
353 North Shelmore Suite 260
Mount Pleasant, South Carolina 29464

**RE: RESPONSE TO JANUARY 27th CORRESPONDENCE REGARDING
JERRY E. WARD**

Ben,

I am in receipt of your January 27, 2011 email addressed to my attention and the copy of the employment agreement for Jerry Ward that was attached. I represent Pratt as its legal counsel and serve as its General Counsel and Vice President. My representation is limited to Pratt and each of its subsidiaries and affiliated companies. I do not represent Mr. Jerry E. Ward, though I understand he has his own legal representation. I have had the opportunity to review the agreement and to conduct preliminary due diligence and a review into the matter and wanted to get back with you with my thoughts and assessment of this matter.

In your email, you made some strong allegations on behalf of your client, which do not appear to be supported by any accompanying facts or documents. Upon review of the facts and circumstances, I have not discovered any: (i) violation of Mr. Ward's former employment agreement with your client, (ii) wrongdoing by Mr. Ward; or (iii) wrongdoing by Pratt. In your letter, you specifically state, Mr. Ward's former employment agreement "contains non-compete and non-solicitation clauses, which we understand that Ward has violated with the knowledge and complicity of Pratt;" however, the information you provide does not substantiate any violation of the referenced non-compete and does not demonstrate any wrongful solicitation in violation of said employment agreement. In addition, nothing contained in your letter supports your libelous allegations that any violation was "with the knowledge and complicity of Pratt."

Based on my review of the said employment agreement, the sections that you reference regarding non-competition and non-solicitation appear to be contained solely in Section 6.

Non-Solicitation

You specifically reference certain customers by name; however, this does not establish or substantiate your allegations regarding any violation of the non-solicitation clause. The mere fact that Pratt may have a working relationship with certain companies does not establish, or evidence, a violation of the non-solicitation clause. Upon investigation, I discovered that Mr. Ward did not approach, or cause any Pratt employee to approach, any of the referenced companies or any former customers of your client in violation of Section 6(b) or 6(c) of the employment agreement. Further, upon my inquiry and review, I did not find any violation of Sections 6(b) or 6(c) or any other sections of the employment agreement. In addition, I certainly did not find where there was any violation “with the knowledge and complicity of Pratt.”

Non-Compete

The noncompetition clause appears to be solely contained in Section 6, specifically, subsection (a). In the prelude to Subsection 6(a), the parties acknowledge harm would occur “if the employee were to disclose Employer's trade secrets or engage in competition against the Employer.” Thus, it was agreed by the parties that for a period of 24 months, in a certain provided geographical region, Mr. Ward was not to “directly or indirectly...compete with the Employer in any business engaged in outsourced medical billing or outsourced collections of medical invoices.” For clarification, Pratt is not engaged in outsourced medical billing or outsourced collections of medical invoices. Thus, there is no violation, by Mr. Ward of the non-compete clause contained in his former employment agreement. Based on my review of the relevant facts, there appears to be no violation of the non-compete terms contained in Mr. Ward's agreement.

Summary

Absent a South Carolina statute governing the enforceability of covenants not to compete, the enforceability, that is provided in the state's case law has not been properly established and violation of any such covenants, valid or otherwise, certainly does not exist [*See Rental Uniform Services of Florance, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (listing the five factors required for a covenant not to compete)]. Your client has failed to establish its burden of proof to establish reasonableness and any violation of the referenced covenants as provided by the Supreme Court of South Carolina in Delmar Studios of the Carolinas [*Delmar Studios of the Carolinas v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958)].

Thus, Mr. Ward did not solicit or cause any customers of your client to be solicited in violation of the employment agreement. Mr. Ward did not provide or disclose any of your client's trade secrets; even though I find the definition of “trade secrets,” contained in the employment agreement, too be overly broad under South Carolina law (*See Chem. Equip. Co. v. Muckenfuss*, 471 SE 2d 721, 322 SC 289 (1996)]. Also, Mr. Ward did not compete with your client in violation of the employment agreement. Finally, there is

Page 3 of 3

absolutely no showing that there was any violation "with the knowledge and complicity of Pratt."

Sincerely,

PRATT INDUSTRIES (U.S.A.), INC.

A handwritten signature in black ink, appearing to read "D. Balyeat", with a stylized flourish at the end.

Douglas R. Balyeat, CPA, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

BLACKHAWK LOGISTICS, LLC

Plaintiff,

v.

JERRY WARD

Defendant.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: _____

) **AFFIDAVIT OF BLACKHAWK LOGISTICS,**
) **LLC, BY OPERATIONS MANAGER**
) **JASON CRAIG**

_____) COMES NOW AFFIANT, Blackhawk Logistics, LLC, by Operations Manager JASON CRAIG, and after being duly sworn, does hereby affirm and state as follows:

1. I am Operations Manager of Defendant Blackhawk Logistics, LLC, ("Blackhawk"). I have personal knowledge of the matters set out herein, and know them to be true, except as to those matters stated on information and belief.

2. I have worked with Blackhawk for five years.

3. I have been Blackhawk's Operations Manager for one year.

4. Blackhawk is a third party logistics company, and it is in a tough business, one which has been seriously affected by the recent recession and general economic downturn.

5. Blackhawk produces no goods, it is responsible for moving, storing and handling freight it at its facilities for third-parties.

6. Logistics is an extremely competitive business. All of our clients want to make sure we will be able to service them. Not surprisingly, competitors use whatever information they can get about other companies in the business to try and win clients, frequently at another company's expense.

7. Jerry Ward, former President and member of Blackhawk has contacted Blackhawk current clients including customers Client A through Client J, in order to disparage Blackhawk and take business from Blackhawk for his new employer Pratt, or for Blackhawk competitors like CGM for whom I believe Ward is brokering deals.

8. On Tuesday, March 15, 2011, I received an email, attached to the Complaint as **Exhibit 7**, from WB, a Client A employee, in which he forwarded a message from co-worker CB. Her email was a message saying that Jerry Ward had contacted Client A looking for WB or regional manager JK seeking to inform them that Blackhawk "will be evicted this Friday, 03/18."

9. Again on Monday, March 28, 2011, I received an internal email of Client A from WB, attached to the complaint as **Exhibit 8**, stating that Jerry Ward had contacted Client A employees about the current litigation between Blackhawk and its Landlord, and that Client A employees were becoming apprehensive about dealing with Blackhawk, and might "start to consider other options." JK is an important regional manager for Client A; he is based in California. WB is a manager of Client A's local operations. "Jerry" refers to Defendant Jerry Ward. BC refers to the President, owner and/or manager of Client J, another client of Blackhawk, and one which has considerable business with Client A. TC refers to the President of Client A. "BH" refers to Blackhawk.

10. Further, RK and KK, who work for Client H, a client and vendor of Blackhawk, and whom I have a close relationship with, informed me that Ward was contacting Blackhawk clients, including Client F, and soliciting business for his new employer. He informed me that Ward had contacted CTI to pick up Client F's unique blue containers from the Port of Charleston and deliver them to Pratt's warehouse in Summerville. Photos of these containers are attached to the Complaint as **Exhibit 9**.

11. Prior to Ward leaving Blackhawk, the only third party logistics company used by Client F was Blackhawk. I do not believe Client F had a relationship with Pratt prior to Ward joining Pratt. I believe Ward successfully induced Client F to do business with Pratt.

12. Ward's actions have already cost Blackhawk two major customers, Client F and Client G, and are threatening our relationship with another, Client A. These actions have caused, and continue to cause irreparable harm to Blackhawk.

13. DO, Sales and Marketing coordinator at Client I, and CK, Director of Sales for Client I, phoned me several weeks to say that they were "worried about the future of Blackhawk." Though they would not initially disclose the source of their concern, I met with them personally on March 30, 2011, during which meeting they told me that Defendant had contacted them in January, 2011, and again in March, 2011 to disparage Blackhawk, and to state: i) Blackhawk is in financial difficulty; ii) Client I's property at Blackhawk's facility was in jeopardy; iii) Blackhawk moved Client I goods from its principal facility to another facility; and iv) that Blackhawk would be evicted from its principal warehouse facility.

14. Ward has also contacted Client H, a Blackhawk client, to disparage Blackhawk, specifically relating to the Blackhawk client Client F.

15. In March, 2010, Client G terminated its relationship with Blackhawk. Subsequently, in a personal meeting between Client G executive officer and owner EB and myself, EB informed me that Client G was moving its business to Pratt.

16. As recently as this past Monday, April 4, 2011, Ward again contacted Client A to solicit them and disparage Blackhawk. I spoke today with WB at approximately 10:00 a.m. Specifically, WB told me that Ward had contacted him on Monday, and warned WB that Blackhawk was financially unstable and that Client A should move their products from Blackhawk's facility to space leased by third party logistics company and Blackhawk competitor called CGM, the President of which is Matt Frey, who has signed a letter of intent with Blackhawk's landlord on 100,000 square feet of space in the same building and just adjacent to Blackhawk's premises in Hanahan. CGM via its agent Matt Frey contacted WB to say that have signed a 5 year lease with Blackhawk's Landlord, and they would like for Client A to begin sending product directly to the space to be leased by CGM.

17. WB also told me this morning that Ward had solicited former Blackhawk employee Matthew Levell, who was terminated from Blackhawk approximately ten days ago, but who upon information and belief was solicited by Ward prior to his termination to work with Ward and/or CGM on Client A products in the space to be obtained by CGM. In fact, the day Blackhawk terminated Levell, Ward told WB that Ward was going to "hire Matt Levell back to run Sunset."

18. I believe that Ward has contacted every single Blackhawk customer to disparage Blackhawk in the fashion described herein, and in the attempt to take customers from Blackhawk. Ward's actions thus pose a mortal threat to the survival of Blackhawk and the continued employment of its 24 employees, of which I am one.

FURTHER AFFIANT SAYETH NAUGHT.

Date: 4/6, 2011

Blackhawk Logistics, LLC

By: Jason Craig

Jason Craig, Operations Manager

Verified and sworn before me this
11th day of April, 2011 by Jason Craig

Jason Craig
Jason Craig

State of South Carolina
County of Berkeley

Mr. Craig produced a SCDL (#100996513) as
identification.

Shirley Williams

my commission
expires 11/23/2019

EXHIBIT 7

----- Forwarded message -----

From: [Client A Employee WB]
Date: Mar 15, 2011 7:42 PM
Subject: Fw: Re. Blackhawk
To: <jason@blackhawklogistics.com>

----- Forwarded message -----

From: [Client A Employee CB email address]
To: [Client A Employee JK email address], [Client A Employee WB]
Date: Tue, 15 Mar 2011 18:11:08 -0400
Subject: Re. Blackhawk

[JK]/[WB],

Jerry Ward who used to work for Blackhawk called here looking for YOU [JK]. Said he called & left messages for you but have not heard back from you and does not have [WB's] #.

Wanted to let us know that BH will be evicted this Friday, 03/18.

His cell if you want to call him back - (843) 514-5653

Tks! (emphasis supplied).

EXHIBIT 8

----- Forwarded message -----

From: [CLIENT A EMPLOYEE WB]
Date: Mon, Mar 28, 2011 at 11:52 AM
Subject: Fw: BH OPEN!
To: jason@blackhawklogistics.com

From: [Client A Employee JK email address]
To: [Client A Employee WB email address]
Date: Mon, 28 Mar 2011 11:36:13 -0400
Subject: Re: BH OPEN!

WHAT ELSE? Jason have some additional information for you yet? Time frame, Plan, Ruling from Judge, etc...?? What does he know??? Jerry calling [BC, President of Client J], etc.. making [TC, President of Client A] nervous, making all of us nervous, making us start to consider other options? Possibly Jerry trying to scare everybody to pull out of BH that will make BH abandon the facility early, who knows at this point?? But if we have the threat of a lockout on our 2 MILLION dollar inventory hanging over us every week, end of month, etc... then we are going to have to do something about it so get some additional information, ps - nice job showing up at 8 this morning.

>>> [WB] 3/28/2011 5:20 AM >>>

As of 810, I have spoken to Amy and Jason and all is well with no expected interruptions

EXHIBIT 9

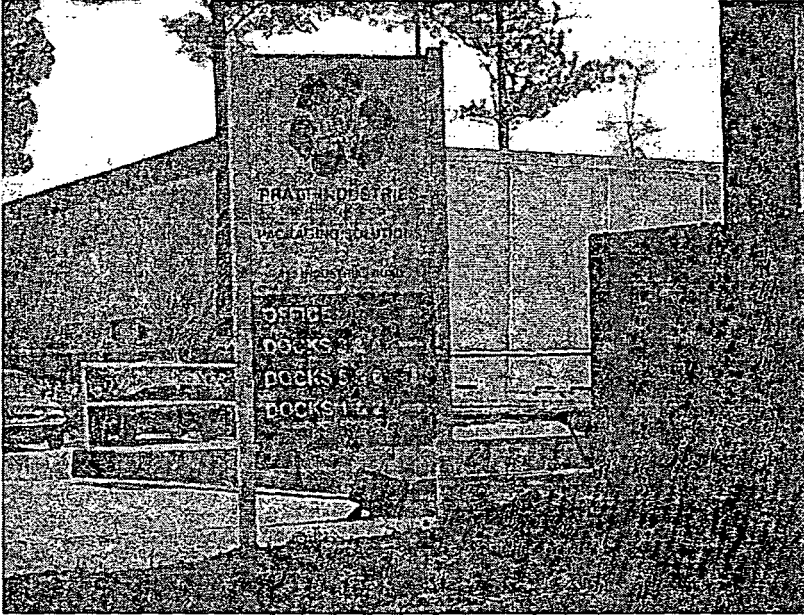


Exhibit 10

LIVINGSTON INTL INC
800 WEST MAPLE LANE (OCEAN)
BENSENVILLE, IL 60106

Phone: 630-766-0202
FAX: 630-766-2729

1 0651

[REDACTED]

DATE	OUR REF. NO
11/22/10	651067302 10

THE MERCHANDISE DESCRIBED BELOW
WILL BE ENTERED AND FORWARDED AS
FOLLOWS:

IMPORTING CARRIER		LOCATION		FROM PORT OF / ORIGIN AIRPORT	
ER CUXHAVEN		WANDO TERMINAL		PAITA, PERU	
BL OR AWB NO.		ARRIVAL DATE		LOCAL DELIVERY OR TRANSFER BY (DELIVERY ORDER ISSUED TO)	
See Below		12/05/10		PRATT DELIVERY	
			HAWB NO.		CUST. REF. NO.
			300-8991343-7		
FOR DELIVERY TO			ROUTE		
PRATT INDUSTRIES 412 INDUSTRIAL ROAD SUMMERVILLE, SC 29483 TEL: 843-963-0992					

NO. OF PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS & EXCEPTIONS	WEIGHT	DO NOT USE
320	[REDACTED]	146211 LB	
DRUMS	# of Containers: 4		
80	DRUMS CLHU3749632 20	16590	
80	DRUMS GLDU3652831 20	16610	
80	DRUMS MEDU2285646 20	16570	
80	DRUMS MEDU2931319 20	16550	
	M MSCU PO701598		
	References: M76-83736276443 ST#4663		
USDA	Ok		
FDA	Ok		
CUSTOMS	Ok		
12/8	LED 12/14		

INLAND FREIGHT

PREPAID/COLLECT
Collect

Received in Good Order
By: _____

Agents for
[REDACTED]
PER: _____

DELIVERY CLERK: DELIVER
TO CARRIER SHOWN ABOVE

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF COLLETON

**Condensed
Copy**

3
4 CHERYL MORRIS,
Plaintiff,

5 vs. CASE NO. 2009-CP-15-973

6
7 BLACKHAWK LOGISTICS, LLC,
and RODNEY KITTRELL,
Defendants.

8
9 JOHN E. MORRIS,
Plaintiff,

10 vs. CASE NO. 2010-CP-15-252

11 BLACKHAWK LOGISTICS, LLC,
and RODNEY KITTRELL,
Defendants.

12
13 DEPOSITION OF: JERRY ALBERT WARD
14 DATE: February 7, 2011
15 TIME: 1:12 p.m.
16 LOCATION: Law Offices of
Clawson & Staubes
17 126 Seven Farms Drive
Charleston, SC

18
19 TAKEN BY: Counsel for the Plaintiff

20 REPORTED BY: Janice N. Shepherd,
Registered Professional
Reporter

21
22
23
24
25 Job No. AMB178140

Page 2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFFS 3 CHERYL MORRIS and JOHN E. MORRIS 4 PETERS, MURDAUGH, PARKER, ELTZROTH & 5 DETRICK, P.A. 6 BY: RANDOLPH MURDAUGH, IV 7 101 Mulberry Street East 8 Hampton, SC 29924 9 PHONE (803) 943-2111 10 FAX (803) 943-3943 11 rmurdaugh@pmpcd.com 12 ATTORNEYS FOR THE DEFENDANTS 13 BLACKHAWK LOGISTICS, LLC and RODNEY 14 KITTRELL: 15 CLAWSON & STAUBES, LLC 16 BY: CHRISTOPHER W. NICKELS 17 MARGARET URBANIC 18 126 Seven Farms Drive, Suite 200 19 Daniel Island, SC 29492-7595 20 PHONE (843) 577-2026 21 FAX (843) 722-2867 22 cnickels@clawsonandstaubes.com 23 murbanic@clawsonandstaubes.com 24 25 (INDEX AT REAR OF TRANSCRIPT)	Page 4 1 don't speak clearly, or if for any other reason you 2 have a question regarding how the deposition is 3 being taken or what's going on, please address that 4 to the person asking the questions. 5 A. Understood. 6 Q. And also to the extent that you do 7 answer, I'll assume that you understood the 8 question. Is that fair? 9 A. Yes, sir. 10 Q. So if you don't understand, please let 11 me know. 12 A. I will. 13 Q. I don't think we'll be here long. But 14 if you need to take a break for any other reason, 15 just let me know. 16 A. Okay. 17 Q. Just for the record, obviously, when 18 you received the subpoena to appear at the 19 deposition, you contacted my office to see if it 20 was still necessary for you to appear; is that 21 correct? 22 A. Correct. 23 Q. And other than me asking who your 24 attorney is in some other related matters, that was 25 the extent of our conversation?
Page 3 1 JERRY ALBERT WARD, 2 being first duly sworn, was examined and testified 3 as follows: 4 EXAMINATION 5 BY MR. MURDAUGH: 6 Q. Mr. Ward, my name is Randy Murdaugh, 7 and you and I just spoke. In fact, we spoke one 8 time on the telephone, and we'll talk about that in 9 just a moment. Before we get started or as we're 10 getting started, if you would, state your full name 11 for me, please. 12 A. It's Jerry Albert Ward. 13 Q. And you are the past president of 14 Blackhawk Logistics Company? 15 A. Correct. 16 Q. You may have given depositions before. 17 I'm not sure. Have you? 18 A. Yes. 19 Q. Okay. So you understand I'll be asking 20 questions of you and that we need to have a verbal 21 response so our court reporter can take it down. 22 And there are certain other things I'm required to 23 tell you. If you have any questions about the 24 procedure of the deposition, if you don't 25 understand the question, if it's not clear or I	Page 5 1 A. That's correct. 2 Q. Okay. What was your role as president 3 of Blackhawk Logistics? 4 A. To bring in sales and to create the 5 operational procedures of our business was my main 6 role. And then I inherited financial 7 responsibilities and everything else later on. 8 Q. Sure. Help me understand how Blackhawk 9 Logistics was set up at the time of the accident, 10 in other words, during that time frame. Obviously 11 you were the president. Was anybody above you? 12 A. I believe at the time there was no 13 board of managers in place at the time. That 14 didn't come until later. But on site, I was the 15 top person. We had the other owners, obviously, 16 who were offsite and didn't have a day-to-day role 17 in the operation until later. 18 Q. And you were an owner at that time? 19 A. I am -- I still am. 20 Q. And that was going to be my next 21 question. So you were, and you still are? 22 A. Correct. 23 Q. What is the percentage of ownership you 24 have? 25 A. Approximately 42 1/2 percent.

2 (Pages 2 - 5)

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973-410-4050

Page 6

1 Q. All right. Who were the other owners?

2 A. Milestone Partners, and they own

3 approximately the same, 42 1/2 percent; SFT -- I'm

4 not sure what that stands for -- it's a gentleman

5 named Joe Jaffe, that owns around 9 percent; the

6 Powers Estate, which owns 5 percent; and John Jack

7 Jeffords owns a half a percent.

8 Q. Jeffords?

9 A. Yeah, Jeffords, J-E-F-F-O-R-D-S --

10 actually, I'm not sure if it's an S or if there's a

11 pleural or not.

12 Q. He owns a half a percent?

13 A. Yes.

14 Q. How did that come about? What's the

15 deal?

16 A. The Milestone group, one of the

17 Milestone Partners, Rogers Drake, I guess the short

18 version, screwed him out of 20, 25 percent of the

19 company.

20 Q. Oh, he wasn't just supposed to have

21 half a percent?

22 A. Yeah, he was supposed to have -- we had

23 tried to get investors into Blackhawk, and we put

24 an offer out for 25 percent for \$1 million.

25 Mr. Jeffords found somebody that had the money, and

Page 7

1 brought -- which was Mr. Powers, and brought them

2 to the table. Mr. Powers put in \$900,000, and

3 Mr. Jeffords put \$100,000 which made up the

4 million.

5 Mr. Jeffords had a relationship with

6 Mr. Powers that he was able to get him to invest

7 without exposing the 25 percent that was available.

8 So he gave him only 5 percent. So it left

9 Mr. Jeffords basically with control of the other 20

10 percent.

11 But Mr. Drake on December 31st at 4:30

12 in the afternoon came to my office and said, hey,

13 we've got to put some operating agreements with

14 percentages in place now for tax purposes. And all

15 of a sudden Mr. Drake created a document that

16 Mr. Jeffords only owned a half a percent, and it

17 got sent off to all the owners. The rest of that

18 was history.

19 Q. Okay. I didn't really mean to get that

20 detail, but it was just kind of unusual in that it

21 was a half a percent.

22 A. Oh, yeah. I've been told that if I

23 write the book, I'd make more money than I'll ever

24 do in my lifetime.

25 Q. Joe's last name is Jaffe or Caffé?

Page 8

1 A. Jaffe. It's J-A-F-F-E.

2 Q. Okay. Just to make sure I understand,

3 Milestone Partners, you don't mean those partners

4 own 43 percent, but that entity?

5 A. Correct.

6 Q. And SFT is another entity --

7 A. SFT, like Sally, Francis, Thomas.

8 Q. And Joe Jaffe is the person of SFT?

9 A. He is, my understanding, the managing

10 partner of SFT. He's also a managing partner of

11 Milestone. And that's how, later, that I found

12 that I didn't have even equal to majority control,

13 that the two were kind of connected, and they

14 owned -- controlled 51 percent of the company.

15 Q. Sure. And I knew he was in Milestone.

16 All right.

17 Who was under you at the date of the

18 accident?

19 Let me go ahead and tell you what I

20 understand. I understand Jason Craig was the

21 warehouse manager. Would he be the next in charge

22 under you?

23 A. It would really depend on what -- in

24 charge for -- we had a transportation division,

25 which was Rebecca Thompson, and she also was our

Page 9

1 safety and compliance person. So it just really

2 depended what the need was for and who would

3 actually be next in command. As far as the

4 warehouse, yeah, Jason would be the next.

5 Q. Who was Rebecca employed by?

6 A. By Blackhawk Logistics. She worked for

7 me.

8 Q. Okay. Earlier in a deposition we were

9 told there was a Blackhawk Transportation?

10 A. Blackhawk Transport is owned by

11 Blackhawk Logistics. Blackhawk Logistics was

12 created as a Delaware company, and then Blackhawk

13 Transport was developed in South Carolina and owned

14 by Blackhawk Logistics.

15 Q. I see. I see. So she's employed by or

16 was employed by Blackhawk Logistics and was an

17 employee there, but acted also as an employee for

18 Blackhawk Transportation or did some duties that

19 were specifically for transportation?

