

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Case No. 13-CP-10-5579  
Appellate Case No. 2014-001828

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JOSHUA FAY, .....Appellant-Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC.....Respondent-Appellant.

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**INITIAL BRIEF OF APPELLANT-RESPONDENT**

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**SC Court of Appeals**

## TABLE OF CONTENTS

Table of Authorities .....	ii
Statement of Issues on Appeal .....	1
Statement of the Case.....	1
Facts .....	2
Argument .....	5
I. THE TRIAL COURT ERRED IN FINDING THAT OHIO LAW APPLIED TO THE NON-COMPETITION AGREEMENT .....	5
A. South Carolina Courts Will Not Enforce a Non-Competition Agreement that Violates Public Policy Even if the Law of Ohio Would Enforce Such Agreement .....	5
B. Ohio Courts Would Apply the Law of South Carolina to Determine the Validity of the Agreement.....	8
II. THE TRIAL COURT ERRED IN FINDING THAT THE NON-COMPETITION AGREEMENT WAS VALID AND ENFORCEABLE UNDER EITHER OHIO OR SOUTH CAROLINA LAW.....	9
A. South Carolina Takes a Disfavorable View of Non-Competition Agreements. ....	9
B. Ohio Has Adopted a Reasonableness Standard with Regard to Non-Competition Agreements.....	10
C. Paragraphs 4, 6 And 7 of the Agreement (Entitled “Confidential Information Is for TQL’s Use Only,” “Presumption Regarding Confidential Information,” and “Trade Secrets” Respectively) Are Invalid Non-Competition Provisions Under Both South Carolina and Ohio Law.....	11
D. The Non-Competition Provisions of Paragraph 9 Are Invalid and Unenforceable Under Both Ohio and South Carolina Law Because There is No Geographical Limitation .....	13
Conclusion .....	16

## TABLE OF AUTHORITIES

### Cases

<u>Brentlinger Enterprises v. Curran</u> , 752 N.E.2d at 1001 .....	11, 16
<u>Cad Cam, Inc. v. Underwood</u> , 521 N.E.2d 498, 502 (Ohio Ct. App.1987).....	13
<u>Carolina Chem, Equip. Co., Inc. v. Muckenfuss</u> , 322 SC 289, 293, 296-97, 471 SE 2d 721, 722-23, 725 (Ct. App. 1996).....	12
<u>Century Business Services, Inc. v. Barton</u> , 967 N.E.2d 782 (2011).....	8
<u>Faces Boutique, Ltd. v. Gibbs</u> , 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995).....	9
<u>Greif Packaging, LLC v. Ryder Integrated Logistics, Inc.</u> , 2010 WL 3610588 (2010).....	8
<u>Lifestyle Improvement Centers, LLC, v. East Bay Health, LLC</u> , 2013 WL 5564144 .....	9
<u>Poole v. Incentives Unlimited, Inc.</u> , 345 S.C. 378, 548 S.E.2d 207 (2001) .....	7
<u>Raimonde v. Van Vlerah</u> , 325 N.E.2d 544 (1975).....	10
<u>Rental Unif. Serv. of Florence, Inc. v. Dudley</u> , 278 S.C. 674, 675-76 301 S.E.2d 142, 143 (1983).....	10
<u>Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co.</u> , 453 N.E.2d 683, 684 (1983) .....	8, 9
<u>Sermons v. Caine &amp; Estes Ins. Agency</u> , 275 S.C. 506, 273 S.E.2d 338 (1980).....	15
<u>Standard Register Co. v. Kerrigan</u> , 238 S.C. 54, 119 S.E.2d 533 (1961).....	6, 7, 10
<u>Stonhard v. Carolina Flooring Specialists</u> , 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005).....	6, 7, 8
<u>Team IA v. Lucas</u> , 395 SC 237, 717 SE 2d 107 (Ct. App. 2011).....	15
<u>Tyler v. Sento Corp.</u> , 2008 WL 4999985 (2008).....	8

### Other Authorities

Adam V. Buente, <u>Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs</u> , 8 Ohio St. Entrep. Bus. L.J. 73 (2013).....	7
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## STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN FAILING TO FIND THAT THE NONCOMPETE AGREEMENT AT ISSUE WAS INVALID AS A MATTER OF LAW AND/OR BECAUSE IT VIOLATED THE PUBLIC POLICY OF SOUTH CAROLINA AND, THEREFORE, COULD NOT BE ENFORCED?

