

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

James Randall Davis, Special Master/Referee

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**SC Court of Appeals**

Case No. 2014-001819

Palmetto Mortuary Transport, Inc., .....Respondent,

v.

Knight Systems, Inc. and Robert L. Knight, .....Appellants.

INITIAL BRIEF OF APPELLANTS

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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE SPECIAL REFEREE/MASTER ERR IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE GEOGRAPHIC RESTRICTION IN THE PARTIES' NON-COMPETE AGREEMENT IS UNREASONABLE AND VOID?
2. DID THE SPECIAL REFEREE/MASTER ERR IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE EXCESSIVE TERRITORIAL RESTRICTION IN THE NON-COMPETE AGREEMENT IS UNSUPPORTED BY INDEPENDENT AND VALUABLE CONSIDERATION?
3. DID THE SPECIAL REFEREE/MASTER ERR IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE NON-COMPETE AGREEMENT IS VOID AS A MATTER OF PUBLIC POLICY BY RESTRICTING COMPETITIVE BIDDING FOR A PUBLIC CONTRACT?
4. DID THE SPECIAL REFEREE/MASTER ERR IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE NON-COMPETE AGREEMENT IS VOID AFTER ANY BREACH BY THE RESPONDENT, WHETHER OR NOT THE BREACH IS MATERIAL?

## **STATEMENT OF THE CASE**

On October 20, 2011, Palmetto Mortuary Transport, Inc. ("Plaintiff") brought this action against Knight Systems, Inc. and Robert L. Knight ("Defendants") alleging that the Defendants breached a covenant not to compete, executed by and between the Parties at the time that Palmetto Mortuary purchased a mortuary transportation business from the Defendants. The Defendants denied the allegations in the Complaint and counterclaimed, alleging that the Plaintiff first breached the terms of the Asset Purchase Agreement between the Parties, thereby voiding the Non-Compete Agreement. By consent, this matter was referred to the court-appointed Special Referee/Master James Randall Davis. After trial before the Special Referee/Master, on December 18, 2013, and the submission of proposed orders by the Parties, Special Referee/Master Davis ruled in favor of Palmetto Mortuary.

The Special Referee/Master ordered the Appellants to pay the Respondent monetary damages in the amount of Three Hundred Seventy Three Thousand, Two Hundred Sixty Four and 54/100 (\$373,264.54) Dollars, as lost profits arising from Appellants' "wrongful competition in Richland County over the five-year term" of Appellants' contract with the Richland County Coroner's Office. Appellant was also ordered to pay Seventy-Two Thousand Seventy-seven and 38/100 (\$72,077.38) Dollars to the Respondent for attorney's fees and litigation costs. The Special Referee/Master issued an injunction against the Appellants requiring that Appellants abide by the terms of the Non-Compete Agreement for a term of five-years and seven months, beginning from the date of the Special Referee/Master's Order.<sup>1</sup> Lastly, the Respondent was ordered to pay Four Hundred Seventy-Eight and 50/100 (\$478.50) in damages to the Appellant as damages for breaching the Asset Purchase Agreement's requirement that Respondent purchase body bags exclusively from the Appellants.

### STANDARD OF REVIEW

An action to construe a contract is an action at law and an action for specific performance is one in equity. *Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527, 530 (Ct.App. 2009) (citations omitted). "In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence." *Id.* Further,

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<sup>1</sup> This Order would have the affect of increasing the length of time of the Non-Compete Agreement as originally agreed to by the Parties. Pursuant to the terms of their agreement and absent a breach of the agreements, the non-compete would last until January 5, 2017 (ten years). See, Order, p. 31, n. 13. "[I]t would be impermissible [through injunctive relief] to extend the non-compete period contained in the agreement as a remedy for its breach, since such an extension 'would essentially rewrite the parties' contract, a service the courts of South Carolina do not perform.'" *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 17-18 (2010), quoting, *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 363, 588 S.E.2d 635, 639 (Ct. App. 2003).

"[q]uestions of law may be decided with no particular deference to the trial court." *Id.*

"This court may correct errors of law in both legal and equity actions." *Id.*

## FACTS

This case involves a dispute between the Parties alleging that the Respondent breached an asset purchase agreement between the Parties and that the Appellants breached a covenant not to compete executed as part of the Respondent's purchase of Knight Systems, Inc.'s body removal business assets.

On or about January 5, 2007, these Parties executed an Asset Purchase Agreement (also referred to herein as "Agreement") whereby the Appellants sold the assets of their mortuary transportation (or "body removal") business to Palmetto Mortuary. *See*, Respondent's Exhibit 1. In accordance with the Agreement, Palmetto Mortuary paid a total of Five Hundred Ninety Thousand and No/100 (\$590,000.00) Dollars for the designated assets of Appellants Knight Systems. *See*, Respondent's Exhibit 1, p. 1 and 2. Pursuant to the terms of the Agreement, Palmetto Mortuary was obligated, after the asset purchase and for the term of the Parties' non-compete agreement, "to buy all of their body bags from" Knight's related body bag manufacturing business. *See*, Respondent's Exhibit 1, p. 4 (Section 3.4.8 Seller's Related Business). At the January 5, 2007 closing, the Parties also executed a Non-Competition Covenant. *See*, Respondent's Exhibit 1 (Exhibit 3.2.6 of the Agreement) (also referred to herein as the "Covenant").

Pursuant to the terms of the Non-Competition Covenant and for the consideration of One Thousand and No/100 (\$1,000.00), the Parties purported to prohibit Knight from

competing against Respondent in the mortuary transportation business within 150 miles of Knight's present location and for a period of ten (10) years after the date of the Agreement. *Id.* at p. 2. Additionally, the Covenant states that Knight shall not be deemed to be in violation of "any covenant contained herein as a result of [Knight] providing services to [Palmetto Mortuary] or [Knight] selling body bags through his related body bag business." *Id.* at p. 3. Further, under a termination clause of the Covenant, entitled "Breach of the Purchase Agreement," the Non-Competition Covenant states that "[n]otwithstanding anything herein to the contrary, a breach by [Palmetto Mortuary] of the Purchase Agreement or such other documents ancillary thereto, shall constitute a breach of this [Non-Competition Covenant] and shall release [Knight] from any and all restrictions hereunder." *Id.* at p. 3.

Respondent initiated this civil action on or about October 26, 2011 and subsequently filed an Amended Complaint alleging that Knight breached the Non-Competition Covenant by bidding on and winning a public contract in 2011 to provide mortuary transportation services to the Richland County Coroner's Office. The Respondent seeks damages in the amount of revenues they did not receive from the Richland County public contract and injunctive relief against Appellantss prohibiting further competition pursuant to the terms of the Covenant. In response, Appellantss filed an Answer and Answer to the Amended Complaint alleging, *inter alia*, that Respondent first breached the Purchase Agreement by purchasing body bags from a source other than Knight's body bag manufacturing business; that the Non-Competition Covenant is unenforceable due to a lack of adequate consideration and unreasonable

duration and geographic scope requirements; and that the Non-Competition Covenant is unenforceable as a matter of South Carolina law.

At the trial of this action, Mr. Donald J. Lintal (also referred to herein as “Don Lintal”) and Mrs. Ellen M. Lintal (also referred to herein as “Ellen Lintal”), the owners and officers of Palmetto Mortuary Transport, Inc., testified on behalf of the Respondent. Mr. Robert “Buddy” Knight (also referred to herein as “Buddy Knight”), the owner of Knight Systems, Inc. and an ancillary body bag manufacturing business, testified on behalf of the Appellantss. According to the testimony of Don and Ellen Lintal, the couple saw a sales listing of Knight Systems, Inc. on a business brokerage website in the summer or fall of the year 2006. *See*, Trial Tr. at 21:19-23; 164:2-7. After deciding they had an interest in purchasing Mr. Knight’s mortuary transportation business and after negotiations over the purchase price, the Parties agreed on a price of \$590,000.00 for the purchase of specific assets from Knight Systems, Inc. *See*, Respondent’s Exhibit 1 (Asset Purchase Agreement); Trial Tr. at 83:21-25; 84-90; 91:1-4; 166:17-25; 167:1-18; 199:20-25; 200:1-15.

At the purchase closing on January 5, 2007, the witnesses testified that the \$590,000.00 asset purchase price was allocated between “furniture, fixtures and equipment” (\$37,500.00); a “non-competition covenant” (\$1,000.00); and Knight Systems, Inc.’s “customer lists” (\$551,500.00).<sup>2</sup> *See*, Exhibit 2.3 (Purchase Price Allocations) attached to Respondent’s Exhibit 1; *see also*, Trial Tr. 98-99:2-10; 157:3-13; 201:19-22. Both the Lintals and Buddy Knight testified that the Parties had no

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<sup>2</sup> The asset purchase actually included three on-going public contracts for mortuary transportation services on behalf of the Lexington County Coroner’s Office and the Richland County Coroner’s Office, as well as the University of South Carolina School of Medicine.

discussion about the amount of consideration to be paid for the Non-Competition Covenant prior to the Parties' arrival at the January 5, 2007 closing. Trial Tr. 156:9-25; 157-161:1-19; 166:12-16; 199:10-16.<sup>3</sup> In fact, the \$1,000.00 allocated for the non-compete agreement was merely deducted from the originally negotiated \$590,000.00 asset purchase price. Trial Tr. 158:13-20; 182:7-22. Thus, as Mrs. Lintal testified, there was never any discussion between the Parties about a separate and distinct offer of consideration for the non-compete agreement apart from the original purchase price for all assets of Appellantss' mortuary transportation business. Trial Tr. 182: 17-22.

