

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5471
Heard November 17, 2016 – Filed March 1, 2017
Petition for Rehearing Denied May 26, 2017

Joshua Fay, ... Respondent,

v.

Total Quality Logistics, LLC, ... Petitioner,

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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

JOSHUA FAY, ...Appellant-Respondent,

vs.

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDUCIAL CIRCUIT
CASE NO.: 2103-CP-10-5579

THOMAS JOSHUA FAY)
Plaintiff,)

vs.)

TOTAL QUALITY LOGISTICS,)
LLC)
Defendant.)

Order Amending April 14, 2014 Order
and Certifying Case for Appeal Under
SCRCP 54(b)

2014 AUG -4 AM 10:51
JULIE
CLERK OF COURT

This case is postured differently from the typical action that involves a non-competition agreement. Normally, these suits are initiated by the former employer against the employee seeking to enjoin the former employee from violating a non-competition agreement. In this case, the former employee is the plaintiff, and the defendant is the former employer. The Plaintiff moved for summary judgment seeking a declaratory judgment that that agreement was unenforceable. Conversely, the defendant sought summary judgment on its counterclaim for a declaratory judgment that the noncompetition agreement is enforceable. The plaintiff also sought summary judgment on the defendant's counterclaims for conversion and misappropriation of trade secrets, which I denied.

I do not change the substantive reasoning of my April 14, 2014 Order Granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment. My purpose in writing today is to clarify two things. First, the April 14th order found the defendant's noncompetition agreement valid and enforceable because Ohio law would have found this agreement to be reasonable, not

because it could have been have “blue-penciled.” As noted on pages 6 through 11 of the April 14, 2015 Order, I believe the agreement was valid under the reasonableness analysis required by Ohio law as set forth in the leading Ohio case of Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975). Since it would be valid under current Ohio law, it is enforceable in South Carolina unless it violates the public policy of South Carolina. South Carolina appellate courts have not previously approved a nationwide geographic limitation, and I believe this case provides a vehicle for South Carolina appellate courts to revisit the much narrower current geographic limitations usually imposed under South Carolina law. South Carolina law must recognize that national and multinational corporations now transact business far beyond the narrow current geographic limitations typically upheld under South Carolina law. National and multinational corporations recruit and train highly technical personnel who often conduct business in multiple states and around the world. This 21st century reality should be a factor that our appellate courts may want to re-examine in light of modern business conditions and practices.

Because this matter is for partial summary judgment, involves important policy considerations that should be examined by the appellate courts, and there is no just reason for delay, I certify this issue pursuant to SCRCP 54(b).

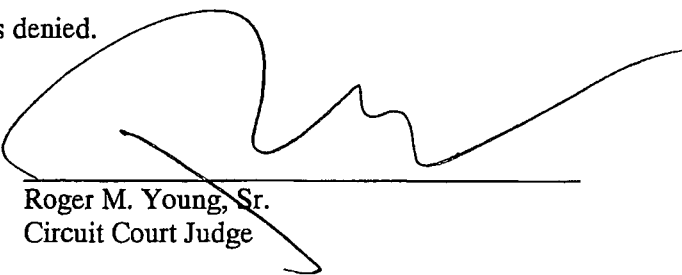
The second thing I wish to clarify is that my April 14th order final paragraph instructed the parties to conduct discovery focused on the damages owed to the defendant proximately flowing from the plaintiff’s breach of the agreement. This was incorrect as I made no finding that the plaintiff in fact violated the agreement. My order was limited to the question of whether the agreement’s non-competition clause was valid and

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enforceable. Whether the plaintiff violated the agreement is highly contested, and therefore the last sentence of the April 14, 2014 order is deleted, and the defendant's motion for summary judgment seeking a finding that the plaintiff breached the agreement and misappropriated trade secrets is denied.

It is so ordered.

August 4, 2014
Charleston, SC



Roger M. Young, Sr.
Circuit Court Judge

FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Joshua Fay,

Plaintiff,

vs.

Total Quality Logistics, LLC,

Defendant,

2014 APR 14

JULIE J. ARMSTRONG
CLERK OF COURT

BY

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-5579

**ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court by the parties' cross-motions for partial summary judgment concerning the enforceability of the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement") which Plaintiff Joshua Fay ("Fay") entered into when he became employed by the Defendant, Total Quality Logistics, LLC ("TQL"). TQL asserted counterclaims for breaches of the Agreement and for a declaratory judgment that the Agreement is enforceable, as a matter of law. Plaintiff moved for partial summary judgment on those counterclaims, as well as TQL's counterclaims for conversion and misappropriation of trade secrets.

The parties submitted initial and supplemental memoranda of law and facts supported by affidavits, and this Court heard oral arguments Friday, January 31, 2014. For the reasons explained below, the Court finds that the Agreement is enforceable and therefore grants the Defendant's motion for partial summary judgment on its counterclaims for a declaratory judgment and for breaches of contract, and denies the Plaintiff's motion for partial summary judgment on those same counterclaims of TQL, as well as Plaintiff's motion for partial summary judgment on TQL's counterclaims for conversion and misappropriation of trade secrets.

ROA 000004

I. FINDINGS OF FACT

A. TQL'S offer of employment to Plaintiff.

TQL is an Ohio limited liability company providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. (Answer of Defendant to Amended Complaint and Counterclaims, ¶51; Affidavit of Hillary Kotlarz, ¶13).

TQL offered Plaintiff employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. (Affidavit of Anna Longar Wolf, ¶14). The offer of employment specifically informed the Plaintiff that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." (*Id.* at ¶16).

Thereafter, TQL employed Plaintiff on December 10, 2012. (Answer of Defendant to Amended Complaint and Counterclaims, ¶52; Affidavit of Hillary Kotlarz, ¶14). At the inception of his employment, and as an inducement to TQL's employing him, Plaintiff entered into an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"). (Answer of Defendant to Amended Complaint and Counterclaims, ¶53; Affidavit of Hillary Kotlarz, ¶15). Even the Plaintiff admits he signed the Agreement on his first day of employment. (Affidavit of Thomas Joshua Fay, ¶¶3-5).

B. The Agreement contains reasonable covenants against competition.

1. The Agreement restricts competition and solicitation in Section 9.

In Section 9, the Plaintiff agreed that, for a period of one year after his employment terminated, he would not "become employed by or engaged in a Competing Business ..., in a



capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." (Agreement, ¶9(b), ¶9(b)(ii)). The parties agreed that a "Competing Business" is "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." (Agreement, ¶9(d)). The parties agreed that "the Business" is "providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States." (Agreement, First Recital).

Plaintiff also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL." (Agreement, ¶9(b), ¶9(b)(iii)). He also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer¹ ..., or otherwise take any action to divert Business from TQL." (Agreement, ¶9(b), ¶9(b)(iv)).

2. The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that "All Confidential Information as described herein is

¹ "Customer" is any customer or prospective customer (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason.

proprietary and the sole property of TQL.” (Agreement, ¶3). The Agreement prohibits Plaintiff from “us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information.” (Agreement, ¶4).

Plaintiff agreed that “engaging in an employment relationship with a Competing Business ... in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL’s Confidential Information to unfairly compete with TQL.” (Agreement, ¶6).

Plaintiff agreed that “TQL’s trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL’s Business and operations, access to and knowledge of which are essential to performance of Employee’s duties hereunder...” (Agreement, ¶7). The term Confidential Information is defined in the Second Recital of the Agreement.

C. Plaintiff’s extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Plaintiff’s job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. (Affidavit of Hillary Kotlarz, ¶6). Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. *Id.* His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. *Id.*



Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (Affidavit of Hillary Kotlarz, ¶7). As part of his training and employment, Plaintiff had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. *Id.* The Plaintiff was introduced to the customer of TQL's for which Plaintiff began to work after his termination, The Brandt Companies, ("Brandt"), through his training on Load Manager.

Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (Affidavit of Hillary Kotlarz, ¶8). Before he was hired, Mr. Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.*

Following his termination on June 17, 2013, he began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to Brandt the same services that he had provided to Brandt while employed by TQL.

The Plaintiff initiated this action in part seeking a declaratory judgment that the Agreement is unenforceable. TQL counterclaimed asserting claims for a declaratory judgment



that the Agreement is enforceable, that Plaintiff breached his Agreement by providing services to Brandt, and that Plaintiff had misappropriated trade secrets in this pursuit.

II. LAW/ANALYSIS.

A. Standard for Summary Judgment.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009).

B. Analysis.

1. The Agreement is valid under Ohio Law and does not offend the public policy of South Carolina.

Terms in a non-compete agreement may be construed according to the law of another state. *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005), citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961). So long as the resulting agreement is valid as a matter of law and comports with public policy in South Carolina, our courts will enforce the agreement. *Id.*

Here, the restrictive covenants in the Agreement are valid under Ohio law, and they comport fully with South Carolina's public policy which generally requires the enforcement of contracts entered into freely. *Oxman v. Profitt*, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Under Ohio law, they are no greater than is required for

the protection of TQL; they do not impose undue hardship on the Plaintiff; and they are not injurious to the public. *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975). Under Ohio law, the Court must examine a non-competition covenant to determine the reasonableness of the restrictions. *Id.* To make that determination, the court should consider the absence or presence of a long list of factors: whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during the employment, and whether the forbidden employment is merely incidental to the main employment. *Id.*

The Agreement imposes time and geographic limits; the restrictive covenants run for one year after Plaintiff's employment terminates and are limited to the Continental United States. (Agreement, ¶9(b), ¶9(d)). Plaintiff's argument that the geographic scope is somehow overbroad ignores the reach of TQL's business and its need for a nationwide noncompete. Moreover, Plaintiff was able to establish contact with TQL's customers and prospects across the United States and Canada. (Supplemental Affidavit of Hillary Kotlarz, ¶4). For example, TQL's records show that Plaintiff contacted customers and prospects located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico. *Id.* at ¶5. Clearly, the geographic scope of the Agreement is enforceable. Indeed, it is drawn more narrowly than the actual areas within which Plaintiff was able to establish contacts, which included Hawaii and

Puerto Rico. Obviously, the Plaintiff had contact with many customers—and he admits for example that he had contact with The Brandt Companies (“Brandt”). (Affidavit of Thomas Joshua Fay, ¶¶7-12).

Plaintiff possesses TQL’s confidential information and trade secrets. Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL’s customers, as well as their contact information. (Affidavit of Hillary Kotlarz, ¶17). As part of his training and employment, Mr. Fay had access to TQL’s proprietary software system—Load Manager—which contained much of TQL’s Confidential Information as well as marketing and business strategy for TQL’s sales employees. *Id.*

TQL’s Agreement only bars unfair competition. Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL’s methods to develop leads or how to “build” loads, nor did he know what TQL’s pricing, profitability and margin information was. (Affidavit of Hillary Kotlarz, ¶18). Before he was hired, Plaintiff did not have any of the non-public information about the individualized needs and requirements of TQL’s customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parents’ company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.* As a result, there is nothing unfair about preventing Plaintiff from competing in this business, from soliciting TQL’s clients, or from diverting business of TQL’s clients away from TQL to Plaintiff’s competing business, JF Progressions, Incorporated. Finally, by its terms, the restrictions were not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL. (Agreement, ¶14).

Plaintiff's argument that his noncompete prevents him from working in any capacity in the intermodal transportation industry is overstated: his noncompete permits him to hold several positions, including, by way of example, the following jobs: dispatcher for a truck company, driver for a truck company, carrier compliance coordinator, safety compliance officer with a motor carrier, carrier coordinator with a motor carrier, logistics planner for any company other than a freight broker, freight broker for an ocean or air freight company, freight broker for a non-vessel operating common carrier, barge or intermodal freight company, customs broker or international freight broker, produce broker, lumber broker, and an alloy broker.

The covenants do not stifle the Plaintiff's inherent skill and experience, because at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. The benefit to TQL in enforcing the Agreement is not disproportionate to the Plaintiff's detriment. At oral argument, Plaintiff's counsel represented to the Court that Plaintiff was earning as much as \$100,000 annually from his work with Brandt alone. These are substantial damages to TQL.

Plaintiff also argued that under the covenant restricting the disclosure of trade secrets and confidential information, any information that Plaintiff received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the public domain or had been obtained by TQL from another competitive business. This again overstates the effect of the Agreement. Although the definition of Confidential Information in the Agreement is certainly a robust expression of the information protected, a close reading shows that it genuinely focuses on secret and/or proprietary information concerning TQL and/or its customers:

WHEREAS, TQL develops and maintains confidential proprietary Information (hereinafter referred to as, "Confidential Information"), including but not limited

to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This Information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; ...

(Agreement, Second Recital). Thus, as an employee of TQL, Plaintiff learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigerated unit during transit; how to locate flag cars and permits for a

motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain periods of the year (e.g., produce, landscaping, building materials); where products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed—this will help brokers understand when truck costs and availability will “tighten up” because of increased demand and how to obtain backhauls for motor carriers and how to price them.

Courts in Ohio that have considered whether TQL’s Agreement should be enforced with a preliminary injunction or temporary restraining order, both drastic remedies, have held that it is enforceable and granted the preliminary relief. See *Jeffrey A. Dangelo vs. Total Quality Logistics, LLC*, Case No. 1:09cv512 (S.D. Ohio 2009); and *Total Quality Logistics, LLC vs. Michael Siano*, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011).

For the foregoing reasons, I find that the Agreement is valid as a matter of Ohio law and comports with public policy in South Carolina.

2. Plaintiff’s motion for summary judgment on TQL’s claims for breaches of the confidentiality provisions in his Agreement and for conversion and misappropriation of trade secrets are denied.

Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). For the same reason, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991).

Plaintiff's argument that he did not use confidential information to solicit Brandt's business is nothing more than a bald denial and side steps the fact that he was introduced to Brandt and taught how to sell to them by way of his exposure to a range of confidential information that TQL alleges constitutes trade secrets. (Affidavit of Hillary Kotlarz, ¶¶7-9). He was entrusted with such nonpublic information as TQL's pricing, profitability and margin information, as well as non-public information about Brandt and other customers, TQL's proprietary software system, Load Manager, TQL's marketing and business strategies, and how to develop leads and build loads. *Id.*

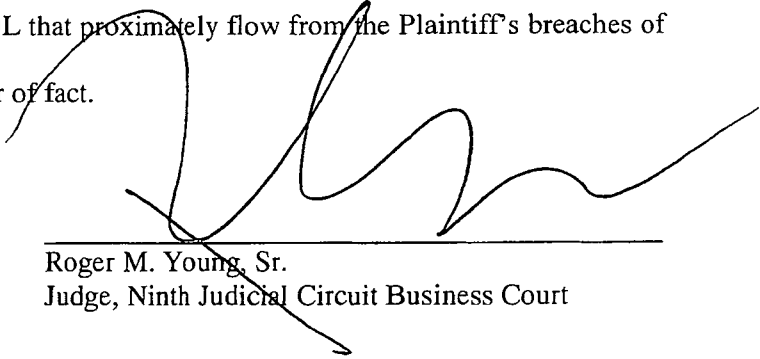
In light of Plaintiff's complete disregard of his contractual obligations not to solicit customers like Brandt, TQL is entitled to conduct discovery to determine the extent of his misconduct and misuse of confidential information. Particularly appropriate in the face of Plaintiff's premature motion is the explanation Judge Lord provided in *Greenberg v. Croydon Plastics Co.*:

Plaintiffs in trade secret cases, who must prove by a fair preponderance of the evidence disclosure to third parties and use of the trade secret by the third parties, are confronted with an extraordinarily difficult task. Misappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what the plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants' witnesses who directly deny everything.

378 F. Supp. 806, 814 (E.D. Pa. 1974) (emphasis added). Finally, TQL included a very explicit list of confidential information and trade secrets it alleges Plaintiff converted. See ¶64, Answer of Defendant to Amended Complaint. Those allegations fully inform the Plaintiff of the nature of TQL's claim.

III. CONCLUSION.

For the foregoing reasons, the Plaintiff's partial motion for summary judgment is denied, and TQL's motion for partial summary judgment is granted. The parties are instructed to conduct discovery focused on the damages to TQL that proximately flow from the Plaintiff's breaches of the Agreement to be presented to the trier of fact.



Roger M. Young, Sr.
Judge, Ninth Judicial Circuit Business Court

April 14, 2014.

6. On or about June 17, 2013, Defendant terminated Plaintiff's employment without any reasonable basis to do so.

7. Shortly after being terminated, Plaintiff was offered, and accepted a position as, independent shipping agent for The Brandt Companies, LLC, located in Carrollton, Texas.

8. Plaintiff had brought The Brandt Companies, LLC to the Defendant as a Customer.

9. When The Brandt Companies, LLC learned that Plaintiff was no longer working with Defendant, The Brandt Companies, LLC asked Plaintiff if he would work for it as its exclusive shipping agent, and Plaintiff accepted.

10. Plaintiff conducts business for The Brandt Companies, LLC, through his solely owned business, JF Progressions, LLC (JF).

11. On or about August 27, 2013, Defendant notified Plaintiff that it intended to pursue legal action against him and JF, if he did not, among other things, immediately cease working as a broker for JF or any other entity.

For a First Cause of Action
(Violation of Fair Labor Standards Act)

12. Plaintiff brings this action to recover from defendants unpaid overtime compensation and an additional equal amount as liquidated damages, pursuant to 29 U.S.C.A. § 216(b) and other provisions of the Fair Labor Standards Act of 1938 (FLSA).

13. At all times herein set forth, Defendant was an employer within the definition of the FLSA, 29 U.S.C.A. § 203, and Plaintiff was at all times herein set forth an employee within the definitions of that section.

14. At all times herein set forth, the Defendant was engaged in commerce within the meaning of the FLSA.

15. At all times herein set forth, the Defendant employed the Plaintiff in the capacity of an assistant to the freight broker for the purpose of facilitating the shipment of goods and freight in interstate commerce.

16. The Plaintiff was employed by the Defendant in the capacity of an assistant to the freight broker from December 10, 2012, to June 17, 2013, inclusive.

17. The Defendant employed the Plaintiff on a 40-hour weekly basis at a weekly salary of \$673.08, or \$16.83 per hour for a forty (40) hour week.

18. This wage was paid December 10, 2012, until June 17, 2013, when the Plaintiff's employment was terminated.

19. During the period covered by the employment, the Plaintiff performed overtime work, as a requirement of his job with Defendant, who had knowledge and consented to Plaintiff's working overtime.

20. Plaintiff received no additional compensation for this overtime from Defendant in violation of the provisions of the FLSA.

21. Pursuant to 29 U.S.C. §§ 207, 216, there is due and owing from the Defendant to the Plaintiff as compensation for overtime work approximately \$13,629.87, plus an additional equal amount as liquidated damages together with an additional sum due for reasonable attorneys' fees and costs.

22. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant in the sum of \$27,259.74 together with interest and costs, plus reasonable attorneys' fees and costs.

For a Second Cause of Action
(Declaratory Judgment)

23. Plaintiff repeats the allegations contained in the above paragraphs as if fully repeated herein.

24. Defendant has informed Plaintiff that his work for The Brandt Companies, LLC violates the Non-Compete Agreement and that it will seek to enforce the Non-Compete Agreement if Plaintiff does not immediately terminate providing services to The Brandt Companies, LLC.

25. The Non-Compete Agreement has no geographical limitations and, if enforced, would prevent Plaintiff from working in the truck shipping industry in any capacity in the entire United States.

26. The Non-Compete Agreement is overly broad and not necessary for the reasonable protection of the Defendant.

27. The Non-Compete Agreement is invalid and not enforceable.

28. Accordingly, this Court should inquire into this matter, which is a proper subject for declaratory relief, grant a speedy hearing pursuant to Rule 57 of the South Carolina Rules of Civil Procedure, and issue an order declaring that the Non-Compete Agreement is invalid and unenforceable as to Plaintiff.

For a Third Cause of Action
(Intentional Interference with a Contract)

29. All of the allegations set forth hereinabove are incorporated herein as if fully repeated verbatim.

30. On or about August 1, 2013, Plaintiff entered into a contractual relationship with The Brandt Companies, LLC ("Brandt") to be its exclusive shipping agent.

31. Defendant is aware of Plaintiff's contract with Brandt.

32. On or about October 18, 2013, Defendant filed a Complaint against Brandt in the Court of Common Pleas for Clermont County, Ohio, Case No. 2013-CVH-01592, alleging, *inter alia*, a debt owed and interference with Defendant's business relationships based on the contract for services between Brandt and Plaintiff.

33. Defendant's Complaint against Brandt was filed without reasonable justification and was done with the sole purpose of causing harm to Plaintiff.

34. As a result of Defendant's institution of a legal action against Brandt, Brandt has declined to conduct business with Plaintiff until the issues in the Ohio case are resolved.

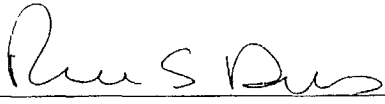
35. As a result of Defendant's wrongful and malicious conduct, Plaintiff has suffered special damages, including harm to his reputation and loss of income.

36. Plaintiff is entitled to actual and punitive damages in an amount to be determined by the Court.

WHEREFORE, the Plaintiff prays that the Court:

- (1) Award of judgment against the Defendant in the sum of \$27,259.74 together with interest and costs, plus attorney fees and costs;
- (2) Inquire into this matter, and issue its judgment concluding that the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement is invalid and unenforceable against Plaintiff;
- (3) For a judgment against Defendant that Plaintiff is entitled to actual and punitive damages in an amount to be determined by the Court for intentional interference with contractual relations; and
- (4) Grant such other and further relief as the court may deem just and proper under the circumstances

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor

Rene S. Dukes

P.O. Box 893

Charleston, SC 29402

(843) 577-6726 (O)

(843) 724-8036 (F)

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina

November 12, 2013



TOTAL QUALITY LOGISTICS, LLC
South Carolina

Employee Non-Compete, Confidentiality
and Non-Solicitation Agreement

This EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT ("Agreement"), is by and between TOTAL QUALITY LOGISTICS, LLC ("TQL"), 4289 Ivy Pointe Blvd., Cincinnati, Ohio 45245 and the Employee whose name and address are set forth below his or her signature on the last page of this Agreement ("Employee").

RECITALS:

WHEREAS, TQL is an Ohio Corporation providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services (hereinafter referred to as the "Business") throughout the Continental United States; and

WHEREAS, TQL is unique within the organizations providing services competitive to the Business (hereinafter referred to as the "Industry"). TQL has spent extensive time developing relationships with Customers, Motor Carriers, suppliers and others within the Industry. TQL provides extensive training on ways to succeed within the Industry. TQL also provides tools, such as proprietary software, that are unique within the Industry. The relationships, tools, and training developed by TQL will assist Employee in gaining intimate knowledge of TQL's business model, its Customers, Motor Carriers, suppliers, contact information, lanes, pricing, sales strategy, service and other confidential and proprietary information. The knowledge learned at TQL is unlike what could be learned elsewhere within the Industry. TQL takes steps to protect the confidentiality of this information, and such information would have value to a TQL competitor. Employee, therefore, acknowledges and agrees that what Employee learns at and is trained in at TQL would necessarily cause unfair competition if Employee took employment competitive to TQL; and

WHEREAS, TQL develops and maintains confidential proprietary information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics

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management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

NOW THEREFORE, in consideration of the employment of Employee by TQL, including compensation and benefits provided by TQL, and the terms, conditions, and covenants, set forth herein, TQL and Employee agree as follows:

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1. Recitals. The "Recitals" set forth above are hereby restated and incorporated herein by reference as though fully set forth again.

2. At-will Employment. Employee is an employee at-will. Nothing in this Agreement changes Employee's status as an at-will employee. Either TQL or Employee may terminate Employee's employment for any reason at any time. Employee acknowledges and agrees that this Agreement does not constitute a contract of employment and that Employee does not have a contract of employment with TQL.

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are

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valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

8. Property Rights and Assignment. Employee agrees that any work, invention, product design, or technological innovation created, conceived, developed, produced, generated, and/or improved by Employee, whether or not patentable, or subject to copyright, trademark, or trade secret protection, at any time during or arising out of Employee's employment with TQL that results from, is suggested by, or relates to any work which Employee does for TQL, shall be the absolute property of TQL and shall promptly be disclosed by Employee to TQL. Employee hereby assigns any and all right, title, and interest in any work product to TQL, including assigning any and all rights to any future invention arising out of or relating to Employee's employment with TQL. To the extent necessary, during employment and thereafter, Employee shall sign applications, assignments, and any other papers that TQL may consider necessary or helpful in perfecting and enforcing TQL's rights in, and to, any such invention, improvement, and/or technological innovation.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

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(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing
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Business" is any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.

(e) Acknowledgement of Intent. The parties agree and affirm that their intention with respect to Section 8 of this Agreement is that Employee's activities be limited only during Employee's employment with TQL and for a twelve (12) month period after termination or cessation of Employee's employment with TQL for any reason. The provisions calling for a "look back" of twelve (12) calendar months prior to termination or cessation of Employee's employment with TQL for any reason are intended solely as a means of identifying the Customers and Motor Carriers to which such restrictions apply and are not intended to nor shall they, under any circumstances, be construed to define the length or term of any such restrictions.

10. Reasonableness of Restrictions. Employee agrees and acknowledges that the provisions of this Agreement, including the geographic, duration, and content restrictions contained in Section 8 and the restrictions on the disclosure and use of Confidential Information contained in Section 4, are reasonable and fair in all respects and properly required for the adequate protection of the Business of TQL from the disclosure of Confidential Information and unfair competition. Employee further agrees and acknowledges that this Agreement is based upon valuable and sufficient consideration, the receipt of which as of the date of this Agreement is hereby acknowledged.

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

12. Severability. Should any of the provisions of this Agreement be declared or determined to be illegal or invalid by a court of competent jurisdiction, (a) the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not a part of this Agreement; (b) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (c) there shall be added automatically as a part of this Agreement provisions as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable. The parties hereby consent and agree that the scope of the Agreement's provisions may be modified judicially in any proceeding brought to enforce such provisions.

13. No Conflicting Employee Agreement. Employee represents that Employee is not bound by any agreement or contract or other duty to a former employer or any other party which would prevent Employee from complying with any obligations hereunder or performing his or her duties as an employee of TQL.

14. Acknowledgments. Employee acknowledges and agrees that he or she:

(a) has had sufficient time within which to consider the Agreement before executing it;

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(b) has carefully read and fully understands all of the provisions of the Agreement;

(c) knowingly and voluntarily agrees to all of the terms set forth in the Agreement;

(d) knowingly and voluntarily intends to be legally bound by this Agreement;

(e) has had sufficient opportunity to obtain and consult with his or her own lawyer regarding this Agreement; and

(f) has knowingly and voluntarily executed this Agreement.

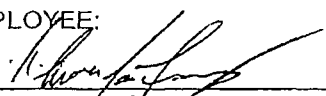
15. Binding Agreement. This Agreement shall be binding and enforceable upon the parties hereto, their heirs, representatives, successors, and assigns. The Agreement is not assignable by Employee.