20 A. Correct. She would be the manager of

21 transportation. Jason would have been the manager

22 of the warehouse operation as far as who the next

23 supervisors were for people to report to. But

24 Rebecca Thompson also, you know, took care of

25 safety and compliance for the warehouse operation

Page 10 1 also. 2 Q. I see. Was there anybody under them in 3 the management other than just normal employees? 4 A. Just normal employees. Some of them 5 had supervisor titles, but they were fairly equal 6 from there, sort of a salary employee versus an 7 hourly employee. 8 Q. Was there anybody other than Jason or 9 Rebecca or yourself that would have some sort of 10 supervisory duties relating to forklift operations? 11 A. I'm not sure what -- in relation to 12 what operations? 13 Q. Related to the operating of the 14 forklifts other than Jason and Rebecca and 15 yourself. I'm going to exclude you-all. 16 A. No, the supervisors would really just 17 be people who were assigned to kind of baby-sit 18 certain accounts. But, no, as far as everybody 19 that was qualified drove forklifts. 20 Q. And there was no safety personnel other 21 than -- and I'm just going to keep it open to the 22 three of you-all together just to make sure I know 23 who does exist out there. No other safety 24 personnel, per se, other than one of the three of 25 you-all?	Page 12 1 then he would have been positioned in there if he 2 was a truck driver. 3 Q. I'll tell you, I haven't seen his name 4 anywhere. 5 A. Yeah. 6 Q. And I don't know if that means 7 anything. 8 A. I don't think he was, because he 9 would -- you know, he's an ex-military guy. So you 10 can imagine the type of safety meetings and stuff 11 that would have -- you know, he would have created 12 from having an accident like this. 13 Q. Right, right. Did you see the accident 14 take place? 15 A. No, I did not. 16 Q. Do you know of anybody other than 17 Mr. Kittrell who saw the accident take place? 18 A. I don't know of anybody else that saw 19 it besides R.J. 20 Q. Is that something you sought to 21 determine, whether there were any witnesses? Did 22 you attempt to find out if there were any 23 witnesses? 24 A. I believe at the time, yeah, we did 25 ask. And everybody was kind of in the same
Page 11 1 A. Correct. 2 Q. Was there anybody else that was in 3 charge of training employees, if I exclude the 4 three of you-all? 5 A. No, no. Now, we had a gentleman 6 named -- his actual real name is Danny Frank Watts. 7 I don't recall if he had -- where he played in a 8 role at the time of this incident, because he had 9 originally started as my operations manager. So he 10 would have probably been the next in command. Then 11 he went into a truck and became a truck driver. 12 And then at some point, he came out of the truck 13 and went back into operations. And then he left. 14 Just so I'm not accused of forgetting him, you 15 know, he was in that picture at some point. But I 16 just don't recall if he had left or if he was a 17 truck driver at the time of the incident I'm here 18 for. 19 Q. Whenever he was there and not a truck 20 driver, he would have been positioned between you 21 and the level that Jason and Rebecca occupied? 22 A. Correct. 23 Q. And you're just not sure whether he was 24 at the time? 25 A. Or if he was in a truck driving role,	Page 13 1 scenario. They saw it afterwards, nobody that saw 2 the whole process of when he got hurt. 3 Q. Obviously I assume you talked to 4 Mr. Kittrell about what happened as soon as you-all 5 were able to get Mr. Morris, you know, out to 6 medical providers. I assume that when you-all were 7 there trying to take care of Mr. Morris and that 8 crate was still on him, you weren't asking him what 9 happened and all that kind of stuff? 10 A. Correct. 11 Q. Once that was okay and, you know, now 12 you focus on, hey, what happened, what's going on 13 here, did you talk to Mr. Kittrell at that point? 14 A. I don't know if I talked to him 15 immediately or if Rebecca talked to him first and 16 brought him into the office. But shortly after, he 17 would have had to repeat it again with me. 18 Q. Okay. We took a deposition of 19 Mr. Garwood, who was one of the investigators that 20 showed up the same day. Is that his name? 21 MR. NICKELS: Gray, Gray Garwood. 22 BY MR. MURDAUGH: 23 Q. Yeah, showed up the same day as the 24 accident. And he said he spoke to you, but he was 25 not able to speak to Mr. Kittrell because you-all's

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1 insurance company wouldn't let you allow
 2 Mr. Kittrell to be interviewed. Okay?
 3 MR. NICKELS: Object to the form.
 4 BY MR. MURDAUGH:
 5 Q. Do you remember speaking with
 6 Mr. Garwood?
 7 A. I believe so, yes.
 8 Q. Had you already talked to Mr. Kittrell
 9 by the time Mr. Garwood would have gotten out
 10 there, which would have been a few minutes later?
 11 A. I really don't recall if it was before
 12 or after, because the adjuster did come out fairly
 13 quickly.
 14 Q. Do you remember speaking to
 15 Mr. Kittrell the same day of the accident in your
 16 office?
 17 A. Yes.
 18 Q. Other than generally kind of hearing a
 19 little bit about how it happened, did you know what
 20 had happened until you sat down and talked to
 21 Mr. Kittrell?
 22 A. Other than, you know, I did go out into
 23 the warehouse -- once it happened and they notified
 24 me, I ran out there and saw, you know, obviously --
 25 Q. And you can conclude certain things by

Page 15

1 what you see, obviously?
 2 A. Yes.
 3 Q. You don't know the whole picture, but
 4 you can tell something?
 5 A. Correct.
 6 Q. Just to make sure you finished
 7 answering, other than kind of what you saw there
 8 and just generally when you-all were trying to get
 9 Mr. Morris out from under there, did you really
 10 know what had happened until you talked to
 11 Mr. Kittrell?
 12 A. No.
 13 Q. Okay. You had sort of that general
 14 understanding. Tell me what Mr. Kittrell told you.
 15 A. He told me that he was bringing two
 16 crates up to the truck to load the truck and that
 17 he had told the truck driver, obviously, to
 18 continue to stay back from the truck. And the top
 19 crate started to slide off the bottom crate. And
 20 the truck driver came back over by the truck and
 21 tried to push the crate, the top crate, back up on
 22 top of the bottom crate.
 23 And R.J. told me that he told him, hey,
 24 that crate weighs 1000 or 2000 pounds or whatever
 25 it was, you know, you can't do that. And the

Page 16

1 driver continued to try to push it. So R.J.
 2 actually got off the lift and tried to give a hand
 3 to see if they could. And R.J. said it was only a
 4 matter of seconds and realized, we're not going to
 5 be able to do this, get out of the way before this
 6 thing falls. And R.J. stepped out of the way, and
 7 the driver stayed right there and continued to try
 8 and push on it. And it slid down wedging itself
 9 between the wall, the crate, and on top of
 10 Mr. Morris.
 11 Q. Back at the time of this accident -- in
 12 fact, on the day of this accident and previous to
 13 that, did Blackhawk Logistics have designated safe
 14 areas?
 15 A. Not a designated safe area. Every
 16 truck driver had the responsibilities to see the
 17 product and to determine how he wanted his truck
 18 loaded. And at that point, the truck drivers would
 19 always be asked to, obviously, step back. A lot of
 20 them would sit in their truck. Some would just
 21 kind of step back and wait for the truck to get
 22 loaded.
 23 Q. Was there a special place they were
 24 supposed to step back to if they chose not to get
 25 in the truck?

Page 17

1 A. Well, there was some safety poles at
 2 the corner at the doors. Obviously you want them
 3 to step back past those. But there was no
 4 designated paint lines or anything to that sort.
 5 Q. And those are a pole similar to what
 6 you see next to the gas pump to keep people from
 7 hitting the --
 8 A. Yeah, the ballards, I think you call
 9 them, to protect the doorways and to protect the
 10 corners.
 11 Q. That's right. And it keeps loads or
 12 trucks or moving objects from actually hitting
 13 those doorways?
 14 A. Correct.
 15 Q. But I understand now they're kind of
 16 being called a safety pole. They were never really
 17 called a safety pole until that day; isn't that
 18 true? What did you call them a while ago, ballard?
 19 A. Ballard.
 20 Q. How do you spell that?
 21 A. I think it's B-A-L-L-A-R-D.
 22 Q. Before the date of this accident,
 23 nobody ever called them a safety pole, did they?
 24 A. There's a variety of different names
 25 that have been used. I don't know if we refer to

Page 18

1 it the same way all the time. You're protecting,
 2 you know, something. It's a concrete ballard. I
 3 mean, they are painted yellow for safety.
 4 Q. That's to make them so you can see them
 5 so you don't hit them. Isn't that true?
 6 A. That's true.
 7 Q. So based on your understanding of where
 8 Mr. Morris was during the time of loading and
 9 unloading, was there any problem with him being in
 10 that area?
 11 A. There would be no problem with him in
 12 the area if he was back past those poles.
 13 Obviously where he got hurt, he was inside the
 14 poles right next to the doorway.
 15 Q. What is it to tell you -- tell a truck
 16 driver, you've got to be a certain distance behind
 17 this pole or beside this pole or close to the pole?
 18 How was he supposed to know that?
 19 A. Well, everybody would differ. You
 20 know, R.J. said that he told him to step back,
 21 further back and away from it. Obviously, some of
 22 it's common sense, you know. Like pulling the car
 23 into your driveway, into the garage, you know,
 24 you're not going to stand at the edge of the door,
 25 the edge of the garage while the car tries to pull

Page 19

1 outside. You're going to step back beyond that
 2 doorway. He was close to that doorway.
 3 Q. I follow you, because that's where he
 4 ended up? That's what you're saying?
 5 A. Correct.
 6 Q. I see. And I should say this. Where
 7 did Mr. Kittrell say that Mr. Morris was before he
 8 moved as his load was falling or after it had
 9 fallen?
 10 A. I don't recall him actually telling me
 11 exactly how far back he was or how far he ran up to
 12 try and push the crate.
 13 Q. Okay. I'll tell you, in his
 14 deposition, Mr. Kittrell said that Mr. Morris was
 15 beside the yellow pole and that, before he stepped
 16 forward and to the left, it was a safe area. In
 17 other words, he was fine right there. If he was --
 18 as you're approaching the rear of the truck, if he
 19 was with the pole to the left, kind of facing down
 20 the line of docks, would that be a safe area?
 21 A. Well, he was actually on the opposite
 22 side. But, yes --
 23 Q. He ended up on the opposite side.
 24 You're right.
 25 A. Well, I'm saying going into the truck,

Page 20

1 it happened to the left of the truck --
 2 Q. That's correct.
 3 A. -- of the door. And so, yes, if he was
 4 to the left of the yellow pole, yes, he would have
 5 been far enough back to be in a safe area.
 6 Q. The way Mr. Kittrell described it, he
 7 was adjacent to it. He was not in the path of the
 8 forklift, nor was he behind the pole. He was
 9 adjacent to it. As Mr. Kittrell is approaching the
 10 rear of the truck, as you're facing like this, here
 11 is the safety pole. Here is Mr. Morris. Would
 12 that be -- I mean, would you agree with
 13 Mr. Kittrell that that's fine, that's a safe area?
 14 MR. NICKELS: I object to the form.
 15 THE WITNESS: Yeah, very possibly, you
 16 know, if he was far enough away and not in the door
 17 jamb of the building, he would have been safe
 18 there, because he had plenty of access to go deeper
 19 into the warehouse, go parallel with the wall. A
 20 lot of safety has to do with emergency exit
 21 strategies and the ability to escape something.
 22 BY MR. MURDAUGH:
 23 Q. If Mr. Morris is standing where this
 24 asterisk is in relation to the corner of this door
 25 frame and the pole, would you agree that's a safe

Page 21

1 area?
 2 A. Yes.
 3 MR. MURDAUGH: Just so we don't have to
 4 try to unscramble what this drawing says, we'll --
 5 let's mark this as Exhibit 1.
 6 (EXH. 1, Drawing, was marked for
 7 identification.)
 8 BY MR. MURDAUGH:
 9 Q. Just to make sure we're clear, when I
 10 was showed you a diagram, I was showing you what's
 11 now labeled as Exhibit 1. And if Mr. Morris was in
 12 the area of the asterisk, which I'll just draw out
 13 to the side here with an arrow pointing to the
 14 asterisk, if he was in that area, he would have
 15 been in a safe area?
 16 A. Correct.
 17 Q. I appreciate that. As I understand
 18 what you're saying Mr. Kittrell told you is that
 19 he -- he claims that he was carrying two crates,
 20 one stacked on top of each other, and that the top
 21 crate began to shift or somehow or another became
 22 unsteady. Is that correct?
 23 A. That's correct.
 24 Q. And that he had previously told the
 25 driver to stay back?

Page 22

1 A. That's what he told me.

2 Q. Okay. And that before -- I'm not real

3 clear on this from what you're telling me, but am I

4 right in assuming that, before he gets into the

5 truck, does he stop moving, or is he still moving

6 when he claims that Mr. Morris stepped up to push

7 it back on top?

8 A. So you're asking me what R.J. told me?

9 Q. Yes, yes.

10 A. Actually, I don't recall if he told me

11 he actually came to a complete stop. It would

12 normally be the practice because you're going over

13 a dock plate. You have to come to a -- he might

14 not come to a complete stop, but almost to a stop,

15 because you're going to bounce over that dock plate

16 a little bit. So you stay stable. So you're not

17 just going to drive in the truck as fast as you

18 would on the warehouse floor.

19 Q. So you're not clear, when Mr. Kittrell

20 claims that Mr. Morris stepped forward or in some

21 other manner tried to push the top crate back up,

22 you're not sure whether Mr. Kittrell told you he

23 was still moving or he had stopped?

24 A. Correct.

25 Q. But what you do recall him telling you

Page 23

1 is that Mr. Morris was pushing on it, and

2 Mr. Kittrell said, stop, there is no way you can

3 push it back up there?

4 A. Correct.

5 Q. And this thing weighs X pounds, you

6 know, a large weight, almost 2000 pounds or

7 whatever number that it actually weighed, and he

8 told Mr. Morris this?

9 A. Correct.

10 Q. And he described that he told him that

11 while Mr. Morris was trying to push the top crate

12 back up?

13 A. Right, before R.J. got off and lifted

14 himself.

15 Q. And actually before it had actually

16 fallen back and touched anything?

17 A. I'm trying to remember. It's been a

18 while. But, yes, the crate hadn't come all the way

19 to the point of hitting the door frame of the

20 building at the initial time. It slid part of the

21 way off the top.

22 Q. Okay. And that Mr. Kittrell, after

23 telling Mr. Morris to stop and that it weighs too

24 much and you can't do it, got off and tried to

25 assist him before it had actually fallen to the

Page 24

1 door frame?

2 A. That's what he told me.

3 Q. And did he tell you whether the fork

4 lift was stopped then or not?

5 A. Yeah, it had to be stopped.

6 Q. Well, we assume so. But did he

7 actually tell you that?

8 A. I don't recall him actually telling me

9 those words. But you don't get off the forklift

10 and leave it in gear.

11 Q. Right. Okay. And Mr. Kittrell

12 described that he actually pushed with Mr. Morris

13 and tried to get it -- to keep from falling?

14 A. Yeah, he said he tried for a couple of

15 seconds and, obviously, realized what he had told

16 Mr. Morris, that we're not going to get this back

17 on there, get out of the way before it falls any

18 further. And that's when R.J. got out of the way,

19 and Mr. Morris stayed there.

20 Q. And as soon as Mr. Kittrell moved, it

21 came on down?

22 A. I don't know exactly how long it took,

23 obviously enough time for R.J. to get away from it,

24 but Morris stayed there. R.J. told me that he

25 never got out of that same position he was at to

Page 25

1 move away from it at all.

2 Q. Did Mr. Kittrell say to you that the

3 crate fell some more after it hit the wall? In

4 other words, after it came to a rest there

5 initially?

6 A. I don't recall him telling me, you

7 know, how much more it moved afterwards, after it

8 hit the wall.

9 Q. Right. Let's assume this crate had

10 fallen to the floor and damaged a crate or the

11 goods or the warehouse door or anything else in

12 there and Mr. Morris had been some other location

13 and hadn't gotten injured. Would Mr. Morris or his

14 company have been responsible for any of that loss?

15 A. For the crate? No.

16 Q. Or the goods?

17 A. No.

18 Q. Or the warehouse door?

19 A. No.

20 Q. Why would Mr. Morris -- do you know of

21 anything anybody has told you why he would have

22 stepped forward and pushed the crate back up after

23 being warned of all these things?

24 A. Somebody -- and I can't recall who told

25 me. It was somebody from his truck -- actually, it

Page 26 1 was. Somebody I talked to from his trucking 2 company had told me that Mr. Morris was normally 3 the flatbed driver -- 4 Q. Was normally a what? 5 A. A flatbed driver. So, obviously, he 6 was not used to driving a van, which is a closed-in 7 trailer where he would actually back up to a 8 warehouse dock like ours and into a -- see a truck 9 get loaded like that, that Mr. Morris was always 10 out in a yard somewhere where you load a flatbed. 11 So the assumption was made, obviously, 12 that Mr. Morris was in an environment that was 13 not -- he wasn't so used to. It wasn't a common, 14 everyday thing for him. So he was in an 15 environment that was new to him. And I think -- 16 and I think that had something to do with why 17 Mr. Morris was trying to be helpful and was doing 18 what he was doing, because it was out of his norm. 19 It was out of his norm. 20 Q. So it's your belief or opinion 21 basically that he was kind of in an unexpected 22 situation and just spur of the moment thought -- 23 reacted the way he thought was appropriate? 24 A. Yes, because if it was a flatbed, 25 you're standing outside, you're watching the truck,	Page 28 1 he had already seen this top crate shift slightly 2 to the left. Okay? 3 A. Okay. 4 Q. And I'll even represent to you that he 5 testified when I asked him, what should you have 6 done there, he said, in hindsight, I just should 7 have stopped, put it down, straightened it up, and 8 this accident would have never happened. And 9 that's what he says in his deposition. We can look 10 at it, but I'll just represent to you that's what 11 he said. 12 Under those circumstances where Jason 13 Craig said, listen, he should have set it down, if 14 in fact he saw it shifting, at that point in time, 15 he should have set it down and straightened it up, 16 both of them said 20 seconds would have saved the 17 day. And I presume that if in fact he saw what he 18 says in his deposition he saw, you would agree, he 19 should have just set it down? 20 A. I'll agree. 21 Q. Under those circumstances where, 22 admittedly, a forklift driver had total control of 23 the situation, but instead, as he testified in his 24 deposition, chose to make that right-hand turn to 25 go into the truck to use a side shifter on the side
Page 27 1 something starts to fall, you've got plenty of room 2 to run. You've got plenty of room to escape the 3 potential of that falling on him. 4 Where he positioned himself there, he 5 kind of blocked himself in to where, you know, you 6 don't have a whole lot of position to run when that 7 crate finally slid down. 8 I think his lack of experience in 9 driving a van and getting loaded in a warehouse 10 environment had something to play in it. 11 Q. Are you aware that Mr. Kittrell has 12 indicated that he saw the top crate shifting before 13 he ever even made a right-hand turn to go into the 14 truck? 15 MR. NICKELS: Object to the form. Go 16 ahead. 17 THE WITNESS: No, I was unaware of 18 that. 19 BY MR. MURDAUGH: 20 Q. I'll tell you he said that -- you know, 21 in many pages in his deposition, that was obviously 22 a very focused issue. And I'll just represent to 23 you that he's testified under oath that as he was 24 driving along running parallel to the warehouse 25 doors to go up to 21 to make that right turn, that	Page 29 1 wall of the truck to straighten it up, he continued 2 on, under those circumstances, do you agree, do you 3 hold the driver, Mr. Morris, who is standing there, 4 responsible in any way whatsoever -- 5 MR. NICKELS: Object to the form. 6 BY MR. MURDAUGH: 7 Q. -- for his actions? 8 A. Well, I mean, I would hold Mr. Morris' 9 actions of putting himself in harm's way that he 10 didn't need to do. 11 My understanding from R.J. is, at the 12 time they were both pushing on that crate, they 13 both had ample time to get out of the way and let 14 that crate either fall down, you know, let him try 15 to straighten it out with the forklift. I didn't 16 hear anything about the side shifting, but I 17 understand what he's referring to. At that point, 18 again, there is no material that's worth a person 19 getting hurt like Mr. Morris did. So... 20 Q. At that point, you would say, now he 21 has some responsibility. 22 A. So Mr. Morris had -- 23 Q. I'm asking a question. That was a 24 statement, but I'm asking a question. My question 25 is, at the point where he decided to continue

Page 30 1 pushing after Mr. Kittrell said, hey, we can't 2 straighten it up, let's stop, let's get away 3 quickly, you're telling me, at that point in time, 4 Mr. Morris should have gotten away? 5 A. Mr. Morris should have gotten away. 6 Q. Okay. And the reason you say that, at 7 that point in time, it's no longer a split-second 8 reaction. It's a, hey, we tried it, we've tried to 9 straighten it up, it's too heavy, I even have 10 assistance from the forklift driver, he's helping 11 me, and it's not going to work. At that point in 12 time, he should have known that it was dangerous 13 is what you're saying? 14 A. Absolutely. 15 Q. And before that moment, perhaps it's a 16 split-second decision. Perhaps he was in a 17 different environment, and you can understand maybe 18 why -- what happened before then. Is that right? 19 MR. NICKELS: Object to the form. 20 THE WITNESS: No, not necessarily. The 21 reason why the truck drivers are allowed to come 22 out into the warehouse is to see the product 23 they're loading, understand what it weighs, because 24 it's the truck driver's responsibility to say, oh, 25 I want you to put one all the way down my truck,	Page 32 1 their ability to do that put himself into harm's 2 way. 3 Q. But you would agree with me, I mean, 4 that was -- if it was just a split-second decision, 5 I mean, you can't hold that against him? 6 MR. NICKELS: Object to form. 7 THE WITNESS: I don't think it was a 8 split-second decision. I mean -- 9 BY MR. MURDAUGH: 10 Q. You think it was drawn out? 11 A. Well, by what you said, if R.J. said 12 that crate was already starting to slide and 13 Mr. Morris was standing where your picture shows, 14 obviously he would have seen that start to slide. 15 Q. I don't know if he would have or not. 16 I don't know. 17 A. Well, again, there is -- sounds like 18 there were things happening, if he's watching his 19 truck get loaded and he's watching the forklift 20 operator, if he's standing where he's at, I mean, 21 that's pretty much the only thing you get to watch. 22 I mean, there's not much else to be looking at. He 23 would have seen that maybe the problem was 24 starting, you know, and knowing that, you know, 25 that he should have known what the weight of those
Page 31 1 two -- you know, whatever that configuration is as 2 far as weight distribution. So from the time that 3 Mr. Morris first saw that load, obviously he would 4 have known that those crates weighed whatever they 5 were, a couple thousand pounds apiece, whatever it 6 was. 7 Q. Absolutely. 8 A. So at that point, when that crate 9 started to fall, he would have already known that 10 that thing was heavy, that he wasn't going to be 11 able to push a couple of thousand pounds, and even 12 with the assistance of R.J., they still weren't 13 going to make that thing slide. 14 BY MR. MURDAUGH: 15 Q. Okay. Just so I understand, what 16 you're saying is that if he had the time to think 17 about, hey, this thing is starting to fall, do I 18 step forward and push, or do I get out of the way, 19 if he had some time to think about it, then perhaps 20 he had some fault at that point too? 21 A. Who has fault? 22 Q. Mr. Morris. 23 A. Well, I guess Mr. Morris' fault was he 24 was trying to be a nice guy. He thought he could 25 do something that obviously it wasn't in any of	Page 33 1 crates were well in advance of when he first got 2 there, I think he stepped into a situation that, 3 you know, he probably had -- he should have had 4 enough time to realize, I'm not going to be able to 5 save this, so why even put myself -- you know, it's 6 just a rough, wooden crate, let alone splinters and 7 everything else he could possibly -- 8 Q. Sure. 9 A. There is nothing good that could come 10 out of trying to even do it. 11 Q. I agree with that. Let's assume he 12 didn't see it falling. Let's assume he didn't know 13 it was shifting, and he's just standing there, and 14 all of a sudden, here comes this crate. 15 A. But he did know it weighed 2000 pounds. 16 Q. He definitely did know it weighed 2000 17 pounds, if in fact Rodney Kittrell did what he said 18 he did, and that is, tell him ahead of time, this 19 is how much these crates weigh. Absolutely. 20 A. It's possible he would have even known 21 that information -- 22 Q. By doing math? 23 A. No, when they check in at the check-in 24 window. When the transportation controller told 25 him what door to back into, you know, she would

Page 34

1 have done it.
 2 And, again, I don't want to make
 3 assumptions for truck drivers. But as an old truck
 4 driver myself, too, what am I picking up? And he's
 5 out of his environment in that he's driving a van.
 6 How is he -- you know, the same weight distribution
 7 responsibility is there. So there is a lot of
 8 information that he had well in advance that should
 9 have prevented him from putting himself into that
 10 situation.
 11 Q. If Mr. Morris was standing where
 12 Mr. Kittrell indicates he was standing before he
 13 moved, beside the yellow pole as we see in Exhibit
 14 1, where is he supposed to run when this thing
 15 starts falling, if in fact it's an unexpected fall?
 16 A. From where he was standing, down
 17 parallel with the wall was -- should have -- would
 18 have been open. He could have ran backwards. He
 19 could have ran deeper into the warehouse, because
 20 obviously the crate didn't fall until the crate got
 21 literally halfway into the door jamb of the
 22 facility. So he could have ran -- actually, in
 23 this case, he could have went 2 or 3 feet deeper
 24 into the warehouse or backwards along parallel with
 25 the wall, and he would have been able to -- you

Page 35

1 know, got himself into a safe zone, because
 2 Mr. Morris actually -- you know, unfortunately,
 3 when it was all done, where he was pinned was
 4 actually between the yellow pole and the wall of
 5 the facility.
 6 Q. It's like he got cornered in and
 7 couldn't get out?
 8 A. Like a couple of feet. So he literally
 9 went on the wrong side of that safety pole and got
 10 himself into a situation that he --
 11 Q. Was trapped?
 12 A. Well, he wasn't trapped at the time of
 13 pushing on that crate, because at that point, he
 14 still could have came back out that same direction
 15 where R.J. was --
 16 Q. Which way?
 17 A. Back into the warehouse. And,
 18 actually, he could have went -- he could have
 19 actually went into his trailer. He could have went
 20 into his trailer.
 21 Q. I'm going to show you a photograph
 22 that's taken by Mr. Garwood, and it's photograph
 23 number 1 to an exhibit of his deposition. I'm
 24 going to show that to you and ask you, is that you
 25 crouched down?

