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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Opinion No. 2016-5402 (S.C. Ct. App. Filed May 4, 2016)

Palmetto Mortuary Transport, Inc.,..... Petitioner,

v.

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

APPENDIX VOLUME II

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Lyndey Ritz Zwingelberg, SC Bar No. 100804
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ATTORNEYS FOR PETITIONER

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ATTORNEYS FOR RESPONDENTS

INDEX

Order Denying Petition for Rehearing	A-1
Decision of the Court of Appeals.....:	A-2
Respondent's Petition for Rehearing	A-10
Record on Appeal	A-23
Brief of Appellants.....	A-731
Brief of Respondent	A-781
Reply Brief.....	A-830

Section – E

Special Conditions

0 00484

**Body Removal Services
RC-025-P-1011
Special Conditions**

1. Proposal shall be received and the names of the submitting parties shall be recorded at the place indicated in Section A and in the advertisement of this solicitation.
2. Proposal shall be made in the official name of the firm or individual under which business is conducted (showing official business address) and shall be signed in ink by a person duly authorized to legally bind the person, partnership, company or corporation submitting the Proposal. In addition, the Federal Identification Number (FEIN) or in its absence, the Social Security Number of the individual issuing the invoices must be included.
3. Offeror is to include all applicable requested information.
4. Sealed Proposal clearly marked: ***"RC-025-P-1011 ; Body Removal Services"*** shall be submitted in a secured envelope/container. A decal must be affixed to the lower left hand corner of the envelope/container with the name and address of the sender, and shall be addressed to the ***Office of Procurement, 2020 Hampton Street, Suite 3064, Columbia, S.C. 29204. (1) One original hard copy and (1) One CD are to be submitted for consideration***
5. Proposal shall be accepted until ***3:00 pm., Eastern Standard Time, Tuesday May 24, 2011, 2010.*** at 2020 Hampton Street, Suite 3064 3rd Floor.
6. In the event that a Proposal is unintentionally opened prior to the official time set for the opening, the employee opening such a Proposal shall immediately sign the envelope, state his position/title and deliver it to the Director of Procurement.
7. All prices and quotations shall be entered in ink or type written, and shall remain firm for not less than one hundred-twenty (120) calendar days from the date of Proposal submission. Mistakes may be crossed out and corrections inserted adjacent thereto, and shall be initialed in ink by the person signing the Proposal.
8. The County shall not accept responsibility for unidentified Proposal.
9. For additional information, please contact Christy Swofford at the address shown in Section A or at rcsolicitations@rcgov.us
10. The County shall not be liable for any costs associated with the preparation of responses to this solicitation; therefore, all costs shall be borne by the Offeror.
11. In case of non-appropriation of funds, the County may terminate the contract in whole or in part without further obligation to the Offeror.
12. It is the intent and purpose of Richland County that this solicitation permits competition. It shall be the Offeror's responsibility to advise the Director of Procurement in writing if any language, requirements, etc., or any combination thereof, inadvertently restricts or limits the requirements stated in this solicitation to a single source. Such notification shall be submitted in writing, and must be received by the Office of Procurement at least five calendar (5) days prior to Proposal receipt date. A review of such notification shall be made.
13. Every effort has been made to ensure that all information needed is included in this document. If the Offeror finds that he/she cannot complete his/her response without additional information, he/she may submit written questions to the Office of Procurement at least five calendar (5) days prior to the Proposal receipt date. No further questions will be accepted after this date.

0 00485

14. Proposal preparation must follow the directions below:

- a. All Proposal shall be complete and carefully worded, and must convey all of the information requested by the County.
- b. Proposal are to be prepared simply and in a manner designed to provide the County with a straightforward presentation of the Offeror's capability to satisfy the requirements of this RFP. The Offeror must, therefore, follow the RFP format, utilizing the same section titles and paragraphs.
- c. Proposal may include any additional comments over and above the specific information requested.

15. Proposal must be clearly marked "**Confidential**" for each part of the Proposal that is consider to be proprietary information that could be exempt from disclosure under Section 30-4-40, Code of Laws of South Carolina, 1976 (1986 Cum Supp.) (Freedom of Information Act). If any part is designated as "**Confidential**", there must be attached to that part an explanation of how this information fits within one or more categories listed in Section 30-4-40. The County reserves the right to determine whether this information should be exempt from disclosure.

16. Contractual engagement and designation shall remain in force for a period of one (1) year, equivalent to Three-hundred sixty five (365) calendar days, with the parties having the right to extend by mutual agreement, on a year-to-year basis not to exceed four (4) additional years. The document that forms the contract shall include this entire solicitation, all amendments and the successful offeror's proposal. Additional contracts for maintenance support may be entered into between the customer and Vendor at the completion of the warranty period

17. To maintain the integrity of the procurement process, all contacts and discussions shall be directed to the Director of Procurement prior to the solicitation due date. The Director of Procurement may waive this provision on a case-by-case basis, and such waiver shall be documented. Interested vendor's shall not contact the Richland County Coroner's Office directly with questions related to this solicitation.

Verbal comments or discussions by county associated personnel relative to this solicitation shall not be binding!

18. Insurance

Insurance shall be obtained and maintained as per the requirements outlined in the General Conditions – Item 34

19. Each Offeror shall fully acquaint themselves with conditions relating to the scope and restrictions attending the execution of the work under the conditions of this solicitation. Failure to acquaint themselves with existing conditions shall in no way relieve the Offeror of any obligation with respect to this solicitation or contract.

20. By responding to this solicitation, it is understood that each Offeror shall comply with all applicable federal, state and local laws and shall meet all requirements imposed upon this service industry by regulatory agencies.

21. Richland County will award a contract to one vendor. The successful vendor may not subcontract the award without prior written consent from the Richland County Procurement Department

22. Richland County does not authorize automatic price increases. A request for a price increase must be submitted in writing sixty (60) days prior to the effective date to the Richland County Procurement Department. The request will be subject for negotiations and approval

23. For the purpose of contract administration, the Contracting Officer will be the Assistant Director of Procurement. A Contracting Officer's Representative (COR) will be appointed in writing, who will serve as the point of contact for the contract

24. **Evaluation & Award Criteria**

The award of the contract will be made to the Proposer providing the most responsive, responsible offer that provides the best overall value and a fair and reasonable cost and is most advantageous to the County. This award will take into consideration soundness and flexibility of proposal, functional capability, quality of performance and service, the time specified in the proposal for the performance of the contract, ability to provide support, overall cost, and Proposer's references and any other factors that may impact on the project. The County reserves the right to reject all proposals or accept such proposals, as appears in its own best interest, and to waive technicalities or irregularities of any kind in the proposal.

A review team duly appointed in writing will conduct a Proposal evaluation. Team members shall assign a rating to each Proposal submitted and establish a "short list" representing the top firms for further evaluation, at which time the County reserves the right to establish different evaluation criteria. The County reserves the right to request any one of the top ranking firms or all to appear for oral interviews and or provide electronic presentations in order to further evaluate qualifications.

The county will then negotiate with one or more offerors over any other terms, conditions, or other items, including cost, and then will publish intent to award.

If an agreement cannot be reached with the top qualifier the County will then negotiate in descending order.

After the approval of the qualified consultant by Richland County Council, a vendor contract will be executed for the services outlined.

25. **Evaluation Criteria**

The review team will take the following criteria, listed in relative order of importance, into consideration during evaluation. The maximum score is one hundred percent (100%).

A. Functionality & Suitability of Proposed Solution

0 - 40 Percent

How well your company can meet the needs of the RC Coroner's Office as it is described within this solicitation

B. Performance History & Professional Background

0 - 30 Percent

Provide a brief history of your company to include the number of years of experience and at least three (3) references of current customers to include the company/agency name, contact person and their contact information - phone number, fax number and email address for which similar services are being performed. Provide complete information on the Project Manager and Project Team to include all resumes, licenses and permits for each individual as it relates to body removal services

C. Location of Contractor

0 - 20 Percent

Awarded contractor must be within a 50-mile radius of the Richland County Administration Building located at 2020 Hampton Street, Columbia SC 29204

D. Cost Proposal

0 - 10 Percent

Provide a complete cost proposal that includes all areas of the Scope of Services

26. DETERMINATION OF RESPONSIBILITY

The following are the standards, and procedures for determining whether prospective contractors and subcontractors are responsible. These standards and procedures apply to all proposed contracts with any prospective contractor.

A. Policy

1. Contracts shall be awarded to, responsible prospective contractors only.
2. No award shall be made unless the Director of Procurement makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the Director of Procurement shall make a determination of non-responsibility
3. A contract will only be awarded to the lowest, responsive and responsible evaluated proposal. A prospective contractor must affirmatively demonstrate its responsiveness and responsibility, including, when necessary, the responsibility of its proposed subcontractors.

B. General standards

The contractor must:

1. Have adequate financial resources to perform the contract, or the ability to obtain them;
2. Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
3. Have a satisfactory performance record;
4. Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors).
5. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them

C. General or Prime Contractor's Responsibility

To be determined responsible, a prospective contractor must:

1. *Ability to obtain resources.* Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer shall require acceptable evidence of the prospective contractor's ability to obtain required resources. Acceptable evidence normally consists of a commitment or explicit arrangement that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. Consideration of a prime contractor's compliance with limitations on subcontracting shall take into account the time period covered by the contract base period or quantities plus option periods or quantities, if such options are considered when evaluating offers for award.
2. *Satisfactory performance record.* A prospective contractor that is or recently (the last two years) has been terminated or deficient in contract performance shall be presumed to be non-responsible. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. The contractor must demonstrate satisfactory record of performance in

previous similar projects to include written verifiable references with original signatures and letterhead to include, the number of years and experience performing similar projects successfully.

3. Demonstrate adequate level of expertise, management/technical capability in area requested.
4. Demonstrate legal qualifications to conduct business in South Carolina (i.e. license), certifications, professional credentials and a certified resume indicating qualification for this project.
5. Availability of Logistical Resources: Must demonstrate the ability to obtain required resources in form of a commitment letter or explicit arrangement that will be in existence incumbent on contract been awarded by having the necessary equipment or show purchase, lease, rent or otherwise acquire the needed equipment, personnel and other resources.
6. Demonstrate adequate financial resources to perform, by submitting your company's Annual Audited Certified Financial Statement or the latest Certified Financial Statement and any other method of proof of adequate financial resources acceptable to the contracting officer.
7. Have a satisfactory record of integrity and business ethics.
8. Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

D. SUBCONTRACTOR RESPONSIBILITY

1. Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.
2. When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility. In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

E. PROCEDURES

1. Before making a determination of responsibility, the contracting officer shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards.
2. A. The contracting officer shall obtain information regarding the responsibility of prospective contractors, including requesting pre-award surveys when necessary to determine responsibility promptly after receipt of offers. Requests for pre-award information shall be limited to information concerning-
 - The proposal that best meets the requested requirements ; or
 - Those offerors in range for award.
- B. Pre-award surveys shall be managed and conducted by the contracting officer.
 - If the surveying activity is a contract administration office then:
 - a. The contracting officer shall request information on prospective contractors' financial competence and credit needs; and
 - b. The contracting officer shall obtain from the auditor any information required concerning the adequacy of prospective contractors' accounting for use in administering the proposed type of contract.
 - The contracting officer shall obtain from the auditor any information required concerning prospective contractors' financial competence and credit

needs, the adequacy of their accounting procedures and suitability for use in administering the proposed type of contract.

- C. Information on financial resources and performance capability shall be obtained or updated on as current a basis as is feasible up to the date of award.
- 3. In making the determination of responsibility the contracting officer shall consider relevant past performance information. In addition, the contracting officer should use the following sources of information to support such determinations:
 - A. Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices and any other governmental agencies and non-governmental entities
 - B. The prospective contractor including proposal information, questionnaire replies, financial data, information on production equipment, personnel information and sub-contractors information.
 - C. Commercial sources of supplier information of a type offered to buyers in the private sector.
 - D. A pre-award survey reports as determined by the contracting officer.
 - E. Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.
 - F. The contracting officer may consider performance evaluation reports.
- 4. County's Project Managers, Contracting Officers Representatives (COR) and cognizant contract administration personnel that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully shall promptly exchange relevant information and that information will be used to assist in the determination.

F. DETERMINATIONS.

- 1. The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, the contracting officer shall make, sign, and place in the contract file a determination of non-responsibility, which shall state the basis for the determination.
- 2. *Support documentation.* Documents and reports supporting a determination of responsibility or non-responsibility, including any pre-award survey reports and any applicable Certificate of Competency, will be included in the contract file.
 - A. Except as provided in the Freedom of Information Act, information (including the pre-award survey report) accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.
 - B. The contracting officer may discuss pre-award survey information with the prospective contractor before determining responsibility. After award, the contracting officer or a designee may discuss the findings of the pre-award survey with the company surveyed.

3. Before beginning a pre-award survey, the contracting officer shall ascertain whether the prospective contractor has been terminated, debarred, suspended, or deemed ineligible. If the prospective contractor has been terminated, debarred, suspended, or deemed ineligible, The contracting officer will not proceed with the pre-award survey unless specifically requested to do so.
27. Vendor's must provide full, accurate, and complete information as required by this solicitation and its attachments. The penalty for making false statements in solicitations will be debarment or suspension from participating in Richland County solicitations, purchasing and award of contracts for a period as prescribe by the Director of Procurement. Richland County does not waive its rights to seek further actions
28. Offers submitted in response to this solicitation shall be in terms of U.S. dollars. Offers received in other than U.S. dollars shall be rejected.
29. Offers submitted in response to this solicitation shall be in the English language. Offers received in other than English shall be rejected.
30. All invoices received shall include detailed billing information
31. Richland County will pay milcage based on the most current standard mileage rate set by the IRS.
32. The contractor is responsible for obtaining all licenses and permits required to perform this service

2. If the organization has had a contract terminated for default during the past five (5) years, submit full details surrounding the termination including the nature of the default and the terminating party's name, address and telephone number
3. Provide the full company or corporate name, address and phone number along with the project contact person full name
4. Provide a list of subcontractors to include their full company or corporate name, address, telephone number and contact person

E. References

Provide a list of at least three (3) clients for whom a similar service has been provided and dates when the services were provided. Include client name, address, telephone number, facsimile number and person to contact.

2. Right to Audit

- A. The County shall have access to the Contractor's facilities, to all necessary records, and shall be provided adequate and appropriate workspace, in order to conduct audits in. The County shall give the Contractor(s) a 10-day advance notice of intent to audit.
- B. If an audit discloses overcharges (of any nature) by the Contractor(s) to the County in excess of five percent (5%) of the total contract billings, the actual cost of the County's audit shall be paid by the Contractor(s).

3. Additional Services

Richland County may add to the Scope of Services or make changes in the Scope of Services with any services of a similar nature to those specified in the Scope of Service of this Request for Proposal as mutually agreed upon in writing at a price mutually agreed upon.

4. Licenses and Permits

The Contractor shall secure, pay for and maintain all permits, governmental fees and licenses which are legally required for the proper execution and completion of the work outlined, for the life of the agreement.

5. **Scope of Services:**

Richland County is seeking an all inclusive service for Body Removal for the Richland County Coroner to be billed on a monthly flat rate basis. This service shall include, but is not limited to, the following items:

1. 24 Hour answering service
2. Supply all materials needed for removal – gloves, sheets, bag locks, odor proof Body bags, water retrieval body bags, heavy duty body bags, etc.
The appropriate bag is to be designated by the Coroner/Deputy Coroner in charge at the scene
3. Maximum One (1) hour arrival time to call location
4. Delivery to be made to Palmetto Richland Medical Park, 5 Medical Park Drive, Columbia, SC 29203
5. A minimum of two (2) people and two (2) vehicles shall be on call 24 hours 7 Days a week
6. Proper dress and appearance of all personnel is expected
7. Additional personnel available for special removals – heavy patients, unusual circumstances
8. Additional locations for pickup and delivery may include but are not limited to Newberry County and Augusta
9. Provide the number of vehicles available to perform this service
10. No additional charges shall be added for wait time or no transport

Additional Information:

Number of Transports: 2009 – 2010 521
2010 – 2011 530 to date

Approximate trips to Newberry County and other locations 30 per year

Section - G

Minority and Women Owned Business Enterprises

0 00496

1. MINORITY PARTICIPATION:

Richland County established a fifteen percent (15%) minority participation goal for each contractual agreement. Offerors shall be required to submit a quarterly report to the Contracting Officer not later than the fifth day of each month. Example: April 5, July 5, October 5, and January 5. The report shall contain the name of individual or firm; status (minority or woman-owned); and the dollar amount awarded. If Offeror's are unable to meet the prescribed goals, evidence of a good faith effort shall be submitted to the Contracting Officer for his determination.

2. TYPE OF BUSINESS:

- a) The Offeror represents as part of its offer that it operates as (Make one with an "X"):

☐ An individual☐ A partnership☐ A sole proprietorship☐ A corporation☐ Another entity _____

- b) If incorporated, under the laws of the State of:
-
- _____

3. MINORITY AND WOMAN-OWNED BUSINESS ENTERPRISES (MBE/WBE):

- a) The Offeror represents as part of its that it (Mark one with an "X"):

☐ Is☐ Is not

A minority-owned business enterprise (MBE). An "MBE" is defined as "a small business concern which is at least 51 percent owned by one or more minority individuals, or in case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minority individuals and whose management and daily business operations are controlled by one or more of the minority individuals who own it." For purpose of this definition, minority individuals include Black Americans, Hispanic Americans, Asian-Pacific Americans, Asian-Indian Americans, and Native Americans.

- b) The Offeror represents as part of its offer that it (Mark one with an "X"):

☐ Is☐ Is not

A woman-owned business enterprise (WBE). A "WBE" is defined as "a small business concern which is at least 51 percent owned by women, or in case of any publicly owned business, at least 51 percent of the stock of which is owned by women and whose management and daily business operations are controlled by one or more of the women who own it."

Section - H

Advertisement

0 00498

Request for Proposal
RC-025-P-1011
Body Removal Services

44 OF 44

Richland County Government, Columbia, South Carolina is soliciting proposals from qualified companies to provide Body Removal Services for the Richland County Coroner's Office

Services to be provided may include, but are not limited to, the following activities:

- Provide all materials needed for removal: bags, heavy duty, odor proof, water retrieval etc; gloves, sheets, bag locks, etc
- 1 hour max, arrival time to any call
- Removal from anywhere in the County to Palmetto Richland Hospital
- At least 2 vehicles and 2 people on call 24/7, 7 days a week
- Proper dress and appearance of all personnel
- Bill on a flat rate per month

Proposals shall be accepted until **3:00 P.M., local time, Tuesday May 24, 2011** proposals submitted after the above date and time shall not be considered. For additional information visit our website shown below and click on "Solicitations":

<http://www.richlandonline.com/departments/procurement/index.asp>

0 00499

RICHLAND COUNTY OFFICE OF PROCUREMENT
COLUMBIA, SC

AMENDMENT OF SOLICITATION

1. SOLICITATION NO: RC-025-P-1011 2. AMENDMENT NO: 1 3. EFFECTIVE DATE: 5-16-11
Body Removal Services

4. REVISION OF OFFER RECEIPT DATE & TIME: DATE: June 9, 2011
TIME: 3:00pm

5. AMENDMENT OF SOLICITATION:

The Solicitation identified in Block 1, above, is hereby amended as described in Block 9, below. Except as provided herein, all other provisions of the solicitation, as to hereto amended, remain unchanged and in full force and effect.

6. REQUIREMENT TO ACKNOWLEDGE AMENDMENT:

Offerors must acknowledge receipt of this amendment prior to the deadline specified in the solicitation for receipt of offers and by one of the following methods:

- a. By signing this amendment in Block 7, below, and returning one signed copy;
- b. By acknowledging receipt of this amendment on the Solicitation, Offer and Award form; or,
- c. By separate letter or telegram that includes a reference to this solicitation and amendment numbers.

WARNING: Failure of an offeror to acknowledge receipt of this Amendment, as described herein, may result in the REJECTION OF THE OFFER.

NOTE: For Invitations for Bids the terms "Offer" and "Offeror" shall mean "Bid" and "Bidder", respectively; and for Request for Proposals the terms "Bid" and "Bidder" shall mean "Offer" and "Offeror", respectively, in this solicitation and any associated exhibits.

7. OFFEROR'S ACKNOWLEDGMENT OF AMENDMENT:

Name & Title: _____ Signed Acknowledgment: _____
(print or type)

Offeror: _____ Date Acknowledged: / /

8. CONTRACTING OFFICER OR AUTHORIZED REPRESENTATIVE:

Signed: _____ Christy Swofford Date: 5-16-11

For Further Information Please Contact Christy Swofford: swoffordc@rcgov.us (803) 576-2130

9. Description of Amendment:

No. of Pages Attached: 0

1. Change Proposal Due Date To: Thursday June 9, 2011 3:00pm

0 00500

RICHLAND COUNTY OFFICE OF PROCUREMENT COLUMBIA, SC		
AMENDMENT OF SOLICITATION		
1. SOLICITATION NO: RC-025-P-1011	2. AMENDMENT NO: 2	3. EFFECTIVE DATE: 6-6-11
Body Removal Services		
4. REVISION OF OFFER RECEIPT DATE & TIME:	DATE: June 17, 2011 TIME: 3:00pm	
5. AMENDMENT OF SOLICITATION: The Solicitation identified in Block 1, above, is hereby amended as described in Block 9, below. Except as provided herein, all other provisions of the solicitation, as to hereto amended, remain unchanged and in full force and effect.		
6. REQUIREMENT TO ACKNOWLEDGE AMENDMENT: Offerors must acknowledge receipt of this amendment prior to the deadline specified in the solicitation for receipt of offers and by one of the following methods: a. By signing this amendment in Block 7, below, and returning one signed copy; b. By acknowledging receipt of this amendment on the Solicitation, Offer and Award form; or, c. By separate letter or telegram that includes a reference to this solicitation and amendment numbers. WARNING: Failure of an offeror to acknowledge receipt of this Amendment, as described herein, may result in the REJECTION OF THE OFFER. NOTE: For Invitations for Bids the terms "Offer" and "Offeror" shall mean "Bid" and "Bidder", respectively; and for Request for Proposals the terms "Bid" and "Bidder" shall mean "Offer" and "Offeror", respectively, in this solicitation and any associated exhibits.		
7. OFFEROR'S ACKNOWLEDGMENT OF AMENDMENT: Name & Title: _____ (print or type) Signed Acknowledgment: _____ Offeror: _____ Date Acknowledged: ____/____/____		
8. CONTRACTING OFFICER OR AUTHORIZED REPRESENTATIVE: Signed: _____ Christy Swofford Date: 6-6-11 For Further Information Please Contact Christy Swofford: swoffordc@rcgov.us (803) 576-2130		
9. Description of Amendment:		
1. Change Proposal Due Date To: Friday June 17, 2011 at 3:00pm ** All questions must be received in writing to the Office of Procurement no later than Thursday June 9, 2011 at 12:00pm **		
No. of Pages Attached: 0		

0 00501

Detail of Damages

Revenue:

Sales Realized per the contract

Sept 2011 - June 2012	80,000.00
July 2012 - June 2013	102,982.50
July 2013 - June 2014	102,982.50
July 2014 - June 2015	106,586.50
July 2015 - June 2016	106,586.50

Total Sales

\$ 499,138.00

Expenses:

Avg bag Cost per call 15.67

Gas

Avg distance per trip 60

Avg MPG 20

Avg Cost per Gallon 3.5

Gas Cost per trip 10.5

Expense Per Call 26.17

Actual Calls from 7/1/10 - 6/30/11 511

Sept 2011 - June 2012 11,144.06

July 2012 - June 2013 13,372.87

July 2013 - June 2014 13,372.87

July 2014 - June 2015 13,372.87

July 2015 - June 2016 13,372.87

Total Expenses 64,635.54

Net Damages \$ 434,502.46

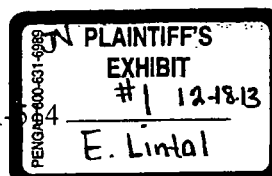
Additional Items

Attorney Fees to be Provided by Mr. Pringle 0

0

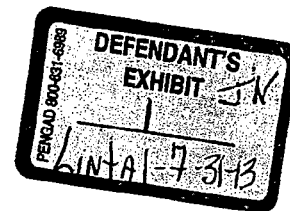
Total Damages \$ 434,502.46

Phone number that are used in the ads that are for Knight
2 1/2 years added back to the Non compete



0 00502

12/17/2013 7:53 PM



Timeline of events - Knight Systems Inc

- January 5, 2007 – entered into Asset Purchase agreement with KSI for \$590,000
- Late 2007 – early 2008 - **Infant body bags** - LCCO (Randy Martin) asked me to check into a better way to bag infants.
- January 31, 2008 - I brought the request for smaller bags up to Buddy when I was picking up my bag order. His response was he always wrapped infants in a sheet and put them in a folded light weight bag. I told him this is not what they wanted and asked me to check into smaller bags. He said it's not worth getting small bags for the few infants that we deal with.
- April 3, 2008 - bought one pediatric bag from Southland Medical Supply for demonstration purposes. Subsequently showed the bag to Randy Martin at LCCO and Jane Powell from RCCO. Both agreed that the next size larger (infant) would be more versatile and a great idea. My goal was to give the customer what they were requesting and improve our professionalism in handling the baby cases.
- April 3, 2008, I ordered one case (30 per case) of infant size bags at \$6.25 per bag.
- December 2, 2008 - KSI performed a **disinterment** and transport of human remains for RCCO. Early 2009 - I asked RCCO to consider PMT to bid for any future disinterment.
- February 2009 - **Water retrieval bags** - When ordering bags in February 2009, I misunderstood Buddy to say he no longer had the water retrieval bag. I found a source on the internet and ordered six bags at \$45.00 per bag on March 6, 2009.
- Later that year (likely in June or July), Buddy confronted me on a water retrieval bag that had been used on a RCCO case. I explained that I understood him to say that he no longer had them. At this point I was not sure if this was a bag he made or purchased. He said this was a bag he makes and he was out of them when we talked about them. I told him we would only buy them from him in the future and offered to pay him for the lost revenue on the six bags we had bought elsewhere but he declined.
- All water retrieval bags purchased by PMT after that were bought from KSI.
- June 2009 – At some time shortly after Capitol won the LCCO bid Buddy asked me if I had purchased infant bags from someone else. He explained they were trying to bags from him for the LCCO contract and the infant bags were requested. They knew PMT bought bags from him so assumed infant bags were included. I told him yes I had

bought the bags elsewhere but I first had tried to buy them from him but he was not interested. I offered to reimburse him for the cost of the bags but he ignored my offer.

- July 2010 - **XL heavy duty bags and Standard heavy duty bags** - For our July order I wanted to get three XL heavy weight bags but Buddy only had one and did not know when he would be able to get more in. KSI purchased these bags from a vendor in China and the lead times were long. I felt I could not risk being out and searched options on the internet. Decided to buy one box of four XL heavy weight bags at \$53.44 per bag and also to buy one box of six standard size heavy weight bags at \$34.75 per bag to be sure we had some with a heavy zipper for cases needing the heavy zipper.
- March 7, 2011 - KSI performed a **second disinterment** and transport of human remains for RCCO. I found out when delivering a coroner case to morgue and Buddy was there for the autopsy with his truck and trailer.
- June 16, 2011 - **USC bag delivery** - Buddy called me to tell me he had the bags ready that they had ordered and paid for 1 – 2 months prior. I offered to meet him at his shop to pick them up as one of my employees or I always did in the past. He declined my offer and insisted on bringing them to me at my home. Buddy brought up bags purchased elsewhere.
- September 6, 2011 – **Denied bags**- We were still servicing RCCO and had not been notified of any award being made and needed to order three bag types (LW, BHW and OP). I attempted to order from KSI but was denied on two (LW and OP) of the three requested as they were “unavailable” and informed me to refer to his website for our pricing.

		Paid		KSI
April 9, 2008	Infant bag (30)	\$187.50	\$5.25 ea	\$240.00 (adult LW)
March 6, 2009	Water retrieval (6)	\$270.00	\$45.00 ea	\$180.00
July 14, 2010	XLHVV (4)	\$213.72	\$53.44 ea	\$400.00
July 14, 2010	HVV (6)	<u>\$208.50</u>	\$34.75 ea	<u>\$120.00</u>
		\$879.72		\$940.00

0 00504

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) C/A #: 2011-CP-32-04051

Palmetto Mortuary Transport, Inc.)

Plaintiff,)

v.)

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

Defendants.)

ORIGINAL

DEPOSITION OF
DONALD J. LINTAL

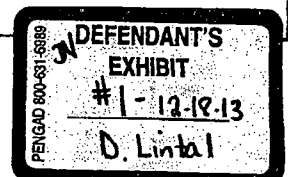
Wednesday, July 31, 2013
11:43 a.m. - 5:08 p.m.

The deposition of DONALD J. LINTAL was taken on behalf of the Defendant at the law offices of Adams and Reese, LLP, 1501 Main Street, Fifth Floor, Columbia, South Carolina, on the 31st day of July, 2013 before Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

A-517

00505



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INDEX

<u>MR. LINTAL:</u>		<u>PAGE:</u>
MR. LLOYD	EXAMINATION	3
MR. PRINGLE	EXAMINATION	203
MR. LLOYD	RE-EXAMINATION	209
Signature Sheet		212
Certificate		213

EXHIBITS

Defendant's Exhibit Number One	6
(Timeline of Events, Knight Systems, Inc.)	

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following examination be, and the same are, hereby not waived. Signature sheet is attached at page 212.

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1 DONALD J. LINTAL, having been duly sworn, deposes
2 and testified as follows:

3 MR. LINTAL - EXAMINATION BY MR. LLOYD:

4 Q: Mr. Lintal, we've met before. Reggie Lloyd,
5 representing Mr. Knight. Just a couple of
6 preliminary questions before we really get into
7 the meat of this. Have you had your deposition
8 taken before?

9 A: No, sir.

10 Q: Okay. First of all I'm going to go over a
11 couple things, and just obviously your
12 attorney, if there's a form of the question
13 that he doesn't like or believes he needs to,
14 he will object to it. Otherwise I would ask
15 that you answer my question. If you don't
16 understand a question that I ask you I'll just
17 ask that you ask me to rephrase it or make sure
18 you understand it. If you don't ask me to do
19 that I'm going to assume that you did
20 understand my question, okay?

21 A: Yes, sir.

22 Q: Are you taking any medications or suffering
23 from any illnesses that might ---

24 A: No. No, sir.

25 Q: --- hamper your ability to answer today?

- 1 A: No.
- 2 Q: And you said you've never taken -- testified in
3 a deposition before? Have you ever testified
4 at a trial before?
- 5 A: Nope. No, sir.
- 6 Q: Have you ever been party to a lawsuit prior to
7 this?
- 8 A: No, sir.
- 9 Q: You've never brought a civil action or been --
10 had a lawsuit filed against you previous to
11 this?
- 12 A: Not that I recall, no.
- 13 Q: Let me ask, just so that we're clear, have you
14 filed -- other than this action, have you filed
15 an action against anybody after you filed this
16 particular action?
- 17 A: No.
- 18 Q: And you had a chance to review the pleadings,
19 the Complaint, Answers filed in this case?
- 20 A: I've read many documents. I assume that that's
21 what I've been reading, yes. Okay, I guess,
22 yes.
- 23 Q: But you understand generally the claims that
24 you've raised against Mr. Knight ---
- 25 A: Yes, yes.

- 1 Q: And you understand the ---
- 2 A: Right, counter ---
- 3 Q: --- answers that he's responded with?
- 4 A: Yes, sir.
- 5 Q: Can I ask you what did you do to prepare for
- 6 this deposition this morning?
- 7 A: Read over documentation and we did prepare a
- 8 document to help me. It was particulars if
- 9 there's a issue ...
- 10 Q: Did you prepare this ---
- 11 A: I did.
- 12 Q: --- document?
- 13 A: Yes, sir.
- 14 **COURT REPORTER:** Is it going to be an exhibit?
- 15 **MR. LLOYD:** Yes. If we can go ahead and mark this
- 16 as Defendant's One.
- 17 **COURT REPORTER:** Defendant's One, okay. I'll give
- 18 it right back to you. We'll just switch when
- 19 it's done.
- 20 A: That's the one I use, okay.
- 21 **COURT REPORTER:** Well, yeah, then at the end ---
- 22 A: Yeah.
- 23 **COURT REPORTER:** That'll come with me and that one
- 24 can go back with you.
- 25 A: Thanks.

1 COURT REPORTER: Okay?

2 A: Yeah.

3 (Defendant's Exhibit Number One was marked for
4 identification purposes.)

5 Q: Okay. Did you prepare this document, sir?

6 A: Once again, yes.

7 Q: What did you use to prepare the document that
8 we're looking at as Exhibit One?

9 A: The same information that we've been -- well,
10 the information that -- invoices, recollection,
11 I guess, to the best -- to my knowledge of the
12 activities through the course of time.

13 Q: So you looked at invoices? When did you look
14 at those invoices?

15 A: Since the exchange of invoices. So I mean,
16 this is all within the last 30 days of -- since
17 Buddy's deposition and such. I felt that it
18 was -- that it'd be -- help me in being -- to
19 be prepared, so.

20 Q: And where are those invoices located?

21 A: It's the evidence that we've both have had
22 party to. You have copies of everything that
23 was involved in this.

24 Q: So the invoices you're referring to that you
25 referenced to create Defendant's Exhibit One,

1 those were invoices you've already produced ---

2 A: Yes.

3 Q: --- as part of discovery in this case?

4 A: Yes, yes.

5 Q: Any invoices that you reviewed that have not,
6 to your knowledge, been produced?

7 A: No, sir.

8 Q: What was the purpose of reviewing the invoices?

9 A: To create a time line just like it says at the
10 top of the thing, of the document. So that I
11 was assured I'd get the right sequential order
12 of information.

13 Q: And specifically these were invoices to who,
14 for what?

15 A: Invoices to me, from either -- let's see, from
16 various suppliers.

17 Q: Okay. They were invoices from you to
18 suppliers, or --

19 A: Well, let me see if that's the case. No, it
20 would be the other way around. From suppliers
21 that I purchased from.

22 Q: And these are suppliers of what?

23 A: Body bags. Various types of body bags, I
24 guess.

25 Q: And we'll come back to Defendant's Exhibit One.

1 You're certainly free to refer to that if you
2 need to during the course of the deposition but
3 I'll ask you some more detailed questions about
4 that shortly. Let me ask you, when did you
5 first come to find out that Mr. Knight was
6 selling his business?

7 A: I believe the time frame, it was prior to -- I
8 would say it was probably the summer of 2006.
9 I know it was in 2006.

10 Q: Okay. Let's start with summer of 2006 and
11 actually work backwards for a little bit.

12 A: Backwards?

13 Q: Prior to the summer of 2006, what occupation
14 were you in?

15 A: I -- prior to this, at that point in time I was
16 a -- I worked at E-Z-Go in Augusta, and I was
17 a warranty specialist.

18 Q: And let me ask you, what is E-Z-Go? Is that a
19 ---

20 A: Golf cart.

21 Q: --- Golf cart maker?

22 A: Textron was their actual parent company.

23 Q: And what were your duties as a warranty
24 specialist?

25 A: My particular job related to a gas engine

1 recall that had been -- that we were performing
2 for repair of some incidents that E-Z-Go had
3 experienced, gas engine fires throughout the
4 various places in the United States. And I was
5 a project coordinator per se, I'm facilitating
6 this to happen -- the repair to take place.

7 Q: And how long were you at E-Z-Go?

8 A: I think a year and a half.

9 Q: Okay. And what did you do prior to that?

10 A: I was a project manager for a brush
11 manufacturer in Summerville, South Carolina.
12 It was -- well, in the Summerville area.

13 Q: And you said brush manufacturer?

14 A: Yeah. Real exciting job. Toilet brushes,
15 household brushes.

16 Q: And how long were you there?

17 A: Two years, maybe.

18 Q: And what did you do before that position?

19 A: I worked as a -- I don't know what my title
20 was. I worked for Corning, Incorporated. It
21 was a -- it was actually called -- gosh --
22 Corning Cable Systems, I'm sorry, but yeah, I
23 have to explain. I'm from the Corning, New
24 York area originally so I always knew it as
25 Corning, Incorporated but we had two different

1 names in the time we were there.

2 Q: And that was in New York?

3 A: No. This -- I never worked for Corning, up in
4 New York.

5 Q: Okay.

6 A: It was just strictly in Summerville. And that
7 was about eight years.

8 Q: And did you have any full-time employment prior
9 to that?

10 A: Oh, yeah. Yeah, I was -- okay, now I was --
11 prior to that I was a licensed funeral
12 director, up in New York State.

13 Q: And how long did you do that?

14 A: Funeral director?

15 Q: Yes, sir.

16 A: Off and on for -- up until that point -- well,
17 let me think, do the math. I was originally
18 licensed in 1976, I believe. '76 or 1977, so
19 from then until we moved in 1997 so --

20 Q: When you say you moved, you moved to South
21 Carolina?

22 A: Yes, sir. It was a relocation for that
23 project, the cable systems project.

24 Q: And you say you were a licensed funeral
25 director off and on?

- 1 A: I did. I worked full-time at some points in my
2 life and I worked part-time and had other jobs,
3 primarily in the sales and marketing. But I
4 was always -- always had my license in that
5 period of time, so and did some type of work
6 typically.
- 7 Q: You said you got licensed in 1976-1977 time
8 period?
- 9 A: Yes, sir. Yeah.
- 10 Q: Did you work for a particular funeral home?
- 11 A: Yeah. Over the course of time I worked for --
12 the last one I was at was-- you want the names,
13 that's my assumption?
- 14 Q: Yes, sir.
- 15 A: Barber Funeral Home, that's in Horseheads, New
16 York.
- 17 Q: And you were a funeral director for them?
- 18 A: Yeah. Others, or --
- 19 Q: Yes, sir.
- 20 A: Okay, I didn't know if you were gonna ask times
21 or anything. Okay. I worked for a short time
22 for Olphoff, O-L-P-H-O-F-F, Funeral Home, and
23 that's in Elmira, New York. And William R.
24 Chase and Son. That's Binghampton, New York.
25 That's it.

- 1 Q: Those three --
- 2 A: I mean I did incidental work for others but --
- 3 occasionally, but those were my primary full-
- 4 time or part-time employers in the funeral
- 5 service.
- 6 Q: Okay. Which ones did you work for full-time?
- 7 A: All three at one point. That's why -- yeah,
- 8 that's what I'm saying, all three of them at
- 9 one point or another.
- 10 Q: And what were your duties as funeral director?
- 11 A: Removal, embalming, making arrangements,
- 12 conducting the services, conducting funeral
- 13 services, interments.
- 14 Q: Prior to moving to South Carolina, had you ever
- 15 owned another business?
- 16 A: No.
- 17 Q: And prior to -- let me ask you, when did you
- 18 create Palmetto Mortuary?
- 19 A: At the time of the purchase of, or going into
- 20 the asset purchase agreement with Knight
- 21 Systems. It was created for that purpose.
- 22 Q: Had you ever owned another business after
- 23 moving to South Carolina?
- 24 A: No. You're saying -- me, right?
- 25 Q: Yes, sir.

1 A: Yes, no. No, I did not.

2 Q: Did somebody else in your family have a
3 business?

4 A: I don't know if it would be considered as a --
5 my wife was a consultant for a short time. So
6 I don't know if once -- I don't know if that
7 would qualify to answer your question. So that
8 would be the closest thing that I can recall
9 that would even apply, so.