The Respondent offered testimony that the rationale for the 10 year term of the non-compete agreement was to allow Respondent to get through two contract cycles for the public contracts with Lexington County, Richland County and the University of South Carolina School of Medicine. Trial Tr. 26:7-16. Over the course of the 10 year non-compete, had Respondent maintained just the Richland County and Lexington County contracts, Palmetto Mortuary stood to make approximately \$1,500,000, more than double the purchase price Respondent paid for the assets of Appellantss' business. Trial Tr. 75:6-25; 76; 77:1-4.

At the time of the asset purchase between these Parties, Don Lintal testified that Knight Systems, Inc.'s primary area of providing mortuary transportation was in Lexington and Richland Counties. Trial Tr. 104:12-15.<sup>4</sup> Mr. Lintal further testified that the intent and affect of including a non-compete agreement within a 150 mile radius

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<sup>3</sup> Witness Don Lintal testified that he did not even have a dollar amount in mind that should be paid for the non-compete agreement prior to arriving at the transaction closing on January 5, 2007. See, Trial Tr. 77:5-8.

<sup>4</sup> Buddy Knight also testified that Knight Systems, Inc. primarily provided body removal and transportation services only in Lexington and Richland Counties. Trial Tr. 193:19-25.

from Lexington County was to prevent Appellantss from competing against Palmetto Mortuary anywhere within the State of South Carolina. Trial Tr. 104:1-11. Although Knight Systems, Inc. was primarily a Midlands, South Carolina based business, Mr. Lintal attempted to justify the statewide restriction on competition by stating that:

“Just because I didn’t -- why was it important? Putting a geographic distance on it would have strengthened -- I didn’t -- it wasn’t to go against Mr. Knight in that regard. We didn’t know where the business was actually going to -- what we were going to -- if we were going to try to expand it at different locations. We wanted to keep our options opened if it was doable, I guess. i mean, you know, the standard -- a standard contract -- I mean, he didn’t have to accept it. We put it in there. He accepted it. So, I mean, the significance of it was that not only was there a duration of time, but we defined the territory, the boundary of which this applied . . . We did not know, but we did not want to limit our options if it was available to us. At the time it did not seem to be an issue on their part. I don’t recall any objections to that.”

See, Trial Tr. 104-106. Thus, although both sides agreed that the business interests purchased from Knight Systems were based primarily in Lexington and Richland Counties, the only justification offered by the Respondent for a statewide non-compete agreement was that Palmetto Mortuary might someday expand its operations into other parts of the State of South Carolina. *Id.*

Respondents allege that the Appellants breached the Non-Competition Covenant by submitting a 2011 bid to provide body removal and transportation services to the Richland County Coroner’s Office. During Don Lintal’s testimony at the trial, the Respondent also alleged that the Appellants breached Section 3.4.8 of the Asset Purchase Agreement (Seller’s Related Business), by removing Knight’s patented odor-proof bags from the open market, thereby preventing Respondent from meeting an essential requirement of the Richland County Coroner’s Office Request for Proposals.

Trial Tr. 62:10-24; 63:10-12; 189:6-22.<sup>5</sup> Mrs. Lintal testified that the only way that Respondent could fulfill the requirements of the Richland County contract is to have access to purchase the odor-proof bags manufactured by Buddy Knight.<sup>6</sup> Trial Tr. 189:6-18. Thus, according to testimony offered on behalf of the Respondent, even in the absence of Appellants' bid on the Richland County contract, Respondent was not guaranteed that Palmetto Mortuary would have been awarded this public contract. *Id.* at 189:19-22.<sup>7</sup>

In contrast to Respondent's claims that Appellants breached the Non-Competition Covenant, Appellants alleged that, prior Appellants bidding on the Richland County public contract, Respondent breached the provision in the Asset Purchase Agreement requiring that Respondent purchase all of its body bags from Knight's body bag manufacturing business. Section 3.4.8 of the Agreement provides, in its entirety, that:

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<sup>5</sup> Although Respondent contends that Section 3.4.8 unambiguously requires Appellants to sell Palmetto Mortuary odor-proof body bags, another provision in the Parties' non-compete agreement provides that "[n]otwithstanding the foregoing [in the Non-Competition Covenant], the Seller [Appellants] shall not be deemed to be in violation of any covenant contained herein as a result of Seller providing services to Buyer [Respondent] or Seller selling body bags through his related body bag business." Despite Respondent's proffered interpretation of Section 3.4.8, they admit that Respondent is not asking the Court to affirmatively enjoin Appellants and require that Knight provide Respondent with the patented odor-proof bags. Trial Tr. 190:7-11. Further, the Respondent did not pursue any perceived remedies against Knight between the time Respondent learned that Appellants would not provide open market access to the patented odor-proof bags and the time that Richland County awarded the body removal contract. Trial Tr. 74:11-24.

<sup>6</sup> Even though Respondent's pleadings allege that Appellants' breach of the Non-Competition Covenant caused them damages, Respondent failed to avail itself of any remedies under the Asset Purchase Agreement to mitigate those alleged damages, such as seeking an injunction against Appellants prior to Richland County's award of the contract. *See*, Trial Tr. 73:19-25; 74:1-24. A Respondent has a duty to mitigate damages. *See, Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974).

<sup>7</sup> Mrs. Lintal also testified that any damages claimed in this case are merely speculative given the fact that the Respondent could not be assured that they would be awarded the Richland County contract. Trial Tr. 186:14-23;187:8-21.

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

Heavy Duty body bags:	\$20.00
Lightweight body bags:	\$8.00
Odor-Proof body bags:	\$50.00
Water-Retrieval body bags:	\$30.00

Prior to any transfer of the Related Business to a third party, Knight shall offer to sell the Related Business to Buyer at the same price and on the same terms as those offered with respect to the proposed transfer of the Related Business.

Respondent claims that Section 3.4.8 does not require that Respondent purchase any other category of body bags, such as infant body bags, not specifically listed in that section. Respondent alleges that the phrase "all of their body bags" should be construed by the Court as limited by the four expressly described categories of body bags. Trial Tr. 46:21-25.

Despite testimony by Don Lintal that he purchased approximately 31 infant body bags from a source other than Mr. Knight, Lintal offered conflicting testimony as to whether he knew that he could have purchased infant body bags from Mr. Knight, as required by Section 3.4.8 of the Agreement.<sup>8</sup> Trial Tr. 45:22 - 49:16.<sup>9</sup> During a secretly recorded conversation between Don Lintal and Buddy Knight, Lintal never states to Knight that Respondent believed that he was not required by the Agreement to

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<sup>8</sup> According to testimony offered on behalf of Palmetto Mortuary, the Respondent purchased those infant body bags from Southland Medical Corporation on or about April 3, 2008 and April 9, 2008, approximately three years prior to Knight's submission of a bid on the Richland County Coroner's contract.

<sup>9</sup> At varying points in his testimony, Don Lintal testified that he knew that Knight had previously manufactured an infant body bag for Lexington County; that he knew there were infant body bags in the inventory purchased from Knight Systems; and that he didn't realize that Knight could manufacture an infant body bag. Trial Tr. 109:2-25; 110-116; 220:13-25; 221-226:1-2.

purchase infant body bags from Knight. See, Appellantss' Exhibit 1 (Audio recording). In fact, Lintal was also untruthful with Knight during that conversation by telling Knight that the infant bags were the only bags he had purchased from another body bag vendor, even though Respondent had at that time purchased other types of body bags from vendors other than Knight. *Id.*; see also, Trial Tr. 229:2-3.

Don Lintal testified at trial that he purchased body bags, other than infant body bags, from sources other than Knight's body bag manufacturing business. According to Lintal's testimony, Palmetto Mortuary also purchased six water-retrieval bags from Evident Crime Scene Products prior to Appellantss submitting a bid on the Richland County public contract.<sup>10</sup> Trial Tr. 49:25-50:5; 50:24-51:23. Lintal testified that the total price paid for those water-retrieval bags was \$270.00. *Id.* On or about July 14, 2010, the Respondent purchased four extra-large and six heavy duty body bags from a company called Medical Products Limited. Trial Tr. 52:2-11.<sup>11</sup> Palmetto Mortuary paid a total price of \$280.00 for the ten body bags purchased from Medical Products Limited. Trial Tr. 53:21-54:1. These purchases, like the purchases from Southland Medical Corporation and Evident, occurred well before Knight submitted a bid on the Richland County public contract.

Following the taped conversation between Don Lintal and Buddy Knight, Lintal testified that he was fearful that Knight believed that Lintal had violated the Asset Purchase Agreement by purchasing body bags from sources other than Knight's

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<sup>10</sup> Respondent's Exhibit 4 states that Palmetto Mortuary purchased the six water retrieval bags from Evident on or about March 6, 2009.