Page 36

1 A. Yes. We were trying to do kind of a
 2 little bit of a reenactment because there was no
 3 marks, there was no anything to the accident, to
 4 try to -- while it was fresh in everyone's mind,
 5 kind of where the situation was going to be.
 6 Q. And this was before the real
 7 reenactment was done where you-all put a crate with
 8 the other crate and all --
 9 A. With a cardboard box and all of that,
 10 correct.
 11 Q. That's right. Are you in the location
 12 where Mr. Morris was found?
 13 A. Probably not exactly. But, obviously,
 14 as you can see, I had light-colored pants on, so I
 15 didn't want to get on the floor.
 16 Q. Okay. Do you know, if you were
 17 slightly in a different -- slightly different
 18 location, where you would have been? In other
 19 words, tell me as best you can --
 20 A. I would say a little bit further back,
 21 because I can remember that he was -- his right
 22 shoulder was -- majority of his right shoulder was
 23 inside the -- between the pole and the wall of the
 24 building. So he was deep into that location, where
 25 I'm kind of -- part of my body is actually exposed

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1 to the warehouse side of that pole, and none of his
 2 body was out that far.
 3 Q. Okay. What's this island that's right
 4 behind you? It's immediately behind where
 5 Mr. Morris would have been standing.
 6 A. It looks like a trash can.
 7 Q. I assume that was there at the time of
 8 the accident?
 9 A. I wouldn't be able to swear to that.
 10 Q. Well, this photograph was taken the
 11 same day of the accident?
 12 A. Yes.
 13 Q. Any reason to think that trash can was
 14 moved there after the accident?
 15 A. No, I wouldn't say that it was moved.
 16 But if he would have stepped -- if he would have
 17 stepped to that trash can, obviously that pole and
 18 the edge of the building where that crane ended up
 19 catching would have kept him from getting hit.
 20 Q. Is that a metal trash can? Is that
 21 like a 55-gallon drum?
 22 A. It is -- it does look like a metal
 23 trash can.
 24 Q. Is that what was commonly out there for
 25 trash cans?

10 (Pages 34 - 37)

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1 A. It was a variety of either metal trash
2 cans or the rubber ones.
3 Q. And it looks like it's bent
4 substantially as well. Do you see that?
5 A. Yes.
6 Q. Any reason to think that wasn't bent in
7 the accident?
8 A. I know for sure it was not bent,
9 because I went out there and saw the crate, where
10 the crate was immediately afterwards, and it was on
11 the edge of the door frame. So it would have been
12 nowhere near that trash can.
13 Q. If it were where it is right here, if
14 the trash can is where it is in this photograph.
15 But if it was slightly forward and had been moved
16 by Mr. Kittrell when he was trying to lift this
17 load, maybe it could have been moved?
18 A. The trash can would have -- that wooden
19 crate would have pushed that trash can halfway
20 around -- halfway across the warehouse.
21 Q. Well, sure, that's what I'm saying.
22 A. It was a policy of ours that the trash
23 cans be dumped every day. So there would never be
24 a full trash can in our warehouse at the end of the
25 day.

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1 Q. Is this one full? I don't know.
2 A. I'm saying it was the policy we dumped
3 them every day. So I'm saying there wouldn't be a
4 full trash can where there would be any weight in
5 it to hold it in place that it would be damaged by
6 that crate. Like I said, that I do know for a
7 fact. You know, I saw the crate where it was,
8 where it hit against, and that trash can was
9 nowhere in play.
10 Q. What you saw is that the trash can
11 wasn't underneath the crate or wasn't touching the
12 crate when you got there; right?
13 A. The trash can wouldn't be in the
14 doorway.
15 Q. Well, it shouldn't be; right?
16 A. Well, I drove around that warehouse
17 numerous times a day on a golf cart --
18 Q. I understand, but just so it helps the
19 deposition go along a little faster, the trash can
20 shouldn't be near the doorway. Isn't that correct?
21 A. Not in the doorway. It should be on
22 the other side of those poles where it's
23 positioned.
24 Q. It should be right where it's still
25 positioned right here?

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1 A. Yes.
2 Q. That's the area that you said was the
3 safety area?
4 A. Yeah -- no, not by the trash -- if
5 Mr. Morris was standing to the right of there,
6 there was room for him to back up in front of that
7 trash can, you know, for him to back up that
8 direction. And like I said, inboard towards the
9 warehouse, obviously there was probably 20 feet
10 before you'd actually get to where the product is
11 stored, if not more.
12 Q. What's stored in the item that's got
13 plastic on it in both of these photographs? It's
14 about 3 feet by maybe 4 feet behind that
15 perpendicular line to the wall.
16 A. I can't tell by these pictures what the
17 actual product is.
18 Q. But that would have been there at the
19 time of the accident as well. Isn't that correct?
20 A. Yeah, at the time of these pictures, I
21 would say that's a very strong possibility that it
22 could have been there.
23 Q. But you recognize that it's basically
24 about the width of a trash can back from the --
25 A. Right. All Mr. Morris would have had

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1 to do is, anywhere in here, he would have been out
2 of harm's way, or, like I said, any direction this
3 way, he could have been out of harm's way. He
4 wasn't blocked in to where he had no place to go.
5 Q. So what you're trying to say is he
6 could have stepped back around the trash can and
7 around those goods that were --
8 A. The trash can was up against the wall.
9 He wouldn't have had to step around it.
10 Q. Well, we'll just differ on that. I
11 mean, it's right there beside and behind that pole.
12 A. I understand what you're trying to get
13 at. I just disagree with you. There was ample
14 room for him to stay back on the correct side of
15 that pole and still give him room to stay in the
16 safe area, and that crate would have --
17 Q. Oh, no, you and I are talking about
18 something different. If he starts off where
19 Mr. Kittrell says he starts off, and that is
20 immediately adjacent to this pole just like is
21 drawn here, wouldn't you agree that this trash can
22 is behind he and the pole?
23 A. Can I draw on this?
24 Q. Why don't we draw on another one.
25 A. Okay.

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1 MR. MURDAUGH: Obviously this is not to
 2 scale, and it's just a reference. But we're going
 3 to mark it Exhibit 2.
 4 (EXH. 2, Drawing, was marked for
 5 identification.)
 6 BY MR. MURDAUGH:
 7 Q. As best as possible, we've tried to
 8 replicate Exhibit 1 in Exhibit 2. Is it basically
 9 fairly accurately replicated? Is it enough to show
 10 what we're going to show here?
 11 A. Yes.
 12 Q. Anything else we need to add, other
 13 than I think you're getting ready to draw in where
 14 you think that trash can was?
 15 A. Correct.
 16 Q. And Exhibit 2 has -- what we replicated
 17 in 1 is in black, and you're getting ready to write
 18 in blue. If you want to draw --
 19 A. I want to try to keep this in
 20 proportion. I would say that the wall is here.
 21 That can would have been something in that sort.
 22 So -- and then the product, as you kind of show in
 23 that picture, is somewhere in here. Literally,
 24 Mr. Morris could have -- if he was standing there
 25 originally, literally could have stepped back --

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1 actually, where the crate was at, if Mr. Morris
 2 would have still been standing right there, that
 3 crate would have not touched him.
 4 Q. No question about that. Earlier you
 5 were arguing with me, saying, well, he probably saw
 6 it falling when Kittrell was making his turn.
 7 MR. NICKELS: Object to the form.
 8 BY MR. MURDAUGH:
 9 Q. Let's assume -- I don't know if he did
 10 or he didn't. But let's assume what your scenario
 11 was, and that is, he saw it falling or starting to
 12 fall.
 13 A. The turn would have been somewhere up
 14 towards the center of the truck. So obviously
 15 there's still a few feet from where he would be
 16 standing to the turn of that truck. So there was
 17 still --
 18 Q. Mr. Kittrell describes that, as he was
 19 traveling along towards the rear of the truck
 20 parallel to the warehouse door, that he made, in
 21 essence, a 90 degree turn to go to the spot where
 22 it eventually completely fell.
 23 A. Well, even if that is the case, he was
 24 going down the center of the trailer. These crates
 25 are so heavy that all they do is single them out

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1 down the center of the trailer. So he wouldn't
 2 have been over to the edge anywhere close to where
 3 Mr. Morris was if that crate's 4 foot wide and that
 4 trailer is 8 or 9 feet wide, whatever. He was a
 5 few feet from the left edge of that trailer, so
 6 there was some space there.
 7 Q. Okay. But if he'd have been over on
 8 the far left-hand side, they were stacking them
 9 double wide, he'd have been on the far left-hand
 10 side, it would have been a different story for
 11 Mr. Morris as far as what he would see coming at
 12 him --
 13 MR. NICKELS: Object to form.
 14 BY MR. MURDAUGH:
 15 Q. -- isn't that right?
 16 A. You're still going to go in that truck
 17 from the center because they were taking the crates
 18 out. They were singling them out, so --
 19 Q. I'm just asking you, if it was a
 20 different scenario and he was going in the
 21 left-hand side of that truck, if Mr. Morris would
 22 see a totally different view, it would be a lot
 23 closer to where he would have been?
 24 MR. NICKELS: Object to the form.
 25 THE WITNESS: It sounds like a question

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1 with a different scenario, Mr. Morris wouldn't be
 2 there.
 3 BY MR. MURDAUGH:
 4 Q. Would you agree with me, though, that
 5 Mr. Morris would believe he's in a lot more
 6 precarious situation if in fact that forklift is
 7 going to the left side of his truck?
 8 MR. NICKELS: Object to the form.
 9 THE WITNESS: I'm not sure -- I guess I
 10 can't speak for Mr. Morris, what he would have
 11 thought if that forklift is coming closer to him or
 12 where it should have been going or...
 13 BY MR. MURDAUGH:
 14 Q. Did you ever measure where the trash
 15 can was?
 16 A. No, I did not.
 17 Q. Are these photographs that we've
 18 referred to as exhibit -- excuse me, photo 1 and 2
 19 to the Gray Garwood exhibit, are those the best
 20 photographs to determine where that trash can is
 21 located or the best evidence?
 22 A. As far as I know. I don't recall any
 23 other immediate photos like that.
 24 Q. Kind of a poor question. Unless there
 25 are some better photographs, these are the best

Page 46 1 that we know about? 2 A. Correct. 3 Q. So as far as you know, nobody went and 4 tried to figure out where that trash can was, 5 measure to see exactly where it was in relation to 6 the accident site and all; is that right? 7 A. That's correct. 8 Q. What did you tell Mr. Garwood about 9 what Mr. Kittrell had told you? Mr. Garwood, 10 remember, is the first guy that came out and was 11 asking questions about what happened. 12 A. I believe what I told him -- obviously 13 we didn't go out to the warehouse because there was 14 nothing to see. There had not been any damage. 15 There wasn't any marks on the wall. There wasn't 16 anything to see. 17 Obviously from the insurance 18 standpoint, you know, this was the first accident 19 like this that Blackhawk had ever had. So 20 obviously from a protective standpoint, obviously 21 until our insurance company could give us some 22 guidance, you know, obviously we wanted to make 23 sure we were careful in what we did. 24 So I just told him what we were -- you 25 know, that we were -- I believe I told him we would	Page 48 1 Q. What did Mr. Morris look like when you 2 looked at him down underneath that crate? 3 A. He was folded over kind of in a 4 somewhat fetal position. He was -- he had urined 5 on himself. 6 Q. He had what? 7 A. You had urined. He had wet his pants. 8 He had obviously some nose -- his nose had some -- 9 a little bit of blood, but more so some snot, for 10 lack of a better word, out of his nose in that 11 position. He was obviously not responsive. That's 12 my immediate vision of when I walked up on it. 13 Q. Did it look like he was alive? 14 A. Yeah, he was breathing. He was 15 breathing. It was hard breathing, and I felt it 16 was because his head was hunched over. You know, 17 his chin was kind of down into his chest. 18 Q. It was like he wasn't being able to 19 breathe very good? 20 A. Correct, yeah, that was his -- his 21 breathing was being impacted, I thought. 22 Q. Could you even see his chest moving, or 23 did you mainly just hear it, some noise? 24 A. Yeah, I remember kind of seeing it. 25 Well, more so in his stomach, because his chin was
Page 47 1 kind of create some pictures and reenact it and we 2 would give them to him. I think I told him the 3 same thing that I told you in regards to what R.J. 4 had told me and that Mr. Morris had pushed on the 5 crate and was told to get out of the way and move 6 back, and I relayed that same information to him. 7 Q. And obviously you had already talked to 8 R.J. by the time you had talked to Mr. Garwood? 9 MR. NICKELS: Object to the form. 10 THE WITNESS: Yeah, I can't recall 11 if -- 12 BY MR. MURDAUGH: 13 Q. How would you know what R.J. told you 14 if you hadn't talked to him? 15 A. I would say, yes, I probably had a 16 conversation with R.J. We might have had more 17 detailed and -- where we documented it with Rebecca 18 Thompson and stuff later. But I tried to be as -- 19 obviously I wanted to be as helpful as I could. I 20 was more concerned about Mr. Morris, tried to be as 21 helpful, but at the same time, making sure that -- 22 obviously I tried to protect Blackhawk and what we 23 should do and shouldn't do, being we had never been 24 through a situation like this, so before we -- 25 before it got too far along.	Page 49 1 kind of down in his chest. 2 Q. Was it down further than what we could 3 bend like this? 4 A. It seemed like it. It seemed like it. 5 That was my concern. 6 Q. And for the record, basically I just 7 put my chin down as far as I can on my chest. 8 You're saying it was just like forced down even 9 further? 10 A. Yeah, it seemed like it was further 11 than what we could. My concern was obviously for 12 his neck. 13 Q. How did you-all get the forklift off of 14 him? I'm reading a statement that basically says 15 that you instructed two warehouse -- excuse me -- I 16 instructed warehouse workers to put two forklift 17 under edge of crate while I slowly pulled driver's 18 truck out, tipping crate off driver. 19 I'm not sure I understand really how 20 that worked. 21 A. In seeing Mr. Morris, I felt that, you 22 know -- my immediate thought was that the crate was 23 causing -- obviously he had a hard time breathing 24 while he had his head over, so -- 25 Q. Sure.

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1 A. So I made the decision that, obviously,
 2 I wasn't going to wait for the ambulance to come
 3 there. I needed to try to at least get him to
 4 where he could breathe a little better by hopefully
 5 taking the strain off his head.
 6 I had two forklifts positioned on the
 7 crate, and I pulled his truck out. My intentions
 8 were -- I didn't care if I upset the crate out into
 9 the yard and it broke. I just wanted to make sure
 10 I created whatever relief I could for Mr. Morris,
 11 which is what I did.
 12 And Mr. Morris didn't move -- obviously
 13 I pulled his truck out when we pulled the crate
 14 out. So I wasn't immediately right there when we
 15 took the pressure off, but it didn't seem like he
 16 moved a whole lot, you know, in straightening it
 17 out. And at that point -- so we left him at that
 18 point until the EMS showed up.
 19 Q. Was Mr. Kittrell's forklift still
 20 holding the bottom crate up off the ground?
 21 A. No, it was on the ground. When they
 22 were trying to slide the top crate onto the bottom
 23 one, it was positioned on the ground.
 24 Q. So Mr. Kittrell at some point in time
 25 put the bottom crane down so that the forks were no

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1 longer holding that load?
 2 A. Yeah, at some point the crate was
 3 sitting on the ground, which would make it more
 4 stable.
 5 Q. Right. And when you arrived, had you
 6 backed his -- had someone removed that forklift
 7 from that spot?
 8 A. Actually, I can't recall if the
 9 forklift was still in the same position at the
 10 time, but the crate was on the ground, because we
 11 did use that forklift as one of them to -- because
 12 we had to get it out of the way in order to reach
 13 the crate. So we did move that one.
 14 Q. And that was really my question. So
 15 basically, at some point, it was backed out from
 16 under the bottom crate, and it was moved to the
 17 upper crate?
 18 A. To be one of the forklifts that we used
 19 to -- because obviously I made sure that there was
 20 going to be nothing to allow that crate to go any
 21 further down. It was either going to go out to the
 22 parking lot when I pulled that truck out or -- but
 23 not create any more risk to Mr. Morris.
 24 Q. So the crate was actually touching the
 25 side wall, the rear corner of the truck?

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1 A. No, it was actually on the door jamb of
 2 the building. It wasn't touching the truck at all.
 3 Q. Okay. Well, when you were going to
 4 move the truck forward and allow it to fall out,
 5 you're talking about move it forward, and what was
 6 going to make it go out?
 7 A. The forklift that we were going to
 8 remove the pressure, you know, and get the crate
 9 from touching Mr. Morris, we were going to let it
 10 go right over the front of the bottom crate and
 11 fall into the yard if we needed to.
 12 Q. Okay. Where was the second forklift
 13 positioned?
 14 A. Well, one -- actually, I can't exactly
 15 remember. But one was positioned, obviously, on
 16 the crate that was on Mr. Morris. And the other
 17 one was kind of -- I think I positioned it to the
 18 left of the bottom crate to kind of hold it to make
 19 sure that that crate didn't start to slide to the
 20 right so that it would allow that crate to come
 21 down. It was -- obviously it seems like -- it's
 22 obviously a split second kind of decision. But it
 23 probably took me, you know, five minutes or so to
 24 really think through the process --
 25 Q. Safely do it?

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1 A. -- because I knew down wasn't going to
 2 be an option for that crate. You know, I had to
 3 make sure it was only going to come up.
 4 Q. Right. So just so I understand, one
 5 forklift was positioned to keep the bottom crate
 6 from sliding away from the wall?
 7 A. Correct.
 8 Q. Just by its sheer weight, it would keep
 9 it from sliding out. And the second forklift,
 10 which was maybe the one Rodney Kittrell had
 11 previously been driving, was positioned such that a
 12 fork was under each -- two different sides of the
 13 crate?
 14 A. Correct.
 15 Q. And it was lifted and tilted in some
 16 manner?
 17 A. Correct.
 18 Q. Did you-all eventually drop that crate
 19 out of the door?
 20 A. No, we were able to actually -- once we
 21 went to go tilt it, we were able to actually be
 22 able to grab it and move it completely without
 23 having to drop it to the ground.
 24 Q. So if this is the box, you know, four
 25 sides, I assume that one point was down?

14 (Pages 50 - 53)

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1 A. Correct.

2 Q. You-all were able to get the forks

3 under it like that?

4 A. Correct.

5 Q. And once you were able to -- you were

6 able to lift it and maneuver it and just get it

7 away?

8 A. Correct.

9 Q. Did you-all take any photographs

10 besides the folks -- you know, the investigators?

11 Did anybody from Blackhawk Logistics take any

12 photographs?

13 A. At the time that Mr. Morris was there?

14 Q. Not the recreation, but at any point in

15 time other than the recreation?

16 A. No, because, like I said, there was no

17 marks. There was no blood. There was not a

18 scratch on the building. There was really nothing

19 to take pictures of.

20 Q. Okay. So obviously somebody took

21 photographs, and it may have been the lady from

22 Crawford & Company when you-all made the recreation

23 using the boxes, cardboard boxes. Other than that,

24 you're telling me Blackhawk Logistics never took

25 any photographs? No employee took photographs?

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1 A. Not that I was aware of. Obviously my

2 office was in the building across the street, and,

3 you know --

4 Q. Nobody showed them to you?

5 A. Nobody showed me any, and there was no

6 pictures of it in the recreation that I'm aware of.

7 Q. We had some statements that were taken

8 by Crawford & Company by Ms. --

9 MR. NICKELS: Keenan, Adria Keenan.

10 BY MR. MURDAUGH:

11 Q. Right. Other than the statements she

12 took, did you-all take any recorded statements?

13 A. No.

14 Q. Did you-all get Rodney Kittrell to fill

15 out a piece of paper saying what had happened?

16 A. Rebecca Thompson would have had him

17 fill out an incident report and put into detail in

18 his words what happened.

19 MR. MURDAUGH: Chris, this is what I

20 got from Crawford.

21 MR. NICKELS: Okay, that's Crawford,

22 yeah.

23 MR. MURDAUGH: I see Crawford up there.

24 MR. NICKELS: Um-hum.

25 MR. MURDAUGH: You know what? I don't

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1 need to hold up for him, because whether I find it

2 or not, I just need to identify it. Let's talk

3 about that after and see if there is.

4 MR. NICKELS: Um-hum.

5 BY MR. MURDAUGH:

6 Q. Ms. Keenan took a recorded statement

7 that was just -- let me show you -- just says

8 Handwritten Statement, and it's filled out with

9 writing. It's not a form or anything. Are you

10 talking about something different than that?

11 A. Probably not. Probably just a

12 handwritten statement from R.J.

13 Q. Oh, I thought you said an incident

14 report.

15 A. We have an incident report. Rebecca

16 should have filled out an incident report. It just

17 has times and dates and addresses and that type of

18 stuff that she would have completed for our own

19 document -- you know, document procedure.

20 Q. That's something you-all keep in the

21 ordinary course of business? I mean, you-all fill

22 it out any time you have some incident or

23 something?

24 A. Right, if there is ever an incident.

25 Q. When you spoke with Mr. Garwood, did he

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1 seem to understand what you were telling him? Do

2 you have any reason to --

3 MR. NICKELS: Object to the form.

4 BY MR. MURDAUGH:

5 Q. -- to think that he was confused or

6 anything?

7 A. Mr. Garwood, the gentleman from the

8 trucking company?

9 Q. No, sir, the very first gentleman who

10 came out. He actually came out at the call of the

11 trucking company. But Gray Garwood, the individual

12 who came out the same day of the accident.

13 A. I guess I assume that he understood my

14 explanation and my input on what happened.

15 Q. Do you remember having any adverse

16 words, you know, that he was hard to get along

17 with, or did he seem controversial or something

18 with you or anything like that?

19 A. I do remember, obviously, he wanted to

20 be taken down to the warehouse. He wanted to go

21 take pictures. Obviously because he had been there

22 fairly quickly and we hadn't gotten complete

23 instructions from our insurance company on what to

24 do, I didn't allow him to go out there.

25 Q. Well, actually, you did, because he

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1 took these photographs with you out there at the
 2 warehouse. And this is the gentleman that you took
 3 over there.
 4 A. Well, there was a couple of people.
 5 Somebody came one day. The very first day, I
 6 didn't let anybody out in the warehouse. And
 7 somebody did come back after we got to talk to our
 8 insurance company. Again, I wasn't trying to be
 9 hardheaded or noncooperative. I just wanted to
 10 make sure that we were doing the right things,
 11 because we had never been through this before. So
 12 the very first day -- the very first person that
 13 came, I did not allow him into the warehouse. I
 14 think he did come back the very next day, and
 15 that's when we had time to take everything in and
 16 get some instructions on what to do and allowed
 17 them to go in then.
 18 MR. NICKELS: I'm not sure I can show
 19 you the rest of that.
 20 MR. MURDAUGH: Hmum?
 21 MR. NICKELS: That incident report --
 22 MR. MURDAUGH: Yeah, I didn't read
 23 anything -- I just read three pages. I don't want
 24 to read something you don't want me to.
 25 MR. NICKELS: We can go off the record

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1 for a second.
 2 (Off-the-record conference.)
 3 (A recess transpired.)
 4 BY MR. MURDAUGH:
 5 Q. I'm going to let you read, and you may
 6 have read this. This is a recorded statement
 7 that's -- or excuse me, a written statement dated
 8 8-6-08; is that right?
 9 A. Correct.
 10 Q. If you would, read through that; or if
 11 you've recently read it, let me know.
 12 A. I haven't seen it since the day I wrote
 13 it.
 14 Q. Okay. Have you had a chance to read
 15 over that?
 16 A. Yes.
 17 Q. Does that refresh your memory of
 18 anything that we've talked about, you need to
 19 explain any answers or anything you and I have
 20 already talked about?
 21 A. I believe the only thing I'd change is
 22 where we positioned the two forklifts. By my
 23 statement, it looks like we might have had both
 24 forklifts picking the crate up and not one holding
 25 the other crate. That's the only -- I think the

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1 only change in my remembrance of what happened when
 2 we went out to the accident.
 3 Q. Well, before your explanation or what
 4 you believe was the explanation of how the second
 5 forklift was used, I never could imagine how you
 6 could use it. Do you know how you could use it,
 7 other than putting one from behind?
 8 In other words, you've described you
 9 put the forks underneath one side, and the other
 10 side just lifted it straight up. How would you use
 11 the other forklift other than to keep that bottom
 12 from moving, do you know?
 13 A. We could have used forks from two
 14 forklifts, one on each side of the V you were
 15 referring to earlier, and possibly push it off that
 16 way. Again, the main thing is that we were
 17 trying -- I was -- just relieve the crate from
 18 Mr. Morris, you know. That was how we did it, you
 19 know. Obviously a little vague on trying to
 20 remember exactly.
 21 Q. Is it fair to say that one forklift was
 22 used this way, and another one was used some other
 23 way?
 24 A. Correct.
 25 Q. And I don't know that it really matters

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1 where the other one was used. Anything else that
 2 this kind of refreshes?
 3 A. No, I think I was pretty accurate on
 4 what I did and why I did it.
 5 Q. How long was it from the time that this
 6 incident happened before EMS arrived, do you
 7 believe? And I don't mean, it seemed like. Can
 8 you kind of give me your best estimate and let me
 9 know whether you think it's accurate or not?
 10 A. From the time that I received the call
 11 in my office over the intercom to rush to that
 12 door, I would say between 10 and 15 minutes.
 13 Q. Between the time you received the call
 14 over the intercom to the time where you were able
 15 to get the upper crate off of Mr. Morris, how long
 16 do you think it was?
 17 A. Maybe five minutes. I mean, I
 18 literally sprinted across the parking lot there,
 19 like I said, checked, saw that he was breathing,
 20 concerned that the crate was interfering with his
 21 breathing, and made the decision to, you know --
 22 obviously there was people standing around, so I
 23 didn't have to go search for somebody to operate
 24 the forklift. So immediately I made some
 25 decisions, and as fast as I -- I think I jumped off

16 (Pages 58 - 61)