10 Q: And your wife's a CPA is that right?

11 A: No.

12 Q: She's an accountant?

13 A: She's an accountant by trade, yes. But she's
14 not a CPA. You could say she's a CFO but not
15 a CPA, if you want to get into acronyms.

16 Q: When did you -- and we started talking about
17 sometime around the summer of 2006 is when you
18 learned that Mr. Knight was planning to sell
19 his business, is that right?

20 A: That's correct.

21 Q: And how did that fact come to your attention?

22 A: A business listing on, I believe it was Sunbelt
23 Business, a business website.

24 Q: And what did you do, as related to that
25 listing?

1 A: I contacted the broker initially, and after we
2 considered whether or not it held any potential
3 value for consideration.

4 Q: Okay. And who was that broker?

5 A: I honestly don't remember his name. I could
6 get it but I don't remember.

7 Q: Is it the same broker you dealt with throughout
8 this period of time prior to the purchase?

9 A: Yes, sir.

10 Q: And you said you all, you and the broker
11 discussed whether it was a good opportunity to
12 purchase this particular business. What did
13 those discussions entail?

14 A: Initially my wife was primarily the point of --
15 the person of contact to him. Relating to
16 different -- we were in the market for
17 considering various businesses, and she was
18 actually looking for one for herself. What was
19 discussed for our purpose was the fact that it
20 was listed as a transport business. And when
21 it was revealed that it was mortuary transport
22 we were interested because of my background.

23 Q: Were there other types of businesses you were
24 on the lookout for as well?

25 A: Me personally?

1 Q: Yes, sir.

2 A: No, sir. Her, yes.

3 Q: Okay. Had you already determined prior to
4 seeing that listing that you were looking for
5 a transport or body removal business?

6 A: No, sir. I was content with my job at E-Z-Go.

7 Q: Now, once you saw the listing and either you or
8 your wife made contact with the broker, you
9 again described it as trying to decide whether
10 it was a good purchase for you, or might be.
11 Tell me what kind of considerations were you
12 and the broker discussing regarding that?

13 A: The financial aspects, guaranties, and what
14 actually the business contained regarding the
15 assets, potential assets I should say. What
16 was included in the price of the asking price
17 of the business.

18 Q: There was -- in that website listing by the
19 business broker, was the asking price for the
20 business already stated there?

21 A: Truly, I don't remember. I can't remember
22 exactly how they represented -- there might
23 have been a price on there, I mean, but I
24 honestly do not recall.

25 Q: Okay. If it wasn't listed on the website, did

1 you and the broker have some discussions ---

2 A: Sure.

3 Q: --- about the price?

4 A: Yes, of course.

5 Q: So, he ---

6 A: He gave us -- if it wasn't listed on the
7 website, the broker was the one that provided
8 us with the asking price.

9 Q: And from the time that you were first informed
10 of the asking price, whether it was through the
11 broker or through the website itself, did the
12 asking price change between that time and the
13 time y'all actually closed the deal?

14 A: No. Not the -- to my knowledge, no. I don't
15 recall.

16 Q: Okay. You said you also discussed the
17 financial aspects of the business with the
18 broker. Can you be a little more specific and
19 describe what financial aspects of Mr. Knight's
20 business you and the broker discussed?

21 A: I guess maybe it was more of a -- well the --
22 they typically provide you with an -- I believe
23 it's an income statement, or a -- there's some
24 basic, basic sales versus -- I can't recall
25 exactly if there was sales dollars involved in

1 it, in the discussion or -- it would have been
2 information that was provided by Mr. Knight to
3 him. It wasn't anything outside of what had
4 been provided on that basis. So I don't
5 recall. Honestly, my wife did a lot of the
6 financial stuff.

7 Q: And your wife, when you said she was doing the
8 financial stuff, she was discussing those
9 financial aspects with the broker?

10 A: Likely, yes.

11 Q: Okay. Was she preparing any sorts of sheets or
12 documents for you to look at regarding those
13 aspects?

14 A: Likely, yes. I would assume, yes. I mean we
15 had to have something to work off decisions on
16 it.

17 Q: Sometimes I may use the term and it may not be
18 the correct term or term that you understand,
19 but for example does she do any proformas based
20 on what you would be purchasing, profit/loss
21 statements, etcetera, this is the kind of
22 return or ---

23 A: Sure.

24 Q: --- investment?

25 A: Yeah. I would assume, yes. I mean that's more

1 in her background, so I assume that the answer
2 is yes.

3 Q: Do you still have those sheets?

4 A: I honestly do not know.

5 Q: I'm going to ask, with Mr. Pringle, that you
6 make a search for those sheets if you still
7 have them.

8 A: You want to get ---

9 Q: Not at this moment, no, sir.

10 A: Okay.

11 Q: Based on what you understood from your wife and
12 the broker regarding the purchase price, what
13 you would get in terms of the business did you
14 determine that this was going to be a good
15 purchase for you?

16 A: We believed so.

17 Q: And what in particular about this deal, based
18 on what information you had at that point, lead
19 you to believe that this would be a good
20 business opportunity for you?

21 A: It had some -- it had decent sales volume,
22 sales dollars tied to it. There were contracts
23 involved that were transferable that would give
24 us some guarantees of business for a period of
25 time. And there was equipment and assets to

1 support the business that we felt that would --
2 it would benefit, you know, the business and be
3 capable of continuing on under a different
4 ownership, our ownership.

5 Q: Were you looking for a certain guarantee of
6 income at that point?

7 A: You mean as a locked number?

8 Q: Yes, sir.

9 A: Not necessarily.

10 Q: At the point that you were considering
11 purchasing Mr. Knight's business were you
12 planning to quit your job ---

13 A: E-Z-Go.

14 Q: --- at that point you were at E-Z-Go ---

15 A: Right.

16 Q: --- were you planning to quit that job?

17 A: Yes.

18 Q: Were you looking for a business that would
19 replace all of that income, that you were
20 making at that particular job?

21 A: Yes.

22 Q: And what was your salary at that job?

23 A: I don't recall.

24 Q: Can you ballpark it for me?

25 A: 28,000 a year, maybe.

1 Q: So you were looking for a business opportunity
2 that would replace that \$28,000?

3 A: Of course.

4 Q: And in comparison to the other jobs you listed
5 for me, the project manager position in
6 Summerville and the Corning Cable System
7 position, the \$28,000, was that more or less
8 than you had made at those other positions?

9 A: It -- some were, some less.

10 Q: Well, let's ---

11 A: Okay. You ---

12 Q: --- go specifically to the brush manufacturer,
13 was \$28,000 more or less?

14 A: It was about the same. Corning Cables was
15 more.

16 Q: How much were you making at Corning Cables?

17 A: I think about 60,000 a year.

18 Q: Okay. And why did you leave Corning Cables?

19 A: They closed.

20 Q: And you immediately got a position with the
21 brush manufacturer or was there a period of
22 time when you didn't work?

23 A: Pretty much immediate, it was a short time but
24 they were right next to each other so I had the
25 skills. The knowledge of -- my first job in

1 South Carolina was to watch the building that
2 the brush manufacturer, that was in, to be
3 built. So I mean I was real familiar with the
4 facilities and it was built for Corning, and
5 then we moved out of that to another facility
6 right up the street, so that helped.

7 Q: Now, in the process of you and your wife
8 considering whether to purchase Knight Systems,
9 did you do any other research other than talk
10 with the broker?

11 A: Not that I recall.

12 Q: Did you believe that if you purchased Knight
13 Systems that you would immediately be able to
14 continue the business running without doing any
15 other training or any other type of research to
16 prepare for that business?

17 A: Repeat that please.

18 Q: In other words, did you believe that once the
19 purchase -- if you could purchase Mr. Knight's
20 business, that you could immediately go from E-
21 Z-Go to running that business without taking on
22 any additional training?

23 A: For the most part. It was a field that I was
24 very familiar with, with the number of years
25 I'd worked in the funeral -- in funeral

1 service. I had known others in New York that,
2 you know, one guy in particular, that ran a
3 similar business. I worked with his brother so
4 I was familiar with what they did up there, so
5 my assumption was that I had the basic skills
6 and expertise to do the majority of the -- of
7 what was needed. Plus a good part of what this
8 business involved was contact with the funeral
9 home customers. So that was an area I felt
10 very strong with because of the number of years
11 of business relationship that I'd had in past
12 -- in the past.

13 Q: Did you talk to the friend of yours in New York
14 ---

15 A: No.

16 Q: --- about his business?

17 A: No.

18 Q: So how many meetings did you have, or
19 discussions did you have with the broker prior
20 to meeting with Mr. Knight?

21 A: Phone conversations included?

22 Q: Yes, sir.

23 A: I don't know, maybe five to seven. I'm
24 assuming that it wasn't just a we want it type
25 conversation, there was some back and forth

1 information that was more than likely
2 exchanged. It might have been less than that.
3 Quite frankly, I don't recall.

4 Q: Okay. Were you asking the broker to go back to
5 Mr. Knight and get additional documents or data
6 for you to consider?

7 A: Possibly. There might have been questions, but
8 I don't think there was any additional
9 documents that was requested.

10 Q: Okay. Were these questions of the broker or
11 questions that needed to be answered by Mr.
12 Knight?

13 A: Of -- I would believe that Mr. Knight would
14 have had the answer through the broker, we had
15 no contact with him at that point, so.

16 Q: Describe -- do you recall the first meeting you
17 had with Mr. Knight?

18 A: I don't.

19 Q: Do you recall meeting with him with the broker?

20 A: Do you know where it was? It might have been
21 at that -- maybe at the broker's office. I
22 don't recall, I really don't.

23 Q: And when I said do you remember the first
24 meeting with Mr. Knight, do you recall meeting
25 with Mr. Knight prior to, obviously, the

1 closing on this?

2 A: Yeah, yeah. We went up to his facility, my
3 wife and I, I believe, we went up there prior
4 to making the decision and I think talked about
5 some various things inside. Some of the
6 equipment and things that were involved with --
7 in the business. I really can't -- I don't
8 recall the exact point -- as far as if it was
9 -- I assume that we did meet with him before,
10 so. But I don't recall.

11 Q: And the visit you and your wife took to his
12 site, that was the first time you had actually
13 physically seen the building or the business
14 itself?

15 A: There wasn't much to see. I mean, I didn't buy
16 the building, I didn't buy the -- you know, it
17 was -- it was, you know, seeing a couple vans,
18 and some stretchers, and maybe a couple types
19 of bags that were involved in it, but that
20 would have been the extent of it. And then
21 just kind of a going back and forth -- the
22 information, back and forth, exchanged I guess.

23 Q: Okay. What sort of information?

24 A: General things related to what he actually did.
25 You know what -- one of the things that was --

1 with the way the business was originally
2 listed, versus the -- what it actually was. It
3 was listed as a transportation business and the
4 broker had made the statement that it was -- it
5 had garnered a good degree of interest but most
6 people walked away once they found out it was
7 dealing with transport of human remains,
8 deceased human remains. So based off of all of
9 that, it was more of understanding what really
10 was involved because it's -- in regards to, you
11 know, what his customers antici- -- what we
12 could anticipate for customers, as far as the
13 types, you know. I was more familiar with the
14 funeral home side. And the learning about the
15 coroners, and the US -- or not -- I mean USC
16 aspect of the business then those -- that type
17 of information was shared. As far as basic
18 information, nothing -- no real specifics, but
19 I don't recall a lot of it to be honest with
20 you, so.

21 Q: Let me ask you, the time you actually made the
22 site visit, you and your wife with Buddy
23 Knight, had you already made the decision to
24 purchase his business?

25 A: We might have made a decision to make an offer

1 but I don't really recall if we made a decision
2 to actually buy it.

3 Q: Do you recall during that meeting with Mr.
4 Knight where you and your wife visited his
5 business, did you make an offer to him at that
6 point?

7 A: No.

8 Q: Do you recall when you actually made that offer
9 to him?

10 A: It would have been through the broker. But the
11 answer is no. The time frame would probably
12 have been October -- September, October,
13 November of 2006.

14 Q: Do you recall whether your offer differed from
15 the asking price?

16 A: It did.

17 Q: And do you recall how much?

18 A: No. It was -- our offer was less than his
19 asking price.

20 Q: Okay. Do you recall how you came up with the
21 dollar figure that you used as your offer?

22 A: That would be a question better suited for my
23 wife. We talked about the given sales volumes,
24 the revenue each business generated, and the
25 assets that were involved in the business and

1 I guess that's probably how we came up with our
2 offer.

3 Q: And when you say the revenue each business
4 generated are you --

5 A: Sales dollars.

6 Q: Are you talking about the contracts he had?

7 A: Some, yes. Contracts plus whatever information
8 he was sharing with us about the revenue
9 generated from business outside/the contracts.

10 Q: But when you use the phrase, the revenue each
11 business generated, are you -- you're not
12 referring to different businesses ---

13 A: Not --- okay. Not business to business, I
14 probably -- more of a segment of the
15 businesses. We got -- we had only general
16 information to work with at that point. We
17 had, I guess -- I would assume by that point we
18 were given some financials -- enough financial
19 information that we would -- that either would
20 have been provided through the broker or we
21 would have requested through the broker to come
22 up with some of the business modeling that
23 helped us formulate an offer.

24 Q: Okay. And who was doing that business
25 modeling, was it your and your wife?

1 A: My wife.

2 Q: Just your wife?

3 A: Primarily.

4 Q: Okay.

5 A: I'm not a numbers person, sir. I mean I'm not
6 -- that's not my strength.

7 Q: Well, let me ask you, were you observant of the
8 process she went through to come up with those
9 business models?

10 A: When I had to be.

11 Q: Well, what would she show you as part of her
12 modeling?

13 A: I don't understand the question.

14 Q: When she was going through these business
15 models, what -- did she show you physically any
16 documents or calculations that she was making?

17 A: I would assume yes, but I don't recall
18 specifics to what it was. You know, it might
19 have been creating a -- I don't know what she
20 created. I would assume it was -- got some
21 form of a spreadsheet that would have gave us
22 an estimation based off of the information we
23 were provided versus the anticipation of what
24 we would expect.

25 Q: Did she do this on a sheet of paper or did she

1 do this on a computer?

2 A: I don't remember, Reggie. I'm sorry, I don't
3 recall.

4 Q: So any modeling, business modeling, or
5 calculations that lead to the first offer
6 price, that came from your wife and not you?

7 A: The financial aspect of it, yes. Right. We
8 jointly made decisions in regards to -- based
9 off of the information she would have created
10 for our assumption of the business's value, so.

11 Q: Okay. Your wife was responsible for sort of
12 the financial ---

13 A: Yes.

14 Q: --- aspect of figuring out what the price was
15 going to be in terms of an offer. What did
16 that leave in terms of your contribution to
17 that offer price?

18 A: What did it leave? You mean what did I ---

19 Q: Yes, sir, what was your contribution to
20 arriving at that initial offer price?

21 A: Probably very little because I trust her. I
22 mean, I believe that she had -- she has the
23 expertise to provide me with the information to
24 say, can we afford to do this or not.

25 Q: Okay. Was it very little input on your part or

1 ---

2 A: Minimal by comparison, on the financial aspect,
3 yes.

4 Q: Okay. But as it relates to the offer price,
5 the initial offer price, did you look at her
6 number and say let's go lower than that or
7 higher than that?

8 A: I don't remember.

9 Q: Did you base it on any valuation of the assets,
10 for example?

11 A: That would have been a factor, I would assume.
12 I mean, that would have been one of the factors
13 involved.

14 Q: And my question is, was that input from you in
15 terms of valuing assets, or was your wife
16 solely the one valuing the contracts, valuing
17 the return.

18 A: All right. I might have helped value the
19 assets by looking up resale val- -- or cost,
20 replacement values for some of the equipment
21 that was being offered in the, you know, in the
22 sale. We didn't have all this, all the
23 particulars, but we had a good share of it, so.
24 I mean number of stretchers of example, number
25 of vans, age of the vans. So my contribution

1 would have likely been to -- I'm sure I would
2 have gotten involved in that aspect of it
3 because it's the part I knew more about than
4 the -- I knew what a stretcher was for an
5 example, I knew what a gurney or a Ferno carry
6 board would be or whatever was listed, so.

7 Q: Okay. And we're going to get into a lot more
8 detail on the actual purchase price later on
9 but let me ask you, what happened to that
10 initial offer?

11 A: What happened to it?

12 Q: Yes, sir. Was it accepted or rejected?

13 A: I think it was rejected. It wasn't accepted.
14 Yeah, it was rejected.

15 Q: And what did you do as a result of that
16 rejection?

17 A: I believe there was a counter that --
18 negotiations that took place.

19 Q: Was the counter offer less than the initial
20 asking price?

21 A: I would assume so.

22 Q: So the initial offer by you for the purchase of
23 the business was actually lower than the asking
24 price?

25 A: Yes.

1 Q: And the counter offer back to you was lower
2 than the initial asking price?

3 A: Yes.

4 Q: Okay. Let's talk about what you were
5 negotiating over at that point in time. There
6 were the hard assets so to speak, there were
7 the stretchers, vans, is that right?

8 A: Yes, yes.

9 Q: And what else did you understand was included
10 in that purchase price?

11 A: Well, okay. You said the vans, right?

12 Q: Right.

13 A: Okay. Three contracts and -- that was probably
14 -- primarily it.

15 Q: Did your wife ever discuss with you a concept
16 called intangible assets?

17 A: I don't recall.

18 Q: Have you ever heard of the term goodwill?

19 A: Uh-huh (affirmative response).

20 Q: Did you believe goodwill was included in that
21 initial asking price as well as the prices you
22 all were negotiating back and forth?

23 A: I -- can you define your goodwill?

24 Q: Well, in other words, just the reputation of
25 the business, the relationships that Mr. Knight

1 had established ---

2 A: Yeah, okay.

3 Q: ---that you were inheriting ---

4 A: Then yes, there was goodwill involved.

5 Q: How did you value the goodwill?

6 A: I'm sure there was a consideration put in there
7 at that point for it but I don't recall what
8 percentage or what number was tied to goodwill.
9 Don't know.

10 Q: Did your wife ever discuss with you for
11 example, the tax implications of what you
12 attributed to goodwill versus the hard assets.

13 A: Not to me, no.

14 Q: Your assumption is that goodwill was built into
15 the price, the initial asking price as well as
16 your initial offer?

17 A: Yes, I guess there would have to be. There is
18 the value for an existing business to have
19 goodwill, so yes.

20 Q: Is there anything else other than the hard
21 assets, the stretchers, vans, and the goodwill
22 that was included, to your knowledge, in the
23 negotiations over price?

24 A: Not that I recall.

25 Q: There was a counter offer, you believe, made to

1 your initial offer. Was that counter offer
2 accepted?

3 A: I'm not sure at what point we came to terms
4 with the actual \$590,000 price. I don't think
5 there was that many back and forths, so. I
6 can't tell you how many times though.

7 Q: To your knowledge the final purchase price, was
8 that still lower than the initial asking price?

9 A: Yes. I don't recall what the initial asking
10 price was but I know it was less.

11 Q: Was there a purchase price number that your
12 wife told you that this deal would not be in
13 your best interest?

14 A: I don't recall.

15 Q: You don't recall whether she told you that or
16 you don't recall the number?

17 A: Quite frankly, neither. I would assume -- I'm
18 assuming that we had a number in mind that we
19 could not go below. We were novices to some --
20 to a great degree in regards to buying a
21 business, but as far as her expertise towards
22 evaluating it and analyzing the business this
23 is what she did for a living, I mean the
24 accounting aspect is what she did, so.

25 Q: Had she ever done business valuations prior to

1 this?

2 A: For purchase?

3 Q: For any purpose?

4 A: I would assume, yes.

5 Q: Okay. Where did your wife work at?

6 A: Where does she work?

7 Q: During this particular time period, where did

8 she work?

9 A: She was working -- at that specific time she

10 was working for AGY. Advanced Glass Fiber or

11 Advanced Glass Yarn something or other.

12 Q: And where's that located?

13 A: Aiken, South Carolina.

14 Q: Has she ever worked for an accounting firm

15 prior to this?

16 A: A public accounting firm?

17 Q: Yes, sir.

18 A: No.

19 Q: Has she ever worked for any other type of

20 accounting firm?

21 A: Is corporate accounting?

22 Q: Yes, sir.

23 A: Yeah.

24 Q: Okay. Where did she work there? Is that at

25 AGY?

1 A: Her -- the broadest, or the most years that she
2 had worked anywhere was Corning, Incorporated.

3 Q: And what did she do for them?

4 A: Accounting. She was -- she had various titles
5 and responsibilities in manufacturing and
6 corporate, business accountings, you know.

7 Q: In which one of these jobs did you believe that
8 she had gained experience doing business
9 valuations?

10 A: Corning.

11 Q: And why do you believe that?

12 A: She was directly involved in acquisitions that
13 Corning had made of some -- a few businesses
14 that they were either did buy or considering
15 buying and so that -- you know, I knew she had
16 the know how.

17 Q: So did she ever discuss with you the initial
18 asking price being a price that you all could
19 not afford to make this purchase at?

20 A: Afford, I mean it was more than we cared to
21 spend, so I would have -- if that's what you
22 mean, then yeah, we had conversations that it
23 wasn't -- it didn't hold the value that the
24 asking price was -- that was being asked, so.

25 Q: At this point in time when you were discussing

1 with the broker the potential purchase of this
2 business and your meeting with Mr. Knight, had
3 you already created the entity that became
4 known as Palmetto Mortuary?

5 A: No.

6 Q: When did you create that entity?

7 A: After the initial acceptance of our offer, I
8 believe. It would have been in the November,
9 December of -- probably in December of 2006.

10 Q: Who did the paperwork to create Palmetto
11 Mortuary?

12 A: My wife.

13 Q: She did the incorporation papers?

14 A: Yes.

15 Q: And does she have an official role with
16 Palmetto Mortuary?

17 A: Yeah. Title wise?

18 Q: Yes, sir.

19 A: She's vice president and treasurer.

20 Q: Any other officers?

21 A: Me.

22 Q: Other than you?

23 A: No.

24 Q: And your title is president?

25 A: Right, yeah.

1 Q: And so Palmetto Mortuary was created simply and
2 solely to purchase Mr. Knight's assets, is that
3 right?

4 A: Yes.

5 Q: At that point in time did you intend to
6 purchase any other similar businesses to Mr.
7 Knight's?

8 A: No.

9 Q: Did you ever have a discussion with Mr. Knight
10 about a ten year business plan that you had?

11 A: Yeah.

12 Q: Okay. Can you tell me what that plan was?

13 A: It wasn't really a plan. It was more what I
14 had in mind for me personally.

15 Q: Okay. Tell me about that.

16 A: Work my ass off for ten years then at the end
17 of ten years decide what -- whether or not I
18 had to continue or I could start getting others
19 to do more of the work for me. Excuse me for
20 stating the way I did , but ...

21 Q: Okay. Is this a business plan you discussed
22 with your wife?

23 A: This -- yes, to some degree. I mean we've had
24 numerous discussions about our lives because of
25 how this business relates to our life. We're

1 separated most of the time by the fact that
2 I've -- our business is here in Columbia, and
3 I'm -- our residence is in Aiken. So, I mean,
4 I -- I'm not down there as much as I would like
5 to be. So it does impact that part of our
6 decisions.

7 Q: Okay. But let's talk specifically about your
8 business plan. You ---

9 A: Are you asking about a formal business plan?

10 Q: You ---

11 A: A ten year plan?

12 Q: You related to me that you had discussed with
13 Mr. Knight a ten year business plan, is that
14 right?

15 A: As a statement, but not as anything as an
16 official ten year business plan.

17 Q: Okay. And you also explained to me that you
18 and your wife had talked about a business plan
19 for this new business, is that right?

20 A: A plan by the statement of goals. There was no
21 formal plan, business plan that we had in
22 place.

23 Q: Okay. What were the goals then, for this
24 business plan?

25 A: Basically what I just said. You know, we would

1 -- you know, that based off of my age at the
2 time of purchase, I was 52 years old at the
3 time, I was just -- my decision was that I'd
4 work full-time until I was 62, and then see
5 where we stood up and determine where we were
6 going to take the business from that point,
7 whether we kept it or sold it or what we did
8 with it.

9 Q: Did you have some general idea about how much
10 you wanted to accumulate over that ten year
11 plan?

12 A: I didn't put a number on it, no, sir.

13 Q: What were you going to make your decision on
14 whether to keep or sell the business on?

15 A: When?

16 Q: What were you going to base that on?

17 A: How it affected our life, our ability to do
18 that -- in our -- in this part of our life.
19 There were a lot of factors that lead up to --
20 prior to this purchase of the transport portion
21 of Knight Systems.

22 Q: Okay. Tell me about those.

23 A: We had relocated from Corning, New York. We
24 came down with Corning, the business that we
25 were involved in closed. We had a window of

1 opportunity for my wife to go back to New York,
2 we chose to stay in South Carolina and fend on
3 our own. From that point on we had multiple
4 jobs and in order to get to a point where we
5 could try to reestablish our lifestyle and
6 income levels that we had had prior to the
7 business in Summerville closing. So at that
8 point this -- these are the types of factors
9 that part of -- part of what we believed, that
10 would help us get to that point was the
11 additional -- the purchase of this business.
12 So that, you know, the potential -- there was
13 a higher potential for earnings there for me
14 than I was going to get in the business
15 segment. So these are parts of what -- we
16 invested our life's savings into buying this
17 business.

18 Q: How much did you invest, of personal life
19 savings into this?

20 A: I -- our personal contribution of it was
21 probably \$150,000 or better. But I'm not
22 totally guaranteeing that that was it.

23 Q: And where'd you get that 150,000 from?

24 A: I don't know, I just recall seeing -- seeing or
25 -- I recall discussions of what we could

1 potentially put into this business.

2 Q: Was it out of retirement?

3 A: Some was savings, some were -- we ultimately
4 got a business loan to buy the business. So,
5 I mean, but we had to put a percentage of it
6 out of -- we had to come up with some initial
7 monies in order be -- even to be qualified, so.

8 Q: Okay. Your personal contribution to the
9 purchase came from where?

10 A: Savings and possibly retirement plans. I don't
11 recall.

12 Q: Do you recall how much you would have had in
13 savings?

14 A: No. No, I don't.

15 Q: Is that something your wife handled?

16 A: Yes.

17 Q: So she accessed whatever accounts you had to
18 come up with the personal contribution?

19 A: Right.

20 Q: And you don't know specifically where she got
21 those from?

22 A: Got what?

23 Q: The monies.

24 A: You mean the accounts or ---

25 Q: Yes, sir.

1 A: No.

2 Q: Other than retirement account and savings
3 account are there other funds that you would
4 have tapped into?

5 A: Not that I recall.

6 Q: Are there other funds other than your
7 retirement savings or retirement accounts or
8 savings accounts that you are aware that you do
9 possess?

10 A: No. That I'm aware of, no.

11 Q: Yes, sir.

12 A: No.

13 Q: Any other investments for example?

14 A: Outside of our home and vehicles and such like
15 that?

16 Q: Yes, sir.

17 A: No.

18 Q: Did you take a loan out on your house?

19 A: No.

20 Q: Take a loan out on your vehicles?

21 A: To buy this business?

22 Q: Yes, sir.

23 A: No.

24 Q: Did you borrow any money from any friends or
25 relatives?

1 A: No.

2 Q: Now, over that ten year period that you were
3 describing when -- you purchased the business,
4 you said you were 52 years old at the time?

5 A: Yes.

6 Q: And at 62 you were going to discuss with your
7 wife whether you kept the business or sold the
8 business, is that right?

9 A: It wasn't just a deadline time frame, it was
10 more a -- it's an ongoing discussion. I don't
11 say that it's been -- it was more of a targeted
12 date in my mind.

13 Q: Okay. Over that time period, you said you
14 wanted to see if you could get back to a
15 certain standard of living that you had enjoyed
16 when you both worked for Corning, I believe, is
17 that right?

18 A: Yes, sir.

19 Q: Okay. Now, combined income, when you were both
20 at Corning, what would that have been?

21 A: \$200,000, I don't know. I don't know a number.

22 Q: You explained to me that you were making
23 approximately \$60,000, is that right?

24 A: I might have been making 80, I don't -- I
25 really don't remember.

- 1 Q: You don't remember what your salary was ---
2 A: Yeah.
3 Q: --- at Corning?
4 A: Not specifically. I mean I assume that it was
5 -- 60 is probably about right.
6 Q: Would your wife have been making about 140 at
7 Corning?
8 A: Yes.
9 Q: Has she always made substantially more money
10 than you?
11 A: Yes.
12 Q: Now, when she left Corning what did she -- did
13 she get another job with another company
14 immediately?
15 A: Huh-uh, she consulted.
16 Q: Do you know how much she made from consulting?
17 A: No.
18 Q: You have no idea what she made from consulting?
19 A: No.
20 Q: Was she consulting when you all decided to
21 purchase Mr. Knight's business?
22 A: No.
23 Q: Okay. Where was she working?
24 A: AGY, like I told you earlier.
25 Q: Well, how much was she making at AGY?

1 A: 90,000.

2 Q: And you would have been making about 28,000?

3 A: I guess, yeah. I might have been -- it might
4 have been more than that. I would assume I was
5 making a little more than that at that point,
6 but ...

7 Q: Is she still employed at AGY?

8 A: No, sir.

9 Q: What is she doing now?

10 A: She is a CFO for the National Wild Turkey
11 Federation in Edgefield.

12 Q: How much does she make for that position?

13 A: 140, maybe 150.

14 Q: And how long has she been there?

15 A: Three years.

16 Q: So what amount of money were you looking to
17 make between -- roughly, and I understand this
18 was just a goal, but between the time of
19 purchasing Mr. Knight's business and the time
20 you reached 62 years of age?

21 A: As much as we could. I don't know if there was
22 a real dollar amount tied to it.

23 Q: You didn't have sort of yearly goal that you
24 wanted to get to?

25 A: Nothing that was discussed that I can recall.

1 Q: Did your business goals include acquiring other
2 body removal businesses?

3 A: In that ten year period?

4 Q: Yes, sir.

5 A: No. It didn't. It did not..

6 Q: Did it include trying to expand the number of
7 contracts or clients that ---

8 A: Yes, it did.

9 Q: --- Mr. Knight's business ---

10 A: Yes, it did.

11 Q: --- had? And what were your plans or methods
12 going to be to expand Mr. Knight's business?

13 A: Through contact of existing customers that
14 didn't -- that were not previously dealing with
15 Mr. Knight.

16 Q: Since the purchase of Mr. Knight's business
17 have you added customers that he didn't have
18 already?

19 A: Yes.

20 Q: Okay. What customers were those?

21 A: Greenlawn -- specifics?

22 Q: Yes, sir.

23 A: Greenlawn Funeral Home, Woodridge Funeral Home,
24 Thompson, South Carolina Cremation and Burial
25 Society, Cremation Society of South Carolina.

1 I mean as far as established ongoing business,
2 what I've just given you is probably the ones
3 that made the biggest impact. We get calls on
4 occasion from out of town customers that -- out
5 of the Columbia/Lexington area that use you on
6 occasion. But it's some we have out of town,
7 regular business but it doesn't necessarily
8 mean some of it was business that we acquired
9 from him and some of it was business that we've
10 added in since.

11 Q: And the business that you've added since, do
12 you know how much revenue is generated from
13 that new business?

14 A: Of what I just listed?

15 Q: Yes, sir.

16 A: Minimal now, I don't have all those businesses
17 at this point.

18 Q: Okay. You said minimal now.

19 A: There was a period of time we held the business
20 with those firms but I don't have all of them
21 at this point. Or some I don't have at all,
22 so.

23 Q: Okay. What time period -- and we'll probably
24 back up and go specifically ---

25 A: Sure.

- 1 Q: --- with each one of them, but /for example with
2 Greenlawn, when did you have a business
3 relationship with them?
- 4 A: 2007 -- or 2000- -- yeah, 2007.
- 5 Q: And how much revenue did you generate in 2007
6 from Greenlawn?
- 7 A: Just in that year?
- 8 Q: Yes, sir.
- 9 A: \$5,000.
- 10 Q: Did you do business with them in 2008?
- 11 A: I did.
- 12 Q: Okay. Do you know what revenue you generated?
- 13 A: These would all be guesses.
- 14 Q: Yes, sir. We'll go back and ask for specific
15 numbers.
- 16 A: \$30,000.
- 17 Q: And did you do business with them in 2009?
- 18 A: Yes.
- 19 Q: How much revenue did you generate from them?
- 20 A: 30,000 to \$40,000.
- 21 Q: Okay. What about 2010?
- 22 A: It would have been the same all the way through
23 the end of 2012.
- 24 Q: So you did business with them in 2010, 2011,
25 and through the end of 2012?

- 1 A: Yes, sir.
- 2 Q: And each of those years you would have done
- 3 roughly 30 to \$40,000?
- 4 A: That would -- yeah, that's probably the
- 5 assumption.
- 6 Q: Okay. Are they still a client of yours?
- 7 A: No.
- 8 Q: What happened with that contract?
- 9 A: They -- it wasn't a contract.
- 10 Q: And what happened with that business
- 11 relationship?
- 12 A: They were purchased by a corporate -- another
- 13 corporation and they transitioned to some
- 14 business in-house and some business to my --
- 15 from what I understand to another transport,
- 16 removal and transport service in town, in the
- 17 area.
- 18 Q: Okay. Do you know what business that is?
- 19 A: Crossroads.
- 20 Q: Do you know why they went with Crossroads?
- 21 A: No.
- 22 Q: Did you ever have any discussions with them
- 23 about whether they were dissatisfied with your
- 24 services?
- 25 A: Yes.

- 1 Q: And what was their response to that?
- 2 A: They were more than pleased with our services.
- 3 Q: Did you ask them why then they were choosing
- 4 Crossroads versus your business?
- 5 A: They didn't tell me they were choosing
- 6 Crossroads. They told me they were taking it
- 7 in-house.
- 8 Q: And after that you found out that they were ---
- 9 A: Yes, sir.
- 10 Q: --- not only doing some in-house, but doing
- 11 business with Crossroads?
- 12 A: Yes, sir.
- 13 Q: And did you ever contact them after you found
- 14 out that they were doing business with
- 15 Crossroads?
- 16 A: I have not.
- 17 Q: When did you find out they were doing business
- 18 with Crossroads?
- 19 A: March of this year, 2013.
- 20 Q: Did you ever sell Greenlawn Funeral Home any
- 21 body bags?
- 22 A: No. Well -- okay. Never? I don't believe --
- 23 I would say minimal if any. They typically
- 24 provided their own. They would supply us with
- 25 bags to do their -- any transport work that

1 required bags.

2 Q: If you sold them bags where would you have
3 gotten those bags from?

4 A: If I had sold them ---

5 Q: Yes, sir.

6 A: --- I would have gotten them from Knight
7 Systems.

8 Q: What would you -- and I understand, we can talk
9 about this in a little bit but, Mr. Knight sold
10 bags to you cheaper than he sold normally to
11 retail customers, is that correct?

12 A: Sold us bags -- my understanding, yes.

13 Q: And would you resell at cost to Greenlawn or
14 any other funeral home or would you do a
15 markup?

16 A: Markup.

17 Q: Okay. And how much would the markup be?

18 A: I bought them for 8, I sold them for 16.
19 Whatever that markup is.

20 Q: And you said Woodridge Funeral Home was another
21 business ---

22 A: Right.

23 Q: --- you had as a client?

24 A: Same time period. They and Greenlawn were
25 owned by the same people, so.

- 1 Q: So from 2007 to 2012 you had them as a client?
- 2 A: Uh-huh (affirmative response).
- 3 Q: And how much revenue was generated each of
- 4 those years?
- 5 A: 15,000 a year, maybe. This is all guessing
- 6 now.
- 7 Q: Is there any reason from 2007 that the amount
- 8 of revenue generated from Greenlawn jumped from
- 9 5,000 to 30,000 in 2008?
- 10 A: From 2007 to 2008?
- 11 Q: Yes, sir.
- 12 A: Yeah, yeah.
- 13 Q: Why is that?
- 14 A: I only had them for a portion of the year.
- 15 Q: When did you get them in 2007?
- 16 A: Oh, probably in the fall of that year. And
- 17 then they started giving us more. Initially we
- 18 weren't doing all of their removals. And then
- 19 we ultimately got -- we did all their
- 20 transport, so.
- 21 Q: And how much did they pay you? Was there a set
- 22 price per body removal?
- 23 A: Yes.
- 24 Q: Okay. How much would that be?
- 25 A: Do I have to answer these questions?

1 Q: Yes, sir.

2 A: 125.

3 Q: \$125 per body?

4 A: Yes, sir.

5 Q: Is there a reason you don't want to answer that
6 question?

7 A: I don't know what the outcome of this ---

8 **MR. PRINGLE:** I'll interpose here that -- certainly
9 an objection, to the extent that the questions
10 are asking confidential and proprietary trade
11 secret information that's particular to my
12 client, especially when the other party in the
13 case is a direct competitor. I would object to
14 that. And certainly based upon the questioning
15 and where it goes in terms of current pricing
16 and getting information that would not be -- it
17 might not be discoverable except under a very
18 tight protective order that I may very well ask
19 him not to answer the question, or instruct him
20 not to answer it, depending on where it goes.

21 **MR. LLOYD:** And certainly we can deal with that if
22 we have to, with a protective order if it
23 warrants it, but what I'm trying to find out
24 right now is, that \$125 per body was that the
25 rate in 2007?

1 A: Pretty much.

2 Q: Has that pretty much stayed the same rate from
3 2007 to 2012?

4 A: Yes.

5 Q: During that time period, were they -- was
6 Greenlawn providing you all of the body bags
7 for those removals?

8 A: That was their intent. 99 percent of the time
9 probably. There might have been exceptions
10 that they didn't, that we would have charged
11 them for a bag. They occasionally would run
12 out of inventory for example. We would just
13 use what we had in our inventory and charge
14 them accordingly.

15 Q: Okay. And that would be the \$16 you would
16 charge?

17 A: Yeah.

18 Q: All of their invoices would reflect whether
19 they -- if they were, for example, not charged
20 a body bag price in the invoice, would that
21 indicate that they had supplied their own bag?

22 A: Not necessarily.

23 Q: How would you keep track of, if you did,
24 whether or not you were selling them a bag or
25 whether they were supplying a bag?

1 A: Through our database.

2 Q: Your database indicates whether or not you sold
3 Greenlawn a bag?

4 A: Yes, sir.

5 Q: And when you say your database, what type of
6 record keeping is that?

7 A: It's -- we acquired it from Buddy and Knight
8 systems in the purchase of the business, so
9 that would have been part of the assets that I
10 omitted from earlier. But what it does, it
11 gives us the opportunity to create records for
12 invoicing purposes and it keeps track of all
13 the pertinent information for the work we do
14 for each of the customers.

15 Q: To your knowledge are those invoices that
16 relate to Greenlawn, are they invoices that you
17 reviewed in preparation of Defendant's Exhibit
18 One?

19 A: No.

20 Q: So those invoices related to Greenlawn have not
21 been produced to the defense at this point to
22 your knowledge?

23 A: I don't believe they were asked for.

24 Q: But that's the database that would tell me how
25 many body bags you actually sold to Greenlawn

1 from 2007 to 2012?

2 A: The information could be -- could be re- --
3 could be pulled from that, yes.

4 Q: Is there any reason that you would have used
5 your own body bag in servicing Greenlawn but
6 not charged them for that body bag?