16. Survival. Sections 3 through 15 of this Agreement shall survive the termination or cessation of Employee's employment with TQL for any reason.

17. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto pertaining to the subject of this Agreement, and fully supersedes in all respects any and all prior oral or written agreements or understandings between the parties hereto pertaining to the subject of this Agreement. This Agreement may be amended or modified only upon written agreement signed by both of the parties hereto. This Agreement may be executed in Counterparts, each of which shall be deemed an original and all of which taken together shall constitute one Agreement.

In Witness Whereof, the undersigned parties to this Agreement have duly executed it on the day and year first written below.

EMPLOYEE:

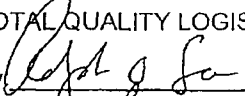

Signature

Name: Thomas S. Fay
Please Print

Address: 1349 Sumner Fox
Charleston, SC

Date: 12/10/12

TOTAL QUALITY LOGISTICS, LLC

By: 
Name: Ralph O Lee

Title: VP of HR

Date: 12/13/12

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C.A. No. 2013-CP-10-5579
Joshua Fay,	)	
	)	
Plaintiff,	)	ANSWER OF DEFENDANT TO
vs.	)	AMENDED COMPLAINT AND
	)	COUNTERCLAIMS
Total Quality Logistics, LLC,	)	
	)	
Defendant,	)	

Now comes Defendant Total Quality Logistics, LLC ("TQL"), responding to the Amended Complaint of the Plaintiff, would respectfully show unto the court as follows:

FIRST DEFENSE

All allegations of the complaint not specifically admitted are denied.

1. TQL admits the allegations of paragraph 1 of the Amended Complaint.
2. TQL denies the allegations of paragraph 2 of the Amended Complaint. For further response, TQL is a limited liability company organized under the laws of the State of Ohio.
3. TQL admits the allegations of paragraph 3 of the Amended Complaint and would further allege that the job title the Plaintiff held initially was that of a Logistics Account Executive in Training ("LAET").
4. TQL admits the allegations of paragraph 4 of the Amended Complaint and would further allege that the referenced agreement was entered into at the inception of Plaintiff's employment with TQL.
5. TQL denies the allegations of paragraph 5 of the Amended Complaint.
6. TQL denies the allegations of paragraph 6 of the Amended Complaint.
7. TQL admits the allegations of paragraph 7 of the Amended Complaint.
8. TQL denies the allegations of paragraph 8 of the Amended Complaint.

9. TQL is without information sufficient to admit or deny the allegations of paragraph 9 of the Amended Complaint and therefore denies them.

10. TQL admits the allegations of paragraph 10 of the Amended Complaint upon information and belief.

11. TQL admits the allegations of paragraph 11 of the Amended Complaint.

12. Responding to paragraph 12 of the Amended Complaint, TQL admits that Plaintiff has asserted claims under the Fair Labor Standards Act seeking allegedly unpaid overtime compensation, and liquidated damages, but TQL denies that it has violated the FLSA and denies that Plaintiff is entitled to the relief he seeks. Except as set out herein, the allegations of paragraph 12 of the Amended Complaint are denied.

13. TQL admits the allegations of paragraph 13 of the Amended Complaint.

14. TQL admits the allegations of paragraph 14 of the Amended Complaint.

15. TQL admits the allegations of paragraph 15 of the Amended Complaint.

16. TQL admits the allegations of paragraph 16 of the Amended Complaint.

17. TQL admits that Plaintiff was hired as an exempt employee with a yearly base salary of \$35,000.00. TQL denies the remaining allegations of paragraph 17 of the Amended Complaint.

18. TQL admits that Plaintiff was paid at least \$1,346.15 on a bi-weekly basis. TQL denies the remaining allegations of paragraph 18 of the Amended Complaint.

19. TQL denies the allegations of paragraph 19 of the Amended Complaint.

20. TQL admits so much of paragraph 20 of the Amended Complaint as alleges that Plaintiff received no additional compensation for hours worked in excess of forty in any workweek. For further response, TQL would allege that Plaintiff was not entitled to additional

compensation for hours worked in excess of forty in any workweek because he was properly classified as exempt from the overtime provisions of the Fair Labor Standards Act. Except as set out herein, the allegations of paragraph 20 of the Amended Complaint are denied.

21. TQL denies the allegations of paragraph 21 of the Amended Complaint.

22. TQL denies the allegations of paragraph 22 of the Amended Complaint.

23. For answer to paragraph 23, TQL incorporates by reference its responses to paragraphs 1 through 23 as if fully set forth herein.

24. TQL admits the allegations of paragraph 24 of the Amended Complaint.

25. TQL denies the allegations of paragraph 25 of the Amended Complaint.

26. TQL denies the allegations of paragraph 26 of the Amended Complaint.

27. TQL denies the allegations of paragraph 27 of the Amended Complaint.

28. TQL denies the allegations of paragraph 28 of the Amended Complaint.

29. For answer to paragraph 29, TQL incorporates by reference its responses to paragraphs 1 through 28 as if fully set forth herein.

30. TQL admits the allegations of paragraph 30 of the Amended Complaint, upon information and belief.

31. TQL admits the allegations of paragraph 31 of the Amended Complaint.

32. TQL admits the allegations of paragraph 32 of the Amended Complaint.

33. TQL denies the allegations of paragraph 33 of the Amended Complaint.

34. TQL admits the allegations of paragraph 34 of the Amended Complaint.

35. TQL denies the allegations of paragraph 35 of the Amended Complaint.

36. TQL denies the allegations of paragraph 36 of the Amended Complaint.

37. TQL denies the Plaintiff is entitled to the relief he seeks in his Prayer for Relief, including subparagraphs 1, 2, and 3.

SECOND DEFENSE

38. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

39. The Amended Complaint should be dismissed for failing to state facts sufficient to constitute causes of action. Rule 12(b)(6), SCRCF.

THIRD DEFENSE

40. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

41. Plaintiff's claims under the Fair Labor Standards Act should be dismissed in their entirety, because another claim is pending between the parties for the same claim. Rule 12(b)(8), SCRCF.

FOURTH DEFENSE

42. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

43. Plaintiff's claim for unpaid overtime is barred by the doctrine of accord and satisfaction, because TQL has paid Plaintiff all wages due and owing.

FIFTH DEFENSE

44. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

45. All decisions regarding the Plaintiff were made in good faith and with no intent to violate federal law.

SIXTH DEFENSE

46. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

47. Plaintiff is not entitled to an award of liquidated damages under the FLSA, because any acts or omissions giving rise to Plaintiff's claims, which are denied, were not willful and were made without any knowledge of any violations of the Act.

SEVENTH DEFENSE

48. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

49. Whether Plaintiff is entitled to liquidated damages and attorneys' fees under the FLSA are issues for the Court, not a jury.

EIGHTH DEFENSE AND BY WAY OF FIRST COUNTERCLAIM (Breaches of Contract)

50. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

51. TQL is an Ohio Corporation providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States.

52. TQL employed Plaintiff on or about December 10, 2012, as a Logistics Account Executive in Training ("LAET").

53. At the inception of his employment, and as an inducement to TQL's employing him, Plaintiff entered into an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), attached hereto at **Exhibit A**, which contained the following provisions and obligations:

WHEREAS, TQL develops and maintains confidential proprietary Information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This Information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and Irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and, that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any Individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to

all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (2) month period prior to

termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing Business" is any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.

(e) Acknowledgement of Intent. The parties agree and affirm that their intention with respect to Section 8 of this Agreement is that Employee's activities be limited only during Employee's employment with TQL and for a twelve (12) month period after termination or cessation of Employee's employment with TQL for any reason. The provisions calling for a "look back" of twelve (12) calendar months prior to termination or cessation of Employee's employment with TQL for any reason are intended solely as a means of identifying the Customers and Motor Carriers to which such restrictions apply and are not intended to nor shall they, under any circumstances, be construed to define the length or term of any such restrictions.

10. Reasonableness of Restrictions. Employee agrees and acknowledges that the provisions of this Agreement, including the geographic, duration, and content restrictions contained in Section 8 and the restrictions on the disclosure and use of Confidential Information contained in Section 4, are reasonable and fair in all respects and properly required for the adequate protection of the Business of TQL from the disclosure of Confidential Information and unfair competition. Employee further agrees and acknowledges that this Agreement is based upon valuable and sufficient consideration, the receipt of which as of the date of this Agreement is hereby acknowledged.

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

16. Survival. Sections 3 through 15 of this Agreement shall survive the termination or cessation of Employee's employment with TQL for any reason.

See Agreement at Exhibit A.

54. The Agreement is a binding contract supported by valid consideration.

55. The Agreement contains valid, binding covenants restricting competition and the misappropriation of confidential information and trade secrets, fully enforceable under the laws of the State of Ohio and the State of South Carolina.

56. TQL terminated Plaintiff's employment on or about June 17, 2013 for cause.

57. Thereafter, Plaintiff breached his Agreement in several material respects, by performing work for The Brandt Companies as alleged in his Complaint. By his own admission, Plaintiff is in breach of the Agreement.

58. TQL is entitled to an award of its actual and consequential damages, in amounts to be determined by the trier of fact, as the direct and proximate results of Plaintiff's breaches of contract, plus an award of its reasonable attorneys' fees as provided by the Agreement.

**NINTH DEFENSE
AND BY WAY OF SECOND COUNTERCLAIM
(Declaratory Judgment)**

59. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

60. By his own admission, Plaintiff is in breach of the Agreement.

61. Plaintiff's refusal to honor the obligations in his Agreement presents an immediate case or controversy under South Carolina Code of Laws, Section 15-53-10, et seq.

62. TQL is entitled to a declaratory judgment of this Court regarding the rights and obligations of these parties under the Agreement, and, in particular, a declaration that the Non-Competition Covenants contained therein are enforceable, as follows:

a. that the restrictions on the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7 of the Agreement are valid and enforceable and that Plaintiff is in breach thereof;

b. that the Covenants and Remedies in Section 9 of the Agreement are valid and enforceable and that Plaintiff is in breach thereof;

c. that Section 10 of the Agreement is a valid provision containing Plaintiff's waiver of any rights to contest the enforceability of the aforementioned restrictions on the use of Confidential Information and Trade Secrets and the Covenants and Remedies; and

d. declaring that TQL is entitled to recover its actual and consequential damages, as well as its reasonable attorneys' fees.

**TENTH DEFENSE
AND BY WAY OF THIRD COUNTERCLAIM
(Conversion/Misappropriation of Proprietary Information
And Misappropriation of Trade Secrets)**

63. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

64. In his capacity as a LAET and a LAE, Plaintiff had access to TQL's confidential and proprietary business information, including operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing

information; functions and records; logistics management; and data, processes, and procedures (together hereinafter, "Confidential Information").

65. TQL's Confidential Information derives economic value by not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use. The information is the subject of reasonable efforts on the part of TQL to maintain its secrecy, and therefore constitutes "trade secrets" under the Ohio Trade Secrets Act, Ohio Rev. Code, Ann., sections 1333.61, et seq., as well as South Carolina Trade Secrets Act, S.C. Code sections 39-8-10, et seq.

66. TQL did not authorize Plaintiff to take its Confidential Information.

67. Plaintiff has misappropriated the trade secrets belonging to TQL, and TQL has been damaged by this conversion and misappropriation.

68. Plaintiff has acted willfully, maliciously, and in disregard of TQL's rights by converting and misappropriating the trade secrets of TQL.

69. The actions of Plaintiff constitute willful violations of the Ohio Trade Secrets Act, Ohio Rev. Code, Ann., sections 1333.61, et seq., and the South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10, et seq.

70. As a result, TQL is entitled to an injunction to prevent actual and/or threatened misappropriations of its confidential and proprietary information and trade secrets. TQL is also entitled to recover its actual damages, including the actual loss caused by Plaintiff's conduct, the unjust enrichment caused by his conduct, and the imposition of a reasonable royalty for the unauthorized disclosure and use. Additionally, TQL is entitled to an award of separate exemplary damages in an amount not exceeding twice its actual damages, as well as its reasonable attorneys' fees, in recognition of the willful, wanton, and reckless conduct of Plaintiff.

**ELEVENTH DEFENSE
AND BY WAY OF FOURTH COUNTERCLAIM
(Injunctive Relief)**

71. TQL incorporates the foregoing responses, allegations, and denials as if set forth fully herein.

72. The Agreement is a binding contract that contains valid restrictions preventing the misuse of Confidential Information and Trade Secrets and covenants restricting competition as defined therein, all enforceable under the laws of the State of Ohio and the State of South Carolina.

73. Plaintiff is in breach of the restrictions and covenants.

74. The confidential and proprietary information described above constitutes trade secrets as defined by the Ohio Trade Secrets Act, Ohio Rev. Code, Ann., sections 1333.61, et seq., and the South Carolina Trade Secrets Act, S.C. Code Ann. sections 39-8-20. Plaintiff's conduct constitutes "misappropriation" by "improper means" under the Acts. The Acts allow injunctive relief to prevent an actual or threatened misappropriation of a trade secret.

75. By virtue of the foregoing, TQL has demonstrated a likelihood of success on the merits and that a balancing of the equities entitles TQL to preliminary, temporary, and permanent injunctive relief, to protect against the irreparable harm caused by Plaintiff's violations of his Agreement and by the actual and threatened misappropriation, misuse, and disclosure of trade secrets by Plaintiff. TQL is also entitled to this Court's order of any affirmative acts necessary to protect its trade secrets, including the return of all trade secrets in the possession of Plaintiff, and

anyone acting in concert with him. Plaintiff's conduct was willful, wanton, and in disregard of TQL's rights, such that the Court may award to TQL its reasonable attorneys' fees.

WHEREFORE, Defendant TQL prays that Plaintiff's Amended Complaint be dismissed with all costs cast upon the Plaintiff, and for the following relief:

1. An award of its actual and consequential damages, in amounts to be determined by the trier of fact, as the direct and proximate results of Plaintiff's breaches of contract, plus an award of its reasonable attorneys' fees as provided by the Agreement under the First Counterclaim.

2. A declaratory judgment of this Court regarding the rights and obligations of these parties under the Agreement, and, in particular, a declaration that the restrictions on the use of Confidential Information and Trade Secrets and the Non-Competition Covenants contained therein are enforceable under the Second Counterclaim.

3. An award of its actual damages, including the actual loss caused by Plaintiff's conduct, the unjust enrichment caused by his conduct, and the imposition of a reasonable royalty for the unauthorized disclosure and use. Additionally, TQL is entitled to an award of separate exemplary damages in an amount not exceeding twice its actual damages under the Third Counterclaim.

4. To preliminary, temporary, and permanent injunctive relief, to protect against the irreparable harm caused by Plaintiff's violations of his Agreement and by the actual and threatened misappropriation, misuse, and disclosure of trade secrets by Plaintiff. TQL is also entitled to this Court's order of any affirmative acts necessary to protect its trade secrets, including the return of all trade secrets in the possession of Plaintiff, and anyone acting in

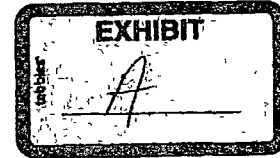
concert with him. Plaintiff's conduct was willful, wanton, and in disregard of TQL's rights, such that the Court may award to TQL its reasonable attorneys' fees, under the Fourth Counterclaim.

5. And such other and further relief as this Court deems just and proper.



Robert D. Moseley, Jr. (SC ID: 05526)
Peter A. Rutledge (SC ID: 15899)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Ave., Suite 500 (29601)
P.O. Box 87
Greenville, South Carolina 29602
Telephone: (864) 240-2410
Facsimile: (864) 240-2498
rob.moseley@smithmoorelaw.com
peter.rutledge@smithmoorelaw.com
Counsel for Defendant Total Quality Logistics, LLC

December 16, 2013



TOTAL QUALITY LOGISTICS, LLC
South Carolina

Employee Non-Compete, Confidentiality
and Non-Solicitation Agreement

This EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT ("Agreement"), is by and between TOTAL QUALITY LOGISTICS, LLC ("TQL"), 4289 Ivy Pointe Blvd., Cincinnati, Ohio 45245 and the Employee whose name and address are set forth below his or her signature on the last page of this Agreement ("Employee").

RECITALS:

WHEREAS, TQL is an Ohio Corporation providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services (hereinafter referred to as the "Business") throughout the Continental United States; and

WHEREAS, TQL is unique within the organizations providing services competitive to the Business (hereinafter referred to as the "Industry"). TQL has spent extensive time developing relationships with Customers, Motor Carriers, suppliers and others within the Industry. TQL provides extensive training on ways to succeed within the Industry. TQL also provides tools, such as proprietary software, that are unique within the Industry. The relationships, tools, and training developed by TQL will assist Employee in gaining intimate knowledge of TQL's business model, its Customers, Motor Carriers, suppliers, contact information, lanes, pricing, sales strategy, service and other confidential and proprietary information. The knowledge learned at TQL is unlike what could be learned elsewhere within the Industry. TQL takes steps to protect the confidentiality of this information, and such information would have value to a TQL competitor. Employee, therefore, acknowledges and agrees that what Employee learns at and is trained in at TQL would necessarily cause unfair competition if Employee took employment competitive to TQL; and

WHEREAS, TQL develops and maintains confidential proprietary information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics

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management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

NOW THEREFORE, in consideration of the employment of Employee by TQL, including compensation and benefits provided by TQL, and the terms, conditions, and covenants, set forth herein, TQL and Employee agree as follows:

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1. Recitals. The "Recitals" set forth above are hereby restated and incorporated herein by reference as though fully set forth again.

2. At-will Employment. Employee is an employee at-will. Nothing in this Agreement changes Employee's status as an at-will employee. Either TQL or Employee may terminate Employee's employment for any reason at any time. Employee acknowledges and agrees that this Agreement does not constitute a contract of employment and that Employee does not have a contract of employment with TQL.

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are

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valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

8. Property Rights and Assignment. Employee agrees that any work, invention, product design, or technological innovation created, conceived, developed, produced, generated, and/or Improved by Employee, whether or not patentable, or subject to copyright, trademark, or trade secret protection, at any time during or arising out of Employee's employment with TQL that results from, is suggested by, or relates to any work which Employee does for TQL, shall be the absolute property of TQL and shall promptly be disclosed by Employee to TQL. Employee hereby assigns any and all right, title, and interest in any work product to TQL, including assigning any and all rights to any future invention arising out of or relating to Employee's employment with TQL. To the extent necessary, during employment and thereafter, Employee shall sign applications, assignments, and any other papers that TQL may consider necessary or helpful in perfecting and enforcing TQL's rights in, and to, any such invention, improvement, and/or technological innovation.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

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(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing

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Business" is any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.

(e) Acknowledgement of Intent. The parties agree and affirm that their intention with respect to Section 8 of this Agreement is that Employee's activities be limited only during Employee's employment with TQL and for a twelve (12) month period after termination or cessation of Employee's employment with TQL for any reason. The provisions calling for a "look back" of twelve (12) calendar months prior to termination or cessation of Employee's employment with TQL for any reason are intended solely as a means of identifying the Customers and Motor Carriers to which such restrictions apply and are not intended to nor shall they, under any circumstances, be construed to define the length or term of any such restrictions.

10. Reasonableness of Restrictions. Employee agrees and acknowledges that the provisions of this Agreement, including the geographic, duration, and content restrictions contained in Section 8 and the restrictions on the disclosure and use of Confidential Information contained in Section 4, are reasonable and fair in all respects and properly required for the adequate protection of the Business of TQL from the disclosure of Confidential Information and unfair competition. Employee further agrees and acknowledges that this Agreement is based upon valuable and sufficient consideration, the receipt of which as of the date of this Agreement is hereby acknowledged.

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

12. Severability. Should any of the provisions of this Agreement be declared or determined to be illegal or invalid by a court of competent jurisdiction, (a) the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not a part of this Agreement; (b) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (c) there shall be added automatically as a part of this Agreement provisions as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable. The parties hereby consent and agree that the scope of the Agreement's provisions may be modified judicially in any proceeding brought to enforce such provisions.

13. No Conflicting Employee Agreement. Employee represents that Employee is not bound by any agreement or contract or other duty to a former employer or any other party which would prevent Employee from complying with any obligations hereunder or performing his or her duties as an employee of TQL.

14. Acknowledgments. Employee acknowledges and agrees that he or she:

(a) has had sufficient time within which to consider the Agreement before executing it;

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- (b) has carefully read and fully understands all of the provisions of the Agreement;
- (c) knowingly and voluntarily agrees to all of the terms set forth in the Agreement;
- (d) knowingly and voluntarily intends to be legally bound by this Agreement;
- (e) has had sufficient opportunity to obtain and consult with his or her own lawyer regarding this Agreement; and
- (f) has knowingly and voluntarily executed this Agreement.

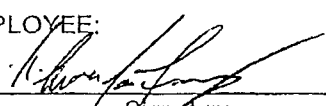
15. Binding Agreement. This Agreement shall be binding and enforceable upon the parties hereto, their heirs, representatives, successors, and assigns. The Agreement is not assignable by Employee.

16. Survival. Sections 3 through 15 of this Agreement shall survive the termination or cessation of Employee's employment with TQL for any reason.

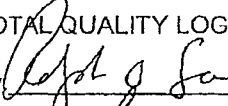
17. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto pertaining to the subject of this Agreement, and fully supersedes in all respects any and all prior oral or written agreements or understandings between the parties hereto pertaining to the subject of this Agreement. This Agreement may be amended or modified only upon written agreement signed by both of the parties hereto. This Agreement may be executed in Counterparts, each of which shall be deemed an original and all of which taken together shall constitute one Agreement.

In Witness Whereof, the undersigned parties to this Agreement have duly executed it on the day and year first written below.

EMPLOYEE:


Signature
Name: Thomas J. Fox
Please Print
Address: 1349 Girard Fox
Charleston, SC
Date: 12/10/12

TOTAL QUALITY LOGISTICS, LLC

By: 
Name: Rachel O Lee
Title: VP of HR
Date: 12/13/12

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) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-5579

Plaintiff,

vs.

Defendant.

**REPLY TO DEFENDANT'S
ANSWER TO PLAINTIFF'S AMENDED
COMPLAINT AND COUNTERCLAIMS**

BY _____ JULIE J. ARMSTRONG
CLERK OF COURT

FOR A FIRST DEFENSE

1. Plaintiff hereby denies each and every allegation not hereinafter specifically admitted, modified, or explained.
2. The allegations of paragraphs 1 through 49 of Defendant's Answer to Amended Complaint and Counterclaims constitute Defendant's answer and affirmative defenses, to which no reply by Plaintiff is required. To the extent a response is required, Plaintiff denies said paragraphs. Plaintiff further denies that any of the affirmative defenses are valid, that they are legally sufficient or appropriate defenses to Plaintiff's causes of action, or that the defenses are supported by the evidence.

3. Answering the allegations of paragraph 50, Plaintiff repeats and realleges the allegations in his Amended Complaint and his response to the allegations as set forth in paragraphs 1 and 2 above as if repeated verbatim herein.

4. Plaintiff admits the allegations of paragraphs 51 and 52.

5. Answering paragraph 53, Plaintiff craves reference to the Agreement signed by him for the terms thereof and denies the remaining allegations of said paragraph.

6. Plaintiff denies the allegations of paragraphs 54, 55, 56, 57, and 58 of Defendant's Counterclaim and demands strict proof thereof.

AS TO THE SECOND COUNTERCLAIM

7. Answering the allegations of paragraph 59, Plaintiff repeats and realleges the allegations in his Amended Complaint and his response to the allegations as set forth in paragraphs 1 and 2 above as if repeated verbatim herein.

8. Plaintiff denies the allegations of paragraph 60.

9. Answering paragraph 61, Plaintiff denies that the allegations set forth in said paragraph and further asserts that he is entitled to an order declaring that the Non-Compete Agreement is invalid and unenforceable as to him.

10. Plaintiff denies the allegations of paragraphs 62.

AS TO THE THIRD COUNTERCLAIM

11. Answering the allegations of paragraph 63, Plaintiff repeats and realleges the allegations in his Amended Complaint and his response to the allegations as set forth in paragraphs 1 and 2 above as if repeated verbatim herein.

12. Answering paragraph 64 of Defendant's Counterclaim, Plaintiff admits that he received training on the business practices of Defendant in order to perform the limited functions of his job and denies all other or inconsistent allegations.

13. Plaintiff denies the allegations of paragraph 65.

14. Answering paragraph 66, Plaintiff denies that he took any Confidential

Information, with or without the authorization of Defendant.

15. Plaintiff denies the allegations of paragraphs 67, 68, 69, and 70.

AS TO THE FOURTH COUNTERCLAIM

16. Answering the allegations of paragraph 71, Plaintiff repeats and realleges the allegations set forth in his Amended Complaint and his response to the allegations as set forth in paragraphs 1 and 2 above as if repeated verbatim herein.

17. Plaintiff denies the allegations of paragraphs 72, 73, 74, and 75 of Defendant's Counterclaims.

FOR A SECOND DEFENSE

18. The allegations of the Counterclaims fail to state claims sufficient to constitute causes of action and should, therefore, be dismissed pursuant to Rule 12(b)(6), FRCP.

FOR A THIRD DEFENSE

19. Defendant is barred from recovering under any of the counterclaims due to the doctrine of unclean hands.

FOR A FOURTH DEFENSE

20. Defendant is barred from recovering under any of the counterclaims due to the doctrine of estoppel.

FOR A FIFTH DEFENSE

21. Defendant is barred from recovering under any of the counterclaims due to the doctrine of waiver.

FOR A SIXTH DEFENSE

22. Any failure on the part of the Plaintiff to perform as agreed under any contract with the Defendant, although specifically denied, was excused because of the Defendant's

conduct constituting a breach of the duty of good faith and fair dealing.

FOR A SEVENTH DEFENSE

23. Plaintiff has at all times pertinent hereto acted in good faith.

FOR AN EIGHTH DEFENSE

24. Plaintiff reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the counterclaims of Defendant, Plaintiff prays that the counterclaims be dismissed, that costs be awarded to him, that the Court award damages and reasonable attorneys' fees to Plaintiff in accordance with his Amended Complaint and for such other and further relief as the Court may deem appropriate.

ROSEN, ROSEN & HAGOOD, LLC

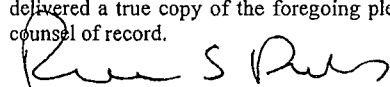
By: 
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(843) 577-6726 (O)
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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
January 2, 2014

CERTIFICATE OF SERVICE

I certify that on January 2, 2014, I caused to be mailed or delivered a true copy of the foregoing pleading(s) to each counsel of record.