## STATEMENT OF THE CASE

On September 23, 2013, Thomas Joshua Fay (“Fay”) brought this action alleging a violation of the Fair Labor Standards Act against the Defendant Total Quality Logistics, LLC (“TQL”) and seeking a declaratory judgment that his noncompetition agreement with TQL was not enforceable. Subsequently, Fay amended the Complaint seeking damages for intentional interference with a contract. TQL counterclaimed against Fay seeking damages for his alleged violation of the noncompetition agreement. Both parties moved for summary judgment as to the validity of the noncompetition agreement.

By Order, dated April 14, 2014, the lower court granted TQL’s motion for summary judgment, finding that the noncompetition agreement was valid and that Fay had violated it. Fay moved the lower court to reconsider its Order and/or to certify the question for immediate appeal. By Order, dated August 4, 2014, the lower court amended its previous order by revoking the ruling that Fay had violated the noncompetition agreement, upheld the order in finding that the noncompetition agreement was valid and enforceable, and certified the question as to the validity of the noncompetition agreement for immediate appeal.

On August 21, 2014, Fay served the Notice of Appeal on TQL.

## FACTS

Fay went to work for TQL in December, 2012, as an assistant to a freight broker. He signed an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (“Agreement”). On June 17, 2013, TQL terminated Fay. A customer, and not a competitor of TQL, The Brandt Companies (“Brandt”), hired Plaintiff, through his solely owned business, JF Progressions, LLC, to work as Brandt’s exclusive shipping agent. On or about August 27, 2013, TQL notified Fay that it intended to pursue legal action against him for violating the Agreement if he did not immediately cease working as a freight broker.

The Agreement set forth a number of Whereas clauses, which defined certain terms, including: “Business,” which is “motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services;” “Industry,” which is “organizations providing services competitive to the Business;” and “Confidential Information,” which “include[es] but [is] not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customer, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses,

telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures ...[;] any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. [Confidential Information] may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form.” These and other “Recitals” were incorporated by reference in Paragraph 1 of the Agreement.

Paragraph 4 provides in pertinent part that “Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose ... any Confidential Information” and that “all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information...”

Paragraph 6 provides in pertinent part that “Employee’s engaging in an employment relationship with a Competing Business ... in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee ...using TQL’s Confidential Information to unfairly compete with TQL.”

Paragraph 9(b) provides that, during a one (1) year period after employment with TQL, the employee will not (i) “own, operate, maintain or have any other interest ... in any Competing Business (as defined below)...”; (ii) “become employed by or engaged in

a Competing Business ... in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information;" (iii) "solicit any Customer or Motor Carrier for any business purpose in competition with or in conflict with the Business of TQL;" and (iv) interfere with, tamper with, disrupt, or attempt to interfere with, tamper with, or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL."

Paragraph 9(d) defines certain words: "Customer," "any customer or prospective customer (A) with whom Employee had contact in connection with Employee's employment with TQL ...; or (B) about whom Employee had access to ... information through Employee's employment by TQL ...;" "Motor Carrier," "any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and (A) with whom Employee had contact in connection with Employee's employment with TQL ...; or (B) about whom Employee had access to ... information through Employee's employment by TQL...;" and "Competing Business," "any person, firm, corporation or entity that is engaged in the Business anywhere in the Continental United States."

Paragraph 11 provides that the Agreement shall be interpreted and enforced under the laws of the State of Ohio.

Paragraph 12 provides that, if any provision(s) of the Agreement are declared to be illegal or invalid, the validity of the remaining parts shall not be affected and shall remain in full force and effect and that "there shall be added automatically as a part of

this Agreement provisions as similar in terms to such illegal, invalid or unenforceable provision as may be possible and still be legal, valid and enforceable.”

Fay initiated this action asking that the Court declare the non-competition agreement invalid and unenforceable. TQL brought an action in Ohio against the Brandt Companies, which ceased doing business with Fay. Fay amended his Complaint to seek damages for intentional interference with his contractual relationship with Brandt. Both parties moved for summary judgment as to the validity and enforceability of the Agreement. Judge Roger Young found that Ohio law applied and that the agreement was valid and enforceable under Ohio law.