Page 62 1 the edge of the dock to go move his truck. 2 Q. You actually drove his truck? 3 A. Correct. 4 Q. When you moved that top crate off of 5 Mr. Morris, did his position change? You were 6 saying something earlier, and I didn't quite hear. 7 I didn't understand what you said. 8 A. Obviously I was in the truck, so I 9 wasn't there when the crate -- when the crate 10 immediately got lifted. But from where he was to 11 afterwards, I guess I expected that he would have 12 straightened out his head. And it really stayed 13 down in that position close to his chin. Whether 14 it moved a little bit or not, I wasn't there 15 watching it, you know, when that crate came off to 16 know exactly if it moved at all. 17 Q. Could you tell whether the breathing 18 changed any when you got back to him? 19 A. I couldn't tell a big difference. 20 Q. Did you see his color change, see the 21 color of him when EMS were arriving? 22 A. I really didn't pay attention to his 23 color. I was obviously concerned about breathing. 24 If we're breathing, obviously we weren't in a worst 25 case scenario at that point.	Page 64 1 Q. So you had a prior marriage? 2 A. I'm sorry, this marriage has been 30 3 years. One is enough. 4 Q. Okay. That's the only marriage ever? 5 A. Correct. 6 Q. Have you ever been arrested? 7 A. No. 8 Q. Have you ever had drug or alcohol 9 counseling or treatment? 10 A. No. 11 Q. Ever have any psychological or 12 counseling or other treatment for psychological 13 conditions or emotional problems? 14 A. No. 15 Q. Okay. And how long had you said you 16 had worked at Blackhawk Logistics? 17 A. Well, I was there from the start, so 18 August of 2005. 19 Q. Where did you work before that? 20 A. Premier Logistics. 21 Q. Who is that or where is that? 22 A. Originally it was part of Palmer 23 Logistics based out of Houston, Texas. They opened 24 an operation in Charleston that I started for them. 25 And then ownership changed and spun off and became
Page 63 1 Q. Right. I've got a few questions I need 2 to ask you. It's things we have to ask all 3 witnesses. Some of it is very personal. Some of 4 it is just general background information. Are you 5 married now? 6 A. Yes. 7 Q. To whom? 8 A. Diana Jeanine -- maiden name is 9 Migliaro. 10 Q. How do you spell that last name? 11 A. M-I-G-L-I-A-R-O. 12 Q. Do you-all have family? 13 A. Yes. 14 Q. Do they live in Charleston? 15 A. No. 16 Q. Where do they live? 17 A. My oldest daughter lives in Hanahan. 18 My youngest daughter lives in Winston-Salem, North 19 Carolina. 20 Q. Any family or friends in Colleton 21 County near the Walterboro area? 22 A. I don't believe so. I don't believe 23 anybody lives in Colleton County. 24 Q. Have you been previously married? 25 A. Yes, 30 years.	Page 65 1 its own entity, Premier Logistics. 2 Q. Okay. And when did you leave them? 3 A. In April or May of '05. 4 Q. And how long had you been with them 5 when you left? 6 A. About six years. 7 Q. In the Charleston area? 8 A. Yes. 9 Q. And you left to come to Blackhawk, to 10 start up Blackhawk? 11 A. Well, I was -- the ownership change 12 created some controversy. The new owners wanted 13 their family members in and basically booted me out 14 the door. And fortunate or unfortunate, the 15 Milestone guy was a client of mine and wanted me to 16 take care of his business. And he said, let's 17 start our own, and we started Blackhawk. 18 Q. I see. Which Milestone guy was that? 19 A. Rogers Drake. 20 Q. What do you know about the dock plate 21 being replaced here at the number 21 warehouse 22 door? 23 A. I know that the landlord had repaired 24 or replaced all of them over -- at a certain period 25 of time, just because of routine maintenance, and

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1 some of them, time to change them.
 2 Q. Who is the landlord, or who was the
 3 landlord at the time of the accident?
 4 A. Still the same. It's ColumbusNova out
 5 of Charlotte. It's a real estate investment
 6 company.
 7 Q. Are they affiliated in any way
 8 whatsoever with Blackhawk Logistics other than
 9 landlord/tenant?
 10 A. With Blackhawk, no.
 11 Q. How about Milestone?
 12 A. That -- I wonder now, but I don't know
 13 for sure.
 14 Q. Do you know anything specific about
 15 this particular dock plate being replaced? Were
 16 there any problems with it, or is it your
 17 assumption it was replaced in the ordinary course
 18 of all of them being replaced?
 19 A. Yeah, I wouldn't know of any specific
 20 dock plates because I wasn't operating forklifts or
 21 doing that part of the job day to day.
 22 Q. When did you effectively leave
 23 Blackhawk Logistics?
 24 A. December 8th of 2009.
 25 Q. And up to that point, were you still

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1 the continuing and acting president?
 2 A. Correct.
 3 Q. And with full powers? I mean, it
 4 wasn't a slowly declining power position?
 5 A. No, it had started declining back in
 6 August the prior year. The Milestone group had
 7 voted themselves in as board members and tried to
 8 sell the company, you know, underneath me. And it
 9 started going downhill from there.
 10 MR. MURDAUGH: I appreciate your
 11 answering my questions.
 12 THE WITNESS: Not a problem.
 13 MR. NICKELS: My turn. You need a
 14 break for any reason?
 15 THE WITNESS: I'm good.
 16 EXAMINATION
 17 BY MR. NICKELS:
 18 Q. Jerry, I want to let you know, it's
 19 good to see you, first of all. I wish it were
 20 under other circumstances.
 21 I'm going to cover some of the
 22 employment stuff just so I get that set up. But I
 23 want to go back to the accident itself, and just
 24 walk me right through it. Okay?
 25 A. Okay.

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1 Q. And I also want to go through some of
 2 the basics, assuming that each and every thing
 3 happened in this instance. But I kind of want to
 4 get a feel for what the process is for, starting
 5 with a box of brake parts in Indonesia or India or
 6 wherever they are, I want to see how that box of
 7 brake parts ends up on Blackhawk's floor, how it
 8 ends up in the back of somebody else's truck or box
 9 and walk through that. Let's kind of use these
 10 brake parts as an example. So do you have an
 11 understanding that the brake parts at issue in this
 12 unfortunate accident originated -- came from
 13 overseas someplace by a vessel or ship?
 14 A. That's correct.
 15 Q. Okay. Now, at some point in the
 16 process, would Blackhawk have been notified that
 17 there are boxes or crates of brake parts that are
 18 on a ship coming across from wherever to
 19 Charleston, and those boxes or crates need to get
 20 in the Blackhawk warehouse?
 21 A. That's correct.
 22 Q. Does it happen literally when the parts
 23 are in Indonesia, or wherever they originate from,
 24 does it happen while they're coming across seas, or
 25 does the notification happen when they're in a

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1 container that's been unloaded in one of our ports,
 2 or all of the above?
 3 A. Usually all of the above. Obviously
 4 the further out you get notice, the better you can
 5 plan. But they could be all the way to they
 6 arrived yesterday, time to go pick them up today.
 7 Q. These brake parts that happened to be
 8 in this crate that happened to fall and hurt this
 9 man, were these parts something that you were
 10 vaguely familiar with as being something that had
 11 already passed through the warehouse previously?
 12 A. Yes.
 13 Q. Tell me a little bit about what you
 14 knew about whoever was involved.
 15 A. Yeah, I think the account's name was
 16 Bawden Webster, and the crates came in from
 17 overseas on an ocean container. They would offload
 18 it at our facility. And then as a Bawden customer
 19 would purchase these parts from them, they would
 20 place orders with us to load them on a truck and
 21 ship them to their customer. So that would have
 22 been the reason for Mr. Morris and his trucking
 23 company to arrive there to pick up a load of those
 24 crates to go to wherever they were selling them.
 25 Q. When the crates of brake parts, which

Page 70 1 is what they were, came across on the ship and they 2 were unloaded off the vessel, were they placed 3 into -- were they unloaded onto Blackhawk property 4 over at the port or just in a designated area? How 5 does that all work? 6 A. Well, they would come across overseas 7 inside an ocean container. And then the ocean 8 container gets placed on what they call a chassis, 9 a set of wheels, that the tractor hooks up to. 10 Then the tractor drags that ocean container back to 11 Blackhawk. And it's just like a regular trailer to 12 everybody else, open up the doors, offload those 13 crates off the container into the warehouse, 14 inventory them, and then they would sit there 15 stored until the customer placed an order to ship 16 them back out. 17 Q. Earlier we heard that Blackhawk had 18 some trucks that were leased trucks? 19 A. That's correct. 20 Q. Any way to know whether it was a 21 Blackhawk truck that went out to the port and 22 pulled these containers over? 23 A. Yes, it would have been a Blackhawk 24 truck that brought them. 25 Q. Now, why do you know that?	Page 72 1 sheet or an intake sheet. Can you kind of walk a 2 civilian through the process, please? 3 A. The document that you would have 4 received from the customer saying that these 5 containers arrived into the Port of Charleston is 6 what they call a delivery order. 7 Q. Who is the customer? 8 A. Bawden Webster, who owns the product. 9 They would have their freight forwarder or broker 10 forward a delivery order, which would list the 11 container numbers that would arrive in the port 12 with their product on it. And that would be the 13 document that Blackhawk would use to go get the 14 container. 15 When a container left the port, the 16 port would issue what they call an interchange. 17 Basically the interchange is the container out, not 18 really what the product is, but that we're taking 19 short-term lease of the chassis and the container. 20 The interchange brings it out of the port. 21 Once it arrives at Blackhawk, we unload 22 it, and we do what we call an inbound receipt 23 telling -- that we send to Bawden saying we've 24 received this container, and these are the products 25 that are on that container. We send that to them.
Page 71 1 A. That's the way that I had the account 2 set up -- 3 Q. This particular account? 4 A. -- that we handled the crates and what 5 we call drayage is what it's called when you pull 6 up transportation from your port to the warehouse, 7 container drayage. The rate was actually all 8 included for the crates. 9 Q. I see what you're saying. It was kind 10 of like an all-inclusive? 11 A. Correct. We did the transportation 12 from the port. We brought it the warehouse. We 13 offloaded it, and then we loaded it back out. It 14 was kind of all one rate. 15 Q. And the only time that -- once it left 16 Blackhawk's possession is when it got put on the 17 back of the box that was owned by another trucking 18 company? 19 A. Correct. 20 Q. In this case, TMC? 21 A. Correct. 22 Q. What is the documentation that 23 follows -- for instance, we've talked earlier today 24 about a bill of lading. There was a document 25 referred to as -- I'm not sure if it was an inbound	Page 73 1 It goes into our system. And then we wait for -- 2 then empty containers are returned to the port, and 3 we wait for Bawden to place an order against that 4 product. 5 Q. And Bawden notifies you that, for 6 instance in this case, that TMC is going to come 7 down there, and we want X number of crates put onto 8 the TMC box, and TMC will take them wherever Bawden 9 tells them to take them? 10 A. That's correct. And then we would 11 create the official legal document for 12 transportation for the carrier to transport that 13 product from A to B. 14 Q. Does the bill of lading have to get 15 shown to anybody, you know, the transportation 16 police or weigh stations or... 17 A. The bill of lading, any time he gets 18 stopped, he would have to show that document, 19 whether it's regular police, you know, Department 20 of Transportation police, the weigh station, 21 because that is proof of what he's got on his truck 22 so that if for some reason it was a liquid or 23 something and it was leaking, they would know 24 exactly what's on his truck. It would also show 25 what his weights are in regards to his scale

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Page 74 1 weights and that kind of thing. 2 Q. And when is the bill of lading issued, 3 if you will? Is it done before, during, or after 4 the box is loaded? 5 A. The bill of lading is created prior to 6 the truck getting loaded. Once the truck is 7 loaded, then the driver's responsibility at that 8 point is to sign the bill of lading, the date, his 9 carrier, how many pieces he picked up. And then he 10 gets a copy, we keep a copy, and he's okay to 11 transport at that point. 12 Q. Okay. Let me represent to you that 13 Mr. Morris woke up that morning in Georgia. He had 14 received notification from his own company that in 15 fact he needed to go to Hanahan and pick up these 16 crates, and that, in fact, your assumption was 17 correct that he had been -- that TMC primarily 18 holds themselves out as really flatbed leaders in 19 the industry. 20 When he -- wherever he picked up his 21 box, would he have had to have stopped at the 22 security guard gate on the way in? I mean, if I'm 23 pulling in with a big, ole tractor trailer, do I 24 have to stop and say -- 25 A. Yeah, you have to check with security.	Page 76 1 Q. Right. 2 A. And then he had to sign in, you know, 3 sign in his name and his truck number. There's a 4 couple of statements in there that it's his 5 responsibility to make sure how the truck is loaded 6 and that he counts his product and all that stuff. 7 Q. For instance, would he actually back 8 his truck and his box up to the dock himself, or do 9 you guys go over and back it up for him? 10 A. No, he backs into the door and secures 11 his truck, and then he would come inside and wait 12 for a forklift operator to come and prepare the 13 load. 14 Q. Right. And if Mr. Morris or others 15 wanted to count their load, you know, to make sure 16 that -- I guess the proper number of crates or 17 whatever, how do they know how many crates they're 18 supposed to have? At what point in the process -- 19 because -- 20 A. Well, typically what would happen at 21 Blackhawk is when the driver came to the window 22 where Julie was, she would actually hand him the 23 paperwork. It would have what we call the pick 24 ticket, you know, our pull order. It would 25 probably have the bill of lading. There may be a
Page 75 1 They would sign him in. Then he would stop at the 2 front window, at the office where Julie Geiner, the 3 transportation coordinator, would sit, and she 4 would ask him who he drove for, what he was there 5 to pick up, and then she would coordinate with the 6 warehouse what door to back into, and get somebody 7 to assign to unload him. 8 Q. When he would be asked, what are you 9 there to pick up -- I don't mean to be coy here -- 10 does he give like I'm here to pick up order, and 11 some kind of a digit thing, or I'm here to get the 12 brake parts, or what is she asking the person? 13 A. We typically ask for a pickup number, 14 which is typically today's date and some kind of 15 reference number. The pickup number would kind of 16 tell us what it is. Various drivers would ask more 17 details than others. But he would have already 18 been pre-told by his dispatcher, whoever assigned 19 him the load, hey, you're going to Hanahan, you're 20 to go pick up 22 crates, 45,000 pounds, whatever it 21 is, you know, he would have already been told what 22 that was, and here is your pickup number to give to 23 the warehouse when you get there. So that pickup 24 number would have been all we would need to kind of 25 direct him where he needed to go.	Page 77 1 seal with it. She would say, take this, go back 2 to, in this case, door 21, and somebody will be 3 with you to load you. 4 So at that point, he would see his 5 paperwork, and I would see -- once R.J. saw him, he 6 would take his paperwork from him and say, okay, 7 this is what you've got, how do you want it loaded? 8 Usually at that point, you know, truck 9 drivers would vary. The product would typically -- 10 you know, we'd already have it pre-pulled because 11 we know that truck was coming from the day before. 12 So we'd have it pre-pulled. There's your crates if 13 you want to count them. 14 Q. So he could have walked around them? 15 A. He could have went and walked around 16 and counted them or whatever, or some truck 17 drivers, like I said, would just kind of hang out, 18 you know, outside the door and just kind of count 19 them when they go. And other truck drivers would 20 just go into their cab and don't care what you 21 loaded on them, and they'll just sign the paperwork 22 anyway when they're done. 23 Q. Okay. What's the best practice from 24 the truck drivers? 25 A. Well --

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Page 78 1 Q. You used to drive a truck? 2 A. Yeah. From a truck driver's 3 standpoint, it is a legal contract. You take 4 ownership of that product when you sign that bill 5 of lading. So if we said we were putting on 20 6 crates of brake pads and instead we put in 20 7 pallets of disposable diapers and he signed that 8 paperwork, he owns a load of brake pads that he 9 would be responsible for and his company would be 10 responsible for paying for them. 11 Q. Right. Even after he had diapers on 12 and said -- 13 A. Exactly. 14 Q. Okay. And is there some sort of system 15 in place then that -- let's say there was no -- I 16 want you to assume that no incident occurred. Do 17 you then notify the owner of the product that, yes, 18 we've loaded it on your truck, and your guy is off 19 to wherever he needs to go? 20 A. Yes, once the driver signed and dated 21 and recorded all the information we require on the 22 bill of lading and he departs, a copy of that bill 23 of lading is then scanned and sent to the customer 24 that says your shipment is gone. 25 Q. And Bawden is B-A-W-D-E-N?	Page 80 1 A. No, not at all. 2 Q. Who was around? Was it R.J.? 3 A. R.J. was there -- 4 Q. Jason? 5 A. Jason was there, and obviously other 6 people from the warehouse and the office were 7 starting to accumulate. Obviously, because of the 8 nature of the accident, they were standing back. 9 Nobody wanted to get too close to see what was 10 going on. 11 Q. Understood. And had you any sense, 12 either at the time or later on in your 13 discussions -- in other words, when the box came 14 over and it pinned Mr. Morris, had anybody tried to 15 move the crate before you came across? 16 A. No, not to my knowledge. 17 Q. Okay. And the crate itself, the 18 portion that was touching a wall, it was not 19 touching the truck wall, but it was touching the 20 actual wall of your warehouse? 21 A. Right, where the door frame is. 22 Q. And was any of it touching the yellow 23 pole? Had it gotten down that low? 24 A. I don't believe so, but I can't 25 exactly -- I know it was really on the door frame,
Page 79 1 A. Correct. 2 Q. Bawden Corporation. So on this 3 particular day, I assume you were sitting over in 4 your office doing your work, and in intercom, 5 somebody notified you that something had occurred? 6 A. Correct. 7 Q. Do you remember who notified you? Was 8 it Rebecca or somebody else? 9 A. I don't know for sure. I thought it 10 might have been Jason, because obviously Jason 11 would have been the warehouse manager that would be 12 patrolling the whole warehouse at the time. It 13 might have been him, but I couldn't swear to it. 14 They just yelled to me, get down to door 21 right 15 away. So I knew something had happened. 16 Q. You literally ran across the yard? 17 A. I ran right across the yard into the 18 warehouse. 19 Q. And when you ran across the yard into 20 the warehouse, in terms of the people involved -- 21 obviously there was a driver who you probably did 22 not know, Mr. Morris, I assume? 23 A. Correct. 24 Q. You had never seen him before that day, 25 hadn't acknowledged him whatsoever?	Page 81 1 but I don't believe it was touching the pole. 2 Q. Was it still in contact with 3 Mr. Morris? 4 A. Yes. 5 Q. Okay. And the yellow pole, from your 6 personal observation of the location of Mr. Morris, 7 on what side of the yellow pole was his body, or 8 was it on both sides? When I say side, I'm going 9 to use the yard as one side, and the interior of 10 warehouse as being the other. 11 A. The yard side, the yard side of the 12 pole. 13 Q. Virtually his entire body? 14 A. Yeah, virtually his entire body. If I 15 recall, his back -- most of his back was up against 16 the door frame of the warehouse. 17 Q. We believe that the evidence in this 18 case will be that a person by the name of Garwood 19 was contacted -- his company was contacted by TMC, 20 and Garwood was deployed or dispatched to come out 21 on the very same date -- that's what Garwood 22 states -- you know, within a couple of hours of the 23 incident itself. Can you recollect independently, 24 as you reflect back, visiting with any 25 investigator-type person representing any company

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1 on the very date of this incident?

2 A. I -- I really can't remember exactly,

3 but I -- but now that we talked about it, I do

4 remember that the gentleman did come one day, and I

5 wouldn't let him into the warehouse. And then

6 after he came -- and I allowed him to come back the

7 next day, and we took him out to the warehouse.

8 Q. Was he accompanied by someone the next

9 day?

10 A. I believe there was. I believe there

11 was somebody else, because I think the first day

12 wasn't comfortable, because obviously I was -- I

13 thought I needed to do what I did and protect

14 Blackhawk and follow the guidance of the insurance

15 company. So until I knew exactly what I should and

16 shouldn't do, obviously I wasn't going to say much

17 of anything.

18 Q. Earlier Mr. Murdaugh showed you a

19 picture. In that picture, you identified, yes,

20 that's me posing, if you will. Do you recall who

21 took that picture of you that first or second day?

22 Was it one of those guys we were just talking

23 about?

24 A. Yeah, I would say -- yes, it would have

25 been one of those guys. Originally I thought that

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1 we might have taken that picture, but we only took

2 the reenactment pictures. It was there, and

3 obviously it was my feeble attempt to get kind of

4 where he was positioned, but it wasn't really

5 accurate.

6 Q. He was more what?

7 A. More to the yard and further down.

8 Q. When you say the yard, you mean the

9 street side?

10 A. Right, the parking lot, out by the

11 truck side.

12 Q. In the scenario where an accident had

13 happened, was R.J. asked to go give a sample to

14 test for drugs and alcohol?

15 A. I believe -- you know, that is our

16 policy. That would have been obviously Rebecca's

17 responsibility, because obviously I would have been

18 back in my office making phone calls to insurance

19 companies, and she should have taken charge from

20 there for the incident report and following those

21 procedures.

22 Q. Right. When you went back -- at the

23 time -- I kind of got lost in writing it all down.

24 You were the president of Blackhawk at the time;

25 correct?

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1 A. Correct.

2 Q. And there is a board of managers?

3 A. Correct.

4 Q. Is Blackhawk an LLC?

5 A. Yes.

6 Q. So would you have contacted other board

7 members to notify them that there was a --

8 obviously there was a man seriously hurt.

9 A. At that time there wasn't a board in

10 place. I think I stated that the board wasn't put

11 in until later when they decided to try to sell the

12 company. So there was supposed to be. In the

13 operating agreement, there was supposed to be, but

14 it had never been put in place. I do remember

15 telling Rogers Drake, the Milestone guy, about the

16 incident. You know, obviously I just felt that

17 they needed -- somebody needed to know who was part

18 owner of Blackhawk.

19 Q. You had 42 1/2 percent?

20 A. Correct.

21 Q. And then what was the basic makeup of

22 the other 57 1/2 percent?

23 A. Milestone at 42 1/2 percent --

24 Q. Okay. That's 85.

25 A. SFT, the Joe Jaffe gentleman, at 9, 9

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1 1/2 or so.

2 Q. Okay. That's up to the mid 90s.

3 A. And the Powers Estate at 5 percent, and

4 then Mr. Jack Jeffords at a half a percent.

5 Q. Half a percent, all right. You

6 testified that you left Blackhawk on December the

7 8th, 2009; is that correct?

8 A. Correct.

9 Q. I think you also testified that you are

10 still an owner?

11 A. Correct.

12 Q. You still have your 42 1/2 percent, I

13 guess?

14 A. Yes.

15 Q. Are you still in the -- what are you

16 doing now?

17 A. I am -- I work for a corrugated box

18 manufacturer. I operate the distribution facility

19 for them.

20 Q. What are they called?

21 A. Pratt Industries.

22 Q. Local?

23 A. They're a worldwide company, but I work

24 for their Greenville, South Carolina, facility.

25 Q. Do you work up in Greenville now?

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1 A. No, actually I work here in
 2 Sumnerville. I opened up a distribution center
 3 here in Sumnerville for them.
 4 Q. And is there forklifts and --
 5 A. Yes, I have forklifts, all the same
 6 kind of scenario of what was at Blackhawk.
 7 Q. Is it a logistics company then?
 8 A. No, it is really a corrugated packaging
 9 manufacturer. But they have box manufacturers that
 10 have fulfillment needs. So being that's my
 11 expertise, they hired me to help them sell boxes
 12 and then sell the service of filling the box and
 13 storing the box and shipping the box.
 14 Q. Okay, good. And when did you start
 15 there? Was it like on December 8th, I worked for
 16 Blackhawk, and on December 9th, I was --
 17 A. No, I was technically suspended from
 18 Blackhawk on December 8th. They paid me for a
 19 little while. And then I think they officially or
 20 wrongfully terminated me in April of that year.
 21 Q. Of 2010?
 22 A. Correct.
 23 Q. I'm just putting the timeline together,
 24 because it could be important. So on December
 25 2009, you left Blackhawk. You were what,

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1 suspended?
 2 A. Suspended.
 3 Q. All right.
 4 A. They paid me through February, so I sat
 5 home. And then I stopped getting paid, but didn't
 6 get terminated officially until the first of April
 7 and started work for Pratt in July of '10.
 8 Q. Good. So is that a full-time job?
 9 A. Yes.
 10 Q. Did you -- any other work between July
 11 and now for any other outfits?
 12 A. No.
 13 Q. So your work history -- because you
 14 took us back to even before Blackhawk -- sounds
 15 like -- were you working out of state in this
 16 industry and then moved here?
 17 A. I've been in this business for 32
 18 years, either transportation, warehousing business
 19 all my life. I worked for a trucking company up in
 20 Connecticut where I'm originally from and came down
 21 here for winter break with the kids. And it was 70
 22 here and snowing there. So there is a truck and a
 23 warehouse. I can do it here in the warm weather.
 24 Q. What year was that?
 25 A. That was in '88, July of '88.

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1 Q. But there was no Blackhawk in '88?
 2 A. There was no Blackhawk. I literally
 3 came down here without a job and went to work for
 4 Emory Airfreight and then got into the trucking
 5 business and then the warehouse business.
 6 Q. And then one of your business contacts
 7 and you decided to try and go it together?
 8 A. Yeah. I had landed a job with Palmer
 9 Logistics, which ended up splitting and becoming
 10 Premier Logistics. And then when the ownership
 11 changed and management decided to go a different
 12 direction and I got terminated from there,
 13 Mr. Drake, the Milestone gentleman, was a customer
 14 of mine at Premier, and I provided a bunch of
 15 logistics solutions for them. And he came to me
 16 and said, this is what I do for a living, we'll
 17 show you how to raise the money, you know, we'll
 18 get you money, we'll get all that stuff, you just
 19 take your operation and your sales know-how, we'll
 20 take care of the financial side, and let's go start
 21 a company.
 22 Q. Drake kind of the money guy, you the
 23 troop on the ground?
 24 A. Exactly.
 25 Q. Got it. Are you and Mr. Drake or

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1 whatever -- or his company, are you guys --
 2 A. Talking terms, no. We're only on legal
 3 terms.
 4 Q. Everybody has lawyers now?
 5 A. Everybody's got lawyers, and the
 6 lawyers have got lawyers.
 7 Q. Is there an actual suit filed?
 8 A. No.
 9 Q. Okay. That's good. As a result of
 10 this incident at Blackhawk, did you have a meeting
 11 with the employees or some sort of a stand down to
 12 kind of review -- I'm trying to understand what
 13 happened.
 14 A. Yeah, that's exactly what we called it.
 15 We had an immediate stand down with every employee
 16 at the office and everybody to talk about what
 17 happened, you know, what we need to do to help
 18 prevent this from ever happening again.
 19 Q. Were there take-aways from this one
 20 that you, you know, instructed the company
 21 employees about? In other words, I'm trying to
 22 understand what happened. Were there any policies,
 23 procedures, or anything else?
 24 A. No, we didn't --
 25 Q. A reminder of common sense?