<sup>11</sup> Lintal testified that he believed that Respondent was not required to purchase the extra-large body bags from Knight because those bags, like the infant body bags, are not expressly listed in the Asset Purchase Agreement. *Id.* at 52.

business. Based upon Lintal's stated fear that Knight believed Palmetto Mortuary had breached the Asset Purchase Agreement, Lintal believed that Knight might bid on the Richland County Coroner's request for proposals.<sup>12</sup> Following the June 16, 2011 taped conversation between Don Lintal and Knight, Lintal testified that he had an "inclination" that Knight was going to submit a bid for the Richland County contract. Trial Tr. 72:1-12. As to whether Knight had indicated to Lintal on June 16, 2011 that Palmetto Mortuary had breached the Agreement, Lintal stated that "I don't believe it was -- the terminology was breached. It might have been it broke my agreement. But in effect, yes, it was the same inference." *Id.* at 72:13-20. Lintal also stated at trial that, following that conversation with Knight, Lintal went home and told his wife that he was "quite confident" that Knight would bid on the Richland County contract. *Id.* at 73:12-23.

Ellen Lintal's trial testimony corroborated her husband's fear that Knight would bid on the Richland County contract because Respondent had breached the Asset Purchase Agreement. Trial Tr. 170:5-13. Ellen Lintal stated that Don Lintal was concerned that Knight would bid on the public contract because Knight believed Lintal had breached the Agreement. *Id.* at 170:14-22. Ellen Lintal further testified that although the couple believed that Knight considered Palmetto Mortuary in breach of the agreement, neither Lintal had any subsequent conversation with Knight about whether there was, in fact, a breach of the Asset Purchase Agreement or with Knight to try to reach a resolution of this potential dispute between the Parties. *Id.* at 171:2-14.

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<sup>12</sup> Ironically, despite Lintal's proclaimed fear about what Knight might do in regard to Lintal's breach of the Agreement, he never spoke with Knight about his belief that the purchase of certain categories of body bags is not required by the Asset Purchase Agreement; never spoke with Palmetto Mortuary's attorney about whether there might have been a breach of the Agreement; and never sought a civil injunction against Knight after he learned of Knight's bid, but before Richland County awarded the public contract.

Respondent's actions in response to the belief that Knight would bid on a major portion of Palmetto Mortuary's business, in supposed violation of the Non-Competition Covenant, is inconsistent with the Lintals' assertions that Respondent did not breach the Asset Purchase Agreement.

After a trial held before Special Referee/Master James Randall Davis, on May 14, 2013, the Special Referee/Master held that the Parties' Non-Compete Agreement is enforceable under South Carolina law because the Non-Compete Agreement was supported by valuable consideration and was reasonably limited in time and geographic scope. The Special Referee/Master also held that although the Respondent breached the Asset Purchase Agreement by purchasing body bags from a source other than the Appellants, such breach was not a material breach. Additionally, the Special Referee/Master held that the Appellants breached the Asset Purchase Agreement by declining to sell a certain type of odor proof body bag to the Respondent and by competing for a contract with the Richland County Coroner's Office, in violation of the Parties' Non-Compete Agreement.

## **ARGUMENTS**

### **I. THE NON-COMPETITION COVENANT, AT ISSUE IN THIS CASE, CONTAINS AN UNREASONABLE STATEWIDE GEOGRAPHIC RESTRICTION AND IS NOT REASONABLY RELATED TO PROTECTING THE PURCHASED CUSTOMER BASE AND GOOD WILL OF RESPONDENT.**

The Non-Competition Covenant between these Parties is for a term of ten years and for a radius of 150 miles from Lexington County. See, Respondent's Exhibit 1. Because of the radius of the geographic restriction, the Non-Compete Agreement was, for all practical purposes, a statewide non-competition restriction. The consideration

purportedly paid by Palmetto Mortuary for this statewide non-compete agreement is described in the contractual documents as \$1,000.00. See, Exhibit 2.3 attached to Respondent's Exhibit 1. The Court of Appeals should find that the 150 mile radius from Lexington County, as a territorial restriction, is a statewide ban on Knight competing against Respondent, even though all witnesses testified that the primary business area of Knight Systems, at the time of the asset sale, was Lexington and Richland Counties.

Initially, it should be noted that in South Carolina, covenants not to compete are generally disfavored and should be critically examined by courts. See *e.g.*, 18 S.C. Jur. Monopolies § 9. "As a general rule, such covenants are given greater deference in the context of a sale of business than in the employment context." *Hagemeyer North America Inc. v. Thompson*, 2006 WL 516733 (D.S.C. 2006). Nonetheless, even a restrictive covenant not to compete, which is ancillary to the sale of a business, will be upheld only if it is supported by a valuable consideration; is reasonably limited as to time; and if it is reasonably restricted as to the place of territory, "that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344, 346 (1958). See also, *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162, 164 (1991) (upholding covenant not to compete as part of business sale because the territorial restriction "was no more restrictive than reasonably necessary to protect [purchaser's] legitimate interest").

In *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 762 S.E.2d 316 (N.C. App. 2014), the North Carolina Court of Appeals described the importance of examining a non-compete's territorial restriction in relation to the

customer or clientele area actually purchased in a business sales transaction.

*Beverage Systems of the Carolinas* involved a suit brought by the buyer of a beverage dispensing business alleging, inter alia, breach of a non-compete agreement by the seller. Holding that the subject two state non-compete was unreasonable, and therefore void, the North Carolina Court of Appeals noted that the areas serviced by the purchased business “extended from Wake County to Morgantown in North Carolina. In South Carolina . . . business only reached as deep as Rock Hill and Spartanburg and as far west as Gaffney.” *Id.* at 321. “Consequently, the geographic area covered by the non-compete [the entire states of North and South Carolina] was not limited to places where [the business sellers] had former customers and included areas not necessary to maintain plaintiff’s customer relationships; thus, it was unreasonable.” *Id.*<sup>13</sup>

Explaining the logical relationship between the connection of an existing or established customer base and a non-compete’s territorial restriction, the North Carolina Court of Appeals applied an analysis parallel to that utilized by South Carolina courts. “With regard to the reasonableness of the territory [in a non-compete], this Court has noted that

to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in

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<sup>13</sup> The North Carolina Court of Appeals also “noted that any area in which plaintiff itself had former or existing customers would also be reasonable to include in the non-compete.” *Id.* at 321, n. 2. However, because there was no pleading or proof offered that plaintiff had ever operated in North or South Carolina prior to the purchase of defendants’ business or that plaintiff had existing customers not acquired by the business purchase, “for purposes of reasonableness, only former customers of [the defendants] will determine the scope of the territory.” *Id.* Likewise, in the case before this Court, Respondents did not have any existing customers prior to the purchase of Knight’s mortuary transportation business, and certainly offered no proof or evidence of customers throughout South Carolina and into parts of Georgia and North Carolina.

*maintaining* its customers. The employer must show that the territory embraced by the covenant is no greater than necessary to secure the protection of its business or good will.”

*Id.* at 321, quoting, *Hartman v. W.H. Odell & Associates, Inc.*, 450 S.E.2d 912, 917 (N.C. App. 1994) (internal citations omitted). In the case before this Court, the Special Referee/Master failed to properly compare the express statewide, and beyond, territorial non-compete with the existing customer base of Knight Systems and, therefore, failed to find that South Carolina law voids the subject Non-Compete Agreement.

The Special Referee/Master clearly ignored precedent set by this Court and the South Carolina Supreme Court by finding that the Non-Compete Agreement’s 150 mile, from Lexington County, geographic radius (a radius extending statewide, as well as into parts of the States of Georgia and North Carolina) is reasonable to protect the good-will purchased by these Respondents. The trial court erroneously concluded that South Carolina law employs a lower scrutiny to geographic restrictions imposed by covenants not to compete as part of the purchase of a business as opposed to such geographic restrictions in employment contracts. In contrast, the law in South Carolina is clear that in either circumstance, a covenant imposing geographic restrictions on competition can be no larger than reasonably necessary to protect the existing client base of an employer or business purchaser.

Generally, in South Carolina, “[a] covenant not to compete is enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by valuable consideration.” *South Carolina Finance Corp. of Anderson v. Westside Finance Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960), citing, 36 Am.Jur., Monopolies, Combinations,

and Restraints of Trade, Sections 52, 53, 54, 55, 56; *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930); *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942); *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958). Nonetheless, such covenants not to compete, even in the context of association with the sale of a business or profession, “are looked upon with disfavor, examined critically, and strictly construed.” *Moser v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123, 125 (Ct. App. 1999) (review of covenant where purchasers sued sellers of construction company for breach). See also, *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162, 164 (1991) (holding restrictive covenant not to compete contained in restaurant asset purchase agreement is viewed with disfavor and examined critically).

The non-compete agreement in this case contains, at the least, a statewide ban on Knight competing against Palmetto Mortuary, although both sides admit that Knight Systems’ business operating territory at the time of Respondent’s purchase existed of primarily Lexington and Richland Counties.<sup>14</sup> The geographical restriction contained in the Non-Competition Covenant between Palmetto Mortuary and Buddy Knight is overbroad, unrelated to a reasonable, legitimate business interest, and is not reasonably related to protecting the “good will” purchased by Respondent. The explicitly overbroad geographic restriction imposed by the Non-Competition Agreement, “must stand or fall on [its] own terms.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 18 (2010) (holding that trial court could not “blue pencil” contract by replacing an unreasonable seventy-five (75) mile territorial restriction with one of its own). A critical examination and strict construction of the non-

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<sup>14</sup> See, Trial Tr. 104:1-25:105:1-15.

compete at issue in this case requires a finding that it is not reasonably restricted in time and territory.