### **LEGAL ARGUMENTS**

#### **I. THE TRIAL COURT ERRED IN FINDING THAT OHIO LAW APPLIED TO THE NON-COMPETITION AGREEMENT.**

##### **A. South Carolina Courts Will Not Enforce a Non-Competition Agreement that Violates Public Policy Even if the Law of Ohio Would Enforce Such Agreement.**

TQL hired Fay in South Carolina to work at TQL’s office in South Carolina. The only nexus to Ohio is that TQL’s home office is there. The Agreement provides that it “is made and entered into in the State of Ohio,” which was not true as Fay executed the agreement in South Carolina, and that “[t]he Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.” On the bottom left hand corner of every page of the agreement are the initials “SC.” The first question the Court must answer is what law governs the interpretation of this Agreement, because Ohio law may allow an unreasonable non-compete agreement to be modified, so as to make it “reasonable,” and South Carolina law does not. The Agreement in question is clearly not reasonable on its face under South Carolina law.

In Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961), the South Carolina Supreme Court dealt with an action in which Standard Register sought to enforce a non-compete against a former employee, Kerrigan. The agreement in question provided that it was to be “construed according to the laws of Ohio,” just as does the agreement at issue before this Court. In that case, the Court held: “The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but *if it is invalid under the law of the State where it is to be performed<sup>1</sup> and contrary to our public policy, we will not enforce it.*” 238 S.C. at 70; 119 S.E.2d at 541-42 (emphasis added). That Court also cited earlier cases that stated: “We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void.” 238 S.C. at 70, 119 S.E.2d at 542.

In a more recent case, Stonhard v. Carolina Flooring Specialists, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005), the United States District Court had certified certain questions to be answered by the State Supreme Court: “*The first question is whether a non-compete agreement which does not contain a geographical limitation may be reformed or ‘blue penciled’ according to New Jersey law and then enforced in South Carolina. The answer to this question is no.*” (emphasis added). In Stonhard, the Court did not reverse its holding in Standard Register but, instead, quoted that case with approval that “[t]erms in a non-compete agreement may be construed according to the law of another state.... *But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement.*”

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<sup>1</sup> The Agreement at issue here was at all times performed in the State of South Carolina.

Id (emphasis added). The Stonhard Court then looked at New Jersey law, which allows a court to “modify or ‘blue pencil’ a non-compete agreement so as to make its terms reasonable.”<sup>2</sup> Id. The Court stated that “the non-compete agreement does not contain a geographical limitation, and we have been unable to find a single case from New Jersey in which a court has added a geographical term when one was previously omitted” and then held “that the contract may not be reformed or blue-penciled so as to add an entirely new term to which neither of the parties agreed.” Id., 366 S.C. at 160, 621 S.E. 2d at 354. The Court finally determined that “[b]ecause we find no term that may suffice as a substitute for a geographical restriction so as to render the covenant reasonable, we hold that the covenant is unenforceable as against public policy.” Id. The Stonhard Court cited Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207 (2001) for its holding “that a covenant not to compete is enforceable if it is not detrimental to the public interest, is reasonably limited as to time and territory, and is supported by valuable consideration.” Id. Because the agreement in question failed to limit the covenant to a reasonable geographical area, the Court held that “[t]o add and enforce such a term requires this Court to bind these parties to a term that does not reflect the parties’ original intention” and “the covenant, despite any reformation, is void and unenforceable as a matter of public policy.” Id.

In its conclusion, the Stonhard Court stated:

We hold that the non-compete agreement may not be reformed in accordance with New Jersey law and then enforced in South Carolina. The

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<sup>2</sup> In the lower court, TQL argued that Ohio law did not call for “blue penciling” and tried to make some distinction between “blue penciling” and modifying an agreement so as to make its terms reasonable. The Ohio courts interpret “blue penciling” to be only the striking of terms in an agreement unlike other courts which describe it as modifying an agreement. See Adam V. Buente, Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs, 8 Ohio St. Entrep. Bus. L.J. 73, 82-83 (2013) (available at <http://tinyurl.com/mtpnuaf> [last accessed September 17, 2014]).

absence of a geographical limitation makes the agreement void as a matter of law. New Jersey's "blue penciling" law, though appearing to provide a court with the discretion to rewrite unreasonable provisions, does not allow a provision to be written into a covenant when such a provision never previously existed. Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy.

366 S.C. at 161, 621 S.E.2d at 354 (emphasis added). Thus, the Court held that South Carolina law applied when determining whether a non-compete agreement violated public policy.