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1 A. Well, I think it was more -- I think
2 everything that we had in place was the right
3 stuff. I think it was just a reminder, you know,
4 maybe in this instance, R.J., stop, make him --
5 make him go back further back, make him go get a
6 chair, or tie him to another pole somewhere if you
7 have to it. But if the driver continues to
8 approach on your truck while you're loading it, we
9 need to stop, and we need to force that issue.

10 Q. Was R.J. -- you know, I don't know if
11 some companies have reprimand systems or, you
12 know -- was he reprimanded, frankly, for this or
13 not?

14 A. I don't -- actually, I don't recall
15 exactly. I don't believe he was, because we really
16 felt that he didn't do anything necessarily wrong,
17 other than be more demanding of making that driver
18 get out of there, but that it was Mr. Morris'
19 reaction than what he did that really put himself
20 in that position.

21 Q. Counsel asked you about dock plates.
22 And I'm wondering if the dock plate -- some of the
23 R and R's of the dock plates were taking place
24 before you left the company?

25 A. Correct.

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1 Q. Mr. Craig described one of the
2 principal reasons to replace some of the dock
3 plates was to be able to better get in and out
4 of -- did he say 20 foot?

5 A. 20 foot containers.

6 Q. Because they had a little bit of high
7 differential as compared with the 40 footers?

8 A. That's correct.

9 Q. Is that primarily the change for -- in
10 other words, from your investigation, your years in
11 the business and anything else, did the dock plate
12 have anything to do with this unfortunate incident?

13 A. No, the dock plate didn't have any
14 factor in what happened.

15 MR. NICKELS: I pass to Mr. Murdaugh.

16 EXAMINATION

17 BY MR. MURDAUGH:

18 Q. A handful of questions. Do you know
19 how much insurance Blackhawk Logistics was
20 maintaining at the time of the accident?

21 A. I don't know the exact numbers,
22 whatever the industry standard was for logistics.

23 Q. What would that have been?

24 A. Well, we had a variety of different
25 types of coverages, general liabilities and

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1 different types of stuff. So they could range
2 anywhere from a million to 2 or 3 million just
3 depending on what category it was in. Which one
4 exactly, I'd have to look at a contract. It's
5 listed on all of our customer contracts.

6 Q. Who was in charge of purchasing that
7 insurance and deciding the amounts of the insurance
8 coverage?

9 A. Well, the amounts are decided by what
10 the industry requires that you have. So we would
11 have kind of been consistent with other warehouse
12 logistics companies that I've been exposed to over
13 the years. Now, Rebecca Thompson would be
14 responsible for finding options on insurance.
15 Obviously we would make kind of a joint decision on
16 which insurance company we decided to go with.

17 Q. Do you know who the agent was that
18 you-all actually purchased the coverage from?

19 A. Back at that period of time, I believe
20 it might have been the Dantzler agent, Jeff
21 Dantzler out of Walterboro, I believe. Later on,
22 we switched to Canal -- or actually RGI or
23 something and then took our -- which was the
24 Gallagher agency. And then after that, it went to
25 canal. So it's changed a few times. But I think

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1 back then, it might have still been with Dantzler.

2 Q. Okay. Rodney Kittrell did not tell you
3 the version of facts that I told you that he
4 testified to in his deposition, did he?

5 MR. NICKELS: Object to the form.

6 THE WITNESS: I guess I wouldn't know
7 unless I listened to him side by side with his
8 written statement. I'm not sure.

9 BY MR. MURDAUGH:

10 Q. Did he tell you that he saw the load
11 shifting before he made the right-hand turn into
12 the van?

13 A. I don't recall him telling me that, no.

14 Q. If he had told you that and told you
15 that despite knowing it was shifting to the left, I
16 continued on, made the turn, and at some point this
17 load fell on Mr. Morris, had you known that, that
18 version, would you have had him reprimanded?

19 MR. NICKELS: Object to form.

20 THE WITNESS: I don't know what I would
21 have done at this point, obviously playing Monday
22 morning quarterback. Obviously I think we all
23 agree he should have stopped. Obviously if the
24 crate would have fell and broke or -- you know,
25 it's hard to say. Maybe I would have. Maybe I

Page 94 1 wouldn't have. Obviously I would have relied on 2 the warehouse manager, being that he's out there 3 and about, a little more of some of his decision on 4 which direction to go versus making that call 5 sitting in my chair. 6 BY MR. MURDAUGH: 7 Q. So you wouldn't have asserted one way 8 or another. You'd let Jason Craig decide whether 9 you reprimand somebody -- 10 A. I would have taken his input, and we 11 would have made a decision whether we would have 12 moved forward with it or not, whatever. 13 Q. You've got to let me finish these 14 questions too. I'm bad about it too. Don't get me 15 wrong. 16 Did you-all examine the crate that 17 actually fell after the fact? When I say examining 18 it, other than looking at it from the outside. Did 19 you-all ever open it up and look on the inside? 20 A. No, we didn't take it apart to examine 21 it. 22 Q. You-all never saw reason to think, hey, 23 something inside this crate might have had anything 24 to do with why it fell? 25 A. No, no, because we handle so many of	Page 96 1 of the accident. 2 MR. NICKELS: And I'll object to the 3 form again. 4 THE WITNESS: Like I said, the 5 circumstances, what's going on with my situation 6 with Blackhawk and those being my next-to in 7 command, obviously doesn't allow me to really be -- 8 to -- to answer that question. Obviously I would 9 wish they would have done something different with 10 regards to my situation at Blackhawk. But from a 11 safety standpoint, I expect that Jason -- safety 12 was first, and Jason was a -- Jason was not scared 13 or would not hesitate to write somebody up, to 14 discipline them, even to suggest termination if he 15 felt that somebody was not being safe or not 16 following procedures. So I would say that about 17 Jason. 18 BY MR. MURDAUGH: 19 Q. Do you-all have surveillance cameras 20 inside the warehouses? 21 A. No. 22 Q. How about outside? 23 A. No. 24 Q. Any possible surveillance camera that 25 could have picked up anything to do with John
Page 95 1 them. The thought didn't come across to tear the 2 crate apart. 3 Q. I've never met Ms. Thompson. Based on 4 your years of working with her, what kind of lady 5 is she? Is she an honest witness? 6 A. I would expect that she would be an 7 honest witness. She's pretty detailed when it 8 comes to dotting I's and crossing T's. Obviously 9 that's why she was in that position. She's a 10 stickler to safety rules and that type of stuff. 11 Q. And is she still there? 12 A. Yes. 13 Q. How about Jason Craig? 14 A. Yes, he's still there. 15 Q. Obviously I met him today. What's your 16 opinion on his integrity and honesty? 17 MR. NICKELS: I object to the form. 18 THE WITNESS: I think some of those 19 questions are -- because of my situation, might be 20 a little distorted from my side. But I assume he 21 did what he was supposed to do and safety was a 22 concern. 23 BY MR. MURDAUGH: 24 Q. I'm asking more about his honesty and 25 integrity than what he was doing back at the time	Page 97 1 Morris coming on the place or anything to do with 2 this incident? 3 A. Not that I'm aware of. 4 MR. MURDAUGH: I appreciate it. 5 MR. NICKELS: Same. Thank you. You're 6 all done. 7 (The witness, after having been advised 8 of his right to read and sign this transcript, does 9 not waive that right.) 10 (The deposition was concluded at 3:16 11 p.m.) 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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Page 98 1 SIGNATURE OF DEPONENT 2 DEPONENT: JERRY ALBERT WARD 3 DEPOSITION DATE: FEBRUARY 7, 2011 4 REPORTER: JANICE N. SHEPHERD 5 CASE CAPTION: MORRIS vs. BLACKHAWK LOGISTICS, ET AL. 6 (Please return both Signature of Deponent pages) 7 I, the undersigned, JERRY ALBERT WARD, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any: <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 10%;">PAGE</th> <th style="width: 10%;">LINE</th> <th style="width: 40%;">CHANGE</th> <th style="width: 40%;">REASON</th> </tr> </thead> <tbody> <tr><td>10</td><td></td><td></td><td></td></tr> <tr><td>11</td><td></td><td></td><td></td></tr> <tr><td>12</td><td></td><td></td><td></td></tr> <tr><td>13</td><td></td><td></td><td></td></tr> <tr><td>14</td><td></td><td></td><td></td></tr> <tr><td>15</td><td></td><td></td><td></td></tr> <tr><td>16</td><td></td><td></td><td></td></tr> <tr><td>17</td><td></td><td></td><td></td></tr> <tr><td>18</td><td></td><td></td><td></td></tr> <tr><td>19</td><td></td><td></td><td></td></tr> <tr><td>20</td><td></td><td></td><td></td></tr> <tr><td>21</td><td></td><td></td><td></td></tr> <tr><td>22</td><td></td><td></td><td></td></tr> <tr><td>23</td><td></td><td></td><td></td></tr> <tr><td>24</td><td></td><td></td><td></td></tr> <tr><td>25</td><td></td><td></td><td></td></tr> </tbody> </table>	PAGE	LINE	CHANGE	REASON	10				11				12				13				14				15				16				17				18				19				20				21				22				23				24				25				Page 100 1 CERTIFICATE OF REPORTER 2 3 I, Janice N. Shepherd, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record. 4 I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. 5 Witness my hand, I have hereunto affixed my official seal this 17th day of February, 2011 at Charleston, Charleston County, South Carolina. 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 Janice N. Shepherd, RPR, CSR My Commission expires October 11, 2014 25																
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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

BLACKHAWK LOGISTICS, LLC

Plaintiff,

v.

JERRY WARD,

Defendant.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-08-1078

**ORDER GRANTING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2011 APR 18 PM 12:21

FILED

After reviewing Plaintiff's Complaint and Emergency Motion for Temporary Restraining Order and Permanent Injunctive Relief with supporting affidavits and exhibits, reviewing Defendant's memorandum in opposition, and hearing arguments of counsel at a hearing held April 14, 2011, the Court hereby partially GRANTS and partially DENIES Plaintiff's Motion for Temporary Restraining Order as set out herein.

FINDINGS OF FACT

1. The Court hereby finds the Employment Agreement ("Agreement") between Plaintiff Blackhawk Logistics, LLC ("Blackhawk") and Defendant Jerry Ward ("Ward") attached to Plaintiff's Complaint valid and enforceable in accordance with the applicable terms thereof, to the extent set out herein.
2. Analyzing the Agreement against the five part test used by South Carolina courts to determine the validity of restrictive covenants and non-competition agreements, *e.g.*, *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675-76 (1983) (holding restrictive covenant must be i) necessary for the protection of the legitimate interest of the employer, ii)

[Handwritten signature]
4/14/11

reasonably limited in its operation with respect to time and place, iii) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, iv) reasonable from the standpoint of sound public policy, and v) supported by valuable consideration)), this Court finds sufficient evidence to conclude that there is:

- a. Protection of a legitimate business interest: The Court finds the purpose of the Agreement is to protect Blackhawk against unfair appropriation of its customers by Defendant, and the protection of business clients is a legitimate interest. *See Std. Register Co. v. Kerrigan*, 238 S.C. 54, 66 (1961) (finding customers to be a business's most important asset); and
 - b. Reasonable under public policy: The Court finds that enforcement of the Agreement does not offend public policy, based on the finding that Blackhawk seeks to protect a legitimate business interest. *See Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 209 (1982); and
 - c. Adequate consideration: The Court finds that the Agreement is supported by adequate consideration because Defendant received employment and payment per Blackhawk's promise, and Blackhawk received Ward's services and knowledge of third party logistics per Ward's promise.
3. The Court hereby finds that Blackhawk has met its burden of proof and made the requisite showing of facts and evidence via affidavit to support the grant of a temporary restraining order, including: a) irreparable harm if the motion is not granted, b) likelihood of success on the merits, and c) no adequate remedy at law. *Denman v. City of Columbia*, 387 S.C. 131, 140 (2010).



Blackhawk's employees if Blackhawk loses customers because of Ward's actions. A temporary restraining order thus appears to be the most appropriate relief in this matter.

CONCLUSION

Accordingly, based on the foregoing reasons, the Court hereby ORDERS:

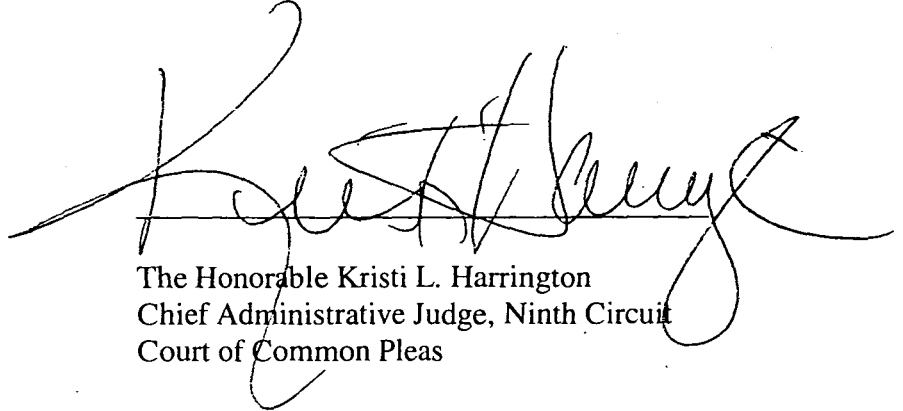
1. Defendant is hereby temporarily restrained and enjoined from contacting, soliciting, interfering, or otherwise affecting or causing others to affect, directly or indirectly, Blackhawk's relationship with its current employees and vendors provided to Defendant at the hearing.
2. Defendant is hereby temporarily restrained and enjoined from contacting, soliciting, interfering, or otherwise affecting or causing others to affect, either directly or indirectly, Blackhawk's relationship with its current customers and clients, including without limitation the confidential list of clients provided to Ward by opposing counsel at the hearing.
3. The Court finds that Blackhawk has met its burden of proving a likelihood of success on the merits. Based upon the affidavits filed and the arguments of Counsel, the Court does not find the need that Blackhawk post bond at this time.
4. Violation of this Order by any party may result in a finding of contempt of this Court.



Under SCRCP 65 this Order expires ten days from the date hereof, and the Court hereby sets this matter for hearing on Plaintiff's Motion for Injunctive Relief on April 25, 2011, at 9:00 a.m.

April 15, 2011

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Kristi L. Harrington', is written over a horizontal line. The signature is fluid and cursive, with a large initial 'K' and a long, sweeping underline that extends to the right.

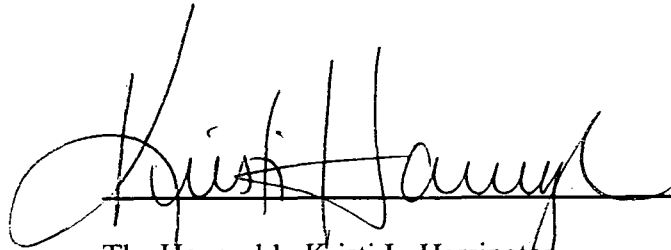
The Honorable Kristi L. Harrington
Chief Administrative Judge, Ninth Circuit
Court of Common Pleas

restraint applies only to customers and clients, including those appearing on the confidential client list, that were clients of Blackhawks as of April 3, 2010.

3. The Court finds that Blackhawk has met its burden of proving a likelihood of success on the merits. In light of the arguments of counsel, the Court again considered bond as required by Rule 65 of the South Carolina Rules of Civil Procedure and orders that the bond remain \$0.00 (zero).
4. Violation of this Order by any party may result in a finding of contempt of this Court.
5. This Injunction will expire on December 8, 2011, unless otherwise modified or superseded by a hearing on the merits.

IT IS SO ORDERED.

April ²⁰~~21~~, 2011

A handwritten signature in black ink, appearing to read "Kristi Harrington", written over a horizontal line.

The Honorable Kristi L. Harrington
Chief Administrative Judge, Ninth Circuit
Court of Common Pleas

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY) CASE NO.: 2011-CP-08-1078

BLACKHAWK LOGISTIC, LLC,)
)
 PLAINTIFF,)
)
VS.)
)
JERRY WARD,)
)
 DEFENDANT.)

MOTION FOR TEMPORARY RESTRAINING ORDER

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Berkeley County Courthouse
Berkeley, South Carolina
on Thursday, April 14, 2011, Commencing at 8:52 a.m.

SUSAN "MIA" PERRON, CVR-CM
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

APPEARANCES OF COUNSEL

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CERTIFICATE OF COURT REPORTER

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EXHIBITS

[None]

PROCEEDINGS

THE COURT: All right. Good morning. If you will state your name for the record and the party you represent.

MR. LECLERCQ: Good morning, Your Honor. My name is Ben LeClercq. I'm here on behalf of Blackhawk Logistics. Also coming today, although he's not here yet, is Mr. Benjamin Cone. Unfortunately, I think he had some difficulties getting here but I think he'll be here in the next five to ten minutes.

THE COURT: All right. Do we need to wait for Mr. Cone?

MR. LECLERCQ: I believe that we don't. He's going to -- I've told him the substance of my remarks and I think if the Court needs his evidence from him, he'll -- he'll be in in the next ten minutes or so.

THE COURT: All right. And just for the record, what is Mr. Cone's involvement?

MR. LECLERCQ: Mr. Cone is the manager of Blackhawk Logistics.

THE COURT: Thank you.

MR. MEETZE: Good morning, Your Honor.

THE COURT: Good morning.

MR. MEETZE: Wes Meetze, from Altman & Coker, and I represent the defendant, Jerry Ward, who is here

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1 with me in the courtroom today.

2 THE COURT: Good morning, Mr. Ward.

3 MR. WARD: Good morning.

4 THE COURT: And, counsel, what are we doing here
5 today?

6 MR. LECLERQ: Good morning, Your Honor.

7 We are here on the -- on Blackhawk's motion for
8 temporary restraining order.

9 And first I would like to thank the Court for
10 hearing this matter on short notice.

11 Twenty-four employees of Blackhawk Logistics are
12 threatened with the loss of their employment because
13 of the actions of Jerry Ward, twenty-four employees
14 who won't be able to make their mortgage payments or
15 won't get salary checks and buy groceries because of
16 the actions of Jerry Ward.

17 Mr. Ward was president of Blackhawk Logistics
18 from 2006 until 2009, and he was general manager of
19 that company, also, and he signed an employment
20 contract. The employment contract contains non-
21 interference clauses, it contains a non-solicitation
22 clause, and it contains a non-competition clause.

23 THE COURT: Do we have a copy of his employment
24 contract?

25 MR. LECLERQ: Yes, Your Honor. If I might

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1 approach the bench. I brought copies of the critical
2 documents that we have --

3 May I approach, Your Honor?

4 [Whereupon, Mr. LeClercq proffers documents to
5 the Court]

6 MR. LECLERQ: That stack of documents contains
7 the client list, an unredacted copy of the client
8 list, as well as the employment agreement.

9 THE COURT: All right.

10 MR. LECLERQ: This case, Your Honor, is about
11 the survival of Blackhawk Logistics, and Mr. Ward's
12 employment is not more important than the employment
13 of twenty-four employees of Blackhawk.

14 Mr. Ward was suspended from Blackhawk, because
15 of mismanagement, in December of 2009. Now, he was
16 terminated for cause on April of 2010. The employment
17 agreement has a term of two years for these
18 restrictive covenants, subsequent to the expiration of
19 the agreement itself or the termination. Now Mr. Ward
20 is currently employed by Pratt Industries, which is a
21 competitor in the third-party logistics industry,
22 which is a direct breach of the non-competition
23 clause. But he has also interfered with the
24 relationship between Blackhawk and its customers.

25 THE COURT: And where is Pratt Industries

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1 located?

2 MR. LECLERQ: They're located in Dorchester
3 County.

4 THE COURT: All right. And what does the
5 employment agreement say about the non-compete,
6 specifically? Is there a territorial limit?

7 MR. LECLERQ: Yes, Your Honor, there is a
8 territorial limitation. And if you look at page --
9 let's see. The territorial agreement is -- if you
10 look on page 2 of the employment agreement, paragraph
11 6, it says, first of all, that the parties acknowledge
12 and agree that the employer's business is that of
13 providing third-party logistics, including warehousing
14 and transportation. And then if you look at the last
15 sentence of that paragraph: accordingly, during the
16 term of this agreement and for a period of twenty-four
17 months, for any reason, in any county which is home to
18 a seaport or any county directly adjoining a county
19 which is home to a seaport in the states of South
20 Carolina, Georgia, or Virginia.

21 Now, the reason for that geographic limitation
22 is that because the third-party logistics industry is
23 very specific and it relates to -- the business here
24 relates to the industry that's located in deep seaport
25 counties, such as Charleston County, and frequently

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1 third-party logistics companies --

2 THE COURT: So your position is that Dorchester
3 County is adjacent to Charleston County, which is a
4 seaport?

5 [Whereupon, Mr. Cone enters the courtroom at
6 8:56 a.m.]

7 MR. LECLERQ: Yes, Your Honor, that's correct.

8 And so that is the --

9 And, Your Honor, Mr. Cone has just arrived. He
10 is the manager of --

11 So the geographic restriction is valid and was
12 bargained for in advance, and the reason is is because
13 companies that are competitors with Blackhawk can
14 easily take business and move it now to Savannah or
15 move it up to Norfolk. And I don't know if you
16 remember, Your Honor, but when I was a kid there were
17 banana ships that were frequently in the Port of
18 Charleston. And the Port of Savannah stole all of
19 that business from Charleston and it's now in Savannah
20 and all the third-party logistics business that went
21 with it.

22 So Mr. Ward has got the ability to work in
23 third-party logistics in the state of South Carolina,
24 he just can't work in Charleston County or in a county
25 adjacent to Charleston County. So our argument is

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1 that that geographic restriction is very narrowly
2 limited and is very necessary for the survival of my
3 client.

4 THE COURT: And, Mr. LeClercq, the contract
5 states twenty-four months after termination. The
6 termination date would be?

7 MR. LECLERQ: April the 2nd, 2010, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. LECLERQ: And so the -- that is the
10 geographic restriction.

11 Now, he is currently employed by Pratt. But we
12 also believe, as is referenced in document -- in an
13 affidavit, that he is brokering third-party logistics
14 deals for a company called CGM, which is also a
15 competitor of Blackhawk's. and the way he's doing
16 that is that he has called Client A, which is
17 referenced on the confidential list which I've gotten
18 you, and he actually said that -- according to what my
19 sources say, that he was going to hire a guy named
20 Lavelle, from Blackhawk, to run Client A's work at
21 space which is just adjacent to my client's space in
22 Hanahan, so he's -- and he's going to hire them for
23 CGM. So we believe that he's brokering deals for CGM.

24 Now, Your Honor, we have shown -- because of the
25 smoking guns that we've brought here, we have shown

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1 irreparable harm, and we've also shown inadequate
2 remedy at law, and we've shown a likelihood of success
3 on the merits. And so what we're asking the Court
4 today to do is to put a stop to Mr. Ward's clear
5 violations of the employment agreement.

6 The employment agreement meets the test for
7 validity in the state of South Carolina. In fact, if
8 you review it, he agreed to injunctive relief. And so
9 it's very clear what the parties agreed to. And the
10 fact is if you look at the documents that we brought,
11 the first one that I would refer you to is first from
12 the employment agreement. There is a non-interference
13 clause that states that, the employee shall not in any
14 manner interfere or attempt to interfere with any
15 business relationship between the employer and its
16 advertisers. And that's at the bottom of page 2, the
17 last three lines. And, again, that's valid until
18 April the 2nd of 2012. And Mr. Ward has been
19 contacting our customers.

20 And if you look at Exhibit 7, which I've also --
21 which is directly behind that, the document is an
22 e-mail from Client A. And I've given you the
23 unredacted copy, so it shows exactly the identities of
24 those individuals. And the document says that: Jerry
25 Ward, who used to work for Blackhawk, called here

1 looking for you. And I've put that as J.K., but you
2 see the name of the person. And J.K. is the national
3 manager of Client A, which represents \$35,000 of
4 monthly revenue for my client. Said: he called and
5 left messages for you but have not heard back. Wanted
6 to let us know that BH, which means Blackhawk, would
7 be evicted this Friday, March 18th.

8 And if you look at the next e-mail, which is
9 Exhibit 8, that e-mail is even more -- it's from the
10 same client and it's even more -- it underscores even
11 more what's happening here, because what it says is:
12 Jason has some additional information for you yet.
13 Says: Jerry is calling -- and, again, we've got that
14 redacted, but it's the president of yet a third
15 client. So he's calling this third client, making the
16 president of this company, Client A nervous -- making
17 all of us nervous, making us start to consider other
18 options. Possibly Jerry trying to scare everybody to
19 pull out of Blackhawk. That will make Blackhawk
20 abandon the facility early. Who knows at this point.
21 But if we have the threat of a lockout on our two-
22 million-dollar inventory -- and that's the inventory
23 that's at Blackhawk's facility -- hanging over us
24 every weekend of the month, then we're going to have
25 to do something about it.