In *Hagermeyer*, the South Carolina District Court observed that "South Carolina Courts have struck down statewide restrictive covenants, but not for that reason alone; a particular geographic scope is 'generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers.'" *Hagermeyer, supra* at p. 5, quoting, *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142, 144 (1983). Non-compete agreements should be limited in geographic or territorial scope to only the area necessary to protect an employer's or business purchaser's legitimate interest in the current client or customer base. See e.g., *Vlasin v. Len Johnson & Co., Inc.*, 455 N.W.2d 772 (Neb. 1990) (striking 50 mile restrictive covenant as not reasonably necessary to protect employer's legitimate interest in existing customer goodwill); *Hartman v. W.H. Odell and Associates, Inc.*, 450 S.E.2d 912 (N.C. 1994) (to prove that a geographic area in a non-compete is reasonable, an employer must show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships); see also, *Manpower of Guilford County, Inc. v. Hedgecock*, 257 S.E.2d 109 (N.C. 1979) (employer must show that the territory in covenant is no greater than necessary to secure the protection of its business).

In *Somerset, supra*, the South Carolina Supreme Court considered a covenant not to compete which arose in circumstances very similar to the present case between Palmetto Mortuary and Knight and should be binding precedent in this case. The

Respondent in *Somerset* brought a declaratory judgment action to declare a covenant not to compete, executed as part of Respondent's sale of his retail silver and jewelry business. Respondent's business was located in the Five Points area of the City of Columbia and nearly 95% of his sales were in the greater Columbia area. *Somerset*, 104 S.E.2d at 345. However, the covenant not to compete, signed by the parties in *Somerset*, prohibited Respondent from engaging in the sale of jewelry, silverware, or similar items in the entire State of South Carolina for 20 years. *Id.* at 346.

The Supreme Court, in *Somerset*, cited long-standing authority for the rule that restrictive covenants, ancillary to the sale of a business, must be reasonably tailored to the customer area served by the purchased business. *Id.* at 346. "The [Respondent's] trade came almost entirely from the area of Greater Columbia. Sales to customers living elsewhere, with the exception of four or five florists, were described in the testimony as being very 'spotty.'" *Id.* "Obviously, it was unnecessary to the protection of the business sold, or that later operated by [purchaser] that Respondent be prohibited from engaging in a similar business in Charleston, Spartanburg, Greenville or numerous other cities in South Carolina. *Id.* Finding "no rational basis for the extent of the territorial restraint," the South Carolina Supreme Court ruled that the covenant not to compete was "clearly invalid." *Id.* at 347. Like the covenant not to compete in *Somerset*, the non-competition covenant in this litigation between Palmetto Mortuary and Knight is not narrowly drawn to protect the legitimate interests of Palmetto Mortuary and, further, the covenant cannot be saved by this Court.<sup>15</sup>

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<sup>15</sup> See, Trial Tr. 104 - 105.

South Carolina courts have held that invalid or unenforceable covenants not to compete are incapable of being saved by a court imposing terms not negotiated by the parties or by "blue pencilling" the non-compete. The South Carolina Supreme Court has held that "[i]f a covenant not to compete is defective . . . it is totally defective and cannot be saved." *Faces Boutique, Ltd. v. Gibbs*, 455 S.E.2d 707, 708-09 (S.C. Ct. App. 1995) (citations omitted); *see also, Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1979) (a court cannot make a new agreement or reform a covenant not to compete into one which the parties did not voluntarily enter, and, instead, the court must uphold the covenant as written or not at all). In *Eastern Business Forms, Inc. v. Kistler*, 189 S.E.2d 22, the South Carolina Supreme Court made it abundantly clear that when a geographic limitation is not divisible, such as a listing of specific prohibited locations, then "there is no basis for drawing a sharply defined line separating the excess territory." *Id.* at 24. Thus, in South Carolina, a court may not modify or "blue pencil" a non-compete agreement so as to make its terms reasonable and enforceable. *See, Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 621 S.E.2d 352, 353-54 (2005); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (2011) (a court may not "blue pencil" the restrictions contained in a non-compete by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable); *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 621 S.E.2d 352, 354 (2005) (Supreme Court holds that a covenant not to compete may not be reformed or "blue penciled" so as to add an entirely new term, such as a more reasonable and valid geographic limitation, to which neither of the parties agreed).

At the trial of this case, Palmetto Mortuary offered no cogent explanation as to why there is a statewide restriction in the Non-Competition Covenant when Knight's purchased business operated primarily in Lexington and Richland Counties. At best, witness Don Lintal, as purchaser, testified that Palmetto Mortuary wanted a statewide territorial restriction simply because Respondent might, someday, wish to expand its business into other areas of South Carolina. See, Order p. 13, ¶ 30. The Special Referee/Master improperly ignored the complete absence of evidence and testimony establishing a legitimate, existing business interest of Palmetto Mortuary that is served by a statewide restriction on competition.

In fact, in order to avoid South Carolina's strict prohibition on "blue penciling" unreasonable terms of a non-compete, the Special Referee/Master erroneously justified this Non-Compete Agreement on the grounds that Respondent might expand its business throughout other counties in South Carolina, beyond the areas of Knight's business operations, and that Mr. Knight testified that he did not intend to get back into the mortuary transport business after the sale of his business.<sup>16</sup> Both rationales employed by the trial court are insufficient grounds to uphold the extraordinary territorial limitations of the non-compete. See, *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103, 107 (Ct. App. 2011) (geographic restriction generally considered reasonable if the

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<sup>16</sup> The Special Referee/Master never addressed the Supreme Court's ruling in *Somerset* and, instead, merely decreed that because Knight "intended to get out of the mortuary transport business . . . the parties' intention with the instant Non-Compete Agreement was not necessarily to restrain Knight's freedom of movement among employment opportunities." See, Order, p. 14, n. 5. In contravention of clear precedent, the Special Referee/Master substituted these merely speculative statements of possible expansion into other counties throughout South Carolina and not desiring to get back into the mortuary transport business for a correct analysis of the geographic provision in the Non-Compete Agreement. The trial court and the evidence fail to provide any authority suggesting that a statewide territorial restriction (one even extending into two other states) is reasonably related to protecting a business clientele and good will based almost exclusively in Lexington and Richland Counties, South Carolina.

area covered is limited to territory in which employee was able, during employment, to establish contact with employer's customers); *Somerset*, 233 S.C. 324, 104 S.E.2d 344, 347 (1958) (even though seller told buyer that covenant not to compete could include whole state, because seller had not intention of going back into that business, seller was not estopped from attacking the validity of covenant on the ground that it covered greater territory than necessary). The *Somerset* Court noted that any contention that the "excessive restraint" was made at the suggestion of the seller was "inconsistent" with the buyer's contention that "a restriction throughout the whole State was necessary for the protection of the business purchased." *Id.* at 347. The trial court clearly erred in finding that the geographical restrictions imposed by this Non-Compete Agreement are valid under South Carolina law requiring some reasonable and legitimate connection between the territorial restriction and the business area and good will actually purchased as part of a business sale.

**II. THE OVERLY BROAD AND EXPANSIVE TERRITORIAL RESTRICTION CONTAINED IN THE NON-COMPETE AGREEMENT IS NOT SUPPORTED BY VALUABLE AND INDEPENDENT CONSIDERATION AND IS, THEREFORE, VOID.**

The overly expansive non-compete geographic restriction between Palmetto Mortuary and Knight is not supported by adequate and independent consideration. Ordinarily, a "covenant not to compete contained in an addendum to a contract of sale is an independent agreement that must be supported by independent consideration." *See*, 54A Am.Jur.2d, Monopolies and Restraints of Trade § 854. In *Newman v. Sablosky*, 407 A.2d 448 (Pa. 1979), a Pennsylvania court considered whether adequate consideration existed for a covenant not to compete, which was executed separate from

the contract purchasing a medical practice. In finding that the noncompete agreement was an independent agreement that must be supported by independent consideration, the court noted that the contract to purchase the assets of the medical practice was a full, complete, and binding agreement that was not dependent on the covenant not to compete to complete its purposes. *Id.* at 450.

Sablosky involved the sale of a general medical practice in Norristown, Pennsylvania. In 1976, Sablosky agreed to sell his practice, along with all equipment, medical supplies, and furniture to Newman. *Id.* at 449. As originally drafted, the sales agreement included the sale of the “good will” of the practice, however, those exact words were deleted prior to closing.<sup>17</sup> *Id.* At the closing of the sale, the parties agreed to add a covenant not to compete as an addendum to the sales agreement. *Id.* at 449-50. Approximately one year later, Sablosky returned to the Norristown area and began practicing medicine at an area hospital. Newman brought suit to enforce the covenant not to compete. In finding a lack of consideration independent of the purchase price, the court stated that “[i]n a sale of business transaction, a covenant not to compete is especially useful to ‘protect the asset known as good will which the purchaser has bought.’”<sup>18</sup> *Id.* However, in *Sablosky*, the court held that it could “find no support for the appellant’s claim that the addendum was merely an ancillary agreement,

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<sup>17</sup> In South Carolina, “good will” has been described as “the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.” *Weinberg v. Wallace*, 314 S.C. 183, 442 S.E.2d 211, 212 (1994), *citing*, *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741, 745 (1989).