Attorney for Plaintiff

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-5579

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UNDISPUTED FACTS¹

On November 20, 2012, Plaintiff accepted the offer of employment extended to him by Defendant, a freight brokerage firm. In reliance on Defendant's promise of employment, Plaintiff submitted his resignation from his prior job and reported to Defendant's office on December 10, 2012, for his first day of work. At approximately 9:00 a.m., Plaintiff attended a training class with approximately five other new employees. During that class, representatives of Defendant distributed a packet of information to the new hires, including Plaintiff, and instructed them to complete and sign the forms. This packet contained an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (Non-Compete Agreement), a copy of which is attached hereto as Exhibit A.

Plaintiff had never before been provided a copy of the Non-Compete Agreement nor was it made a condition of his employment at the time he accepted Defendant's job offer. However, Defendant insisted Plaintiff sign the Non-Compete Agreement immediately in order to continue

1 Facts were taken from the Affidavits of Joshua Fay and Kelly Lyttle filed herewith. Plaintiff does not believe that Defendant will dispute the material facts concerning the existence and terms of the Non-Compete Agreement, the interpretation of which is the heart of this motion.

working for Defendant. Plaintiff was not afforded the opportunity to consult with an attorney or even given adequate time to completely read and comprehend the document. Furthermore, the Non-Compete Agreement was not executed by Defendant until December 13, 2012, three days into Plaintiff's employment.

While working at Defendant company, Plaintiff initiated contact with The Brandt Companies, LLC, (Brandt) for Defendant to provide services to it. Although Brandt was on a potential customer list, that list was not generated through company connections but rather by brokers simply checking the internet or telephone books for trucking companies and entering them into the system. All of this information is within the public domain.

Defendant terminated Plaintiff on June 17, 2013. At that time, Plaintiff had retained Brandt to make several truck runs, so, as a courtesy after he was terminated, Plaintiff contacted and advised Brandt that he was no longer working with Defendant and would not be available to assist with those runs. Brandt asked Plaintiff if he was interested in working exclusively for Brandt to provide needed transportation services, and, having no job or means to earn income, Plaintiff accepted. Plaintiff used JF Progressions, LLC, a dormant limited liability company that he had formed to promote athletic events, as the vehicle to contract with Brandt.

Brandt does not compete with Defendant. Brandt is an engineering company which provides mechanical, electrical and plumbing services.² It is not a freight forwarding enterprise.

² As described on its website on the internet:

From the first stages of new construction to ongoing maintenance and expert retrofitting of existing building systems, Brandt brings together more than 1,000 highly trained technicians, top caliber craftsmen and engineers and renowned technology experts to help our clients develop strategic solutions for their buildings and campuses with minimal facility downtime and maximum productivity. We're the largest mechanical, electrical and plumbing services provider in Texas, and we also have big ideas. You can find us in Austin, Dallas, Fort Worth, Houston, San Antonio, and Waco.

<http://www.brandt-companies.com/company-overview/>

Although Brandt does transport some of its own products, more often it employs independent carriers to deliver its materials. Plaintiff's contractual obligation to Brandt was to locate these carriers solely on behalf of Brandt.

All information Plaintiff obtained in order to be of service to Brandt was received solely from Brandt. There was nothing unique to the truck transportation industry that Plaintiff learned from his training with Defendant. The same business approach is used by Brandt and by most freight forwarding companies as is used by Defendant.

After learning of Plaintiff's association with Brandt, Defendant threatened Plaintiff with litigation if he did not immediately discontinue his relationship with Brandt, because Defendant claimed that it violated the Non-Compete Agreement. On September 23, 2013, Plaintiff filed a Complaint requesting that this Court declare the Non-Compete Agreement invalid and unenforceable as well as to award him for unpaid overtime that he earned while Defendant's employee.

On October 18, 2013, Defendant filed a separate suit in the Court of Common Pleas of Clermont County, Ohio, against Brandt, alleging that Brandt interfered in Defendant's business relationships and caused Plaintiff to breach the Non-Compete Agreement. On October 22, 2013, Defendant served its Answer and Counterclaim in this matter alleging causes of action against Plaintiff for breaches of contract; declaratory judgment; conversion, misappropriation of proprietary information and misappropriation of trade secrets; and injunctive relief.

Because the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement fails as a matter of law, Plaintiff moves this Court for an order awarding him summary judgment as to his second cause of action for declaratory relief and as to all of Defendant's counterclaims.

STANDARD OF REVIEW

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by a consideration of the plain and unambiguous language of the contract, the question is one of law and may be resolved by the court. Lyles v. BMI, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987); citing First-Citizens Bank & Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984).

LEGAL ANALYSIS

I. The Non-Compete Agreement is Invalid and Unenforceable.

Defendant claims that Plaintiff's contractual relationship with Brandt violates the terms of the Non-Compete Agreement. However, as set forth below, the Non-Compete Agreement is invalid and unenforceable against Plaintiff as a matter of law.

A. South Carolina takes a disfavorable view of non-compete agreements.

Covenants not to compete are generally disapproved of and are strictly construed in favor of the employee. Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995). The covenant not to compete will be valid *only* if it is: (1) necessary for the protection of the employer's legitimate interests; (2) reasonably limited as to time and place; (3) "not unduly

harsh or oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;" (4) reasonable when considering public policy; **and** (5) entails valuable consideration. Id. at 42, 455 S.E.2d at 708 (citations omitted and emphasis added); see also Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76 301 S.E.2d 142, 143 (1983) (listing the five required factors). A non-compete agreement must meet all of the above criteria or it will be declared unenforceable as a "restraint upon trade which is against public policy." Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533, 542 (1961).

B. The Non-Compete Agreement is not necessary for the employer's legitimate interest.

The terms of the Non-Compete Agreement prohibit Plaintiff from owning, operating, or having any interest in any Competing Business. ¶ 9(b)(i) Plaintiff is also restricted under the Agreement from becoming employed by a Competing Business "in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." ¶ 9(b)(ii) A "Competing Business" is defined as "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." ¶ 9(d)(iii). The "Business" is a term used to define entities, such as TQL, which provide "motor transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services." Non-Compete Agreement, First Recital.

These provisions are not enforceable because they are not necessary to protect any business interest of Defendant. Brandt, the party for which Plaintiff works, is not a competitor of Defendant. It is an engineering company, not a freight forwarding company.

"A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." Faces Boutique, 318 S.C. at 42, 455 S.E. 2d at 708. If a non-compete

agreement is written so broadly that it allegedly precludes the employee from working in a non-competitive business, then the agreement cannot stand. Id. at 43, 455 S.E. 2d at 709. Likewise here, because Plaintiff does not own or work for a competing business, the Non-Compete Agreement fails as a matter of law. Because the first factor of the test for validity of a non-compete has not been met, Plaintiff is entitled to summary judgment as to his Declaratory Judgment action.

C. The Non-Compete Agreement is not reasonably limited in territory and severely limits Plaintiff's ability to earn a livelihood.

The second required factor for a valid and enforceable non-compete is reasonableness as to time and place. Under the provisions of the Non-Compete Agreement, Plaintiff is barred from seeking employment 'in a similar capacity' with any company that provides motor transport and "related" services anywhere in the entire Continental United States. First Recital. "To be considered reasonable, a territorial restriction must not cover an area any broader than is necessary to protect the employer's legitimate interest." Stringer v. Herron, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (Ct. App. 1992); see also Wolf v. Colonial Life & Acc. Ins. Co., 309 S.C. 100, 109-10, 420 S.E.2d 217, 222 (Ct. App. 1992) ("The general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business.") For example, a restriction which allows a former employee to work anywhere so long as he does not solicit the employer's existing clients may be reasonable and valid as it serves to protect the employer's legitimate business interest. Id.; Collins Music Co., Inc. v. Parent, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986).

In applying the test of reasonableness to the geographical restraint, the single most important factor for the Court to consider is the economic penalty to the employee. Standard Register Co., 238 S.C. at 67, 119 S.E.2d at 540. "The limitation as to the territory in a restrictive

covenant not to compete is unreasonable in the sense that it is unduly harsh and oppressive when the contract tends to deprive the employee of the opportunity of supporting himself and his family.” Id.

Here, there is no limitation on this prohibition which would allow Plaintiff to work at another firm so long as he did not contact existing customers of Defendant. Instead, Plaintiff is essentially banned from working in the intermodal transportation industry at all in the continental United States. Accordingly, the territorial restriction is overly broad on its face and deprives the Plaintiff of earning a living in his profession. Because the non-Compete Agreement’s territorial coverage is not reasonable, Defendant’s agreement does not comply with the second required factor, and the Non-Compete Agreement is invalid and unenforceable. Plaintiff is entitled to summary judgment as to the Declaratory Judgment cause of.

D. Plaintiff received no valuable consideration for the Non-Compete Agreement.

A non-compete agreement is invalid if it does not entail valuable consideration. Faces Boutique, 318 S.C. at 42, 455 S.E. 2d at 708. Valid consideration is another required factor. At-will employment may be sufficient consideration to uphold a non-compete agreement. Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001). “A covenant passes the threshold validity test [when] it [is] exchanged for *a promise of initial employment.*” Id. (emphasis added). However, “[c]onsideration that is wholly past is not valuable consideration.” Future Grp., II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996). Accordingly, when the covenant is entered into *after* the commencement of the employment relationship, even if only shortly thereafter, the employee must receive additional consideration in order for the agreement to be enforced. Poole, 345 S.C. at 42, 455 S.E.2d at 708.

Here, the covenant not to compete was not made in exchange for the promise of initial employment. In fact, the Non-Compete Agreement was not presented to or signed by Plaintiff until *after* he began work on December 10, 2012. Furthermore, it was not fully executed until Defendant's representative signed it three days later. A copy of the Non-Compete Agreement was not even provided to Plaintiff until Defendant accused him of violating it.

Therefore, the Non-Compete Agreement is invalid, and Plaintiff is entitled to summary judgment as to his Declaratory Judgment action.

E. The Non-Compete Agreement is in bad faith and violates the public policy of South Carolina.

South Carolina courts disfavor non-compete agreements because they restrain an individual's right to work. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007). "The South Carolina Supreme Court has held that a covenant restricting the activities of an employee after the termination of his employment is not violative of public policy *only if* it is "[1] partial or restrictive in its operation, either as to time or place, [2] on some good consideration, and [3][is] reasonable, that is, it afford[s] only a fair protection to the interests of the party in whose favor it is made." *Id.* (citing Standard Register, 119 S.E.2d at 539) (emphasis added).

Furthermore, it is contrary to the public policy of this state to sanction contracts obtained in bad faith. Reeves v. Sargeant, 200 S.C. 494, 21 S.E.2d 184, 187 (1942). In terms of a non-compete agreement, an employer may act in bad faith "when employer presented contract containing restrictive covenant to employee on his first day of employment, after employee had given notice to his previous employer in reliance on an oral agreement with employer, and employer insisted that employee sign the contract immediately, without opportunity to consult with an attorney." 36 Causes of Action 2d 103, §5.

F. Because the Non-Compete Agreement violates the public policy of this state, it is invalid and unenforceable as a matter of law.

If a non-compete agreement is defective in any *one* of the areas required for a valid covenant then the entire agreement is defective and cannot be upheld. Faces Boutique, 318 S.C. at 42, 455 S.E.2d at 709. In South Carolina, the court may not rewrite the language of the non-compete clause to make it fit the test for validity. Team IA, Inc. v. Lucas, 395 S.C. 237, 245-46, 717 S.E.2d 103, 107 (Ct. App. 2011), cert. granted (Dec. 6, 2012) In this case, the Non-Compete Agreement is violative of *all* the factors outlined in Faces Boutique, including public policy, and therefore fails as a matter of law.

“Terms in a non-compete agreement may be construed according to the law of another state. But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement.” Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005); see also Standard Register Co. v. Kerrigan, 238 S.C. at 70-71, 119 S.E.2d at 541-42 (“Terms in a non-compete agreement may be construed according to the law of another state ... [b]ut if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, [South Carolina] courts will not enforce the agreement.”) Although the Non-Compete Agreement at issue here claims to be governed by the law of Ohio, the Agreement violates the law and public policy of South Carolina and may not be enforced by this Court.

Accordingly, Plaintiff is entitled to judgment in his favor as to his claim for declaratory judgment.

II. The Covenant Restricting Disclosure of Trade Secrets and Confidential Information is Invalid and Unenforceable.

Also contained in the agreement Plaintiff was required to sign on his first day of employment were restrictions on the release of confidential information. Defendant broadly defines Confidential Information as follows:

Confidential proprietary information ... including but not limited to, its operating policies and procedures; computer databases; *computer software*; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, *potential customers*, Motor Carriers, and suppliers, information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; *Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them*; trade secrets; *correspondence*; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential information also includes any information described above *which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL.* (Emphasis added.)

The Non-Compete Agreement similarly takes an all-inclusive view of proprietary trade secrets, which are defined as: "TQL's Customer and Motor Carrier lists, *other information* about TQL's Customers and Motor Carriers, its Load Management System and other Confidential Information..." (Emphasis added.) Under the terms of the agreement Defendants drafted for Plaintiff to sign, any information that Plaintiff received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the public domain or had been obtained by TQL from another competitive business.

Where a non-disclosure covenant "does not identify any specific trade secrets; rather, it defines trade secrets so broadly that virtually all of the information [the employee] acquired during his employment would fall within its definition ..." the covenant is a pretext for a covenant not to compete and must be subject to the same scrutiny. Carolina Chem. Equip. Co.

Inc. v. Muckenfuss, 322 S.C. 289, 293, 296-97, 471 S.E.2d 721, 722-23, 725 (Ct. App. 1996).

Such a covenant is a disfavored restraint on trade and, if it does satisfy the test set out for non-compete agreements, then the non-disclosure covenant is unenforceable as a matter of law. Id.

Here, the non-disclosure provision of the Non-Compete Agreement fails to meet any of the requirements set forth in Faces Boutique to validate such an agreement. Because the definition of Confidential Information and Trade Secrets sweeps so broadly that it includes all information learned by Plaintiff during the course of his employment, it is not reasonably limited in scope nor is it necessary to protect TQL's legitimate business interests. As shown above, the agreement was not given in exchange for valuable consideration as it was presented to Plaintiff *after* he had accepted Defendant's offer of employment and had resigned from his prior employer and reported to work in reliance on that offer. The non-disclosure agreement is antithetical to the public policy of this state which favors an individual's right to employ his skills and knowledge to pursue his trade. Accordingly, the nondisclosure provisions are unenforceable as a matter of law.

III. Because the Non-Compete and Non-Disclosure Provisions of the Agreement fail, Plaintiff is Entitled to Summary Judgment on Defendant's Counterclaims for Breaches of Contract and Declaratory Judgment.

Defendant has alleged that Plaintiff violated the terms of the agreement restricting competition and misappropriating confidential information and trade secrets. Because the Non-Compete and Non-Disclosure provisions of the agreement fail, Plaintiff is entitled to summary judgment on Defendant's counterclaims for breaches of contract and declaratory judgment.

IV. Plaintiff is entitled to Summary Judgment on Defendant's Counterclaims for Conversion/Misappropriation of Proprietary Information and Misappropriation of Trade Secrets and Injunctive Relief.

"The threshold issue in any trade secrets case is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there

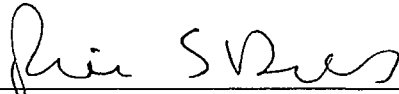
was a trade secret to be misappropriated.” Carolina Chem., 322 S.C. at 295, 471 S.E.2d at 724. A party alleging wrongful disclosure of a trade secret “must adequately identify and describe the subject matter of its trade secrets in sufficient detail to establish each statutory element of a trade secret and to enable the jury to differentiate that which is claimed as a trade secret from ‘matters of general knowledge in the trade.’” Uhlig LLC v. Shirley, 6:08-CV-01208-JMC, 2012 WL 2923242 (D.S.C. July 17, 2012) (quoting Trandes Corp. v. Guy F. Atkinson, Co., 996 F.2d 655, 661–62 (4th Cir.1993)). “In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others. Trade secret protection is limited.” Carolina Chem., 322 S.C. at 295-96, 471 S.E.2d at 724-25 (internal citations omitted). Where information is easily available from sources other than the employer, it is not subject to the protections of the South Carolina Trade Secrets Act. Atwood Agency v. Black, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007)

Defendant’s counterclaims are remarkably silent as to what, if any information allegedly obtained and misappropriated by Plaintiff was protected as a trade secret under statutory law. By its own expansive definition of “trade secrets” in the terms of the non-disclosure agreement, trade secrets *could* include telephone numbers of non-customer motor carriers available on the internet, credit histories available from credit reporting services, computer software, such as Excel, used industry-wide, or even information Defendant learned from an employee who worked for another company. This information is not “secret” but is information generally available to or known by Defendant’s competitors. As such, Defendant’s claims for misappropriation of trade secrets and injunctive relief fail as a matter of law, and Plaintiff is entitled to summary judgment as to all of Defendants’ counterclaims.

CONCLUSION

Therefore, as set forth above, the Court should grant Plaintiff's Motion for Summary Judgment as to his second cause of action and as to all of Defendants' counterclaims.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 30, 2013



TOTAL QUALITY LOGISTICS, LLC
South Carolina

Employee Non-Compete, Confidentiality
and Non-Solicitation Agreement

This EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT ("Agreement"), is by and between TOTAL QUALITY LOGISTICS, LLC ("TQL"), 4289 Ivy Pointe Blvd., Cincinnati, Ohio 45245 and the Employee whose name and address are set forth below his or her signature on the last page of this Agreement ("Employee").

RECITALS:

WHEREAS, TQL is an Ohio Corporation providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services (hereinafter referred to as the "Business") throughout the Continental United States; and

WHEREAS, TQL is unique within the organizations providing services competitive to the Business (hereinafter referred to as the "Industry"). TQL has spent extensive time developing relationships with Customers, Motor Carriers, suppliers and others within the Industry. TQL provides extensive training on ways to succeed within the Industry. TQL also provides tools, such as proprietary software, that are unique within the Industry. The relationships, tools, and training developed by TQL will assist Employee in gaining intimate knowledge of TQL's business model, its Customers, Motor Carriers, suppliers, contact information, lanes, pricing, sales strategy, service and other confidential and proprietary information. The knowledge learned at TQL is unlike what could be learned elsewhere within the Industry. TQL takes steps to protect the confidentiality of this information, and such information would have value to a TQL competitor. Employee, therefore, acknowledges and agrees that what Employee learns at and is trained in at TQL would necessarily cause unfair competition if Employee took employment competitive to TQL; and

WHEREAS, TQL develops and maintains confidential proprietary information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics

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management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

NOW THEREFORE, in consideration of the employment of Employee by TQL, including compensation and benefits provided by TQL, and the terms, conditions, and covenants, set forth herein, TQL and Employee agree as follows:

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1. Recitals. The "Recitals" set forth above are hereby restated and incorporated herein by reference as though fully set forth again.

2. At-will Employment. Employee is an employee at-will. Nothing in this Agreement changes Employee's status as an at-will employee. Either TQL or Employee may terminate Employee's employment for any reason at any time. Employee acknowledges and agrees that this Agreement does not constitute a contract of employment and that Employee does not have a contract of employment with TQL.

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are

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valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

8. Property Rights and Assignment. Employee agrees that any work, invention, product design, or technological innovation created, conceived, developed, produced, generated, and/or Improved by Employee, whether or not patentable, or subject to copyright, trademark, or trade secret protection, at any time during or arising out of Employee's employment with TQL that results from, is suggested by, or relates to any work which Employee does for TQL, shall be the absolute property of TQL and shall promptly be disclosed by Employee to TQL. Employee hereby assigns any and all right, title, and interest in any work product to TQL, including assigning any and all rights to any future invention arising out of or relating to Employee's employment with TQL. To the extent necessary, during employment and thereafter, Employee shall sign applications, assignments, and any other papers that TQL may consider necessary or helpful in perfecting and enforcing TQL's rights in, and to, any such invention, improvement, and/or technological innovation.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

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(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing

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Business" is any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.

(e) Acknowledgement of Intent. The parties agree and affirm that their intention with respect to Section 8 of this Agreement is that Employee's activities be limited only during Employee's employment with TQL and for a twelve (12) month period after termination or cessation of Employee's employment with TQL for any reason. The provisions calling for a "look back" of twelve (12) calendar months prior to termination or cessation of Employee's employment with TQL for any reason are intended solely as a means of identifying the Customers and Motor Carriers to which such restrictions apply and are not intended to nor shall they, under any circumstances, be construed to define the length or term of any such restrictions.

10. Reasonableness of Restrictions. Employee agrees and acknowledges that the provisions of this Agreement, including the geographic, duration, and content restrictions contained in Section 8 and the restrictions on the disclosure and use of Confidential Information contained in Section 4, are reasonable and fair in all respects and properly required for the adequate protection of the Business of TQL from the disclosure of Confidential Information and unfair competition. Employee further agrees and acknowledges that this Agreement is based upon valuable and sufficient consideration, the receipt of which as of the date of this Agreement is hereby acknowledged.

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

12. Severability. Should any of the provisions of this Agreement be declared or determined to be illegal or invalid by a court of competent jurisdiction, (a) the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not a part of this Agreement; (b) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (c) there shall be added automatically as a part of this Agreement provisions as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable. The parties hereby consent and agree that the scope of the Agreement's provisions may be modified judicially in any proceeding brought to enforce such provisions.

13. No Conflicting Employee Agreement. Employee represents that Employee is not bound by any agreement or contract or other duty to a former employer or any other party which would prevent Employee from complying with any obligations hereunder or performing his or her duties as an employee of TQL.

14. Acknowledgments. Employee acknowledges and agrees that he or she:

(a) has had sufficient time within which to consider the Agreement before executing it;

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- (b) has carefully read and fully understands all of the provisions of the Agreement;
- (c) knowingly and voluntarily agrees to all of the terms set forth in the Agreement;
- (d) knowingly and voluntarily intends to be legally bound by this Agreement;
- (e) has had sufficient opportunity to obtain and consult with his or her own lawyer regarding this Agreement; and
- (f) has knowingly and voluntarily executed this Agreement.

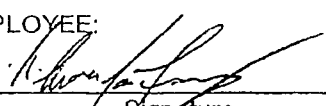
15. Binding Agreement. This Agreement shall be binding and enforceable upon the parties hereto, their heirs, representatives, successors, and assigns. The Agreement is not assignable by Employee.

16. Survival. Sections 3 through 15 of this Agreement shall survive the termination or cessation of Employee's employment with TQL for any reason.

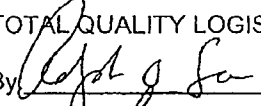
17. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto pertaining to the subject of this Agreement, and fully supersedes in all respects any and all prior oral or written agreements or understandings between the parties hereto pertaining to the subject of this Agreement. This Agreement may be amended or modified only upon written agreement signed by both of the parties hereto. This Agreement may be executed in Counterparts, each of which shall be deemed an original and all of which taken together shall constitute one Agreement.

In Witness Whereof, the undersigned parties to this Agreement have duly executed it on the day and year first written below.

EMPLOYEE:


Signature
Name: Thomas J. Fox
Please Print
Address: 1349 Girard Park
Charleston, SC
Date: 12/10/12

TOTAL QUALITY LOGISTICS, LLC

By: 
Name: Ralph O Lee
Title: VP of HR
Date: 12/13/12

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Joshua Fay,)
)
Plaintiff,)
vs.)
Total Quality Logistics, LLC,)
)
Defendant,)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-5579

TOTAL QUALITY LOGISTICS, LLC
MOTION FOR SUMMARY JUDGMENT

FILED
2014 JUL 15
JULIE ARMSTRONG
CLERK OF COURT
PM 2:54

The Defendant, Total Quality Logistics, LLC ("TQL"), hereby files its motion for summary judgment. Rule 56, SCRCP. The grounds for this motion are that, based upon the pleadings, and affidavits, there are no genuine issues of material fact, and TQL is entitled to judgment as a matter of law on its counterclaims for breaches of contract for the following reasons:

1. The Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), Plaintiff entered into, and particularly the restrictions on the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7 of the Agreement, and the Covenants and Remedies in Section 9 of the Agreement, are reasonable and thus enforceable as a matter of law, because under Ohio law, which the parties agreed controls,

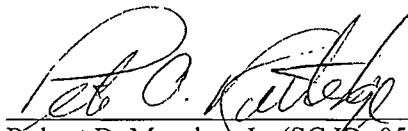
- a. they are no greater than is required for the protection of TQL;
- b. they do not impose undue hardship on the Plaintiff; and
- c. they are not injurious to the public.

2. South Carolina courts will honor the choice of law provision the parties selected in the Agreement, because the Agreement and particularly the restrictions on the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7 of the Agreement, and

the Covenants and Remedies in Section 9 of the Agreement, do not violate the public policy of South Carolina and are enforceable under South Carolina law, because:

- a. they are necessary for the protection of the legitimate interest of TQL;
- b. they are reasonably limited in operation with respect to time and place;
- c. they are not unduly harsh or oppressive in curtailing the legitimate efforts of the Plaintiff to earn a livelihood;
- d. they are reasonable from the standpoint of sound public policy; and
- e. they are supported by valuable consideration.

In addition to the pleadings and affidavits, this motion will be supported by a memorandum of law and facts and any affidavits filed according to applicable rule.



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Counsel for Defendant Total Quality Logistics, LLC

January 21, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-5579

Joshua Fay,)
Plaintiff,)
vs)
Total Quality Logistics, LLC,)
Defendant,)

**TOTAL QUALITY LOGISTICS, LLC'S
("TQL") MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

The Defendant, Total Quality Logistics, LLC ("TQL"), hereby files its memorandum in support of its motion for summary judgment, and in opposition to Plaintiff's motion for summary judgment.

I. BACKGROUND.

Plaintiff was previously employed by TQL as a Logistics Sales Account Executive in training. Following his termination on June 17, 2013, he began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to a TQL customer, the Brandt Companies ("Brandt"), the same services that he had provided to Brandt while employed by TQL.

Plaintiff filed this lawsuit on September 23, 2013, alleging violations of the Fair Labor Standards Act and seeking a declaratory judgment that the Agreement is invalid and unenforceable. Plaintiff amended his Complaint on November 12, 2013, to add a claim for interference with contract, after Brandt ceased its dealings with him as the result of litigation TQL filed against Brandt to enforce its rights under the Agreement.

Pending before the Court are the parties' cross motions for summary judgment. Plaintiff filed his motion for judgment on the pleadings, or for summary judgment in the alternative, to ask this Court to rule that his Agreement is unenforceable. Plaintiff has also asked the Court—

prematurely, without the benefit of any discovery—to rule against TQL on its counterclaim for conversion and misappropriation of confidential information and trade secrets.

TQL's Agreement with Plaintiff is enforceable as a matter of Ohio law, which the parties selected to govern their Agreement. Further, even measured under South Carolina law, the Agreement is enforceable. TQL has filed its motion seeking judgment as a matter of law that the Agreement is enforceable. Finally, it is free from doubt that TQL disclosed to the Plaintiff as part of his employment confidential and proprietary information that qualifies as a trade secret under the South Carolina Trade Secrets Act. As a result, Plaintiff's motion for summary judgment on the counterclaim for conversion and misappropriation of confidential information and trade secrets should be denied.