**B. Ohio Courts Would Apply the Law of South Carolina to Determine the Validity of the Agreement.**

If TQL had brought this action in Ohio, the Ohio courts would have determined the validity of the Agreement in accordance with the law of South Carolina. In Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co., 453 N.E.2d 683, 684 (1983), the Ohio Supreme Court stated that it would enforce the parties' choice of law unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." The Schulke analysis is applied even when the parties have set forth a choice of law and indicated that it applied "without regard to principles of conflicts of law." Greif Packaging, LLC v. Ryder Integrated Logistics, Inc., 2010 WL 3610588 (2010); Tyler v. Sento Corp., 2008 WL 4999985 (2008); see also Century Business Services, Inc. v. Barton, 967 N.E.2d 782 (2011).

In an unpublished case out of the United States District Court, Southern District

of Ohio, dated October 7, 2013, the Court was asked to interpret a non-competition agreement, which stated that Ohio law applied to any dispute concerning it. Lifestyle Improvement Centers, LLC, v. East Bay Health, LLC, 2013 WL 5564144 (S.D. Ohio 2013)<sup>3</sup>. Similar to the facts in the present case, that matter concerned a contract entered into and performed in the State of California, but included a choice of law provision that Ohio law would apply. California has, by statute, prohibited non-competition agreements, so the choice of law decision governed the entire case. Based on the ruling in Schulke, the Ohio Court found that California law would apply and that the non-competition agreement was not valid.

Therefore, because even the Ohio Court would apply the law of South Carolina, there is no question but that South Carolina law governs this dispute which arose solely in South Carolina.

## **II. THE TRIAL COURT ERRED IN FINDING THAT THE NON-COMPETITION AGREEMENT WAS VALID AND ENFORCEABLE UNDER EITHER OHIO OR SOUTH CAROLINA LAW.**

### **A. South Carolina Takes a Disfavorable View of Non-Competition Agreements.**

Covenants not to compete are generally disapproved of and are strictly construed in favor of the employee. Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995). The covenant not to compete will be valid *only* if it is: (1) necessary for the protection of the employer's legitimate interests; (2) reasonably limited as to time and place; (3) "not unduly harsh or oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;" (4) reasonable when considering public policy; and (5) entails valuable consideration. Id. at 42, 455 S.E.2d at 708 (citations

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<sup>3</sup> Available at <http://tinyurl.com/mkd8zds> (last accessed September 17, 2014).

omitted and emphasis added); see also Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76 301 S.E.2d 142, 143 (1983) (listing the five required factors). A non-compete agreement must meet all of the above criteria or it will be declared unenforceable as a “restraint upon trade which is against public policy.” Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533, 542 (1961).

**B. Ohio Has Adopted a Reasonableness Standard with Regard to Non-Competition Agreements.**

In Ohio, the courts originally followed a “blue pencil” test which provided that if unreasonable provisions exist in a non-compete agreement, they may be stricken if divisible, but not amended or modified. That test also specified that if restrictions were unreasonable and indivisible, the entire contract failed. In Raimonde v. Van Vlerah, 325 N.E.2d 544 (1975), the Ohio Supreme Court rejected the “blue pencil” test and, instead, adopted a “reasonableness standard” with a three prong test. If the contract failed the standard, the courts were permitted to fashion a contract reasonable between the parties:

In determining the validity of a covenant or agreement in restraint of trade, each case must be decided on its own facts.... We hold that a covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer’s legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. Courts are empowered to modify or amend employment agreements to achieve such results.

325 N.E.2d at 547.

Interestingly, the Ohio courts take seriously the requirement that the employer prove that it needs protection in order to enforce the non-compete:

Generally, the only business interests which have been deemed sufficient to justify enforcement of a noncompete clause against a former employee

are preventing the disclosure of the former employer's trade secrets or the use of the former employer's proprietary customer information to solicit the former employer's customers.