<sup>18</sup> “Good will” has been defined as the excess value of a business beyond and separate from its buildings, inventory, and contracts. *See*, 38A C.J.S. Goodwill § 1. “The market value of good will is the amount a willing buyer would pay for a professional practice in excess of the value of the physical assets.” 30A Ill. Law and Prac. Property § 15.

part and parcel with and supported by the original sales contract,” and, therefore, “the covenant was an independent agreement that must be supported by independent consideration.” *Id.*<sup>19</sup>

Like the Sablosky court, South Carolina courts have held that covenants not to compete must be supported by adequate and independent consideration. In a case dealing with a covenant not to compete in the employment context, the South Carolina Court of Appeals deemed a non-compete agreement as unenforceable because it was not supported by new consideration. *See, Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480, 489 (Ct. App. 2013). In *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999), the South Carolina Court of Appeals found that a covenant not to compete, entered into during an existing employment relationship, was unenforceable due to a lack of consideration. In a case analogous to the case before this Court, the Poole court found that the employee received no new benefit for signing the non-compete, including no increase in salary, no bonus, and no change in work conditions. *Id.* at 900. Stated another way, the employee in Poole received nothing new in exchange for signing the non-compete, other than the employee’s originally bargained for terms of employment.

In this case, Palmetto Mortuary paid no independent and adequate consideration to Knight in exchange for a non-compete throughout South Carolina and extending into two other states. Other than the previously agreed upon purchase price for the physical assets of Knight’s business and the value of the existing contracts with the Lexington

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<sup>19</sup> In *Sablosky*, the words “good will” were stricken from the sales agreement, but whether or not the words had been included, the court found no actual independent consideration for the non-compete between the parties.

County Coroner's Office, the Richland County Coroner's Office, and the University of South Carolina's Medical School, the Respondents provided no additional compensation for a statewide non-compete.<sup>20</sup> Although the Parties assigned a large portion of the purchase price to "good will," the testimony and evidence produced at trial shows that the purchase price included no amount above and separate from the valuation of the physical assets and existing contracts of Knight Systems.

Incredibly, Palmetto Mortuary's stated consideration amount of \$1,000 was merely deducted from the previously negotiated purchase price for the physical assets and existing contracts, rather than even being \$1,000 paid above or in addition to the negotiated purchase price. Knight testified at trial that he did not even know about a proposed non-compete agreement until he arrived at the closing. Both Don and Ellen Lintal testified that they had not thought of or contemplated a dollar amount to pay as consideration for the non-compete prior to their arrival at the closing.<sup>21</sup> It is clear from the testimony and evidence, at trial, that there was no consideration paid to Knight for the overly expansive non-competition agreement, above the existing negotiated purchase price.

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<sup>20</sup> Ellen Lintal testified that other than the \$590,000 purchase price agreed upon for the purchase of Knight's business assets, the Respondent never proposed any additional compensation for the non-compete. *See*, Trial Tr. 158:21-25; 159:1.

<sup>21</sup> Ellen Lintal, who testified that she had previous experience with non-compete agreements as part of business acquisitions, raised concerns with her husband and closing attorney about her perception that the amount designated as consideration for the non-compete was insufficient consideration for a valid agreement.

### III. APPLICATION OF THE NON-COMPETITION COVENANT TO PROHIBIT KNIGHT FROM SUBMITTING A BID ON THE RICHLAND COUNTY CORONER'S CONTRACT FOR BODY TRANSPORTATION SERVICES RESTRICTS COMPETITIVE BIDDING FOR A PUBLIC CONTRACT AND IS VOID AS AGAINST PUBLIC POLICY.

Although the issue has not been directly addressed by South Carolina courts, many other jurisdictions have held that agreements restricting competition, even noncompete agreements, between potential competitors for public contracts are invalid and void as against public policy.<sup>22</sup> Those courts have held that agreements not to compete with another in making bids or other agreements having a direct tendency to prevent bidding or competition for public contracts are against public policy. *See e.g.*, 17A C.J.S. Contracts § 300, *citing*, *Board of Ed. of Floyd County v. Hall*, 353 S.W.2d 194 (Ky. 1962); *Application of Caristo Const. Corp.*, 30 Misc.2d 185 (N.Y. 1961); *Borden v. Ellis*, 44 A.2d 530 (Pa. 1945); *Wade v. Ingram*, 528 F.Supp. 495 (E.D.Ar. 1981); *City of Oakland v. California Const. Co.*, 104 P.2d 30 (1940); *Uvalde Const. Co. v. Shannon*, 165 S.W.2d 512 (Tx. 1942). Courts have ruled that whether or not the public has received any actual injury by reason of the anti-competition contract or agreement will not relieve the contract of its illegality. *See*, *Finley Method Co. v. Standard Asphalt Co. of Fla.*, 139 So. 795 (1932); *Pyle v. Kernan*, 36 P.2d 580 (Or. 1934); *Borden v. Ellis*, 44 A.2d 530 (Pa. 1945). While South Carolina has not directly addressed the issue of non-compete, and other anti-competition, agreements as restricting bidding on public

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<sup>22</sup> "Agreements designed to suppress bidding and competition in the letting of public contracts, such as agreements not to compete with another in making bids, to withdraw a bid for a public or quasi-public contract, or to share in the result or profits, are against public policy and void." 12 Ill. Law and Prac. Contracts § 107, *citing*, *Premier Elec. Const. Co. v. Miller-Davis Co.*, 291 F.Supp. 295 (N.D.Ill. 1968); *Conway v. Garden City Paving & Post Co.*, 60 N.E. 82 (Ill. 1901).

contracts, South Carolina courts have held that contracts violating public policy are illegal and unenforceable.<sup>23</sup>

In the case of *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (2000), the South Carolina Court of Appeals discussed, in an analogous case, the importance of a public policy upholding free and open competition for public contracts. Sloan brought a challenge to certain contracts entered into by a local school district and sought a declaration that those contracts were *ultra vires* to the District's procurement code, were invalid, and were illegal. *Sloan, supra*. The *Sloan* court noted that, although the local school district had adopted its own procurement code, "the [South Carolina] General Assembly's intent is relevant when examining the public policy of competitive sealed bidding in the award of public contracts. *Sloan*, 537 S.E.2d at 303. "The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." *Id.* Further, the Court of Appeals held that competitive bidding for public contracts is so important "that in some states 'once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed . . . without showing that the municipality suffered any injury.'" *Id.* at 303-04, *citing*, 18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.26

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<sup>23</sup> "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288, 291 (2012). South Carolina law is well established that a contract "which is contrary to public policy, is void, and cannot be enforced in a court of justice." *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 288 (2012), C.J. Toal *concurring in part* (citations omitted).

(3d ed. 1993); *see also*, 5 Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04 (2d ed. 1999).<sup>24</sup>

Courts have long held that agreements or covenants not to compete in bidding for public contracts are void and unenforceable as violative of the public interest in competitive bidding. In *Spokane Sav. & Loan Soc. v. Park Vista Imp. Co.*, 294 P. 1028 (Wa. 1930), the Supreme Court of Washington held that any agreement to “chill or suppress bidding is void.” *Id.* at 1036. “The authorities clearly recognize the principle that where an agreement, without regard to its form, is made for the purpose of preventing free and fair competition, or of stifling or chilling bids at public sales or in the letting of contracts by the government, or for the purpose of giving undue advantage to either of the parties thus engaged in dealing with reference to the biddings, it is contrary to public policy and void.” *Id.*; *see also*, *Heid Bros. v. Riesto*, 281 S.W. 638 (Tx. 1926) (agreement stifling competition on government contracts is violative of state anti-trust statutes and contrary to public policy).

In *Richmond Co., Inc. v. Rock-A-Way, Inc.*, 404 So.2d 121 (Fla. 1981), the courts explained the nature of the harm to the public interest and why such collusive agreements restricting bidding on public contracts are void as a matter of law. The *Rock-A-Way* court noted that:

“The principal contracts involved in this case were subject to the competitive bidding statutes. The rule is well settled in the United States that all agreements, whether principal or subsidiary in character, which, in their necessary operation upon the action of contractors engaged in bidding for public work, tend to restrain the natural rivalry and competition

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<sup>24</sup> In ruling that Sloan had standing as a taxpayer to challenge the local contracts, the South Carolina Court of Appeals also held that “we find the issues involved ‘are of such wide concern’ that this declaratory judgment action should be decided for future guidance in the expenditure of public funds pursuant to competitive sealed bidding requirements.” *Sloan*, 537 S.E.2d at 304.

of the parties, and thus produce a result disadvantageous to the public, are against public policy and void. What the public has to be on guard against in the violation of such salutary statutes as these is not the violation direct, but the violation oblique; not the frank disregard of what the statutes in terms require, but the suave and insidiously evasive arrangements which, operating in secret understandings between contractors and their privies, tend to produce an effect as harmful in result as the most direct misconduct or malfeasance.”

*Id.* at 122-23.