II. FACTS.

A. TQL'S offer of employment to Plaintiff.

TQL is an Ohio corporation providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. *See* ¶51, Answer of Defendant to Amended Complaint and Counterclaims; *see also* Affidavit of Hillary Kotlarz, ¶3.

TQL offered Plaintiff employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. *See* Affidavit of Anna Longar Wolf, ¶4. The offer of employment specifically informed the Plaintiff that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." *Id.* at ¶6.

Thereafter, TQL employed Plaintiff on December 10, 2012. *See* ¶52, Answer of Defendant to Amended Complaint and Counterclaims; *see also* Affidavit of Hillary Kotlarz, ¶4. At the inception of his employment, and as an inducement to TQL's employing him, Plaintiff entered into an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), attached hereto at **Exhibit A**. *See* ¶53, Answer of Defendant to Amended Complaint and Counterclaims; *see also* Affidavit of Hillary Kotlarz, ¶5. Even the Plaintiff admits he signed the Agreement on his first day of employment. *See* Affidavit of Thomas Joshua Fay, ¶¶3-5.

B. The Agreement contains reasonable covenants against competition.

1. The Agreement restricts competition and solicitation in Section 9.

In Section 9, the Plaintiff agreed that, for a period of one year after his employment terminated, he would not "become employed by or engaged in a Competing Business ..., in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." *See* Agreement, ¶9(b), ¶9(b)(ii) at **Exhibit A**. The parties agreed that a "Competing Business" is "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." *See* Agreement, ¶9(d) at **Exhibit A**. The parties agreed that "the Business" is "providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States." *See* Agreement, First Recital at **Exhibit A**.

Plaintiff also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL." *See* Agreement, ¶9(b), ¶9(b)(iii) at **Exhibit A**. He

also agreed that for a period of one year after his employment terminated, he would not “directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer¹ ..., or otherwise take any action to divert Business from TQL.” See Agreement, ¶9(b), ¶9(b)(iv) at **Exhibit A**.

2. The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that “All Confidential Information as described herein is proprietary and the sole property of TQL.” See Agreement, ¶3 at **Exhibit A**. The Agreement prohibits Plaintiff from “us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information.” See Agreement, ¶4 at **Exhibit A**.

Plaintiff agreed that “engaging in an employment relationship with a Competing Business ... in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL’s Confidential Information to unfairly compete with TQL.” See Agreement, ¶6 at **Exhibit A**.

¹ “Customer” is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee’s employment with TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee’s employment by TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason.

Contrary to the position he takes now, Plaintiff agreed that “TQL’s trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL’s Business and operations, access to and knowledge of which are essential to performance of Employee’s duties hereunder... .” *See* Agreement, ¶7 at **Exhibit A**. The parties agreed that the term Confidential Information was defined in the Second Recital of the Agreement.

C. Plaintiff’s extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Plaintiff’s job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. *See* Affidavit of Hillary Kotlarz, ¶6. Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. *Id* His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. *Id*.

Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL’s customers, as well as their contact information. *See* Affidavit of Hillary Kotlarz, ¶7. As part of his training and employment, Plaintiff had access to TQL’s proprietary software system—Load Manager—which contained much of TQL’s Confidential Information as well as marketing and business strategy for TQL’s sales employees. *Id*

Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL’s methods to develop leads or how to “build” loads, nor did he know what TQL’s pricing,

profitability and margin information was. *See* Affidavit of Hillary Kotlarz, ¶8. Before he was hired, Mr. Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.*

III. LAW/ANALYSIS.

A. Standard for Summary Judgment.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009).

B. Analysis.

1. The Agreement is valid under Ohio Law and does not offend the public policy of South Carolina.

Terms in a non-compete agreement may be construed according to the law of another state. *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005), citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961). So long as the resulting agreement is valid as a matter of law and comports with public policy in South Carolina, our courts will enforce the agreement. *Id.*

Here, the restrictive covenants in the Agreement are valid under Ohio law. They are no greater than is required for the protection of TQL; they do not impose undue hardship on the Plaintiff; and they are not injurious to the public. *Raimonde v Van Vlerah*, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975). Under Ohio law, the Court must examine a non-competition covenant to determine the reasonableness of the restrictions. *Id* To make that determination, the court should consider the absence or presence of a long list of factors: whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during the employment, and whether the forbidden employment is merely incidental to the main employment. *Id*

Here, the Agreement does impose time and geographic limits; the restrictive covenants run for one year after Plaintiff's employment terminates and are limited to the Continental United States. *See* Agreement, ¶9(b), ¶9(d) at **Exhibit A**. Plaintiff had contact with many customers—he admits for example that he had contact with Brandt. *See* Affidavit of Thomas Joshua Fay, ¶¶7-12.

Plaintiff possesses TQL's confidential information and trade secrets. Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. *See* Affidavit of Hillary Kotlarz, ¶7. As

part of his training and employment, Mr. Fay had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. *Id.*

TQL's Agreement only bars unfair competition. Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. *See* Affidavit of Hillary Kotlarz, ¶8. Before he was hired, Plaintiff did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.* As a result, there is nothing unfair about preventing Plaintiff from competing in this business, from soliciting TQL's clients, or from diverting business of TQL's clients away from TQL to Plaintiff's competing business, JF Progressions, Incorporated. Finally, the restrictions were not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL. *See* Agreement, ¶4 at **Exhibit A**.

Courts in Ohio that have considered whether TQL's Agreement should be enforced with a preliminary injunction or temporary restraining order, both drastic remedies, have held that it is enforceable and granted the preliminary relief. *See Jeffrey A. Dangelo vs. Total Quality Logistics, LLC*, Case No. 1:09cv512 (S.D. Ohio 2009); and *Total Quality Logistics, LLC vs. Michael Siano*, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011), both at **Exhibit B**.

2. The Agreement is also enforceable under South Carolina Law.

In South Carolina, a non-compete agreement will be upheld if it is: (1) necessary for the protection of the legitimate interests of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of public policy; and (5) supported by a valuable consideration. *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct.App.1992).

Here, Plaintiff makes the frankly inexplicable argument that the Agreement does not protect a legitimate business interest of TQL because Brandt is not a competitor of TQL. The point is that Brandt is, or was, a *customer* of TQL, one Plaintiff serviced as a TQL employee, and one that Plaintiff admits he diverted business from through his new company, JF Progressions, Incorporated, which is the *competitor* in this situation. See Affidavit of Thomas Joshua Fay, ¶¶7-12. Moreover, in seeking to have the Agreement declared unenforceable, the Plaintiff presumably hopes to compete by diverting business from other TQL customers, not just Brandt. Thus, as the *Dangelo* Court wrote, “For him to use the knowledge and experience he gained while working at TQL to divert business from TQL is a legitimate business interests [sic] and no greater than required to protect those interests, especially given that the restriction is only limited to one year.” *Jeffrey A. Dangelo vs. Total Quality Logistics, LLC*, Case No: 1:09cv512, p.8 (S.D. Ohio 2009) at **Exhibit B**; see also *Wolf v. Colonial Life and Accident Ins. Co*, 309 S.C. 100, 420 S.E.2d 217 (Ct.App.1992) (holding that protecting existing business contacts, accounts and customers from pirating by a former employee is a legitimate business interest).

The Agreement is reasonably limited as to time and place. It restricts unfair competition throughout the Continental United States. South Carolina will enforce a nationwide protection when a company does business nationwide. *Wolf v. Colonial Life and Accident Ins. Co.*, 309 S.C. 100, 420 S.E.2d 217 (Ct.App.1992) ("The fact that Colonial does business nationwide shows that it needs nationwide protection."). The duration of the non-compete is for one year following termination. South Carolina courts have upheld time restrictions from two to five years as reasonable. *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (three years valid).

The Agreement is not unduly harsh or oppressive; it only prohibits unfair competition for one year, and the Plaintiff has worked in other fields before he joined TQL. To suggest that it is unduly harsh to prevent the Plaintiff from working in a field in which he was employed for a mere six months is untenable. He has other work experience and employment skills. The Agreement is also reasonable from the standpoint of sound public policy, which generally requires the enforcement of contracts entered into freely. *Oxman v. Profitt*, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Moreover, the prohibitions reasonably protect TQL's legitimate interest in protecting its business contacts and trade secrets, an interest shared by all businesses. *See Wolf*, 309 S.C. 100, 108, 420 S.E.2d 217, 221 (S.C. Ct. App. 1992).

Finally, there is no doubt that the Agreement is supported by valuable consideration. Plaintiff admits he signed the Agreement on his first day of employment. *See* Affidavit of Thomas Joshua Fay, ¶¶3-5. Under South Carolina law, at-will employment is sufficient consideration to support a noncompete that is entered into at the inception of employment, and the rationale behind the rule is fairly straightforward:

...[O]rdinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, 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. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944). Therefore, we adopt the rule that when a covenant 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.

Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) (covenant entered into three and a half years after inception of employment not supported by consideration) (emphasis added).

Moreover, Plaintiff's suggestion that he was surprised when he was presented with the Agreement on his first day is specious. The offer of employment specifically informed the Plaintiff that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." See Affidavit of Anna Longar Wolf, ¶6. Even under Ohio law, the Agreement is supported by consideration. See *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992) ("When, as here, an employee begins work with the understanding that a covenant is a condition of employment, the covenant is adequately supported by consideration even if it is not signed until later.").

3. Plaintiff's motion for summary judgment on TQL's claims for breaches of the confidentiality provisions in his Agreement and for conversion and misappropriation of trade secrets should be denied.

Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). For the same reason, summary judgment must not

be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991).

Plaintiff's argument that he did not use confidential information to solicit Brandt's business is nothing more than a bald denial and side steps the fact that he was introduced to Brandt and taught how to sell to them by way of his exposure to a range of confidential information that TQL alleges constitutes trade secrets. *See* Affidavit of Hillary Kotlarz, ¶¶7-9. He was entrusted with such nonpublic information as TQL's pricing, profitability and margin information, as well as non-public information about Brandt and other customers, TQL's proprietary software system, Load Manager, TQL's marketing and business strategies, and how to develop leads and build loads. *Id.*

In light of Plaintiff's complete disregard of his contractual obligations not to solicit customers like Brandt, TQL is entitled to conduct discovery to determine the extent of his misconduct and misuse of confidential information.² Particularly appropriate in the face of Plaintiff's premature motion is the explanation Judge Lord provided in *Greenberg v. Croydon Plastics Co.*:

Plaintiffs in trade secret cases, who must prove by a fair preponderance of the evidence disclosure to third parties and use of the trade secret by the third parties, are confronted with an extraordinarily difficult task. Misappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what the plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants' witnesses who directly deny everything.

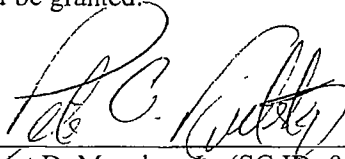
378 F. Supp. 806, 814 (E.D. Pa. 1974) (emphasis added). Finally, TQL included a very explicit list of confidential information and trade secrets it alleges Plaintiff converted. *See* ¶64, Answer

² In light of Plaintiff's acknowledgment in paragraph 6 of the Agreement, that engaging in a Competing Business in a position similar to his position with TQL would necessarily and inevitably result in his use and reliance on TQL's Confidential Information, he probably should be estopped to deny converting trade secrets.

of Defendant to Amended Complaint. Those allegations fully inform the Plaintiff of the nature of TQL's claim.

IV. CONCLUSION.

For the foregoing reasons, the Plaintiff's motion for summary judgment should be denied, and TQL's motion for summary judgment should be granted.



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Counsel for Defendant Total Quality Logistics, LLC

January 29, 2014

Exhibit A

Employee Non-Compete, Confidentiality and Non-Solicitation Agreement

ROA 000093

TOTAL QUALITY LOGISTICS, LLC
South Carolina

Employee Non-Compete, Confidentiality
and Non-Solicitation Agreement

This EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT ("Agreement"), is by and between TOTAL QUALITY LOGISTICS, LLC ("TQL"), 4289 Ivy Pointe Blvd., Cincinnati, Ohio 45245 and the Employee whose name and address are set forth below his or her signature on the last page of this Agreement ("Employee").

RECITALS:

WHEREAS, TQL is an Ohio Corporation providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services (hereinafter referred to as the "Business") throughout the Continental United States; and

WHEREAS, TQL is unique within the organizations providing services competitive to the Business (hereinafter referred to as the "Industry"). TQL has spent extensive time developing relationships with Customers, Motor Carriers, suppliers and others within the Industry. TQL provides extensive training on ways to succeed within the Industry. TQL also provides tools, such as proprietary software, that are unique within the Industry. The relationships, tools, and training developed by TQL will assist Employee in gaining intimate knowledge of TQL's business model, its Customers, Motor Carriers, suppliers, contact information, lanes, pricing, sales strategy, service and other confidential and proprietary information. The knowledge learned at TQL is unlike what could be learned elsewhere within the Industry. TQL takes steps to protect the confidentiality of this information, and such information would have value to a TQL competitor. Employee, therefore, acknowledges and agrees that what Employee learns at and is trained in at TQL would necessarily cause unfair competition if Employee took employment competitive to TQL; and

WHEREAS, TQL develops and maintains confidential proprietary information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics

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management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

NOW THEREFORE, in consideration of the employment of Employee by TQL, including compensation and benefits provided by TQL, and the terms, conditions, and covenants, set forth herein, TQL and Employee agree as follows:

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1. Recitals. The "Recitals" set forth above are hereby restated and incorporated herein by reference as though fully set forth again.

2. At-will Employment. Employee is an employee at-will. Nothing in this Agreement changes Employee's status as an at-will employee. Either TQL or Employee may terminate Employee's employment for any reason at any time. Employee acknowledges and agrees that this Agreement does not constitute a contract of employment and that Employee does not have a contract of employment with TQL.

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are

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valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

8. Property Rights and Assignment. Employee agrees that any work, invention, product design, or technological innovation created, conceived, developed, produced, generated, and/or improved by Employee, whether or not patentable, or subject to copyright, trademark, or trade secret protection, at any time during or arising out of Employee's employment with TQL that results from, is suggested by, or relates to any work which Employee does for TQL, shall be the absolute property of TQL and shall promptly be disclosed by Employee to TQL. Employee hereby assigns any and all right, title, and interest in any work product to TQL, including assigning any and all rights to any future invention arising out of or relating to Employee's employment with TQL. To the extent necessary, during employment and thereafter, Employee shall sign applications, assignments, and any other papers that TQL may consider necessary or helpful in perfecting and enforcing TQL's rights in, and to, any such invention, improvement, and/or technological innovation.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

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(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing

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Business" is any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.

(e) Acknowledgement of Intent. The parties agree and affirm that their intention with respect to Section 8 of this Agreement is that Employee's activities be limited only during Employee's employment with TQL and for a twelve (12) month period after termination or cessation of Employee's employment with TQL for any reason. The provisions calling for a "look back" of twelve (12) calendar months prior to termination or cessation of Employee's employment with TQL for any reason are intended solely as a means of identifying the Customers and Motor Carriers to which such restrictions apply and are not intended to nor shall they, under any circumstances, be construed to define the length or term of any such restrictions.

10. Reasonableness of Restrictions. Employee agrees and acknowledges that the provisions of this Agreement, including the geographic, duration, and content restrictions contained in Section 8 and the restrictions on the disclosure and use of Confidential Information contained in Section 4, are reasonable and fair in all respects and properly required for the adequate protection of the Business of TQL from the disclosure of Confidential Information and unfair competition. Employee further agrees and acknowledges that this Agreement is based upon valuable and sufficient consideration, the receipt of which as of the date of this Agreement is hereby acknowledged.

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

12. Severability. Should any of the provisions of this Agreement be declared or determined to be illegal or invalid by a court of competent jurisdiction, (a) the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not a part of this Agreement; (b) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (c) there shall be added automatically as a part of this Agreement provisions as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable. The parties hereby consent and agree that the scope of the Agreement's provisions may be modified judicially in any proceeding brought to enforce such provisions.

13. No Conflicting Employee Agreement. Employee represents that Employee is not bound by any agreement or contract or other duty to a former employer or any other party which would prevent Employee from complying with any obligations hereunder or performing his or her duties as an employee of TQL.

14. Acknowledgments. Employee acknowledges and agrees that he or she:

(a) has had sufficient time within which to consider the Agreement before executing it;

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(b) has carefully read and fully understands all of the provisions of the Agreement;

(c) knowingly and voluntarily agrees to all of the terms set forth in the Agreement;

(d) knowingly and voluntarily intends to be legally bound by this Agreement;

(e) has had sufficient opportunity to obtain and consult with his or her own lawyer regarding this Agreement; and

(f) has knowingly and voluntarily executed this Agreement.

15. Binding Agreement. This Agreement shall be binding and enforceable upon the parties hereto, their heirs, representatives, successors, and assigns. The Agreement is not assignable by Employee.

16. Survival. Sections 3 through 15 of this Agreement shall survive the termination or cessation of Employee's employment with TQL for any reason.

17. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto pertaining to the subject of this Agreement, and fully supersedes in all respects any and all prior oral or written agreements or understandings between the parties hereto pertaining to the subject of this Agreement. This Agreement may be amended or modified only upon written agreement signed by both of the parties hereto. This Agreement may be executed in Counterparts, each of which shall be deemed an original and all of which taken together shall constitute one Agreement.

In Witness Whereof, the undersigned parties to this Agreement have duly executed it on the day and year first written below.

EMPLOYEE:

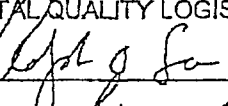

Signature

Name: Thomas J. Faley
Please Print

Address: 1349 Susan Fox
Charleston, SC

Date: 12/10/12

TOTAL QUALITY LOGISTICS, LLC

By: 
Name: Sarah O. Lee

Title: VP of HR

Date: 12/13/12

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Exhibit B

Jeffrey A. Dangelo vs. Total Quality Logistics, LLC
Case No. 1:09cv512 (S.D. Ohio 2009)

Total Quality Logistics, LLC vs. Michael Siano
Case No. 2010-CV-2731
(Court of Common Pleas, Clermont County Ohio January 4, 2011)

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Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeffrey A. Dangelo,

Plaintiff,

v.

Case No. 1:09cv512

Total Quality Logistics, LLC,

Judge Michael R. Barrett

Defendant.

OPINION & ORDER

This matter is before the Court upon Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2). Defendants have filed a Response in Opposition (Doc. 7), the Affidavit of Jeff Montelisciani (Doc. 8) and a motion to dismiss (Doc. 6). Plaintiff then filed an amended complaint (Doc. 12) and the Affidavit of Bob Klare (Doc. 11). Defendant then filed a motion to strike the affidavit of Bob Klare (Doc. 13). The Court held a hearing on Plaintiff's Motion on August 7, 2009 (Doc. 14).

I. BACKGROUND

Plaintiff Jeffrey A. Dangelo ("Dangelo") seeks to enjoin Defendant Total Quality Logistics, LLC ("TQL") from enforcing an employee non-compete agreement. TQL is engaged in the business of providing third-party logistics by supplying freight brokerage services in every state in the continental United States. (Doc. 8, p1). Plaintiff Dangelo was employed with TQL from November 13, 2002 until May 23, 2009 when Mr. Dangelo voluntarily terminated his employment. (Doc. 8, p3). Dangelo was an Logistics Account Executive or Broker at TQL where his responsibilities included developing customers and

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selling to existing TQL customers. He would then obtain freight orders from these customers and arrange transportation of the freight. (Doc. 8, p1). Upon his hiring at TQL, Dangelo executed an Employee Confidentiality and Non-Compete Agreement which contained a two year non-compete provision (the "2002 Agreement"). Then in 2008, TQL presented another Employee Confidentiality and Non-Compete Agreement which contained a one year non-compete provision (the "2008 Agreement"). (Doc. 8, p2). The 2008 Agreement provides, in part:

Employee agrees that, during the course of his or employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reasons: (i) Employee will not, directly or indirectly, own, operate, maintain, consult with, be employed by (including self-employment), engage in, or have any other interest ... in any Competing Business ...; and (ii) Employee will not ... participate in any transportation-intermediary business that provides services in the Continental United States, including but not limited to any person or organization that provides shipping, third-party logistics, freight brokerage, truck brokerage, or supply-chain management services; (iii) Employee will not ... solicit any Customer, Motor Carrier, client, consultant ... or take any action to divert business from TQL.

(Doc. 12-3, p.4).

Dangelo now desires to accept employment with MegaCorp, a competing business owned by Ryan Legg. Mr. Legg is a former owner of TQL. The parties stipulate that MegaCorp is a Competing Business as defined in the 2008 Agreement. Dangelo argues that the 2008 Agreement is overbroad and should be unenforceable.

II. ANALYSIS

Under Federal Rule of Civil Procedure 65, Injunctive relief is an extraordinary remedy whose purpose is to preserve the *status quo*. However, if the status quo is causing irreparable injury it may be necessary for the Court to alter the situation. *Stenberg v.*

Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. Mich. 1978) quoting *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). When determining whether to grant or deny a temporary restraining order or a preliminary injunction, this Court must consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Chabad of S. Oh. & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004), quoting *Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). The foregoing factors are not prerequisites, but rather are factors which the Court should balance. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). However, "a plaintiff must always demonstrate some irreparable injury before preliminary injunction may issue." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002).

A. Justiciable Controversy

Defendant argues that since TQL has not yet sought to enforce the non-compete agreement against Dangelo that this Court can not grant equitable relief where Dangelo has an adequate remedy at law. Namely, he would be able to raise a defense if TQL did

file suit, i.e., the very claims Dangelo is making in this matter. However, most of the cases TQL cites to support this proposition were decided between in 1892 and 1946. The more recent cases seem to indicate that equity should intervene. See *Naveux v. Webcraft Technologies, Inc.*, 921 F. Supp. 1568 (S.D. Mich., 1996); *Leach v. Ford Motor Co.*, 299 F. Supp. 2d 763, 774 (E.D. Mich. 2004).

A "controversy" must be one that is "appropriate for judicial determination." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937). The controversy "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 241. Here there is evidence that Plaintiff has obtained a job offer and evidence that the Defendant traditionally enforces its non-compete agreements against former employees. See Doc. 12, p 4. It makes little sense to this Court to require Plaintiff to knowingly breach an agreement subjecting himself and his prospective employer to litigation when it can be determined in this fashion. Furthermore, although Defendant has stated that it has not yet sought to enforce the 2008 Agreement against Dangelo, it has failed to state that it would not do so. Thus, the Court finds that a justiciable controversy exists between Dangelo and TQL. This is not a situation where hypothetical facts exist and the Court is being asked to render an advisory opinion. There exists a real and substantial controversy between the parties as to whether the agreement is reasonable and enforceable. Such a situation is within the purview of a justiciable controversy.

From its own research, it appears to this Court that cases like this one where an

employee seeks to enjoin its former employer instead of the other way around are fairly rare. And in most of the similar cases the Court has found the employer brings its own counterclaim seeking to enjoin the former employee from violating the non-compete agreement, which is not the case here as of yet.¹ However, in *Neveux v. Webcraft Technologies, Inc.*, the Court addressed a similar fact pattern as presented here. Although there is not a specific discussion of jurisdiction in *Neveux*, presumably the Court determined that it had jurisdiction to hear the case. 921 F. Supp. 1568 (S.D. Mich. 1996).

In addition, the Defendant, in its response to the TRO and in its motion to dismiss, raises other jurisdictional arguments. However, those arguments are mooted by the filing of the amended complaint. Thus, that motion to dismiss is hereby DENIED.

B. Likelihood of success on the merits

Dangelo argues that the non-compete provision of the 2008 Agreement is unreasonable and unenforceable. The parties agree that Ohio law applies to this dispute. In Ohio, reasonable non-compete agreements are enforced, and unreasonable non-compete agreements are enforced to the extent necessary to protect an employer's legitimate interest. *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 275 (Ohio Ct. App. 2000). The Ohio Supreme Court has held that "[a] covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 544 (Ohio 1975). In determining whether a non-compete

¹TQL has indicated that it would be forced to file a counterclaim if the case continues.

agreement is reasonable, courts are to consider the following factors:

whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during the employment, and whether the forbidden employment is merely incidental to the main employment.

Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992), citing *Raimonde*, 325 N.E.2d at 547. If a non-compete agreement is unreasonable, courts are empowered to modify the terms to create a reasonable covenant between the parties. *Rogers v. Runfola & Assoc., Inc.*, 565 N.E.2d 540, 544 (Ohio 1991).

Dangelo argues that the non-compete provision is unreasonable based on the *Raimonde* factors. Dangelo argues that the restrictive covenants in the 2008 Agreement are unreasonable because they impose an undue burden on Dangelo that is grossly disproportionate to what is necessary to protect TQL's legitimate interests. First, Dangelo argues that the geographic limitation is unreasonable because it would prevent him from working for a similar business anywhere in the world. (Doc. 2, p 7). The 2008 Agreement defines Competing Business as any business "that is engaged in shipping, third-party logistics, freight brokerage, truck brokerage, or supply-chain management services in the Continental United States." Dangelo argues that since foreign companies could offer services in the Continental United States that he would also be prohibited from working for those foreign companies which thereby creates a worldwide geographical limitation. Dangelo argues that such a worldwide geographical limitation is overbroad and unreasonable.

TQL counters that it is a nation-wide business that performs its services "throughout the lower forty-eight states". (Doc. 7, p 15). TQL argues that because this type of brokerage work can be performed from almost anywhere in the world such a restriction is reasonable. The Court agrees that this restriction is reasonable given the advanced technological world that exists today, especially in the business world where transactions are commonly arranged on ones' cell phone in a coffee house half a world away.

Next, Dangelo argues that the one year time limitation is unreasonable. While Ohio courts have upheld agreements with time limits longer than one year, e.g., *Raimonde*, 325 N.E.2d at 548 (upholding three-year limitation), there must be a "reasonable relationship" between the period of prohibition and the legitimate interests of the employer. *Life Line Screening of Am., Ltd. v. Calger*, 881 N.E.2d 932, 943 (Ohio Com.Pl. 2006), quoting *S & S, Inc. v. Kuret*, 1993 WL 158238, *2 (Ohio Ct. App. May 13, 1993) (unpublished). A one year limitation is very common in non-compete agreements. Taking into consideration the number of years Dangelo worked at TQL, the number of customers that he has contacted over those years, and the various training methods, pricing structures, etc. that he was made aware of over those years, the one year prohibition is reasonable.

Dangelo also argues that the definition of Competing Business is overbroad as it could encompass other forms of transportation, such as those by rail, sea and air. However, at the hearing counsel for TQL asserted that TQL just wanted Dangelo to stay out of the trucking brokerage industry. Although it may be TQL's intent to only enforce the agreement as to the trucking industry only, the 2008 Agreement states otherwise. The Court agrees that the 2008 Agreement as written is overbroad. It is not reasonable to exclude the train, boat and plane brokerage industries when TQL does not participate in

those industries. By limiting the agreement to only the trucking brokerage industry, the Court finds that this covenant is reasonably related to TQL's legitimate business interests and are no greater than required to protect those interests.