7 A: Would there be any reason that I would do that?

8 Q: Yes, sir.

9 A: Not by design. No, I would say no, not that I
10 know of, not that I'm aware of.

11 Q: Woodbridge Funeral Home, that's here in
12 Columbia?

13 A: Woodridge?

14 Q: Woodridge, I'm sorry.

15 A: It's in Lexington.

16 Q: Lexington. And again, the rate per -- is there
17 a set rate?

18 A: It's the same apply. Take Greenlawn and put
19 Woodridge next to it.

20 Q: \$125 per body?

21 A: Exactly.

22 Q: And again, did you ever sell Woodridge any body
23 bags?

24 A: Occasionally. I'm not for sure that -- well,
25 let me think. Yeah, I could, we could be able

1 to provide that.

2 Q: And Thompson Funeral Home?

3 A: Yes, sir.

4 Q: Where's that located?

5 A: Lexington and West Columbia.

6 Q: Okay. What years were they a client of yours?

7 A: 2011, 2010 or 2011 to 2013. I don't remember
8 exactly when it started up. Or -- you know.

9 Q: In each of those years what revenue was
10 generated from that business?

11 A: Probably about 50,000 a year.

12 Q: For each year?

13 A: Yeah.

14 Q: And did you sell them any body bags?

15 A: Yes.

16 Q: Were those -- was that -- because as it related
17 to Greenlawn and Woodridge, you said
18 occasionally you would do that, did you sell
19 more than occasionally to Thompson?

20 A: Yes.

21 Q: Okay. Do you recall how often you would sell
22 a body bag to them?

23 A: Any time they required it.

24 Q: Again, I'm assuming there's a set price per
25 body removable, is that right?

- 1 A: That is.
- 2 Q: Is it the \$125 or is it a different rate?
- 3 A: That's -- that is accurate.
- 4 Q: And during your body removal or retrieval
- 5 service for Thompson, did they ever supply
- 6 their own body bags?
- 7 A: Not that I recall.
- 8 Q: And those body bags that you would have sold to
- 9 Thompson, were they Mr. Knight's body bags?
- 10 A: Yes.
- 11 Q: They were always Mr. Knight's body bags?
- 12 A: Yes.
- 13 Q: And again, your database would indicate again
- 14 that a body bag was used on each of those
- 15 retrievals?
- 16 A: Whatever -- yeah, whatever applied.
- 17 Q: And would it also indicate on that, in that
- 18 database where the body bag -- what type of
- 19 body bag was used?
- 20 A: Uh-huh (affirmative response).
- 21 Q: So if it was Mr. Knight's body bag the database
- 22 would indicate that?
- 23 A: No, it wouldn't. You said type.
- 24 Q: It wouldn't indicate the manufacturer of the
- 25 body bag?

1 A: No, sir.

2 Q: How do you know that Mr. Knight's body bags
3 were always used with Thompson?

4 A: Because that's all I bought. For that purpose.

5 Q: That's all you bought for that purpose, what do
6 you mean by that?

7 A: His bag was the only bags that I bought for
8 that -- for -- that purpose. For what we would
9 have used for Thompson's.

10 Q: You said the South Carolina Cremation and
11 Burial Society?

12 A: Yeah, it was small amount of business, nothing
13 significant.

14 Q: What years were they clients?

15 A: 2009 to 2012, maybe 2011.

16 Q: How much revenue was generated with them?

17 A: Minimal, maybe you know 5,000 a year.

18 Q: Would you use body bags with them?

19 A: Would I?

20 Q: Yes, sir.

21 A: Sometimes yes, sometimes no.

22 Q: Okay. When would you use body bags?

23 A: When they required them for home removal, for
24 example nursing home removals. Those type of
25 things, typically.

1 Q: And would you get body bags from them or would
2 you supply the body bag?

3 A: We would sell the bag that we acquired from
4 Knight.

5 Q: And again, any bag that you used with South
6 Carolina Cremation and Burial Society would
7 have been a Knight Systems bag?

8 A: Yes, sir.

9 (Off the record discussion.)

10 Q: Other than South Carolina Cremation Burial
11 Society, who else were clients that you brought
12 in new?

13 A: McSwain-Evans.

14 Q: Is that a funeral home?

15 A: Yeah, they're all funeral homes.

16 Q: And when were they a client?

17 A: 2011 until now, current.

18 Q: How much revenue generated from them?

19 A: Six, \$7,000 a year maybe.

20 Q: Anybody else?

21 A: I'm sure there's other, Reggie. Without
22 looking at the customer -- you have to
23 understand part of it. When I bought the
24 database, some customers were existing
25 customers with minimal or no activity. And

1 they still were on the customer list but they
2 were not necessarily current customers to what
3 we had bought. So part of it was the necessity
4 to go out and re-nurture and try to establish
5 business with them, so yeah, there's other
6 ones, the occasional here and there ones that
7 -- so, I mean ...

8 Q: You've indicated ---

9 A: I don't know what you're trying to get towards,
10 so I mean -- go ahead. I indicated?

11 Q: I'm not trying to get to anything Mr. Lintal.

12 A: Okay.

13 Q: I'm trying to understand this case. You'd
14 indicated earlier that some of these businesses
15 that we just discussed may no longer be
16 clients, is that right?

17 A: Some of the businesses that we discussed?

18 Q: Greenlawn and ---

19 A: Like Thompson ---

20 Q: --- Woodridge ---

21 A: --- Greenlawn ---

22 Q: --- Yes.

23 A: --- and Woodridge, right.

24 Q: Which ones are no longer ---

25 A: Those three.

- 1 Q: All thryree of those?
- 2 A: Yeah. All for the same reason.
- 3 Q: Is Thompson owned by the same company ---
- 4 A: Yes, it is.
- 5 Q: --- that owns Greenlawn and Woodridge?
- 6 A: Yes, sir.
- 7 Q: And South Carolina Cremation and Burial Society
- 8 is still a client?
- 9 A: No, they're owned by the same people as well.
- 10 Q: All -- so all four of those are gone? McSwain-
- 11 Evans, are they still ---
- 12 A: No. They're independent. We have them still.
- 13 Q: Okay. Was Shives Funeral Home a client?
- 14 A: They were on the customer list.
- 15 Q: Have you done any --
- 16 A: Yeah, we do business with Shives, yeah.
- 17 Q: How much business do you do with them?
- 18 A: Twenty to 25,000 a year maybe.
- 19 Q: Do you sell them body bags?
- 20 A: Sometimes. They prefer not to have the bags,
- 21 bodies in bags. So we don't necessarily use
- 22 bags for their transport.
- 23 Q: And if you sold them any bags would those have
- 24 been Mr. Knight's bags?
- 25 A: Yes, they would.

1 Q: And again it's a flat fee charge per removal?

2 A: Uh-huh (affirmative response).

3 Q: Your driver's records, when the driver goes to
4 a site to remove a body, do those records
5 indicate whether or not he's taking a bag with
6 him to sell to the customer?

7 A: I don't understand your question.

8 Q: Your -- somebody goes to pick up the body,
9 right?

10 A: Yeah.

11 Q: Okay. When goes to that site, is your normal
12 practice that he gives them an invoice at that
13 particular time?

14 A: A delivery slip.

15 Q: Okay. He gives them a delivery slip and what's
16 on that delivery slip?

17 A: The customer name, where we did the removal
18 from, the delivery location, the name of the
19 deceased, the transit permit if there is one,
20 the times that they took for calls and whether
21 or not there was a bag used. Along with the
22 name -- the initials of the individual that did
23 the work.

24 Q: And the bag, if there is an indication of a
25 bag, that means that the driver took a bag out

1 of your inventory to that site, is that right?

2 A: Uh-huh (affirmative response).

3 Q: If the funeral home, for example, he was going
4 to was supplying their own body bag, would the
5 slip indicate in any way that they were
6 providing the body bag or that he did not to
7 need to provide a body bag?

8 A: Yes. It's supposed to. We don't have that any
9 longer, so it would have during the period that
10 that took place.

11 Q: When did you all stop using the delivery slip?

12 A: No, not the delivery slip. We don't do
13 business with Greenlawn, so Greenlawn was the
14 only -- Greenlawn, Woodridge, they were the
15 ones that supplied -- they were the two that
16 supplied us bags. The were the only ones.

17 Q: So everybody else other than those two you
18 always supplied bags for?

19 A: If we use a bag.

20 Q: And all of those would have been Mr. Knight's
21 bags?

22 A: Yes.

23 Q: And just so that I understand, the delivery
24 slip -- do you keep those in archives or keep
25 some sort of ---

1 A: Yes.

2 Q: --- record of those? So since you purchased the
3 business you've retained any delivery slips
4 that you've used?

5 A: At least five years worth, so. Whatever the
6 legal limit for holding, that we're required
7 for by the state or whatever.

8 Q: Are you aware of any delivery slips that you've
9 destroyed?

10 A: I'm not aware of any so they more than likely
11 have everything from day one.

12 Q: So the delivery slips should match your totals
13 that you've produced in terms of the number of
14 bags you've purchased from Mr. Knight?

15 A: In theory, but that's not necessarily the case.
16 I mean there could have been bags that were
17 given away or were not accounted for. I can't
18 say that with 100 percent accuracy that they
19 would be absolutely correct.

20 Q: But there would be ---

21 A: But for the most part, yes.

22 Q: --- there would be some minimal ---

23 A: There should be a ---

24 Q: --- difference?

25 A: --- check and balance that I could created by

1 it.

2 Q: And like you said, if you gave them away that
3 wouldn't be indicated ---

4 A: I mean ---

5 Q: --- and ---

6 A: It's such a small item that, you know, there's
7 value but it's not -- it wasn't a significant
8 value by comparison to the other things that we
9 were -- it was a tool for -- that we used for
10 the work we did.

11 Q: But you were purchasing those bags from Mr.
12 Knight at \$8 per bag and charging your clients
13 \$16 per bag?

14 A: Yes.

15 Q: Where do you keep those delivery slips?

16 A: At my home.

17 Q: Are they all boxed together?

18 A: Yes, they're organized.

19 Q: In other words if we were asked to produce,
20 asked you to produce copies of those ---

21 A: Of every one of them?

22 Q: --- you would be able to go to one --
23 potentially we may do that, but you would be
24 able to go to one site to pull those, is that
25 right?

1 A: One maybe two, but yeah.

2 Q: Any difficulty you can think of sitting here
3 today at being able to retrieve those delivery
4 slips?

5 A: The retrieving no. Making copies, yes. That's
6 a lot of invoices. There are a lot of slips.

7 Q: Why don't we let y'all take a break.

8 (A short break was taken at this time.)

9 Q: Mr. Lintal, did your attorney play for you a
10 recording of a conversation that you had with
11 Mr. Knight regarding your purchase of infant
12 bags from someone else?

13 A: Yes.

14 MR. PRINGLE: Let me just interpose here.

15 A: Ooops.

16 MR. PRINGLE: No, no, no, you answer every question.
17 I was just going to interpose you know sort of,
18 maybe it's characterized as an objection to the
19 form but certainly to just lodge and to hold
20 that, you know, whatever objections to the
21 actual use of the tape ---

22 MR. LLOYD: Sure.

23 MR. PRINGLE: --- at the appropriate time that
24 violates every known rule of evidence as well
25 as the Magna Carta going back to the history of

1 the legal system. But I'll just make all of
2 those and bring them all forward but just, you
3 know, ---

4 MR. LLOYD: Sure.

5 (Off the record discussion)

6 Q: And that's something, Mr. Lintal that your
7 attorney will address at some point, but did
8 you recognize the voices on that recording?

9 A: Yes.

10 Q: And was that you and Mr. Knight involved in
11 that conversation?

12 A: Yes.

13 Q: Do you recall the circumstances around the time
14 line of when that conversation would have
15 occurred?

16 A: The date?

17 Q: Approximately, I know you don't remember.

18 A: September 16th. I can tell you, September
19 16th, 2011 -- no, June 16th, 2011.

20 Q: And how do you know that it was June 16th?

21 A: It was the day before the Richland bid was due.

22 Q: Since your purchase of Mr. Knight's business,
23 has Palmetto Mortuary purchased any other body
24 removal businesses?

25 A: Yes.

1 Q: And which ones are those, now?

2 A: Capital Transportation.

3 Q: Is that the only one?

4 A: Yes.

5 Q: Did you go through a broker to purchase
6 Capital?

7 A: No.

8 Q: How did that purchase come about?

9 A: I was approached by the owner, Archie Maddox.
10 And we discussed what he had, what he wanted,
11 and negotiated from there.

12 Q: Did you go through a similar or different sort
13 of business valuation process that you went
14 through with Mr. Knight's business?

15 A: As far as the process?

16 Q: Yes, sir.

17 A: Likely similar.

18 Q: Again, would your wife have been sort of the
19 one doing the business modeling?

20 A: A good bunch of it, yeah.

21 Q: Did you take any greater role in arriving at
22 the purchase price of that business than you
23 did with Mr. Knight's business?

24 A: Yeah, probably. Like it was a little more
25 familiar with the -- what it's potential was

1 for what it gave us versus the -- my experience
2 was played in more to it, I guess, in the
3 decision process.

4 Q: Now, would that business -- did you do any
5 modeling of the business purchase on paper or
6 computer or did you just do this in your head?

7 A: I -- like -- you know, we did some -- I'm sure
8 we did some modeling on paper but whether or
9 not we've kept it is another question because
10 it was a much simpler process.

11 Q: Is there a non-compete clause in that purchase
12 agreement?

13 A: There is.

14 Q: Let me ask you, how did you value the non-
15 compete clause in the purchase agreement with
16 Capital Transportation?

17 A: I don't know if we put a financial amount to it
18 quite frankly. I mean, in our modeling
19 process?

20 Q: Yes, sir.

21 A: No, I -- it wasn't -- there way -- it wasn't
22 any bone of contention for him because he
23 wanted to sell the business so he was willing
24 to -- so it had minimal value in this
25 particular instance.

1 Q: And how did that differ from your negotiation
2 with Mr. Knight regarding that non-compete
3 clause?

4 A: At the time we felt it was the same, that it
5 had minimal -- because he expressed his desire
6 to get out of the business.

7 Q: Had you ever discussed with Mr. Knight prior to
8 the closing, the inclusion of a non-compete in
9 the purchase agreement?

10 A: I'm sure it was discussed.

11 Q: Do you recall when it was discussed?

12 A: No, I don't recall.

13 Q: Do you recall who might have been present when
14 you discussed it?

15 A: Prior to the closing?

16 Q: Yes sir.

17 A: No, I don't recall. I mean the primary parties
18 were myself, my wife, and the broker, and so it
19 could have been any combination of those three.

20 Q: Okay. Did you ever, to your knowledge, have
21 any discussion with yourself, the broker or
22 your wife with Mr. Knight regarding the non-
23 compete prior to the closing?

24 A: That I recall?

25 Q: Yes.

1 A: I don't recall.

2 Q: In the discussions with your wife and/or the
3 broker, how did you all value the non-compete?
4 Come up with a dollar figure for example.

5 A: I am not sure if it was really considered in
6 the value, dollar value. I know it was
7 something that we required and were insistent
8 upon.

9 Q: Let's talk about the closing. The actual asset
10 purchase agreement, that included a non-
11 compete, for example, in it, had you shown --
12 had you gone back and forth with Mr. Knight
13 regarding varying drafts of that agreement?

14 A: I believe his lawyer and our lawyer had
15 exchanged documents at some point prior to the
16 closing, yes.

17 Q: So it was your understanding that the document
18 had been shared with Mr. Knight prior to that
19 closing?

20 A: I believe so. To my understanding, yes.

21 Q: At any point during the process of coming up
22 with that final draft of the asset purchase
23 agreement had there been requests or offers by
24 Mr. Knight that he wanted certain things
25 included or taken out that you all responded

1 to?

2 A: That he requested?

3 Q: Yes, sir.

4 A: Prior to the final draft?

5 Q: Yes, sir.

6 A: Yeah, yes.

7 Q: Okay. What were those?

8 A: He wanted the term of the -- term of our
9 requirement to buy the body bags listed to be
10 equal to the amount of the term of our non-
11 compete. So in other words ten years versus
12 ten years. The original contract as I recall,
13 the original document, it was a three year
14 period.

15 Q: The non-compete was a three year?

16 A: No, the -- no, I don't recall what the non-
17 compete was. I think it was five. But we were
18 required to buy bags for three years as it was
19 originally written, as I recall.

20 Q: That, for lack of a better description, let's
21 just call it an exclusivity provision. You
22 were going to purchase bags exclusively from
23 Mr. Knight, is that right?

24 A: That was the intent, yes.

25 Q: Now, when did y'all first -- you and Mr.

1 Knight, when did y'all first have the
2 discussion about your new business purchasing
3 solely from him any body bags?

4 **MR. PRINGLE:** I'm going to just throw in, just a
5 continuing objection to the form, just based
6 upon the idea that the final document says what
7 it says. But for what that's worth, that the
8 document speaks for itself. But, continue.

9 A: Say it again, please.

10 Q: Okay. At what point prior to the closing did
11 you and Mr. Knight discuss your new business,
12 Palmetto Mortuary, purchasing body bags only
13 from his body bag business?

14 A: Our assumption, it was -- it was probably in
15 all aspects. Before, when it was first
16 drafted, when we came to the ultimate draft of
17 the document. Our understanding was that we
18 were entit- -- we were -- our intention was
19 that we would be buying all bags from him. He
20 said he could supply everything, every bag that
21 we would ever need for this business.

22 Q: Okay. And when did y'all have that discussion?

23 A: Well, a good part of it took place during the
24 day of the negotiation of the -- I mean, he --
25 he had expressed that right from the beginning

1 but the bag portion he wanted to keep and, you
2 know,, we -- our -- okay. Primarily -- I mean,
3 I do recall it being part of the talk during
4 the day that we were -- we drafted the final
5 copy and signed the document, so.

6 Q: Okay. Was the language regarding your
7 requirement to purchase body bags solely from
8 him, was that already in the document when Mr.
9 Knight arrived at the closing?

10 A: The document -- well, it -- it changed during
11 the course of the closing. So ...

12 Q: What changed during the course of the closing?

13 A: The -- the -- what was in that particular
14 portion of the agreement. The term, for
15 example, is ---

16 Q: The length of the exclusivity?

17 A: Right.

18 Q: But was it Mr. Knight who insisted that that
19 exclusivity provision be included in the Asset
20 purchase agreement?

21 A: He was insistent on it. I mean he wanted --
22 yes. I mean he -- that was part of what he
23 wanted, yes.

24 Q: And was that insistence communicated to you
25 prior to the closing or at the closing?

1 A: I don't recall. I know at that point it was
2 definitely communicated.

3 Q: So, is your testimony today that Mr. Knight
4 wanted that provision included in the agreement
5 that you purchase body bags only from him?

6 A: To the best of my recollection. We had no
7 objection to it at that point in time. Based
8 on -- okay, go ahead.

9 Q: My question is, is it your recollection that
10 Mr. Knight wanted that provision inserted into
11 the agreement?

12 A: As part of the negotiation, I believe it was --
13 it would have been what he would have
14 requested. I don't recall whether or not he
15 directly specified that exact verbiage be put
16 in there or if it was just written up for
17 approval. As I recall, the document was not
18 final and settled until we both had the
19 opportunity to change at that day of closing.
20 We didn't have any -- we could not detect any
21 objection, we being my wife and myself, didn't
22 really -- didn't have any reason to believe
23 there would be any reason that -- other -- that
24 all bags, that he couldn't supply all bags.
25 Especially, you know, specifically the ones

1 listed on the document.

2 Q: Okay. Let's go at it this way, when did you
3 first learn that Mr. Knight had a body bag
4 business?

5 A: The very first that we talked with him about --
6 I mean it was a known process right from the
7 beginning because the -- I'm sure it was the
8 broker that initially said that he had two
9 parts to his business, of which he was only
10 going to sell one.

11 Q: And at some point you go physically to where
12 his business was located with your wife, is
13 that right?

14 A: Yes.

15 Q: And did you happen to tour the area where he
16 manufactured body bags?

17 A: Not that I recall.

18 Q: So you ---

19 A: I don't know. I don't believe we did.

20 Q: Okay. So to this day you've never seen the
21 area that he manufactures body bags?

22 A: To this day?

23 Q: Yes.

24 A: No, I have seen it since. I've never seen him
25 do it, but I've seen the area.

1 Q: Okay. If it wasn't during that visit when you
2 went to the site, was it after you purchased --

3 -

4 A: Yes.

5 Q: --- the business?

6 A: Yeah.

7 Q: Okay. There's a provision in the agreement as
8 well that essentially gives you right of first
9 refusal should he decide to sell the body bag
10 business, is that right?

11 A: Yeah.

12 Q: Okay. How did you know you wanted to purchase
13 the body bag business if you'd never seen it?

14 MR. PRINGLE: Object to the form, answer the
15 question.

16 A: I -- how did I know I would want to buy it?

17 Q: Yes, sir.

18 A: Well, it seemed to make sense only based off
19 the fact that it worked for him. It was a
20 related entity that could relate to what we --
21 we didn't intend to do a lot, make a lot of
22 changes to the way he was operating his
23 business. The difference being is we were not
24 going to have -- be supplying ourselves with
25 body bags at that point. That was the biggest

1 distinction between it.

2 Q: Had you had any discussions prior to the
3 purchase of Mr. Knight's business about the
4 revenue he generated from the body bag
5 business?

6 A: Was there any -- there was never, that I
7 recall, any specific to what revenue the body
8 bag generated. We never made an offer for --
9 the offer was final refusal. If I recall the
10 way that the verbiage was in there. It didn't
11 say that he couldn't sell anyone else.

12 Q: Right.

13 A: It says that if we had the opportunity -- if he
14 were to sell it, we were given the opportunity
15 to meet or beat the price should we chose to.

16 Q: Was there a value placed on that?

17 A: No, no, not at that point. We were intent on
18 one part of this business and it was what we
19 bought.

20 Q: And again, was it your idea or Mr. Knight's
21 idea to put that right of first refusal?

22 A: That was our idea.

23 Q: And so that was already in the agreement when
24 Mr. Knight came to the closing?

25 A: I believe so.

- 1 Q: And again, the discussions about your new
2 company only purchasing body bags from Mr.
3 Knight's business, body bag business, that was
4 a discussion that according to you, you only
5 had at the closing?
- 6 A: No. I'm sure we talked about it prior to that.
7 I -- sir, I didn't believe that the body bags
8 were -- and I still -- I did not believe that
9 the body bag was a significant portion of what
10 this business was. My understanding was that
11 the revenues that the removal and transport
12 portion of this company generated as compared
13 to what the -- generate -- revenue generated in
14 the body bags was tremendously different. So
15 the body bag was more of a -- would have been
16 more of an add-on if we chose to do it later
17 on. We didn't -- this -- it's not a high value
18 item, so. And I didn't believe -- I mean, I
19 didn't know what volumes he had. We never
20 really discussed that. I've heard times that,
21 you know, he's had windfalls with Katrina and
22 different things that -- events that occurred,
23 but as an ongoing customer base, my belief is
24 that we were probably as big -- his --
25 potentially his largest customer as an ongoing

1 -- as on ongoing customer. But I was more than
2 willing to do the business with him, so.

3 Q: Okay. And what I'm trying to understand from
4 your perspective is why, within this asset
5 purchase agreement, him selling his business to
6 you, was it important from your standpoint to
7 ---

8 A: It wasn't.

9 Q: --- require ---

10 A: The opt- ---

11 Q: Well, let me finish the question.

12 A: Okay.

13 Q: To require in the agreement that you solely
14 purchase body bags from him.

15 A: I don't believe that it was a significant fact
16 to us.

17 Q: Had you seen any prior drafts of the purchase
18 agreement, prior to the closing, that had that
19 language in the agreement?

20 A: I don't recall. It very likely was in there,
21 but I don't ---

22 Q: How many drafts of the eventual purchase
23 agreement do you recall seeing prior to the
24 final version?

25 A: Maybe two. I don't recall exactly what was

1 changed in it, so. Maybe two, I don't know.
2 I don't recall the number.

3 Q: Would you ever mark up those drafts?

4 A: Would I ever?

5 Q: Yes, sir.

6 A: Yeah, I assume. I mean, yeah, sure I would
7 have read it and marked up. Yes.

8 Q: And what would have done with those markups?

9 A: Likely passed them back to the lawyer.

10 Q: Did you keep them?

11 A: Communication was between us and our lawyer
12 here, at Ellis Lawhorne.

13 Q: Did you keep any drafts?

14 A: I don't believe so.

15 Q: Do you think your wife kept any drafts?

16 A: I don't know.

17 Q: Does she also have input in marking up any of
18 those drafts?

19 A: Certainly.

20 Q: And do you recall what she would have made
21 suggestions or comments about?

22 A: I don't know. I don't -- not specifics. The
23 term of the non-compete was probably the
24 biggest things that we would have been
25 discussing, you know, on that part.

1 Q: And by we, you're talking about ---

2 A: She and I.

3 Q: --- your wife and you?

4 A: Yes.

5 Q: What discussions did you have with your wife
6 about the non-compete?

7 A: Whether it was adequate for our benefit,
8 whether or not it sufficed in making the --
9 both parties protected, if you will, from the
10 standpoint of the business transaction.

11 Q: The length of the non-compete, who came up with
12 the length of that?

13 A: The final version?

14 Q: Yes, sir.

15 A: It was our input on the ten year.

16 Q: Our being?

17 A: My wife, myself and our lawyer.

18 Q: Was there -- previous to that was there a
19 shorter time period in the non-compete?

20 A: There was.

21 Q: What was the time period?

22 A: I believe it was three years. It might have
23 been -- I -- it might have been -- I believe
24 it was five years, quite honestly. I don't
25 recall exactly what it was.

1 Q: And the previous number where there was three
2 or five years ---

3 A: Uh-huh (affirmative response).

4 Q: --- is that a number that you and your wife
5 came up with?

6 A: I believe -- I think it was the lawyer -- our
7 lawyer came up with it more than likely and it
8 was up to us to decide, you know, whether or
9 not it was adequate.

10 Q: Okay. What discussions did you and your wife
11 have regarding, whether it was three or five
12 years, that particular time period?

13 A: Well, we wanted -- you know, we wanted as many
14 as we could feasibly have just to protect our
15 -- our goal was to protect ourselves. Buddy
16 had -- okay, let me go back. Our conversation
17 was that we were trying to protect ourselves
18 through two contract cycles. Of which the
19 contracts came due at -- the three contracts
20 that had time frames on them had -- they came
21 due at different periods of time. So, we --
22 our ultimate goal was to try to make sure that
23 we got the current -- the contract we were
24 currently in plus one to two more times that we
25 were protected against the potential of Buddy

1 coming back into the business.

2 Q: Why did you and your wife fear Buddy coming
3 back into the business?

4 A: Buddy had a very strong reputation for the
5 three businesses that the contracts pertained
6 to. The contracts were the whole value to this
7 business in regards to what types of guaranteed
8 revenues that we were going to be able to
9 generate. So we wanted at all costs to try to
10 protect that for as long as we could.

11 Q: And the value of those contracts made up your
12 ultimate purchase price, is that right?

13 A: The majority, yeah.

14 Q: The majority.

15 A: The vast amount. And it was allocated
16 accordingly in the -- in the way that it was --
17 you could see it in the breakdown in the asset
18 agreement.

19 Q: And, as you said, Buddy's reputation, as it
20 related to those contracts and just in the
21 industry in general, had some value to you to
22 keep him out of competing against you, is that
23 right?

24 A: Yes. Mostly for the contracts, but yes.

25 Q: And again, your calculation was to try and get

1 through two contract cycles, is that right?

2 A: That was our goal. I mean it was -- that was
3 ultimately what was ---

4 Q: And during the course of that did you and your
5 wife, again with her business accounting
6 background, did you -- how did you all discuss
7 or come to terms with what value you would
8 assign on paying for that non-compete?

9 MR. PRINGLE: Object to the form, answer the
10 question.

11 A: Repeat that again. I didn't understand.

12 Q: Okay. You told me earlier that your wife and
13 her accounting background ---

14 A: Right.

15 Q: --- and her background at Corning ---

16 A: Right.

17 Q: --- particularly as it related to business
18 acquisitions and potential business
19 acquisitions, factored a great deal in coming
20 up with the ultimate purchase price, is that
21 right?

22 A: Uh-huh (affirmative response).

23 Q: And during the discussions with your wife about
24 the importance of Buddy not competing with you,
25 as it related to those contracts, what

1 discussions did you and your wife have
2 specifically about the value that you were
3 willing to pay for that non-compete?

4 **MR. PRINGLE:** Same objection, answer the question.

5 A: I don't recall the -- in our discussion, there
6 being a value on the non-compete. I mean as
7 far as a dollar value. It was -- it was very
8 important to us because without the non-compete
9 we wouldn't have bought the business, okay.. I
10 mean, so it held a great value to us. So, the
11 -- but I don't know if we looked at in a dollar
12 and cents point of view that this non-compete
13 has a certain value to the contract. We
14 estimated and anticipated somewhat of what the
15 term of the given contract based off of the
16 history that we were provided would -- i.e. the
17 number of calls per year, that was done for
18 Richland County for example. Given equal
19 circumstances and business speculation you
20 could -- you'd have to decide whether or not
21 things will stay the same, things will grow and
22 base your decisions off of that. Will cost go
23 up? So there were a lot of factors that played
24 into it but as far as the non-compete, without
25 those -- the whole value to the business that

1 we bought from Buddy was those three contracts.
2 That was the vast majority of what it's value
3 held. And because of the fact that it kept us,
4 got us in and kept us in the game. We had no
5 clue going into this if we would have one
6 funeral home customer after the closing of that
7 date. We had no guarantees on it. So, the
8 non-compete part was very important from the
9 standpoint of protecting those contracts as --
10 for as well as we could and as long as we
11 could.

12 Q: So was any part of your purchase price offer,
13 did it include compensation to Mr. Knight for
14 ---

15 A: I don't recall specific ---

16 MR. PRINGLE: Object to the form, answer the
17 question.

18 A: I don't recall specifically that that was -- it
19 was broke down in that way. I don't recall.

20 Q: When you and your wife rejected the three or
21 five year term of the non-compete in your -- to
22 your recollection, did the purchase price offer
23 to Mr. Knight increase any to go from three or
24 five years to ten years?

25 MR. PRINGLE: Same objection, answer the question.

1 A: The price did not change to the best of my
2 knowledge.

3 Q: So was there any added benefit to you from
4 going from three or five years to ten years?

5 A: Other than what I just said?

6 Q: Yes, sir.

7 A: I don't believe so. I don't think that that
8 was the goal behind that.

9 Q: But to your recollection the compensation to
10 Mr. Knight did not increase by going from three
11 or five years to ten years?

12 A: I don't agree with that.

13 Q: Okay. What value did Mr. Knight get for going
14 from three or five years, whichever it was, to
15 ten years?

16 A: Well, the original contract did not list the
17 pricing for the bags. It was a cost plus
18 scenario. We have no clues about it's cost.

19 Q: I'm not talking about the body bags, I'm
20 talking about the non-compete agreement. You
21 went from three or five years, whichever was in
22 the original ---

23 A: Yes, sir.

24 Q: --- draft of the agreement for the non-compete.

25 A: Right.

1 Q: When you insisted upon, you and your wife
2 insisted upon the non-compete of ten years, was
3 there any discussion by you and your wife, with
4 anybody, and I'm not asking you certainly to
5 get into attorney-client privilege, but did you
6 have any discussion either amongst yourselves
7 or with anybody else about increasing
8 compensation to Mr. Knight for that increase in
9 the term of the non-compete?

10 A: Not that I recall.

11 Q: Now, you said that -- and I don't want to mis-
12 characterize you -- what value did you place on
13 the body bag business?

14 MR. PRINGLE: Object to the form, answer the
15 question.

16 A: As part of our asset purchase agreement?

17 Q: Yes, sir.

18 A: It had none, minimal if any.

19 Q: Okay. And ---

20 A: It was more -- it was more an offering that we
21 put in there should he accept the terms of
22 that. It was really non-committal on either
23 side because it was written, as far as we -- as
24 I believe it to be. Because there was nothing
25 saying that we had exclusive rights to it.

1 There was no exclusivity into that part of it
2 other than the fact that we had a chance to buy
3 it if he sold it.

4 Q: And I didn't -- are you aware of whether or not
5 there's a value attached to ---

6 A: I'm not aware.

7 Q: --- that body bag business in the asset
8 purchase agreement?

9 A: There -- none by our -- none from our point of
10 view as best I could tell you.

11 Q: Okay. So you're not aware that there is any
12 price set in the purchase agreement for the
13 body bag business?

14 A: Huh-uh (negative response).

15 Q: Is that a no?

16 A: Not that I recall.

17 Q: And was that something that you would have been
18 involved in reviewing or your wife?

19 A: I don't think we put any value on it so we
20 didn't really review it.

21 Q: Now, as it relates to the process of actually
22 closing this deal, you said you put \$150,000,
23 roughly, into it of your own personal assets,
24 is that right?

25 A: We put something in. I'm not exactly sure of

1 the dollar amount, but let's use that number.

2 Q: Would it have been over \$100,000?

3 A: I think so.

4 Q: And was that -- describe for me, if you will
5 for the record, when you say you put personal
6 assets in of roughly \$100,000, maybe, and up to
7 \$150,000, was that paid to the bank or was
8 there an infusion of that investment into the
9 business itself?

10 A: It -- I would assume it was an infusion into
11 the business itself, so -- I don't recall us
12 paying it to the bank, so.

13 Q: Did you have to put up any kind of collateral
14 for the loan from the bank?

15 A: Minimal, if we did any. I mean, it -- that's
16 where I believe we probably put in a portion of
17 it through the -- we more than likely paid some
18 monies in through the bank because they were
19 willing to do it with little or no collateral.
20 I don't recall any collateral that we had to
21 put up. The business assets were gonna --
22 became the collateral, so.

23 Q: And the business assets ---

24 A: The vans, were the primary things that they
25 used as assets against the -- which is minimal,

1 it was a very small value. But it was a very
2 safe contract that they felt comfortable with
3 based off of the fact that the three contracts
4 existed.

5 Q: How much did you borrow from the bank for this
6 particular transaction?

7 A: I would say an excess of \$400,000, but I don't
8 know the exact amount.

9 Q: And to your knowledge the only collateral that
10 the bank required was the vans?

11 A: As far as I recall.

12 Q: And where did you get a loan from for this
13 deal?

14 A: Community Bank, I think it was the name of it.
15 It's changed -- it changed names so I'm not
16 really sure where it was.

17 Q: Did they finance your purchase of Capital
18 Transportation?

19 A: No.

20 Q: How did you purchase Capital Transportation?

21 A: Through BB&T.

22 Q: And what was the loan on that?

23 **MR. PRINGLE:** I'm just going to lodge an objection
24 for relevance, but answer the question.

25 A: Well, it was a consolidation of two loans. We

1 transferred our monies through them. So the
2 exact amount we borrowed I'm not quite for
3 sure. I think it was -- it was likely around
4 80,000 to 90,000 -- 80,000 to \$100,000.

5 Q: Do you know what the debt service on the loan
6 from Community Bank is per year?

7 A: Current?

8 Q: Yes, sir.

9 A: Zero.

10 Q: Has that all been payed back?

11 A: No. We transferred it to BB&T.

12 Q: Well, what is the debt service on that original
13 amount borrowed?

14 A: I don't know. You'd have to ask my wife that,
15 sir.

16 Q: She would know that?

17 A: Better than I.

18 Q: Had you approached any other financial
19 institutions about borrowing the purchase price
20 of Mr. Knight's business?

21 A: Possibly.

22 Q: Were you ever turned down by any financial
23 institutions regarding this?

24 A: I don't believe so.

25 Q: Did you at any point ever have a discussion

1 with Mr. Knight about seeking help at acquiring
2 a loan to purchase his business?

3 A: I don't recall if I inquired about it but he
4 helped us, if you will, from the standpoint of
5 putting us in contact with his banker, so.

6 Q: And were you seeking that or accepting that
7 assistance with his banker because other banks
8 had turned you down already?

9 A: They might have, I don't recall. Or we didn't
10 like the terms or the -- I don't recall the
11 whole circumstance behind it, so.

12 Q: Who would have made the loan applications at
13 any of these institutions?

14 A: My wife.

15 Q: So your wife handled any loan applications?

16 A: Yes.

17 Q: And did she ever share with you having -- that
18 she was having any trouble getting a loan?

19 A: Not that I recall.

20 Q: How did it come that you had this discussion
21 with Mr. Knight about either accepting or
22 seeking help from his banker?

23 A: I don't recall the discussion, so I mean it's
24 -- we had a lot of discussions through the
25 course of that time, so once -- so I don't

1 recall.

2 Q: What assistance did you provide to your wife as
3 she made applications for a business loan?

4 A: Minimal. I -- she did the financial aspect of
5 this.

6 Q: Do you know what you filed -- what you reported
7 as income on your income taxes last year?

8 A: I do not.

9 Q: Who normally handles your filing of your income
10 taxes?

11 A: My wife.

12 Q: You don't use an outside accountant or service?

13 A: Not that I -- no, I don't believe so.

14 Q: Do you actually sign your returns?

15 A: No. It's all filed electronic.

16 Q: So you have no idea what your income was last
17 year?

18 A: Truthfully?

19 Q: Yes, sir.

20 A: No.

21 Q: Do you file joint returns or individually?

22 A: I believe it's joint.

23 Q: And does she handle all the filings for
24 Palmetto Mortuary?

25 A: She does.

1 Q: When you sell body bags to funeral homes, like
2 Greenlawn for example when you were doing that,
3 did you ever consider that as competing against
4 Mr. Knight's business, body bag business?

5 A: No.

6 Q: Why is that?

7 A: It was part of his -- we continued on with his
8 business practices and -- that he had had prior
9 to the sale to us of which we utilized his
10 model, and his formula, and it was a part of
11 the -- part -- if I didn't -- if I was
12 competing with him for those bags, then I would
13 have no reason to buy bags from him. So, I
14 mean, where else would they go? Does that
15 answer your question? I mean, I'm not trying
16 to be -- we had bags for a specific reason to
17 sell. But I did not consider it to be
18 competitive to him.

19 Q: Would those folks, if they didn't purchase bags
20 from you, do you know some other body bag
21 manufacturers that they would have gone to?

22 A: There's multitudes. I mean there's hundreds --
23 well maybe not hundreds, but there's a lot.

24 Q: And that's what I'm a little curious about the
25 exclusivity provision in the purchase

1 agreement. If there are so many manufacturers
2 of body bags, why were you willing to lock
3 yourself in for ten years of purchasing only
4 from Mr. Knight?

5 A: Once again, I didn't -- we didn't think it was
6 a big portion of this contract. It wasn't --
7 it was an add on to the -- it was a tool to
8 provide the services that we were ultimately
9 trying to perform, which is the removal and
10 transport portion that -- of the mortuary
11 businesses that we were serving.

12 Q: Did you price compare Mr. Knight's body bags to
13 any of those other hundreds of body bag
14 manufacturers?

15 A: At what point, ever?

16 Q: At the point prior to the closing where ---

17 A: No.

18 Q: --- that provision was put in there?

19 A: No, we did not. We did not have a set price on
20 the bags at the point that we were negotiating.
21 It was always at a cost plus that he was going
22 to be selling them to us for, at least from
23 that point. And he -- we've been assured --
24 he'd given us assurances that he was
25 competitive so we continued the negotiation on

1 that promise. But it was always one of those
2 areas that we weren't quite sure of and
3 uncomfortable with because we didn't know his
4 cost.