Therefore, this Court should find that the Non-Competition Agreement between Palmetto Mortuary and the Appellants, as applied to the Richland County Coroner’s contract for body transportation services, is void and unenforceable on grounds of the important public policy interest in competitive bidding on public contracts. *See e.g., City Nat. Bank of Corpus Christi v. City of Corpus Christi*, 233 S.W. 375 (Tx. 1921) (rule of law is settled that arrangements among prospective bidders, for government contracts, to prevent competition among themselves are contrary to public policy and void); *Kimball Elevator Co., Inc. v. Elevator Supplies Co., Inc.*, 272 P.2d 583 (Utah 1954); *Premier Electrical Const. Co. v. Miller-Davis Co.*, 291 F.Supp. 295 (N.D. Ill. 1968); *Conway v. Garden City Paving & Post Co.*, 190 Ill. 89 (1901); *Re Salmon*, 145 Fed. 649 (D.C. 1906) (there is a uniform and inflexible rule of law that all combinations which would stifle competition as applied to bidding on public contracts are “immoral, vicious, and void.”). Even if the trial court could find that the non-compete agreement between Palmetto Mortuary and Knight is valid as to restricting competition for private sector business, the South Carolina Court of Appeals should hold that such a private agreement, preventing competitive bidding on a public contract, is violative of South Carolina public policy, and, therefore, is unenforceable between these Parties, as applied to the Richland County public contract.

**IV. RESPONDENT FIRST BREACHED THE ASSET PURCHASE AGREEMENT AND THE EXPRESS TERMS OF THE PARTIES' CONTRACTS PROVIDES THAT ANY BREACH OF THAT AGREEMENT, WHETHER A MATERIAL BREACH OR NOT, VOIDS THE NON-COMPETE AGREEMENT AS APPLIED TO APPELLANTS.**

The central issue before this Court is whether Respondent or Appellantss breached the contractual agreement between the Parties. In this case, the Court must apply well established rules of contractual construction or interpretation to Section 3.4.8 of the Asset Purchase Agreement and to the Termination Clause set forth in the Non-Competition Covenant. When an action raises a question as to the construction of a written contract, South Carolina law provides that the court's duty is limited to the interpretation of a contract made by the parties, regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully. *See e.g., Builders Mut. Ins. Co. v. OakTree Homes, Inc.*, 867 F.Supp.2d 800 (D.S.C. 2012). South Carolina follows an objective contract interpretation rule, meaning that if the language of a contract is patently plain and reasonably capable of legal construction, then such contractual language determines the force and effect of the instrument. *Catawba Indian Tribe of South Carolina v. City of Rock Hill, S.C.*, 501 F.3d 368 (4th Cir. 2007).

When interpreting the language of a contract, the court must give such language its usual meaning and the words used therein must be taken and understood in their plain, ordinary and popular sense. *F.D.I.C. v. Prince George Corp.*, 58 F.3d 1041 (4th Cir. 1995) (applying South Carolina contract law); *Dean v. American Fire & Cas. Co.*, 249 S.C. 39, 152 S.E.2d 247 (1967); *Friarsgate, Inc. v. First Federal Sav. and Loan Ass'n of South Carolina*, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995), *reh'g denied* (Mar. 16, 1995). Courts have no authority to alter an unambiguous contract by

construction or to make new contracts for the parties. *U.S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199 (Ct. App. 2009). Courts only have the authority to specifically enforce contracts that the parties themselves have made and, therefore, they do not have the authority to alter contracts or to make new contracts for the parties.

*Lowcountry Open Land Trust v. Charleston Southern University*, 656 S.E.2d 775 (Ct. App. 2008) (court cannot impose unwanted obligations and terms under the guise of specific performance or judicial construction); *see also, Davis v. Davis*, 372 S.C. 64, 641 S.E.2d 446 (Ct. App. 2006) (in enforcement of an agreement or contract, court does not have the authority to modify terms that are clear and unambiguous on their face).

In interpreting the language of a contract, if the language is plain and capable of legal construction, then the language set forth in the agreement alone determines the instrument's force and effect. *See e.g., Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705 (1993); *State v. Gates*, 299 S.C. 92, 382 S.E.2d 886 (1989). Thus, when construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or otherwise stated, the intent and meaning of the contract is gathered from the four corners of the instrument. *State Acc. Fund v. South Carolina Second Injury Fund*, 693 S.E.2d 441 (Ct. App. 2010). When such contract is clear and unequivocal, its meaning must be determined by its contents alone and the court cannot supply a meaning different than that expressed in the agreement. *Id.* In fact, it is the duty of the court to enforce the plain language of a contract. *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005); *see also, Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) (to discover the intention of a contract, one must first look to its

language and if it is plain and capable of legal construction, then it alone determines the document's force and effect).

Only if a contract is deemed ambiguous does a court try to ascertain the intention of the parties from extrinsic or parol evidence.<sup>25</sup> See e.g., *Middleton v. Eubank*, 388 S.C. 8, 694 S.E.2d 31 (Ct. App. 2010). An ambiguous contract is one capable of being understood in more ways than one, or is obscure in meaning through indefiniteness of expression, or having a double meaning. *Keefer v. Keefer*, 394 S.C. 329, 715 S.E.2d 379 (Ct. App. 2011); *Stevens Aviation, Inc. v. DynCorp Intern. LLC*, 394 S.C. 300, 715 S.E.2d 655 (Ct. App. 2011). A contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated writing and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business. *Laser Supply and Services, Inc., supra*.<sup>26</sup>

In the case before this Court, the language of the contract between Respondent and Appellantss clearly requires that Palmetto Mortuary purchase **all** of its body bags from Knight's body bag manufacturing business. See, Section 3.4.8 of the Agreement. The contract expressly obligates Palmetto Mortuary, "for the term of the non-compete agreement [to] **buy all their body bags from the Seller**. *Id.* (emphasis added). That particular provision of the Agreement does further state that "[b]elow are current charges for different types of body bags." *Id.* However, that sentence is merely

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<sup>25</sup> Whether an ambiguity exists in the language of a contract is a question of law. *Laser Supply and Services, Inc. v. Orchard Park Associates*, 676 S.E.2d 139 (Ct. App. 2009).

<sup>26</sup> In determining as a matter of law whether a contract is ambiguous, a court must consider the contract as a whole, rather than deciding whether certain isolated phrases could be interpreted in various ways and, further, an ambiguity may not be created by pointing to a single sentence or clause in the agreement. *Buice v. WMA Securities, Inc.*, 668 S.E.2d 430 (Ct. App. 2008).

exemplary of different types of body bags that Respondent might purchase, but not exhaustive of all types of body bags that Palmetto Mortuary might use or that Knight could manufacture or provide.<sup>27</sup>

The contract language requiring that Respondent purchase “all” of their body bags from Knight is plain, unequivocal and capable of only one meaning. The word “all” is defined as meaning “the whole of,” “every one of,” “wholly,” “completely,” “entirely,” “everything,” “the whole amount, quantity, or extent of.” Webster’s Dictionary and Thesaurus (2002). “The word ‘all,’ standing alone, means exactly what it imports; that is, nothing less than all.” *Knox Jewelry Co., Inc. v. Cincinnati Insurance Co.*, 203 S.E.2d 739, 741 (Ga. 1974). “[T]he word ‘all’ needs no definition; it includes everything, and excludes nothing. There is no more comprehensive word in the language . . . .” *Cannon v. Bresch*, 160 A. 595, 596 (Pa. 1932). The word “all” is not in anyway limited, qualified, or reduced by the succeeding sentence which describes “current charges for different types of body bags.” See, Section 3.4.8 of the Agreement (Respondent’s Exhibit 1).<sup>28</sup>

Respondent’s assertion that the sentence setting forth examples of “charges for different types of body bags” excluded infant bags and extra-large body bags from Section 3.4.8’s exclusive purchase requirement is without merit and contrary to a plain

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<sup>27</sup> See e.g., Trial Tr. 220:18-25 (Knight explaining that he manufactures bags and can make any type of body bag).

<sup>28</sup> At best, the only logical interpretation of that sentence is to assume that “different types of body bags” means “some types of body bags.” The ordinary meaning of the word “some” is “of a certain unspecified quantity,” “being unknown, undetermined, or unspecified unit or thing,” “being at least one of a subclass.” Webster’s Dictionary and Thesaurus (2002). “The word ‘some’ by definition is ‘indefinite’ and ‘indeterminate.’” *State v. Lerch*, 677 P.2d 678, 690 (Or. 1984), citing, Webster’s New Third International Dictionary (Unabridged 1971). “‘Some’ is a word that refers to an unspecified quantity or quality. It is a word that diminishes precision, not adds to it.” *Yazd v. Woodside Homes Corp.*, 143 P.3d 282, 289 (Utah 2006); see also, *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tx. 1993) (citing, Webster’s Dictionary and explaining that “some” means being of an unspecified quantity).

and ordinary usage of the word “all.”<sup>29</sup> The Court’s interpretation of that provision of the Agreement is not only supported by the plain and ordinary meaning of the word “all,” but rather it is also supported by the Respondent’s knowledge of the fact that Knight actually manufactured body bags, as opposed to merely being a wholesale provider of body bags. In fact, Respondent included a right of first refusal in the Agreement granting Respondent the right to purchase Knight’s body bag manufacturing business in the event Knight ever offered to sell that business. See, Section 3.4.8 of the Agreement (Knight was required to offer to sell the body bag manufacturing business to Respondent at the same price and terms as those offered to any third party). Therefore, this Court must construe Section 3.4.8 as requiring Respondent to purchase, without limitation, any and all body bags from Knight, including infant and extra-large body bags.