Dangelo argues that he has no trade secrets and that his presence was not crucial to TQL's success. He also argues that he was not the sole contact with his customers. Dangelo had an assistant who worked with him and apparently had some contact with the customers. However, whether or not another employee at TQL can handle Dangelo's customer is not relevant to this inquiry. What is relevant is the information that Dangelo possessed or had access to. Based upon the evidence, it is clear to this Court that Dangelo did, in fact, possess trade secrets, confidential information and customer data. He underwent a six month intensive training program and was entrusted with confidential information and materials, including detailed expense information, pricing, profitability and margin information as well as non-public information about the individualized needs and requirements of TQL's customers as well as their contact information. In addition, Dangelo came to know the software used by TQL and its marketing and business strategy. (See Doc. 8).

Dangelo argues that the restrictive covenant that prevents an employee from working with clients or customers with whom he had no contact is unreasonable. The Court disagrees. Dangelo had access to customers lists and is therefore aware of many of TQL's customers. For him to use the knowledge and experience he gained while working at TQL to divert business from TQL is a legitimate business interest and no greater than required to protect those interests, especially given that the restriction is only limited to one year.

Finally, the Court finds that enforcement of the non-compete provision would not be injurious to the public. Ohio courts have explained that where enforcement of a non-compete clause would result in an employer's having a near monopoly for its products or services in a given market, enforcement may be denied on the grounds that it would harm the public. *Brantlinger Enterprises v. Curran*, 752 N.E.2d 994, 1004-1005 (Ohio Ct. App. 2001). There is no indication in the record that enforcement of the non-compete provisions in 2008 Agreement would create a monopoly, as services which are similar to those offered by TQL are available from other sources.

Based on the foregoing, the Court concludes that Dangelo has not shown a likelihood of success on the merits. To the extent that the Court has modified the non-compete provision and found it to be reasonable, the agreement is therefore enforceable. Therefore, this factor weighs in favor of denying an injunction.

B. Irreparable injury

Dangelo argues that he will suffer irreparable injury if his motion is denied because he will not be able to work in "his industry" and would be denied the right to support his family. However, it is well-settled that "a plaintiff's harm is not irreparable if it is fully compensable by money damages." *Basicomputer*, 973 F.2d at 511.

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other collective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

Here, Dangelo voluntarily quit his job at TQL. He was not fired or laid off. Any

alleged injury he now suffers is not due to any actions of TQL. Additionally, Dangelo can work in the brokerage industry, just not in the trucking brokerage industry. There are at least three other means of transportation that are available. Finally, if Dangelo was able to work in "his industry" he would be supporting his family by collecting a pay check, i.e., receiving money. Dangelo has presented no evidence that his damages could not be compensable by money damages. Thus, this factor weighs in favor of denying an injunction.

C. Harm to others

In assessing a motion for an injunction, this Court must consider whether the injunction would harm the party enjoined or others, and if so, whether such harm outweighs any irreparable harm established by the party seeking the injunction. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). The harm to TQL would be substantial. Dangelo would be working for a direct competitor, taking with him his knowledge of TQL's training practices, customers, policies, pricing structures, etc. The Court does not give any weight to the argument that Mr. Legg was a co-founder of TOL and therefore he already knows this information. Mr. Legg departed from TQL over three years ago and there is evidence in the record to support the fact that policies, training methods and customers have changed in that time period. (See Doc. 15). Even if irreparable harm existed, the harm to TQL outweighs any possible irreparable harm to Dangelo. Thus, this factor weighs in favor of denying an injunction.

D. Public interest

Under Ohio law, "[p]reserving the sanctity of contractual relations and preventing unfair competition have traditionally been in the public interest." *UZ Engineered Products*

Co. v. Midwest Motor Supply Co., Inc., 770 N.E.2d 1608, 1081 (Ohio Ct. App. 2001).

Accordingly, this factor weighs in favor of denying an injunction.

E. Motion to Strike

Defendant filed a motion to strike the affidavit of Bob Klare on the grounds that the information contained in Mr. Klare's affidavit were derived from attempts to settle matters between TQL and MegaCorp, Dangelo's prospective employer. Based on Evidence Rule 408, the Court finds the motion to be well taken. The Court did not consider the affidavit in its determination of this Order and hereby strikes the affidavit.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED that:

1. Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2.) is hereby DENIED;
2. Defendant's Motion to Dismiss (Doc. 6) is DENIED;
3. Defendant's Motion to Strike the Affidavit of Bob Klare (Doc. 13) is GRANTED.
4. Defendant shall file an answer to the amended complaint or otherwise plead with in twenty days of this Order.

IT IS SO ORDERED.

/s/ Michael R. Barrett
United States District Judge

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS,
LLC.

Case No. 2010 CVC 2731

Plaintiff

(Judge McBoyle)

vs.

TEMPORARY RESTRAINING
ORDER.

MICHAEL SIANO, et al.

Defendants

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CLERMONT COUNTY, OHIO

This matter came on for hearing on January 4, 2011 before the Court on Plaintiff, Total Quality Logistics, LLC's ("TQL's"), request for a temporary restraining order; and

The Plaintiff TQL gave notice to the Defendants Michael Siano ("Siano") and Overland Xpress, LLC ("Overland Xpress"), of the hearing as certified by counsel for the Plaintiff TQL; and

Having considered the Plaintiff TQL's *Motion for Temporary Restraining Order and Preliminary Injunction*, its supporting memorandum, and the *Affidavit of Jeff Montelisciani* ("the Montelisciani Affidavit"), the Court finds that it clearly appears, from the specific facts shown, as follows:

The Defendants are committing acts and are about to commit acts as set forth in the Montelisciani Affidavit and TQL's *Motion for Temporary Restraining Order and Preliminary Injunction*, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss, or damage will result to Plaintiff TQL for which TQL has no adequate remedy at law in that the Defendant Michael Siano

is employed by the Defendant Overland Xpress, a Florida limited liability company and a TQL competitor; that he has worked and is continuing to work at Overland Xpress in violation of the Employee Confidentiality and Non-Compete Agreement ("the Agreement") signed by him; that Overland Xpress is aware that Siano is bound by the Agreement; that Siano is in contact with at least one TQL customer in violation of his Agreement with TQL; and that the Plaintiff, TQL, has demonstrated to a substantial likelihood that it will prevail on the claims asserted in its Complaint.

THEREFORE, IT IS ORDERED that Defendants, their agents, servants, employees, and attorneys, and all persons in active concert and participation with them, be and they are hereby restrained as follows:

(1) Siano is prohibited and enjoined from accessing, using, disseminating, or otherwise distributing any TQL trade secrets or confidential information; and

(2) Siano is prohibited and enjoined from working for Overland Xpress or any TQL competitor, including competing self-employment, within the continental United States; and

(3) Siano is prohibited and enjoined from soliciting transportation intermediary business; and

(4) Siano is prohibited and enjoined from contacting or communicating with any TQL customers and/or carriers for the purpose of doing business or attempting to do business with those customers or carriers; and

(5) Siano is prohibited and enjoined from disclosing and/or communicating TQL trade secrets (including the identities and contact information of its customers) to Overland Xpress and/or to any other persons or entities; and

(6) Overland Xpress is prohibited and enjoined from employing Siano; and

(7) Overland Xpress is prohibited and enjoined from accessing, disclosing, using, or otherwise distributing any TQL confidential information or trade secrets currently in its possession, including information regarding the identities of TQL customers; provided that Plaintiff TQL first gives security in the sum of \$2,000.00 as set forth in Civ. R. 65; and it is further

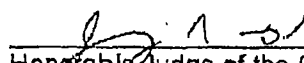
ORDERED, that this Order expire within 14 days after entry unless, within such time, the order for good cause shown is extended, or unless the parties consent that it may be extended for a longer period; and it is further

ORDERED, that Plaintiff TQL's *Motion for a Preliminary Injunction* be assigned for hearing on ^{11m} December ^{5, 2017} 18, 2018, at 10:30 a.m./p.m.; and that it is further

ORDERED that Plaintiff, TQL, shall cause copies of this Order to be immediately served upon the Defendants via facsimile, overnight mail delivery, or by any other method authorized by Civ. R. 5.

Issued at 2:25 p.m., ^{11m} December 18, 2018.

IT IS SO ORDERED.


Honorable Judge of the Clermont
County Court of Common Pleas

TO THE CLERK:

Please serve Defendants via certified mail service, return receipt requested.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

THOMAS JOSHUA FAY,

Plaintiff,

vs.

TOTAL QUALITY LOGISTICS, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-5579
)
)
)
) **PLAINTIFF'S SUPPLEMENTAL**
) **MEMORANDUM OF LAW IN SUPPORT**
) **OF HIS MOTION FOR SUMMARY**
) **JUDGMENT AND IN OPPOSITION TO**
) **DEFENDANT'S MOTION FOR**
) **SUMMARY JUDGMENT**

FILED
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CLERK OF COURT
JULIE A. HARRIS
PM 3:56

On January 31, 2014, this matter came before the Court for a hearing on the parties' cross motions for summary judgment. The Court took the matter under advisement and asked the parties to submit supplemental briefs on or before February 7, 2012. Based on Judge Young's statements at the hearing, Plaintiff submits this supplemental legal memorandum concerning only the validity of the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement signed by the Plaintiff ("Fay") on December 10, 2012. Because all covenants contained in this agreement are unreasonable and violate the public policy of South Carolina, the covenants restricting Fay's right to work in the motor carrier transport industry are not valid and are unenforceable as a matter of law.

UNDISPUTED FACTS

Defendant Total Quality Logistics, LLC ("TQL") hired Fay in December of 2012 and terminated him in June of 2013. During his short period of employment with TQL, Fay received training and provided services in the area of motor carrier transportation out of TQL's Charleston office. After Fay left TQL, a customer of TQL, Brandt Companies, LLC ("Brandt"), a company that provides engineering services, retained Fay as an exclusive independent contractor through

an LLC that Fay created to provide services only to Brandt with regard to transporting Brandt's equipment. Fay provided those services to Brandt for several months until TQL sued Brandt in Ohio claiming that Brandt had interfered with TQL's Employee Non-Compete, Confidentiality and Non-Solicitation Agreement with Fay. Brandt stopped doing business with Fay until the matter was resolved. A copy of the Complaint in that action is attached as Exhibit A hereto.

Fay brought this action asking that the Court declare that the said noncompetition agreement was invalid and unenforceable in South Carolina, as well as several other causes of action, which are not the subject of this motion.

I. SOUTH CAROLINA LAW APPLIES TO DETERMINE WHETHER THE AGREEMENT VIOLATES PUBLIC POLICY AND, CONSEQUENTLY, IS NOT ENFORCEABLE.

The agreement in question provides that the "[a]greement is made and entered into in the State of Ohio," which was not true as Fay executed the agreement in South Carolina, and that "[t]he Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles." On the bottom left hand corner of every page of the agreement are the initials "SC." The first question the Court must answer is what law governs the interpretation of this Agreement, because Ohio law allows an unreasonable non-compete agreement to be modified, so as to make it "reasonable," and South Carolina law does not. The Agreement in question is not reasonable on its face under South Carolina law.

In Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961), the South Carolina Supreme Court dealt with an action in which Standard Register Co. sought to enforce a non-compete against a former employee, Kerrigan. The agreement in question provided that it was to be "construed according to the laws of Ohio," just as does the agreement at issue before this Court. In that case, the Court held: "The contract with which we are here concerned

provides that it shall be construed according to the law of the State of Ohio, but *if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.*” 238 S.C. at 70; 119 S.E.2d at 541-42 (emphasis added). That Court also cited earlier cases that stated: “We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void.” 238 S.C. at 70, 119 S.E.2d at 542.

In a more recent case, Stonhard v. Carolina Flooring Specialists, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005), the South Carolina Supreme Court again considered the question that is before this Court. The United States District Court had certified certain questions to be answered by the State Supreme Court: “*The first question is whether a non-compete agreement which does not contain a geographical limitation may be reformed or ‘blue penciled’ according to New Jersey law and then enforced in South Carolina. The answer to this question is no.*” (emphasis added). Contrary to the argument of TQL’s counsel at the hearing, that same question is the precise question before this Court.

In Stonhard, the Court did not reverse its holding in Standard Register but, instead, quoted that case with approval that “[t]erms in a non-compete agreement may be construed according to the law of another state.... *But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement.*” Id. (emphasis added). The Stonhard Court then looked at New Jersey law, which allows a court to “modify or ‘blue pencil’ a non-compete agreement so as to make its terms reasonable.”¹ Id.

¹ TQL’s counsel argued that Ohio law did not call for “blue penciling” and tried to make some distinction between “blue penciling” and modifying an agreement so as to make its terms reasonable. The Ohio courts interpret “blue penciling” to be only the striking of terms in an agreement unlike other courts which describe it as modifying an agreement. “Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts

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

In its final paragraph, entitled “Conclusion,” the *Stonhard* Court stated:

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

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

Apply the Reasonableness Standard to Entrepreneurs,” Vol. 8.1 *Ohio State Entrepreneurial Business Law Journal*, p. 73. Copy attached as Exhibit B.

Just as in Stonhard, South Carolina law applies to the TQL Employee Non-Compete, Confidentiality and Non-Solicitation Agreement when determining whether it violates the public policy of South Carolina and, therefore, is not enforceable in South Carolina.

II. THE EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT VIOLATES THE PUBLIC POLICY OF SOUTH CAROLINA AND, THEREFORE, IS VOID AND UNENFORCEABLE AS TO FAY.

In Faces Boutique, Ltd. v. Gibbs, 318 S.C. 35, 41-42, 455 S.E. 2d 707, 708-09 (Ct. App. 1995), the South Carolina Court of Appeals summarized the law concerning the validity of non-compete agreements in South Carolina:

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer.... A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer.... A covenant not to compete will be upheld only if it is:

- (1) necessary for the protection of the legitimate interest of the employer;
- (2) reasonably limited in its operation with respect to time and place;
- (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) reasonable from the standpoint of sound public policy; and
- (5) supported by valuable consideration.

Moreover, each case concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on its own facts. If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved. See Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 434, 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 v. Reyner, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("[I]f ... the territorial scope of the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.").

In Ohio, the courts have adopted a "reasonableness standard" with a three prong test:

A noncompete clause will be found to be reasonable only where the employer can show by clear and convincing evidence that the restrictions imposed by the non-compete clause (1) are no greater than necessary for the protection of the

employer's legitimate business interests, (2) do not impose undue hardship on the employee, and (3) are not injurious to the public.

Raimonde v. Van Vlerah, 325 N.E.2d 544, 546-547 (1975).

However, the Ohio courts take seriously the requirement that the employer proving that it needs protection:

Generally, the only business interests which have been deemed sufficient to justify enforcement of a noncompete clause against a former employee are preventing the disclosure of the former employer's trade secrets or the use of the former employer's proprietary customer information to solicit the former employer's customers.

Brentlinger Enterprises v. Curran, 141 Ohio App. 3d 640, 649 (2001).² The Ohio Court of Appeals in this case held that the non-compete agreement at issue was not enforceable because the employer did not prove that the non-compete was necessary to protect its legitimate business interests. The facts in that case are similar to those present herein. In that case, a three-month employee left one car dealership to go to work for a competitive dealership, and the employer sought to enforce a non-compete. The only legitimate business interest of the employer, as found by the Court, was the fact that the employee had contacted a person to whom he had been trying to sell a car before he left Brentlinger's employment. Because there was only evidence that he had contacted one former customer, the Court found that there was not sufficient contacts with former customers to justify the enforcement of the non-compete and, therefore, refused to do so.

A. THE CONFIDENTIAL INFORMATION PROVISION OF THE AGREEMENT AMOUNTS TO A NON-COMPETE AND IS NOT VALID OR ENFORCEABLE IN EITHER OHIO OR SOUTH CAROLINA BECAUSE IT HAS NO TIME OR GEOGRAPHICAL LIMITATIONS.

Paragraph 4 of the Agreement states:

4. Confidential Information is for TQL's Use Only. Unless Employee has

² A copy of this opinion is attached as Exhibit C.

prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof. [Emphasis added. Section 8 deals with property rights and assignment with regard to any work product created by the Employee. This is not an issue in this case.]

The third "Whereas" clause of the Agreement defines "Confidential Information" and includes every piece of information gleaned by, or provided to, the Employee while employed by TQL. The Affidavits submitted by TQL also claim that every piece of information known by Employee with regard to the motor carrier transport business is TQL's Confidential Information.

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

TQL's covenant not to compete set forth in its confidential provision has no time or geographic limitations. Even in Ohio, such a covenant is not enforceable. See Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App. 1987) ("We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an

extraordinary showing to establish that an unlimited restriction against competition, anywhere... and at any time...was reasonably necessary to protect the covenantee's legitimate business interests....").

South Carolina law agrees with Ohio law with respect to non-competes that have no geographic or time restrictions. Thus, the Confidentiality provision of the Agreement should be declared invalid and unenforceable.

B. THE NON-COMPETE PROVISIONS OF PARAGRAPH 9 ARE INVALID AND UNENFORCEABLE BECAUSE THERE IS NO GEOGRAPHICAL LIMITATION.

Paragraph 9(b) of the Agreement sets forth the non-compete covenants. Unlike the confidentiality provision non-compete which has no time or geographical restrictions, 9(b) provides that the restrictions set forth therein shall be "for a period of one (1) year after termination ... of Employee's employment." However, Paragraph 9(b) has no clear geographical limitations on the non-compete. Paragraph 9 does define a "Competing Business" as "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." "Business" is defined in the first "Whereas" clause as "providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services." Under these definitions and Paragraph 9(b)(i) and (ii) of the Agreement, Fay is prohibited from having any interest in, or working for, a company "engaged in the Business anywhere in the Continental United States" even if Fay were living and working in another country, so there is no geographical limitation.

Concerning Paragraph 9(b)(iv), there is no evidence that Fay "interfere[d] with, tamper[ed] with, disrupt[ed] or attempt[ed] to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship between TQL and any Customer,

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

Thus, the question before the Court with regard to the Paragraph 9 covenants is whether a non-compete can be valid even if there is no geographical limitation.³ In Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980), the South Carolina Supreme Court held that a geographical restriction of the State of South Carolina was unreasonable and violated public policy. In Team IA v. Lucas, 395 SC 237, 717 SE 2d 107 (Ct. App. 2011), the Court held that a nationwide territorial restriction was on its face overly broad, so no restriction would also be overly broad. Non-compete covenants with no limitation on geographical application violate public policy in South Carolina, because the restriction is general and not limited to the needs of the Employer and are, therefore, void and unenforceable.

C. THE RESTRICTION ON SOLICITATION OF CUSTOMERS AND MOTOR CARRIERS IS VOID AND UNENFORCEABLE BECAUSE IT IS UNREASONABLE, IS NOT LIMITED TO NEEDS OF TQL, AND VIOLATES THE PUBLIC POLICY OF SOUTH CAROLINA.

Paragraph 9(b)(iii) prohibits Fay from “directly or indirectly, solicit[ing] any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL.” “Customer” is defined as “any customer or prospective customer: (A) with whom Employee had contact in connection with Employee’s employment with TQL during

³ At the hearing, TQL argued that the geographical limitation was the Continental United States. However, there is no such limitation mentioned other than in the definition of “Competing Business” and only to limit that term to businesses which operate in the Continental United States. If a Competing Business operated in both the United States and Europe, Fay would be prohibited from working for that business even if he were in Europe

the twelve (12) month period prior to termination ... of Employee's employment with TQL...; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination ... of Employee's employment with TQL" "Motor Carrier" is defined as "any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements or communication with TQL and [with whom Employee had contact while employed with TQL or about whom Employee had access to ... information through Employee's employment by TQL.]" These definitions cover virtually every business which makes use of motor carrier transport, as well as every motor carrier business, in the United States.

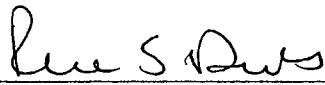
Non-competes which are limited to existing customers have been upheld but never has any court upheld a restriction that covers every business in the United States that used motor carrier transport as well as every motor carrier in the country. This restriction is overly broad and violates the public policy of South Carolina. Even the Ohio Courts would not enforce such a restrictive covenant. See Brentlinger Enterprises v. Curran, 141 Ohio App. at 649.

CONCLUSION

Therefore, under either Ohio or South Carolina law, the TQL non-competes are not enforceable because they are not reasonable (Ohio law) and they violate the public policy of South Carolina. The Plaintiff Fay is entitled to summary judgment as to his declaratory judgment action requesting that the non-competes be found to be void and not enforceable and as to TQL's counterclaims for declaratory judgment that the provisions of the Agreement should be enforced. That leaves the Plaintiff's claims for unpaid overtime compensation and for intentional interference with contractual relations and Defendant's claim under the Trade Secrets

Act remaining to be determined.

February 7, 2014

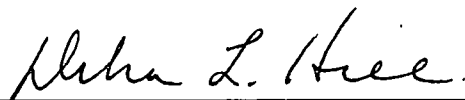
By: 
Alice F. Paylor
Rene S. Dukes
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843)577-6726

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of February, 2014, a true and correct copy of Plaintiff's Supplemental Memorandum of Law in Support of His Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following.

Robert D. Moseley, Jr., Esquire
Peter A. Rutledge, Esquire
Smith, Moore & Leatherwood, LLP
Post Office Box 87
Greenville, SC 29602


Debra L. Hill

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC
4289 Ivypoint Blvd.
Cincinnati, OH 45245

Plaintiff

v.

THE BRANDT COMPANIES, LLC
P.O. Box 29559
Dallas, TX 75229-0559

Please Also Serve Defendant At:

1728 Briercroft Court
Carrollton, TX 75006

Defendant

Case No. 2013 CVH 01592

Judge: JUDGE HERMAN

2013 CVH 01592 JUDGE HERMAN

COMPLAINT

Comes now the Plaintiff, Total Quality Logistics, LLC ("TQL") by and through counsel, and for its Complaint against the Defendant, The Brandt Companies, LLC ("Brandt") states as follows:

FIRST COUNT

1. This Court has jurisdiction over the Defendant because the Defendant has transacted business in the State of Ohio, has regularly engaged in a persistent course of conduct in the State of Ohio, and/or has sufficient minimum contacts in this state for the Court to exercise jurisdiction.

2. Plaintiff and Defendant entered into an agreement wherein Plaintiff provided services to Defendant.

3. Pursuant to said agreement, Defendant is indebted to Plaintiff in the amount of \$4,325.00. (See Exhibit "A").

579828v1

EXHIBIT

tabbies
A
RCA 000127

4. Despite demand being made, Defendant has refused to pay Plaintiff the amounts owed to Plaintiff in breach of the parties' agreement.

SECOND COUNT

5. The preceding paragraphs are incorporated herein by reference as if fully rewritten herein.

6. Defendant has been unjustly enriched, to Plaintiff's detriment, in the amount of \$4,325.00.

THIRD COUNT

7. The preceding paragraphs are incorporated herein by reference as if fully rewritten herein.

8. Pursuant to Defendant's credit application with Plaintiff, Defendant agreed to pay Plaintiff 1.5% per month finance charge, court costs, collection fees, and attorney's fees in the event that the Plaintiff has to obtain an attorney due to a delinquent account.

9. Pursuant to said agreement, Plaintiff is entitled to collection costs, attorney fees, court costs, and prejudgment interest at the rate of 1.5% per month. (See Exhibit "B").

FOURTH COUNT

10. The preceding paragraphs are incorporated by reference as if fully rewritten herein.

11. On or about December 10, 2012, TQL hired an individual by the name of Joshua Fay to work as a trucking broker.

12. After hiring Fay, TQL provided him with extensive training on TQL's services, pricing structure, sales strategies, customers, and general operations.

13. On average, it takes a new TQL employee eighteen weeks to complete the TQL training program. With respect to Fay, TQL provided this training to him at considerable expense to itself.

14. In addition, throughout his employment, TQL entrusted Fay with highly confidential business information and trade secrets, including information on TQL's specialized software, client relationships, pricing, marketing, sales lists, customer information, motor carrier information, and business strategy.

15. TQL has protected the confidentiality of this information through a number of methods—including internal controls that prevented employees from downloading or printing certain information. TQL also guards its confidential information with computer passwords. TQL constantly changes these passwords in order to maintain secrecy.

16. In addition, to protect its investment in its employees and to safeguard its confidential information from disclosure, TQL requires all of its employees to agree to TQL's "Employee Non-Compete, Confidentiality, and Non-Solicitation Agreement" (the Agreement").)

17. Fay voluntarily signed the Agreement as a condition of his employment with TQL. (See Exhibit C)

18. By signing the Agreement and maintaining employment with TQL, Fay agreed to the following terms (among others):

- a. To maintain the secrecy of TQL's confidential information and to use such information only for TQL's benefit;

- b. To return to TQL all confidential and company information upon the termination of his employment or upon TQL's request;
- c. Not to solicit TQL customers for a period of one year following the termination of employment;
- d. Not to make use of or disclose TQL's confidential information and/or trade secrets;
- e. To refrain from recruiting certain TQL employees for a period of one year following termination of employment with TQL; and
- f. Not to compete against TQL or to work for a TQL competitor for a period of one year following termination of employment with TQL.

19. Furthermore, under the express terms of the Agreement with TQL, Fay acknowledged that TQL develops and maintains certain confidential information (including customer and carrier lists and pricing information) and that he would have access to this confidential information in order to perform his duties for TQL.

20. Throughout his employment with TQL, TQL entrusted Fay with highly confidential business information and trade secrets including information on TQL's specialized software and client relationships. Fay also developed significant knowledge of and contacts with customers, carriers, and other persons doing business with TQL.

21. In his capacity with TQL, Fay also had access to and gained knowledge of extremely sensitive information pertaining to TQL's services, its software, its personnel, its customer lists, its methods, procedures and practices, its commission and fee rates, its sales figures and other business affairs, and its strategic business forecasts and plans including marketing strategies and targets. That information is highly confidential and proprietary in nature and is protected by TQL as a valuable business asset.

22. Fay's employment with TQL terminated on or about June 17, 2013.

32. Upon information and belief, Brandt has interfered with TQL's business relationships to the competitive disadvantage of TQL.

33. Brandt caused Fay to wrongfully compete with TQL, to divulge the trade secrets of TQL, and to wrongfully convert the business opportunities of TQL for the benefit of Brandt.

34. Brandt has intentionally, maliciously, and wrongfully caused Fay to breach the Agreement.

35. By reason of Brandt's conduct, TQL has been and continues to be damaged and deprived of benefits to which it is entitled pursuant to the Agreement.

36. Brandt has been unjustly enriched as a direct and proximate result of its intentional interference and unfair competition, and Brandt must disgorge profits and gain derived from its wrongful acts.