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1 And so the -- that doesn't exist in a vacuum.
2 In addition to that, Mr. Ward has contacted other
3 clients. And as is set out in the affidavit of both
4 Mr. Cone, who's with me today, and Jason Craig, who's
5 the operations manager, Mr. Ward has contacted a
6 client -- and we've referred to it as Client I. And
7 Client I is probably a twenty to 25,000-dollar annual
8 client.

9 And what's happened is is that the
10 representatives of Client I have been in contact with
11 Jason Craig and they said, Jason, Mr. Ward has
12 contacted us and has told us the following: that
13 Blackhawk is in financial difficulty; that Client I's
14 property at Blackhawk is in jeopardy; that Blackhawk
15 is moving the Client I's goods from its principle
16 facility to another facility; and that Blackhawk would
17 be evicted.

18 So, Judge -- Your Honor, we don't believe that
19 this could be anything else but Mr. Ward interfering
20 with very important relationships. And the
21 irreparable harm is that he's already cost Blackhawk
22 two clients and there's no reason to allow him to take
23 yet another client, which is in the range of \$30,000
24 in monthly revenue. That's going to be the end of
25 this company. And so that is what the irreparable

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1 harm is.

2 And if you look at the non-solicitation clause,
3 which is on page 3 of the -- excuse me, it's still on
4 page 2. But it states that: the employee shall not
5 in any manner induce or attempt to induce any of the
6 employer's advertisers, suppliers or customers to
7 withdraw, reduce or divert any of their business from
8 the employer. Now, we believe that those e-mails,
9 Exhibit 7 and 8, which we think are smoking guns, also
10 show Mr. Ward soliciting Blackhawk customers. Which
11 we think is very important.

12 But when you look at the evidence under the non-
13 solicitation clause, Mr. Ward has contacted Client H.
14 And Client H is, frankly, a trucking company and the
15 Client H representatives, who are referred to as K.K.
16 and R.K. -- but you have the unredacted copies -- they
17 told, again, Mr. Craig and Mr. Cone that Mr. Ward had
18 contacted this trucking company to go pick up another
19 client's typical blue containers and deliver them to
20 Pratt. And so the Client F represented for Blackhawk
21 in the neighborhood of \$20,000 per month revenue.

22 Now, the proof that we have of that is Exhibit
23 10, which you also have, and what Exhibit 10 is is a
24 bill of lading. And the bill of lading -- and, again,
25 you've got the unredacted copy -- shows the identity

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1 of the client at the top and then the for delivery to
2 Pratt industries.

3 So what third-party logistics is is when you
4 accept deliveries from third parties and you store
5 them at your facility. So whatever else Pratt says
6 that they're doing, this exhibit, on its face, shows
7 that Pratt Industries is involved in third-party
8 logistics.

9 What happened was, with client -- with that
10 client is that they were a 20,000-dollar a month
11 client and because of the actions of Mr. Ward, they're
12 not a client of Pratt Industries. And so there's
13 absolutely no reason to allow that to happen, both
14 with these other clients, Client A and Client I that
15 we have referenced. And so he's -- even last week,
16 with regard to Client A, as is set out in Craig's
17 affidavit, Mr. Ward solicited them to move business
18 into the CGM warehouse.

19 And so it's just that this non-compete clause,
20 these clauses are set out to try to save Blackhawk its
21 most important asset, which is its customers, and if
22 Blackhawk loses anymore customers they're going to be
23 out of business. And so Mr. Ward's employment is not
24 more important than the twenty-four employees of
25 Blackhawk.

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1 Now, with regard to the non-compete clause,
2 there is a scribner's error. But it relates only to
3 the -- at most, it relates only to the non-compete
4 clause. If you look at paragraph 6-A it states that
5 employee shall not directly or, as a partner, compete
6 with the employer in any business engaged in
7 outsourced medical billing or outsourced collection of
8 medical invoices. Your Honor, that is nothing more
9 than a scribner's error. And as you see, just above
10 that the parties agreed that they were involved in the
11 third-party logistics. However, as I mentioned, that
12 relates only to the non-compete clause and not to the
13 non-solicitation clause or the non-interference
14 clause. But we would ask that the -- it's not a --
15 the only thing is a correction of a scribner's error,
16 because the parties clearly knew that what they were
17 involved in was third-party logistics.

18 So in summary, Your Honor, I would say that
19 Blackhawk has demonstrated by this evidence the
20 existence -- first of all, the validity of this
21 contract, but, more importantly, the irreparable harm
22 that would result if this action continues. Blackhawk
23 is going to lose these clients and they are going to
24 be put out of business. And so the finding out what
25 the damages are relating to twenty-four employees that

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1 don't have jobs anymore, that's very difficult to
2 estimate.

3 There's no adequate remedy at law. We believe
4 that Mr. Ward is substantially without assets. And so
5 there's no adequate remedy at law. Even if we were to
6 get a judgment, it's unlikely that it would be
7 collected. And the -- there's a very likely -- great
8 likelihood of success on the merits.

9 And it is -- it's just we're asking for the
10 Court to put a stop to this action. And I appreciate,
11 again, your hearing us on short notice. Thank you,
12 Your Honor.

13 THE COURT: Mr. Meetze?

14 MR. MEETZE: Thank you, Your Honor.

15 THE COURT: First of all, my first question to
16 you is is there anything that makes this employment
17 agreement invalid?

18 MR. MEETZE: Absolutely, Your Honor.

19 THE COURT: All right.

20 MR. MEETZE: But before I talk about the
21 invalidity of the employment agreement, I don't
22 believe my client has breeched the plain language of
23 the employment agreement.. What plaintiff's counsel
24 refers to as a scribner's error is not a scribner's
25 error. Mr. Ward has signed an employment agreement in

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1 2005 and in 2007 and in both instances it contained
2 this language. Mr. Ward asked a member of Blackhawk
3 Logistics why this specific language is inserted into
4 the agreement and they said it was for the protection
5 of a minority member of Blackhawk Logistics,
6 Milestone, LLC. So this is not a scribner's error.
7 Both parties were aware that this language was
8 inserted in the document at the time it was signed.

9 Now, in South Carolina, covenants not to compete
10 are strongly disfavored and they're strictly construed
11 against the drafting party, in this case, Blackhawk
12 Logistics.

13 Now, it's undisputed Mr. Ward is not in the
14 field of medical outsourced billing or the outsourced
15 collection of medical billing. He hasn't violated the
16 plain terms of the employment agreement.

17 But assuming that despite the substantial body
18 of law in South Carolina that says these agreements
19 can't be redrawn by the Court -- if the Court were to
20 redraw the agreement and insert the language
21 plaintiff's counsel has asked you to insert, it would
22 make the agreement over-broad.

23 First, it would prevent Mr. Ward from working in
24 any capacity in the field of third-party logistics,
25 whether or not that capacity competed against the

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1 plaintiff or not. Mr. Ward cannot be a janitor at a
2 FedEx facility because it would be in the field of
3 third-party logistics. His current employer, Pratt,
4 is a box manufacturer. He couldn't be in the business
5 of box manufacturing because it's in the field of
6 third-party logistics.

7 When an agreement is too overly broad, it
8 doesn't protect the legitimate interest of the
9 employer and it makes it invalid. The second thing
10 that makes this employment agreement invalid is the
11 scope of the geographic restriction on this.

12 South Carolina courts have held that
13 restrictions in the county in which the client had
14 contact are valid. But restrictions three states
15 long, in any county or any county adjoining a seaport,
16 this would prevent Mr. Ward from working in
17 Charleston, Colleton, Dorchester, Berkeley,
18 Georgetown, Horry, Williamsburg, Marion. That's in
19 South Carolina. Savannah --

20 THE COURT: But didn't he know that when he
21 signed it?

22 MR. MEETZE: He did. But, again, he was signing
23 an employment agreement not to compete in the field of
24 third-party logistics.

25 And, again, when a geographic restriction that

1 broad, regardless of whether he knew at the time he
2 signed it or not, the Court has the ability to look at
3 that and say that geographic restriction is just way
4 too large. The courts have done this repeatedly
5 throughout the body of law in South Carolina.

6 So the geographic restriction is too broad. The
7 terms of the non-compete have not been violated. The
8 only evidence that has been presented is affidavits by
9 members of Blackhawk, chock full of hearsay without
10 any real substantial evidence to support that.

11 And the plaintiff's counsel refers to this as
12 affecting the twenty-four jobs. This is going to
13 prevent Mr. Ward from working in the only industry
14 he's ever worked in for thirty years. Until the
15 members of Blackhawk Logistic met Mr. Ward, they had
16 never been in the field of third-party logistics. Now
17 they want to prevent Mr. Ward from working in the only
18 job he's ever had.

19 And now they also refer to the fact that it's
20 Mr. Ward's actions that are causing these drastic
21 measures over at Blackhawk. That's not true, either.
22 Blackhawk is involved in substantial litigation with
23 their landlord, who has locked them out of the
24 facility on several occasions and Blackhawk is
25 pointing at their landlord and saying, because you

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1 locked us out, twenty percent of our business left
2 that day. They point at the landlord and say, it's
3 your fault. But now they're pointing at my client and
4 saying, no, it's his fault. It's got to be one or the
5 other, Your Honor.

6 We just feel that the plaintiff has not met his
7 burden as to the enforceability of the non-compete.
8 And there's been a substantial delay. The plaintiff,
9 in his own pleadings, acknowledges that he has known
10 since January where Mr. Ward worked and waited until
11 April to bring this motion.

12 So for the -- for those reasons, Your Honor, we
13 just feel that the plaintiff's motion is not
14 appropriate and that it should be denied.

15 THE COURT: All right. Your response, counsel?

16 MR. LECLERQ: Well, I would underscore what your
17 response was to the geographic scope. He did know, in
18 fact, what the geographic scope was when he signed it.
19 And the fact is is that Mr. Ward, as is clear under
20 the Delmar Studios of the Carolinas vs. Kinsey case,
21 Dalmar vs. Kinsey, when -- and I have a copy for the
22 Court.

23 [Whereupon, Mr. LeClercq proffers documents to
24 the Court]

25 MR. LECLERQ: Under that case, Your Honor, the

1 Supreme Court of South Carolina followed a North
2 Carolina case which discussed the situation where you
3 have somebody who's a president or a general manager
4 of the company. The scope is broader than might
5 ordinarily be the case with just a simple salesman,
6 and because Mr. Ward was the president and had so much
7 in unfettered access to all of the confidential client
8 communications, that that geographic scope is
9 reasonable.

10 And, again, Mr. Ward could go work in third-
11 party logistics in Columbia and Orangeburg. He just
12 can't do it in counties which border seaports. And he
13 can do it in North Carolina, even, the Port of
14 Wilmington, because the -- the drafting of this clause
15 was done in such a way to try to keep it as
16 restrictive as possible, frankly, because of this very
17 issue. And so it was probably drawn more narrowly
18 than it should have been drawn but based on their
19 actual business. But the fact is is that it is -- we
20 believe that it is very reasonably worded, under the
21 circumstances.

22 And opposing counsel saying that all that we've
23 brought is affidavits of Blackhawk is inaccurate,
24 because we have e-mails from these other parties. And
25 it is those -- we believe speak for themselves. And

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1 they show, on their face, that he is interfering with
2 the clients.

3 So it's -- it is -- it's just the facts really
4 speak to themselves. And the harm to Blackhawk is
5 immediate and irreparable. They've already lost
6 clients because of Mr. Ward's actions. And Mr. Ward's
7 employment is not more important than the employment
8 of Blackhawk employees. Thank you, Your Honor.

9 THE COURT: All right. And, specifically,
10 counsel, what is it that you're requesting this Court
11 do?

12 MR. LECLERQ: We're asking the Court put a stop
13 to these actions. And the temporary restraining order
14 that we would like, first of all, would prevent Mr.
15 Ward from contacting any of the clients that are
16 listed on the confidential client list that we have
17 provided the Court, Clients A through J, and any of
18 their employees or agents. That would be the first
19 thing.

20 We would ask that he not contact and interfere
21 with them. And, second, we would ask that he not
22 solicit those clients for business, that the Court
23 enter a temporary restraining order preventing him
24 from doing that.

25 Now, the third thing is that he is, in fact,

1 employed in third-party logistics, by Pratt, and that
2 is in breach of the non-competition clause. So we ask
3 that the Court also restrain him from working in that
4 capacity as an employee for a competitive third-party
5 logistics company.

6 But given those three options, the Court -- in
7 terms of what we feel most strongly about is the
8 noninterference and then the non-solicitation. The
9 third on the list would be the non-competition, Your
10 Honor. But we are asking for a temporary restraining
11 order restraining Mr. Ward from all of those
12 activities. Thank you, Your Honor.

13 THE COURT: And so, Mr. LeClercq, the practical
14 aspect of what you're asking me to do is, in essence,
15 that Mr. Ward would need to cease employment with
16 Pratt Industries effective immediately? Is that
17 correct?

18 MR. LECLERQ: There are three elements to it.
19 The Court might decide that we have not met our burden
20 or that we have met our burden on the non-competition
21 clause. But we believe that, without a shadow of a
22 doubt, on the noninterference and non-solicitation
23 clauses, that we have met our burden for the temporary
24 restraining order.

25 And so at a minimum we believe that the Court

1 should enter a TRO which would restrain him from
2 either contacting, interfering with, or soliciting
3 those other customers. So at a minimum, we would ask
4 -- I understand full well that the third thing that
5 we're asking for is -- would require the Court engage
6 in a much greater scrutiny of exactly what has
7 happened. We believe that we have met that burden,
8 because Pratt is engaged in third-party logistics.
9 They are -- and, in fact, if you look at the picture
10 which we have attached as Exhibit 9 -- and I've given
11 you a picture of that in color, it shows Client F's
12 unique containers in a Pratt warehouse.

13 So I know that they say they are engaging in box
14 manufacturing, but that document, Exhibit 9, on its
15 face demonstrates that Pratt is engaged in third-party
16 logistics with regard to that client. So by
17 definition, they are involved in third-party
18 logistics. He's admitted that he's working for them,
19 they've admitted that he's working for them. So he's
20 working in a third-party logistics company in a county
21 which is adjacent of Charleston, and that is in breach
22 of the non-competition clause.

23 I also understand that these clauses are
24 disfavored. However, that is a scribner's error.
25 Mr. Ward, that I know of, has never been involved in

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1 medical outsource billing and neither have my clients.
2 That's simply a scribner's error. But at the same
3 time, we understand the scrutiny that the Courts will
4 put on these clauses.

5 THE COURT: And what about Mr. Meetze's position
6 that it was a scribner's error twice, that he signed
7 two employment contracts. Do I need to be concerned
8 with that?

9 MR. LECLERQ: Well, I'm not -- I haven't seen
10 evidence of the -- I have heard that there were
11 earlier employment contracts. We have not been able
12 to find them. And so perhaps if he's got a document
13 that he would put forward as an exhibit, we could look
14 at that. But I don't -- I have not seen that
15 document.

16 But, again, I think what we've got here is --
17 it's happened before. But I think we've had non-
18 lawyers that have drafted these clauses perhaps in
19 some ways and tried to adapt them, and didn't give
20 them the scrutiny in some ways that should have been
21 done, with regard to that clause.

22 And, in fact, Mr. Ward is the one that drafted
23 this agreement because he's the one that my clients --
24 he was the one that was the president of Blackhawk
25 when this was happening. So we believe that the

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1 employment contract actually came from him and that's
2 why it -- there are a number of other clauses that
3 would normally be favorable to the employer that were
4 not in that agreement. For example, termination
5 clauses and other things like that, that are not in
6 there. And the reason they're not in there is because
7 Mr. Ward drafted it.

8 So we don't believe that the presumption against
9 the party that drafted that contract should apply to
10 Blackhawk in this case, because Mr. Ward drafted the
11 agreement.

12 THE COURT: All right. Thank you.

13 Mr. Meetze, I saw you shaking your head. I'll
14 allow --

15 MR. MEETZE: I consulted with my client --

16 THE COURT: -- allow you just a few moments to
17 respond.

18 MR. MEETZE: I'm sorry, Your Honor. But I
19 consulted with my client. Mr. Ward did not draft the
20 employment agreement. And I'm certain he wouldn't
21 have drafted an employment agreement that would
22 prevent him from working in the only field, that he's
23 ever had employment in, in three different states.

24 But plaintiff's counsel has made the comment
25 that Mr. Ward was terminated from Blackhawk for cause.

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1 On two separate occasions the Employment Security
2 Commission found that Mr. Ward was not terminated for
3 cause and upheld his right to collect unemployment
4 benefits. And since he's seeking equitable relief
5 here, I believe it's important to note that he who
6 seeks equity must do equity.

7 Mr. Ward was unceremoniously removed from his
8 position at Blackhawk. That position was terminated.
9 His membership interest was transferred because
10 Blackhawk intentionally defaulted on an agreement to
11 alleviate -- to eradicate Mr. Ward's membership
12 interest. So if they're seeking equitable relief, he
13 who seeks equity must do equity.

14 And there's been an unreasonable delay. And I
15 just believe that the plaintiff has not met his burden
16 for such a drastic remedy as a temporary injunction to
17 prevent Mr. Ward from working in the only field he
18 ever has for thirty years.

19 THE COURT: Any final response, Mr. LeClercq?

20 MR. LECLERQ: Excuse me, Your Honor.

21 [Whereupon, Mr. LeClercq and client confer]

22 MR. LECLERQ: Your Honor, we don't believe that
23 there's been an unreasonable delay here. And I would
24 not be before the Court today unless we had smoking
25 guns, because I know the standard that has to be met.

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1 We've got smoking guns: Exhibit 7 and 8. They show
2 interference on their face. And so we've got those.
3 We believe that we've assembled our case in a
4 reasonable fashion and brought it at the appropriate
5 time. Thank you, Your Honor.

6 THE COURT: Counsel, we had allotted thirty
7 minutes so what I want to do is take the matter under
8 advisement.

9 I will issue, hopefully, depending -- my parties
10 for my jury trial and the jury is being brought up.
11 So hopefully I will have my order today.

12 Until I issue my order -- it will be no later
13 than tomorrow by noon, I guarantee that -- Mr. Ward is
14 not to contact, or instruct any of his members to
15 contact, any of the clients listed on the confidential
16 client list. And I will issue an order either
17 granting or denying the request.

18 Mr. LeClercq, since you are requesting the
19 relief, if you would submit a proposed order. And the
20 easiest way for you to do that is by e-mail to my
21 clerk, Ms. Stinson Ferguson, and she is at
22 kharringtonsc e-mail.

23 Mr. LeClercq, please put the three reliefs that
24 you are seeking and then I will -- it's easier for me
25 to take them out than to add them.

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1 Mr. Meetze, in no way, by requesting that order,
2 am I indicating that I am going to grant the relief
3 requested. It just gives me a framework from which to
4 issue an appropriate order.

5 Mr. Meetze, I'm assuming that the simple way you
6 would like for me to rule is simply by a Form 4
7 denying the relief requested. That's why I'm not
8 putting the burden on you. You are welcome to submit
9 a proposed order, as well, assuming that I would grant
10 one of -- one, two, or three of the mentioned requests
11 for relief, but I am not requiring you to do so.

12 Mr. LeClercq, please make sure you copy Mr.
13 Meetze on all of your correspondence with my law
14 clerk.

15 Any questions on how we will proceed?

16 MR. LECLERQ: Thank you, Your Honor. I
17 appreciate that.

18 THE COURT: Any questions?

19 MR. LECLERQ: No, Your Honor.

20 THE COURT: You're clear? Mr. Meetze?

21 MR. MEETZE: Just to be clear: could you point
22 us out the confidential client list --

23 THE COURT: Yes.

24 MR. MEETZE: -- so I make sure that Mr. Ward is
25 aware of his obligations?

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1 MR. LECLERQ: Your Honor, we have not actually
2 provided that to them yet because of the -- we've
3 provided them redacted copies of this. But I will
4 provide -- the problem is we have not entered yet a
5 confidentiality agreement with them. But I
6 understand: how do they know who they can't contact.
7 Mr. Ward, in fact, we believe, does know who he can't
8 contact. But we would like to have it clearly set
9 out.

10 So what I would like to do today with opposing
11 counsel is to enter a confidentiality agreement and
12 then I'll provide him with the client list, you know,
13 no later than --

14 THE COURT: The confidentiality agreement is
15 only as to the -- for the purposes of this hearing so
16 that Mr. Ward may comply with the Court's order here
17 today, and only for the confidential client list that
18 you have provided the Court.

19 MR. LECLERQ: Thank you, Your Honor. I
20 understand, and will do that.

21 THE COURT: So it's for very limited purposes
22 and for a very limited time, Mr. Meetze. I understand
23 that. That just gives me a little more time to issue
24 my order and so that everybody is clear. In no way,
25 again, am I saying that I am issuing a TRO. But this

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1 gives everyone just a few moments -- or for the
2 remainder of the day, so that the Court can order --
3 issue an appropriate order.

4 MR. MEETZE: Just one quick additional matter,
5 Your Honor.

6 THE COURT: Yes, sir.

7 MR. MEETZE: In case the Court grants a
8 temporary injunction, we would ask that security be
9 posted. We have provided an affidavit of Mr. Ward,
10 which is attached to my memorandum, which states that
11 his yearly compensation is in the neighborhood of
12 \$130,000. He would also incur expenses pending this
13 action. So we would ask that a security be posted in
14 no less than the amount of \$250,000.

15 THE COURT: Counsel, your response to the
16 security must be posted, what would appropriate
17 security be?

18 MR. LECLERQ: Well, there are three legs to
19 this. If the Court were to grant a TRO on the
20 noninterference and non-solicitation, there should be
21 no bond posted at all because we don't believe that
22 Mr. Ward is going to be damaged by not contacting
23 and/or soliciting our clients. So we don't believe
24 that there's any appropriate bond in that situation.

25 In the case of his employment contract, I think

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1 that since we're asking the Court for an equitable
2 remedy, that the Court also has to consider the damage
3 that he has done to the client and the client's
4 financial ability to actually post that bond. Because
5 the fact that he has taken client -- all the clients
6 that are listed, that he's taken Client G, which was a
7 20,000-dollar annual client, that he's taken Client F,
8 which was a 25,000-dollar a month client; and that
9 Client A, which is a 30,000-dollar a month client,
10 that he's put -- they've now become a slow payer
11 because of Mr. Ward's contact of them. And because of
12 these financial damages, it seem -- would seem very
13 unjust that we make -- that the Court would force
14 Blackhawk to post a 250,000-dollar bond in such
15 circumstances, Your Honor.

16 THE COURT: All right. I will require the
17 security in an amount appropriate, after reviewing all
18 of the affidavits and the matters involved.

19 Anything further, counsel?

20 MR. LECLERQ: No, Your Honor. Thank you very
21 much.

22 MR. MEETZE: Thank you, Your Honor.

23 THE COURT: Thank you. Thank you Mr. Cone and
24 Mr. Ward.

25 [HEARING CONCLUDES AT 9:26 A.M.]

1

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the hearing before the Honorable Kristi L. Harrington, on 14th day of April, 2011.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 28th day of November, 2011.



Mia Perron, CVR-CM
Circuit Court Reporter
9th Judicial Circuit

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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO.: 2011-CP-08-1078

BLACKHAWK LOGISTIC, LLC,)
)
 PLAINTIFF,)
)
VS.)
)
JERRY WARD,)
)
 DEFENDANT.)

MOTION FOR TEMPORARY AND PERMANENT INJUNCTION

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Monday, April 25, 2011, Commencing at 1:10 p.m.

SUSAN "MIA" PERRON, CVR-CM
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CERTIFICATE OF COURT REPORTER

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EXHIBITS

[None]

PROCEEDINGS

THE COURT: All right. We're here on the ten-day hearing. I'll be happy to hear from you, counsel.

MR. LECLERCQ: Thank you, Your Honor. Ben LeClercq, on behalf of Blackhawk Logistics. I'm joined at the table by Benjamin Cone, III. He's the general manager of Blackhawk Logistics.

Your Honor, we're here today to ask for the Court to turn the temporary restraining order that is already granted into a temporary injunction, and we believe that all of the factors that we described at the previous TRO hearing apply.

Upon further review of Rule 65, Your Honor, we don't believe that it's necessary that the Court, in fact, turn a TRO into a temporary injunction because the rule says that the TRO can be extended if the Court believes that that is necessary. The Court granted --

THE COURT: Mr. LeClercq, is it your belief that it remains a temporary restraining order, or does it convert into a permanent until the merits, or what is it -- what is your position at this time?

MR. LECLERCQ: Our position would be that it continues as a temporary restraining order until there is a hearing on the merits and a final adjudication by

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1 the Court. And that's -- if there's any doubt on that
2 matter, we would ask for a clarification on that
3 issue.

4 Now, the Court granted our request for the non-
5 interference and the non-solicitation clauses based on
6 the evidence that we produced at the TRO hearing, all
7 of which is just as valid today as it was in that
8 hearing. So there wouldn't be any reason, from our
9 perspective, not to go ahead and either renew the TRO
10 or turn it into a temporary injunction, which would go
11 through to a trial on -- an adjudication on the merits
12 by a court.

13 And, again, we would just like to emphasize that
14 Mr. Ward's employment and his actions that the Court
15 has enjoined, that's not more important than the
16 employment of twenty-four employees of Blackhawk who
17 are threatened greatly, frankly, by his actions.

18 And so we would ask simply that the TRO be
19 extended through an adjudication on the merits or that
20 it be turned into a temporary injunction. Thank you,
21 Your Honor.

22 THE COURT: All right. Counsel, if you'll state
23 your name for the record and the party you represent.

24 MR. MEETZE: Thank you, Your Honor. Marcus W.
25 Meetze, on behalf of the defendant, Jerry Ward. I'm

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1 joined by co-counsel, Charlie Altman. And Defendant
2 Jerry Ward is also present in the courtroom today.