Regardless of whether the infant and extra-large body bags are included within the exclusive purchase requirement set forth in Section 3.4.8, Respondent concedes that it purchased categories of bags specifically listed in that section, including water-retrieval and heavy-duty body bags. See e.g., Trial Tr. 49:25 - 50:5; 50:24 - 51:23; and 52:2-11. However, Respondent argues that its admitted breaches of the Asset Purchase Agreement were not “material” breaches of the Agreement.<sup>30</sup> Ordinarily, a

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<sup>29</sup> Further, to the extent that Respondent argues that the phrase “[b]elow are current charges for different types of body bags” creates an ambiguity as to the word “all,” in Section 3.4.8, that ambiguity must be construed against the Respondent and in favor of Appellantss’ interpretation of the section. See, *Mathis v. Brown*, 698 S.E.2d 773 (S.C. 2010).

<sup>30</sup> Respondent propounded testimony comparing the total amount of money paid for body bags purchased from Knight with the total amount paid for the purchase of body bags from other vendors. See, Trial Tr. 49:21 - 50; 52:4-23; 56:10-20 (approximately \$45,000.00 versus slightly less than \$900.00). Even excluding the disputed purchases of infant and extra-large body bags, Respondent admits to spending nearly \$500.00 on body bags from sources other than Knight.

nonperforming party is liable for breach of contract, excusing the other party from further performance, only when there is a material breach of the contract. See, Williston on Contracts, § 63:3, *citing, In re Krueger*, 192 F.3d 733 (7th Cir. 1999). “Otherwise stated, a nonperforming party is liable for any breach of contract, but the other party is discharged from further performance, and is entitled to substantial damages only when there is a material breach.” *Id.* “[I]f a breach is relatively minor and not of essence, the [non-breaching party] is still bound by the contract and may not abandon performance . . . .” *Id.* However, in this case, the Court finds that the Respondent’s argument is erroneous and, therefore, Palmetto Mortuary’s breach of the Asset Purchase Agreement is a material breach of Section 3.4.8 and is also express grounds for Knight to revoke the Non-Competition Covenant.

First, Respondent’s purchases of body bags from Evident, Medical Products Limited and Southland Medical Corporation constituted a material breach of the terms of the Asset Purchase Agreement.<sup>31</sup> “[C]ourts have come up with numerous ways of speaking about ‘material’ breaches of contract.” Williston on Contracts, *supra*. “A breach is ‘material’ if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, [the] breach substantially defeats the contract’s purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.” *Id.* “The standard for determining materiality must necessarily be both imprecise and flexible to further the purpose of securing for each party his or her expectation of an exchange of performances.” *Id.* “[P]roof of a specific amount of monetary damages is

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<sup>31</sup> The question of whether a breach of the contract is material is usually a question of fact for the fact finder. *Id.* Further, the “party who first commits a material breach cannot enforce the contract.” *Id.*

not required when the evidence establishes that the breach was so central to the parties' agreement that it defeated the essential purpose of the contract." *Id.*

The trial court attempts to minimize the materiality of its breach by arguing that the amounts paid to other vendors for body bags is insignificant compared to the dollar amount of purchases from Knight's body bag manufacturing business. The Special Referee/Master's view of Respondent's actions erroneously fails to account for whether Palmetto Mortuary breached an essential term or condition of the Asset Purchase Agreement, rather than the repetitiveness of its breaches. The Parties clearly considered the exclusive purchase provision of the Agreement to be a vital part of the contract by including it as an expressly required "Transaction Subsequent to Closing." Respondent's Exhibit 1, Section 3.4. In *Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009), the South Carolina Supreme Court held that it is improper to focus merely on the dollar amount involved in the breach, rather than the essential nature of the term or condition actually breached.

In *Brazell*, vendors sued a purchaser for breach of contract and requested rescission of their contract for the purchase and sale of a house. The *Brazell* parties entered into a sales contract for the purchase of a home on Edisto Island. *Id.* at 514. The total purchase price of the home was \$550,000 and, after satisfying liens on the property, the petitioners were to receive a total of \$327,818.54 from the sale of the house. *Id.* The purchasers notified that petitioners that the reverse osmosis water filtration system at the house did not work and forwarded a check to petitioners for the net proceeds of the sale, minus \$2,000.00 for the water system. Petitioners refused to

accept the check and filed suit alleging breach of contract.<sup>32</sup> The trial court held that the complaint that the purchasers had withheld \$2,000 from the contract price was a minor breach of the \$550,000.00 sales contract. *Id.* at 827. “Similarly, the court of appeals held that the remedy of rescission was not available because the alleged breach was not fundamental or substantial enough to defeat the purpose of the contract.” *Id.*

Reversing the lower courts, the South Carolina Supreme Court found a material breach of the sales contract. The Supreme Court stated that, [i]n our view, the trial court’s and court of appeal’s error stems from focusing on the dollar amount withheld in determining whether [purchaser’s] actions defeated the purpose of the contract and the objective of the contracting parties.” *Brazell, supra* at 827.<sup>33</sup> The Supreme Court held that “the overriding purpose of the contract was not merely to receive proceeds from the sale of a home, but rather to finalize a real estate transaction and transfer title from the vendors to the purchasers. *Id.* The Court further observed that the respondent “could have negotiated for provisions in the contract regarding the reverse osmosis system or could have sought relief by filing her own breach of contract action.” *Id.*

As in *Brazell*, it would be wrong for this Court to focus on the dollar amounts paid to purchase body bags from sources other than Knight, rather than to properly focus on whether the exclusive purchase provision of Section 3.4.8 of the Agreement is an essential term or condition of the Agreement. These parties negotiated and executed a

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<sup>32</sup> Unlike this case, the petitioner in *Brazell* also sought rescission of the entire contract. “[W]hether it would be fair and equitable to rescind [a] contract is a different issue from whether [a party has] sufficiently alleged a material breach of contract and sufficiently alleged that rescission would allow them to be restored to the status quo.” *Brazell, supra* at 828.

<sup>33</sup> The Supreme Court commented that “the trial court noted that Respondent paid 99.6% of the contract price and withheld only .04%. The court found that Petitioners’ complaint was ‘over a minor .04%’” *Id.* at 827 n.1.

contract expressly requiring Palmetto Mortuary to purchase “all of their body bags” from Knight’s related body bag business. “It has been said that the best indication of the true intent of the parties as to the materiality of a breach is their treatment of it.” 23 Williston on Contracts § 63:3, *citing, Panhandle Rehabilitation Center, Inc. v. Larson*, 288 N.W.2d 743 (1980). Don and Ellen Lintal clearly treated Palmetto Mortuary’s breach of Section 3.4.8 as a serious and material breach.

Both of Respondent’s witnesses testified, at trial, that following the June 16, 2011 conversation between Don Lintal and Buddy Knight, Don and Ellen Lintal discussed their belief or fear that Knight would bid on the Richland County Coroner’s contract as a direct result of Respondent’s breach of Section 3.4.8. *See*, Trial Tr. 72:1-12. Ellen Lintal even testified, contrary to her husband, that Respondent contacted an attorney concerning the fear that Mr. Knight was going to begin competing again in the body transportation business, after the issue was raised on June 16, 2011 as to whether Respondent had breached the Agreement. Trial Tr. 171:2-23. The Lintals’ comments and actions, following the June 16, 2011 conversation with Knight, most certainly indicate that both Parties considered Section 3.4.8 to be an essential, important, and material term of the Agreement. As in *Brazell*, despite their fear that Palmetto Mortuary might have breached the Agreement; that Knight might compete against them for a substantial part of Respondent’s business; and that they consulted an attorney about their non-compete agreement with Knight; Don and Ellen Lintal failed to initiate their breach of contract action against Knight until after Knight was awarded the Richland County public contract. *See e.g., Brazell*, 682 S.E.2d at 827.

A second reason that this Court should find that Respondent's breach of Section 3.4.8 of the Agreement requires a ruling in favor of the Appellants is that the Non-Competition Agreement contains an explicit Termination Clause. The termination provision, as expressly stated in the non-compete agreement, provides that in the event that Respondent breaches Section 3.4.8 of the Asset Purchase Agreement, then Mr. Knight may be relieved from the terms of the non-compete. Specifically the Termination Clause of the Non-Competition Covenant provides as follows: "Breach of the Purchase Agreement. Notwithstanding anything contained herein to the contrary, a breach by Buyer of the Purchase Agreement or such other documents ancillary thereto, shall constitute a breach of this Agreement and shall release Seller from any and all restrictions hereunder." See, p. 3 of Exhibit 3.2.6 of the Asset Purchase Agreement, admitted as Respondent's Exhibit 1. Thus, pursuant to the Termination Clause, any breach of the Asset Purchase Agreement, by Palmetto Mortuary, completely releases Knight from the terms of the non-compete agreement.

