IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-Respondent,

vs.

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

APPELLANT'S FINAL REPLY BRIEF OF THE RESPONDENT-APPELLANT

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ARGUMENT IN REPLY

Respondent-Appellant Total Quality Logistics, LLC (hereinafter "TQL") incorporates the Statement of the Issues on Appeal, the Statement of the Case, and the Facts from its Initial Brief of Respondent-Appellant.

In his Initial Brief of Appellant-Respondent, Joshua Fay (hereinafter "Fay") makes two assertions that call for reply: (1) that the "trade secrets" [sic] portion of his Agreement is invalid because it lacks restrictions for time and place; and (2) that TQL admitted that Fay has not violated the Agreement. TQL addresses each of these in reverse.

I. Fay's solicitations of a TQL customer to provide freight brokering services through his own freight brokerage company, JF Progressions, LLC, is a clear violation of his Agreement entitling TQL to summary judgment.

Fay's assertion, that Hillary Kotlarz's affidavit unwittingly admits that his work through JF Progressions, LLC ("JF Progressions") is permitted by the Agreement, is a profound mischaracterization of her testimony and of TQL's consistent position. According to Fay, the purported "admission" results from Ms. Kotlarz's testimony that Fay's Agreement would permit him to work as a "logistics planner." See Respondent's Initial Brief of Appellant-Respondent, p.2. But this was not Ms. Kotlarz's testimony—rather she testified that "his noncompete permits him to hold several positions, including, by way of example, the following jobs: ... logistics planner **for any company other than a freight broker**... ." (R. pp. 198-199) ¶4 (emphasis added).

Fay did not work as a logistics planner for The Brandt Companies ("Brandt"), an engineering firm and former customer of TQL's. Fay never was an employee of Brandt. Rather, he established his own freight brokering company and competed for Brandt's

business. For the following undisputed reasons, the trial court should have found that Fay violated his Agreement, and so too should this Court.

Fay did through JF Progressions exactly what he did with TQL. And he did so for a former TQL customer, Brandt. (R. pp. 181-184) In his affidavit, Fay admits that he created JF Progressions and entered into a contract with Brandt "to provide qualified carriers, manage logistics, provide support, and handle claims and documentation." (R. p. 183) ¶10. This is "freight brokering" and violates his Agreement, and Fay initiated the declaratory judgment action in hopes of having it declared invalid, so that he could continue competing.

Fay's Amended Complaint admits that he conducted business through JF Progressions. (R. p. 18) ¶10. Thus, JF Progressions is a freight broker, and Fay was never employed by Brandt as its logistics planner.

Fay established and competed through his own brokerage company, JF Progressions, which had its own broker authority with the U.S. Department of Transportation. (R. p. 255 line 18-p. 256 line 13; p. 262 lines 11-12, lines 19-21).[1] Although nearly forced to drag it out of Fay's counsel, the court clearly understood that Fay was not working for Brandt as an employee, but rather for his own company, doing what he once did for TQL. Id.; (R. p. 215 line 12-p. 216 line 9) ("THE COURT:

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[1] Although counsel for TQL did not include in his colloquy with the court the broker authority number USDOT had assigned to JF Progressions, it is 2450775. See http://www.safersys.org/query.asp?searchtype=ANY&query_type=queryCarrierSnapshot&query_param=USDOT&original_query_param=NAME&query_string=2450775&original_query_string=JF PROGRESSIONS LLC.

Basically, that [JF Progressions] was his little business, was acting as a little freight company. MS. PAYLOR: Basically. That's correct, yes, sir, Yes, sir.").

Ms. Kotlarz does not testify or "admit" that Fay is permitted to work for his own freight company. Rather, she testified that he could work as a logistics planner for any company other than a freight broker. (R. pp. 198-199) ¶4. His work through JF Progressions, his "little freight company," is a clear violation of his Agreement. This Court should so hold.

II. Fay's Agreement contains enforceable protections for confidential information and trade secrets.

Fay again mischaracterizes the facts and TQL's position, when he argues that "[u]nder the terms of the Agreement, 'Confidential Information' includes every piece of information gleaned by, or provided to, the Employee while employed by TQL." See Respondent's Initial Brief of Appellant-Respondent, p.4. However, this is not the definition of Confidential Information to which the parties agreed. Rather, as TQL has already demonstrated, the definition of Confidential Information appears in the Agreement, Third Recital, and includes only a list of genuinely proprietary information and concepts. See Respondent's Initial Brief of Respondent-Appellant, p.11.

Moreover, as Fay himself concedes, Ms. Kotlarz testified to a robust list of general transportation concepts, methods, and information that he learned from TQL that he is freely permitted to use in the transportation industry, consistent with the definition of Confidential Information. (R. pp. 199-200) ¶5.

Fay inexplicably asserts in his Initial Brief of Appellant-Respondent that "[t]here is no evidence in the record that Fay ever used or received information that was not included in the list above [i.e., Ms. Kotlarz's Affidavit] or within the public domain. See

p.3. This assertion is preposterous—the record is replete with uncontradicted evidence that he received Confidential Information. Ms. Kotlarz testified that Mr. Fay was imparted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (R. p. 188) ¶7. As part of his training and employment, Plaintiff had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. Id. Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (R. p. 188) ¶8. Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. Id. In fact, at the time of his hire Fay had previously worked for his parent's company, T. Mark Fay Consulting, which was not in the transportation or logistics industry. Id.

Finally, Fay argues that the "trade secrets" [sic] portion of his Agreement is invalid because it lacks restrictions for time and place and cites to Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996). However, as TQL has argued to the trial court, in response to Muckenfuss, South Carolina's General Assembly amended the South Carolina Trade Secrets Act in 1997, in part as follows:

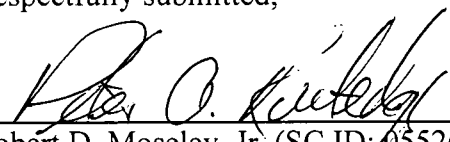
> (D) A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.

S.C. Code Ann. § 39-8-30. Thus, the provisions of the Agreement that restrict the uses of Confidential Information and trade secrets (Second Recital, Sections 3, 4, 5, 6, and 7) are not rendered invalid merely because they lack a durational or geographical limitation.

CONCLUSION

For the foregoing reasons, TQL respectfully requests that the order of the lower court, revoking its earlier finding that Fay breached his Agreement, be reversed. This is fully consistent with the lower court's denial of Fay's motion for partial summary judgment and the undisputed record.

Respectfully submitted,



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March 26, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appellant's Final Reply Brief of the Respondent-Appellant complies with Rule 211(b), SCACR.

March 26, 2015

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PROOF OF SERVICE

The undersigned employee of the law offices of Smith Moore Leatherwood LLP, attorneys for Respondent-Appellant, does hereby certify that service of **the Appellant's Final Reply Brief of the Respondent-Appellant** was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, on **March 30, 2015**, to the following address:

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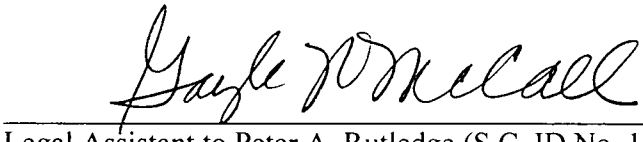

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