5 Q: Okay. Did you do any research to see what body
6 bags were priced at from any of his
7 competitors?

8 A: More than likely we look at them and what bags
9 would be bought for so I can't say we did not.
10 I don't recall having any records or
11 documentation of that. But we -- yes, we did
12 some due diligence to try to come up with what
13 was a fair and marketable price for bags that
14 would be purchased.

15 Q: Is that something you did personally or is that
16 something your wife ---

17 A: I would have done that.

18 Q: And what -- how did Mr. Knight's prices compare
19 to the rest of the market?

20 A: Once again, at that point, we didn't -- I
21 didn't know what he was selling them to us --
22 what he was going to be selling them to us for.

23 Q: And how did that figure get into the purchase
24 sale agreement?

25 A: He came up with it. It was -- he contributed

1 that as his portion of the --

2 Q: And the first time you saw that figure was at
3 the closing?

4 A: The day of the closing. We might have had a
5 general idea based off of prior conversations,
6 but there was nothing locked into it other than
7 what I recall being the cost plus provision in
8 the prior version of the asset purchase
9 agreement.

10 Q: And again, at some point had you had
11 discussions with your wife about that
12 particular provision being in the agreement,
13 prior to the closing?

14 A: Which particular provision?

15 Q: The exclusivity provision.

16 A: I don't think either of us objected to it
17 because once again we felt that -- we were
18 being assured he could take care of all of the
19 needs of what we were doing. So it wasn't a
20 major point from our point of view. It was a
21 small, small portion of what we were going to
22 -- it was a needed item but it wasn't a
23 necessity from a standpoint of buying body bags
24 from him or for elsewhere. But part of the
25 negotiation was to give something back for what

1 we wanted, giving him the exclusivity or the
2 terms that are put in there were part of what
3 we were willing to do from the standpoint of --
4 to make sure that we had, you know, the terms
5 and such that we were looking for, price and
6 terms.

7 Q: What's your understanding under the non-compete
8 agreement of the geographical restriction on
9 Mr. Knight competing against you?

10 A: It was agreed upon in there that the -- I
11 believe the mileage is 150 mile radius. I mean
12 I can -- I don't have a copy. You ...

13 Q: Did that ever change as far as you recollect
14 during the course of the negotiations?

15 A: I don't recall. I don't recollect if it did.

16 Q: So, the only thing as far as you recall sitting
17 here today that did change was the length of
18 the non-compete went from three or five years
19 to ten years?

20 A: Just in the non-compete?

21 Q: Yes, sir.

22 A: I -- yes, I guess so.

23 Q: And again, that was at your and your wife's
24 insistence?

25 A: I don't recall what all brought it upon. There

1 was something else that was involved in it and
2 I can't remember exactly what it was -- what
3 brought it upon. So I wouldn't agree totally
4 with what you were saying. There was something
5 else that -- that was causing this to be us
6 wanting it and being more insistent upon it.
7 And part of it came down to his ability to
8 value the business.

9 Q: Okay. You're going to have to explain that to
10 me.

11 A: I can't explain it. I truly can't. If you --
12 not to be short, if you want an explanation,
13 you're going to have to ask my wife to be
14 deposed because that part -- that part was
15 truly between her and our lawyer at that point.

16 Q: Okay. I intend to depose your wife, but what
17 I'm trying to get to is your understanding of
18 -- and really I'm trying to understand your
19 last statement. You said there was some issue
20 about the valuation of the non-compete?

21 MR. PRINGLE: I'm going to continue to -- continue
22 to lodge the objection about the negotiations
23 and whatever were involved in the negotiations
24 because you have a final document that's signed
25 by both parties, but answer the question.

1 A: In order to adequately answer that, we'd have
2 to look at both documents to see what was
3 changed. There was some other reason for the
4 way the assets were going to be or the -- how
5 the monies were going to be divvied up or paid
6 off. I don't recall. I mean honestly you're
7 in an area that I'm totally deer in the
8 headlights with. I don't really recall what
9 changed on it. I'm sorry, sir.

10 Q: Just so that I understand, the person who would
11 have those answers as related to the valuation
12 of the non-compete or what you termed a minute
13 ago as difficulties at valuing the business
14 itself ---

15 A: Whatever, yeah.

16 Q: --- that would be your wife that I would have
17 to get those answers from?

18 A: She would be your best source on our -- from
19 our side, yes.

20 Q: And other than you, from your standpoint, is
21 there anybody else other than your wife who I
22 would go to for answers on how you valued this
23 business or did business modeling on this
24 proposal?

25 A: Not that I recall. The lawyer would have been

1 the other -- only other one that would have had
2 some kind of a personal input into it.

3 Q: What lawyer was that?

4 A: Can I ask? 'Cause I don't remember ---

5 **MR. PRINGLE:** Can we go off the record for a second.

6 (Off the record)

7 Q: Mr. Lintal, we've been talking about your wife,
8 and I've never asked, what's her name?

9 A: Ellen.

10 Q: And did you -- the lawyer that you're referring
11 to, was that the same lawyer you dealt with
12 throughout the negotiations on this agreement?

13 **MR. PRINGLE:** Yeah, it was Chris Rogers ---

14 **MR. LLOYD:** Okay.

15 **MR. PRINGLE:** --- who used to be part of this firm.

16 Q: And, Mr. Pringle and I can talk about this on
17 a different occasion, and certainly the
18 document speaks for itself, but the
19 negotiations and changing of terms, at least
20 from your side of the table, would have come
21 either at Mr. Rogers' suggestion, your
22 suggestion or your wife?

23 A: From our part -- our side of it?

24 Q: Yes.

25 A: Yes, sir.

1 Q: And would there have been anybody else involved
2 in the negotiations from your side?

3 A: No, not that I recall.

4 Q: Other than the infant bags that we'll talk
5 about in just a minute, had you ever purchased
6 any other body bags from any manufacturer other
7 than Mr. Knight?

8 A: Prior to the infant bags?

9 Q: Yes, sir.

10 A: No, not that I recall.

11 Q: There's never been any other bags that you've
12 purchased?

13 A: Not before the infant bag.

14 Q: After the infant bag were there any other bags
15 you purchased from other?

16 A: Yes, yes, there were.

17 Q: And who did you purchase those bags from?

18 A: Medical Products or South- -- well, let's see,
19 Southland. Let's see, Medical Products I think
20 was it and then there was Evident, Evident
21 something or other. Evident Supply, whatever.
22 You've got the invoices for those.

23 Q: And your testimony is that -- let me ask you
24 this way, when did you start purchasing body
25 bags from Medical Products and Evident?

- 1 A: So, not Southland? You've got Southland in
2 there too, right?
- 3 Q: Yes, sir.
- 4 A: You want to start with Southland?
- 5 Q: Yes, sir.
- 6 A: 2000- -- January of 2008, I think.
- 7 Q: And what bags did you purchase from Southland
8 ---
- 9 A: No, wait a minute, I'm sorry, I made a mistake.
10 April of 2008. And the initial bag that I
11 bought was a pediatric sized body bag.
- 12 Q: How many did you recall purchasing?
- 13 A: One.
- 14 Q: Did you purchase any other bags from Southland
15 in 2008?
- 16 A: Yes.
- 17 Q: How many?
- 18 A: Thirty.
- 19 Q: Were those all pediatric?
- 20 A: No. They were all infant.
- 21 Q: And why did you, in April of 2008, why did you
22 start purchasing infant bags or pediatric bags
23 from Southland?
- 24 A: The Lexington County, Randy Martin from
25 Lexington County Coroner's Office had been --

1 had asked about having a smaller bag suitable
2 for infants.

3 Q: Randy Martin?

4 A: Yes, sir.

5 Q: And I told him I'd check into it.

6 A: And what did you do to check into it?

7 Q: I talked with Buddy Knight about it, at a time
8 when I was picking up an order. There was
9 period of time in there that I'm not exactly
10 sure as to when the conversation was, but I
11 told him what they had asked for and asked if,
12 you know, if it was a bag he had. And he
13 didn't really express any interest in it and
14 said that he'd always wrapped them in sheets
15 and that's the way I should do it, so. But it
16 wasn't the way he wanted, that wasn't what they
17 were asking for, the coroners were asking for.

18 Q: Did you ever ask Mr. Knight to manufacture you
19 a pediatric or infant bag?

20 A: I didn't ask him to manufacture the bag. I
21 didn't -- at that point in time, I didn't know
22 -- quite frankly did not know what bags he made
23 and what bags he bought, so I went there and
24 had -- I knew some that he made. I knew he
25 made the odor proof bag. But I knew that the

1 light weight, heavy weight and the -- light
2 weight and heavy weight bags that I primarily
3 bought were outsourced by him as well, so not
4 bags that he necessarily would manufacture.

5 Q: So whether he manufactured pediatric or infant
6 bags, did you ever ask him to order you
7 pediatric or infant bags?

8 A: I asked him, yes. I asked him if he had them
9 or could get them or to check into it and he
10 said it wasn't worth -- he told me basically
11 that it wasn't worth -- the volume wasn't worth
12 messing with them.

13 Q: And this was a conversation you had with him in
14 ...

15 A: After January of 2008. Okay. I believe it was
16 the 31st of 2008, January 31st, 2008.

17 Q: So January 2008 or there about, Randy Martin --
18 -

19 A: Prior to that he'd asked -- requested.

20 Q: So he asked you about that prior to January
21 31st or --

22 A: Yes, Randy did.

23 Q: 2008 or 2007? -

24 A: I don't recall the exact date. I recall the
25 call that we were on and the circumstances

1 behind it, so. And, you know, it was out --
2 part of it was out of frustration on his part
3 based off of what we were having to deal with,
4 but he still -- it was -- he said it was part
5 of what he felt they needed to look into.

6 Q: And do you recall about when in 2008 you had
7 this conversation with Buddy? Are you saying
8 it was January 31st?

9 A: I believe was because that was the day I picked
10 up the bags in that particular month, based off
11 of invoicing. So I'm pretty confident ---

12 Q: So this was a conversation you had at Mr.
13 Knight's business?

14 A: Yes, yes, yes.

15 Q: And describe for me again what is it that you
16 related to him about these infant and pediatric
17 bags and what did he say to you?

18 A: I explained to him or told him what Randy had
19 asked for and that they didn't like the idea of
20 us wrapping them in a sheet and putting them
21 into an adult sized bag because they tended to
22 get lost in the bag when they -- if they had to
23 do an autopsy or take the body back out. So
24 they -- he wanted a smaller bag to make it more
25 conducive to the size of the -- the infant.

1. And at that point I wasn't for sure that even
2 a bag existed. I hadn't researched it. So it
3 wasn't until after that that I came upon it
4 and decided to get one in to see if that's kind
5 of what they were talking about, so.

6 Q: Okay. And what research did you do?

7 A: Internet.

8 Q: Okay. And is the first place you found a
9 pediatric bag was Southland?

10 A: It was one of them. I mean it -- it was a
11 supplier I was using for other items, for
12 gloves and other items that I was buying and
13 still do, so.

14 Q: And so over the course of 2008 you purchased 31
15 bags ---

16 A: That's it.

17 Q: From Southland?

18 A: Yes.

19 Q: And again, when did you start purchasing infant
20 and pediatric bags from Evident?

21 A: Nev- -- oh, no, Evident was another bag.

22 Q: What kind of bags ---

23 A: Southland, those bags by the way are the only
24 bags -- infant bags that were purchased by us.
25 The 31 bags.

- 1 Q: From Southland?
- 2 A: 31 bags.
- 3 Q: So in 2009, you didn't purchase any infant
- 4 bags?
- 5 A: No, sir.
- 6 Q: In 2010 you didn't purchase any infant bags?
- 7 A: No, sir.
- 8 Q: 2011 you didn't purchase any infant bags?
- 9 A: No, sir.
- 10 Q: 2012 no infant bags?
- 11 A: No, sir.
- 12 Q: And through 2013 you've purchased no infant
- 13 bags?
- 14 A: No, sir.
- 15 Q: And is that because you've not needed to use an
- 16 infant bag or have you been using adult bags?
- 17 A: I've not needed an infant bag.
- 18 Q: What bags did you purchase from Evident?
- 19 A: I purchased a case of water retrieval bags.
- 20 Q: When did you do that?
- 21 A: March of 2009. March 6th, 2009.
- 22 Q: And why did you go to Evident for those water
- 23 retrieval bags?
- 24 A: I misunderstood Buddy to tell me that he didn't
- 25 make or he didn't have -- make the bags -- he

1 didn't have them anymore is the way I recall it
2 being stated.

3 Q: When did you have that conversation with Mr.
4 Knight?

5 A: Probably in February of that -- because we were
6 getting into -- I was concerned we were coming
7 up on the summer months when those bags would
8 be more likely to be used. And I didn't at
9 that point realize he even made the bags, quite
10 frankly.

11 Q: Did you inquire from him as to if he did?

12 A: I did. And like I said, I misunderstood.
13 Whether I was going to buy them that day or at
14 a future date, I can't recall, but I -- it --
15 I -- I did buy the bags, so I mean ...

16 Q: And again that conversation, was that
17 conversation at Mr. Knight's business?

18 A: Yes, it was. - We always picked up our bags up
19 at his place.

20 Q: And how many water retrieval bags came in that
21 box?

22 A: Six.

23 Q: And in 2000 -- are those the only bags you
24 brought from Evident in 2009?

25 A: The only bags I ever bought from Evident.

- 1 Q: You've never purchased any other bags from ---
2 A: Never bought another water retrieval bag from
3 anyone else.
4 Q: Have you used a water retrieval bag?
5 A: Well, I can't say that. Yes, I have. Have we
6 used one?
7 Q: Yes, sir.
8 A: Sure.
9 Q: Okay. Where'd you get that one?
10 A: I had supplies of these, so I mean ...
11 Q: So you're still using the six you purchased in
12 2009?
13 A: No, no. I have since bought, just since -- I
14 bought another -- maybe another six, I don't
15 recall, since this whole thing -- just
16 recently, within the last couple months, but
17 that's not pertinent to this.
18 Q: So from Evident you purchased six water
19 retrieval bags?
20 A: Yes, sir.
21 Q: And that's the sum total of all bags you've
22 ever purchased from Evident?
23 A: As far as I can re- -- yes, it is.
24 Q: And from Medical Products what bags did you
25 purchase?

1 A: During this time frame was six -- or let's see
2 four extra large heavy weight, heavy duty body
3 bags, and then one -- which is one box. Oh,
4 wait a minute. Yeah. And it was four -- four
5 of the extra large and six of the heavy weight.

6 Q: And can you describe for me the circumstances
7 that caused you to purchase those bags from
8 Medical Products?

9 A: Yeah. I was trying to -- I had tried to buy
10 three extra large heavy weight bags from Buddy
11 and he had -- was only able to supply me with
12 one and said that we were using them too fast.
13 So he wasn't sure when he was gonna have more
14 of them in. That wasn't a bag that he made or
15 offered to make, so.

16 Q: Okay. And when did you start purchasing these
17 bags from Medical Products?

18 A: In July of 2010.

19 Q: From July of 2010 until you filed this lawsuit
20 had you purchased any other bags from Medical
21 Products?

22 A: From that time to later?

23 Q: Until you filed this lawsuit.

24 A: Yes.

25 Q: When did you have occasion to purchase more

1 bags?

2 A: In September of 2011.

3 Q: And what bags did you purchase then?

4 A: A medium weight -- a medium weight body bag.

5 Q: And why did you purchase that?

6 A: Quite frankly, I -- had already -- I was told
7 -- I was denied by Buddy to get bags because I
8 was told that the light weight bags were
9 unavailable and on the 6th of September and I
10 had to have something to hold me over for after
11 that fact.

12 Q: September 6th of ---

13 A: 2011.

14 Q: --- 2011? Okay, let's break this down. In
15 2010 you purchase bags from Medical Products,
16 this is the first purchase you make of body
17 bags from them?

18 A: Yes.

19 Q: Okay. Tell me about the conversation you had
20 with Mr. Knight regarding his ability to
21 produce those bags for you and subsequently the
22 need for you to go to Medical Products.

23 A: I tried -- I put -- I put an order in or
24 attempted to order from him three bags, three
25 of the extra large ---

1 Q: Again, was this an oral conversation or was
2 this a written order form?

3 A: I'd have to look and see but I can't -- a lot
4 of them were oral, but -- or it could have been
5 then I told him I needed them and I only put
6 one in. I know I was trying to gain inventory
7 or put some in stock so I had a backup because
8 we probably only had one left. I don't recall
9 the exact circumstances. But he said he was
10 down to his last one and would have to order,
11 so. So, I didn't feel confident that we were
12 gonna get them at any time -- in any particular
13 -- I didn't really know when he expected them
14 to come in. It was a very vague conversation
15 from his point of view.

16 Q: Did you ask him specifically when he would be
17 able to produce those bags for you?

18 A: No.

19 Q: Did you ask him if he could order those bags
20 for you?

21 A: He said he was going to order them but it took
22 time because they were coming from China.
23 That's the best I can remember.

24 Q: Where was Medical Products getting their bags
25 from?

1 A: Their warehouse, wherever that is, here in,
2 probably in Texas.

3 Q: And how soon after you ordered those bags did
4 they ---

5 A: Two to three days.

6 Q: --- provide those bags for you?

7 A: Two to three days.

8 Q: And when did you use those bags?

9 A: I'm not sure I've used all of them up to this
10 point. I mean I've -- no, I have. All of the
11 extra larges are gone.

12 Q: How long did it take you to use up all those
13 extra larges?

14 A: I don't recall.

15 Q: A month after you ordered them?

16 A: I don't recall.

17 Q: Do you have any general time span of how long
18 it took you to use up those body bags?

19 A: Well, actually -- no, let me think. Of those
20 four -- quite frankly I might still have one of
21 them. I don't recall exactly what I have in my
22 -- of these. It -- the whole purpose behind
23 these bags is, it's not how many you use, as
24 much as that you have them available when you
25 need them. And with the volume of coroner

1 calls we were doing at that given time, I would
2 have used them by now. Definitely would have
3 used them by now if we continued to do the
4 Richland contract. But without that, that's
5 the outlet for it, for this particular bag.
6 It's not a ---

7 Q: You lost the ---

8 A: --- bag you would typically use.

9 Q: --- Richland contract when?

10 A: We quit doing -- well, we were -- we quit doing
11 business with them in September of 2011.

12 Q: With Richland County?

13 A: Yes, sir. And at that point we were doing no
14 business with Lexington County either.

15 Q: And why did you lose the Lexington County ---

16 A: Price.

17 Q: --- business?

18 A: Price.

19 Q: What do you mean price?

20 A: I was under -- our pricing was under-bid.

21 Q: By who?

22 A: Capital Transportation.

23 Q: Who told you that price was the reason you lost
24 the Lexington County?

25 A: Lexington County gave us the -- each -- the

1 bid, the bid tabulations.

2 Q: Did you ever enlist Mr. Knight to assist you in
3 trying to get that business back?

4 A: Of course, yes.

5 Q: Was there any other issues related to your
6 relationship with Lexington County, either the
7 coroner's office or the County Council that
8 lead to you losing that business?

9 A: That lead to me losing that?

10 Q: Yes, sir.

11 A: Not when they initially told me that I'd lost
12 it. County Council got upset because of a
13 letter that I wrote, but it didn't -- I didn't
14 -- to the best of my knowledge it did not
15 pertain to their final decision on not allowing
16 me in, because I'd already lost it at that
17 point.

18 Q: And what did you ask Mr. Knight to do, to
19 assist you in trying to get that back?

20 A: I -- he offered to talk to Harry Harman and
21 probably Bobby, one of the councilmen, Bobby
22 Keisler, about it, and see if there was
23 anything he could do to assist us.

24 Q: Going back to your comment just a moment ago,
25 you said had you continued to have the Richland

1 County contract you would have used all of the
2 Medical Products bags by now?

3 A: I would have assumed that we would have. There
4 were -- on an average we did enough of the
5 larger people that it would require these four.
6 We probably used more of the -- more of those
7 than we needed to due to other circumstances,
8 so I mean it was -- so, maybe we did use more
9 than we absolutely had to, of the extra large
10 heavy weight.

11 Q: And so the best you can tell me is that you
12 used those bags purchased from Medical Products
13 somewhere from three days, two or three days
14 after you ordered them, through the time period
15 that you lost the Richland County contract?

16 A: Yes.

17 Q: Do you have any recollection sitting here today
18 that would narrow that time span down at all?

19 A: No.

20 Q: And in September 2011 you said you ordered a
21 medium weight bag from Medical Products?

22 A: Thirty.

23 Q: You ordered what?

24 A: Thirty.

25 Q: Thirty bags, okay. Why did you order those

1 bags from them?

2 A: Because I could no longer get them from Knight
3 Systems. Under the terms of the contract that
4 we'd had in place. He was -- I was told they
5 were not available by him.

6 Q: That he wasn't going to sell them to you?

7 A: No, that they were not available at the time
8 that I was trying to order them.

9 Q: Okay. But that --

10 A: I tried ordering three bags, three style of
11 bags. The light weight, black heavy weight and
12 an odor-proof bag.

13 Q: But I'm talking about specifically in September
14 of 2011 ---

15 A: Wait, what month?

16 Q: You said in September 2011 ---

17 A: Right.

18 Q: --- you purchased 30 medium weight bags ---

19 A: Yes.

20 Q: --- from Medical Products.

21 A: I believe it was 30. I don't have it on this
22 sheet, so.

23 Q: Okay. And now I'm trying to figure out why you
24 went to Medical Products for those particular
25 bags.

- 1 A: I needed a bag that would -- I didn't -- at the
2 point in time I was not sure whether or not I
3 had -- when I tried to order the bags that --
4 and was denied, then I -- at that point I was
5 -- I still -- I was still doing work for
6 Richland County, and I wasn't sure how long it
7 was going to continue. I hadn't been informed
8 that I was out of the contract. So I ordered
9 bags that would hold me over until I figured
10 out what we were going to do.
- 11 Q: Mr. Lintal, I'm trying to still find out what
12 conversations that you had with Mr. Knight
13 regarding him being able to provide you with
14 those medium light weight bags.
- 15 A: Medium and light weight? Medium, say that ---
- 16 Q: Medium weight bags, I'm sorry.
- 17 A: Okay. It wasn't a bag that he listed as a
18 carried item at that given point in time.
- 19 Q: Did you talk to him about it?
- 20 A: Why? He was already turning me down on the
21 light weight bags that I was actually going to
22 use these in place of. This was -- this was a
23 bag that could go either way for the medium
24 weight application or the light weight
25 application.

1 Q: Is that a ---

2 A: Or for the heavy weight or the light weight in
3 some cases.

4 Q: So no, you did not talk to him about it?

5 A: I don't ...

6 Q: I'm sorry?

7 A: No, I did not.

8 Q: Now, you said he had already turned you down as
9 to what bags?

10 A: Light weight.

11 Q: Light weight bags?

12 A: And heavy -- and odor-proof bags.

13 Q: Okay. And when did he again specifically turn
14 you down as to those?

15 A: September 6th.

16 Q: Of 2011?

17 A: (Nods head affirmatively.)

18 Q: And was he refusing to sell them to you in
19 2000- -- September 6th of 2011 or was he saying
20 he did not have them in stock?

21 A: They were not available, is what the answer
22 was. And also the pricing I had -- I was
23 instructed to refer to the website for my
24 future pricing. To his website for my future
25 pricing.

1 Q: Because he was not providing them to you
2 anymore at the discount price?

3 A: I explained to you what the -- what it said in
4 his response, so.

5 Q: Was this a written response?

6 A: Yes, it was. It was an email.

7 Q: Did you normally make most of your orders by
8 email?

9 A: Typically, yes.

10 Q: So most --

11 A: Well, typically yes. It wasn't 100 percent.
12 It got to a point where later that it pretty
13 much was 100 percent, that they were by order.
14 But quite often I would try to call him and
15 give him a heads up so that we could get things
16 staged if -- to give him time to do it. If he
17 needed time to get them from his warehouse.

18 Q: And how much time would you typically try to
19 give him a heads up?

20 A: Two to three days if I could. I mean it was --
21 it wasn't like these were items that I -- I
22 tried to keep an inventory, but I wouldn't
23 always stay up with my inventory to match his
24 inventory. So I didn't always know what he had
25 available. I knew he always had available the

1 light weight and heavy weight bags whenever I
2 needed them. They were -- quite often if I
3 ordered odor-proof bags I'd have to go back and
4 get them later on or send one of my guys to do
5 it, because he would not have them in stock.

6 Q: And in September of 2011, September 6th of 2011
7 you still had the Richland County contract?

8 A: Yep.

9 Q: And you're saying as of September 6th, 2011,
10 Mr. Knight was no longer willing to sell to you
11 under the terms -- body bags under the terms of
12 the ---

13 A: Right.

14 Q: --- exclusive provision in the purchase
15 agreement?

16 A: According to what he -- how he responded to the
17 email request for bags that we had put in.

18 Q: And that was the September 6th email?

19 A: Uh-huh (affirmative response).

20 Q: So prior to the RFP with Richland County that
21 Mr. Knight submitted and a follow up letter
22 saying that he was no longer making those --
23 the bags, odor-proof bags available to the
24 general public, you had already at that point
25 been told that you were no longer allowed to

1 purchase from him?

2 **MR. PRINGLE:** Object to the form, answer the
3 question.

4 A: Say that last part again. I just don't ---

5 Q: The letter that Mr. Knight ---

6 A: I -- yeah.

7 Q: --- sent to the Richland County in response to
8 their RFP, where he informed Richland County
9 that -- coroner's office, that he would no long
10 sell those body bags retail. Do you recall
11 that letter?

12 A: Yeah.

13 Q: That wasn't the first time you had been made
14 aware that he was no longer -- Mr. Knight was
15 no longer selling bags to you?

16 **MR. PRINGLE:** Object to the form, answer the
17 question.

18 A: Not -- no, I believe you're correct. Yep, I
19 believe I was informed. I believe he had it
20 for me that -- that -- trying to recall the
21 circumstances.

22 Q: In other words by the time he sent that letter
23 to Richland County, you were already under the
24 understanding that he was not selling bags to
25 you, is that right?

1 A: Yes. Or I wasn't -- yeah, right, yes. Yes.

2 Q: And you again say that that knowledge came from
3 an email from Mr. Knight to you?

4 A: The email was later. The email was in
5 September. You're talking about events that
6 happened in -- no wait a minute, you're right,
7 it is September. Yeah, right. No, you're
8 right, it is September. It's September, right.
9 So, yes, the answer is yes.

10 Q: The answer is yes, you were aware prior to his
11 sending the letter to Richland County that you
12 were no longer able to purchase bags from him?

13 A: No, that was in -- okay, wait a minute. That
14 was in June. I believe so.

15 Q: And did you purchase bags from Medical Products
16 in August of 2011?

17 A: Uh-huh (affirmative response). More than
18 likely.

19 Q: And the purchase in August of 2011 is not on
20 your time line of events, is that correct?

21 A: I didn't carry it out that far. Well, August
22 I did, you're right. Okay. No, I didn't put
23 it on there.

24 Q: Is there any reason it's not on here?

25 A: I, quite frankly, probably forgot to look at

1 that part of it, so. I didn't realize at the
2 time this was gonna be used for evidence or in
3 this part of the proceeding. I did this for my
4 intent -- for my purpose to try to be able to
5 keep sequences, time line and place.

6 Q: And you wanted to use what's -- Defendant's
7 Number One is what we're talking about, is that
8 right?

9 A: Yeah, that's right.

10 Q: And you wanted to use this to help you keep the
11 events ---

12 A: Yeah.

13 A: --- as you said, in sequence?

14 A: This is very confusing to me, so.

15 Q: So you would understandably want to include all
16 of the ---

17 A: Right.

18 Q: --- purchases you made of body bags?

19 A: It was an omission on my part that that would
20 not be there.

21 Q: Is there any reason why the invoices you
22 referred to in creating Defendant's Exhibit One
23 would not have included the August purchase of
24 body bag -- August 2011 purchase of body bags
25 from ---

1 A: Medical Products?

2 Q: --- Medical Products?

3 A: It was likely an omission on my part.

4 Q: Were those -- would those invoices have been at
5 a location different from the invoices that you
6 did include on this time line?

7 A: Possibly, or just out of sequence with the rest
8 of it.

9 Q: Could there be other invoices that are either
10 out of sequence or not kept with these invoices
11 that are referenced on Defendant's One?

12 A: I -- it could be, but I don't believe so.
13 We've given the evidence to -- as you can tell
14 that you've already got, that -- of all
15 purchases that we made.

16 Q: Well, explain to me why you felt a need to
17 purchase bags from Medical Products in August
18 of 2011?

19 A: Once again, I needed bags and was unsure if
20 they were available. I was upset with Buddy as
21 well. He took -- he bid on a contract that I
22 did not believe he should have been bidding on.
23 I didn't believe that I had done anything that
24 justified his ability to enter into that and --
25 or substantiate it to that point, so.

- 1 Q: Are any of the conversations that you've
2 referenced, April of 2008, March of 2009, July
3 of 2010, September of 2011, August of 2011,
4 where you say Mr. Knight either couldn't
5 provide the bags to you in a timely manner or
6 couldn't provide them to you at all, were any
7 of those conversations memorialized in either
8 an email, a letter, or any other written form
9 of communication?
- 10 A: No.
- 11 Q: So the only times that you've had to go to some
12 other supplier of body bags are as a result of
13 a conv- -- oral discussion with Mr. Knight
14 where you say he said to you that he could not
15 provide those bags?
- 16 A: Yes, three occasions.
- 17 Q: Now, you referenced earlier that you had
18 listened to a tape between, and I believe you
19 gave me the date actually of June 16, 2011?
- 20 A: My belief, yes.
- 21 Q: And you said that those were in fact your voice
22 and Mr. Knight's voice on there, is that right?
- 23 A: Yes.
- 24 Q: Well, during the course of that conversation,
25 and take this as my characterization, I

1 understand you may not agree with my
2 characterization, you were discussing with Mr.
3 Knight the fact that you didn't realize that he
4 could make infant bags, is that right?

5 A: That I didn't realize?

6 Q: Yes, sir.

7 A: I did say that.

8 Q: Now that was a conversation you had in 2011,
9 June of 2011 with him. Back in April of 2008
10 you said that you had a discussion with Mr.
11 Knight regarding pediatric and infant bags, is
12 that right?

13 A: Same bag, yep.

14 Q: Now at that time in 2008 did he tell you he
15 would not make or could not make pediatric or
16 infant bags?

17 A: No, he did not.

18 Q: Is there anything between April of 2008 and
19 June 16 of 2011 that lead you to believe that
20 he could not or would not make pediatric or
21 infant bags?

22 A: Give me the dates again, 2008?

23 Q: April of 2008, you said the Mr Knight ---

24 A: I ---

25 Q: --- in April of 2008 ---

- 1 A: Right.
- 2 Q: --- he doesn't say ---
- 3 A: Okay.
- 4 Q: --- anything to you to lead you to believe that
- 5 he cannot make or cannot get you infant or
- 6 pediatric bags, is that correct?
- 7 A: No. I never had the occasion to purchase them
- 8 again.
- 9 Q: That's not my question.
- 10 A: I understand.
- 11 Q: My question is in April of 2008, did Mr. Knight
- 12 inform you in any way that he could either not
- 13 make or produce for you or go purchase
- 14 somewhere else and provide to you infant or
- 15 pediatric bags?
- 16 A: No.
- 17 Q: Now in June 16 of 2011, to your recollection is
- 18 when that recorded conversation happens, is
- 19 that right?
- 20 A: Uh-huh (affirmative response).
- 21 Q: And in that conversation, you acknowledge or at
- 22 least express, again my characterization not
- 23 yours, surprise that Mr. Knight can in fact
- 24 provide infant or pediatric bags, is that fair?
- 25 A: Uh-huh (affirmative response).

1 Q: Is that a yes?

2 A: Yes it is, yes, sir.

3 Q: Okay. Now, between April of 2008, and June 16
4 of 2011, either from Mr. Knight or any other
5 source, were you provided any information that
6 would have lead you to believe that Mr. Knight
7 could not produce or manufacture or get you
8 infant or pediatric bags?

9 A: The only -- the only -- no, I -- that he could
10 do neither, no.

11 Q: And I'm assuming you're saying that no
12 information came to you that would suggest that
13 he could not produce or manufacture those bags?

14 A: I was told that he had made one bag that was
15 rejected by Lexington County but that's -- that
16 was the only -- that was all hearsay, so I
17 don't ---

18 Q: Who told you that?

19 A: It was through Capital Transportation.

20 Q: Who told you that?

21 A: I believe it was Archie Maddox.

22 Q: So Archie Maddox told you that Mr. ---

23 A: After ---

24 Q: --- Knight had produced an infant or pediatric
25 bag that had been rejected by Lexington County?

- 1 A: That was what I was told.
- 2 Q: Okay. When did he tell you that?
- 3 A: Probably at the time that we bought the
- 4 business, so that was -- but I also -- I'd
- 5 heard about it prior to that also, from the --
- 6 Randy Martin at the coroner's office.
- 7 Q: At the time you purchased the business ---
- 8 A: Yeah
- 9 Q: --- from Mr. Knight ---
- 10 A: Right.
- 11 Q: --- Mr. Maddox told you that Mr. Knight ---
- 12 A: No. When I purchased ---
- 13 Q: Capital?
- 14 A: --- Capital ---
- 15 Q: Okay, I'm sorry.
- 16 A: --- which was later on, which would have been
- 17 2000 and what, 13?
- 18 Q: Okay. 2000 and ---
- 19 A: Or 2012.
- 20 Q: 2012 Mr. Maddox told you that Mr. Knight had
- 21 produced an infant or pediatric bag that had
- 22 been rejected by Lexington County?
- 23 A: That's what I was -- it was in -- it was
- 24 discussed. He had produced one at least to my
- 25 understanding for someone from the -- from

1 there. It was at the time that none of the
2 current employees was available or working
3 there, as far as I recall, so.

4 Q: Okay. The purchase of Capital happened in
5 2012?

6 A: I believe so, yeah.

7 Q: Okay. Under what circumstances lead to you and
8 Mr. Maddox to be having a conversation in 2012
9 about Mr. Knight producing infant or pediatric
10 bags?

11 A: It was part of the discussion based off of the
12 -- what had happened in the time frame when
13 Capital took the business from us and came up
14 in conversations that they had tried to acquire
15 these bags from Buddy and back in, well let's
16 see, 2009 that -- that they tried to buy --
17 they requested -- that was part of the -- the
18 infant bags were one of the items that they
19 were responsible to provide Lexington County if
20 they needed them.

21 Q: I just want to be sure I understand. In 2012
22 Capital Transportation, through Archie Maddox,
23 told you that Mr. Knight had produced a, back
24 in 2009, a pediatric or infant bag that had
25 been rejected by Lexington county coroner's

1 office?

2 A: That was my understanding. I mean, it was made
3 out of a heavier weight material.

4 Q: Okay. Now did he have that discussion with you
5 prior to June 16 of 2011?

6 A: No.

7 Q: Again, what was the source -- what created this
8 conversation in 2012 about infant or pediatric
9 bags that may or may not have been made by Mr.
10 Knight?

11 A: Probably when I took on inventory that we
12 bought as part of the acquisition and there
13 were infant bags in that inventory. So there
14 were -- I acquired infant bags from him as a
15 result of the sale of his current inventory.
16 So it likely came up from that but I don't
17 recall the exact reasons that it came about.

18 Q: And you indicated that Randy Martin may have
19 said something to you about ---

20 A: In passing, at some point after -- in the
21 course of that first year that Capital had
22 their business.

23 Q: Again is that somewhere between April of 2008
24 and June 16 of 2011?

25 A: Yes. Yeah, it is.

1 Q: And what was the conversation? Describe that
2 conversation between you and Mr. Martin.

3 A: It was more about his discontent with Capital's
4 -- with Capital's service at that point and the
5 items that -- the struggle that they had on
6 some of the things that they were trying to
7 buy. You know, that they had switched some
8 items and the initial part of it they were --
9 they'd come up with this -- it was just -- it
10 was just more of an overall description of them
11 at that point in time and their mis- -- their
12 lack of understanding I believe of what they
13 were really doing for the coroner's office.
14 And as an example I -- you can ask the
15 circumstances behind it, I mean ---

16 Q: Well, that's what I'm trying to get to and I'm
17 not sure I understand.

18 A: Right. Why was it brought up?

19 Q: Between April of 2008 and June 16 of 2011,
20 somewhere in that time period ---

21 A: Yes.

22 Q: --- we can narrow it down a little bit, you and
23 Randy Martin are talking about Capital
24 Transportation?

25 A: Yes.

- 1 Q: And during the course ---
- 2 A: It was after I lost the business.
- 3 Q: Right. During the course of that conversation
- 4 you and Mr. Martin have a conversation about
- 5 Mr. Knight having produced an infant bag?
- 6 A: Right, okay, yeah. Someone had produced it --
- 7 they had provided a bag that came from there,
- 8 is the way I was -- it was explained to me, of
- 9 which it was a heavy weight. I never -- I
- 10 never saw the bag so, you know, it could be all
- 11 hearsay and it might not even be worth even
- 12 having a discussion ---
- 13 Q: I'd like ---
- 14 A: --- but it led me to have beliefs on certain
- 15 things as a result of that, so.
- 16 Q: We probably need to narrow this down then.
- 17 A: Yes, please do.
- 18 Q: This is a period of time when you lost the
- 19 Lexington County Coroner's Office business. Do
- 20 you recall ---
- 21 A: July of 2009 would be my best guess.
- 22 Q: Somewhere around July of 2009?
- 23 A: July '09, yeah.
- 24 Q: You have a conversation with Randy Martin?
- 25 A: Right.

1 Q: About their dissatisfaction with Capital
2 Transportation?

3 A: Initially, they had -- yeah. Yes, that is
4 right.

5 Q: And somewhere around July or August of 2009,
6 during that conversation about Capital
7 Transportation, Mr. Martin discusses Mr.
8 Knight's purported manufacture of a pediatric
9 or infant bag?

10 A: Yes.

11 Q: And what was your understanding of -- from Mr.
12 Martin about Mr. Knight's infant or pediatric
13 bag?

14 A: He said he rejected it because it was too heavy
15 of a material for what they were looking for.
16 They -- he was looking for something comparable
17 to a light weight bag and this was in a heavy
18 weight style of material from my understanding.
19 So that was all I can recall him saying in that
20 regard. And I don't have it documented either,
21 so.

22 Q: Your recollection is that he specifically said
23 Mr. Knight had manufactured that bag?

24 A: They said it -- his point was they had gotten
25 it from Buddy, whether he made it or bought it

1 and supplied it.

2 Q: So in June, by June 16 of 2011 when you and Mr.
3 Knight are having this conversation, you were
4 aware at that point that Mr. Knight could make
5 infant bags?

6 A: Acceptable, no.

7 Q: My question was not whether is was acceptable
8 or not.

9 A: Whether he could or could not make them?

10 Q: Yes, sir.

11 A: I knew he had attempted to make them, but as
12 far as commercially acceptable I wouldn't -- I
13 -- it really hadn't come to my -- come to mind.
14 I bought the bags one time.