"Explicit termination clauses are common in many different categories of commercial contracts, including employment agreements, service contracts, merger and acquisition agreements, loans, and franchise and distributorship arrangements." Anticipating Litigation In Contract Design, 115 Yale L.J. 814, 873 (Jan. 2006). "Under the common law of contracts, material breach entitles the nonbreaching party to withhold performance and seek damages for breach. One reason for explicit termination clauses is to provide for the conditions that trigger termination, rather than

relying on the common law requirements for material breach.” *Id.* at 874.<sup>34</sup> In the absence of a termination clause, a party may ordinarily terminate a contract only in the event of a material breach. See, 33 New York Construction Law Manual § 4:2 (2d ed.).

In *Tricat Industries, Inc. v. Harper*, 748 A.2d 48 (Md. 2000), the Maryland Court of Special Appeals described the nature of termination clauses. The Maryland court explained that “unless a contract provision for termination for breach is in terms exclusive, it is a cumulative remedy and does not bar the ordinary remedy of termination for a ‘breach which is material, or which goes to the root of the matter or essence of the contract.’” *Id.* at 61 (citations omitted). Under the express provisions of a termination clause, the *Tricat* court noted that a contract may be terminated for a breach of an obligation which did not amount to a material breach of that agreement. *Id.* Thus, the very existence of a termination clause in a contract eliminates the necessity for a court to determine whether a breach of a term or condition of the contract is material, thereby giving rise to the right of a party to terminate the contract.

In the case of *In re Hawker Beechcraft, Inc.*, 486 B.R. 264 (S.D.N.Y 2013), the United States Bankruptcy Court discussed a termination clause in a matter involving an aircraft manufacturing, sales and servicing company and certain purchase agreements. The bankruptcy court discussed, in part, whether there was a breach of a provision in certain aircraft purchase agreements. The court noted that “[o]rdinarily, the materiality of the [breached] promises would be a question of fact requiring a trial.” *Id.* at 278,

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<sup>34</sup> Parties may enter into any contracts that they deem fit, including, for example, contracts providing for termination of the agreement for reasons other than the common law material breach. See *e.g.*, *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 161 S.C. 487, 159 S.E. 825 (1931). “[P]ersons may enter into whatever contracts they see fit, which are not illegal, immoral, or against public policy.” *Id.* at 826 (upholding contractually agreed upon termination provision).

citing, *Almena State Bank v. Enfield*, 954 P.2d 724, 727-28 (Kan. 1998). “However, if the parties contractually agree that some or all of the terms are sufficiently important to discharge any further obligations imposed on the party aggrieved by a breach, their intent will govern.” *Id.*, *supra*, citing, *Gen. Datacomm Indus., Inc. v. Arcara*, 407 F.3d 616, 623-24 (3rd. Cir. 2005) (provision in Benefit Plan that allowed corporation to terminate the employee’s rights if he failed to comply with certain covenants, including the agreement not to compete and to maintain confidentiality, rendered those covenants material)<sup>35</sup>; *Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp.*, 495 A.2d 66, 75 (N.J. 1985) (enforcing provision in franchise agreement that rendered underreporting of sales a material breach of contract that allowed franchisor to terminate franchise and sue for damages); 23 Richard A. Lord, *Williston on Contracts* § 63:3 (4th ed. 2002) (“Where the contract itself is clear in making a certain event a material breach of that contract, a court must ordinarily respect that contractual provision.”); *cf. Dexter v. Brake*, 269 P.3d 846, 856 (Kan. 2012) (“The doctrine of substantial performance does not apply where the parties, by the terms of their agreement, make it clear that only complete performance will be satisfactory.”).

Palmetto Mortuary and the Appellants included a specific termination clause in the Non-Competition Covenant. The termination provision expressly provides that **any** breach of the Asset Purchase Agreement, by Palmetto Mortuary, releases Knight from the restrictions imposed by the non-compete agreement. See, p. 3 of the Non-

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<sup>35</sup> Even though the termination clause at issue in the case of *In re General DataComm* did not use the term “material,” the court held that “[b]y contractual definition . . . such obligations are material.” *In re General DataComm Industries, Inc.*, *supra*, at 624, citing, 23 *Williston on Contracts* § 63:3 (4th ed.) (when the contract itself is clear in making a certain event a material breach of the contract, a court must ordinarily respect that contractual termination provision).

Competition Covenant, admitted as Respondent's Exhibit 1.<sup>36</sup> Don and Ellen Lintal's fears that Knight would compete for the Richland County Coroner's contract, following Don Lintal's June 16, 2011 conversation with Buddy Knight, is consistent with the Lintals' knowledge that the termination clause allowed Knight to terminate the non-compete. The recorded conversation between Lintal and Knight included statements by Lintal indicating that he was concerned that Knight would see Palmetto Mortuary's purchases of infant body bags as a breach of the Asset Purchase Agreement. See, Trial Tr. 221 -225.<sup>37</sup> During the same conversation, Lintal was affirmatively untruthful with Knight, by denying that Respondent had purchased any bags, other than the infant body bags, from other vendors. Trial Tr. 223:4-9; 221 - 225. Don Lintal also discussed with his wife, and later their attorney, the issue of whether Knight's belief that Respondent had breached the Asset Purchase Agreement would be grounds for Knight to bid on the Richland County public contract.

Evidence of the Respondent's behavior, coupled with the express language of the termination clause of the non-compete, required the trial court to uphold Appellants' right to terminate the Non-Competition Covenant.<sup>38</sup> These Parties' termination clause, as expressed in the Non-Competition Covenant, "should be examined to determine

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<sup>36</sup> See e.g., *Jespersen v. Minnesota Mining and Manuf. Co.*, 700 N.E.2d 1014 (Ill. 1998) (termination events listed in a termination clause or provision of a contract are themselves inherent instances of material breach and any contract is terminable upon occurrence of a material breach).

<sup>37</sup> Lintal never stated or indicated in any way during that conversation with Knight that Lintal did not believe that Respondent was required to purchase the infant bags under the terms of the Agreement.

<sup>38</sup> One party to a contract may end it if the contract itself so provides. 28 N.Y.Prac., Contract Law § 13:1. If the language of a termination clause contained in an agreement is unambiguous, the court must enforce it as written. *Id.*, citing, *Robert J. McRell Associates, Inc. v. Insurance Co. of North America*, 677 F.Supp. 721, 728 (S.D.N.Y. 1987). "When the parties assent to a right of termination at the time they enter into a contract, there is no reason that justifies a court's alteration of the clear provisions of the parties' agreement. *Id.*, citing, *A.S. Rampell, Inc. v. Hyster Co.*, 144 N.E.2d 371 (N.Y. 1957).

whether the clause makes termination automatic upon the occurrence of an event specified in the clause or merely gives a party the right to terminate upon occurrence.” See, 28 N.Y.Prac., Contract Law § 13:1, citing, *In re Velo Holdings, Inc.*, 475 B.R. 367, 382-83 (S.D.N.Y. 2012). “When a contract provides it can be terminated upon occurrence of specified events, termination after such an event is proper even though the terminating party did not know of the event’s occurrence.” 28 N.Y.Prac., *supra.*, citing, *Arbor Leasing, LLC v. BTMU Capital Corp.*, 68 A.D.3d 580 (N.Y. 2009).

Therefore, as described herein above, Mr. Knight had an absolute right, pursuant to the termination clause of the Non-Competition Covenant, to terminate the non-compete at any time after Respondent breached the Asset Purchase Agreement by purchasing any body bags from sources other than Knight’s business, regardless of the number of purchases or the amount of bags bought by Respondent.<sup>39</sup> Further, the purchase of the body bags by Respondent, from vendors other than Knight, constituted a material breach of the Asset Purchase Agreement. The material breach of the Agreement by Respondent and the unambiguous terms of the termination clause should cause the Court of Appeals to find in favor of the Appellants and reverse the Special Referee/Master.

### CONCLUSION

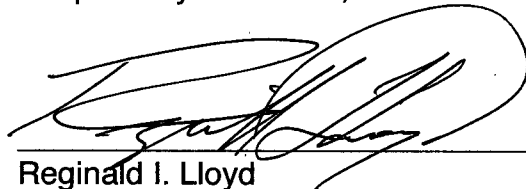
For the reasons stated herein, the Court of Appeals should find in favor of the Appellants and reverse the judgment of the Special Referee/Master. The Court should

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<sup>39</sup> The clear words of the termination clause at issue in this case omitted the requirement that Respondent’s breach of the Asset Purchase Agreement had to be a “material breach” prior to granting Knight the right to terminate the non-compete. This Court has no obligation or right to insert a materiality requirement to the terminating event when these Parties themselves failed to include such a requirement. See, *Ebert v. Ebert*, 320 S.C. 331, 465 S.E.2d 121 (Ct.App. 1995), *cert denied*, Oct. 17, 1996 (court will not supply omitted terms to an agreement between contracting parties).

find that the Respondent materially breached the Asset Purchase Agreement prior to Knight submitting a bid for the Richland County Coroner's contract. Further, the Court should find that Respondent's breaches of the Asset Purchase Agreement permitted Appellants to terminate the Non-Competition Covenant. Additionally, the Court should hold that the Non-Competition Covenant is void based upon a lack of adequate, independent consideration, as well as an unreasonable territorial restriction, which is incapable of being modified or "blue penciled." Lastly, the Court of Appeals should hold that, as a matter of public policy, the Non-Competition Covenant is unenforceable, as stifling of competition for bidding on a public contract for services sought by Richland County government.

Respectfully submitted,



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