FIFTH COUNT FOR RELIEF

37. Plaintiff incorporates the allegations of the preceding paragraphs as if fully set forth herein.

38. Brandt's actions described above were willful, wanton, intentional, and demonstrated fraud, insult, malice, and/or a disregard of the rights of TQL.

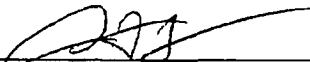
39. As a direct and proximate result thereof, TQL is entitled to punitive damages against Brandt.

RELIEF REQUESTED

WHEREFORE, Plaintiff TQL demands that judgment be entered in its favor against the Defendants as follows:

A. Awarding compensatory damages in excess of \$25,000;

- C. Awarding punitive damages;
- D. Awarding prejudgment interest;
- E. Awarding the costs and expenses incurred in connection with this litigation, including reasonable attorney's fees;
- F. Awarding any other relief as this Court deems appropriate.



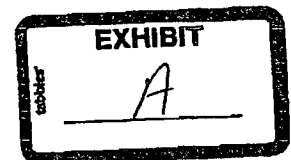
Barry F. Fagel (#0060122)
LINDHORST & DREIDAME CO., LPA
312 Walnut Street, Suite 3100
Cincinnati, OH 45202
(513) 345-5797 direct
(513) 421-0212 facsimile
bfagel@lindhorstlaw.com
Attorney for Plaintiff

TO THE CLERK:

Please serve Defendant by certified mail, return receipt requested.

Brandt

PO Number	Customer PO	Rep	Bill Date	Original Amount	Balance	Days Old
3597661	BP5529	5562	8/6/2013	\$675.00	\$675.00	63
3610677	BP5570	5562	8/6/2013	\$1,200.00	\$1,200.00	63
3543148	BP4656	5562	8/16/2013	\$1,100.00	\$1,100.00	53
3577325	BP5218	5562	9/3/2013	\$1,350.00	\$1,350.00	35
4 loads				\$4,325.00	\$4,325.00	



ROA 000133



Intellectual, discipline, execution and communication - Others say it's WE LIVE BY,

Company Name THE BRANDT COMPANIES LLC

Mailing Address _____

Telephone Number _____

Fax Number _____

D & B Number _____

Shareholder's Ownership % _____

A/P Contact _____

Year Business Started _____

Estimated Loads per Week _____

Company Website _____

Federal ID# _____

f.) \$251K+

Page 2 of 3

1/13

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Total Quality Logistics

TOTAL QUALITY LOGISTICS

www.TQL.com

Integrity, discipline, efficiency and communication - Others say it, WE LIVE IT.

Terms and Conditions

1. Applicant hereby certifies that information furnished in this application is true and correct.
2. Our payment receiving terms are NET 30 days from invoice date.
3. Applicant affirms that the financial condition of the business is satisfactory and all financial obligations can be met.
4. Finance charge of 1.5% per month (18% annum) added to accounts 30 days or more past due.
5. Applicant affirms that there are no open judgments, suits, or liens against company.
6. In the event that Total Quality Logistics deems it necessary to utilize the services of a collection agency or attorney to collect any amounts due, applicant agrees to pay all collection costs, attorney fees, and court costs.
7. Applicant will notify Total Quality Logistics of any change in ownership.
8. By signing this credit application, authorization is hereby given to Total Quality Logistics to contact any or all credit / bank references provided.
9. Applicant understands that Total Quality Logistics is a transportation broker who will arrange their freight to be transported by a third party motor carrier. Applicant understands and agrees that Total Quality Logistics cannot fill out the Bills of Lading nor be listed on the Bills of Lading as the delivering carrier.
10. Applicant understands motor carriers under contract with Total Quality Logistics are required to maintain cargo loss and damage liability insurance in the amount of \$100,000.00 per shipment. Please sign below acknowledging that loads valued in excess of \$100,000 will not be tendered without giving written notification to allow Total Quality Logistics and the contracted carrier the opportunity to arrange for increased insurance limits. Failure to provide written notice will result in your loads not being insured to the extent the value exceeds \$100,000.00.
11. The state courts located in Clermont County, Ohio shall have exclusive and irrevocable jurisdiction and shall be the exclusive venue with respect to any claim, counterclaim, or dispute arising in connection with any transactions, loads, or other business between Total Quality Logistics and applicant.

Less-Than-Truckload (LTL) Terms and Conditions

1. Transit time is an estimate based on the carriers' published times and has no definite date and time for pickup or delivery. If you need delivery by a specific date, TQL can arrange a guaranteed shipment with advance notice and proper notes on the BOL. If a guaranteed delivery arrives late you will not be charged, and TQL is not liable for additional charges or damages due to a late guaranteed delivery.
2. If your freight exceeds any of the following it may be considered a "volume shipment" and additional charges may apply: 8,000 lbs, 8 double-stacked standard-sized pallets, 4 non-stackable standard-sized pallets, 12 feet of linear space, or 650 cubic feet. Please contact your TQL salesperson to verify your freight details are accurately reflected in your quote.
3. TQL assumes all quoted information is accurate and will not change. Adjustments to the lane, pallets, dimensions, weight, or class, including corrections made by the carrier, may result in additional charges and accessorial. Please notify TQL of any inaccuracies or changes to your quote to get an accurate confirmation.
4. TQL may help classify your freight but is not responsible for the accuracy of its suggestion. If a carrier determines the incorrect class was used additional charges may apply.
5. Accessorials such as delivery appointment, liftgate, pallet jack, redelivery, or reweigh / reclass may be added to your freight in order to complete delivery. While TQL strives to notify you of all charges in advance, this is not always possible and unanticipated accessorial may be added to your shipment.
6. The shipper must use TQL's bill of lading on top of any shipping documents. The customer is responsible for notifying TQL of any incorrect information on the bills. Additional charges may result from incorrect information on the bill of lading including, but not limited to, inspection fees, reconsignments, and rebills.
7. Your freight will be insured by the carrier at the default amount for your commodity and class per NMFTA guidelines and carrier tariffs, but your freight may not be insured for its full value. You may purchase cargo insurance on the full value of your freight through TQL at a rate of \$.50 per \$100 value; minimum charge of \$30 will apply.

Authorized Company Representative

Signature Virginia Kimmen Date 4-22-13 Print Name VIRGINIA Kimmen Title AP MGR

Please FAX or EMAIL all three pages of the completed/signed credit application to: Total Quality Logistics, Attn: Credit Department.
Fax: 513-965-7630. Email: creditdept@TQL.com Page 2 of 3



Total Quality Logistics

TOTAL QUALITY LOGISTICS

www.TQL.com

Integrity discipline, responsibility and communication - Orders ship it, WE LIVE IT.

Billing Specifications (to be filled out by account payables contact)

1. Are bills of lading required with invoice to process payment? Y/N
2. TQL's invoices via email to the appropriate Accounts Payable contact.
Certified copies of the bills of lading can also be attached (if necessary for payment processing).
Please provide A/P email address: BRANDT AP @ BRANDT-COMPANIES.COM
(If no email then fax is also an option. Please provide fax number: _____)
3. TQL is capable of Electronic Data Interchange (EDI) transactions. Do you have EDI capabilities? Y/N
If yes, please forward specifications and contact information to EDI@TQL.com.
4. Are your loads pallet exchange? Y/N
5. Do you reimburse for unloading charges? Y/N
6. Do you have the ability to pay invoices via ACH/EFT? Y/N
If yes, please email ACH paperwork to apayments@tql.com.

Please add any additional billing requirements/comments below:

Company Name: TAE BRANDT COMPANIES LLC

A/P Contact Name / Title: SUSAN McDONALD

Signature: Viggo James

Please FAX or EMAIL all three pages of the completed/signed credit application to: Total Quality Logistics, Attn: Credit Department.
Fax: 513-965-7630. Email: creditdept@TQL.com. Page 3 of 3



BRANDT

CONFIDENTIAL CREDIT INFORMATION

The Brandt Companies, LLC

P. O. Box 29559

Dallas, TX 75229-0559

Phone: 972-395-6000

Fax: 972-395-6001

EIN # 37-1652957

All Invoices should be sent to brandtap@brandteng.com

OFFICERS

M. A. Zilbermann, CEO (Managing Member)

B. Moore, President (Managing Member)

Mike Arthurs, CFO

BANK REFERENCE

Frost Bank

15455 N. Dallas Parkway # 100

Addison, Texas 75001

Credit inquiries only accepted via phone.

Credit Reference Phone 214-515-4885

Account # 980035033

TRADE REFERENCES

All-Tex Pipe & Supply

P.O. BOX 542885

Dallas, TX 75354

Phone: 214-350-5886

Fax: 214-353-0449

Contact: Bob Makarski

Ferguson Enterprises

2683 W Euless Blvd

Euless, TX 76040

Phone: 817-540-1888

Fax: 817-540-8022

Contact: Avon Kidd

McMillan James

1010 Mustang Dr

Grapevine, TX 76051

Phone: 817-912-0800

Fax: 817-912-0888

Contact: Dixie

The Trane Company

3600 Pammel Creek Road

LaCrosse, WI 54601-7599

Phone: 608-787-4363

Fax: 608-787-4393

Contact: Bill Kratt

OTHER INFORMATION

Sales Tax Permit #32045410050

Dun & Bradstreet # 007508120

The above information is submitted for the purpose of opening an account and we do hereby certify this information to be true.

Signed: Virginia Kimmons

Date: 4-22-13

Virginia Kimmons

Accounting Manager

AUSTIN
1340 Airport Commerce Dr., Suite 575
Austin, TX 78741
512-491-8100
TACLA 132210
TECL 20109
M18098

DALLAS
1728 Briarcliff Court
Carrollton, TX 75006
972-396-6000
TACLA 000488C
TECL 20109
M14608

FORT WORTH
2502 Gravel Drive
Fort Worth, TX 76118
817-828-0833
TACLA 20707E
TECL 20109
M14608

SAN ANTONIO
6023 Corridor Pkwy., Suite 100
Schertz, TX 78154
210-599-6120
TACLA 21188C
TECL 20109
M18098

WACO
5111 N. Hwy 77, Ste 5
Hewitt, TX 76643
254-772-1883
TACLA 18441C
TECL 20109
M36508

Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, TX 78711, 1-800-803-9202, 512-463-6569, www.license.state.tx.us

ROA 000137

TOTAL QUALITY LOGISTICS, LLC
South Carolina

Employee Non-Compete, Confidentiality
and Non-Solicitation Agreement

This EMPLOYEE NON-COMPETE, CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT ("Agreement"), is by and between TOTAL QUALITY LOGISTICS, LLC ("TQL"), 4289 Ivy Pointe Blvd., Cincinnati, Ohio 45245 and the Employee whose name and address are set forth below his or her signature on the last page of this Agreement ("Employee").

RECITALS:

WHEREAS, TQL is an Ohio Corporation providing motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services (hereinafter referred to as the "Business") throughout the Continental United States; and

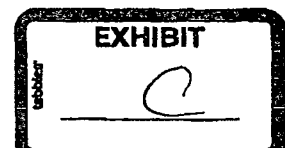
WHEREAS, TQL is unique within the organizations providing services competitive to the Business (hereinafter referred to as the "Industry"). TQL has spent extensive time developing relationships with Customers, Motor Carriers, suppliers and others within the Industry. TQL provides extensive training on ways to succeed within the Industry. TQL also provides tools, such as proprietary software, that are unique within the Industry. The relationships, tools, and training developed by TQL will assist Employee in gaining intimate knowledge of TQL's business model, its Customers, Motor Carriers, suppliers, contact information, lanes, pricing, sales strategy, service and other confidential and proprietary information. The knowledge learned at TQL is unlike what could be learned elsewhere within the Industry. TQL takes steps to protect the confidentiality of this information, and such information would have value to a TQL competitor. Employee, therefore, acknowledges and agrees that what Employee learns at and is trained in at TQL would necessarily cause unfair competition if Employee took employment competitive to TQL; and

WHEREAS, TQL develops and maintains confidential proprietary information (hereinafter referred to as, "Confidential Information"), including but not limited to; its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics

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Initials TSF



ROA 000138

management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; and

WHEREAS, Employee agrees that any and all such Confidential Information set forth above, whether or not formally designated as such, is vital to the success of TQL's Business and Employee understands that all such Confidential Information is the exclusive property of TQL, that it is to be treated and maintained as confidential proprietary information by Employee, and that it is treated and maintained as confidential proprietary information by TQL; and

WHEREAS, in order to allow TQL to remain effective and competitive in the marketplace in which it conducts its Business, and to maintain its business relationships on the basis of trust and confidence, it is essential that all Confidential Information remain protected from unauthorized disclosure, dissemination, and use, except as authorized and required by TQL to enable Employee to properly perform his or her work in the normal course of TQL's Business; and

WHEREAS, Employee acknowledges that unauthorized use or disclosure of Confidential Information as defined herein would cause, or would be likely to cause, substantial and irreparable harm and detriment to TQL and would constitute unreasonable and unfair competition to TQL; and

WHEREAS, Employee acknowledges that TQL's Customer and Motor Carrier lists, other information about TQL's Customers and Motor Carriers, its Load Management System, and other Confidential Information, are proprietary trade secrets with significant economic value, are compiled through a substantial investment of time and money by TQL, and are not common knowledge throughout the Industry; and

WHEREAS, in the course and scope of employment by TQL, Employee must be given access to such Confidential Information from time-to-time or continuously, in order to effectively perform his or her job duties; and

WHEREAS, TQL will not agree to employ Employee unless Employee signs this Agreement and is bound by it;

WHEREAS, Employee acknowledges and agrees that this Agreement is entered into at the inception of his or her employment with TQL and that Employee has not been permitted to perform any work for TQL before executing this Agreement; and

NOW THEREFORE, in consideration of the employment of Employee by TQL, including compensation and benefits provided by TQL, and the terms, conditions, and covenants, set forth herein, TQL and Employee agree as follows:

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Initials: TSF

ROA 000139

1. Recitals. The "Recitals" set forth above are hereby restated and incorporated herein by reference as though fully set forth again.

2. At-will Employment. Employee is an employee at-will. Nothing in this Agreement changes Employee's status as an at-will employee. Either TQL or Employee may terminate Employee's employment for any reason at any time. Employee acknowledges and agrees that this Agreement does not constitute a contract of employment and that Employee does not have a contract of employment with TQL.

3. TQL Owns Confidential Information. All Confidential Information as described herein is proprietary and the sole property of TQL.

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof.

5. Return of Company Property. Upon termination or cessation of employment for any reason or upon request by TQL for any reason, Employee will immediately deliver to TQL all originals and all copies of all documents and other materials obtained from or belonging to TQL, including but not limited to all Confidential Information, regardless of form, in Employee's possession, custody or control, including but not limited to any TQL files, documents (including any containing customer information), computer data, or other media however stored, and Employee will retain no copy of any such document, data or other materials.

6. Presumption Regarding Confidential Information. Employee agrees that Employee's engaging in an employment relationship with a Competing Business, as defined in Section 8 below, in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL.

7. Trade Secrets. The Employee recognizes and acknowledges that TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are

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valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder. Employee will not hereafter disclose such trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever, nor shall Employee make use of any such property for Employee's own purpose or the benefit of any person, firm, corporation, association, or any entity other than TQL under any circumstance.

8. Property Rights and Assignment. Employee agrees that any work, invention, product design, or technological innovation created, conceived, developed, produced, generated, and/or improved by Employee, whether or not patentable, or subject to copyright, trademark, or trade secret protection, at any time during or arising out of Employee's employment with TQL that results from, is suggested by, or relates to any work which Employee does for TQL, shall be the absolute property of TQL and shall promptly be disclosed by Employee to TQL. Employee hereby assigns any and all right, title, and interest in any work product to TQL, including assigning any and all rights to any future invention arising out of or relating to Employee's employment with TQL. To the extent necessary, during employment and thereafter, Employee shall sign applications, assignments, and any other papers that TQL may consider necessary or helpful in perfecting and enforcing TQL's rights in, and to, any such invention, improvement, and/or technological innovation.

9. Covenants and Remedies.

(a) Agreement to Covenants and Material Breach. The Employee hereby covenants and agrees to the terms and conditions of the restrictive covenants and agreements set forth in Sections 3 through 9 of this Agreement, and agrees that any breach thereof shall constitute a material breach by the Employee of his or her obligations under this Agreement.

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venturer or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

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(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit, or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(c) Injunction & Enforcement Remedies. If there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach. Alternatively and additionally, without limitation of remedy, TQL, in its sole discretion, may pursue a claim for damages in tort and/or contract resulting from any breach or threatened breach of this Agreement by Employee. If Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL. Nothing herein shall be construed as prohibiting TQL from pursuing any other legal or equitable remedies that may be available to it for any breach or threatened breach of the Agreement. Furthermore, the Restricted Period (defined above) shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants contained in this Agreement.

(d) Definitions. For purposes of this Agreement, the term: (i) "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (ii) the term "Motor Carrier" is any over-the-road motor carrier, trucker or hauling business that has transported freight for any Customer as a result of a relationship, dealings, arrangements, or communications with TQL and: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with Company for any reason; or (B) about whom Employee had access to proprietary, confidential, or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; (iii) the term "Competing

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8 Ohio St. Entrepreneurial Bus. L.J. 73

Ohio State Entrepreneurial Business Law Journal

2013

Note

ENFORCEABILITY OF NONCOMPETE AGREEMENTS IN THE BUCKEYE STATE: HOW AND
WHY OHIO COURTS APPLY THE REASONABLENESS STANDARD TO ENTREPRENEURS

Adam V. Buente^{a1}

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I. Introduction

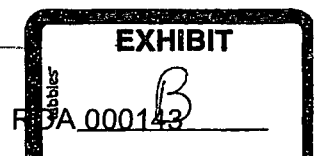
In the buildup to the heated 2012 presidential election, both candidates delivered strong campaign rhetoric that enforced their vastly different theories on how to turn around the then-struggling economy. One important economic issue on which they did agree, however, was that entrepreneurs and small businesses would be the driving force behind America's long-term economic revival. Governor Mitt Romney, the Republican nominee, simply stated, "small business creates the jobs in America."¹ Meanwhile, President Barack Obama declared, "We believe small businesses are the engine of economic growth in this country."²

For many entrepreneurs, the first step to starting a business occurs long before renting a space, incorporating a venture, filing for a copyright or hiring new employees. The entrepreneur's first step—and oftentimes the most difficult—is the decision to leave his or her current employer. In the past decade, this decision has become far more complicated than simply putting in a two-week notice, as employers across the country "are now much more likely to require employees to sign [noncompete] agreements as a condition of employment."³ This practice is even more formidable⁷⁴ considering the fact that employers are now also much more likely to file suits against previous employees to enforce these noncompete agreements.⁴

It is therefore critical that both employers and employees understand the ramifications of drafting and signing these noncompete agreements. Unfortunately, the Ohio Supreme Court has provided little guidance on the issue, adopting a laissez-faire approach to noncompete litigation and primarily allowing the state's trial courts to decide noncompete litigation on a case-by-case basis.⁵ This confusion has resulted in employers not understanding the enforceability of noncompete agreements, while employees do not understand the implications of signing the agreements.⁶ In other words, many employers and employees simultaneously believe that Ohio's trial courts have created a standard that has "stacked the deck" against them in terms of noncompete litigation.

This note seeks to provide practical information and advice to Ohio's attorneys and small business owners in regard to Ohio courts' enforcement of noncompete agreements in the employment arena. More specifically, this note will attempt to explore the perception among a growing number of Ohio's trial attorneys that Ohio courts enforce the "reasonableness" standard too strictly against employees. This note will narrow its focus to the entrepreneurial context, or, in other words, cases involving situations where an employee has potentially breached a noncompete agreement to start his or her own business. Notably, this note does not seek to explore in-depth issues concerning consideration (for both contractual and at-will employees), assignment, the statute of frauds, estoppel, wrongful termination by the employer or remedies available to either party for breach (including liquidated, compensatory and punitive damages for injunctive relief).

First, this note seeks to set a foundation for the pros and cons—or the necessities and burdens—of noncompete agreements in the employment context.⁷ Next, it offers a brief background discussion of the development of Ohio's case law regarding



noncompete agreements.⁸ It then provides a narrow discussion of how Ohio courts have ruled on cases in the entrepreneurial context in a variety of industries, including service-based *75 startup companies, businesses in the public interest (such as doctors, lawyers, etc.) and high-tech startup companies.⁹ This note then offers suggestions to both employers and employees on how to confront the problems raised by noncompete agreements.¹⁰ This note concludes with a brief discussion of the current law in Ohio and how employers and employees should move forward.

Ohio's enforcement of noncompete agreements in the entrepreneurial context is fairly reasonable in light of the many issues raised by such covenants. The flexibility of the reasonableness standard set forth in *Raimonde v. Van Vlerah*¹¹ has allowed trial courts to reach what I would argue are fair and equitable results in more decisions than not. This same flexible standard, however, is also responsible for the growing frustration among parties, as even the most seasoned trial attorneys have a difficult time predicting whether a trial court will find a covenant to be reasonable or unreasonable in light of the circumstances.¹² For this reason, this note encourages both employers and employees to negotiate and understand specific terms of the noncompete agreement during the drafting process-not following a term's potential breach

II. A General Overview of Noncompete Agreements

The most recent employment data show that employees are highly mobile in today's modern economy.¹³ Consequently, employees feel that this mobility should be disturbed by trial courts in very limited circumstances, while employers include noncompete agreements in employment contracts to protect their investments in human capital.¹⁴ As one scholar dramatically noted, "[t]his is a war about competition and unfair competition, an attempt to balance an employer's desire to protect its business assets and the employee's interest in professional mobility. And it is a delicate balance."¹⁵ Noncompete agreements thus provide courts with a *76 unique situation, as both employers and employees have very strong policy arguments regarding the enforceability of these covenants.

This section will examine these important policy arguments from a mostly economic lens. Part A offers a brief discussion of statistical data regarding the increasing mobility of employees in today's modern economy, which provides an argument both for and against enforcing noncompete agreements. Part B and Part C then delve into these arguments in more depth. Part B provides a discussion regarding employers' significant investment in human capital, the central argument for enforcement of noncompete agreements. Part C sets forth the employees' principal counterargument: strict enforcement of noncompete agreements causes economic harm and slows the natural spread of ideas.

A. Why Businesses Draft Noncompete Agreements

A recent study found that employees expect to stay at a company for nearly five years when they are initially hired, yet most only stay half of that time.¹⁶ Furthermore, the average adult will have "about nine jobs between the ages of 18 and 32."¹⁷ This high employee turnover has created significant challenges for employers to protect their employees¹⁸-usually the company's most important asset.¹⁹ Thus, many employers now require both contractual and at-will employees to sign an employment contract that includes a noncompete agreement, a covenant that usually limits the employee's use of important trade secrets and limits the employee's future employment interests in terms of duration and geographic scope.²⁰

*77 Despite the fact that these covenants were originally considered to be in restraint of trade and unenforceable,²¹ almost all state courts now use one of three standards-(1) the all-or-nothing approach, (2) the "blue-pencil" doctrine, or (3) the judicial modification standard-to enforce these covenants.²² Regardless of which standard is used, the trial court's central focus in noncompete litigation in the employment context centers around various policy considerations, usually phrased as a "reasonableness" test specifically applied to the noncompete agreement at issue.²³ It is therefore critically important to consider

the policy arguments for both the employer and the employee to understand why courts strictly enforce, revise, or in some cases, completely strike previously agreed-upon noncompete agreements

B. The Necessity for Noncompete Agreements

Contrary to popular belief, employers do not draft and require employees to sign noncompete agreements solely to spite employees who have decided to leave the company for what they perceive to be a better business opportunity. Employers have incredibly strong business and monetary incentives to protect what many people believe to be their most important asset: employees.²⁴ Indeed, while "[t]oday's market is extremely tough," elite employees-those who are highly educated, skilled and motivated-are often aggressively sought after by competing businesses because "[w]orkers who take pride in what they do, show up on time, give their all and stay until a job is completed can be very difficult to find."²⁵

In noncompete litigation, most courts require employers to show that they are enforcing the agreement to protect a "legitimate employer *78 interest."²⁶ Despite the fact that some scholars argue that employers should bear the burden of proving more to state a prima facie case,²⁷ courts frequently allow employers to argue that the monetary investment in human capital is the "legitimate interest" they are seeking to protect.²⁸ This investment in "human capital," commonly defined as "the acquired skills, knowledge, and abilities of human beings,"²⁹ is essential since many companies depend on the intelligence, experience, proficiency and innovation of their employees to remain competitive.³⁰ This is especially true for businesses in markets that require employees with highly specialized knowledge,³¹ such as software engineers or public relations officers

Investment in human capital, for both large corporations and small businesses, requires significant time and money. Notably, businesses invest a substantial amount of money before even hiring a new employee because a company must first determine whether hiring an extra employee is a financially sound decision.³² In simple terms, this is accomplished by offsetting a new employee's salary, benefits and training with the potential *79 additional revenue that the employee could generate in his or her first year.³³ Businesses, especially those in high-tech fields (such as websites that provide products or services solely through the Internet, or firms that provide such services to larger corporations), also invest a significant amount of time in the recruiting process.³⁴

Once an employee is hired, companies invest time and money in training the employee.³⁵ Some companies have offered less training than they previously provided-largely due to the "Great Recession"-while others have expanded investment in employee training in order to minimize employee turnover.³⁶ This temporal and monetary investment in new employees has the potential to be a great waste if a company has high employee turnover.³⁷

In addition to the recruiting and training process, perhaps the most significant investment a company makes in human capital involves company knowledge, trade secrets and industry experience.³⁸ Ohio courts, in particular, will almost always enforce a noncompete agreement to the "extent necessary to protect trade secrets."³⁹ The line between knowledge and a trade secret, however, is admittedly blurry, resulting in very difficult problems for the courts.⁴⁰ Most notably, the proliferation of technology and data-especially on the Internet-has made it all the more difficult for companies to protect their trade secrets and industry knowledge.⁴¹

*80 Thus, employers invest a significant amount of money, time and knowledge in recruiting, training and retaining their employees. This investment in human capital is a short-term economic sacrifice⁴² that a company must protect in order to be successful in the long term. This becomes even more true when one realizes that "once an employer has paid for training, an employee forever retains monopoly power over his skills, which can be used to obtain additional compensation from competing

businesses.”⁴³ Ultimately, one of the most effective and frequently used methods an employer utilizes to protect this investment is to include a noncompete agreement in the employment contract.⁴⁴

Moreover, when properly drafted and enforced,⁴⁵ a noncompete agreement arguably serves to protect already established small businesses. In a hypothetical scenario, imagine that Urban works at Brady's car dealership, which has been in business for twenty-five years. One might think that if Urban wanted to leave Brady's company to start his own car dealership, it would help expand small business and create jobs. If Urban's car business is within close proximity to Brady's dealership and ultimately becomes more successful, however, Brady might have no other choice but to lay off employees in order to offset revenue losses attributable to Urban's new powerhouse dealership. Thus, any jobs created by Urban's new car dealership could be at the expense of Brady's already well-established dealership. Theoretically, therefore, properly drafted and enforced noncompete agreements should not have a substantial negative effect on the job market, because currently established small businesses would be protected.