15 Q: Mr. Knight ---

16 A: Yeah, I know.

17 Q: --- I mean Mr. Lintal, my question is simply
18 this. On June 16 of 2011, you weren't of the
19 impression at that point in time that Mr.
20 Knight could not produce or manufacture an
21 infant or pediatric bag, is that right?

22 A: Say it one more time.

23 Q: By June 16 of 2011, you had firsthand knowledge
24 from Mr. Martin that Mr. Knight in fact could
25 produce a pediatric or infant bag?

1 A: Okay, yes.

2 Q: So it was no surprise to you, and we'll set
3 aside for a moment whether you thought it was
4 an acceptable bag or not, but any suggestion by
5 you that you weren't aware that he could
6 produce an infant bag would have been
7 erroneous, is that correct?

8 A: Okay, yes.

9 Q: At any point after that conversation with Randy
10 Martin in 2009 did you ever go back to Mr.
11 Knight and say, hey, I understand you can make
12 infant bags but they don't want them to be as
13 heavy as they are?

14 A: No.

15 Q: Is there any reason you didn't re-approach Mr.
16 Knight about making or providing you with
17 infant bags?

18 A: I never bought them again, after that date.

19 Q: At some point you got the Lexington County
20 contract back, is that ---

21 A: Yes, sir.

22 Q: And was Lexington County still requiring or
23 asking you to provide infant bags?

24 A: No.

25 Q: They were no longer requiring or asking you to

1 do that?

2 A: I don't supply -- I have the Lexington contract
3 now, and I don't supply them an infant bag at
4 all.

5 Q: Is that a change in their preference or are you
6 just not providing infant or pediatric bags?

7 A: It's a change in their preference.

8 Q: And who made that policy change?

9 A: I don't know. They did.

10 Q: Who informed you that you were not going to be
11 required to use infant or pediatric bags?

12 A: Probably -- someone from the coroner's office,
13 may- -- likely Randy Martin. They don't --
14 they get them from the hospital now. So the
15 hospital supplies them these bags so they don't
16 require us to do it. They get them for free,
17 so -- is the way it was told to me.

18 Q: Infant bags?

19 A: Uh-huh (affirmative response).

20 Q: And are you aware of when they started getting
21 those from the hospital?

22 A: Before I -- in that period of time between when
23 I lost the business and when I reacquired it
24 through purchasing Capital. So some time in
25 that two year time frame.

1 Q: Have you had the occasion to use one of those
2 hospital supplied infant bags?

3 A: More than likely, yeah. Yes, I would say we've
4 transported an infant in that period of time.

5 Q: And do you know where they get those bags from?

6 A: No, I do not.

7 Q: Are they light weight infant bags?

8 A: Light weight, they're real light weight infant
9 bags.

10 Q: So you, prior to June 16, 2011, you knew that
11 somewhere out there in the world somebody
12 manufactured a light weight infant or pediatric
13 bag?

14 A: Uh-huh (affirmative response).

15 Q: Is that a yes?

16 A: Yes, it is. I'm sorry.

17 Q: And again, during that June 16, 2011
18 conversation with Mr. Knight you never make
19 reference to asking him whether he can produce
20 a light weight infant bag?

21 A: I believe I did ---

22 MR. PRINGLE: Objection ---

23 A: Yeah.

24 MR. PRINGLE: --- to the form, answer the question.

25 A: I believe I did ask him that question.

1 Q: Okay.

2 A: I mean it -- he didn't have any interest in it
3 at that point from what -- the way -- he was
4 more interested in having me persuade Lexington
5 County to do it the way they had always done it
6 than he was in trying to provide them something
7 else that was going to maintain such a low
8 volume of -- for him to inventory or make.

9 Q: Are you talking about June 16 of 2011?

10 A: No, I'm talking about back in -- I'm sorry, I
11 got the dates mixed up. I'm getting tired
12 again here, so.

13 MR. PRINGLE: Can we take a break?

14 MR. LLOYD: Yeah.

15 (A short break was taken at this time.)

16 Q: Let me just make sure so the record is clear,
17 you said that Mr. Knight never refused to
18 produce or provide you with infant bags prior
19 to June 16 of 2011, that's right?

20 A: Right.

21 Q: And as to any other bags, heavy weight, medium
22 weight, light weight, he never refused to
23 produce or provide you any of those bags prior
24 to June 16 of 2011, is that right?

25 A: Never refused, yes.

- 1 Q: And you said Lexington County started supplying
2 you bags when you got the contract back with
3 the coroner's office, is that right?
- 4 A: They started supplying me bags?
- 5 Q: Yes, sir.
- 6 A: No.
- 7 Q: The infant bags?
- 8 A: They -- my understanding is they have them
9 available for use. If not we have -- we still
10 have some, so it's not --
- 11 Q: Since you've got the contract back at Lexington
12 County ---
- 13 A: I can't recall if we've supplied them or if
14 they have.
- 15 Q: You said earlier that they were at least
16 providing infant bags from the hospital, is
17 that right?
- 18 A: Uh-huh (affirmative response).
- 19 Q: Is that ---
- 20 A: They were provided, yes.
- 21 Q: And were they providing any other bags, for
22 example, medium weight bags?
- 23 A: No.
- 24 Q: Have they provided you any odor-proof bags?
- 25 A: No. They -- just so you're understanding, they

- 1 don't provide them to me anyhow. If they carry
2 them that's theirs, they keep their inventory
3 separate from what I carry, so.
- 4 Q: And when you say they you're referring to the
5 --
- 6 A: They, Lexington County.
- 7 Q: --- Coroner's Office?
- 8 A: The Coroner's Office.
- 9 Q: So whenever you're servicing a call for
10 Lexington County Coroner's Office, do you use
11 your own bags or do they provide bags to you?
- 12 A: It depends, we use some of ours and we use some
13 of theirs.
- 14 Q: What bags do you use of theirs?
- 15 A: The heavy weight.
- 16 Q: Why do you use their heavy weight?
- 17 A: If they -- it's their choice. They being the
18 coroner, the deputy coroner at the scene.
- 19 Q: Is it their choice to always use their own
20 heavy weight bag?
- 21 A: No.
- 22 Q: Do sometimes they use your heavy weight bags?
- 23 A: Yes, quite often.
- 24 Q: What's the difference between your heavy weight
25 bag and their heavy weight bag?

1 A: Currently?

2 Q: Yes, sir.

3 A: They're a different style, we have -- there's
4 not a significant -- they're both classified --
5 fall into the heavy weight category, so.

6 Q: Have you purchased any -- from the time you
7 purchased Mr. Knight's business until you filed
8 this lawsuit, have you ever purchased any odor-
9 proof bags from anybody other than Mr. Knight?

10 A: Have I ever purchased, no. I don't know of any
11 -- no, I did not.

12 Q: And the -- just so that I'm clear, I know we
13 discussed this a little bit earlier, is it your
14 testimony that the exclusivity, and again I'm
15 just using that phrase, your agreement under
16 the sale purchase -- asset purchase agreement
17 with Mr. Knight, the provision that requires
18 you to purchase bags from him, is it your
19 testimony that that in any way was compensation
20 to him or consideration to him for the non-
21 compete agreement?

22 MR. PRINGLE: Objection, answer the question.

23 A: I don't recall. I believe it was but I can't
24 recall.

25 Q: So you believe that was a concession made by

1 you and your wife in exchange for at least the
2 terms of the non-compete agreement?

3 A: It played into it, I don't know how it played
4 in, but --

5 Q: Who would know?

6 A: I don't know. I assume my wife would have a
7 better handle on that than I would. I'd have
8 to look -- I'd have to look back if we still
9 have both versions of the draft and the final
10 version to see what was actually in it. My
11 wife would probably have a ---

12 Q: Well I'm talking about the very final contract
13 between you and Mr. Knight.

14 A: What was your question?

15 Q: The provision that requires you to purchase
16 body bags from Mr. Knight ---

17 A: Uh-huh (affirmative response).

18 Q: --- was that in any way, in addition to
19 whatever price was attributed to the non-
20 compete, was the exclusivity provision
21 considered by you to be consideration paid to
22 him in any way for that non-compete?

23 **MR. PRINGLE:** Same objection, answer the question.

24 A: Yes. I guess, yes.

25 Q: Have you sold any bags to -- I know we

1 discussed earlier two funeral homes. Have you
2 ever sold any bags to any coroner's offices?

3 A: That I wasn't -- yes. Likely, there is -- yes,
4 we have sold bags.

5 Q: Which coroner's offices have you sold bags to?

6 A: Since when now?

7 Q: Since the time you purchased Mr. Knight's
8 business.

9 A: Richland, Lexington.

10 Q: And do you recall how many bags you've sold to
11 Richland?

12 A: No, sir.

13 Q: Do you have any records at your office that
14 would indicated how many ---

15 A: Sure ---

16 Q: --- you sold?

17 A: Yes.

18 Q: Have you sold any bags to Lexington?

19 A: Yes.

20 Q: And ---

21 A: Same.

22 Q: --- you again have records at your office that
23 would indicate how many you sold?

24 A: Yes.

25 Q: Other than the funeral homes that we talked

1 about earlier, Richland County Coroner's Office
2 and Lexington County Coroner's Office, have you
3 sold any bags to anybody else?

4 A: Yes, yes.

5 Q: Do you know who those entities were?

6 A: Either funeral homes, I don't recall if there
7 were any -- any other coroner's offices that
8 would have bought any type of bag directly from
9 me, I don't believe so. So I'd think it would
10 just be varying funeral homes.

11 Q: And again, those records that you have at your
12 office would indicate everybody that you've
13 ever sold body bags to?

14 A: They should, yeah.

15 Q: And where are those records located now?

16 A: On my computer.

17 Q: And where's your computer located?

18 A: Currently it's in West Columbia, at our home in
19 West Columbia.

20 Q: Does your wife handle any of the day to day
21 business record keeping for your business?

22 A: No, I do.

23 Q: You handle all business record keeping?

24 A: Yeah, pretty much.

25 Q: Are all of your business records, either on

1 your computer or at your, I know earlier you
2 mentioned your home in Aiken, are they at one
3 of those two locations?

4 A: I believe so, yes.

5 Q: Just so I understand, your wife is the one who
6 handled all of the loans for the purchase of
7 Mr. Knight's business as well as Capital
8 Transportation?

9 A: Yes.

10 Q: So she's the --- she's a better person than you
11 to give us facts and details about any
12 financial ---

13 A: Yes.

14 Q: --- dealings with those ---

15 A: Yes.

16 Q: -- institutions? And again, the two people who
17 told you about Mr. Knight producing an infant
18 or pediatric bag for the Lexington County
19 Coroner's Office, that would have been Archie
20 Maddox and Randy Martin?

21 A: To the best of my knowledge, yes.

22 Q: Did you ever consider the purchase of any of
23 these bags to be a breach of the exclusivity
24 provision?

25 A: No.

1 Q: And why is that?

2 A: They -- they were either bought for, my
3 understanding, of not being available from
4 Knight's or for potential quality issue, to
5 address a quality issue.

6 Q: Okay. Let's talk -- take those one at a time.
7 When you say they weren't available, we
8 established earlier he never refused to provide
9 you those, is that correct?

10 A: That's correct.

11 Q: And when you say they weren't available
12 because, as you described earlier, you may call
13 him and say I need a certain type of bag, and
14 I need them in two or three days, is that
15 right?

16 A: Yeah.

17 Q: And was that ever to service a particular
18 client or was that just an always restock your
19 inventory?

20 A: Typically restock inventory.

21 Q: So if you wanted bags to restock your
22 inventory, his ability to produce those within
23 a two or three day period for you was
24 necessarily contingent upon when you called
25 him, is that right?

1 A: Yeah, yeah. Yeah.

2 Q: Now what quality issues did you have that
3 required you to purchase bags from someone
4 else?

5 A: The heavy weight -- black heavy weight bag that
6 he was providing, we had zipper failures when
7 the girth of the individual -- either the girth
8 of the individual or the weight of the
9 individual exceeded what the zipper's ratings
10 were. And we would have to put a second bag on
11 those individual cases.

12 Q: Okay. How many times did that happen?

13 A: Without looking I, couldn't tell. It was --
14 Buddy had always provided replacement bags, for
15 any of those that that happened with.

16 Q: You don't recall when that happened?

17 A: It happened all the time. I mean not all -- it
18 wasn't every case, but I mean it was a case by
19 case basis. It might be one in a month, or one
20 in three months, or four or five in a month.
21 I mean I don't know that I even documented all
22 or my guys documented all of them, but it
23 happened, so.

24 Q: So he would provide a second bag for you, is
25 that right?

- 1 A: He'd give me a second bag because we would have
2 to put that person into a second bag after we'd
3 already put them in one so they'd go to
4 transport in two bags. Sometimes it happened
5 that we put them in at the scene, sometimes
6 we'd do it at the hospital, but it all depended
7 on the situation.
- 8 Q: Okay. And would your records reflect when you
9 had to place an individual in a second bag?
- 10 A: Pretty much, yes. Yes, yes. I don't know. It
11 wasn't a high number of incidents, but ...
- 12 Q: When did that start happening?
- 13 A: Probably January of 2007.
- 14 Q: So in January of 2007 you started having zipper
15 problems?
- 16 A: Uh-huh (affirmative response).
- 17 Q: And where would you get heavy duty bags that
18 didn't have those zipper problems?
- 19 A: From Knight's. I -- keep going.
- 20 Q: So ---
- 21 A: He had -- he had more than one style of bag
22 that would be used. The best bag for the
23 coroner cases where these were required was a
24 black heavy weight bag.
- 25 Q: Okay. I guess my question though is,

1 originally you said that there were two reasons
2 you went ---

3 A: Uh-huh (affirmative response).

4 Q: --- to other suppliers for body bags. One was
5 when they were not available from Mr. Knight.

6 A: Uh-huh (affirmative response).

7 Q: And we covered that. And then number two you
8 said there were quality issues that caused you
9 to go to some other supplier.

10 A: One time, yes.

11 Q: So one time you went to another supplier?

12 A: Yes.

13 Q: And who was that supplier?

14 A: Medical Products, I believe.

15 Q: And that was in July of 2010?

16 A: Yes, sir.

17 Q: According to your outline?

18 A: To the best of my recollection, you have
19 invoices that should reflect that.

20 Q: And you indicated earlier that had bought four
21 heavy duty bags, is that right?

22 A: Extra large heavy duty.

23 Q: And six heavy duty?

24 A: Yes, or a case of each is how it ...

25 Q: And the purchase of those two cases was because

1 they had a better quality zipper?

2 A: In this particular bag, yes, yes. In the heavy
3 weight bag, yes.

4 Q: Now you indicated the Mr. Knight had different
5 versions of the heavy duty bag, is that right?

6 A: Yes, sir.

7 Q: Were you unable to use the version of his bag
8 that didn't require you to double bag a very
9 heavy individual?

10 A: In -- in light of times -- in many cases, yes,
11 that was not much better from that standpoint.
12 It had that -- he -- the zipper was adequate
13 but the handles would rip out on those bags if
14 the person was too heavy.

15 Q: And you never had those problems with the bags
16 from Medical Products?

17 A: No.

18 Q: Did you discuss that with Mr. Knight?

19 A: Oh, yeah. Yes.

20 Q: And what was that discussion?

21 A: He'd replace them.

22 Q: So one reason you went to Medical Products is
23 because the zippers would not support the girth
24 of certain individuals and also because
25 sometimes the handles would rip?

1 A: Yes. Yes, depending on the bag, yes, that is
2 correct.

3 Q: Now, prior to July of 2010 and after July of
4 2010 when you purchased those two cases of
5 heavy duty bags, what bags would you use for
6 very heavy individuals?

7 A: The bags that we were purchasing from Buddy,
8 from Knight Systems.

9 Q: Why did you go back to Mr. Knight's heavy duty
10 bags?

11 A: I never left him. That wasn't my intention.
12 I needed -- I needed an inventor- -- I felt I
13 needed an inventory of the extra large heavy
14 weight that I -- in this one instance because
15 we, you know, we had been using so many of them
16 that I was concerned that -- I didn't want to
17 be without any. So I hit -- we had depleted
18 our inventory at the same time he depleted his,
19 so I went -- I felt that I needed to have
20 something available. This -- the -- and while
21 I was ordering the other, I thought that it'd
22 be worth seeing if the zipper was the only
23 issue with that particular in that black bag
24 that he had been providing. So we got these in
25 the case that we could use, the heavy weight

- 1 instead of the extra large heavy weight bag.
2 Because there was a significant price
3 difference between what I was paying from
4 Knight's for those two bags. At the time one
5 of the bags was \$20, one bag was \$100. So they
6 didn't particularly like me using a bag that
7 cost me \$100 for their calls, that I'd have to
8 upcharge them to -- that I would upcharge for
9 that purpose.
- 10 Q: And how much did those bags cost from Medical
11 Products?
- 12 A: I don't recall. 53.44 was what I paid for
13 those bags.
- 14 Q: And again, this sort of goes back to the
15 original asset purchase agreement. For those
16 bags, for example, had you done any price
17 comparisons between what Mr. Knight was
18 charging and what others were charging?
- 19 A: The price wasn't the object in this case. I
20 wasn't trying to undercut or shop his price.
- 21 Q: My question is ---
- 22 A: Did I ---
- 23 Q: --- prior to entering into the exclusivity
24 provision of the asset purchase agreement had
25 you done any price comparisons of his heavy

1 duty bags versus others out there ---

2 A: Not ---

3 Q: --- whether in the country or outside?

4 A: Not that I recall. I more than likely did but
5 I don't recall being -- I would have -- I don't
6 recall, but -- I -- let's say yes, I more than
7 likely did look at them, so.

8 Q: How long did it take you to use those heavy
9 duty and extra large heavy duty bags from
10 Medical Products?

11 A: I could still have them in inventory, but I
12 don't know. They might still be in my
13 inventory. They get intermixed with the
14 others. We had those put aside until -- so I
15 can't say if they're still there or not.

16 Q: What kind of inventory would you normally
17 attempt to keep?

18 A: Now or when this was going on?

19 Q: At the time you were going to purchase bags
20 from others, other than Mr. Knight.

21 A: Light weight bags we would probably keep about
22 200 bags on hand. 200 to 250 bags, maybe even
23 more. Heavy weight probably about 50 to 60 or
24 -- let's say heavy weight, no, there'd be
25 probably 100 heavy weight. The water retrieval

1 pouch, two to three. That varied, I'd say two
2 to three. And the odor-proof bag probably
3 about six to eight, or five to eight. I'd
4 order them five at a time typically.

5 Q: Did you have a sort of routine interval of when
6 you would order bags in order to restock your
7 inventory?

8 A: No, none, not definitive.

9 Q: So you would normally try to order in order to
10 maintain 200 to 250 light weight bags in your
11 inventory?

12 A: Yeah. I'd -- it would fluctuate up and down
13 from that level, but-yes. So I would try to
14 order to maintain.

15 Q: And you would normally try to keep 100 heavy
16 weight bags in inventory?

17 A: Yeah, 50 to 100 you could probably say. No, it
18 would probably be closer to 100. Yeah, that's
19 a fair -- fair assessment.

20 Q: And based on the volume of business you were
21 doing from the time you purchased the business
22 until this lawsuit, how often would you have to
23 order, would you order once a month?

24 A: Some months -- sometimes -- anywhere from 10 to
25 12 times a year is probably a fair estimate.

1 That frequency went down when we lost Lexington
2 but we still maintained a lot of inventory.

3 Q: I just want to be clear, as I'm looking at your
4 time line of events. In late 2007, early 2008
5 when Randy Martin asked you to check into
6 infant bags, did he tell you at that point that
7 Mr. Knight had made an infant bag previously?

8 A: No.

9 Q: Did Randy Martin know that you had an agreement
10 with Mr. Knight ---

11 A: Yes, he did.

12 Q: --- that you would get his bags from -- your
13 bags from him?

14 A: Yes, he did.

15 Q: How did he know that?

16 A: Any one of us could have told him. So they --
17 he probably -- he'd heard it from me, if no one
18 else. I assume he heard it from Buddy as well
19 but I can't speak for that.

20 Q: In late 2007, early 2008 would he have known
21 that you had an agreement to get your bags from
22 Mr. Knight?

23 A: Yes, I believe so.

24 Q: Did Archie Maddox ever know that you had an
25 exclusive agreement to purchase bags from Mr.

1 Knight?

2 A: At that -- at what point in time?

3 Q: At any point.

4 A: Yes.

5 Q: And when did he find out, to your knowledge,
6 that you had an exclusive agreement to purchase
7 bags from Mr. Knight?

8 A: Probably June, July of 2009.

9 Q: And how did he come to learn that?

10 A: When he was tempted to buy the body bags from
11 Buddy, the infant bag from Buddy, along with
12 the other bags that they were acquiring for the
13 coroner's office. That would be my assumption
14 as the first.

15 Q: Did he learn of that agreement to purchase body
16 bags from Mr. Knight from you?

17 A: No. I can't speak that that's -- you asked me
18 when I would assume that he knew, is the way I
19 understood the question, and that's when I
20 would have guessed that that would've been the
21 first one.

22 Q: What made you assume that sometime in 2009
23 Archie Maddox would have learned that you had
24 an agreement with Mr. Knight to purchase your
25 body bags from him?

1 A: Because of a discussion that Buddy had with me
2 about the infant bags that asked if I had been
3 supplied -- if I had been buying bags from
4 somewheres else.

5 Q: When did he have that -- when did Mr. Knight
6 have that discussion with you?

7 A: My assumption -- let's see, it was after the --
8 after the -- we lost Lexington contract, so it
9 would have been June, July, August. I mean in
10 the summer of 2009, or the fall of 2009.

11 Q: Okay. What about Mr. Knight's conversation
12 with you about that issue leads you to believe
13 that Archie Maddox learned that you had an
14 exclusive agreement with Mr. Knight to purchase
15 all your body bags from him?

16 A: Are you saying -- state that again please?

17 Q: You referenced that sometime in 2009 after
18 you've lost the contract with Lexington County
19 Coroners Office, you have a conversation with
20 Mr. Knight where Mr. Knight asks you if you had
21 been purchasing bags from someone else, is that
22 right?

23 A: Yes.

24 Q: What about the conversation between you and Mr.
25 Knight about whether or not you've been

1 purchasing bags from somebody else, to your
2 knowledge would have alerted Mr. Maddox to the
3 fact that there was an exclusive agreement
4 between you and Mr. Knight?

5 A: I just -- I recall that it was mentioned in our
6 conversation between he and I, so.

7 Q: And when you say he and I?

8 A: Buddy -- between Buddy and I.

9 Q: And you said ---

10 A: It's not documented.

11 Q: --- in 2009 Mr. Knight asked you if you'd been
12 purchasing bags from someone else?

13 A: Uh-huh (affirmative response).

14 Q: Is that right?

15 A: Yes, sir.

16 Q: And what was your response to him?

17 A: I told him I had bought infant bags.

18 Q: Why did you not tell him about the heavy duty
19 bags or light weight bags or medium weight bags
20 that you had also purchased?

21 A: Well, I hadn't bought any of those, at that
22 point. This is in 2009.

23 Q: Right.

24 A: I had bought the water retrieval bag, and
25 that's probably what -- well, that he knew

1 about because of a -- I knew he knew about that
2 one, so. And we talked -- we had discussed
3 that. But as far as the infant bags, I didn't
4 deny it and recall offering to reimburse him
5 for the bags, so -- the cost of what I had in
6 the infant bags.

7 Q: This conversation in June of 2009, Mr. Knight
8 asks you if you've been buying bags from
9 someone else other than him?

10 A: Yep.

11 Q: And you tell him, yes, I bought infant bags?

12 A: And -- yeah. Right, yes.

13 Q: Did you also tell him that you bought water
14 retrieval bags?

15 A: To the best of my recollection, the water
16 retrieval was involved in another conversation.

17 Q: Different from this June ---

18 A: Yeah.

19 Q: --- 2009 conversation?

20 A: Right, yes.

21 Q: Okay. So was that conversation before June
22 2009 or after June 2009?

23 A: It was right -- it was in the same time frame.
24 I don't know -- I don't recall the exact date.

25 Q: So your testimony is that on two occasions Mr.

1 Knight asked you if you'd been purchasing bags
2 from someone else?

3 A: Yes.

4 Q: And in both instances did you tell him yes you
5 had purchased bags?

6 A: Yes.

7 Q: One of those conversations was about pediatric
8 or infant bags ---

9 A: Yes.

10 Q: --- and the second conversation was about water
11 retrieval bags?

12 A: Yes, sir.

13 Q: And what was Mr. Knight's response to your
14 acknowledgment that yes you had been purchasing
15 those bags?

16 A: He never offered -- there never was accepting
17 of my offer for reimbursement, so it was kind
18 of a moot point at that point.

19 Q: Okay. Did he say I can provide you with water
20 retrieval bags?

21 A: Yes.

22 Q: And at that point did you promise to continue
23 purchasing any future water retrieval bags from
24 ---

25 A: Yes, I did.

1 Q: And in 2009 did he say I can make you infant
2 bags?

3 A: No. If he did I don't recall. I don't recall
4 if he did or didn't in that particular case.

5 Q: Now again, in 2011 you all have this
6 conversation again about infant bags, is that
7 right?

8 A: Yep.

9 Q: And at that point in time is it your testimony
10 that Mr. Knight as of June 16, 2011 already
11 knows that you've been purchasing infant bags
12 from someone else?

13 A: Yes. Yes.

14 Q: And that's because of the conversation you had
15 in June of 2009?

16 A: Yes.

17 Q: So it shouldn't have been a surprise to him in
18 June of 2011 that you had been purchasing bags
19 from someone -- infant bags from someone else?

20 A: I don't believe it was a surprise to him, no,
21 in June of 2011.

22 Q: Because you had specifically told him that you
23 were purchasing those bags?

24 A: I believe so, yes.

25 Q: And again, in June of 2011 were you surprised

1 that he said I can make you infant bags?

2 A: No.

3 Q: Why were you not surprised?

4 A: I knew he could make bags. By that point I
5 understood what -- that he had wider
6 capabilities, whether -- than -- he could -- he
7 could make anything -- you can make a bag,
8 whether it's an acceptable bag or not. I
9 didn't know if he had the capabilities of
10 making a light weight infant bag. And that's
11 what this original topic was all about.

12 Q: And y'all didn't have that conversation in June
13 of 2009 as to whether he could make a light
14 weight bag?

15 A: June of 2009?

16 Q: Yes, sir.

17 A: No.

18 Q: In June, I believe it would have been June 16
19 of 2011, is it your recollection that you told
20 Mr. Knight that you didn't realize that he
21 could make an infant bag?

22 A: Yes.

23 Q: So, based on your testimony here today, that
24 wasn't a true statement on your part, is that
25 right?

1 MR. PRINGLE: Object to the form, answer the
2 question.

3 A: Yes.

4 Q: Yes, that was an untrue statement on your part?

5 A: In that context, yes.

6 Q: In what context was it a true statement?

7 A: Well, from the context of, I got hijacked with
8 the whole conversation and ---

9 Q: Describe for me what you mean by you got
10 hijacked?

11 A: I didn't feel like that -- that whole thing --
12 that whole conversation came at a time where we
13 were -- you know, I was bidding Richland
14 County. I was unsure of what his -- what would
15 -- what he was going to do. So, I mean, all of
16 these things up until that point it's -- it was
17 -- I didn't know where -- we had never -- we
18 had this conversation before, so I didn't know
19 why it was being brought up again. Even though
20 I made the statement that I didn't know that he
21 could make these bags, it -- that -- it was not
22 accurate from that standpoint. I'm sure he
23 could make it. Whether or not it would be
24 acceptable would be the other question, so.

25 Q: So is your testimony here today that both you

1 and Mr. Knight in June of 2011 were having a
2 conversation as to whether or not you realized
3 that he could make infant bags. And your
4 testimony is that you both realized that
5 neither of you were telling the truth about
6 either's awareness about this whole topic?

7 **MR. PRINGLE:** Objection to form, answer the
8 question.

9 A: This bag was such an insignificant issue. I
10 don't know -- I could not understand why it was
11 keep- -- it kept coming back up.

12 Q: If it was an insignificant issue, why did you
13 lie to him and tell him that you did not know
14 he could make an infant bag?

15 **MR. PRINGLE:** Object to the form, answer the
16 question.

17 A: I'm uncertain because I -- I -- I wasn't hiding
18 anything from him in that regard. I told him
19 that I had bought bags, he knew that I had
20 bought bags, so I didn't know where it was
21 coming from. It was more -- it was probably an
22 inaccurate statement on my part, so.

23 Q: What was an inaccurate statement?

24 A: Saying that I didn't know that he could make
25 it. I didn't know what he -- for sure what he

1 could and could not make. I never knew of any
2 light weight material that he worked with of
3 any of the items that we bought that -- there
4 was always a heavier gauge vinyl of the items
5 that we bought with the exception of one thing,
6 and that was a mesh item in a water retrieval
7 pouch.

8 Q: Just so that I'm not confused, after the
9 purchase of this business did you ever ask Mr.
10 Knight if he could make a light weight infant
11 bag?

12 A: I'm saying yes.

13 Q: Prior to June 16, 2011?

14 A: Yes.

15 Q: And based on your recollection that you did ask
16 him if he could make that, did he inform you
17 that he could make them light weight?

18 A: I'm sorry, I misspoke. I do not believe that
19 I asked him if he could make it. I think the
20 conversation was more of could he provide it.
21 Back in June of 2009. I did not -- I think it
22 was June of 2009, or 2008. Or -- yeah.
23 January 2008. I wasn't -- at that point in
24 time I was uncertain of what his capabilities
25 were, manufacturing wise. What he could make,

1 what he could not make, what he purchased.

2 Q: Okay. Did it make a difference as to whether
3 he had to manufacture it or whether he would
4 have to purchase it?

5 A: No.

6 Q: And it didn't make a difference because you'd
7 already agreed in the purchase of his business
8 that you were going to buy body bags from him
9 irregardless of whether he could make it or
10 purchase it?

11 A: That -- okay. Of the bags that he had
12 available.

13 Q: No, sir.

14 A: Of the bags that -- I know, all ---

15 Q: I'm asking you, was it your understanding at
16 the time of the purchase of his business that
17 you were going to purchase all body bags from
18 him, regardless of whether he could manufacture
19 them or whether he would have to himself
20 purchase them?

21 A: At the time, yes.

22 Q: And at any point during the course of your
23 relationship with Mr. Knight from the time of
24 the purchase up until you filed this lawsuit,
25 did you come to understand that the terms of

1 that agreement had changed, that unless he
2 could manufacture them, you didn't have to
3 purchase them from him?

4 A: No.

5 Q: So you still, up until the time you filed this
6 lawsuit, believed that whether he had to
7 purchase them or he had to manufacture them,
8 that you were under an obligation to purchase
9 all body bags from him?

10 A: No, I don't agree with that.

11 Q: Okay. What was your understanding of the
12 agreement then?

13 A: That the -- the contract speaks for itself.
14 That there was no ---

15 Q: That's not my question to you, Mr. Lintal.

16 A: That's ---

17 **MR. PRINGLE:** Let him answer the question please.
18 Answer the question.

19 A: The bags that were listed on there were the
20 only bags that were -- we were obligated to
21 buy.

22 Q: Your ---

23 A: Obligated.

24 Q: You finished?

25 A: Yes.

1 Q: Your understanding of the agreement is, that if
2 there was not a bag listed on that -- and by
3 listed we're talking about the prices, is that
4 right?

5 A: Description and prices.

6 Q: And if it's not listed there, you weren't
7 obligated to purchase it from him?

8 A: I didn't feel that that was -- I -- yes, I
9 guess it led to -- that's the way the contract
10 was spelled out.

11 Q: When did you realize or come to view that as
12 the agreement?

13 A: I don't recall.

14 Q: Was it after the purchase?

15 MR. PRINGLE: Object to the form, answer the
16 question.

17 A: I'm not sure if it was before or after. More
18 than likely after is when I would have made
19 that assumption.

20 Q: So your position is that the prices, for
21 example, the different types of bags that are
22 listed in the purchase agreement, if there was
23 not one listed with a price that you were not
24 obligated to purchase that bag from Mr. Knight?

25 A: Yes.

1 Q: So the only bags you were obligated to purchase
2 would have been heavy duty body bags?

3 A: No. Light weight, heavy duty ---

4 Q: Going to go through the list.

5 A: Okay.

6 Q: You were required to purchase heavy duty body
7 bags?

8 A: Yes.

9 Q: You were required to purchase light weight body
10 bags?

11 A: Yes.

12 Q: You were required to purchase odor-proof body
13 bags?

14 A: Yes.

15 Q: You were required to purchase water retrieval
16 body bags?

17 A: Yes.

18 Q: You were not, under your interpretation, were
19 not required to purchase pediatric or infant
20 body bags?

21 A: Right, yes.

22 Q: Any other type of body bags you were not
23 required to purchase?

24 A: None that I re- -- I don't know what else I --
25 let's see. Well, extra large heavy weight.

1 Q: Extra large heavy weight?

2 A: Right.

3 Q: Okay. From January of 2008 to June of 2009 and
4 again in June of 2011, those are three
5 different conversations that you told me you
6 had with Mr. Knight about purchasing infant
7 bags, is that right? Or being able to supply
8 you with infant bags?

9 A: Yes.

10 Q: Okay. At any point did you ever tell him, in
11 any of those conversations, that you weren't
12 required to purchase those bags from him?

13 A: No. No. No.

14 Q: At any point during those conver- -- in any of
15 those years, 2008, 2009, 2011, did you ever
16 have any conversations with him where you said
17 I don't have to purchase extra -- some extra
18 heavy duty?

19 A: It's extra large heavy duty. No.

20 Q: Extra large heavy duty?

21 A: No.

22 Q: Now why did you leave those bags out of the
23 agreement?

24 **MR. PRINGLE:** Object to the form, answer the
25 question.

- 1 A: I didn't leave them out.
- 2 Q: Did you know that extra ---
- 3 A: No.
- 4 Q: --- heavy duty existed?
- 5 A: No, I did not.
- 6 Q: Did you know that infant bags existed?
- 7 A: I did not.
- 8 Q: Did you know --
- 9 A: As a usable item for this business, I did not
- 10 know. We referred to his expertise to come up
- 11 with a list of what bags we would be needing.
- 12 Q: Did he give you a list and say these are the
- 13 bags you're going to need?
- 14 A: As best I -- I don't recall.
- 15 Q: Did y'all ever have discussions with him about
- 16 what bags you would need?
- 17 A: Sure.
- 18 Q: Okay. When did you have those discussions?
- 19 A: Prior to the contract, after the contract.
- 20 Q: Did you have those discussions when you went to
- 21 visit his site?
- 22 A: More than likely, sure.
- 23 Q: Did you look around at the types of bags he had
- 24 in inventory?
- 25 A: I did not. We never saw his inventory.

1 Q: So he said, to your knowledge, that you were
2 supposed to, at least in the agreement, said
3 you were supposed to purchase all body bags
4 from him. Your understanding of the agreement
5 is that that did not include those two specific
6 bags?

7 MR. PRINGLE: Object to the form, answer the
8 question.

9 A: Yes.

10 Q: And again, that's based on the fact that
11 they're not listed in the agreement?

12 A: Yes.

13 Q: Any other reason?

14 A: No. None that I can think of, let's put it
15 that way.

16 Q: And again, this conversation you have in June
17 of 2011 about infant bags, your testimony is
18 that even though you're lying to him ---

19 MR. PRINGLE: Object to the form.

20 Q: --- and I don't mean that in an insulting way,
21 but by your own admission you're not telling
22 him the truth when you say you didn't know he
23 could make those bags ---

24 A: Yes, sir.

25 Q: --- is that right? But you never actually have

1 a discussion with him in June of 2011 about the
2 fact that you're not required to get those bags
3 from him anyway?

4 A: No.

5 Q: If you weren't required to get those bags from
6 him, you said it kept coming up as a subject
7 matter in discussions, is that right?

8 A: Uh-huh (affirmative response).

9 Q: Now, at any point did you think to yourself why
10 does this keep coming up, because I'm not
11 required to buy those from him anyway?

12 A: Yes.

13 Q: Okay. In June of 2009, did you ever tell him,
14 hey, why are you asking about that, I'm not
15 required to buy those bags from you?

16 A: No.

17 Q: It never came up?

18 A: No, sir.

19 Q: Why were you going to reimburse him the costs
20 of the infant bags if you weren't required to
21 purchase them from him?

22 A: Conscious effort, more than anything else, to
23 keep our business relationship intact. We had
24 -- we'd had an amiable relationship and these
25 were issues that would stand in the way of that

1 relationship that I wanted to continue. I had
2 no reason to buy bags from elsewhere so long as
3 they sufficed to the needs of what we had.

4 Q: Well, if you didn't think you were required to
5 buy infant bags from Mr. Knight and according
6 to your testimony earlier Mr. Knight didn't
7 seem particularly interested in producing or
8 providing infant bags, why did you think that
9 the fact that you were buying infant bags from
10 somebody else, that that would jeopardize your
11 business relationship with Mr. Knight?

12 A: Because he would take it just the way that he
13 did. That it was a -- I wasn't giving him all
14 -- everything that I could. And -- we had to
15 have ongoing conversations. It was more about
16 being able to get along than anything else in
17 that regard. He was a mentor to me for a good
18 number of years, you know, and provided me with
19 advice and help and assistance on things like
20 what you said about going to Lexington.
21 Initially with telling me some of the, you
22 know, people, the players that were involved.
23 All the background of what you would expect
24 from buying a business. But I never got one
25 person that I was introduced to by him through

1 the course of the whole time that -- of when we
2 first went in to this business. So the ongoing
3 part of the business was something that was
4 very important to me. This was such a small
5 amount of dollars that I could not see why
6 there was any significance to any of these
7 activities that would take place.

8 Q: Thank you, Mr. Lintal. My question to you
9 again is, if in fact you didn't believe you had
10 to purchase infant bags from Mr. Knight, and
11 your characterization of Mr. Knight's opinion
12 about this was that it isn't that big of a deal
13 to him, why were you -- why did you ---

14 A: To him or to me?

15 Q: To him.

16 A: Okay.

17 Q: Why did you believe that the fact that you were
18 purchasing infant bags from someone else, that
19 that would cause some rift in your business
20 relationship or somehow jeopardize your working
21 relationship with Mr. Knight?

22 MR. PRINGLE: Object to the form, answer the
23 question.

24 A: I did believe it was a bigger issue to him.

25 Q: You did believe it was a bigger issue ---

- 1 A: Yeah. If I had said someplace -- I believe
2 that any of these would be a big issue to him,
3 not that I had tried to deceive it but -- when
4 I went to him to try to buy those bags, he
5 didn't have -- he had no interest in it. Maybe
6 it was the time of the moment, but I don't know
7 what the reason was at that point in time.
- 8 Q: When did you come to believe that it was a big
9 deal to him?
- 10 A: When it kept coming up.
- 11 Q: And at any point during that time, when it kept
12 coming up, because you've told me about three
13 conversations y' all have had about infant
14 bags.
- 15 A: Yeah.
- 16 Q: Okay. Did it come up more times than those
17 three?
- 18 A: No, not that I recall.
- 19 Q: So when you say it keeps coming up, the one
20 time was in January of 2008?
- 21 A: Uh-huh (affirmative response).
- 22 Q: And you brought it up?
- 23 A: Right, when I was re- -- trying to find out
24 what they even were.
- 25 Q: Okay. June of 2009, you said Mr. Knight

1 contacted you or had a conversation with you
2 where he asked you if you had purchased bags
3 from someone else?