Brentlinger Enterprises v. Curran, 752 N.E. 2d 994, 1001 (Ohio Ct. App. 2001).<sup>4</sup> The Ohio Court of Appeals in this case held that the non-compete agreement at issue was not enforceable because the employer did not prove that the non-compete was necessary to protect its legitimate business interests. The facts in that case are similar to those present herein. In that case, a three-month employee left one car dealership to go to work for a competitive dealership, and the employer sought to enforce a non-compete. The only legitimate business interest of the employer, as found by the Court, was the fact that the employee had contacted a person to whom he had been trying to sell a car before he left Brentlinger's employment. Because there was only evidence that he had contacted one former customer, the Court found that there was not sufficient contacts with former customers to justify the enforcement of the non-compete and, therefore, refused to do so. Similar to the facts of Brentlinger, Fay only contacted one customer of TQL, Brandt, and he actually went to work for that one customer under an exclusive agreement. Prior to terminating Fay, TQL had told him that TQL did not want to continue doing work for Brandt, so TQL had no legitimate business interest in enforcing the non-compete. See Fay Affidavit.

**C. Paragraphs 4, 6 And 7 of the Agreement (Entitled "Confidential Information is for TQL's Use Only," "Presumption Regarding Confidential Information," and "Trade Secrets" Respectively) Are Invalid Non-Competition Provisions Under Both South Carolina and Ohio Law.**

Because the definition of Confidential Information in the Agreement covers everything that Fay learned or could have learned about the motor carrier industry and

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<sup>4</sup> A copy of this opinion is attached as Exhibit C.

Paragraph 4 of the Agreement prohibits Fay from ever using “Confidential Information,” Fay is effectively barred from ever doing work in the motor carrier industry. In addition, there is no time restriction and no geographical restriction with regard to the prohibition imposed in Paragraph 4.

Paragraph 6 goes even further to ensure that Fay will never be able to work again in the motor carrier industry by having Fay agree that, if he does go to work for a Competing Business in a position similar to the one that he held with TQL, he would automatically “reveal[], base[] judgments and decisions upon, or otherwise us[e] TQL’s Confidential Information to unfairly compete with TQL.” Again there is no time or geographical restriction with regard to this provision.

Similarly, in Paragraph 7, Fay is barred from ever using any information that he obtained while working for TQL, because TQL defines that information as proprietary, a trade secret and confidential. As in Paragraph 4, there is no time restriction and no geographical restriction with regard to the prohibition imposed in Paragraph 7.

As the South Carolina Supreme Court has held, a confidentiality provision in an agreement may constitute a non-compete if its purpose is to prevent the employee from engaging in the same business as the employer. See Carolina Chem, Equip. Co., Inc. v. Muckenfuss, 322 SC 289, 293, 296-97, 471 SE 2d 721, 722-23, 725 (Ct. App. 1996). (“Despite its designation as a “Covenant Not to Divulge Trade Secrets,” this section would substantially restrict Muckenfuss’s competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete.”)

Not one of these provisions complies with the five (5) factors necessary to have a valid and enforceable non-competition agreement in South Carolina and are, therefore, unenforceable as a “restraint upon trade which is against public policy.” Because these provisions set forth no time or geographic limitation, Ohio will also not enforce them. See Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App.1987) (“We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere... and at any time...was reasonably necessary to protect the covenantee’s legitimate business interests....”).

South Carolina law is in accord with Ohio law with respect to non-competes that have no geographic or time restrictions. Thus, the non-competition provisions set forth in 4, 6 and 7 of the Agreement should be declared invalid and unenforceable.

**D. The Non-Competition Provisions of Paragraph 9 Are Invalid and Unenforceable Under Both Ohio and South Carolina Law Because There is No Geographical Limitation.**

Paragraph 9(b) of the Agreement sets forth additional non-compete restrictions. Unlike the confidentiality provision in a non-compete which has no time or geographical restrictions, 9(b) provides that the restrictions set forth therein shall be “for a period of one (1) year after termination ... of Employee’s employment.” However, Paragraph 9(b) has no clear geographical limitations on the non-compete. Paragraph 9 defines a “Competing Business” as “any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.” “Business” is defined in the first “Whereas” clause as “providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management

services.” Under these definitions and Paragraph 9(b)(i) and (ii) of the Agreement, Fay is prohibited from having any interest in; or working for, a company “engaged in the Business anywhere in the Continental United States.” Based on the way this provision is written, even if Fay were living and working in another country and he went to work for a company that was engaged in the “Business,” he would violate this provision. In other words, there is no geographical limitation on the scope of these non-competition restrictions. Even if the limitation were the Continental United States, such restriction is overly broad and serves no legitimate business purpose of TQL other than prevent Fay from working in the motor transport business.