C. Unnecessary Burdens Caused by Noncompete Agreements

Not all noncompete agreements are created equally. Again, the reasonableness of a noncompete agreement is determined by the particular circumstances of the case.⁴⁶ Most courts can modify or invalidate a *81 noncompete agreement if it is found to be unreasonable.⁴⁷ In other words, the covenant will be unenforceable if the legitimate interests the employer is seeking to protect are outweighed by the harm enforcement would cause both to the individual employee and the public at large.⁴⁸

Employees in general, however, are likely to suffer harm if they reside in a state that strictly enforces noncompete agreements.⁴⁹ Studies have shown that enforcement can have a negative impact on both contractual and at-will employees.⁵⁰ A recent Harvard Business School study observed post-legislation enforcement of noncompete agreements in Michigan and found that job mobility decreased slightly more than eight percent and “nearly twice that much for workers with highly specialized skills.”⁵¹ The study also showed that employees “who had . . . left jobs . . . often left that particular industry and took jobs with lower compensation because they couldn't use their skills.”⁵² These findings understandably provide employees, especially those in the high-tech industry,⁵³ with an argument that strictly enforced noncompete agreements hurt economic growth.

Furthermore, employees often have little bargaining power when entering into an agreement with a new employer.⁵⁴ Since almost all states enforce noncompete agreements to some extent,⁵⁵ both at-will and *82 contractual employees across the country are often subjected to such covenants. The relative ease with which employers can state a cause of action, and consequently get through the pleading stages of litigation, makes the agreements all the more formidable against employees.⁵⁶ In particular, the near complete lack of bargaining power for at-will employees has led some commentators to argue that any noncompete agreement between the parties is void due to a lack of consideration in the underlying contract.⁵⁷

These economic policy arguments against enforcement of noncompete agreements provide a strong rebuttal to the policy considerations that support even moderate enforcement of the agreements. Yet, forty-nine of the fifty states enforce the agreements to some degree.⁵⁸ Whether this is because of courts following the common law's traditional enforcement of freedom of contract⁵⁹ is not the subject of this note, instead, this note will next seek to explore how Ohio courts enforce noncompete agreements in light of these policy considerations.

III. Enforcement of Noncompetes in Ohio

Prior to 1975, the Ohio Supreme Court utilized the "blue pencil" test to enforce noncompete agreements.⁶⁰ This test allowed courts to strike unreasonable provisions from a noncompete agreement, but a court "could not mend or modify the agreement."⁶¹ The Ohio Supreme Court abandoned *83 this test in 1975 and adopted a "reasonableness" test.⁶² The Court's holding, however, has provided little guidance to Ohio's trial courts. Unfortunately, even the most seasoned trial attorneys sometimes have a difficult time predicting how a trial court will rule on a particular noncompete agreement.

Part A of this section provides important background discussion of *Raimonde v. Van Vlerah*, the Ohio Supreme Court's leading case regarding noncompete agreements. Part B discusses the result of *Raimonde*, notably the confusion in Ohio's trial courts as to what standard to apply to noncompete agreements. Finally, Part C offers a brief comparison of Ohio's "reasonableness" standard to the national trend regarding enforcement of noncompete agreements.

A. Ohio's Two Tests to Determine Reasonableness

The Ohio Supreme Court adopted the "reasonableness" test in *Raimonde v. Van Vlerah* in an attempt to achieve more consistent results in comparison to the previously used "blue pencil" test.⁶³ The reasonableness analysis articulated in *Raimonde*, however, has led to anything but consistency in Ohio's trial courts.⁶⁴ This is, in large part, due to the fact that *Raimonde* appeared to announce two separate tests to determine the reasonableness of a noncompete agreement: (1) a three-prong balancing test and (2) a multitude of reasonableness factors to be weighed in light of the circumstances.⁶⁵ In particular, some trial courts apply the three-prong balancing test and use the reasonableness factors only as illustrative authority, while others give equal weight to the three-prong balancing test and the multitude of reasonableness factors.⁶⁶

*84 1. *Raimonde's* Three-Prong Balancing Test

Raimonde held that an employer's noncompete agreement will be enforced only to the "extent necessary to protect the employer's legitimate interests."⁶⁷ As previously discussed, often the legitimate interest an employer is seeking to protect is its investment in the employee, or "human capital."⁶⁸ Courts can uphold these covenants, overturn them or even modify them if they deem it necessary to protect the employee from undue hardship.⁶⁹ *Raimonde* pronounced a three-prong analysis to guide trial courts to balance this potential "undue hardship" to the employee with the "legitimate interests" of the employee:

A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.⁷⁰

These factors are to be balanced against each other, with the most weight usually given to the first and second factors.

2. *Raimonde's* Reasonableness Factors

While this three-prong test appears to offer a relatively simple balancing test between the interests of the employer and employee, *Raimonde* arguably complicated matters by listing other factors to assist courts to "evaluate all the factors compromising 'reasonableness.'"⁷¹ The additional reasonableness factors proscribed in *Raimonde* are as follows:

[1] [W]hether the employee represents the sole contact with the customer; [2] whether the employee is possessed with confidential information or trade secrets; [3] whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; [4] whether the covenant seeks to stifle the inherent skill and experience of the employee, [5] whether the benefit to the employer is disproportional to the detriment to the employee; [6] whether the covenant operates as a bar to the employee's sole means of support;

*85 [7] whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and [8] whether the forbidden employment is merely incidental to the main employment.⁷² Although certain factors will carry more weight in different factual contexts, Ohio courts appear to place the most emphasis on three factors: geographic scope, duration and the potential harm enforcement could cause to the public at large

First, almost all noncompete agreements attempt to expressly prohibit the employee from competing in a particular geographic region.⁷³ Reasonableness of the covenant's geographic market is determined by the market of the employer's customer base or service area, meaning that no geographic region is per se unreasonable.⁷⁴ In other words, if the employer's market is the entire Midwest, then prohibiting the employee from competing in the entire Midwest could arguably be found to be reasonable, so long as other factors also favor the employer.⁷⁵ In more modern practice, however, employers are encouraged to draft a noncompete agreement that protects only the geographic area necessary to protect its legitimate business interests⁷⁶

Second, Ohio courts also place considerable emphasis on the time limitation expressed in the noncompete agreement.⁷⁷ If the time limitation is expressly stated, courts will determine whether it is reasonable based on the facts of the case, the employer's market and industry practice.⁷⁸ Generally speaking, Ohio courts uphold one- year limitations (so long as the other *86 factors are deemed reasonable), but two-year, five-year and other time durations are viewed with more scrutiny.⁷⁹ The only instance in which courts will almost always find a time limitation to be per se unreasonable is when the duration is not expressly stated in the noncompete agreement⁸⁰

Third, courts are often concerned with potential economic (i.e. financial loss due to lack of competition) or market (i.e. lack of choice) injury to the public.⁸¹ As previously discussed, enforcing noncompete agreements too strictly may hinder economic choice and the spread of ideas within a local or state economy. Physicians, moreover, frequently argue that noncompete agreements could potentially harm the public since the physician could no longer provide his or her services in the geographic area for a particular period of time.⁸² Thus, when the noncompete agreement involves an employee who provides a service to the public, Ohio's trial courts will usually view a noncompete agreement with considerably more scrutiny.⁸³

B. Result of Raimonde-Confusion in the Lower Courts

The combination of Raimonde's three-prong inquiry and the reasonableness factors has led to confusion in the lower courts.⁸⁴ Some Ohio courts only apply the three-prong reasonableness test and use the articulated factors only as illustrative authority, while others give equal weight to both the three-prong inquiry and the articulated factors.⁸⁵ *87 Unfortunately, the Ohio Supreme Court's lack of decisions directly addressing noncompete agreements since Raimonde has only compounded the confusion for Ohio's trial attorneys and small business owners.⁸⁶ A practitioner representing an employer or employee is therefore advised to consult the precedent of his or her own trial court in the appropriate jurisdiction.⁸⁷ He or she must then determine whether the local court places more emphasis on Raimonde's three-prong inquiry or the reasonableness factors.⁸⁸

C. Contrasting Ohio's Reasonableness Test to the National Trend

The Ohio Supreme Court's laissez-faire attitude towards noncompete agreements may run against the emerging national trend. Originally, the common law (Ohio courts included) disapproved of noncompete agreements because they were contrary to public policy.⁸⁹ Courts across the country then moved to a more accepting approach towards noncompete agreements, so long

as the agreements protected a legitimate business interest and were not in restraint of trade.⁹⁰ The most common test to enforce these covenants is the reasonableness standard, which Ohio employs. Recently, however, it appears many courts and legislatures across the country have circled back to the common law's original disfavoring of noncompete agreements.

On account of today's economic conditions, some courts are now more likely to strike noncompete agreements in the employment context.⁹¹ This modern trend is likely due to the "need for information sharing in the new economy," heightened employee mobility and constantly evolving technology:

*88 The emerging trend in the law of employee noncompete agreements suggests that courts are generally more inclined to invalidate employee noncompete agreements than under the modern approach and that the law of employee noncompete agreements is becoming more protective of the employee's interest in mobility. This heightened scrutiny of employee noncompete agreements reflects some of the fundamental changes taking place in the economy and in the workplace.⁹²

Furthermore, some state legislatures, including California and North Dakota, have outlawed noncompete agreements entirely.⁹³ In this respect, courts and legislatures are far more laissez-faire towards noncompete agreements than Ohio's reasonableness standard under *Raimonde*.

Despite this emerging national trend, Ohio's utilization of the reasonableness standard still falls in line with the majority of states that employ a similar test. In one way or another, a large majority of state courts continue to attempt balancing the legitimate business interests of the employers against the free market and mobility interests of the employee.⁹⁴ Thus, while Ohio certainly is not as employee-friendly as some states, it runs parallel to the large majority of states that employ a reasonableness standard.

IV. *Raimonde* Applied in the Small Business Context

Ohio's trial courts have applied *Raimonde* to a plethora of noncompete cases in a variety of industries. Generally speaking, the employer is trying to enforce the noncompete agreement against one of two types of employees: a former employee trying to start his or her own business, or, more commonly, an employee trying to work for one of the employer's direct competitors. This note seeks to focus on the former, and, in particular, highlight cases in three particular areas. (a) service-based startup companies, (b) public interest entrepreneurs (e.g., doctors, lawyers, etc.) and (c) high-tech startup companies.

*89 A. Service-Based Startup Companies

Ohio trial courts appear to be hesitant to completely strike noncompete agreements when an employee leaves his or her original employer to start a competing business.⁹⁵ This is in large part due to the fact that employees generally gain knowledge and industry experience from their previous employer.⁹⁶ For example, in *Copeco Inc. v. Caley*,⁹⁷ Caley worked at a copy business as a sales representative for two years before attempting to start his own copying business with another partner.⁹⁸ Although the trial court's analysis focused on whether there was adequate consideration, the court found that the noncompete agreement was reasonable in light of the particular circumstances.⁹⁹ Thus, Caley was not able to start his copying business within the proscribed forty-five mile radius of Copeco Incorporated for a period of eighteen months.¹⁰⁰

Sometimes, however, a court will modify the noncompete agreement if it believes that the covenant is too broad in scope relative to the employer's legitimate business interests.¹⁰¹ In *Rogers v. Runfola & Associates*, Rogers and a fellow coworker signed employment contracts containing noncompete agreements with Runfola, a company that provided court reporting services.¹⁰² After over ten years of employment, each employee sent a letter of resignation to start their own court reporting company.¹⁰³

The noncompete agreement, however, prohibited Rogers and his coworker from providing court reporting services in Franklin County for two years.¹⁰⁴

The Ohio Supreme Court held that this noncompete agreement was excessive, but also analyzed "whether some restrictions prohibiting appellees from competing [[were] necessary to protect Runfola's business interests."¹⁰⁵ The court modified the covenant's scope, but defended the employer's business interest mostly in terms of its investment in human capital, long before that theory was accepted by most businesses.

The record reflects that Runfola played a large role in appellees' development as successful court reporters

*90 While employed by Runfola, Rogers and Marrone gained valuable experience in the business which included the use of computerized technology. Runfola invested time and money in equipment, facilities, support staff and training. Much of this training and support, undoubtedly, inured to the benefit of the appellees. Runfola also developed a clientele with which appellees had direct contact.¹⁰⁶

Ohio courts have applied the modification principles set forth in Rogers to other cases involving startup companies.¹⁰⁷

Importantly, Ohio's trial courts (as well as trial courts across the country)¹⁰⁸ view employees' new businesses with scrutiny when the employees directly solicit customers of their former employer.¹⁰⁹ For example, in *American Logistics Group, Inc. v. Weinpert*, the defendant left the plaintiff-employer's financial consulting company in order to start his own similar business.¹¹⁰ Evidence acquired during discovery showed that defendant Weinpert "secretly operated a business known as Professional Grade Macros ('PGM') out of his home while he worked for American" and charged American's customers a preferable rate in order to solicit further business from them when he left the company.¹¹¹

Ultimately, after leaving American, Weinpert continued to solicit business from American's former clients.¹¹² The Eighth District Court of Appeals of Ohio affirmed the trial court's finding that American's seventy-five mile noncompete agreement was reasonable because "employers such as American rely heavily upon an active service team and close client contact."¹¹³ Thus, the covenant not to compete was found to be reasonable in light of the circumstances, especially considering the fact that Weinpert solicited customers of his previous employer.

*91 These cases show that Ohio courts enforce noncompete agreements strictly but reasonably against previous employees looking to start their own service-based startup companies. Ohio courts' hesitancy to completely strike noncompete agreements in the entrepreneurial context appears to be due in large part to the fact that employers have invested a significant amount of time, finances and industry experience into their employees. Nevertheless, Ohio courts are willing to modify these covenants when they are unreasonable in light of the interests of the employee and industry practice.

B. Businesses in the Public Interest

As previously discussed, Ohio's trial courts sometimes place emphasis on the third factor articulated in *Raimonde*: whether enforcement of a noncompete agreement could cause harm or injury to the public interest.¹¹⁴ One of the most oft-cited examples is from within the medical profession,¹¹⁵ since prohibiting doctors and physicians from providing healthcare to a community could potentially cause harm to the public's health.¹¹⁶ These noncompete agreements, however, are not per se unreasonable, as the Sixth Circuit Court of Appeals noted.

[Holding physician's noncompete agreements to be per se unreasonable] would eviscerate entirely the protection of restrictive covenants to allow a physician to practice, contrary to the restrictive covenant, after [the physician's] employment enabled [the

physician] to establish the very contacts which would allow [the physician] to destroy a practice that was established before [the physician's] employment ¹¹⁷

For example, in *Ohio Urology, Inc. v. Poll*, ¹¹⁸ the Tenth District Court of Appeals reversed a trial court decision that relied on the American *92 Medical Association's Code of Ethics and held that noncompetes enforced against physicians were per se unreasonable. ¹¹⁹ The court explained:

The covenant broadly proscribes competition within a five-mile radius of Ohio Urology. There is an exception, however, for maintenance or establishment of staff privileges at an acute care hospital . .

"[M] aintain" can be read to mean "carry on " Hence, this exception allows defendant to carry on his practice . . . ¹²⁰

Thus, the court believed modification was a more reasonable remedy than completely striking the noncompete clause.

The Third District Court of Appeals provided another illustrative example in *Owusu v. Hope Cancer Center*, where Dr. Owusu signed a noncompete agreement with Hope Cancer Center (HCC) that limited his ability to practice for two years within HCC's "primary service area." ¹²¹ The trial court initially held that the covenant was per se unreasonable because the agreement provided no definition for the geographic scope of the "primary service area." ¹²² The court of appeals reversed, explaining, "[l]ack of a specific definition for this phrase did not make the contract void or indefinite but merely required the trial court to use rules of construction to determine what would be a reasonable meaning for the terminology " ¹²³ The court of appeals ultimately held that the contract was reasonable, asserting that "primary service area" was a common term in the industry and was reasonable in light of the interests that HCC was trying to protect. ¹²⁴

Courts will therefore still consider the interests of employers, even in cases involving covenants with physicians, doctors and other medical practitioners, so long as they are protecting a legitimate business interest to the extent necessary for the employer. There is still a "measure of disfavor," however, for covenants restricting physicians from practicing because "[i]t is vital that the health and expectations of patients, who are rarely aware of private agreements among physicians, be adequately protected." ¹²⁵ Thus, doctors attempting to start their own practices might receive more favorable interpretations of noncompete agreements compared to entrepreneurs in other industries. To prevail in noncompete litigation, doctors or physicians *93 must show that "the effect of the covenant will be to reduce medical services to the community or some other similar harm." ¹²⁶

For other professions in the public interest, including attorneys, Ohio's courts have remained markedly silent on the balance between the public's interest in obtaining services and the employer's interest in protecting its market ¹²⁷ Ohio's disciplinary rules for attorneys, however, prohibit such covenants. ¹²⁸ Thus, it is recommended that employees in other professional vocations reference the relevant code of ethics when negotiating noncompete agreements.

C. A Note on High-Tech Startup Companies

The proliferation of technology has undoubtedly raised many new questions in regard to noncompete agreements. More companies are exclusively providing products or services on the Internet, while the vast majority of other companies offer an online platform so their customers can obtain similar services to those they could receive at an actual physical location. ¹²⁹ These companies provide complex challenges to contractual laws rooted in the common law, including rules regarding noncompete agreements based on physically measurable terms (including time, duration and geographic scope).

Thus, a pertinent issue for Ohio's courts is the enormous effect that constantly evolving technology will have on determining reasonableness, the central consideration of noncompete litigation.¹³⁰ For example, it is now much more difficult to determine a company's traditional market (i.e. its geographic scope), if the company offers its product or services on an Internet website (which would, in turn, arguably create a national or international market).¹³¹ Similarly, in a rapidly evolving economy, it is very difficult for courts to judge appropriate time limitations for noncompete agreements. Therefore, as technology continues to increase, finding a ^{*94} covenant to be reasonable becomes difficult, and can establish potentially harmful precedent for future unknown technologies. Ohio's trial courts should therefore be wary of establishing too broad a precedent when ruling on cases involving the high-tech industry.

V. Proposed Solutions

In the entrepreneurial context, some Ohio attorneys are correct in their observation that the trial courts uphold or only slightly modify noncompete agreements more often than the courts overturn them. This observation, however, is not the result of courts favoring corporations or big businesses; instead, courts have seemed to create quite a high standard to show that a covenant is unreasonable. This high standard is arguably reasonable in light of the important policy considerations that favor enforcement of noncompetes.¹³² Furthermore, employers' contracts are often drafted by very experienced attorneys and signed by employees who typically do not understand the effects of what they are signing.¹³³ Thus, employees seeking counsel have usually already assented to a binding agreement with their employer that limits their ability to start a competing business.¹³⁴

Theoretically, to confront the employee's potential unawareness of a noncompete agreement at the time of signing, courts could require noncompete clauses to be more conspicuous than other clauses in the contract. Such a requirement would make a noncompete clause more visible to the employee and perhaps make him or her more aware of the binding effects it could have in the future. This heightened conspicuousness requirement, however, is unlikely, given the deference Ohio courts' laissez-faire attitude towards noncompete agreements.¹³⁵

Since assistance from the courts is unlikely to occur, the smartest and most practical solution lies at the beginning—not the end—of the employment relationship. In short, employers and small business owners should focus on drafting reasonable noncompete agreements. Meanwhile, employees should do everything they can do to be more aware of the terms of a noncompete agreement before signing the agreement. As scholars have noted, “[employment lawyers] are likely to save their clients time and ^{*95} money in the long run . . . [M]ore reason [in the drafting process] should equal less litigation.”¹³⁶

A. Drafting Reasonable Noncompete Agreements

In drafting a noncompete agreement, an employer should not be trying to gain an unfair competitive advantage or make it impossible for the employee to leave the company and continue his or her career with a competitor. Drafting such an unreasonable agreement would make future litigation more likely and potentially freeze out future business partners. Instead, the sole focus of the employer in drafting a noncompete agreement should be the reasonableness of the covenant. The employer should weigh its legitimate business interests against those of the employee and draft an agreement that balances those interests accordingly.¹³⁷ Generally speaking, an employer must consider three important terms in drafting its covenant: duration, geographic scope of the covenant and the potential economic harm to the public and individual employee.¹³⁸

First, in regard to duration, Ohio courts are inconsistent in establishing what limits are reasonable and what are not.¹³⁹ What may be reasonable for one industry may be ruled unreasonable for another. In addition, “the duration of the restriction must not unduly harm the employee by making it difficult or impossible for him to work in his chosen field and support himself and his family.”¹⁴⁰ Thus, an employer should observe not only what time limitation is reasonable within its particular industry or market, but also must look out for the special qualities that a specific employee possesses.

Second, employers should have the same concerns in regard to the geographic scope of the noncompete agreement.¹⁴¹ Again, employers should observe what scope is reasonable within their industry, and should also consider the employee's ability to use his or her skill, training and experience to make a living. The fact that most Ohio courts give deference to the employer to protect its legitimate business interests within its own *96 market is certainly of benefit to the employer.¹⁴² Thus, if an employer can affirmatively prove that the geographic scope of the noncompete agreement is limited to its market (usually proven by showing a customer base or market), courts are likely to uphold the covenant as reasonable

As discussed supra Part IV, however, this general rule is limited in cases involving employees that serve the public interest, such as doctors or lawyers. In these particular circumstances, employers must give more weight to the specific services provided by employees and not seek to prohibit them from an overbroad geographic region. Such an overbroad prohibition would decrease important services to the public and cause irreparable harm to the public at large, not just the employee leaving his or her previous employer

Ultimately, the employer's sole goal should be to reasonably protect its established market, trade secrets and consumer base with specific and reasonable terms. The best way to accomplish this goal is for a company to thoroughly understand its established consumers and observe practices of competitors within the same industry. Employers should use this information to draft noncompete agreements that contain specific terms and limitations that are supported by legitimate business interests. In today's volatile hiring market, drafting an ambiguous or overly broad noncompete agreement is asking for future litigation from a disgruntled employee

Ideally, the noncompete agreement should be drafted specifically for that particular employee in his or her current position. Likewise, the drafting should eliminate any "boilerplate" language. Counsel for the employer should consider the employee's education, his or her experience, previous mobility in the market and other relevant factors.¹⁴³ In addition, the covenant should be very explicit about the interests it is seeking to protect.¹⁴⁴ This drafting would not only eliminate ambiguity in noncompete agreements, but would likely make them more reasonable, potentially reducing future litigation costs.¹⁴⁵

***97 B. Understanding the Terms of a Noncompete Agreement**

In comparison to employers, employees are often at a disadvantage during the drafting process. Most employees are not present during the drafting of the noncompete agreement, do not have the knowledge that an employer has, and furthermore, do not feel that they are able to negotiate many of the terms within their employment contract. This situation ultimately creates an apparent unfair bargaining relationship, but employees must begin to become more aware of the effects of a noncompete agreement before signing.

Preferably, employees could try to obtain legal counsel to review an employment agreement before signing. People regularly obtain legal counsel for many other contractual issues, such as mortgage signings, wills, trust accounts and other important business or personal transactions. Effective legal representation at the outset of an employment relationship would likely result in a more favorable noncompete clause for the employee, which could later benefit the employee greatly if he or she decided to leave the company. Moreover, effective representation at the beginning of the employment relationship for both parties could potentially lead to less ill will between the employer and employee, which ultimately would lead to fewer legal disputes in the future.

Unfortunately, hiring effective legal representation is not a practical solution for the majority of employees. Some newly hired employees may have been unemployed for a prolonged period of time and may be unable to afford counsel, while others would feel that hiring legal representation would be a rather hostile way to begin a new relationship with their employer. Despite the probable lack of legal counsel, employees can combat negative terms in an employment contract if they understand the effects of the agreement before signing.

Employees are encouraged to read the entire employment agreement before signing. If the agreement contains a noncompete agreement, the employee should ask himself or herself questions regarding the same reasonableness factors that employers observe in drafting the agreement. Is the time limitation reasonable regarding this particular industry and my career goals? Is the geographic scope broader than the company's established consumer base? Would I be able to make a living in the future if I were to decide to leave the company?

If the answer to any of these questions is no, the employee should seek to bargain with his or her employer to make the terms of the noncompete agreement more reasonable in light of the circumstances. If the employer is unwilling to negotiate, the employee may have no choice but to seek legal *98 representation, or, perhaps more unfortunately, decline the job offer. Employees, like employers, must seek to protect their own personal career interests for both the short and long term.

Ultimately, like other important contractual terms, these proposed solutions would provide the employee with more knowledge at the beginning of the employment relationship. All too often, employees sign employment contracts with noncompete agreements without realizing the binding effects that they can have in the future. It is therefore critically important for employees to be more knowledgeable about an employment agreement at the outset of the employment relationship, not at its end.

VI. Conclusion

The fact that the Ohio Supreme Court has largely deferred issues regarding noncompete agreements to the state's trial courts has frustrated and bewildered attorneys, employers and employees. Rulings appear to be inconsistent from jurisdiction to jurisdiction, which has led to misperceptions about the enforceability of these covenants by both parties; however, the Ohio Supreme Court's deference is arguably desirable due to the fact-specific nature of noncompete litigation.

A blanket holding by the Ohio Supreme Court or the state's appellate courts would likely adversely affect businesses in entirely different industries. Thus, the Court's deference goes beyond the state's trial courts and reaches industries. In other words, the lack of bright-line tests allows different industries-medical, legal, technology, etc -to self-govern and establish their own particular reasonableness standards for noncompete agreements.

This self-governance is most malleable during the drafting of the noncompete agreement. Employers should seek to draft covenants with specific terms that are limited to protect their own legitimate interests, while employees should make certain that the covenant would not limit their ability to make a living if they were to decide to leave their current employer. Ultimately, thorough knowledge of the noncompete agreement and its terms during the drafting process would benefit both employers and employees.

Footnotes

a1 Juris Doctor, The Ohio State University Moritz College of Law, expected 2014

1 Rohit Arora, Small Business BIG Topic During Presidential Debate, Fox Bus. (Oct. 4, 2012), <http://smallbusiness.foxbusiness.com/entrepreneurs/2012/10/04/small-business-big-topic-during-presidential-debate/>.

2 Catherine Ho, Obama Supports Tax Incentives to Move Jobs to U.S., Wash. Post (May 13, 2012), http://articles.washingtonpost.com/2012-05-13/business/35458427_1_tax-incentives-move-jobs-tax-credit

3 Pierre H. Bergeron, Navigating the "Deep and Unsettled Sea" of Covenant Not to Compete Litigation in Ohio: A Comprehensive Look, 31 U. Tol. L. Rev. 373, 373 (2000).