4 A: Right.

5 Q: Did he bring up infant bags?

6 A: That's what it was in regard to, because --

7 Q: My question is did he ---

8 A: Yes.

9 Q: --- ask you if ---

10 A: Yes.

11 Q: --- you purchased other bags ---

12 A: Yes.

13 Q: --- and he asked you specifically about ---

14 A: Yes.

15 Q: --- infant bags?

16 A: Yes.

17 Q: He asked you specifically about infant bags?

18 A: Yes, right.

19 Q: And at that time, because it had come up in
20 June of 2009 during that conversation, did you
21 say, hey, I didn't think it was big deal to you
22 or ...

23 A: Yes.

24 Q: Okay. And what was his response to you to
25 that?

1 A: It was more don't do it again, you know. It
2 wasn't -- I don't recall the exact answer but
3 it was the kind of an issue that I thought was
4 going away.

5 Q: Okay. If he ---

6 A: I had offered to -- I had offered to reimburse
7 on what I paid -- it was less than \$200 that I
8 had into all those bags that I had purchased.

9 Q: If he told you don't do that again, don't
10 purchase infant bags from somebody else again
11 ---

12 A: Right, yes, sir.

13 Q: --- why did you not tell him at that point,
14 well under the agreement I'm not required to
15 purchase infant bags from you?

16 A: I don't know. No, I didn't, it didn't seem
17 like a major issue to me.

18 Q: In June 16, 2011 did he bring up the infant
19 bags again?

20 A: Yes.

21 Q: And again, to not jeopardize your working
22 relationship with Mr. Knight you declined again
23 to say to him, hey I'm not required to purchase
24 these bags from you?

25 MR. PRINGLE: Object to the form, answer the

1 question.

2 A: Yes. I declined, I did not bring that out
3 again.

4 Q: And you believe that your purchase of bags from
5 somebody else, of infant bags was going to
6 jeopardize your working relationship with Mr.
7 Knight?

8 A: Uh-huh, yes.

9 Q: And in what way would it have jeopardized your
10 working relationship with him?

11 A: By him using it against me to say that I -- to
12 accuse me of breaching the contract, our
13 contract.

14 Q: When did you first think he would use that to
15 say that you had breached the contract?

16 A: That day.

17 Q: June 16 of 2011?

18 A: Yeah.

19 Q: Did you consult your attorneys about that
20 provision at that point?

21 A: Shortly after, I don't recall exactly when it
22 was -- it was after that, yes.

23 Q: What did he say that made you think he was
24 going to accuse you of breaching the contract?

25 A: I don't recall.

- 1 Q: But he said something specifically in that June
2 16, 2011 conversation that lead you to believe
3 that he was going to accuse you --
- 4 A: Okay, wait a minute --
- 5 Q: Let me finish my question.
- 6 A: Okay.
- 7 Q: That he was going to accuse you of having
8 breached the contract between you and him?
- 9 A: Yes.
- 10 Q: Prior to that conversation of June 16, 2011,
11 did you have any reason to believe that Mr.
12 Knight was considering your purchase of infant
13 bags from other sources as a breach of the
14 contract?
- 15 A: No. Not that I recall.
- 16 Q: So the first time you actually have this notion
17 that, hey maybe I breached the contract, is
18 whatever transpired in this conversation
19 between you and Mr. Knight on June 16, 2011?
- 20 **MR. PRINGLE:** Object to the form, answer the
21 question.
- 22 A: I'm not sure. I mean -- I -- that's the first
23 that I felt definitively that it was going to
24 be -- become an issue. I believe I had heard
25 rumors that he was considering doing something

1 but I had no proof of anything at that point.

2 I had not talked with him.

3 Q: What rumors had you heard?

4 A: That he was gonna find a way to bid the
5 contract.

6 Q: Bid what contract?

7 A: The Richland County contract.

8 Q: Where'd you hear those rumors?

9 A: I don't recall.

10 Q: Do you recall when you heard that, the rumor
11 that he was going to bid for the Richland
12 County contract?

13 A: I would say prior to that date, but it would --
14 it had to have been prior to that date. Wait
15 a minute. You're talking September now? No,
16 we're talking June.

17 Q: We're talking June 16 ---

18 A: Yeah.

19 Q: --- 2011.

20 A: No, okay. Yeah, it was prior to that. So
21 probably within, you know, within 10, 15 days
22 before that.

23 Q: 10 to 15 days prior to June 16, 2011 you had
24 heard that he may bid for the Richland County
25 contract?

1 A: I -- right.

2 Q: You don't recall who told you that?

3 A: No. I believe it was somebody within the
4 Richland County coroner's group. I couldn't
5 -- I wouldn't testify as to who or ---

6 Q: When you say it was somebody within the
7 Richland county coroner's group, within the
8 office?

9 A: Likely one of the deputy coroners. They would
10 have been the only ones with that kind of
11 knowledge.

12 Q: What was your reaction to hearing this rumor
13 that he was going to bid for the contract?

14 A: I was unsure, uncertain. I wasn't certain how
15 he could -- how it could come into play, so.

16 Q: So on June 16, 2011 when you had this
17 conversation with Mr. Knight where you believe
18 that he has either said directly or given you
19 some indication that he's going to use this
20 purchase of infant body bags from other sources
21 to accuse you of breaching the agreement, at
22 that point in time you have some knowledge
23 that, at least by rumor, that he may be bidding
24 for the Richland County contract?

25 A: Uh-huh, yes.

- 1 Q: And at that particular time, June 16, 2011, did
2 you confront him or ask him about whether or
3 not he was going to bid on that contract?
- 4 A: I believe I did.
- 5 Q: And you believe you did ---
- 6 A: Yes.
- 7 Q: --- ask him about that?
- 8 A: Right.
- 9 Q: And that was during the same conversation we
10 were referencing earlier ---
- 11 A: No.
- 12 Q: --- that was recorded?
- 13 A: It was not in the recording.
- 14 Q: Okay. Was it --
- 15 A: -- of which I had no knowledge that I was being
16 recorded.
- 17 Q: Was it while he was physically there or after
18 he left?
- 19 A: I don't recall. It was in that time frame. I
20 thought it was on my premises but ---
- 21 Q: Did you call Mr. Knight after he left on one or
22 more occasions to again talk about this infant
23 bag situation?
- 24 A: I don't believe so.
- 25 Q: So again, June 16, 2011 when you're referencing

- 1 this issue about not knowing whether he could
2 produce infant body bags, either manufacture
3 them or provide them to you, at that point that
4 is the point in time where you believe that
5 he's going to use that issue to say you've
6 breached the contract and then bid on the
7 Richland County contract with the coroner's
8 office?
- 9 A: I was getting sus- -- more suspicious, yes. So
10 yes.
- 11 Q: And what did you do after this conversation
12 with Mr. Knight? Did you talk to anybody about
13 your suspicion?
- 14 A: My wife.
- 15 Q: What did you tell her?
- 16 A: That I was assuming he was gonna try -- he was
17 going to bid the contract.
- 18 Q: Did you tell her why you thought he might do
19 that?
- 20 A: Not specific.
- 21 Q: What was her response?
- 22 A: We couldn't figure out how he could, but ...
- 23 Q: Did you believe that if he raised the issue of
24 your purchase of infant body bags from other
25 sources as a breach of the contract, that he

1 would have no longer an obligation to not
2 compete against you?

3 A: Did I believe -- say that again?

4 Q: In other words, did you believe after this
5 conversation on June 16, 2011 where you say
6 that Mr. Knight -- at least your impression was
7 that Mr. Knight was going to use this infant
8 body bag issue as an allegation of breach on
9 your part, that that was the reason why he was
10 going to try and get out of the contract and
11 thereby bid on the Richland County ---

12 A: Yes.

13 Q: And did you share that with your wife?

14 A: Yes.

15 Q: And what was her response to that?

16 A: We didn't believe that it could happen, but --
17 she didn't believe it could happen, so ---

18 Q: And in your, this conversation that you believe
19 you had with Mr. Knight that wasn't recorded,
20 where you confronted him about the rumor that
21 he was bidding on the Richland County contract,
22 did you bring up this issue of this alleged
23 breach by you of the body bag provision?

24 A: The alleged breach of what?

25 Q: Did you raise to him whether or not he was

1 considering accusing you of having breached the
2 agreement by purchasing infant bags from
3 somebody else?

4 A: I would say yes. As I recall, yes.

5 Q: And at that time did you tell him that you
6 weren't required to purchase infant bags from
7 him?

8 A: No, no.

9 Q: What was your defense, so to speak, for lack of
10 a better term, to him regarding what you
11 thought was the specific grounds that he was
12 going to raise to get out of the contract?

13 A: He never -- never said that he was going to get
14 out of the contract.

15 Q: But you thought that he was going to use this
16 infant bag, body bag issue as an alleged breach
17 by you, is that right?

18 A: I believed that, so yes, was the case.

19 Q: And you said you raised that with him in this
20 conversation that wasn't recorded?

21 A: Right, yeah.

22 Q: Okay. And did he respond and say anything
23 about ---

24 A: He didn't ---

25 Q: --- no you're not in breach or ---

1 A: No, he claimed that I breached the contract at
2 that point.

3 Q: And this would have been on June 16, 2011?

4 A: As best I recall. It was in that time frame.
5 If not, it's right in that time frame.

6 Q: Okay. And he told you somewhere around that
7 time frame either on June 16 or shortly
8 thereafter that he believed that you had
9 breached the contract because you had purchased
10 infant bags from somebody else?

11 A: I don't recall it being said as infant.

12 Q: Okay. Any ---

13 A: Bags.

14 Q: --- kind of bags?

15 A: Bags.

16 Q: And at that point in time what did you do to
17 try and disabuse him of the notion that you had
18 breached the contract?

19 A: I tried to once again reimburse him for what I
20 felt the only obligation I had in this
21 particular case. I didn't feel it was
22 significant, from the standpoint of who I
23 bought it from as long as the monies were
24 funneled to the right party. It was an
25 insignificant amount.

1 Q: Why didn't you just tell him, I don't believe
2 I'm required to purchase those bags from you?

3 A: Because out of good -- on good conscience I
4 really felt that it was the right thing to do.
5 Whether or not I felt that I was obligated to
6 do it, I thought it was the right thing to do.

7 Q: Okay. At this point in time though you believe
8 that he's trying to get out of this agreement
9 between you and him and therefore get back into
10 the body removal business and compete with you
11 as it relates to the Richland County contract,
12 is that right?

13 A: Yes, sir.

14 Q: And your only reason for not raising with him
15 any of these issues about you're not required
16 under the agreement to purchase those bags from
17 or this is not a breach of the agreement is
18 because you have a good conscience of not
19 wanting to offend him or something?

20 A: I didn't want to offend him. That was never --
21 none of this -- none of my actions were
22 intended to be against Buddy on that part of it
23 ---

24 Q: But at that point in time you believe in your
25 heart and you've already had this discussion

1 with your wife, that Buddy is about to get back
2 in the business and compete with you.

3 A: I hadn't had -- okay, yeah, right. You're
4 right and I believed at that point that he was
5 and until we addressed it yes.

6 Q: Okay. And during that conversation where you
7 address it sometime after June 16 of 2011 you
8 never discuss with him your belief that you are
9 not in breach of the agreement?

10 A: I never said that -- I never admitted to being
11 in a breach of the agreement.

12 Q: That's not my question. My question is did you
13 ever raise to him, based on your belief that
14 he's using this issue of the body bag purchases
15 to get out of the agreement, that that could
16 not constitute a breach of the agreement
17 because you were not obligated to buy those
18 bags from ---

19 A: Between what period, time period?

20 Q: Any time after June 16, 2011 when you had the
21 idea that he was going to use that as an issue
22 to get out of it.

23 A: I did not. I did not bring it up.

24 Q: But you did talk to your wife about it?

25 A: Yes.

1 Q: And you told her that he was, you believe that
2 he was going that specific issue ---

3 A: He was gonna try to use it.

4 Q: And did you talk to anybody else?

5 A: I didn't know what else he would be using to
6 get back into -- to get into it.

7 Q: Did you talk to anybody else about that
8 particular issue other than your wife?

9 A: I don't recall, I don't recall. The lawyer ---

10 Q: You called your lawyer and told him about the
11 rumor or ...

12 A: No. At that point we had already lost the
13 business -- or not -- we hadn't -- no, I'm
14 sorry. We hadn't lost it, because I never got
15 told on it until I think it was the tail end of
16 -- I think it was -- no, it was the first week
17 of September or second -- first, second week of
18 September is when, as best I recall. I don't
19 remember exactly the dates that they announced
20 that.

21 Q: Sometime between June 16, 2011 and September
22 when Richland county announces who won the bid,
23 you don't talk to anybody about whether or not
24 you may or may not be in breach of the
25 agreement?

1 A: I had no reason to bring it up. Other than the
2 question of asking -- being asked how could he
3 bid it. By you name who, I mean it's ---

4 Q: When did you find out that he had in fact bid
5 on the contract?

6 A: Shortly after the contract came out. I don't
7 know how that -- how the -- how it came
8 available to me but someone knew. Through the
9 offices or whatever.

10 Q: And when you found out that he had in fact bid
11 on the contract did you have any conversations
12 with Mr. Knight directly about it?

13 A: Not that I recall.

14 Q: Did you have any further conversations with
15 your wife about him bidding on the contract?

16 A: Yes.

17 Q: And what were those conversations?

18 A: Trying to figure out what we were gonna do
19 next, if we lost it. We had no clue if we were
20 gonna win it or not win it.

21 Q: Did y'all discuss this alleged or perceived
22 breach that you thought Mr. Knight was trying
23 to use against you?

24 A: I'm sure it was brought up.

25 Q: Now, at that point did you seek any legal

1 counsel or other counsel from some professional
2 about whether or not you had breached the
3 contract?

4 A: No, not until July, August. It was in -- I
5 don't know when we first had our conversation.
6 I don't recall the exact date. I have it
7 somewheres, but ...

8 Q: Did you have a conversation -- did you seek an
9 opinion or a consultation about whether or not
10 you were in breach of the agreement prior to
11 Mr. Knight being awarded the contract?

12 A: No.

13 MR. LLOYD: I'm going to step out for second. I'll
14 see if we might be close.

15 MR. PRINGLE: Okay, sure.

16 (A short break was taken at this time.)

17 Q: Just so that I'm sure, Mr. Lintal, the
18 provision in the agreement between you and Mr.
19 Knight that required you to purchase body bags
20 from him, at any time prior to filing this
21 lawsuit, did you seek, after the closing,
22 between the time of the closing and between the
23 time of filing this lawsuit, did you seek legal
24 counsel as it related to the interpretation of
25 what bags you were required to purchase from

1 Mr. Knight?

2 MR. PRINGLE: Object to the form, do not answer the
3 question. That's clearly attorney-client
4 privilege.

5 MR. LLOYD: Well, the -- I'm not asking you what ---

6 MR. PRINGLE: Huh-uh (negative response).

7 MR. LLOYD: --- they told you, I'm asking you ---

8 MR. PRINGLE: No.

9 MR. LLOYD: --- did you seek legal counsel?

10 MR. PRINGLE: No, do not answer the question, we'll
11 seek protective order if we need to on that.

12 MR. LLOYD: We'll move to compel on that at the same
13 time, deal with the protective order on that.

14 MR. PRINGLE: You mean before filing the lawsuit, is
15 that what you're saying?

16 MR. LLOYD: Uh-huh (affirmative response).

17 MR. PRINGLE: You can answer the question.

18 A: Before filing?

19 Q: Your lawsuit.

20 A: Yes.

21 Q: When did you seek legal consultation regarding
22 whether you were required, under that
23 provision, and that provision we're talking
24 about is 3.4.8 Seller's Related Business. At
25 what time period did you seek legal counsel or

1 opinion as to your obligations under that? And
2 again I'm not asking you what the discussion
3 was ---

4 A: The fall, the fall of that year.

5 Q: Of 2011?

6 A: Right.

7 Q: Was that before or after Mr. Knight was awarded
8 the contract?

9 A: I believe ---

10 Q: I'm sorry?

11 A: I believe it was after. Honestly I -- my head
12 is scrambled now.

13 Q: Is there any record that would refresh your
14 memory as to when you sought that counsel? -

15 A: Yeah, I can produce, if need be, the date, the
16 time and whatnot.

17 Q: Well ---

18 A: I don't know what initial -- it was, yeah.

19 Q: Again, I'm not asking you what you discussed
20 with your counsel, don't produce anything like
21 that to me. What I'm asking is is there
22 something you could refer to that would
23 indicate the date or time period that you
24 sought that legal counsel?

25 A: Okay. It was before the contract. Before he

1 was awarded.

2 Q: Okay. And you just looked at ---

3 A: I'm confident that ---

4 Q: --- your time line?

5 A: I'm confident of that, so.

6 Q: Okay. What's in your time line that refreshed
7 your memory?

8 A: I recalled at what point it was.

9 Q: Okay. What point was that?

10 A: It was between June and September on the time
11 line.

12 Q: And was that before or after you learned that
13 Mr. Knight had submitted a bid?

14 A: After.

15 Q: And again, before or after you realized that he
16 was awarded the contract?

17 A: Before.

18 Q: Sometime between ---

19 A: Submission.

20 Q: --- the time submission and the time of award?

21 A: Yes.

22 Q: And again, is there anything between June 16,
23 2011 and the time that you did consult with
24 counsel that at least allowed you to know
25 definitively that Mr. Knight was accusing you

1 of having breached that particular provision of
2 the agreement?

3 A: No.

4 Q: Okay, thank you.

5 **MR. LINTAL - EXAMINATION BY MR. PRINGLE:**

6 Q: Mr. Lintal, there's a lot of discussion about
7 the conversation that took place on or about
8 June the -- and I want to refer to Exhibit One
9 while I'm talking to you -- the June 16th, 2011
10 conversation you had with Mr. Knight, correct?

11 A: Yes.

12 Q: And when did you learn that Mr. Knight had
13 taped that conversation?

14 A: Within the last 60 days, 30 to 60 days.

15 Q: Did you learn about this, that he had taped it
16 before or after I took his deposition?

17 A: After.

18 Q: Okay. And so the tape was made without your
19 consent?

20 A: Yes, it was.

21 Q: Okay. It was never -- Mr. Knight never told
22 you that he was going to tape you?

23 A: No, he didn't.

24 Q: Okay. And there's -- you had a lot of
25 discussion with Mr. Lloyd about a statement of

1 something to the affect that, I didn't know
2 that you could make that bag. Is that a fair
3 characterization of what this discussion was
4 about?

5 A: Yes.

6 Q: About what the discussion was about?

7 A: Yes, yes.

8 Q: Okay. Referring back to that Exhibit, all of
9 that conversation about that bag referred back
10 to January 31st, 2008 or thereabout, after
11 Lexington asked you to find another bag or
12 another solution?

13 A: Yes.

14 Q: So it was all in the context of your having
15 gone to Mr. Knight and telling him that your
16 client needed another solution?

17 A: Yes.

18 Q: Okay. At that time he said it's not worth
19 getting small bags for the few infants that we
20 deal with; correct?

21 A: Yes.

22 Q: At that time he didn't say, oh, I can make one
23 for you?

24 A: No.

25 Q: He didn't say, I can get one for you?

- 1 A: No.
- 2 Q: He responded to your need for bags by saying,
3 it's not worth getting them?
- 4 A: Yes.
- 5 Q: So that was the context about all that?
- 6 A: Yes.
- 7 Q: So in that time, when you needed those bags,
8 when you asked him for a solution for those
9 bags, he -- you didn't know whether he could
10 make the bag?
- 11 A: That's correct.
- 12 Q: Okay. So whether you learned subsequently
13 about whether or not he could make that bag was
14 really immaterial for purposes of when you
15 needed those infant bags?
- 16 A: Yes.
- 17 Q: Okay. And indeed, either the day after or very
18 soon after Mr. Knight surreptitiously and
19 without your consent taped you, he indeed did
20 bid on the Richland County contract?
- 21 A: That's correct.
- 22 Q: The contract that you held?
- 23 A: That's correct.
- 24 Q: The contract that you'd specifically purchased
25 or had assigned from him?

- 1 A: That's correct.
- 2 Q: Okay. The provision that we're talking about
- 3 here, Section 3.4.8, that there's so much
- 4 discussion about seller's related business,
- 5 which party to the contract insisted that that
- 6 provision be in the contract?
- 7 A: What is the provision again?
- 8 Q: The bags, who insisted that they be in the
- 9 contract?
- 10 A: We did.
- 11 Q: You insisted that the provision to buy the body
- 12 bags --
- 13 A: Oh, no, not to buy the body bags, but as far as
- 14 the listing ---
- 15 Q: Okay.
- 16 A: --- of them. Yeah. The provision was his.
- 17 Q: Okay. That you had to buy that from him?
- 18 A: Knights. Right, that was his.
- 19 Q: Okay.
- 20 A: I'm sorry, I misunderstood the question.
- 21 Q: All right. And as you testified earlier the
- 22 things that you were most interested in were
- 23 the length, certainly the price and the length
- 24 of the non-compete?
- 25 A: Certainly.

- 1 Q: Okay. So in each instance, and just go back
2 through your time line and look at your time
3 line with me, you bought infant bags from
4 somebody else because he says it's not worth
5 getting small bags for the few infants that we
6 deal with, correct?
- 7 A: Correct.
- 8 Q: You bought water retrieval bags, six water
9 retrieval bags, because at least your initial
10 understanding was that Buddy didn't have the
11 water retrieval bag any longer?
- 12 A: Right, yes.
- 13 Q: And after you bought those infant bags, I'll go
14 back, but after you bought those infant bags,
15 you continued to buy bags from Buddy Knight?
- 16 A: Yes.
- 17 Q: After you bought the water retrieval bags in
18 February of 2009, you continued to buy bags
19 from Buddy Knight?
- 20 A: Yes.
- 21 Q: Okay. And you continued to buy water retrieval
22 bags from Buddy Knight following that February
23 2009 purchase?
- 24 A: Yes.
- 25 Q: And you offered to reimburse him for the infant

1 bags?

2 A: Yes. And the water retrieval.

3 Q: And the water retrieval bags. You bought some
4 bags in July of 2010. Following that purchase
5 did you continue to buy bags from Buddy Knight?

6 A: Yes.

7 Q: Okay. And what was the total amount, the total
8 price of bags that you bought from suppliers
9 other than Mr. Knight?

10 A: \$885.47.

11 Q: And how does that relate to the total amount,
12 broad brush of bags that you bought from Mr.
13 Knight over the course of the contract?

14 A: Insignificant.

15 Q: Okay. There was some discussion about some
16 bags that you sold to coroners and to funeral
17 homes. The agreement requires -- required that
18 you buy bags from Mr. Knight, doesn't it?

19 A: Yes.

20 Q: It doesn't have any prohibition on selling bags
21 to anyone else?

22 A: No.

23 Q: As long as those are Mr. Knight's bags?

24 A: Correct.

25 Q: Okay. And so whatever bags you may have sold

1 to funeral homes, coroners, the man on the
2 street, or anybody in this room wouldn't be a
3 violation of your agreement with Mr. Knight,
4 would it?

5 A: No.

6 Q: Okay, that's all I have.

7 **MR. LINTAL - RE-EXAMINATION BY MR. LLOYD:**

8 Q: Let's follow up to a couple of questions from
9 Mr. Pringle. By June of 2011, Lexington County
10 Coroner's Office no longer was requiring you to
11 use or provide infant bags, is that right?

12 A: June of 2011?

13 Q: Yes, sir.

14 A: I would not know. I wasn't servicing them at
15 that time.

16 Q: Lexington County you were not servicing at that
17 time?

18 A: No.

19 Q: When did you start servicing Lexington County
20 again?

21 A: 2012, after we bought the Capital business.

22 Q: You stated that that provision regarding the
23 body bag purchasing being all solely from Mr.
24 Knight, you said that they insisted upon that
25 being in the agreement, is that your testimony?

1 A: Yes.

2 Q: Was it your understanding that Mr. Knight never
3 saw that purchase agreement including that
4 provision until he got to the closing?

5 MR. PRINGLE: Object to the form, answer the
6 question.

7 A: Yes.

8 Q: Yes, that was his first time seeing the
9 agreement?

10 A: The actual agreement. My -- I wouldn't know
11 what information he was given by his attorney
12 prior to that one. They were exchanging
13 documents for -- prior to the final day.

14 Q: Who told you that they were exchanging
15 documents with Mr. Knight?

16 A: I believe our lawyer did. I -- my -- by
17 assumption. I mean how else could you come
18 into an agreement without having a document
19 agreed upon?

20 Q: Well, that's a good question, because if Mr.
21 Knight never saw the agreement prior to that,
22 is it still your testimony that he insisted
23 upon the inclusion of that provision?

24 MR. PRINGLE: Object to the form, answer the
25 question.

1 A: I can't -- I don't -- I can't be -- I don't
2 know that he didn't see that before that. I
3 have no knowledge of that.

4 Q: Well, my question is then, where do you get the
5 understanding of what source of information ---

6 A: I don't know.

7 Q: --- that Mr. Knight insisted upon that
8 provision being in the agreement?

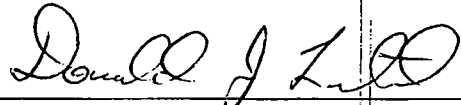
9 A: I can't say that he insisted on it. I would I
10 say that it would have been to his advantage so
11 that would be why I would believe that he was
12 the one that would have wanted it in there.

13 Q: Okay, thank you.

14 (There being no further questions, the deposition
15 concluded at 5:08 p.m.)
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25

SIGNATURE

I have read the foregoing deposition and confirm that it is a true and accurate transcript of my testimony. Any errors I may have noticed have been listed below and returned to the court reporter for checking against the tapes.



DONALD J. LINTAL

Date: 8/29/13

<u>Page</u>	<u>Line</u>	<u>Correction</u>	<u>Reason for Change</u>

*Stands as transcribed. All other corrections are acknowledged and accepted as errors in the transcript. Jennifer Nottle, Court Reporter

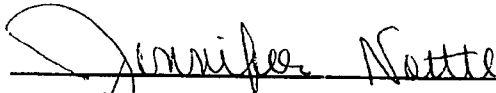
Re: Palmetto Mortuary Transport V. Knight Systems
jn

CERTIFICATE

This is to certify that the deposition of DONALD J. LINTAL, consisting of two hundred eleven (211) pages, is a true and correct transcript of the testimony given by said deponent after being duly sworn; said deposition was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on August 14, 2013.



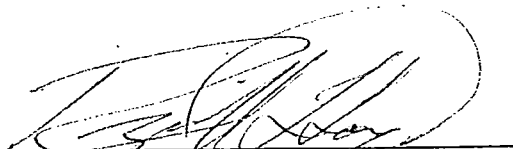
Jennifer Nottle
Court Reporter

Notary Public for South Carolina
My Commission Expires: 7/11/2023

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 22, 2015



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Case No. 2014-001819

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

v.

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

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SC COURT OF APPEALS

TABLE OF CONTENTS

Table of Authorities	3
Statement of Issues on Appeal	8
Statement of the Case	8
Standard of Review	9
Facts	10
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.	19
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.	28
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.	32
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.	36
Conclusion	49

TABLE OF AUTHORITIES

CASES

<i>Almena State Bank v. Enfield</i> , 954 P.2d 724, 727 (Kan. 1998)	47
<i>Application of Caristo Const. Corp.</i> , 30 Misc.2d 185 (N.Y. 1961)	32
<i>Arbor Leasing, LLC v. BTMU Capital Corp.</i> , 68 A.D.3d 580 (N.Y. 2009)	49
<i>Atlantic Coast Builders and Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	33
<i>A.S. Rampell, Inc. v. Hyster Co.</i> , 144 N.E.2d 371 (N.Y. 1957)	48
<i>Baugh v. Columbia Heart Clinic, P.A.</i> , 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)	30
<i>Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC</i> , 762 S.E. 2d 316 (N.C. App. 2014)	20, 21
<i>Board of Ed. of Floyd County v. Hall</i> , 353 S.W.2d 194 (Ky. 1962)	32
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<i>Brazell v. Windsor</i> , 384 S.C. 512, 682 S.E.2d 824 (2009)	42, 43, 44
<i>Buice v. WMA Securities, Inc.</i> , 668 S.E.2d 430 (S.C. Ct.App. 2008)	38
<i>Builders Mut. Ins. Co. v. OakTree Homes, Inc.</i> , 867 F.Supp.2d 800 (D.S.C. 2012)	36
<i>Cafe Associates, Ltd. v. Gerngross</i> , 305 S.C. 6, 406 S.E.2d 162, 164 (1991)	20, 23
<i>Cannon v. Bresch</i> , 160 A. 595, 596 (Pa. 1932)	39
<i>Catawba Indian Tribe of South Carolina v. City of Rock Hill, S.C.</i> , 501 F.3d 368 (4th Cir. 2007)	36
<i>City of Oakland v. California Const. Co.</i> , 104 P.2d 30 (1940)	32
<i>City Nat. Bank of Corpus Christi v. City of Corpus Christi</i> , 233 S.W. 375 (Tx. 1921)	35
<i>Clardy v. Bodolosky</i> , 383 S.C. 418, 679 S.E.2d 527 (Ct.App. 2009)	9

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<i>Davis v. Davis</i> , 372 S.C. 64, 641 S.E.2d 446 (Ct. App. 2006)	37
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<i>Dexter v. Brake</i> , 269 P.3d 846, 856 (Kan. 2012)	47
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<i>Donahue v. Multimedia, Inc.</i> , 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005)	37
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<i>Friarsgate, Inc. v. First Federal Sav. and Loan Ass'n of South Carolina</i> , 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995), <i>reh'g denied</i> (Mar. 16, 1995)	36
<i>Gen. Datacomm Indus., Inc. v. Arcara</i> , 407 F.3d 616 (3rd. Cir. 2005)	47
<i>Hagemeyer North America Inc. v. Thompson</i> , 2006 WL 516733 (D.S.C. 2006)	20
<i>Hartman v. W.H. Odell & Associates, Inc.</i> , 450 S.E.2d 912 (N.C. App. 1994)	22, 24
<i>Heid Bros. v. Riesto</i> , 281 S.W. 638 (Tx. 1926)	34
<i>Heins v. Heins</i> , 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001)	37
<i>In re Hawker Beechcraft, Inc.</i> , 486 B.R. 264 (S.D.N.Y 2013)	46
<i>In re Krueger</i> , 192 F.3d 733 (7th Cir. 1999)	41
<i>In re Velo Holdings, Inc.</i> , 475 B.R. 367 (S.D.N.Y. 2012)	49
<i>Jespersen v. Minnesota Mining and Manuf. Co.</i> , 700 N.E.2d 1014 (Ill. 1998)	48

<i>Jordan v. Security Group, Inc.</i> , 311 S.C. 227, 428 S.E.2d 705 (1993)	37
<i>Keefer v. Keefer</i> , 394 S.C. 329, 715 S.E.2d 379 (Ct. App. 2011)	38
<i>Kimball Elevator Co., Inc. v. Elevator Supplies Co., Inc.</i> , 272 P.2d 583 (Utah 1954)	35
<i>Knox Jewelry Co., Inc. v. Cincinnati Insurance Co.</i> , 203 S.E.2d 739 (Ga. 1974)	39
<i>Laser Supply and Services, Inc. v. Orchard Park Associates</i> , 676 S.E.2d 139 (S.C. Ct.App. 2009)	38
<i>Lowcountry Open Land Trust v. Charleston Southern University</i> , 656 S.E.2d 775 (S.C. Ct. App. 2008)	37
<i>MailSource, LLC v. M.A. Bailey & Assoc.</i> , 356 S.C. 363 S.E.2d 635 (Ct.App. 2003)	9
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<i>Metts v. Wenberg</i> , 158 S.C. 411, 155 S.E. 734 (1930)	23
<i>Mid-Continent Refrigerator Co. v. Way</i> , 262 S.C. 101, 208 S.E.2d 31 (1974)	15
<i>Middleton v. Eubank</i> , 388 S.C. 8, 694 S.E.2d 31 (Ct. App. 2010)	38
<i>Milliken & Co. v. Morin</i> , 399 S.C. 23, 731 S.E.2d 288 (2012)	33
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<i>Re Salmon</i> , 145 Fed. 649 (D.C. 1906)	35
<i>Reeves v. Sargeant</i> , 200 S.C. 494, 21 S.E.2d 184 (1942)	23
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<i>Richmond Co., Inc. v. Rock-A-Way, Inc.</i> , 404 So.2d 121 (Fla. 1981)	34
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<i>Stevens Aviation, Inc. v. DynCorp Intern. LLC</i> , 394 S.C. 300, 715 S.E.2d 655 (Ct. App. 2011)	38
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<i>Team IA, Inc. v. Lucas</i> , 395 S.C. 237, 717 S.E.2d 103 (2011)	26, 27

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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.¹ 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,

¹ 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, R.p. 32, 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*, R.p. 372 - 388. 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*, R.p. 385 - 388. 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*, R.p. 375 (Section 3.4.8 Seller's Related Business). At the January 5, 2007 closing, the Parties also executed a Non-Competition Covenant. *See*, R.p. 394 - 400 (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. R.p. 396. 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." R.p. 397 (Section F Exceptions). 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." R.p. 397 (Section G).

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. R.p. 125, lines 19-23. 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. R.p. 187, lines 21-25; p. 188, lines 1-25; p.194, lines 24-25; p. 195, lines 1-4; p. 270, lines 17-25; p. 271, lines 1-18; p. 303, lines 20-25; p. 304, lines 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).² See, R.p. 388 (Exhibit 2.3 Purchase Price Allocations attached to Asset Purchase Agreement); *see also*, R.p. 202, p. 203, lines 1-10; p. 261, lines 3-13; p. 305, lines 19-22. Both the Lintals and Buddy Knight

² 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.

testified that the Parties had no 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. R.p. 260, lines 9-25; p. 261-265, lines 1-19; p. 270, lines 12-16; p. 303, lines 10-16.³ 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. R.p. 262, lines 13-20; p. 286, lines 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. R.p. 286, lines 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. R.p. 130, lines 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. R.p. 179, lines 6-25; p. 180, lines 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. R.p. 208, lines 12-15.⁴ Mr. Lintal further testified that

³ 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, R.p. 181, lines 5-8.

⁴ Buddy Knight also testified that Knight Systems, Inc. primarily provided body removal and transportation services only in Lexington and Richland Counties. R.p. 297, lines 19-25.

the intent and affect of including a non-compete agreement within a 150 mile radius from Lexington County was to prevent Appellantss from competing against Palmetto Mortuary anywhere within the State of South Carolina. R.p. 208, lines 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, R.p. 208 - 210. 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.

R.p. 166, line 10-24; p. 167, lines 10-12; p. 293, lines 6-22.⁵ 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.⁶ R.p. 293, lines 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 lines 19-22.⁷

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:

⁵ 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. R.p. 294, lines 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. R.p. 178, lines 11-24.

⁶ 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*, R.p. 177, lines 19-25; p. 178, lines 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).

⁷ 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. R.p. 290, lines 14-23; p. 291, lines 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. R.p. 150, lines 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.⁸ R.p. 149, lines 22 - 25; p. 153, lines 14-16.⁹ 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

⁸ 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.

⁹ 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. R.p. 213, lines 2-25; p. 214 - 220; p. 324, lines 13-25; p. 325 - 329; p. 330, lines 1-2.

Agreement to purchase infant body bags from Knight. 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. R.p. 333, lines 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.¹⁰ R.p. 153, line 25; p. 154 - 155, lines 1-25. 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. R.p. 156, lines 2-11.¹¹ Palmetto Mortuary paid a total price of \$280.00 for the ten body bags purchased from Medical Products Limited. R.p. 157, lines 21-25; p. 158, line 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

¹⁰ Respondent's Exhibit 4 states that Palmetto Mortuary purchased the six water retrieval bags from Evident on or about March 6, 2009. See, R.p. 453.

¹¹ 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.¹² 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. R.p. 176, lines 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 lines 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. R.p. 177, lines 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. R.p. 274, lines 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. R.p. 274, lines 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

¹² 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.

reach a resolution of this potential dispute between the Parties. R.p. 275, lines 2-14. 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, R.p. 388. 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.*¹³

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

¹³ 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.

those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *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 Spécial 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.¹⁴ 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

¹⁴ See, R.p. 208, lines 1-25; p. 209, lines 1-15.

restriction with one of its own). A critical examination and strict construction of the non-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.¹⁵

¹⁵ See, R.p. 208 - 209.

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, R.p. 14, ¶ 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.¹⁶ Both rationales employed by the trial court are insufficient grounds to uphold the extraordinary territorial limitations of the non-compete. See, *Team 1A, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103, 107 (Ct. App. 2011) (geographic restriction generally considered reasonable if the

¹⁶ 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, R.p. 15, 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.¹⁷ *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.'" ¹⁸*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,

¹⁷ 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).

¹⁸ "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.*¹⁹

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

¹⁹ 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.²⁰ 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.²¹ 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.

²⁰ 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, R.p. 262, lines 21-25; p. 263, line 1.

²¹ 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.²² 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

²² "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.²³

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

²³ "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).²⁴

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

²⁴ 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.²⁵ 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*.²⁶

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

²⁵ 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).

²⁶ 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.²⁷

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, R.p. 375 (Section 3.4.8).²⁸

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

²⁷ See e.g., R.p. 324, lines 18-25 (Knight explaining that he manufactures bags and can make any type of body bag).

²⁸ 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."²⁹ 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. R.p. 375 (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., R.p. 153, line 25 - p. 154, lines 1-5; p. 154, lines 24-25; p. 155, lines 1-25; p. 156, lines 1-11. However, Respondent argues that its admitted breaches of the Asset Purchase Agreement were not "material" breaches of the Agreement.³⁰ Ordinarily, a nonperforming party is liable for breach of

²⁹ 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 Appellant's interpretation of the section. See, *Mathis v. Brown*, 698 S.E.2d 773 (S.C. 2010).

³⁰ 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, R.p. 153, lines 21 - 25; p. 154; p. 156, lines 4-23; p. 160, lines 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.

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.³¹ "[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

³¹ 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 "Transactions Subsequent to Closing." *See*, R.p. 374 (Section 3.4.8). 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.³² 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 827.³³ 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

³² 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.

³³ 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, R.p. 176, lines 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. R.p. 275, lines 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, R.p. 394 - 397. 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 non-breaching 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 874.³⁴ 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,

³⁴ 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)³⁵; *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

³⁵ 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).

the restrictions imposed by the non-compete agreement. See, R.p. 397.³⁶ 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, R.p. 325 - 329.³⁷ 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. R.p. 327, lines 4-9; see also R.p. 325 - 329. 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.³⁸ These Parties' termination clause, as expressed in the Non-Competition Covenant, "should be examined to determine

³⁶ 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).

³⁷ 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.

³⁸ 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. McReil 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.³⁹ 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

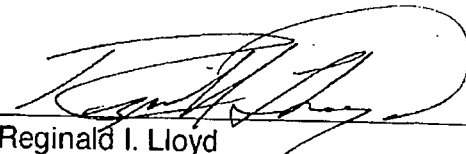
For the reasons stated herein, the Court of Appeals should find in favor of the Appellants and reverse the judgment of the Special Referee/Master. The Court should

³⁹ 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,

January 29, 2015



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Appellate Case No. 2014-001819

Palmetto Mortuary Transport, Inc. Respondent

v.