3 Your Honor, we're here today asking that
4 plaintiff's motion be denied for a temporary
5 injunction, as a TRO has already been issued.

6 In December of 2009, my client was wrongfully
7 terminated from Blackhawk Logistics, LLC. This is
8 evidenced by two findings from the South Carolina
9 Employment -- South Carolina Department of Employment
10 and Work Force, which found that Mr. Ward's
11 termination with Blackhawk LLC was without cause.

12 Now a year and four months after Mr. Ward has
13 been terminated without cause from Blackhawk Logistics
14 LLC, we're back before the Court today. And they're
15 seeking to restrain Mr. Ward from earning a living in
16 the only business he's been employed in for thirty
17 years.

18 Mr. Ward had an opportunity to join Blackhawk
19 Logistics LLC in 2009. Mr. Ward was the only member
20 of Blackhawk Logistics LLC with any experience in the
21 third-party logistics area. Mr. Ward came, built the
22 business up, but due to financial mismanagement by the
23 other members of Blackhawk Logistics LLC the business
24 began to deteriorate.

25 Once they wrongfully terminated Mr. Ward, the

1 only contact -- the only member of the LLC with
2 substantial contacts in the third-party logistics
3 industry, the business started deteriorating even
4 greater, resulting in substantial litigation with
5 their landlord, and eventually were locked out by
6 their landlord.

7 Now, we're here today because we feel that, [a],
8 Mr. Ward has not violated the plain terms of the non-
9 compete agreement, which was clear in the TRO that was
10 issued by this Court. Mr. Ward is not involved in
11 medical outsourced billing, which was presented in the
12 non-compete clause in two separate occasions which
13 referred to outsourced billing. So we feel that issue
14 has been ruled upon and we don't need to discuss that
15 one any further.

16 But what we would argue is that the other two
17 restrictive covenants contained within the employment
18 agreement are also unenforceable because they violate
19 public policy of this state.

20 Now, in order for the plaintiff to win today, he
21 must show that he has a substantial likelihood of
22 success on the merits in order for this temporary
23 injunction to be granted. And he failed to do that.

24 The South Carolina Supreme Court, in Delmar
25 Studios vs. Kinsey, held that the party seeking to

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1 enforce or restrict a covenant in an employment
2 agreement has the burden to show five things. One,
3 that it is necessary for the protection of the
4 legitimate interest of the employer; and, two, that it
5 is reasonably limited in its operation with respect to
6 place and time; three, that it's not unduly harsh and
7 oppression in curtailing the legitimate efforts of the
8 employee to earn a livelihood; four, that it's
9 reasonable from the standpoint of --

10 THE COURT: Can you slow down just a little bit?

11 MR. MEETZE: Sure.

12 THE COURT: Thank you.

13 MR. MEETZE: Four, that it is reasonable from
14 the standpoint of sound public policy; and, five, that
15 it is supported by valuable consideration.

16 We're only concerned with the first two prongs
17 of this test today: one, that it is necessary for the
18 protection of a legitimate interest of the employer;
19 and, two, that it is reasonably limited in its
20 operation with respect to place and time.

21 Now, the South Carolina Court of Appeals, in the
22 case of Boutique Limited vs. Gibbs, held that an
23 overly-broad restrictive covenant in an employment
24 agreement was unenforceable. The employee in Faces
25 [phonetic] had been hired to perform facials for the

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1 employer. The employee left, went to work for another
2 business, performed manicures. But because the other
3 business derived some of its income from facials the
4 former employer sued, trying to enforce the
5 restrictive covenant. The Court held that any
6 restrictive covenant that would prevent the employee
7 from working in a field that doesn't compete with a
8 former employer is overly broad and does not protect
9 the legitimate interest of the employee.

10 That's exactly what we have here today. They
11 are seeking to prevent Mr. Ward from working in any
12 capacity in the field of third-party logistics.
13 Mr. Ward is currently employed by Pratt Industries
14 Inc., which is a paper manufacturer. They are a
15 paper, packaging, and resource recovery company --

16 THE COURT: Well, Mr. Meetze, didn't I address
17 that issue that I'm not going to order that he cease
18 employment with that company? What my order said was
19 he's not to interfere with previous clients and
20 contacts that he had while he was employed with
21 Blackhawk.

22 MR. MEETZE: Yes, Your Honor. But that presents
23 an issue for our client. For example, several of the
24 former vendors of Blackhawk Logistics had trouble
25 communicating with Blackhawk about past debts that are

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1 owed to them, so they've contacted Mr. Ward because
2 they had Mr. Ward's contact information from when he
3 was an employee of Blackhawk. Now, according to the
4 terms that the plaintiff has proposed, if Mr. Ward has
5 any communication with those former vendors, even if
6 it means to say that, I can't talk to you about this,
7 that is indirectly interfering with the business
8 relationship of Blackhawk.

9 In effect, if we held that the non-solicit and
10 non-interference were valid but the non-compete was
11 not, it would have the exact same effect. Mr. Ward
12 would not be able to communicate to vendors that he
13 currently does business with, that have no
14 relationship with Blackhawk, former customers of Pratt
15 Industries that are no longer business -- that are no
16 longer customers of Blackhawk. It's overly broad in
17 what its trying to prevent Mr. Ward from doing.

18 THE COURT: My order -- and I crafted it with
19 the intent that Mr. Ward is to be limited from
20 soliciting business or interfering with business of
21 Blackhawk.

22 MR. MEETZE: And we would seek the Court's
23 clarification on what exactly Mr. Ward's obligation
24 is, particularly concerning former vendors of
25 Blackhawk who are still contacting Mr. Ward regarding

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1 past-due accounts from Blackhawk. Whether the Court
2 would ask to specifically have Mr. Ward direct the
3 inquiries from the vendors to Mr. LeClercq, we would
4 be happy to do that.

5 But our concern is with language that says it's
6 directly or indirectly interfering or -- with the
7 business of Blackhawk. We don't want our client
8 paranoid about communications with third-party vendors
9 that really aren't interference with the business of
10 Blackhawk.

11 THE COURT: If he's not interfering, Mr. Meetze,
12 than what's the issue?

13 MR. MEETZE: The issue is that we don't want to
14 have Mr. Ward to have to incur any substantial costs
15 to be brought back in on a contempt hearing because
16 he's had communications with vendors at Blackhawk,
17 because the order prevents him from communicating with
18 any vendors from Blackhawk. And certain vendors of
19 Blackhawk are also vendors of Pratt.

20 THE COURT: It prevents him from communicating
21 with the intent to interfere with business of
22 Blackhawk.

23 MR. MEETZE: So if he has to -- again, we're
24 just seeking the Court's clarification. If he has
25 communications with third-party vendors concerning

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1 debts at Blackhawk, then that's not considered
2 interfering with the business relations of Blackhawk?

3 THE COURT: Why would he need to talk about
4 Blackhawk's business if he's --

5 MR. MEETZE: Because the --

6 THE COURT: -- not currently employed --

7 MR. MEETZE: -- creditors of Blackhawk are under
8 the mistaken impression that Mr. Ward is a personal
9 guarantee on some of the debts of Blackhawk Logistics
10 LLC because he was a member of the LLC and executed
11 certain loan documents on behalf of the company. So
12 they're contacting him under the mistaken assumption
13 that Mr. Ward is personally obligated on those debts.

14 THE COURT: Well, it would seem to me that in
15 that scenario, Mr. Meetze, it would be to Mr. Ward's
16 benefit to have those individuals contact Mr.
17 LeClercq. Wouldn't you agree?

18 MR. MEETZE: Well, they have -- they have
19 contacted my client.

20 THE COURT: Or to contact you and you filter it
21 through?

22 MR. MEETZE: But they have had contact with
23 my client because they cannot get response from
24 Mr. LeClercq and Blackhawk Logistics LLC. That's the
25 reason they turn to my client for communication.

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1 THE COURT: Well, Mr. Meetze, I do not intend to
2 -- and I hope that you are not asking the Court to
3 address every possible plausible conversation that
4 could be had by vendors dealing with your client, are
5 you?

6 MR. MEETZE: We would ask for a nearly-drafted
7 order to that effect so my client has a clear
8 guideline as to what he can and cannot do.

9 THE COURT: Mr. Meetze, in that particular
10 scenario, how is that interfering if he simply accepts
11 a phone call and then refers the individual to the
12 appropriate attorney, either to you or to Mr.
13 LeClerc?

14 MR. MEETZE: Beg the Court's indulgence.

15 THE COURT: Yes, sir.

16 [Whereupon, Mr. Meetze and Mr. Altman confer]

17 MR. MEETZE: Well, the list that was provided to
18 my client says it's included but not limited to
19 certain members identified on vendor list and customer
20 contact list. If it's including but not limited to,
21 then I'm not sure who my client can contact because we
22 -- when we have a definite list of people, that's
23 clear and if it's just the names included on that
24 list, my client can certainly not contact the names on
25 that list.

1 THE COURT: Mr. LeClercq, are there other
2 individuals that you have belief -- because my
3 understanding was the confidential list of clients
4 that you provided was the only one that you had proof
5 that Mr. Ward was contacting. Is that correct?

6 MR. LECLERQ: That's correct, Your Honor.

7 But let me clarify because -- this issue of the
8 confidential list. We provided a confidential client
9 list to the Court, as well as to opposing counsel, of
10 just the customers, the existing customers, very
11 narrowly, that we don't want him interfering with that
12 are the known customers. However, we believe that Mr.
13 Ward knows all of the customers of Blackhawk because
14 he was president and general manager for almost three
15 years. And so we believe that the Court's language,
16 including without limitation the confidential list of
17 clients, is entirely appropriate because he knows who
18 the customers are. He shouldn't be allowed to contact
19 Blackhawk customers.

20 Now, we did not provide opposing counsel or the
21 Court, at the time of the last hearing, with the
22 Blackhawk employees list or the vendors list. We
23 provided those via e-mail the next day. And so to the
24 extent that paragraph 1 on page 4 of the order says
25 that Blackhawk's relationships with its current

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1 employees and vendors provided to defendant at the
2 hearing: it was actually subsequent to the hearing
3 that the vendors list and the employees list was
4 provided to opposing counsel. But, again, that -- and
5 I understand from opposing counsel that they don't
6 object to the employee list. Those are Blackhawk --
7 those are Blackhawk's employees and owner/operators.

8 And as to the vendors, no vendors that I'm aware
9 of, with the exception of one, have contacted me and
10 said, well, we haven't gotten any response from you.
11 So I object to opposing counsel's characterization of
12 that.

13 And, again, all we're asking is for the Court to
14 enforce the TRO that it's already entered and turn
15 that into a temporary injunction or just decide that
16 there is good cause for him to continue that TRO.

17 And the fact is that Ward was the president and
18 the general manager of the company for three years.
19 So under the Delmar case, which we provided to the
20 Court previously, that merits a much broader scope of
21 the geographic clause and the provisions that are at
22 issue here. And we believe that they're entirely
23 irrelevant under these circumstances.

24 So they're -- opposing counsel has mentioned
25 some things related to the landlord that I don't

1 believe are relevant here, so I'm not going to address
2 them unless the Court would like me to.

3 THE COURT: All right. Mr. Meetze, I did not
4 mean to interrupt you. I just wanted some
5 clarification.

6 MR. MEETZE: To address just real briefly a
7 matter: the TRO that was issued in this case was
8 issued without a bond. We requested a bond in the
9 amount of \$250,000, pointing to Rule 65(c) which
10 states that except in divorce, child custody and non-
11 support actions where the giving of security is
12 discretionary, no restraining order or temporary
13 injunctions are issued except upon the giving of
14 security.

15 We also have cited the case of Atwood Agency v.
16 Black, 374 S.C. 68, 646 S.E.2d 82. That was in the --
17 and the Court held that the posting of a 250-dollar
18 nominal security bond did not satisfy the civil
19 procedure rule requiring security for the granting of
20 a TRO. But that's a procedural issue that I just
21 wanted to address for the Court briefly.

22 And we've -- as we feel we've demonstrated, that
23 the restricted covenants contained in the employment
24 agreement are strictly over-broad and unenforceable,
25 we would ask that the TRO be dissolved, that

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1 plaintiff's motion be denied, and any further relief
2 the Court deems appropriate.

3 THE COURT: Mr. LeClercq?

4 MR. LECLERQ: Your Honor, the issue of the bond
5 is to me very -- is clear-cut. In South Carolina, a
6 judge has got the discretion to decide what a bond
7 should be. We don't believe that there's any reason
8 to post a bond to keep Jerry Ward from talking to
9 Blackhawk's customers or soliciting its employees.

10 Mr. Ward knew what he was signing when he signed
11 it, and the -- because -- we're not asking the Court
12 anything related to the non-compete agreement. We
13 believe that because he has unclean hands, that
14 there's absolutely no reason to post a bond in this
15 situation. And, again, the employment of Mr. Ward and
16 his ability to contact third parties is simply not
17 more important than the twenty-four employees of
18 Blackhawk --

19 THE COURT: But doesn't --

20 MR. LECLERQ: Thank you, Your Honor.

21 THE COURT: -- the rule require that a bond
22 shall be issued?

23 MR. LECLERQ: Judge, we believe that the rule
24 that a bond is set upon the -- it's within the
25 discretion of the Court as to what the amount of the

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1 bond is or if there shall -- if there shall be any
2 bond. And we don't understand why there's -- why
3 there should be a bond. What damages could be done to
4 Mr. Ward by not contacting our customers or contacting
5 our employees? I just don't see how -- now, if we're
6 talking about whether he could be employed, I would
7 understand that there might possibly be a bond but not
8 in a situation where he's simply restrained from
9 contacting employees or soliciting our customers or
10 clients.

11 THE COURT: All right. And just so the record
12 is clear, the Court considered -- in the bond that was
13 issued -- because I agreed that there has to be a bond
14 issued that is appropriate under the rule, considering
15 the Court did not set -- actually set a bond of no
16 amount because the Court, based upon the granting of
17 the TRO, did not feel that a bond was required.

18 Gentlemen, I'm going to take this matter under
19 advisement.

20 [Off the record momentarily]

21 THE COURT: Mr. Meetze, do you have a question?

22 MR. MEETZE: Mr. Altman has asked that we seek
23 clarification. Mr. Ward was terminated from
24 employment at Blackhawk in December of 2009. They're
25 trying to push the date back to April of 2010, based

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1 on the notification to an attorney. We would just ask
2 the Court to accept the date of Mr. Ward's wrongful
3 termination as December of 2009.

4 THE COURT: And do you --

5 MR. MEETZE: Your Honor, the two years would
6 begin to run in December of 2009 to December of 2011,
7 if the Court finds that the employment agreement is
8 enforceable.

9 THE COURT: All right. And so the exact date?
10 December --

11 MR. MEETZE: December 8th of 2009 is when Mr.
12 Ward was terminated. We would ask that the terms --
13 if the agreement is found to be enforceable, the terms
14 would run from December 8th, 2009, to December 8th of
15 2011.

16 THE COURT: Mr. Meetze, was there a period that
17 your client worked -- was employed but was not
18 working? Do you understand my question? Prior to the
19 December 8th date, was there some sort of perhaps
20 leave of absence or anything prior to that date?

21 MR. MEETZE: May I confer with my client real
22 quick, Your Honor?

23 [Whereupon, Mr. Meetze and client confer]

24 MR. MEETZE: Your Honor, Mr. Ward did receive
25 full compensation for two weeks after the December 8th

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1 deadline so we would ask that it be pushed back to an
2 additional fourteen days, to make it the 22nd.

3 THE COURT: But December 8th was the last day he
4 was actually in the office?

5 MR. MEETZE: Last day he was --

6 THE COURT: That was my question. Perhaps --

7 MR. MEETZE: -- actually in the office.

8 THE COURT: -- it wasn't clear. I'm sorry.

9 Thank you, Mr. Meetze.

10 Anything further?

11 MR. LECLERQ: Yes, Your Honor.

12 THE COURT: Yes.

13 MR. LECLERQ: Your Honor, Mr. Ward -- and these
14 documents are already before the Court and have been
15 filed but we'll provide other copies as courtesy
16 copies.

17 Mr. Ward was suspended on December the 9th of
18 2009. And that letter of suspension is in the file.
19 He was then terminated on April the 2nd of 2010. And
20 so he was paid subsequent -- as admitted by him, he
21 was paid subsequent to the time of his suspension.

22 He was ordered to do things during that time
23 period of December, January, and February, which he
24 didn't do. He was ordered to tell the managers with
25 whom he was contacting, other things like that. He

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1 did not do that. There's a lot of exchange of e-mails
2 during that time. He was --

3 THE COURT: December -- December 8th of 2009 was
4 the last time that he was actually conducting business
5 on behalf of Blackhawk; is that correct?

6 MR. LECLERQ: That is not correct, Your Honor.
7 Because we had -- the managers had asked him
8 subsequent to that time, during his suspension and --
9 for him to show good faith, to give reports as to the
10 parties that were contacting him and that who he -- he
11 was contacting on behalf of Blackhawk.

12 There was some limited response by him but, by
13 and large, it was not an effective response. That was
14 one of the reasons why, in fact, he was terminated
15 from Blackhawk.

16 But there is a letter of termination -- which is
17 in the file -- on April the 2nd, which lists the ten
18 or fifteen different reasons that he was terminated.
19 And --

20 THE COURT: All right. Counsel, what was he --
21 was he having contact with clients and acting on
22 behalf of Blackhawk from December 8th to April of
23 2010?

24 MR. LECLERQ: We believe that he was in contact
25 with --

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Blackhawk Logistics, LLC, v. Jerry Ward
Motions Hearing
April 25, 2011

1 THE COURT: All right. Not what you believe.
2 Was he ordered to do so is --

3 MR. LECLERQ: He was not -- he was ordered the
4 other way, not to contact anybody. But he was ordered
5 if anybody contacted him, that he was to report that
6 contact.

7 THE COURT: All right. Thank you.

8 MR. LECLERQ: Thank you, Your Honor.

9 THE COURT: Thank you.

10 [HEARING CONCLUDES AT 1:32 P.M.]
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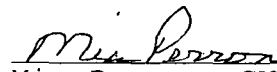
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the hearing held before the Honorable Kristi L. Harrington, on Monday, April 25th, 2011.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 28th day of November, 2011.


Mia Perron, CVR-CM
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
BLACKHAWK LOGISTICS, LLC,	)	CIVIL ACTION NO.: 2011-CP-08-1078
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JERRY WARD,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR A TEMPORARY AND PERMANENT INJUNCTION**

Defendant Jerry Ward, by and through undersigned counsel, submits this memorandum on opposition to Plaintiff Blackhawk Logistics, LLC's motion for a temporary and permanent injunction. In opposition to said motion, Defendant states as follows:

I. Plaintiff's motion should be denied, or, in the alternative, continued as Plaintiff has failed to comply with the South Carolina Rules of Civil Procedure.

On April 6, 2011, Plaintiff's counsel sent an email to the Honorable Kristi L. Harrington, attaching a copy of an unverified complaint and requesting an emergency hearing on a motion in the Complaint. A copy of the email is attached as Exhibit "A" and incorporated herein by reference. It appears a Complaint was also filed in the Court of Common Pleas on the same day. Defendant's counsel, though not yet retained by Defendant, was copied on the email to Judge Harrington. On April 7, 2011, counsel for Defendant contacted Plaintiff counsel to inquire as to whether Plaintiff's counsel represented Jerry Ward and was informed that while Defendant's counsel had represented Jerry Ward in the past, it had not been retained as to this particular

matter. On April 8, 2011, Defendant Jerry Ward retained Altman & Coker, LLC to represent him in this matter. By email of same date, Defendant's counsel notified the Court of Defendant's objections to the a hearing on Plaintiff's motion being held at 9:00 a.m. on Monday, April 11, 2011. A copy of the email is attached as Exhibit "B".

A. Defendant has not been served with the pleadings.

Rule 3(a), SCRCF provides that a civil action is commenced when the Summons and Complaint have been filed with the Clerk of Court and the Summons and Complaint are served within the statute of limitations. While it appears from the electronic records of the Berkeley County Clerk of Court that a Summons and Complaint were filed with the Clerk of Court, Defendant Ward has yet to be served with the pleadings. It is important to note that Plaintiff has failed to serve Defendant even though the copy of the unfiled complaint provided to Defendant's counsel makes reference to both the Defendant's home and work address. No attempt to serve Defendant's counsel was ever made by Plaintiff. As Defendant Ward has never been served with the Summons and Complaint, a action against him has not been commenced and the Court lack jurisdiction over Defendant Ward.¹

B. Plaintiff's motion is not supported by from specific facts shown by an affidavit or by a verified complaint.

As an initial matter, Defendant is uncertain if Plaintiff's motion is for a temporary restraining order or for a temporary injunction as Defendant has not been served with a time stamped copy of any complaint or motion. To the extent the motion is for a temporary restraining order, the motion is flawed. Rule 65(b), SCRCF provides:

¹Upon information and belief, no attempt was made by Plaintiff to serve Defendant until Plaintiff attempted to serve Defendant at his personal residence on April 10, 2011 at approximately 8:00 p.m. Defendant was not at home.

No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

The copy of the complaint provided to Defendant's counsel via electronic mail was not stamped verified. The affidavits attached as exhibits to the complaint were not signed before a Notary Public; accordingly, Plaintiff's motion is not supported by verified complaint or by affidavit and it therefore fatally flawed.

C. Defendant has not been provided with proper notice.

To the extent Plaintiff's motion is for a temporary injunction, Rule 65(a), SCRCP provides that no temporary injunction shall be issued without notice to adverse party. Rule 6(d), SCCP provides that a written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served no later than then days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. As a motion for a temporary injunction requires notice, it may not be heard *ex parte*, and Defendant is entitled to at least 10 days notice of the hearing.

Plaintiff's counsel has argued that Defendant was on actual and/or constructive notice as Defendant's counsel, who had yet to be retained, was copied on the April 6, 2011 email from Plaintiff's counsel to the Court. It is without question that emailing a copy of a pleading is not a proper form of service; but assuming *arguendo* that Plaintiff's email to the Court was sufficient to provide Defendant notice, the evidence clearly shows Defendant was provided informal notice on April 7, 2011 of the hearing scheduled for April 10, 2011, less than ten (10) days before the hearing.

II. Plaintiff's motion should be denied as Plaintiff has failed to establish the elements necessary for the issuance of a temporary injunction.

A preliminary injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Levine v. Spartanburg Regional Services Dist., Inc., 626 S.E.2d 38 (S.C. Ct. App. 2005). For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 603 S.E.2d 905 (S.C. 2004).

A. Plaintiff has failed to demonstrate it would suffer irreparable harm if the injunction is not granted.

"The facts alleged on a motion for temporary injunctive relief must be sufficient to support a temporary injunction, and the injunction must be reasonably necessary to protect the rights of the moving party. Atwood Agency v. Black, 646 S.E.2d 882 (S.C. 2007). Plaintiff has produced no evidence it will suffer irreparable harm if the temporary injunction is not issued. While the Plaintiff has produced two documents which purport to be affidavits of employees of Plaintiff, neither document is notarized and therefore are not sworn statements and therefore not affidavits. The only "evidence" contained within the documents which purport to be affidavits are hearsay statements made by employees of Plaintiff. Additionally, Plaintiff filed an unverified Complaint.

B. Plaintiff has failed to demonstrate it will likely succeed on the merits as to its claims of breach of the Employment Contract.

In order to show it is entitled to a temporary injunction, Plaintiff must show a likelihood of success on the merits of the underlying case. In this matter, Plaintiff must show it is likely to

succeed on its claims the Defendant breached the terms of the Employment Agreement Defendant entered with Plaintiff. Plaintiff has alleged Defendant violated Section 6 of the Employment Contract, specifically Section 6(a) (hereinafter "Non Compete Clause"), Section 6(c) (hereinafter "Non Solicit Clause").

- i. Plaintiff is not likely to succeed as to its claims of breach of the Non Compete Clause as Defendant has not violated the plain terms on the Non Compete Clause.

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 Non Compete Clause provides:

Employee shall not directly or indirectly, individually or as a partner, employee, stockholder, consultant, agent, officer, director, advisor or in any capacity, compete with the Employer in any business engaged in outsourced medical billing or outsourced collections of medical invoices.

Defendant is not currently employed in the field of outsourced medical billing or outsourced collections of medical invoices. See Exhibit "C", Affidavit of Jerry Ward, at ¶ 7. Defendant is not in breach of the plain terms of Section 6(a).

Plaintiff has alleged the language of Section 6(a) was a "scrivener's error" and the Court should "blue pencil" the Employee Agreement. South Carolina Courts have consistently 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 Investments v. Century Builders, Op. No. 26821 May 24, 2010.

Plaintiff further alleges the language contained within Section 6(a) was a mutual mistake, but Defendant was aware at the time he signed the Employment Agreement it contained the clause quoted above. See Exhibit "C", Affidavit of Jerry Ward, at ¶5. In fact, Defendant discussed the specific language of the Employment Contract with Rogers Drake, a member of Plaintiff, who presented the Employment Agreement to Mr. Ward. See Id. at ¶6. Defendant was presented two (2) separate occasions, once in 2005 and once in 2007, both times the Employment Agreement contained the same language.

- C. In the event the Court decides to blue pencil the Employment Agreement, the Plaintiff still would not have a likelihood of success on the merits as to the enforceability of the Employment Agreement.

In Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313 (1958), the South Carolina Supreme Court laid out the elements the Court held that in order for a litigant to establish the enforceability of a non-compete covenant, the burden is on the party seeking enforcement of the non-compete covenant to show the covenant is:

- a. necessary for the protection of the legitimate interest of the employer;
 - b. reasonably limited in its operation with respect to time and place;
 - c. not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
 - d. reasonable from the standpoint of sound public policy; and
 - e. supported by valuable consideration
- i. Plaintiff has failed to demonstrate the protection of a legitimate interest of the employer as the Non Compete Clause is overly broad.

In Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995), the Court found an overly broad restriction unenforceable. The Court found that a non-compete which prevents the employee from working in a capacity that is not competitive with their former employer is too broad.

Plaintiff argues the Employment Agreement be "blue penciled" to substitute the language "third-party logistics, including warehousing and transportation". If this language is inserted into the agreement, the language would be overly broad. It would restrict Defendant from working in any capacity of the logistics fields, including capacities that would not be competitive to Plaintiff.

- ii. Plaintiff has failed to demonstrate the Non Compete Clause is reasonably limited in its operation with respect to time and place.

Section 6 of the Employment Agreement imposes a territorial restriction of "any county which is home to a sea port or any county directly adjoining a county which is home to a sea port in the States of South Carolina, Georgia or Virginia. A geographic restriction of any area which covers three states is overly broad. If the territorial scope of restraint is unreasonable, no inquiry need be made as to the presence or absence of other necessary requirements." Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992)

The South Carolina Supreme Court has held that a state wide prohibition when the employee's dealings with occurred in only two counties was overly broad. Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961). Plaintiff's sole place of business is in Berkeley County. See Exhibit "C" at ¶ 3. Any restriction that would prevent Defendant from working in 3 states is simply not reasonably limited in its operation with respect to time and place.

- iii. Plaintiff has failed to demonstrate that the Non Compete Clause is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

As Plaintiff has failed to prove the Non Compete Clause is reasonable with regards to the scope of the activities it seeks to prevent and with regards to its territorial scope, Plaintiff has also failed to meet its burden with regard to show the Non Compete Clause is not unduly harsh and oppressive in curtailing the legitimate efforts of Defendant to earn a livelihood.

- D. Plaintiff has failed to demonstrate it will likely succeed on the merits as to its claims of breach of non-interference and/ or solicitation clauses of the Employment Agreement.

Plaintiff has also alleged Defendant has breached Section 6(b) of the Employment Agreement by divulging trade secrets and/or confidential information of Plaintiff. None of the "evidence" produced by Plaintiff substantiates this claim. The only alleged correspondence produced shows that any information disclosed by Defendant was matter of public record, specifically, that Plaintiff was a party to a eviction lawsuit filed in Magistrate's Court in Berkeley County. This information was not confidential, not a trade secret and by Plaintiff's own admission it is party to a lawsuit involving a Rule to Show Cause filed by its landlord. See Complaint, ¶ 25. Based upon the record, Plaintiff has failed to demonstrate it will likely succeed on its claims that Defendant has breached Section 6(b) or Section 6(c) of the Employment Agreement.

III. In the event Plaintiff's motion is granted, Plaintiff is required to post a bond.

Rule 65(c), SCRPC provides:

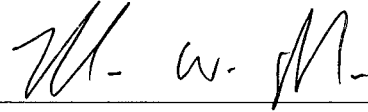
Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Mr. Ward's currently yearly compensation, including health benefits and commissions, totals approximately \$130,000.00. If it is found Mr. Ward was wrongfully enjoined from earning a living in his lifelong occupation, he would be damaged by the loss of his wages, as well as attorney's fees and costs incurred in litigation; therefore, Defendant requests the Court order Plaintiff post security in an amount no less than \$250,000.00.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests Plaintiff's motion be denied, for costs associated with the defense of this matter and for such other and further relief as the Court deems appropriate.

ALTMAN & COKER, LLC



Charles S. Altman

caltman@altmancoker.com

Meredith L. Coker

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Marcus W. Meetze

wmeetze@altmancoker.com

Post Office Box 265

Charleston, South Carolina 29402

843-853-9907

843-853-9838 Facsimile

Attorney for Defendant

April 11, 2011

EXHIBIT A

Wes Meetze

From: Ben Whaley Le Clercq [leclercqb@bellsouth.net]
Sent: Wednesday, April 06, 2011 3:13 PM
To: 'Judge K Harrington'
Cc: wmeetze@altmancoker.com
Subject: Attached Courtesy Copy of Complaint and Emergency Motion for Injunctive Relief of Blackhawk Logistics, LLC against Defendant Jerry Ward, with Exhibits
Importance: High
Attachments: Complaint as FILED 4 6 11.pdf; Summons 4-6-11.pdf; Civil Cover Sheet.pdf; Exhibit 1- Cone Affidavit Executed.PDF; Exhibit 2- Employment Agreement.pdf; Exhibit 3-Termination Letter.pdf; Exhibit 4- Google Search.PDF; EXHIBIT 5 REDACTED.pdf; Exhibit 5b- Response Email.pdf; Exhibit 6 Jason Craig Affidavit signed.pdf; EXHIBIT 7 Redacted.pdf; EXHIBIT 8 REDACTED.pdf; EXHIBIT 9 client F blue containers chez Pratt.pdf; Exhibit 10 Bill of Lading to Pratt re Client F.PDF; Exhibit 11 Transcript of Ward Deposition.pdf

Dear Judge Harrington,

I represent Blackhawk Logistics, LLC, the Plaintiff in the above styled matter. Blackhawk is a third party logistics company in Hanahan, I spoke this morning with Ms. Ferguson of your chambers, and she suggested that I email the attached documents to you. I have copied Marcus Meetze, Esquire, an attorney with Altman and Coker, on this message, as I believe he may be counsel for Defendant Jerry Ward.

Given the incredible damage done by Ward to my client Blackhawk as a result of Ward's flagrant breach of an Employment Agreement executed in favor of Blackhawk, which damage threatens the very survival of my client and the continued employment of its 24 employees, you will note in the attached documents that we have requested emergency injunctive relief.

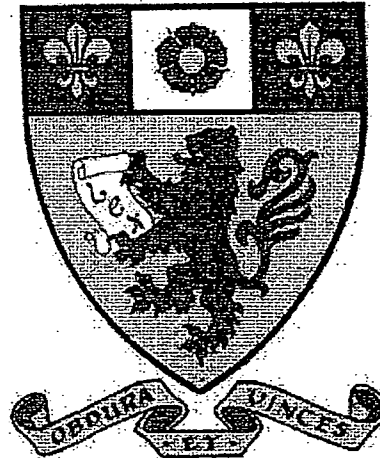
We are very hopeful of obtaining an emergency hearing on this matter at your very earliest convenience.

My law clerk is leaving now to file the attached documents at the clerk of court in Berkeley County.

Please do not hesitate to contact me with questions or comments.

Respectfully submitted,

Ben Whaley Le Clercq, J.D., LL.M.
353 North Shelmore Suite 260
Mount Pleasant, South Carolina 29464
(843) 722-3523
(843)720-3197 fax
www.LeClercqlaw.com



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EXHIBIT B

Wes Meetze

From: Wes Meetze [wmeetze@altmancoker.com]
Sent: Friday, April 08, 2011 3:56 PM
To: 'Ben Whaley Le Clercq'; 'Judge K Harrington'
Cc: 'Charles S. Altman'
Subject: RE: Attached Courtesy Copy of Complaint and Emergency Motion for Injunctive Relief of Blackhawk Logistics, LLC against Defendant Jerry Ward, with Exhibits

Dear Ms. Stinson:

My firm has been retained to represent Mr. Ward in this matter. After reviewing the courtesy copy of the pleadings attached, there appear to be numerous procedural deficiencies that would prevent this matter from being heard on Monday.

A. My client has never been served with the pleadings.

Rule 3(a), SCRCP provides that a civil action is commenced when the Summons and Complaint have been filed with the Clerk of Court and the Summons and Complaint are served within the statute of limitations. As my client has never been served, a action against him has not been commenced.

B. A Motion for a Temporary Injunction requires proper notice.

Rule 65(a), SCRCP provides that no temporary injunction shall be issued without notice to adverse party. Rule 6(d) provides that a written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than then days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. As a Motion for a Temporary Injunction requires notice, it may not be heard ex parte, and my client is entitled to at least 10 days notice of the hearing.

Based on the procedural defects listed below, we object to the hearing on Monday and respectfully request the hearing be postponed until such time as the Plaintiff has complied with the Rules of Civil Procedure.

If you have any questions, please do not hesitate to contact me.

With kind regards,

Marcus W. "Wes" Meetze, Esquire
Altman & Coker, LLC
P.O. Box 265 (29402)
575 King Street, Suite A
Charleston, South Carolina
Phone: (843) 853-9907
Fax: (843) 853-9838
Email: wmeetze@altmancoker.com

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EXHIBIT C

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

BLACKHAWK LOGISTICS, LLC,)
)
Plaintiff,)

CIVIL ACTION NO.: 2011-CP-08-_____

vs.)

JERRY WARD,)
)
Defendant.)

AFFIDAVIT OF JERRY WARD

COMES NOW AFFIANT, Jerry Ward, and after being duly sworn, does hereby affirm
and state as follows:

1. I am a minority member of Blackhawk Logistics, LLC.
2. In August 2005, I assumed the role of President and General Manager of
Blackhawk Logistics, LLC.
3. Blackhawk Logistics, LLC's sole place of business is in Berkeley County, South
Carolina.
4. At the time I became associated with Blackhawk Logistics, LLC, I entered into an
Employment Agreement.
5. I was aware at the time I signed the Employment Agreement, it contained a
provision in Section 6(a) that stated "[e]mployee shall not directly or indirectly, individually or as
a partner, employee, stockholder, consultant, agent, officer, director, advisor or in any other
capacity, compete with the Employer in any business engaged in outsourced medical billing or
outsourced collections of medical invoices."

6. I discussed Section 6(a) with Hamilton Rogers Drake, a member of Milestone, LLC - the majority member of Blackhawk Logistics, LLC and was informed the provision was inserted for protection of Milestone, LLC.

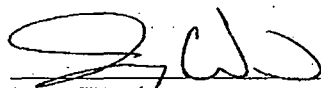
7. I am not currently employed in the field of outsourced medical billing or outsourced collections of medical invoices.

8. In December 8, 2009, I was informed that I had been suspended from my duties as President and General Manager of Blackhawk Logistics, LLC.

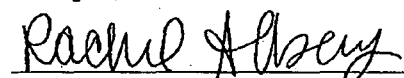
9. During the time I have been employed by Pratt Industries (USA), Inc., I did not initiate any contact with current or past customers of Blackhawk Logistics, LLC in an effort to solicit their business.

10. I am currently employed Pratt Industries (USA), Inc. My yearly compensation, including health benefits and commissions, totals approximately \$130,000.00.

FURTHER AFFIANT SAYETH NAUGHT.


Jerry Ward

SWORN TO before me this 8 day
of April, 2011.


Notary Public for South Carolina
My commission expires: 01/18/2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

BLACKHAWK LOGISTICS, LLC,)
)
Plaintiff,)
)
vs.)
)
JERRY WARD,)
)
Defendant.)
)

CIVIL ACTION NO.: 2011-CP-08-1078

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A TEMPORARY AND PERMANENT INJUNCTION**

Defendant Jerry Ward, by and through undersigned counsel, submits this supplemental memorandum in opposition to Plaintiff Blackhawk Logistics, LLC's motion for a temporary and permanent injunction. In opposition to said motion, Defendant states as follows:

FACTUAL BACKGROUND

On December 8, 2009, Jerry Ward was wrongfully terminated from Plaintiff. Following his wrongful termination, Mr. Ward sought unemployment benefits. Plaintiff objected on the grounds Mr. Ward was terminated "for cause". On May 14, 2010, the South Carolina Department of Employment and Workforce found Mr. Ward was terminated **WITHOUT CAUSE** and awarded Mr. Ward unemployment benefits. Plaintiff appealed the decision. On June 21, 2010, a hearing was held, attended by Plaintiff, Plaintiff's counsel, Mr. Ward and his former counsel. By written decision dated June 29, 2010, the May 14th decision was affirmed. The written decision is attached as Exhibit "A".

Following his wrongful termination from Plaintiff, Mr. Ward found employment with Pratt Industries, Inc., a paper, packaging and resource recovery company, with a location in Berkeley County. Due to poor financial management, Plaintiff's business began to deteriorate. Eventually Plaintiff defaulted in its obligations to its landlord and was locked out of its facility.

Now, over one (1) year and four (4) months after Mr. Ward was wrongfully terminated as an employee of Plaintiff, Plaintiff has brought the current action, alleging Mr. Ward is in violation of his Employment Agreement. Plaintiff's motion should be denied as (a) Mr. Ward has not violated the plain terms of the Employment Agreement and (b) the restrictive covenants contained within the Employment Agreement are unenforceable.

STANDARD OF REVIEW

A preliminary injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Levine v. Spartanburg Regional Services Dist., Inc., 626 S.E.2d 38 (S.C. Ct. App. 2005). For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 603 S.E.2d 905 (S.C. 2004).

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). In Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313 (1958), the South Carolina Supreme Court laid out the elements the Court held that in order for a litigant to establish the enforceability of a non-compete covenant, **the burden is on the party seeking enforcement of the non-compete covenant to show the covenant is:**

- a. necessary for the protection of the legitimate interest of the employer;
- b. reasonably limited in its operation with respect to time and place;
- c. not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- d. reasonable from the standpoint of sound public policy; and
- e. supported by valuable consideration

LEGAL ARGUMENT

I. Plaintiff has failed to prove it will likely succeed on the merits.

In Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313 (1958), the South Carolina Supreme Court laid out the elements the Court held that in order for a litigant to establish the enforceability of a non-compete covenant, **the burden is on the party seeking enforcement of the non-compete covenant to show the covenant is:**

- a. necessary for the protection of the legitimate interest of the employer;
 - b. reasonably limited in its operation with respect to time and place;
 - c. not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
 - d. reasonable from the standpoint of sound public policy; and
 - e. supported by valuable consideration
- A. Plaintiff has failed to prove the protection of a legitimate interest of the employer as the restrictive covenants are overly broad and unduly harsh and oppressive in curtailing the legitimate efforts of Mr. Ward to earn a livelihood.

In Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995), the Court found an overly broad restriction unenforceable. In Faces, the employer sought to restrain the former employee from:

directly or indirectly, own manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces]. It is understood and agreed that this prohibition applies to FACIAL, SELLING OF COSMETICS, AND ALL COSMETIC APPLICATION OR FACIAL SPA RELATED SERVICES. (emphasis in original)

The employee has agreed to work as an esthetician, performing “facials”. The employee left and went to work for a competitor as a manicurist. Because the competitor derived some of its revenue from facials, the employer filed suit against the employee to enforce the non-competition agreement. The trial court found the prohibition contained within the restrictive covenant overly broad and that the covenant not to compete violated the requirements that a covenant be “necessary for the protection of the legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of an employee to earn a livelihood.” 709, 43.

The South Carolina Court of Appeals agreed with the findings of the trial court, specifically the finding that “the covenant seeks to prevent [the employee] from being associated in any capacity with any business which gives facials, sells cosmetics, etc. Such a prohibition goes far beyond the protection of any legitimate business interest [the employer] may be able to articulate. This broad prohibition also prevents [the employee] from earning a livelihood through legitimate means.” Id.

Here, as in Faces, Plaintiff is seeking to enforce an overly broad prohibition. Specifically, Plaintiff is seeking to prevent Mr. Ward from any capacity in the field of “third-party logistics, including warehousing and transportation”. As stated above, Mr. Ward is currently employed by Pratt Industries, Inc., a paper, packaging and resource recovery company. Based on Plaintiff’s interpretation of the restrictive covenants contained within the Employment Agreement, Mr. Ward would be prevented from working in his current job, even though Pratt Industries, Inc. is not a direct competitor with Plaintiff. Mr. Ward would be prevented from working as a janitor in a Fed Ex facility. Such a broad prohibition goes far beyond the protection of any legitimate

business interest Plaintiff may be able to articulate. This broad prohibition also prevents Mr. Ward from earning a livelihood through legitimate means and therefore is unduly harsh and oppressive in curtailing the legitimate efforts of Mr. Ward to earn a livelihood.

B. Plaintiff has failed to demonstrate the restrictive covenants are reasonably limited in its operation with respect to time and place.

If the territorial scope of restraint is unreasonable, no inquiry need be made as to the presence or absence of other necessary requirements.” Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).

The South Carolina Supreme Court has held that a state wide prohibition when the employee’s dealings with occurred in only two counties was overly broad. Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961). In Oxman, an insurance company sought to prevent insurance agent from soliciting business in the entire state of South Carolina, when the agent only worked in Orangeburg and Calhoun Counties. The Court held “[a]ny covenant should be limited to the area where [the agent] worked. Extending it to the entire State rendered it unenforceable.” Id. At 225, 562.

Section 6 of the Employment Agreement imposes a territorial restriction of "any county which is home to a sea port or any county directly adjoining a county which is home to a sea port in the States of South Carolina, Georgia or Virginia. A geographic restriction of any area which covers three states is overly broad. Plaintiff's sole place of business is in Berkeley County. Any restriction that would prevent Defendant from working in three (3) states is simply not reasonably limited in its operation with respect to time and place.

II. In the event Plaintiff's motion is granted, Plaintiff is required to post a bond.

Rule 65(c), SCRPC provides:

Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

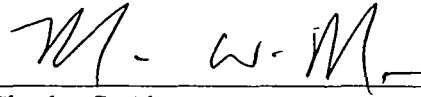
Mr. Ward's currently yearly compensation, including health benefits and commissions, totals approximately \$130,000.00. If it is found Mr. Ward was wrongfully enjoined from earning a living in his lifelong occupation, he would be damaged by the loss of his wages, as well as attorney's fees and costs incurred in litigation; therefore, Defendant requests the Court order Plaintiff post security in an amount no less than \$250,000.00. See Atwood Agency v. Black, 374 S.C. 68, 646 S.E.2d 882 (S.C. 2007) (holding a circuit court's order requiring only a nominal security bond of \$250 did not satisfy civil procedure rule governing restraining orders and temporary injunctions, because it erroneously assumed the injunction, restraining former employee and other employees of competitor from contacting and contracting with any vacation renter or homeowner of employer, was proper, instead of providing an amount sufficient to protect former employee and competitor in the event the injunction was ultimately deemed improper).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests Plaintiff's motion be denied, for costs associated with the defense of this matter and for such other and further relief as the Court deems appropriate.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

ALTMAN & COKER, LLC



Charles S. Altman

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Meredith L. Coker

mcoker@altmancoker.com

Marcus W. Meetze

wmeetze@altmancoker.com

Post Office Box 265

Charleston, South Carolina 29402

843-853-9907

843-853-9838 Facsimile

Attorney for Defendant

April 25, 2011

EXHIBIT A

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

DECISION OF APPEAL TRIBUNAL

Hearing Date: June 21, 2010

JERRY A. WARD
104 ABRUM CT
GOOSE CREEK, SC 29445

CLAIMANT

BLACKHAWK LOGISTICS LLC
210 WINGO WAY
MOUNT PLEASANT, SC 29464

EMPLOYER

APPELLANT: Employer

SS NO: 048-54-9270

APPEARANCES

FOR THE Present
CLAIMANT: with Legal Counsel

FOR THE One Witness
EMPLOYER: with Legal Counsel

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for "cause."

The employer appealed the determination mailed May 14, 2010 which held the claimant eligible to receive benefits effective March 28, 2010 upon a finding the claimant was discharged without cause.

The claimant worked from September 17, 2006 to December 8, 2009 with the subject employer, most recently as a general manager.

The claimant's employment was terminated for receiving compensation amounts that he was not entitled to and mismanaging the company. The claimant denies the employer's allegations. He maintains that he managed the company per instructions given to him by the board of managers. As it pertains to his compensation, the addendum to his employment contract was voluntarily, and he increased his salary under the original terms of the contract once the conditions of the addendum were satisfied. He asserts the company was cash flow positive following the addendum to his original employment contract. The employer disagrees that the company was cash flow positive following the addendum; however, the addendum did not define that term or indicate what party was responsible for making that determination. The employer maintains that the claimant's actions led to serious financial consequences for the company.

REASONS

South Carolina Code provides in §41-35-120(2) for a disqualification of from five (5) to twenty-six (26) weeks, with a corresponding monetary reduction, if the Agency finds the claimant was discharged for "cause" connected with the most recent bona fide employment.

"Cause" includes, but is not limited to, a violation of the employer's reasonable rules or regulations, or a disregard for the standards of behavior that an employer has a right to expect of an employee.

The burden to establish a claimant was discharged for cause lies solely with the employer. In this case, the Appeal Tribunal must conclude this burden has not been met. The employer witness who participated in the evidentiary hearing had no firsthand personal knowledge concerning the circumstances that led to the claimant's discharge. Accordingly, in the absence of such personal knowledge, the Appeal Tribunal must give greater weight to the claimant's testimony. The claimant has successfully refuted all of the employer's allegations. Such being the case, the Appeal Tribunal concludes the claimant was discharged without cause in connection with the work, and as a result, no disqualification shall be imposed.

DECISION

The Tribunal hereby holds the claimant eligible to receive benefits effective March 28, 2010 upon a finding the claimant was discharged without cause. This decision affirms the determination mailed May 14, 2010.

This will be the final decision of the Agency, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," Post Office Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center.

Courtney D. Wingate

Courtney Wingate
Administrative Hearing Officer

CW: KLT

Decision Mailed: 06/29/10

Mailed on the above Date by: KT

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

DECISION OF APPEAL TRIBUNAL

Hearing Date: June 21, 2010

JERRY A. WARD
104 ABRUM CT
GOOSE CREEK, SC 29445

CLAIMANT

BLACKHAWK LOGISTICS LLC
210 WINGO WAY
MOUNT PLEASANT, SC 29464

EMPLOYER

APPELLANT: Employer

SS NO: 048-54-9270

APPEARANCES

FOR THE Present
CLAIMANT: with Legal Counsel

FOR THE One Witness
EMPLOYER: with Legal Counsel

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for "cause."

The employer appealed the determination mailed May 14, 2010 which held the claimant eligible to receive benefits effective March 28, 2010 upon a finding the claimant was discharged without cause.

The claimant worked from September 17, 2006 to December 8, 2009 with the subject employer, most recently as a general manager.

The claimant's employment was terminated for receiving compensation amounts that he was not entitled to and mismanaging the company. The claimant denies the employer's allegations. He maintains that he managed the company per instructions given to him by the board of managers. As it pertains to his compensation, the addendum to his employment contract was voluntarily, and he increased his salary under the original terms of the contract once the conditions of the addendum were satisfied. He asserts the company was cash flow positive following the addendum to his original employment contract. The employer disagrees that the company was cash flow positive following the addendum; however, the addendum did not define that term or indicate what party was responsible for making that determination. The employer maintains that the claimant's actions led to serious financial consequences for the company.

REASONS

South Carolina Code provides in §41-35-120(2) for a disqualification of from five (5) to twenty-six (26) weeks, with a corresponding monetary reduction, if the Agency finds the claimant was discharged for "cause" connected with the most recent bona fide employment.

"Cause" includes, but is not limited to, a violation of the employer's reasonable rules or regulations, or a disregard for the standards of behavior that an employer has a right to expect of an employee.

The burden to establish a claimant was discharged for cause lies solely with the employer. In this case, the Appeal Tribunal must conclude this burden has not been met. The employer witness who participated in the evidentiary hearing had no firsthand personal knowledge concerning the circumstances that led to the claimant's discharge. Accordingly, in the absence of such personal knowledge, the Appeal Tribunal must give greater weight to the claimant's testimony. The claimant has successfully refuted all of the employer's allegations. Such being the case, the Appeal Tribunal concludes the claimant was discharged without cause in connection with the work, and as a result, no disqualification shall be imposed.

DECISION

The Tribunal hereby holds the claimant eligible to receive benefits effective March 28, 2010 upon a finding the claimant was discharged without cause. This decision affirms the determination mailed May 14, 2010.

This will be the final decision of the Agency, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," Post Office Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center.

Courtney D. Wingate

Courtney Wingate
Administrative Hearing Officer

CW: KLT

Decision Mailed: 06/29/10

Mailed on the above Date by: KT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-08-1078

Blackhawk Logistics, LLC, ...Respondent,

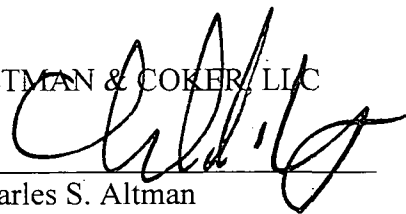
v.

Jerry Ward, ...Appellant.

CERTIFICATE OF APPELLANT

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. The undersigned further certified that the Record on Appeal complies with the Supreme Court Order, dated August 13, 2007, regarding personal data identifiers.

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Attorneys for Appellant

Dated: May 4, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
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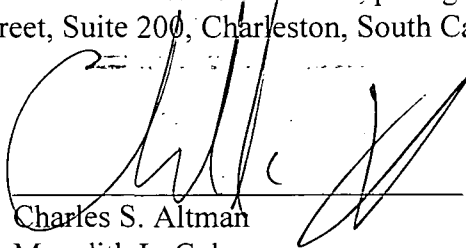
Blackhawk Logistics, LLC, ...Respondent,

v.

Jerry Ward, ...Appellant.

PROOF OF SERVICE OF RECORD ON APPEAL OF APPELLANT

I certify that I have served the Record on Appeal on Blackhawk Logistics, LLC, by delivering the same via United States Mail, postage prepaid, on May 8, 2012, to its attorney of record Ben Whaley LeClerc, 353 North Shelmore Boulevard, Suite 260, Mt. Pleasant, South Carolina 29464. A copy of the same will be deposited in the United States Mail, postage prepaid, on May 8, 2012, to Benjamin P. Glass, 211 King Street, Suite 200, Charleston, South Carolina 29401, Counsel for Pratt (Georgia Box), Inc.



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May 8, 2012

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