Concerning Paragraph 9(b)(iv), there is no evidence that Fay “interfere[d] with, tamper[ed] with, disrupt[ed] or attempt[ed] to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship between TQL and any Customer, Motor Carrier, ..., or otherwise t[ook] any action to divert Business from TQL.” The only evidence is Fay’s statements in his affidavit that TQL did not want him to keep Brandt as a customer, because its business did not fit in the TQL model. Thus, Fay’s entering into a contract with Brandt did not violate Paragraph 9(b)(iv). There has been no evidence and no allegation that Fay has directly or indirectly recruited or solicited any employee or consultant of TQL, so there is no violation of Paragraph 9(b)(v).

Thus, the question before the Court with regard to the Paragraph 9 covenants is

whether a non-compete can be valid even if there is no geographical limitation.<sup>5</sup> In Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980), the South Carolina Supreme Court held that a geographical restriction of the State of South Carolina was unreasonable and violated public policy. In Team IA v. Lucas, 395 SC 237, 717 S.E.2d 107 (Ct. App. 2011), the Court held that a nationwide territorial restriction was on its face overly broad, so no restriction would also be overly broad. Non-compete covenants with no limitation on geographical application violate public policy in South Carolina, because the restriction is general and not limited to the needs of the Employer and are, therefore, void and unenforceable.

Paragraph 9(b)(iii) prohibits Fay from “directly or indirectly, solicit[ing] any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL.” “Customer” is defined as “any customer or prospective customer: (A) with whom Employee had contact in connection with Employee’s employment with TQL during the twelve (12) month period prior to termination ... of Employee’s employment with TQL...; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee’s employment by TQL during the twelve (12) month period prior to termination ... of Employee’s employment with TQL ....” “Motor Carrier” is defined as “any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements or communication with TQL and [with whom Employee had contact while employed with TQL or about

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<sup>5</sup> At the hearing, TQL argued that the geographical limitation was the Continental United States. However, there is no such limitation mentioned other than in the definition of “Competing Business” and only to limit that term to businesses which operate in the Continental United States. If a Competing Business operated in both the United States and Europe, Fay would be prohibited from working for that business even if he were in Europe.

whom Employee had access to ... information through Employee's employment by TQL.]” These definitions cover virtually every business which makes use of motor carrier transport, as well as every motor carrier business, in the United States.

Non-competes which are limited to existing customers have been upheld but never has any court upheld a restriction that covers every business in the United States that used motor carrier transport as well as every motor carrier in the country. This restriction is overly broad and violates the public policy of South Carolina and, thus is invalid. Even the Ohio Courts would not enforce such a restrictive covenant. See Brentlinger Enterprises v. Curran, 752 N.E.2d at 1001.

### CONCLUSION

Under either Ohio or South Carolina law, the TQL non-competes are not enforceable because they are not reasonable (Ohio law) and they violate the public policy of South Carolina. Appellant Fay is entitled to a reversal of the lower court's grant of summary judgment to TQL and, instead, to the issuance of a declaratory judgment that the provisions of the Non-Competition Agreement restricting Fay's employment are void and not enforceable, with a remand to the Circuit Court to go forward with Fay's remaining causes of action seeking damages.

Respectfully submitted,

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Attorneys for Appellant-Respondent

September 19, 2014

# ROSEN | HAGOOD

Alice F. Paylor  
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September 19, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

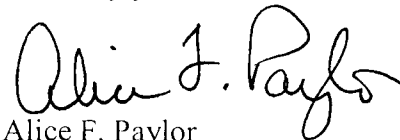
Re: Joshua Fay v. Total Quality Logistics, LLC  
Court of Common Pleas – Case No. 13-CP-10-5579  
Appellate Case No. 2014-001828

Dear Mrs. Kitchings:

Enclosed please find the original and one copy of Appellant-Respondent Joshua Fay's Initial Brief and Designation of Matter to be included in the Record on Appeal the above-referenced matter, along with our Proof of Service. We would appreciate it if you would please file the original Initial Brief and Designation of Matter, and return a clocked-in copy to us in the enclosed self-addressed, stamped envelope.

Please do not hesitate to contact me if you have any questions. Thank you in advance for your assistance in this matter.

Sincerely yours,



Alice F. Paylor

AFP/dlw

Enclosures

cc: Robert D. Moseley, Jr., Esquire (w/encl)  
Peter A. Rutledge, Esquire (w/encl)

**RECEIVED**

SEP 22 2014

**SC Court of Appeals**