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

BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	9
ARGUMENTS.....	11
I. THE PARTIES' NON-COMPETE AGREEMENT IS ENFORCEABLE.....	12
A. <i>The Non-Compete Agreement Was Negotiated by the Parties as Part of the Sale of a Business—Not in an Employment Context.</i>	12
B. <i>The Non-Compete Agreement is supported by valuable consideration.</i>	14
C. <i>The Non-Compete Agreement is reasonably limited in time and geographic scope.</i>	21
D. <i>The Non-Compete Agreement is not void against public policy.</i>	27
II. PALMETTO MORTUARY'S CONDUCT DID NOT CONSTITUTE A MATERIAL BREACH OF THE PARTIES' AGREEMENT SUCH THAT KNIGHT WAS EXCUSED FROM PERFORMANCE OF ITS CONTRACTUAL OBLIGATIONS.....	34
A. <i>The Special Referee's interpretation of the Exclusivity Provision in the parties' Agreement was reasonable and should be upheld.</i>	34
B. <i>Palmetto Mortuary's breaches of the Exclusivity Provision were not material.</i>	36
CONCLUSION.....	43

TABLE OF AUTHORITIES

Cases

<i>Aaron v. Mahl</i> , 381 S.C. 585, 674 S.E.2d 482 (2009)	42
<i>Ackerman v. McMillan</i> , 314 S.C. 268, 442 S.E.2d 618 (Ct. App. 1994)	37
<i>Almers v. S.C. Nat. Bank of Charleston</i> , 265 S.C. 48, 217 S.E.2d 135 (1975)	27
<i>Alston Studios, Inc. v. Lloyd v. Gress and Associates</i> , 492 F.2d 279 (4th Cir. 1974)	13
<i>American Hot Rod Ass'n, Inc. v. Carrier</i> , 500 F.2d 1269 (4th Cir. 1974)	13
<i>Arnold v. City of Spartanburg</i> , 201 S.C. 523, 23 S.E.2d 735 (1943)	42
<i>ATC South, Inc. v. Charleston County</i> , 380 S.C. 191, 669 S.E.2d 337 (2008)	29
<i>Atwood Agency v. Black</i> , 374 S.C. 68, 646 S.E.2d 882 (2007)	10
<i>Bailey v. Bailey</i> , 312 S.C. 454, 441 S.E.2d 325 (1994)	28
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999)	28
<i>Baugh v. Columbia Heart Clinic, P.A.</i> , 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)	19, 20
<i>Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC</i> , 762 S.E.2d 316 (N.C. 2014)	25, 26
<i>Brazell v. Windsor</i> , 384 S.C. 512, 682 S.E.2d 824 (2009)	37
<i>Brock v. Bennett</i> , 313 S.C. 513, 443 S.E.2d 409 (Ct. App. 1994)	28
<i>C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n</i> , 296 S.C. 373, 373 S.E.2d 584 (1988)	35
<i>Cafe Assocs., Ltd. v. Gerngross</i> , 305 S.C. 6, 406 S.E.2d 162 (1991)	27
<i>Campbell v. Carr</i> , 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004)	15, 16
<i>Carolina Chemical Equipment Co., Inc. v. Muckenfuss</i> , 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996)	27
<i>Childress v. C.W. Myers Trading Post, Inc.</i> , 100 S.E.2d 391 (1957)	37
<i>City Nat. Bank of Corpus Christi v. City of Corpus Christi</i> , 233 S.W. 375 (Tex. App. 1921)	31, 32
<i>Day Companies v. Patat</i> , 403 F.2d 792 (5th Cir. 1968)	13
<i>Ellie, Inc. v. Miccichi</i> , 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)	36, 38
<i>Gibbs v. G.K.H., Inc.</i> , 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993)	37
<i>Gibbs v. Kimbrell</i> , 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993)	10
<i>Gilley v. Gilley</i> , 327 S.C. 8, 488 S.E.2d 310 (1997)	10
<i>Goree v. Wilson</i> , 17 S.C. L. 597 (S.C. Eq. 1830)	18
<i>Hagemeyer North America, Inc. v. Thompson</i> , 2:05-3425, 2006 WL 516733 (D.S.C. Mar. 1, 2006)	13, 24
<i>Harris Teeter, Inc. v. Moore & Van Allen, PLLC</i> , 390 S.C. 275, 701 S.E.2d 742 (2010)	39
<i>Hawkins v. Greenwood Development Corp.</i> , 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)	36
<i>In re Krueger</i> , 192 F.3d 733 (7th Cir. 1999)	37

<i>In re Nightingale's Estate</i> , 182 S.C. 527, 189 S.E. 890 (1937).....	36
<i>Ingram v. Kasey's Associates</i> , 340 S.C. 98, 531 S.E.2d 287 (2000)	42
<i>Jackson v. Carter</i> , 128 S.C. 79, 121 S.E. 559, 563 (1924).....	18
<i>Kiriakides v. United Artists Comm'n</i> , 312 S.C. 271, 440 S.E.2d 364 (1994).....	38
<i>Koontz v. Thomas</i> , 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999).....	16
<i>Laidlaw, Inc. v. Student Transp. of America, Inc.</i> , 20 F.Supp.2d 727 (D.N.J. 1998).....	32, 33
<i>Ledford v. Pa. Life Ins. Co.</i> , 267 S.C. 671, 230 S.E.2d 900 (1976).....	10
<i>Lowery v. Callahan</i> , 210 S.C. 300, 42 S.E.2d 457 (1947).....	15
<i>Lyles v. Williams</i> , 96 S.C. 290, 80 S.E. 470 (1913).....	10
<i>Madden v. Bent Palm Investments, LLC</i> , 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010)	9
<i>Mailsources, L.L.C. v. M.A. Bailey & Assocs.</i> , 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003)	10
<i>Metts v. Wenberg</i> , 158 S.C. 411, 155 S.E. 734 (1930)	14, 21
<i>Moser v. Gosnell</i> , 334 S.C. 425, 513 S.E.2d 123 (Ct. App. 1999).....	16
<i>Newman v. Sablosky</i> , 407 A.2d 448 (Pa. 1979).....	18
<i>Norlund v. Faust</i> , 675 N.E.2d 1142 (Ind. App. 1997).....	33
<i>Park Regency, LLC v. R&D Development of the Carolinas, LLC</i> , 402 S.C. 401, 741 S.E. 528 (Ct. App. 2012).....	16
<i>Poole v. Incentives Unlimited, Inc.</i> , 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999)	20
<i>Poole v. Incentives Unlimited, Inc.</i> , 345 S.C. 378, 548 S.E.2d 207 (2001).....	13, 20
<i>Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship</i> , 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998)	15
<i>Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n</i> , 343 S.C. 335, 540 S.E.2d 843 (2001)	35
<i>Reeves v. Sargeant</i> , 200 S.C. 494, 21 S.E.2d 184 (1942).....	14, 21, 22
<i>Richardson v. Paxton Co.</i> , 127 S.E.2d 113 (Va. 1962)	13
<i>Rogers v. Salisbury Brick Corp.</i> , 299 S.C. 141, 382 S.E.2d 915 (1989)	37
<i>Schulmeyer v. State Farm Fire and Cas. Co.</i> , 353 S.C. 491, 579 S.E.2d 132 (2003)	35
<i>Shayne of Miami, Inc. v. Greybow, Inc.</i> , 232 S.C. 161, 101 S.E.2d 486 (1957).....	15
<i>Sloan v. School Dist. of Greenville County</i> , 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)	27, 28, 29
<i>Somerset v. Reyner</i> , 233 S.C. 324, 104 S.E.2d 344 (1958).....	14, 22, 23
<i>South Carolina Finance Corp. of Anderson v. West Side Finance Co.</i> , 236 S.C. 109, 113 S.E.2d 329 (1960)	14, 21, 27
<i>Spokane Sav. & Loan Soc. v. Park Vista Imp. Co.</i> , 294 P. 1028 (Wa. 1930).....	30, 31
<i>Standard Register Co. v. Kerrigan</i> , 238 S.C. 54, 119 S.E.2d 533 (1961)	26
<i>Stanley v. Atlantic Title Ins. Co.</i> , 377 S.C. 405, 661 S.E.2d 62 (2008)	35
<i>Stringer v. Herron</i> , 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).....	13
<i>Team IA, Inc. v. Lucas</i> , 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011).....	13

<i>Temple v. Tec-Fab, Inc.</i> , 381 S.C. 597, 675 S.E.2d 414 (2009)	9
<i>Uniform Serv. of Florence, Inc. v. Dudley</i> , 278 S.C. 674, 301 S.E.2d 142 (1983)	13
<i>Wachovia Bank, N.A. v. Coffey</i> , 404 S.C. 421, 746 S.E.2d 35 (2013)	42
<i>Weiner v. McGraw-Hill, Inc.</i> , 57 N.Y. 2d 458 (N.Y. 1982)	15
<i>Willms Trucking Co., Inc. v. JW Construction Co., Inc.</i> , 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994)	36

Other Authorities

1A C.J.S. <i>Actions</i> § 183	10
36 Am. Jur., <i>Monopolies, Combinations, and Restraints of Trade</i> , §§ 52, 53, 54, 55, 56	14
54A Am. Jur. <i>Monopolies and Restraints of Trade</i> § 247 (2005)	13
Restatement (Second) of Contracts § 241 (1981)	38, 41
<i>Williston on Contracts</i> § 63:3	36, 37

STATEMENT OF THE CASE

This case was initiated by Palmetto Mortuary Transport, Inc. ("Palmetto Mortuary") on October 26, 2011 against Knight Systems, Inc. ("Knight Systems") and Robert L. Knight (Knight Systems and Knight collectively referred to as "Knight"). The case arises out of Knight's sale of its mortuary transport business to Palmetto Mortuary pursuant to an Asset Purchase Agreement ("APA") executed on January 5, 2007. (R. pp. 372-407.)

Palmetto Mortuary claimed that Knight breached the APA in the following ways: (i) violating the "Non-Competition Covenant" (the "Non-Compete Agreement") contained in the APA at Exhibit 3.2.6 by submitting a response to a request for proposal ("RFP") for body removal services issued by Richland County, South Carolina (R. p. 40-47 at ¶¶ 12, 17-19); (ii) violating Section 3.4.8 (the "Exclusivity Provision") of the APA by refusing to sell certain body bags to Palmetto Mortuary and preventing Palmetto Mortuary from satisfying the RFP's requirement to provide "odor-proof body bags." (*Id.* at ¶¶ 11-16, 19, 20-23.) Palmetto Mortuary sought monetary damages and injunctive relief as provided by the APA. (*Id.*)

Knight asserted in its Answer that the Non-Compete Agreement was unenforceable due to an alleged unreasonable geographic scope and time length and lack of adequate consideration. (R. pp. 57 at ¶ 36 – p. 58 at ¶ 38 (Appendix).) Knight also asserted a counter-claim for breach of contract. (*Id.* at ¶¶ 39-43.) At trial, Knight also claimed that the Non-Compete Agreement violated public policy as it placed an unreasonable restraint on competition for public contracts. (R. p. 66-82 (Proposed Order submitted by Knight).) Knight furthermore alleged that its breaches of the APA were

justified by Palmetto Mortuary's alleged previous breaches of the Exclusivity Provision because Palmetto Mortuary purchased body bags from sellers other than Knight Systems. (R. p. 58 at ¶¶ 39-43 (Appendix) ("Plaintiff's breach of the agreement with Defendants negated all terms, conditions and responsibilities of the Defendants under the Asset Purchase Agreement and the Non-Compete Agreement").)

By consent of the parties, the case was referred to a court-appointed Special Referee/Master, James Randall Davis ("Special Referee" or "trial court"). The case was tried on December 18, 2013. Both parties submitted proposed orders following the trial. On July 22, 2014, the Special Referee held that the Non-Compete Agreement was not unreasonably expansive in time or scope and was supported by adequate consideration. (R. pp. 3-15 at ¶¶ 1-31.) The Special Referee concluded that Knight breached the APA by withdrawing odor-proof body bags from the market in violation of the Exclusivity Provision and by submitting a response to an RFP for mortuary transport services with Richland County, thereby violating the express terms of the Non-Compete Agreement (R. pp. 15-18 at ¶¶ 32-41); that Palmetto Mortuary's purchases of body bags from other sellers was not a material breach justifying Knight's repudiation of the APA (R. pp. 18-29 at ¶¶ 42-70); and that Palmetto Mortuary was entitled to actual damages, injunctive relief, and attorneys' fees and costs as provided by the APA (R. pp. 29-33 at ¶¶ 71-84).

STATEMENT OF FACTS

A. THE ASSET PURCHASE AGREEMENT ("APA")

In October of 2006, Donald and Ellen Lintal met with a broker regarding the purchase of Knight's mortuary transport business which had been advertised by Knight for sale. (R. p. 268, lines 2-9.) Shortly after meeting with their broker, in November of

2006, Mr. and Mrs. Lintal visited with Knight and looked at Knight System's business location for the purpose of informing the Lintals' final valuation of the business. (R. p. 268, lines 17-24; page 269, lines 3-13.) From November of 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the APA. (R. p. 239, line 11 – p. 240, line 15; p. 244, line 4 – p. 245, line 14; p. 302, lines 5-9; p. 349, line 20 – p. 353, line 19.) During that time, on December 14, 2006, Palmetto Mortuary's counsel sent a draft ten-year covenant not to compete to Knight's counsel which was intended by both parties to be included in the final APA. (R. p. 260, lines 9-12.)

Closing took place on January 5, 2007. (R. pp. 372-407.) At the closing, the parties for the first time allocated dollar amounts to each of the APA's provisions, including the Non-Compete Agreement. (R. p. 202, lines 5-13; p. 202, line 25 – p. 203, line 10.) Mrs. Lintal testified that prior to closing, she "had discussions with our attorney and we were working with [Knight's attorney] to get an allocation of assets, because that was never put in the document prior to closing. [I] wanted it in . . . because I wanted to review it. It never got accomplished until we sat down at closing." (R. p. 261, lines 3-8.) There is no dispute that until closing no dollar figure was specifically assigned to the Non-Compete Agreement. (R. p. 260, lines 13-22.)

Mrs. Lintal testified, and Mr. Knight conceded, that the \$1,000 allocation ultimately attributed to the Non-Compete Agreement was primarily driven by Knight at the instruction of its accountant. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-15.) Both Mrs. Lintal and Mr. Knight testified that Mr. Knight wanted to allocate \$1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize

their potential capital gains tax. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)¹ After collectively determining what allocation was best for the parties, following the advice of their agents, the parties executed the APA. (R. p. 286, lines 13-16 (Mrs. Lintal testified that negotiations were “a give and take”); R. p. 306, lines 4-20 (Mr. Knight testified that “there was some discussion” regarding negotiating the amount allocated to the Non-Compete Agreement, but that he did not remember what it was); R. p. 354, lines 1-13 (same).)

Knight admitted that he “appeared at the closing [with his attorney] and . . . read the documents at closing.” (R. p. 350, lines 1-6; p. 353, lines 16-19.) Mr. Knight further testified that “after th[e] discussion about the \$1,000 that’s mentioned as the consideration for the covenant not to compete, [he] did[] [not] object to that provision or any provision of either agreement at the closing.” (R. p. 353, lines 20-25.) The parties executed the APA on January 5, 2007 at the closing. (R. pp. 372-407.)

Pursuant to the final version of the APA, Palmetto Mortuary purchased, among other assets specified in Section 1: tangible assets (R. p. 372 at Section 1.1.1.1), goodwill (R. p. 372 at Section 1.1.1.6), and customer records, lists, and contracts (R. p. 372 at Section 1.1.1.3) associated with Knight’s mortuary transport business (the “Business”). Three contracts were among the assets transferred to Palmetto Mortuary pursuant to the APA: (1) Contract with Richland County for body removal services; (2) Contract with Lexington County for body removal services; (3) Contract with the University of South Carolina for cadaver preparation and transportation services. (R. p. 386 at Exhibit 1.1.1.3). Palmetto Mortuary did not purchase any assets associated with Knight’s body

¹ Mrs. Lintal testified that part of Palmetto Mortuary’s goal was to minimize the amount allocated to goodwill for the same reason. (R. p. 283, line 10 – p. 285, line 1.)

bag business (the "Related Business"). (R. pp. 372-407.) Palmetto Mortuary also obtained mutual covenants from Knight, including a ten-year Non-Compete Agreement which is set forth in Exhibit 3.2.6 to the APA. (R. p. 394 at Exhibit 3.2.6.) The Non-Compete Agreement placed no restrictions or limitations on Knight's body bag business.

In exchange for the assets and other contractual terms specified in the APA, including the Non-Compete Agreement, Palmetto Mortuary was obligated to and did pay Knight a purchase price of Five Hundred and Ninety Thousand Dollars (\$590,000.00). (R. pp. 372-407; R. p. 128, lines 8-12.)

Additionally, the APA obligated Palmetto Mortuary to purchase four types of body bags from Knight Systems. (R. p. 375 at § 3.4.8.) The types of bags identified in Section 3.4.8 of the APA (the "Exclusivity Provision") include: (1) heavy duty body bags, (2) lightweight body bags, (3) odor-proof body bags, and (4) water-retrieval body bags. (*Id.*) Plaintiff agreed to purchase the four stated body bags from Defendants for the ten-year term of the Non-Compete Agreement. (*Id.*; *see also* R. p. 131, lines 18-22.)

B. THE DISPUTE

The subject dispute began in early 2011, when Richland County issued a Request for Proposal ("RFP") seeking responses to an RFP to provide mortuary transport services for a period of five years. (R. p. 160, lines 5-9; p. 161, lines 16-22; p. 163, lines 4-7; p. 165, lines 6-8, 21-24.) At that time, Palmetto Mortuary held the mortuary transport services contract with Richland County as a result of the APA. (R. p. 162, line 24 – p. 163, line 3; p. 165, line 18 – p. 166, line 5.) The deadline for submission of responses to an RFP to Richland County was June 17, 2011 at 3:00pm. (R. p. 162, lines 12-22).

Palmetto Mortuary prepared a response to an RFP and timely submitted it for the County's consideration. (R. p. 163, lines 4-5.)

On June 16, 2011, one day before the responses to the RFP were due, Mr. Knight tape-recorded a conversation he had with Mr. Lintal ("Tape Recording"). (R. p. 163, line 8 – p. 164, line 7; p. 315, line 18 – p. 316, line 15.) At the time of the conversation, Mr. Lintal was not aware that he was being recorded. (R. p. 163, line 17.) Throughout the tape-recorded discussion, Mr. Knight repeatedly referenced "infant body bags" that Palmetto Mortuary had allegedly purchased from another vendor in 2008, nearly three years prior to the tape-recorded conversation. (R. p. 164, line 14 – p. 165, line 5; p. 324, line 14 – p. 325, line 12.) In response to the allegations, Mr. Lintal stated that he did not believe his purchases of body bags from other manufacturers were "significant," specifically stating that he was "not trying to breach" the parties' Agreement. (R. p. 325, lines 11-14, 19; p. 327, lines 5-9; p. 327, line 19 – p. 328, line 9; p. 329, lines 18-24.)

Palmetto Mortuary's previous purchases of body bags from manufacturers other than Knight can be summarized as follows:

1. Palmetto Mortuary purchased one infant body bag from Southland Medical Corporation on or about April 3, 2008 for the purchase price of \$5.25, and on April 9, 2008 purchased one case containing thirty infant bags for a total price of \$187.50. (R. p. 149, line 22 – p. 150, line 12; *see also* R. p. 449.)
2. Mr. Lintal testified that after receipt of the first infant body bag (a "pediatric" size bag) and demonstration to the Lexington County Coroner, he purchased thirty of the larger sized infant bags. "[W]e, being Randy Martin and myself, [determined] that the larger size would be more versatile for [our] use." (R. p. 153, lines 7-13.)
3. On March 6, 2009, Palmetto Mortuary purchased six water-retrieval bags from Evident at a purchase price of \$45.00 a piece, for a total of \$270.00. (R. p. 153, line 25 – p. 154, line 5; p. 154, line 24 – p. 155, line 23.)

4. On July 14, 2010, Palmetto Mortuary purchased a total of ten body bags from Medical Products Limited, including four extra-large body bags, and six heavy-duty body bags. (R. p. 156, lines 2-11.) The total purchase price for the bags from Medical Products Limited was \$208.50. (R. p. 157, line 21 – 158, line 1.)

The amount of bags purchased by Palmetto Mortuary from sources other than Knight Systems totaled Eight Hundred and Eighty-Four Dollars and Ninety-Seven Cent (\$884.97). (R. p. 158, lines 9-17.) This amount includes thirty-one (31) infant bags at a total price of 192.75, four (4) extra-large body bags at a price of \$213.72, six (6) heavy duty body bags at a total price of \$208.50, and six (6) water-retrieval bags at a total price of \$270.00. (R. p. 152, lines 5-25; p. 153, line 21 – p. 154, line 6; p. 156, lines 4-23.) Because infant and extra-large body bags are not within the types of bags that Palmetto Mortuary was required to purchase from Knight pursuant to Section 3.4.8 of the APA, Palmetto Mortuary's purchases of such bags did not breach the contract. The total amount Palmetto Mortuary paid for bags that were included in the Exclusivity Provision was Four Hundred Seventy-Eight Dollars and Fifty Cents (\$478.50). (R. p. 153, line 21 – p. 154, line 10; p. 156, lines 4-23.)

During the recorded conversation, Mr. Lintal assured Mr. Knight: "If you're willing to make [infant body bags], I'm going to order them." (R. p. 329, lines 18-24.) Mr. Knight responded: "I can make them." (R. p. 329, line 25.) It is undisputed that from January 2007 to June 2011, Palmetto Mortuary purchased more than \$45,000.00 worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-448.) These purchases from Knight were before, during, and after, Palmetto Mortuary's alleged purchases from other manufacturers. After Palmetto Mortuary purchased body bags from other manufacturers, Palmetto Mortuary continued to purchase body bags from Knight Systems. (*Id.*)

At no point during the tape recorded conversation did Knight inform Mr. Lintal that he intended to submit a response to the RFP in competition with Palmetto Mortuary. (R. p. 335, lines 1-6, 18-23.) Following the parties' conversation on June 16, 2014, Mr. Knight met with his attorney and prepared a response to the Richland County RFP. (R. p. 336, lines 4-22.) Mr. Knight testified that he felt that if he did not submit a competing response against Palmetto Mortuary he would be "left out in the cold." (R. p. 337, lines 6-22.) Knight submitted a competing response on June 17, 2011. (R. p. 344, line 22 – p. 345, line 11.)

After the RFP closed on June 17, 2011, Mr. Knight emailed Ms. Christie Swofford at the Richland County Procurement Office, seeking a determination that Knight Systems be chosen to provide mortuary transport services because Knight System was the alleged "sole provider" of odor-proof body bags required by the RFP. (R. p. 166, line 6 – p. 168, line 13; p. 241, lines 14-24; p. 346, line 14 – p. 347, line 25.) There is no dispute that Richland County required odor-proof bags as part of the RFP.

Mr. Knight stated in his email to Richland County that he was taking all of his odor-proof bags off of the market, despite the Exclusivity Provision's requirement in the APA that Knight Systems provide "odor-proof body bags" to Palmetto Mortuary. (R. p. 375 at § 3.4.8.) At that time, Mr. Lintal, "was [not] aware of" needing any alternative to an odor proof bag for his response to Richland County "[b]ecause [he] still was under the existing contract . . . with Knight Systems." (R. p. 240, line 24 – p. 241, line 1.) The referenced contract, the APA, gave Palmetto Mortuary "the rights to buy th[e] odor proof bag [from Knight], as well as these other[] [types] of bags" in Section 3.4.8 of the Agreement. (R. p. 241, lines 2-5.)

Palmetto Mortuary submitted a response to the RFP with the lowest price for services and received the highest total of points from the Richland County Procurement Office as part of the review of the RFP. (R p. 225, lines 1-14; p. 168, lines 14-25; p. 241, lines 2-24.) Nevertheless, Richland County selected Knight Systems for the five-year contract. (*Id.*) There is evidence in the record supporting the contention that without Knight's assertion to Ms. Swofford that Knight Systems was the sole provider of odor-proof body bags, the Richland County contract would have been awarded to Palmetto Mortuary. (*Id.*)

STANDARD OF REVIEW

"A breach of contract is an action at law." *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010) (citations omitted). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors at law." *Id.* (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009)). Therefore, an appellate court should "not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.*

This action does not involve a request for "specific performance." (*See* Appellant's Brief at p. 9.) Rather this action only involves causes of action for (1) breach of contract and (2) breach of contract accompanied by a fraudulent act.² (R. pp. 40-47.) Palmetto Mortuary's claim to entitlement to both monetary damages and injunctive relief is based on explicit remedies provided by the parties' Agreement. (R. p. 375 at § 3.2.6 (3).) "The character of an action at law is not changed by the fact that a plaintiff also

² Palmetto Mortuary did not proceed with its third cause of action for tortious interference with prospective contractual relationship.

seeks relief by injunction, merely as an ancillary remedy” 1A C.J.S. *Actions* § 183 (citations omitted).³

“The remedy of injunction rests in the sound discretion of the trial court.” *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993). Such relief should “not be overturned unless the order is clearly erroneous.” *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 824 (2007) (citations omitted). “Clearly erroneous” is the hallmark of the “abuse of discretion” standard of appellate review. *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470, 471 (1913). The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. *Gilley v. Gilley*, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *Mailsources, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). An abuse of discretion occurs in one of two circumstances: “(1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support.” *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

The standard of review allowing this Court to “find facts based on its own view of the preponderance of the evidence,” (*see* Appellant’s Brief at pp. 9-10) is not applicable in this case because the case involves only an action at law.

³ The Special Referee ruled: “In this case, the award of a permanent injunction is necessary to give the Plaintiff the benefit of its bargain and to ensure Defendants’ compliance with the Non-Compete Agreement. Although monetary damages are sufficient to put Plaintiff in the position it would have been in had Plaintiff held the Richland County contract for a five-year term, enforcement of the restrictive covenant is necessary to enforce the remaining term of the Non-Compete Agreement and to avoid a forfeiture of the contract as a whole.” (R. p. 32 at ¶ 80.)

ARGUMENTS

The Special Referee concluded that Knight breached the terms of the Agreement in two manners: (1) by refusing to make odor-proof bags available to Palmetto Mortuary in violation of Section 3.4.8 of the APA, and (2) by violating the Non-Compete Agreement in Section 3.2.6 of the APA. (R. pp. 15-18 at ¶¶ 32-41.) Knight does not dispute that it withdrew odor-proof bags from the market after the close of the Richland County deadline for submission of responses to the RFP for mortuary transport services. (R. p. 346, line 14 – p. 347, line 25.) Knight also does not dispute that by submitting a response to the Richland County RFP he competed against Palmetto Mortuary for “mortuary transport services” in violation of the clear and unambiguous terms of the Non-Compete Agreement. (R. p. 349, lines 9-19.)

Knight’s submission of a response to Richland County’s RFP for mortuary transport services, less than five years following the sale of its business to Palmetto Mortuary, including its good will, was a direct violation of the Non-Compete Agreement contained in Section 3.2.6 of the Agreement. (R. p. 394 at Exhibit 3.2.6.) Knight also breached the APA by refusing to sell odor-proof body bags to Palmetto Mortuary as required by Section 3.4.8 of the APA. (R. p. 375 at § 3.4.8.) A more deliberate breach of contract is difficult to imagine.

Knight argues that he was justified in submitting a competing response to Richland County’s RFP against Palmetto Mortuary on June 17, 2011 and withdrawing odor-proof bags from the market because (1) the Non-Compete Agreement was unenforceable as it was in violation of public policy, and (2) that rescission of the Agreement was available to Knight based on Palmetto Mortuary’s previous purchases of

body bags from manufacturers other than Knight Systems. For the following reasons Knight's arguments are without merit and this Court should affirm the trial court's order.

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

The Non-Compete Agreement provides in relevant part:

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

- A. **Customers, etc.** Seller shall not, directly or through Affiliate, (i) call upon or contact (or assist another person(s) or business entity to call upon or contact) any Customer for the purpose of furnishing the same or similar services provided or offered at any time by the Business to any Customer, or (ii) solicit or divert (or assist another person(s) or business entity to solicit or divert) any Customer from purchasing or using any of the Buyer's services, or (iii) provide or attempt to provide (or assist another person(s) or business entity to provide or attempt to provide) to any Customer the same or similar services provided or offered by the Business. For purposes of this Section 2(A), the term "Customer" shall mean any customer or client of the Business and shall include (without limitation) every such person(s) to which the Business or Seller has provided services prior to the date hereof.
- B. **Territory.** In addition to (but not in limitation of) the restrictions of Section 2(A), Seller shall not, directly or through an Affiliate engage in, or assist another person or entity to engage in, providing services similar to those furnished by the Business or Seller at any time prior to Closing (as such term is defined in the Purchase Agreement) in competition with Buyer anywhere within 150 miles of the present location of the Business (the "Territory").

(R. p. 394 at Exhibit 3.2.6.)

A. *The Non-Compete Agreement Was Negotiated by the Parties as Part of the Sale of a Business—Not in an Employment Context.*

The Non-Compete Agreement at issue arises out of the sale of a business, and not in connection with an employment contract. In general, a covenant not to compete will be upheld if (1) supported by valuable consideration, (2) reasonably limited as to time, and (3) reasonably restricted as to the place or 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. *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 381, 548 S.E.2d 207, 209 (2001) (citation omitted). Cases concerned with the enforceability of covenants not to compete must be decided on their own facts. *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).

The more rigorous standard in evaluating the reasonableness of covenants not to compete contained in employment contracts⁴ is not applicable in reviewing covenants ancillary to the sale of a business. See *Hagemeyer North America, Inc. v. Thompson*, 2:05-3425, 2006 WL 516733, *4 (D.S.C. Mar. 1, 2006) (“As a general rule, such covenants are given greater deference in the context of a sale of business than in the employment context.”) (citing 54A Am. Jur. *Monopolies and Restraints of Trade* § 247 (2005)). As the Fourth Circuit has recognized, “restrictive covenants not to compete in employment contracts . . . are scrutinized more rigorously than similar covenants incident to a sale of business.” *American Hot Rod Ass’n, Inc. v. Carrier*, 500 F.2d 1269, 1277 (4th Cir. 1974) (noting that this is the “general trend of modern authority”).⁵

In South Carolina, the applicable standard in reviewing the reasonableness of a covenant not to compete ancillary to the sale of a business is stated in *South Carolina*

⁴ Where an employment contract contains a non-compete agreement, the courts strictly construe the terms of the covenant not to compete against the employer. See *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011) (“Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.”) (quoting *Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983)).

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

Finance Corp. of Anderson v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960). In that case, the Supreme Court held that such a covenant is “enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by a valuable consideration.” *Id.* at 120, 113 S.E.2d at 334 (citing 36 Am. Jur., *Monopolies, Combinations, and Restraints of Trade*, §§ 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)).

In this case, the Special Referee considered and applied the applicable standard for enforcing covenants not to compete ancillary to the sale of a business and was not controlled by an error of law. The trial court’s order is supported by evidence in the record and should be affirmed.

B. The Non-Compete Agreement is supported by valuable consideration.

The clear and unambiguous language of the Non-Compete Agreement provides that valuable consideration was exchanged between the parties. The Non-Compete Agreement states:

Now, therefore, in consideration for the following premises, the promises set forth herein, the consideration of \$1,000 specifically allocated to this Agreement in the Purchase Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller and Buyer, intending to be legally bound, hereby agree and covenant as follows:

(R. p. 394 at Exhibit 3.2.6.) Like other contracts, a covenant not to compete must be supported by valuable consideration. *See Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (citations omitted). The trial court concluded that the \$1,000 consideration constituted

“valuable consideration.” The trial court’s conclusion is supported by evidence in the record and should be affirmed by this Court.

Knight has not, and cannot, attack the “valuable consideration” in the Non-Compete Agreement. The Agreement was negotiated by Knight with the assistance of legal counsel, read by him prior to closing, and executed without objection. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-25; p. 306, lines 4-20; p. 350, lines 1-6; p. 353, lines 16-25.) Consideration is generally considered a bargained for gain or advantage to the promisee or a bargained for detriment or disadvantage to the promisor. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 464 (N.Y. 1982) (citation omitted). Consideration is present when the parties exchange something to which they attach value. “It matters not from whom the consideration moves or to whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous.” *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (citation omitted); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

Absent a claim of fraud or unconscionability, a court will not concern itself with whether there was adequate consideration. *Campbell v. Carr*, 361 S.C. 258, 265, 603 S.E.2d 625, 628 (Ct. App. 2004). In *Lowery v. Callahan*, 210 S.C. 300, 42 S.E.2d 457 (1947), the South Carolina Supreme Court stated: “When the consideration agreed upon . . . is something of value, the courts will generally, in the absence of fraud, coercion, and undue influence, and if the parties are competent, not avoid the [contract] on the ground of the inadequacy of the consideration . . . , for the contracting parties, and not the courts, must determine the quid pro quo.” *Id.* at 304, 42 S.E.2d at 458. “The inadequacy of

price is determined at the date the contract was entered.” *Campbell*, 361 S.C. at 264, 603 S.E.2d at 628 (citations omitted).

Knight’s references to pre-contract negotiations cannot be used as evidence to demonstrate a lack of consideration for the Non-Compete Agreement. *See Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (“When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect and the court must construe it according to its plain, ordinary, and popular meaning.”) (quotation omitted).

In considering the adequacy of consideration, the Court must look to the four corners of the document, and cannot consider parol evidence to construe the agreement unless its terms are ambiguous. *See Park Regency, LLC v. R&D Development of the Carolinas, LLC*, 402 S.C. 401, 412, 741 S.E. 528, 534 (Ct. App. 2012) (“the intention of the parties . . . [is] gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument”) (citation omitted); *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999) (only if a contract is ambiguous will parol evidence be admissible to ascertain the true meaning and intent of the parties). There is no ambiguity with respect to the consideration stated on the face of the Non-Compete Agreement, and even Knight does not make such an assertion.

Additionally, Knight neither alleged nor proved fraud, unconscionability, coercion, or undue influence in connection with the APA or the Non-Compete Agreement that was part of the APA. There is no contention that there was unequal bargaining power or oppressive circumstances. To the contrary, the record amply demonstrates that Mr. Knight was at all times a sophisticated party who pursued and

secured his interests (and those of Knight Systems) in negotiating and executing the APA. From November of 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the APA. (R. p. 239, line 11 – p. 240, line 15; p. 244, line 4 – p. 245, line 14; p. 302, lines 5-9; p. 349, line 20 – p. 353, line 19.) Knight's own attorney assisted in the drafting of the Agreement and there is evidence that Knight's attorney received drafts of the Non-Compete Agreement prior to closing. (R. p. 260, lines 9-12.) Knight admitted that he "appeared at the closing [with his attorney] and . . . read the documents at closing." (R. p. 350, lines 1-6; p. 353, lines 16-19.)

More particularly, Mr. Knight did not object to the \$1,000 allocated to the Non-Compete Agreement, testifying that "after th[e] discussion about the \$1,000 that's mentioned as the consideration for the covenant not to compete, [he] did[] [not] object to that provision or any provision of either agreement at the closing." (R. p. 353, lines 20-25.) Further, there is evidence in the record that the \$1,000 in valuable consideration allocated to the Non-Compete Agreement in the APA was placed there at the insistence of Knight. Mrs. Lintal testified, and Mr. Knight conceded, that the \$1,000 allocation ultimately attributed to the Non-Compete Agreement was primarily driven by Knight at the instruction of his accountant. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-15.) Both Mrs. Lintal and Mr. Knight testified that Mr. Knight wanted to allocate \$1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize their potential capital gains tax. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)

Knight cannot now complain that \$1,000 was “inadequate” to support the terms of the Non-Compete Agreement when he previously insisted that the value exchanged was reasonable and benefitted him and his business financially. “It is not the business of courts to protect parties from the consequences of bad contracts, but to protect them from the consequences of either legal or moral fraud and imposition.” *Jackson v. Carter*, 128 S.C. 79, 121 S.E. 559, 563 (1924) (quoting *Goree v. Wilson*, 17 S.C. L. 597 (S.C. Eq. 1830)). Knight received a financial benefit of \$590,000.00 as a result of entering into the APA and the Non-Compete Agreement, retained the specific right to continue to conduct his body bag business, and through the Exclusivity Provision required Respondent to purchase certain bags from Knight for the 10-year term of the Non-Compete Agreement. Further, Knight realized a financial benefit by allocating only \$1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize their potential capital gains tax from the transaction. “Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say he got no consideration.” *Jackson v. Carter*, 128 S.C. 79, 121 S.E. at 563 (citation omitted).

The cases cited by Knight do not support the proposition that the Non-Compete Agreement was not supported by “valuable consideration.” Knight’s comparison of this case to *Newman v. Sablosky*, 407 A.2d 448 (Pa. 1979), is without merit because in that case there was no consideration for the covenant not to compete. *See id.* at 450. Instead, the plaintiff in *Sablosky* argued that the covenant not to compete was supported by his previous agreement to purchase real property from the defendant in conjunction with the sale of defendant’s equipment, medical supplies, and furniture. *Id.* at 450. The Court rejected the plaintiff’s position as “wholly without merit.” *Id.* The instant case is

distinguishable from *Sablosky* on the facts. Here, the covenant not to compete stated a \$1,000 payment as consideration and such consideration was stated on the face of the covenant. Palmetto Mortuary is not asserting that some *previous exchange* or agreement constitutes adequate consideration.

For the same reasons, *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), an employment case cited by Knight (Appellants' Initial Brief at p. 30), is inapposite.⁶ In that case, various physician-employees signed an employment agreement upon their initial date of employment at Columbia Heart Clinic. *Id.* at 8, 738 S.E.2d at 484. The original employment agreements did not contain any covenant not to compete. *Id.* Later, after substantial investments made by Columbia Heart to expand its business and a departure of a large number of physicians, Columbia Heart "sought to bind" its physician-employees "more tightly" and asked that they sign two separate non-compete agreements. *Id.* The Court recognized that "[n]o separate monetary consideration was paid to any [physician-employees] to sign the Agreements, nor did the Agreements change the compensation system established by . . . the prior agreements." *Id.* at 9, 738 S.E.2d at 485. The Court concluded that the physician-employees "executed the [covenants] after they became employed . . . , and the Agreements did not change the general compensation system agreed to by the parties under their prior employment contracts. . . ." *Id.*

The *Baugh* Court cited applicable law in South Carolina relevant to covenants not to compete entered into after the inception of employment. *Id.* at 9, 738 S.E.2d at 489

⁶ Additionally, Appellants misstate the holding in that case. *See id.* at 18, 738 S.E.2d at 489-90 (concluding that subject agreements were "supported by new consideration." (emphasis added)).

(quotation omitted) (“[W]hen a covenant [not to compete] is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.”)). “There is no consideration when the contract containing the covenant is exacted after several years’ employment and the employee’s duties and position are left unchanged.” *Id.* Nevertheless, the Court upheld the covenants not to compete on the basis that a provision in the new agreements provided that Columbia Heart would pay each physician-employee a total of \$60,000 over twelve months after termination so long as they did not violate the non-compete provision. *Id.* at 18, 738 S.E.2d at 490.

Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999), *aff’d* 345 S.C. 378, 548 S.E.2d 207 (2001) (still another employment case) is also distinguishable on the same bases as *Baugh*. In *Poole*, an employee of a travel agency began working in 1992. *Id.* at 273, 525 S.E.2d at 899. Four years later, her employer asked her to sign a non-compete agreement. *Id.* “Poole allege[d] that she was told she had to sign the agreement in order to remain employed, and she was offered no other compensation or consideration in exchange for signing” *Id.* The Court held “under South Carolina law, if an at-will employment relationship already exists without a covenant not to compete, any future covenant must be based upon new consideration.” *Id.* at 275, 525 S.E.2d at 900.

The covenant not to compete in this case was not executed by an employee but rather, by a sophisticated seller (Knight) ancillary to his sale of a business (Knight Systems). More significantly, the covenant was executed by Knight at the time of closing and was supported by independent consideration of \$1,000. Had Palmetto Mortuary

purchased Knight's business and then subsequently asked that Knight execute a non-compete agreement, *Baugh* and *Poole* may be analogous, but given the facts in this case, and especially considering that the covenant not to compete is supported, on its face, by consideration, *Baugh* and *Poole* are not applicable.

Based on the foregoing, evidence in the record reveals that the Non-Compete Agreement was supported by valuable consideration. Knight has adduced no evidence of fraud, coercion, undue influence, or incompetence. Therefore, based on the evidence before the court, the Special Referee's order, concluding that the Non-Compete Agreement is supported by "valuable consideration," should be affirmed.

C. The Non-Compete Agreement is reasonably limited in time and geographic scope.

Evidence in the record supports the trial court's finding that the Non-Compete Agreement was reasonably limited in time and geographic scope. In South Carolina, covenants not to compete arising out of the sale of a business "will, in conformity with the just and equitable principles of the common law, be generally upheld and enforced . . . if reasonably limited as to time, and . . . if reasonably restricted as to the place of the territory, that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930) (citations omitted); *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960). "[T]he restraint must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may in reason expect to follow from the restrictive features of the contract, and not injurious to the interests of the public." *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942) (citations omitted).

“In determining whether a contract in partial restraint of trade is reasonable, the court will look to the *whole subject matter of the contract, the kind and character of the business, its location, the purpose to be accomplished by the restriction, and all circumstances which show the intentions of the parties* and which must have entered into the making of the contract.” *Reeves*, 200 S.C. 494, 21 S.E.2d at 188 (emphasis added). “It naturally follows that each case must be governed in the main by its own facts.” *Id.*

The facts of this case—and in particular the APA and the circumstances showing the intention of the parties executing the APA—demonstrate the reasonableness of the Non-Compete Agreement. The APA involved a transaction between sophisticated business entities. In particular, and unlike the plaintiff in *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958), who was never represented by counsel (*id.* at 329, 104 S.E.2d at 346), Knight was represented by an attorney in the negotiation of the APA, including specifically the Non-Compete Agreement, and Knight’s attorney was present at the closing that took place on January 5, 2007. Knight also received advice from his accountant with respect to the APA and the Non-Compete Agreement. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)

In exchange for the Non-Compete Agreement, Knight received not only a substantial payment of money from Palmetto Mortuary, but the right to continue his existing body bag manufacturing business, and a substantial financial commitment from Palmetto Mortuary in furtherance of Knight’s existing business. (R. p. 375 at § 3.4.8.) In addition to receiving \$590,000 in exchange for the assets transferred, Knight also

negotiated for and obtained the right to continue to operate Knight Systems' body bag business without any limitation whatsoever.

Moreover, Knight negotiated the Exclusivity Provision requiring Palmetto Mortuary to purchase body bags from Knight for ten years—the duration of the Non-Compete Agreement. (R. p. 375 at § 3.4.8.) (The ongoing business relationship between Palmetto Mortuary and Knight is in sharp contrast to the facts in *Somerset*, 233 S.C. 324, 104 S.E.2d 344, where the plaintiff was discharged as manager of the defendant's business following the sale of plaintiff's business to defendant after merely three months on the job. *Id.* at 329, 104 S.E.2d at 346.) The Exclusivity Provision (R. p. 375 at § 3.4.8) conferred a significant financial benefit upon Knight. Prior to Knight's breach of the Non-Compete Agreement and the Exclusivity Provision, Palmetto Mortuary paid Knight more than \$45,000 for body bags purchased pursuant to the Exclusivity Provision. (R. p. 160, lines 10-20; R. pp. 408-448.) As such, while the APA placed reasonable limitations on Knight's ability to perform mortuary transport services, the same APA allowed and enhanced Knight's ancillary body bag business.

Similarly, the 150 mile radius contained in the Non-Compete Agreement was supported by legitimate business interests stated in the record and was reasonable based on the facts of this case. Mr. Lintal testified that he believed Palmetto Mortuary would expand its business throughout other counties in the State of South Carolina. (R. p. 208, line 12 – p. 209, line 13; p. 209, line 25 – p. 210, line 10 (“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.”)).

During his deposition, Mr. Lintal testified further that Palmetto Mortuary has added customers that Knight did not serve and does business outside the area encompassed by the contracts purchased from Knight. (R. p. 551, line 16 – p. 552, line 10 (“Q: Since the purchase of Mr. Knight’s business, have you added customers that he didn’t have already? A: Yes . . . we get calls on occasion from out of town customers that – out of the Columbia/Lexington area that use you on occasion.”)) Such evidence is in addition to testimony by Knight that he intended to get out of the mortuary transport business following the sale to Palmetto Mortuary. (R. p. 299, line 25 - p. 300, line 6; p. 308, lines 1-8 (Mr. Knight testified that he “expressed [his] desire to [Mr. Lintal] how much I wanted to get out of the business.”))

No South Carolina court has stricken a non-compete agreement because of a statewide geographic reach as Knight would have this Court hold. *See Hagemeyer North America, Inc. v. Thompson*, 2006 WL 516733 at *5 (“The restriction’s statewide geographic reach does not automatically render it void.”). Mr. Knight, a sophisticated business person, made no objection “to [the non-compete] provision or any provision of [the] agreement at the closing.” (R. p. 353, lines 20-25.) Indeed, the specific and ongoing benefits Knight received as a result of the APA and the Non-Compete Agreement help demonstrate the reasonableness of the restrictions placed on Knight.

Additionally, Palmetto Mortuary provided testimony regarding the importance of the Non-Compete Agreement to its decision to buy the business. Mr. Lintal testified that the ten-year term of the Non-Compete Agreement was significant to Palmetto Mortuary’s decision to purchase Knight’s business. (R. p. 178, line 25 – p. 179, line 12.) The ten year period was intended by both parties to protect Palmetto Mortuary from competition

with Appellants for two five-year contract cycles with the University of South Carolina, and Richland and Lexington Counties' Coroners' Offices, contracts which were previously held by Knight for more than fifteen years. (*See id.*)

The Lintals wanted a ten year period to allow Palmetto Mortuary "to get through at least two cycles" of five-year contracts with the Richland and Lexington Coroner's Offices. (R. p. 207, lines 16-25.) "The contracts were the whole value to this business in regards to what types of guaranteed revenues that we were going to be able to generate. So we wanted at all costs to try to protect that for as long as we could." (R. p. 590, lines 2-10.) "[T]he value of th[e] contracts made up [the Lintals'] ultimate purchase price" of the business. (R. p. 590, lines 11-18.) Mr. Lintal testified that the Non-Compete Agreement "was very important to [Palmetto Mortuary's evaluation] because without the non-compete we wouldn't have bought the business." (R. p. 592, lines 6-10.)

The applicable standard of review of a covenant not to compete is whether the limitations are "no more restrictive than reasonably necessary to protect [the] legitimate interest[s]" of the purchaser, not whether the restrictions only cover the "customer or clientele area actually purchased in a business sale transaction" as Knight would have this Court rule. (*See Appellant's Brief at pp. 20-21.*) Based on the applicable reasonableness standard, evidence in the record supports the Special Referee's determination that the territorial restrictions were reasonable.

Knight would have this Court adopt the standard as set forth in *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 762 S.E.2d 316 (N.C. 2014), which requires:

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 *maintaining* its customers.

Id. at 321 (citation omitted).⁷ In *Beverage Systems*, the North Carolina appellate court concluded that because the subject non-compete agreement was not limited to areas where the sellers had former customers, the scope of the non-compete agreement was unreasonable. *Id.* Such a showing is not required in South Carolina.

In South Carolina, evidence of the location of a business' customers or clientele is only one factor to consider in examining the reasonableness of a restraint as to territory. In *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961), the South Carolina Supreme Court noted: "The general rule is that restraint as to territory, in order to be reasonable, must be necessary in its full extent for the *protection of some legitimate interest of the employer.*" *Id.* at 66, 119 S.E.2d at 539 (emphasis added). "Stated negatively, the territorial scope renders the restraint unreasonable if it covers an area broader than necessary to protect the legitimate interest of the employer." *Id.*

The South Carolina Supreme Court in *Standard Register* listed "the most important single asset of most business[es]" as "their stock of customers," but it did not limit an employer's "legitimate business interests" to that factor alone. *Id.* at 66, 119 S.E.2d at 539. Palmetto Mortuary maintains that its interest in expanding the mortuary transport business is reasonable in light of the fact that Knight stated his intent to "get out of the business" entirely, maintained his body bag business, and required Palmetto Mortuary to buy bags from Knight for the term of the Non-Compete Agreement.

⁷ Appellants assert that because the Special Referee "failed to properly compare the express statewide, and beyond, territorial non-compete with the existing customer base of Knight Systems," the Special Referee erred and should be reversed. (See Appellant's Brief at p. 22.)

D. *The Non-Compete Agreement is not void against public policy.*

In *South Carolina Finance Corp. of Anderson*, 236 S.C. 109, 113 S.E.2d 329, the South Carolina Supreme Court stated that a covenant not to compete which is ancillary to the sale of a business or profession “is enforceable if it is not detrimental to the public interest.” *Id.* at 119, 113 S.E.2d at 334. In this case, there is no detriment to the public interest in enforcing the subject Non-Compete Agreement.

The court did not err in rejecting Knight’s argument that the subject Non-Compete Agreement was void against public policy because it unreasonably restrained competition for public contracts. A contract in restraint of trade may be in violation of public policy where the restraint is unreasonable. *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996); *Almers v. S.C. Nat. Bank of Charleston*, 265 S.C. 48, 217 S.E.2d 135 (1975). With regard to covenants not to compete, this standard is typically used to evaluate the reasonableness of the restraint as to time and territory. *See id.*; *see also Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

Knight asks this Court to recognize another factor to be determined in evaluating the “reasonableness” of a restraint, and that is whether the restraint has a “direct tendency to prevent bidding or competition for public contracts.” (Appellant’s Brief at p. 32.) Knight recognizes that this “issue has not been . . . addressed by South Carolina courts.” (*Id.*) Knight relies on *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), stating that this Court has recognized “the importance of a public policy upholding free and open competition for public contracts.” (Appellant’s Brief at p. 33.) Knight’s reliance on *Sloan* is misplaced for the following reasons.

Sloan was procedurally and factually different from the case at bar. In *Sloan*, the plaintiff-taxpayer brought a declaratory judgment action against the Greenville County School District asserting that certain contracts entered into by the District were *ultra vires* to the District's procurement code, invalid, and illegal. *Id.* at 516, 537 S.E.2d at 300. The trial court dismissed Sloan's action, finding that Sloan did not have standing. *Id.* at 518, 537 S.E.2d at 300. This Court reversed the trial court, finding that Sloan, as a taxpayer, had standing to challenge the District's award of allegedly illegal contracts, based on his "direct interest in the proper use and allocation of tax receipts." *Id.* at 522, 537 S.E.2d at 303.

In addition, this Court found that Sloan also had standing based on the significant public importance of the issue before the Court. *Id.* (citing *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) ("a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance"). This Court recognized the great public importance of "prevent[ing] . . . the unlawful expenditure of money raised by taxation." *Id.* at 523, 537 S.E.2d at 303. This Court cited the intent of the General Assembly in adopting its own procurement code. *Id.* (citation omitted). This Court held that standing could be conferred on Sloan based on the "immense public importance" of "expenditure of public funds pursuant to a competitive bidding statute." *Id.* at 524, 537 S.E.2d at 303-304.

Standing to sue is a fundamental requirement for instituting an action. *See Brock v. Bennett*, 313 S.C. 513, 443 S.E.2d 409 (Ct. App. 1994) (holding no justiciable controversy is presented unless the plaintiff has standing to maintain an action). The importance of standing cannot be overstated. An order or judgment in favor of a plaintiff without standing is void. *See Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 328 (1994) ("In view of

our finding that the respondents were without standing to intervene, the resulting restraining order is rendered void.”). This Court’s discussion of the importance of standing in *Sloan* renders the holding in *Sloan* distinguishable from this case. In *Sloan* this Court applied the “public importance” exception to general standing requirements. Such doctrine “necessitates a cautious balancing of the competing interests presented.” *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008).

Knight’s standing is not at issue in this case. Moreover, Knight is not bringing an action on behalf of citizens of this State for violations of public policy. There is moreover no issue before this Court as to whether a public body acted in violation of its procurement code or statute such that the significant public policy rationale in *Sloan* should be analyzed in this case. The case at bar does not require a “cautious balancing of . . . competing interests.” *See Sloan*, 380 S.C. at 198, 669 S.E.2d at 341. The only issue before the Special Referee was whether Knight, the sole provider of odor-proof bags, violated the terms of the private contract with Palmetto Mortuary, not only by withdrawing their odor-proof body bags from the market but also in competing against Palmetto Mortuary in violation of the clear and unambiguous language of the parties’ non-compete agreement.

Section 3.4.8 of the parties’ Agreement required Knight to provide odor-proof body bags to Palmetto Mortuary for a price of \$50.00 per bag. (R. p. 375 at § 3.4.8.) The “shall provide” language in the Exclusivity Provision required Knight to provide Palmetto Mortuary with odor-proof body bags at the time of the parties’ submission of bids to Richland County and throughout the duration of the ten-year Non-Compete Agreement. (*Id.*) There is evidence in the record that Palmetto Mortuary submitted the lowest bid and

should have won the contract with Richland County had Knight not withdrawn their odor-proof bags from the market. (R. p. 168, lines 14-25; p. 241, lines 2-24.)

The facts of this case present the opposite issue than those considered and addressed by the cases cited in Appellant's Brief. If there is any unreasonable restriction on bidding for a public contract in this case, it is Knight's breach of the Agreement that unreasonably restricted Palmetto Mortuary's right to compete for the mortuary transport services through Richland County. By withdrawing odor-proof bags from the market, which Knight was obligated to sell to Palmetto Mortuary, pursuant to Section 3.4.8 of the APA, Knight succeeded in winning a public contract with Richland County even though he was not the lowest bidder. Such a situation enabled Knight, the higher bidder, to successfully receive the public contract with the County.

Knight cited a string of cases standing for the proposition that agreements to "chill or suppress bidding [are] void." (See Appellant's Brief at pp. 34-35.) However, Knight has failed to come forward with any case from South Carolina or any other jurisdiction holding that a *covenant not to compete* was void based on public policy where the effect of such covenant was to restrict bidding on public contracts. Even the cases cited by Knight do not support his position that the Non-Compete Agreement in this case is violative of public policy for that reason.

In *Spokane Sav. & Loan Soc. v. Park Vista Imp. Co.*, 294 P. 1028 (Wa. 1930), cited by Appellants (see Appellant's Initial Brief at p. 34) the Supreme Court of Washington held that an agreement between lienors and a mortgagee not to bid at a sheriff's sale was not void as against public policy. The court specifically noted:

In the case at bar there is no evidence that the property was sold for less than its value and that there was a chilling of bids; in fact, the court expressly found that the price was adequate. . . .

There is nothing in the contract or the court's findings of fact from which we may infer that the parties agreed to exclude the general public or that the general public was excluded from bidding. That the lienors entered into an agreement with the mortgagee not to bid at the sheriff's sale would not bring the contract within the ban of the rule as to the chilling or expressing of bidding.

Id. at 1036-37. The *Spokane* court concluded that the private contract between the lienor and the mortgagor was enforceable even though the two parties agreed not to submit competing bids at the judicial sale of the real property. *Id.* As stated by the court,

[P]ersons may combine together for the protection of their interests. They may even expressly agree not to bid against each other, in furtherance of a plan mutually agreed upon as calculated to conserve their rights. But in doing so, their activities must not operate to exclude any part of the general public

Id. at 1037 (quotation omitted). Likewise, the parties in this case should be free to combine together for the protection of their business interests.

Other cases cited by Knight are distinguishable on factual grounds. In *City Nat. Bank of Corpus Christi v. City of Corpus Christi*, 233 S.W. 375 (Tex. App. 1921), the court found evidence of "a tacit agreement between the parties to obtain the use of the public funds for a less sum than would have been bid if such agreement had not been made." *Id.* at 378. There is no such evidence before the Court in this case.

In this case, Knight has failed to submit any evidence that the Non-Compete Agreement stifles competition for public contracts even though the effect of the agreement was to preclude *Knight* from competing. The private covenant not to compete executed by the parties did not unreasonably restrict the general public's ability to bid on public contracts for mortuary transport services. See *Spokane*, 294 P. at 1037. There is

no evidence that Palmetto Mortuary's response to the Richland County RFP was unreasonably high or above market value. *See City of Corpus Christi*, 233 S.W. at 378. The private covenant not to compete entered into between the parties does not fall within other jurisdictions' public policy grounds for voiding a covenant not to compete and should not be voided on such ground in this case where there is no South Carolina precedent for doing so.

Moreover, the Non-Compete Agreement did not, in any way, guarantee that Palmetto Mortuary would win every public contract in the State for mortuary transport services. Mr. Lintal acknowledged during trial that after Palmetto Mortuary purchased Knight's business it lost the public contract for mortuary transport services through the Lexington County Coroner's Office. (R. p. 218, lines 15-24.) Palmetto Mortuary's ability to be shielded from certain competition by Knight did not secure its position as the *only* mortuary transport services company in the State as it lost a public contract to another bidder after the time of the subject transaction. (*See id.*)

The only reported decision that comes close to finding a covenant not to compete void on the basis of public policy where such covenant restricted a competitor's right to compete for a public contract is *Laidlaw, Inc. v. Student Transp. of America, Inc.*, 20 F.Supp.2d 727 (D.N.J. 1998). In *Laidlaw*, the buyer of a school bus company, Laidlaw, brought an action to enforce noncompetition agreements entered into by seller, Student Transportation of America ("STA"). *See id.* The issue before the court was whether Laidlaw was entitled to a preliminary injunction prohibiting STA from competing for a public bid with the area school district. *Id.* at 731. The court refused to issue a preliminary injunction prohibiting STA from competing because it found that Laidlaw

had not adequately proven “likelihood of success on the merits.” *Id.* at 761 (concluding “Laidlaw no longer has a protectable interest in [the] non-compete . . . [and] do not have a likelihood of success in enforcing . . . [the] non-compete”).

The *Laidlaw* court refused to issue a preliminary injunction based on a finding that the public interest would be “adversely affected by putting them out of business pending final adjudication of the merits,” especially where the moving party did not show a likelihood of success on the merits. *Id.* at 769. In doing so, the court did not hold that as a matter of law, the non-compete agreement was void because it stifled the defendant’s ability to submit a bid for a public contract. *See id.* Instead, it held that because Laidlaw had not adequately proven likelihood of success on the merits, the public’s interest in competition for public contracts outweighed Laidlaw’s private contract rights. *Id.*; *see also Norlund v. Faust*, 675 N.E.2d 1142, 1153 (Ind. App. 1997) (“the public’s general interest in medical services is subservient to the public interest in the freedom of individuals to contract”) (citation omitted). These cases infer that where a party does show a likelihood of success on the merits, or where, as in this case, the moving party succeeds on the merits, the public’s interest in the freedom of individuals to contract may outweigh competing public policy interests.

Palmetto Mortuary’s legal right to have its purchase of the good will of Knight’s business protected through this Court’s enforcement of the covenant not to compete is reasonable. The covenant does not restrict the public’s ability to bid on public contracts. There is no evidence in this case that would support Knight’s position that the private covenant not to compete entered into between the parties should be held to be in violation

of the public's interest in competition for public contracts. Accordingly, the Special Referee's order enforcing the covenant should be affirmed.

II. PALMETTO MORTUARY'S CONDUCT DID NOT CONSTITUTE A MATERIAL BREACH OF THE PARTIES' AGREEMENT SUCH THAT KNIGHT WAS EXCUSED FROM PERFORMANCE OF ITS CONTRACTUAL OBLIGATIONS.

A. The Special Referee's interpretation of the Exclusivity Provision in the parties' Agreement was reasonable and should be upheld.

Knight attempts to justify its breaches of the parties' Agreement by asserting that he was entitled to rescission of the entire contract based on Palmetto Mortuary's purchases of body bags from manufacturers other than Knight Systems. (R. p. 58 at ¶ 42 (Appendix) ("Plaintiffs' breach of the agreement with Defendants negated all terms, conditions and responsibilities of the Defendants under the Asset Purchase Agreement and the Non-Compete Agreement."))

Knight relies on Section 3.4.8 of the Agreement ("Exclusivity Provision") which provides:

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

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

(R. p. 375 at § 3.4.8.)

In construing the Agreement, the Special Referee concluded that the Exclusivity Provision obligated Palmetto Mortuary to buy only those categories of bags listed in Section 3.4.8 of the Agreement from Knight (heavy duty bags, lightweight bags, odor-

proof bags, and water-retrieval bags). The Special Referee concluded that the Exclusivity Provision did not *prevent* Palmetto Mortuary from buying any other body bag from sources other than Knight. (R. p. 19 at ¶ 45.)

The Special Referee's ruling is supported by the evidence and is based on a reasonable interpretation of the plain language of the parties' Agreement. Accordingly, the Special Referee's interpretation should be affirmed by this Court. "An action to construe a contract is an action at law." *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings. *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted). The Special Referee gave reasonable effect to all of the provisions in Section 3.4.8 of the Agreement. Accordingly, the Special Referee's interpretation of the parties' contract should be affirmed.

B. *Palmetto Mortuary's breaches of the Exclusivity Provision were not material.*

Palmetto Mortuary's acts of purchasing body bags from other sources do not constitute *material* breaches of the Agreement which would excuse Knight's performance under the Agreement or otherwise justify Knight's rescission of the Agreement. Rather, as a result of Palmetto Mortuary's minor breaches, Knight is entitled only to monetary damages which are proximately caused by the breach, a total damages found by the Special Referee to equal \$478.50. (R. pp. 22-29 at ¶¶ 54-70.)

A breach of contract by nonperformance gives rise to merely a cause of action for damages. Monetary damages in a breach of contract action are intended to place the non-breaching party in the position he would have been in had there been no breach and the contract was performed. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875, 879 (Ct. App. 1997). The proper measure of compensation is the loss actually incurred as the result of the breach. *Willms Trucking Co., Inc. v. JW Construction Co., Inc.*, 314 S.C. 170, 442 S.E.2d 197, 202 (Ct. App. 1994) (citing *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 897 (1937)).

Typically the non-breaching party is *not* automatically excused from the future performance of contract obligations every time the other party commits a breach. Rescission or repudiation may only be granted when there is a breach which is so fundamental and substantial that it defeats the purpose of the contract. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). If the breach is relatively minor and not of the essence, the non-breaching party is still bound by the contract and may not abandon performance and obtain damages for a total breach by the defendant. *Williston on Contracts* § 63:3. "Otherwise stated, a nonperforming party is liable for any breach of

contract, but the other party is discharged from further performance, and is entitled to substantial damages only when there is a material breach.” *Id.* (citing *In re Krueger*, 192 F.3d 733 (7th Cir. 1999)). The determination of whether a material breach has occurred is generally a question of fact.

Under South Carolina law, “[i]n order to warrant a *repudiation*, a breach must be so fundamental and substantial as to defeat the purpose of the contract.” *Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 620-21 (Ct. App. 1994) (citing *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993)) (emphasis added). “Where the breach is not so material as to defeat the purpose of the contract, the non-breaching party is compensated by damages.” *Ackerman* at 271, 442 S.E.2d at 620 (citing *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957)). Similarly, “[a] breach of contract warranting *rescission* of the contract must be so substantial and fundamental as to defeat the purpose of the contract.” *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (citing *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989)) (emphasis added). “Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties.” *Brazell* at 517, 682 S.E.2d at 826 (citation omitted).

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

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

- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981) (adopted by South Carolina Supreme Court in *Kiriakides v. United Artists Comm'n*, 312 S.C. 271, 276, 440 S.E.2d 364, 367 (1994), in the context of breach of a commercial lease); *see also Ellie, Inc. v. Miccichi*, 358 S.C. at 96, 594 S.E.2d at 494.

The first element regards ensuring the parties' reasonable expectation of an exchange of performances. In determining whether a failure is material, a court must consider the extent to which the non-breaching party will be deprived of the benefit which was reasonably expected from the exchange. In this case, Knight obtained his reasonable expectations from the contract, including the total purchase price and his ability to continue his body bag manufacturing business without limitation. Additionally, it is undisputed that from January 2008 to June 2011, Palmetto Mortuary purchased more than forty five thousand dollars' (\$45,000) worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-449.) These purchases from Knight Systems occurred both before and after Palmetto Mortuary's purchases of body bags from sources other than Knight Systems. (*Id.*)

Under the second element, Knight is adequately compensated for Palmetto Mortuary's breaches by the receipt of the monetary damages. Knight is entitled to the monetary benefit of the body bags Palmetto Mortuary purchased from other vendors but

should have purchased from Knight Systems. Rescinding the entire Agreement, valued at \$590,000 plus those revenues from the sale of body bags pursuant to the Exclusivity Provision, due to Palmetto Mortuary's purchases of body bags from manufacturers other than Knight Systems, totaling \$478.50, would result in a windfall to Knight.

The third Restatement element is the extent to which the party failing to perform or make an offer to perform will suffer forfeiture if the failure is treated as material. The South Carolina Supreme Court has made abundantly clear that "in the liberally related rule of contracts . . . the law abhors a forfeiture and . . . contractual provisions of forfeiture are looked upon with disfavor by the Courts." *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 287, 701 S.E.2d 742, 748 (2010) (citation omitted). For this reason a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance.

In this case, Palmetto Mortuary will suffer a significant forfeiture if Knight is entitled to repudiate the remaining five years and seven months of the Non-Compete Agreement. Under the terms of the Non-Compete Agreement, Knight was prohibited from competing against Palmetto Mortuary for a period of ten years that began on January 5, 2007. (R. p. 394 at Exhibit 3.2.6.) At the time of Knight System's breach in June of 2011, five years and seven months remained on the Non-Compete Agreement. Additionally, at that time Palmetto Mortuary had significantly complied with the terms of the parties' Agreement, paying the full purchase price, \$590,000.00, and purchasing significantly all of its body bags from Knight Systems pursuant to the Exclusivity Provision, a total amount of more than \$45,000.00. (R. p. 160, lines 10-20; pp. 408-448.)

A material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances. *See* 14 Williston on Contracts § 43:5 (4th ed.). To the extent that the expectation is already reasonably secure, in spite of the failure, there is less reason to conclude that the failure is material. Here, Knight already had security for Palmetto Mortuary's performance; in fact, Knight was already paid the full purchase price for their mortuary transport business. (R. p. 341, lines 9-20.)

Additionally, Knight had reasonable assurances of performance given by Palmetto Mortuary after its non-performance. On June 16, 2011, one day before the Richland County bid was due, Mr. Knight tape-recorded a conversation he had with Mr. Lintal ("Tape Recording"). (R. p. 163, line 8 – p. 164, line 2; p. 315, line 18 – p. 316, line 15.) At the time of the conversation, Mr. Lintal was not aware that he was being recorded. (R. p. 163, line 17.) Throughout the tape-recorded discussion, Mr. Knight repeatedly references infant body bags Palmetto Mortuary purchased from another vendor in 2008, nearly three years prior to the conversation. (R. p. 164, line 14 – p. 165, line 5; p. 324, line 14 – p. 325, line 12.) In response to the allegations, Mr. Lintal stated that he did not believe his purchases of body bags from other manufacturers were "significant," specifically stating that he was "not trying to breach" the parties' Agreement. (R. p. 325, line 19; p. 327, lines 5-9.)

Mr. Lintal assured Mr. Knight during the tape recorded conversation in July of 2011: "If you're willing to make them, I'm going to order them." (R. p. 329, lines 18-24.) Mr. Knight responded: "I can make them." (R. p. 329, line 25.) After Palmetto Mortuary purchased body bags from other manufacturers, Palmetto Mortuary continued

to purchase body bags from Knight Systems. It is undisputed that from January 2007 to June 2011, Palmetto Mortuary purchased more than \$45,000.00 dollars' worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-448.)

Moreover, "[a] party's adherence to standards of good faith and fair dealing will not prevent his failure to perform a duty from amounting to a breach" entitling the non-breaching party to damages, but "[t]he extent to which [his] behavior . . . comports with standards of good faith and fair dealing is a significant circumstance in determining whether the failure is material." Restatement (Second) of Contracts § 241, cmt. f. Here, Palmetto Mortuary adhered to standards of good faith and fair dealing. There is testimony in the record that before each occasion when Palmetto Mortuary purchased bags from other sources, Mr. Lintal spoke with Mr. Knight about Knight System's ability to sell certain bags when it needed them for business. (R. p. 150, line 25 – p. 152, line 9; p. 154, lines 9-23; p. 157, lines 1-20.)

Moreover, considering the context in which the Tape Recording took place and the timing of the Richland County contract bid, the evidence in the record suggests that Mr. Knight knew or should have known more than three years prior to the Tape Recording that Palmetto Mortuary previously purchased body bags from other manufacturers. However, instead of bringing the breaches to Mr. Lintal's attention when he was aware of such allegations⁸, Knight held onto the information until a time that was

⁸ Mr. Knight admitted at trial that he heard from at least one other person as early as 2009 or 2010 that Plaintiff was purchasing body bags from other sources, but did not bring the rumors to Plaintiff's attention until June of 2011. (R. p. 343, lines 9-22; p. 361, line 23 – p. 362, line 25; p. 363, line 11 – p. 365, line 6 (p. 364 in Appendix).)

beneficial to him.⁹ (R. p. 343, line 9 – p. 344, line 21.) Additionally, Mr. Knight's conduct on June 16, 2011, including surreptitiously tape-recording Mr. Lintal, bringing up Palmetto Mortuary's purchases of body bags from other manufacturers after more than three years after the purchases, and immediately placing a bid for the Richland County contract one day following the parties' discussion, evidences something less than good faith with respect to adhering to the terms of the APA.

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

Based on the evidence presented, Palmetto Mortuary's purchases of bags from sources other than Knight did not constitute material breaches of the APA. As a result,

⁹ Mr. Knight testified that sometime in 2009 and 2010 he was informed by a competitor that Palmetto Mortuary had purchased body bags from another source. (R. p. 314, line 12 – 315, line 17. Mr. Knight testified that he did not take any action or discuss the allegations with Mr. Lintal, despite the fact that he may have believed such purchase would have been in violation of the parties Agreement. (*Id.*)

Knight was not excused from performance under the Agreement, including the Non-Compete Agreement. Knight is only entitled to monetary damages that naturally flow from Palmetto Mortuary's breaches. As the Special Referee concluded, the monetary damages owed to Knight totals Four Hundred Seventy Eight Dollars and Fifty Cents (\$478.50). (R. p. 22 at ¶ 53.) Such a ruling is based on evidence in the record and was not controlled by any error of law. Accordingly, this Court should affirm the Special Referee's Order filed July 22, 2014.

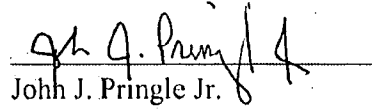
CONCLUSION

For the foregoing reasons, the Special Referee did not err in concluding that the Non-Compete Agreement was supported by valuable consideration, reasonable in time and scope and did not violate public policy. The Special Referee's findings that Knight and Knight Systems were not entitled to rescission of the contract based on Palmetto Mortuary's previous non-material breaches should likewise be affirmed. All of the Special Referee's rulings were based on evidence in the record and were not controlled any error of law.

Palmetto Mortuary respectfully requests that this Court affirm the Special Referee's Order for the foregoing reasons, or on the basis of any grounds appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

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Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John J. Pringle Jr.", is written over a horizontal line.

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February 19, 2015.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Case No. 2014-001819

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

v.

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

REPLY BRIEF OF APPELLANTS

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JAN 29 2015

SC Court of Appeals

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TABLE OF CONTENTS

Table of Authorities	3
Arguments	
I. The South Carolina Supreme Court has Previously Held that a Statewide Covenant Not To Compete is Per Se Unreasonable When the Existing Customers of a Purchased Business are Contained within a Significantly Smaller Geographic Region	4
Conclusion	7

TABLE OF AUTHORITIES

CASES

<i>Eastern Business Forms, Inc. v. Kistler</i> , 258 S.C. 429, 189 S.E.2d 22, 24 (1972)	7
<i>Faces Boutique, LTD v. Gibbs</i> , 318 S.C. 39, 455 S.E.2d 707, 709 (Ct.App. 1995)	7
<i>Hagemeyer North America, Inc. v. Thompson</i> , 2:05-3425, 2006 WL 516733, p.4 (D.S.C. Mar. 1, 2006)	4
<i>Somerset v. Reyner</i> , 233 S.C. 324, 104 S.E.2d 344 (1958)	4, 5, 6, 7
<i>Stringer v. Herron</i> , 309 S.C. 529, 424 S.E.2d 547 (Ct.App. 1992)	6, 7

APPELLANTS' ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their Initial Brief, the Appellants offer the following brief points of clarification and reply to the arguments raised by the Respondent.

I. The South Carolina Supreme Court has Previously Held that a Statewide Covenant Not To Compete Is Per Se Unreasonable When the Existing Customers of a Purchased Business are Contained within a Significantly Smaller Geographic Region.

Respondent's Initial Brief, like the Order of the Special Referee in this matter, erroneously concludes that the general more rigorous standard applied when evaluating the reasonableness of covenants not to compete in employment contracts negates the precedent set by the South Carolina Supreme Court in a case invalidating overly broad territorial restrictions in covenants not to compete which are ancillary to the sale of a business. *See e.g., Hagemeyer North America, Inc. v. Thompson*, 2:05-3425, 2006 WL 516733, p.4 (D.S.C. Mar. 1, 2006) ("As a general rule, such covenants are given greater deference in the context of a sale of business than in the employment context.") (citations omitted). In *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958), the South Carolina Supreme Court ruled invalid a **statewide** geographic restriction in a covenant not to compete that was ancillary to the sale of a Columbia jewelry business. The material terms of the *Somerset* covenant not to compete and that Court's holding are indistinguishable from this dispute between Appellants and Respondent.¹

The Somerset Court stated that "[i]t is well settled that a restrictive covenant not to compete, ancillary to the sale of a business and its good will, will be upheld and

¹ As discussed throughout both parties' briefs, at the time that Respondent purchased Appellants' mortuary transport business, nearly all of Appellants' business clients were located in Lexington or Richland Counties.

enforced if '(1) supported by a valuable consideration, (2) if reasonably limited as to time, and (3) if **reasonably restricted as to the place of 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*, 104 S.E.2d at 346 (citations omitted) (emphasis added). In striking down the statewide covenant not to compete in *Somerset*, the Supreme Court noted that it “shall first determine whether the covenant under consideration is necessary in its full extent for the protection of the covenantee’s business or good will. If not, the territorial scope of the restraint is unreasonable and no inquiry need be made as to the presence or absence of other necessary requirements.” *Id.*, citing, Annotation in 46 A.L.R.2d. 119.

Respondent attempts to distinguish the patently clear holding in *Somerset* by arguing that the *Somerset* plaintiff was not represented by counsel while the Appellant in this case was represented by an attorney. Further, Respondent argues that Appellant never objected to the inclusion of a statewide ban on competition and the Respondent anticipated future expansion of its business beyond the territory of business purchased from Appellant. None of Respondent’s arguments negate the express holding of *Somerset*. Finding such specious justifications for an overly broad non-compete, the *Somerset* Court held that it could “find no rational basis for the [statewide] extent of the territorial restraint.” *Id.* at 347. “Obviously, it was unnecessary to the protection of the business sold, or that later operated . . . that plaintiff be prohibited from engaging in a

similar business in Charleston, Spartanburg, Greenville or numerous other cities in South Carolina.” *Id.* at 346.²

Respondent contends that evidence of the location of a business’ customers or clientele is only one factor which should be considered by courts in examining the reasonableness of a covenant not to compete’s territorial restriction. Respondent’s contention is without merit when examined under the facts, analysis, and holding of *Somerset*. Further, this Court has relied on the holding in *Somerset*, even in cases involving overly broad geographic restrictions in employment contracts, to hold that if a covenant not to compete’s territorial prohibition is facially invalid, then no other consideration is necessary by a reviewing court. In *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct.App. 1992), the South Carolina Court of Appeals held that a territorial restriction of fifteen (15) miles surrounding three veterinarian practice locations in Anderson County, South Carolina, which had the practical affect of proscribing the competition of a former employee in “nearly all of Anderson County, parts of Abbeville, Greenville, Pickens, and Oconee Counties, and indeed a small part of Georgia,” was facially invalid.

Citing *Somerset*, the *Stringer* Court held that its “focus here need only be upon the question of whether, as a matter of law, the covenant in issue is reasonably limited in its operation with respect to place.” *Stringer*, 424 S.E.2d at 548. Further, *Stringer* noted that no other factors need to be considered once a court determines that the

² The defendant in *Somerset*, much like the Respondent in the case at bar, argued that the overly broad non-compete should be upheld, in part, because the plaintiff suggested that the non-compete could include the whole state; that the plaintiff stated that he had no intention of going back into this particular business; and that the statewide restriction was necessary for the protection of the defendant’s purchase of the business. See, *Id.* at 346-47.

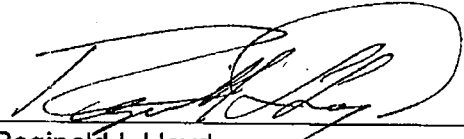
territorial restriction is unreasonable. *Id.*, citing, *Somerset*, 104 S.E.2d at 346 ("If . . . the territorial scope of the restraint is unreasonable . . . no inquiry need be made as to the presence or absence of other necessary requirements.") "If a covenant not to compete is defective in one of the [required elements], the covenant is totally defective and cannot be saved." *Faces Boutique, LTD v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707, 709 (Ct.App. 1995), citing, *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally."); *Somerset*, 104 S.E.2d at 346. Both Respondent and the Special Referee attempt to dodge the applicable holding in *Somerset* by justifying the overly broad territorial restriction imposed upon the Appellants based upon irrelevant factors, such as Appellants' failure to object to the terms of the non-compete or because Appellant Knight indicated that he planned to get out of business. Such arguments were rejected by the *Somerset* Court and are contrary to the precedent determining reasonableness based upon the territorial reach of the client or customer base of a business at the time it is purchased. *See, Somerset, supra.*

CONCLUSION

Based on the foregoing, and in addition to the arguments set forth in Appellants' Initial Brief, Appellants respectfully submit that this case should be decided in accordance with the holding set forth in *Somerset* and the non-compete at issue declared invalid. Respondent's types of proffered justifications for the geographic component of the non-compete, outside the express terms of the overly broad territorial radius, were rejected by the *Somerset* Court as improper considerations. Thus, based

upon the foregoing, the Appellants respectfully request that the Orders of the Special Referee be reversed and vacated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Reginald I. Lloyd', is written over a horizontal line.

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