4 Id.

- 5 Kollin L. Rice, *Ohio Law Governing Employee Covenants Not to Compete. A Practitioner's Guide to Current Trends and the Impact of Ohio's Adoption of the Uniform Trade Secrets Act*, 23 Ohio N.U. L. Rev. 347, 361 (1996) ("For the most part, it seems the courts will assess each dispute over restrictive covenants based on the individual facts. As such, it is difficult, if not impossible, to draft such an agreement in a manner which will insulate the drafter from litigation challenging its validity or its interpretation.")
- 6 Bergeron, *supra* note 3.
- 7 See discussion *infra* Part II.
- 8 See discussion *infra* Part III.
- 9 See discussion *infra* Part IV.
- 10 See discussion *infra* Parts V, VI
- 11 *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975)
- 12 Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. Corp. L. 483, 485 (1990).
- 13 Dan Schawbel, *How to Know Whether You Should Switch Employers*, Time (Apr. 11, 2012), <http://business.time.com/2012/04/11/how-to-know-whether-you-should-switch-employers/>.
- 14 For an exploration into the term "human capital," see discussion *infra* Part II.
- 15 Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 110 (2008).
- 16 Schawbel, *supra* note 13.
- 17 *Id.*
- 18 See John Dwight Ingram, *Covenants Not to Compete*, 36 Akron L. Rev. 49, 49 (2002) ("[M]ore than fifty years ago, most people expected to work for their initial employers for their entire careers, and indeed many have done just that. Presently, that is no longer the case. Many people will change employers, and even industries, several times over their working years. This increased mobility has added greatly to the opportunities of workers, but it has also created serious problems for employers who want to protect their trade secrets, confidential information, and goodwill.").
- 19 Deepti Dhaval, "Employees Are the Most Important Asset of Every Company as They Can Make or Break a Company's Reputation and Profitability."-Kiril Maranov, eBrandz (Aug. 17, 2011), <http://news.ebrandz.com/small-business/2011/4458-employees-are-the-most-important-asset-of-every-company-as-they-can-make-or-break-a-companys-reputation-and-profitability-kiril-maranov.html/>.
- 20 Whitmore, *supra* note 12, at 484 ("Covenants in employment contracts which restrict postemployment activities of an employee are increasingly common in modern times.").
- 21 Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil. Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. Rev. 1931, 1933 (2012) ("[T]he acceptance of covenants not to compete in contract law is a relatively recent phenomenon. Initially at common law, such covenants were disallowed because they represented invalid restraints on trade. Courts were wary that restrictive covenants would negatively impact competition, encourage monopolies, and drive up prices.")
- 22 *Id.* at 1935.
- 23 Ingram, *supra* note 18, at 50.
- 24 Dhaval, *supra* note 19
- 25 How to Keep Your Employees from Going to Another Company, CheckPointHR (Apr. 13, 2011), <http://www.checkpointhr.com/industry-articles/how-to-keep-your-employees-from-going-to-another-company/>.

- 26 Chiara F. Orsini, Comment, Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment, 62 U. Pitt. L. Rev. 175, 176 (2000)
- 27 E.g., Kate O'Neill, 'Should I Stay or Should I Go?'-Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions, 6 Hastings Bus. L.J. 83, 86 (2010) ("The employer ought to have the burden to produce clear and convincing evidence for the legitimacy of its business interest if it seeks injunctive relief before a trial on the merits and it should have the burden of proof on this issue if either party moves for summary judgment and at trial.").
- 28 Orsini, *supra* note 26, at 175.
- 29 Norman D. Bishara, Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment, 27 Berkeley J. Emp. & Lab. L. 287, 300 (2006) (footnote omitted).
- 30 Orsini, *supra* note 26, at 175.
- 31 *Id.*
- 32 Bishara, *supra* note 29 ("Underlying the concept [of human capital] is the notion that such skills and knowledge increase human productivity, and that they do so enough to justify the costs incurred in acquiring them. It is in this sense that expenditures on improving human capabilities can be thought of as 'investment.' Specific human capital is an individual employee's earning potential and skills that are only useful in a specific work situation-essentially they are non-transferable, firm-specific skills that are not valuable to a third party (i.e., another employer). An example of specific skill training is when an employer invests in training an employee on how to navigate that particular employer's filing system. In this instance the skill of understanding that particular filing system is not useful to another employer (leaving aside the fact that the employee could develop some general filing acumen)." (footnotes omitted)).
- 33 Should You Hire Someone?, U.S. Chamber of Commerce Small Business Nation, http://www.uschamberssmallbusinessnation.com/toolkits/guide/P05_0005/ (last visited Mar. 30, 2013).
- 34 See Orsini, *supra* note 26 ("Companies spend a considerable amount of money recruiting qualified employees, training them, and retaining them.")
- 35 *Id.*
- 36 Mary Beth Lehman, Investment in Employees Pays Off, Dayton Bus. J. (Apr. 27, 2009), <http://www.bizjournals.com/dayton/stories/2009/04/27/smallb1.html?page=all/> (citing a medical manufacturing company that invested \$150,000 to "retrain" its employees, resulting in a 38% profit)
- 37 Brandon S. Long, Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements, 54 Duke L.J. 1295, 1301 (2005) ("Much like any other investment, employers will invest in training only if they can recoup that investment by exploiting the skills of those who receive the training. In that sense, human capital is indistinct from nonhuman capital...")
- 38 Orsini, *supra* note 26, at 176-77 (highlighting the employer's legitimate interest in protecting this information)
- 39 Rice, *supra* note 5, at 351
- 40 Ingram, *supra* note 18, at 51-52 ("It is often difficult to draw the line between knowledge, skill, and experience, on the one hand, and trade secrets and confidential information on the other.")
- 41 Orsini, *supra* note 26, at 178-79.
- 42 Kevin Hollenbeck, Employer Motives for Investment in Training 1 (Nov. 15, 1996) (unpublished conference paper), available at <http://research.upjohn.org/cgi/viewcontent.cgi?article=1048&context=confpapers> ("The costs of the training include the foregone productivity of the trainee, lost productivity of supervisors or co-workers who engage in the training activity, and the costs of providing training materials and providers. These costs are borne by the employer...").
- 43 Long, *supra* note 37.

- 44 Id. at 1295 ("Saddled with the challenge of competing for top talent, employers frequently use noncompetition clauses ('noncompetes') in employment agreements to guard against employee defections." (footnote omitted)).
- 45 See discussion *infra* Part V for a more in-depth discussion of drafting noncompete agreements.
- 46 McClanahan & Burke, *supra* note 21, at 1935.
- 47 Id.
- 48 17 Ohio Jurisprudence § 107 (3d ed. 2012); see also *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 116 (3d Cir. 2003) ("[A court] must balance the employer's protectable business interest against the oppressive effect on the employee's ability to earn a living in his or her chosen profession, trade, or occupation." (quoting *Hess v. Gebhard & Co.*, 808 A.2d 912, 923 (Pa. 2002))).
- 49 See generally Matthew C. Palmer, Note, Where Have You Gone, Law and Economic Judges? Economic Analysis Advice to Courts Considering the Enforceability of Covenants Not to Compete Signed After At-Will Employment Has Commenced, 66 Ohio St. L.J. 1105, 1129-36 (2005).
- 50 Jacquelyn Gutc, 'Non-Compete Agreements May Restrict Employees' Mobility, but Experts Say They Have Benefits, Worcester Bus. J. Online (Sept. 3, 2012), <http://www.wbjournal.com>.
- 51 Id.
- 52 Id.
- 53 Bishara, *supra* note 29, at 310 ("Covenants not to compete are in tension with fostering employee mobility and knowledge spillovers that encourage innovation in the high-tech arena. It is particularly attractive to ban, or severely limit, noncompetes in the high-tech sector, where the uninhibited exchange of ideas can lead to innovation from information spillovers").
- 54 O'Neill, *supra* note 27, at 91.
- 55 Norman D. Bishara, Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy, 13 U. Pa. J. Bus. L. 751, 778 (2011) ("From the 2009 ranking data, forty-nine states (96%) and the District of Columbia allow some sort of noncompete enforcement. Within that broad range of enforcing states, twelve states (20%) strongly enforce noncompetes . . .").
- 56 O'Neill, *supra* note 27, at 90 ("The relative ease with which an employer can state a *prima facie* case of breach of contract when an employee engages in activities that appear to violate the terms of a covenant-whether or not those terms will ultimately be deemed reasonable-affords an employer considerable leverage That leverage is, of course, the reason that employers want to add contractual claims to the arsenal of public law protections for proprietary information and assets." (footnote omitted)).
- 57 See *id.* at 117-18 ("[T]he employee's at-will status allows the employer relatively unfettered power to alter the terms and conditions of employment, perhaps disadvantageously, while yet insisting upon the post-employment restraints to which she assented.").
- 58 Bishara, *supra* note 55.
- 59 Brian Kingsley Krumm, Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee, 35 U. Mem. L. Rev. 447, 451-52 (2005) (briefly summarizing the common law shift from "restraint of trade" to the "reasonableness" test).
- 60 See generally *Briggs v. Butler*, 45 N.E.2d 757 (Ohio 1942); *Bergeron*, *supra* note 3, at 375.
- 61 *Bergeron*, *supra* note 3, at 375.
- 62 See generally *Raunonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975).
- 63 Id. at 546-47 ("In practice, however, the [blue pencil] test has not worked well. Because it precludes modification or amendment of contracts, the entire contract fails if offending provisions cannot be stricken Thus, many courts have abandoned the 'blue pencil' test in favor of a rule of 'reasonableness,' which permits courts to determine, on the basis of all available evidence, what restrictions would be reasonable between the parties").

- 64 Bergeron, *supra* note 3, at 399 ("Ohio's law regarding covenant not to compete litigation is well-developed, though it is not always consistent . . . [T]here is a conspicuous absence of guidance from the supreme court on many of these issues." (footnote omitted)).
- 65 *Id.* at 375-76
- 66 *Id.*
- 67 Raimonde, 325 N E 2d at 547
- 68 See discussion *infra* Part III
- 69 Raimonde, 325 N E.2d at 547 ("Courts are empowered to modify or amend employment agreements to achieve such results.").
- 70 *Id.*
- 71 *Id.*
- 72 *Id.*
- 73 Bergeron, *supra* note 3, at 376.
- 74 *Id.* (citing several Ohio cases).
- 75 While this is often true, courts give weight to "potential injury" to the public in cases involving professionals that serve the public interest, such as doctors, lawyers or physicians *Id.* at 380-81.
- 76 Michael Newman & Shane Crase, The Rule of Reason in Drafting Noncompete Agreements, Fed. Law., Mar.-Apr. 2007, at 20, 21 ("[T]he lawyer should determine if the restrictions imposed in the noncompete agreement are geographically reasonable. Courts are less likely to enforce an agreement that restricts an employee's ability to work in an industry on a regional basis or nationwide. Depending on the nature of the employee's position and duties, such a restraint might inhibit the employee from contributing his or her talents to the workforce as a whole. Thus, the lawyer should work with the client to define the relevant marketplace in which the noncompete agreement can effectively and reasonably protect the employer's interests.").
- 77 17 Ohio Jurisprudence, *supra* note 48.
- 78 See generally Bergeron, *supra* note 3, at 377-78.
- 79 *Id.*; 17 Ohio Jurisprudence, *supra* note 48; see also James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co., 643 N.E.2d 143, 150 (Ohio Ct. App. 1993).
- 80 See *Cad Cam, Inc. v. Underwood*, 521 N.E.2d 498, 502 (Ohio Ct. App. 1987) ("We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere . . . and at any time . . . was reasonably necessary to protect the covenantee's legitimate business interests . . ."); Bergeron, *supra* note 3, at 377.
- 81 See 6 Samuel Williston, *Treatise on the Law of Contracts* § 13:1 (4th ed. 1995).
- 82 Bergeron, *supra* note 3, at 380-81 ("For some professions . . . courts have determined that covenants not to compete are disfavored because their effect injures the public. One classic example is the medical profession, where doctors frequently argue that restrictions on the practice of medicine are harmful to the public and thus should be unenforceable.").
- 83 See generally *Wall v. Firelands Radiology, Inc.*, 666 N E 2d 235 (Ohio Ct. App. 1995).
- 84 Bergeron, *supra* note 3, at 375-76 ("This apparent dual standard has contributed to confusion in the lower courts. Some Ohio courts recognize that the three-part test is the proper reasonableness inquiry, but if the court needs to modify the contract to bring it into compliance with the reasonableness rule, it should consider the longer list of factors. Others believe the longer list of factors is simply an elaboration of the three-part test").
- 85 *Id.*

- 86 Id. at 374.
- 87 See id. at 381
- 88 Id. at 374-76, 399 ("If those individuals litigating covenant not to compete claims in the courts are armed with full information, then they can educate the judges and their clients. Full information should lead to more consistent decisions from the courts and more efficient litigation from the parties.").
- 89 Garrison & Wendt, *supra* note 15, at 113-14
- 90 Id. at 114 ("[O]ver time, the common law prohibition against noncompete agreements loosened. The courts recognized that such agreements can be legitimate if they serve business interests other than the restriction of free trade. Thus, agreements not to compete ancillary to an employment relationship have been permitted, subject to a reasonableness requirement.").
- 91 See id. at 111 ("[T]he opinions suggest a heightened judicial scrutiny of employee noncompete agreements, the effect of which is to restrict the enforceability of employee noncompete agreements. These recent decisions represent a full scale assault on the modern approach.").
- 92 Id. at 112
- 93 Bishara, *supra* note 55, at 757.
- 94 Alina Klimkina, Note, Are Noncompete Contracts Between Physicians Bad Medicine? Advocating in the Affirmative by Drawing a Public Policy Parallel to the Legal Profession, 98 Ky. L.J. 131, 136 (2010) ("Furthermore, in recent years more emphasis has been placed on employee education and training. Courts have begun to recognize a legitimate interest in the extraordinary costs of employee education and specialized training in order to validate the enforcement of restrictive covenants." (footnote omitted)).
- 95 See generally *Rogers v. Runfola & Assocs.*, 565 N.E.2d 540 (Ohio 1991)
- 96 Id. at 544
- 97 *Copeco, Inc. v. Caley*, 632 N.E.2d 1299 (Ohio Ct. App. 1992)
- 98 Id. at 1299.
- 99 Id. at 1300.
- 100 See id. at 1301 (reversing the trial court, which held for Caley)
- 101 See generally *Rogers v. Runfola & Assocs.*, 565 N.E.2d 540 (Ohio 1991).
- 102 Id. at 541.
- 103 Id. at 541-42.
- 104 Id. at 541.
- 105 Id. at 544.
- 106 Id. at 543-44 (modifying the covenant to apply for one year and within the city limits of Columbus)
- 107 See *Sash & Storm, Inc. v. Thompson*, No. 1-98-47, 1998 WL 852619, at *2 (Ohio Ct. App. Dec. 11, 1998) (modifying the covenant to only limit former employee from using customer lists obtained from former employer)
- 108 Griffin Toronjo Pivateau, Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements, 86 Neb. L. Rev. 672, 703 (2008) ("Among those states that recognize customer relationships as a protectable interest . . . differences arise as to what sort of relationships may be protected. Some states require a more permanent relationship between customer and business for such a relationship to fall within the realm of protected interests.")

- 109 See generally *Am Logistics Grp., Inc v Weinpert*, No. 85041, 2005 WL 2240987 (Ohio Ct App Sept 15, 2005).
- 110 *Id.* at *1.
- 111 *Id.* at *5
- 112 *Id.* at *2
- 113 *Id.* at *8.
- 114 See *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975)
- 115 *Klimkina*, supra note 94, at 148 (“While the courts invalidating restrictive agreements between doctors are in the minority, more jurisdictions seem to have developed a higher awareness and respect for the recommendations of the AMA. Today, more and more courts are holding these covenants unenforceable for public policy reasons.” (footnotes omitted) (citing another source)).
- 116 *Bergeron*, supra note 3, at 380.
- 117 See *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235, 235, 247 (Ohio Ct. App. 1995).
- 118 *Ohio Urology, Inc. v Poll*, 594 N.E.2d 1027 (Ohio Ct. App 1991).
- 119 *Id.* at 1030-31
- 120 *Id.* at 1032.
- 121 See *Owusu v Hope Cancer Ctr of Nw Ohio*, No. 1-10-81, 2011 WL 3890516, at *1-2 (Ohio Ct App. Sept 6, 2011)
- 122 *Id.* at *4.
- 123 *Id.*
- 124 *Id.* at *4-5.
- 125 *Ohio Urology, Inc.*, 594 N.E.2d at 1031.
- 126 *Bergeron*, supra note 3, at 381.
- 127 *Id.*
- 128 Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession The Role of Conflict of Interest Principles*, 84 Minn. L. Rev. 915, 915 (2000)
- 129 *Orsini*, supra note 26, at 178.
- 130 See *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).
- 131 *Orsini*, supra note 26, at 178-79 (“The growth of the Internet also affects traditional businesses . . . Whether it is simply through on-line advertising or by selling their products and services on the Internet, in addition to their traditional stores, these firms are being forced to adapt their procedures and resources to accommodate their on-line expansion.”)
- 132 *Newman & Crase*, supra note 76, at 21 (“[I]t is important to recognize that both sides-employer and employee-have an interest in the substance of the agreement. In adopting the rule of reason, courts generally recognize that employees have a right to earn a living in the profession for which they have been trained.” (footnote omitted)).
- 133 *Bergeron*, supra note 3.
- 134 See *id.*
- 135 See discussion supra Part III

- 136 Newman & Crase, *supra* note 76, at 21.
- 137 *Id.*
- 138 See discussion *supra* Part III.
- 139 Bergeron, *supra* note 3, at 377 ("Although the issue of how long a covenant not to compete remains enforceable does not depend as much on the employer's market as does the geographic scope, Ohio courts are nevertheless remarkably inconsistent in determining what type of time limitations are reasonable").
- 140 Ingram, *supra* note 18, at 70.
- 141 Newman & Crase, *supra* note 76, at 21
- 142 See generally Bergeron, *supra* note 3, at 376-77.
- 143 Pivateau, *supra* note 108, at 698 ("The noncompete agreement should set forth, in detail, the reasons why this particular employee will be restrained from competing after the termination of his employment. The employer should consider factors such as the particular education or experience of the employee at the time of hire, the specialized training that he might receive on the job, and the specialized knowledge that he will receive while employed.").
- 144 *Id.*
- 145 Bergeron, *supra* note 3, at 399 ("[M]any of the problems that surface in noncompete litigation can be prevented by careful drafting").

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BRENTLINGER ENTERPRISES v CURRAN

NO 00AP-737

141 Ohio App 3d 640 (2001)

**BRENTLINGER ENTERPRISES, d.b.a. Midwestern Auto Group and Midwestern BMW,
Appellant,
v.
CURRAN et al., Appellees.**

Court of Appeals of Ohio, Tenth District, Franklin County
Decided March 20 2001

Vorys, Sater Seymour & Pease LLP William G Porter II, Robert A Harns and Michael C Gniffaton, for
appellant

Carlile, Palchen & Murphy, Dennis J Concilla and Michael H Igoe for appellees

JOHN W MCCORMAC, Judge

[141 Ohio App 3d 642]

Plaintiff-appellant, Brentlinger Enterprises, d b a Midwestern Auto Group and Midwestern BMW, appeals
from a judgment of the Franklin County Court of Common Pleas declining to enforce a noncompete clause
against defendant-appellee, John T Curran

According to the testimony presented at trial, Brentlinger Enterprises, d b a Midwestern Auto Group and
Midwestern BMW ("MAG"), is an automobile dealership located in central Ohio that specializes in European
automobiles MAG owns franchises for the following eleven European automobile lines Porsche, Audi,
Volkswagen, BMW, Saab, Aston Martin, Rolls Royce, Bentley, Lotus, Land Rover, and Ferrari MAG's
largest competitor in the central Ohio market is Byers Imports, which owns franchises for the following five
European automobile lines Porsche, Audi, Volkswagen, Volvo, and Jaguar

Defendant Curran has worked in the sale of European automobiles since 1984 From 1993 until 1997,
Curran was employed by MAG as a salesman In

[141 Ohio App 3d 644]

February 1997, Curran left MAG to become Byers Imports' sales manager for its
Volkswagen, Audi and Subaru franchises In November 1999, Curran was fired by
Byers Imports On January 6 or 7, 2000, MAG hired Curran as its sales manager for its
Audi and Saab franchises

On January 12, 2000, MAG presented defendant with an employment contract, which contained
noncompete and confidentiality clauses Defendant executed this agreement on January 13, 2000

In early March 2000, MAG notified all of its sales managers, including Curran, that it wished to restructure
their pay plans On March 16, 2000, MAG's Chief Financial Officer, Timothy Galli, met with Curran to
discuss the new pay plan, which would replace the pay plan contained in the employment contract that
Curran signed on January 13, 2000 At this meeting, Galli provided Curran with a copy of the new pay plan
to review and sign, and Curran expressed his dissatisfaction with several aspects of the new plan

Within days of learning the details of MAG's proposed new pay plan, Curran contacted Byers Imports'
General Manager, Kevin King, about returning to his old job King, who had already fired the individual who
had replaced Curran when he left Byers Imports in November of the previous year, immediately expressed
interest in rehiring Curran as sales manager for Byers' Volkswagen, Audi, and Subaru lines if they could
"clear up the matter of the noncompete [clause in Curran's employment contract with MAG]"

On Friday, April 14, 2000, Curran submitted his two-week notice of resignation to MAG When Curran
arrived for work at MAG on the morning of Monday, April 17, 2000, MAG officials informed him that his
employment with MAG had ended and that he was to leave the dealership Because Curran never agreed
to the new pay plan, he was compensated according to the terms of his original pay plan for the entire
period of his most recent employment with MAG

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EXHIBIT

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Although both Curran and King testified that, as of the time of trial Curran was not and had not been hired by Byers Imports, everyone agrees that, upon leaving MAG's dealership on the morning of April 17, 2000, Curran went directly to Byers Imports and began operating as Byers Volkswagen, Audi, and Subaru sales manager

On April 18, 2000, MAG filed a complaint and motion in the Franklin County Court of Common Pleas seeking a temporary restraining order and preliminary and permanent injunctions enforcing the terms of the noncompete and confidentiality clauses contained in Curran's employment contract and prohibiting Curran from working at Byers Imports

On April 19, 2000, the trial court filed an agreed-upon temporary restraining order which prohibited Curran from working for Byers Imports or any business

[141 Ohio App.3d 646]

located in Franklin or Delaware County, Ohio, which is in the business of selling, leasing, or servicing new or used European automobiles

On May 12 and 15, 2000, a trial was held on MAG's complaint and motion for preliminary and permanent injunctions. On May 22, 2000, the trial court issued a decision granting MAG's request for preliminary and permanent injunctions prohibiting Curran from disclosing any confidential information that he obtained during his most recent employment at MAG, but denying MAG's request for preliminary and permanent injunctions enforcing the noncompete clause in Curran's employment contract and prohibiting Curran from working for Byers Imports. MAG appeals therefrom assigning the following errors

"1 The trial court's decision refusing to enforce the parties' noncompete agreement was against the manifest weight of the evidence and was an abuse of discretion

"2 The trial court's finding that appellant Midwestern Auto Group lacks sufficient business interests to warrant enforcement of the parties' noncompete agreement was erroneous, against the manifest weight of the evidence, and an abuse of discretion

"3 The trial court's finding that appellee John Curran would suffer undue hardship if the noncompete agreement is enforced was erroneous, against the manifest weight of the evidence, and an abuse of discretion

"4 The trial court erred as a matter of law in denying enforcement of the noncompete agreement on the basis that enforcement would not benefit the public interest, because the proper test is whether enforcement would not be injurious to the public

"5 The trial court erred after finding that the restrictions in the parties' noncompete agreement were unreasonable under the circumstances, in not modifying those restrictions to give effect to the parties' agreement to its enforceable limits "

MAG's first, second and fifth assignments of error are combined for discussion

Because a noncompete clause, which prohibits a former employee from working in competition with his former employer, amounts to a restraint of trade, *Frank, Sennger & Chaney, Inc v Jesko* (Dec 6, 1989), Lorain App No 89CA004577, unreported, 1989 WL 147951, such clauses will be enforced only to the extent that the restraints imposed thereby are reasonably necessary to protect the employer's legitimate business interests. See *Raimonde v Van Vlerah* (1975), 42 Ohio St 2d 21, 25-26, 71 O O 2d 12, 14-15, 325 N E 2d 544, 546-548. A noncompete clause will be found to be reasonable only where the employer can show by clear and convincing evidence that the restrictions imposed

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by the non-compete clause (1) are no greater than necessary for the protection of the employer's legitimate business interests, (2) do not impose undue hardship on the employee, and (3) are not injurious to the public. *Id* at paragraph two of the syllabus. Factors which may be considered in determining whether a noncompete clause is reasonable include the clauses' geographic and temporal limits, if any, whether the employee represents the sole customer contact, whether the employee possesses confidential information or trade secrets, whether the clause seeks to restrain ordinary, rather than unfair, competition, whether the clause stifles the pre-existing skills of the employee or only those skills that were developed while working for the employer, the balance of the clause's detriment to employer and employee; whether the clause restricts the employee's sole means of support, and whether the restricted employment is merely incidental to the main employment. *Id* at 25, 71 O.O 2d at 14, 325 N E 2d at 546-547

In the instant case, MAG seeks an injunction as a means of enforcing the noncompete clause. An injunction is an extraordinary remedy in equity that is available only where there is no adequate remedy available at law. *Garono v State* (1988), 37 Ohio St 3d 171, 173, 524 N E 2d 496, 498-499. Injunctive relief is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot. *Id*. Accordingly, an employer who seeks an injunction to enforce a noncompete clause must not only establish the reasonableness of the noncompete clause at issue but must also show that the employer is likely to suffer irreparable harm as a result of the employee's breach of that clause. *Levine v Beckman* (1988), 48 Ohio App 3d 24, 27, 548 N E 2d 267, 270-271. Further, the decision of whether to grant or deny injunctive relief lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Garono*. An abuse of discretion connotes more than an error of judgment, it implies a

decision that is without a reasonable basis, and one that is clearly wrong. *Blakemore v. Blakemore* (1983), 5 Ohio St 3d 217, 219, 5 OBR 481, 482-483, 450 N E 2d 1140, 1141-1142

The noncompete clause at issue in the present case provides as follows

"Non-Competition Covenant MAG is engaged in a competitive business. In the course of his employment, Mr. Curran will hold a position of trust and will be exposed to and will acquire valuable confidential and proprietary information of MAG. This information includes, but is not limited to, information regarding MAG's clients (customers), finances, operations, pricing, marketing, recruiting, training, and selling practices, and methods, techniques, and computer software unique to MAG. Mr. Curran agrees that he shall not, for a period of 18 months immediately following separation from employment with MAG (whether the separation is voluntary or involuntary), directly or indirectly divert or solicit, or attempt to divert or solicit, any clients of MAG, or any prospective clients of

[141 Ohio App 3d 647]

MAG (defined as individuals who have been identified by MAG as prospective clients prior to Mr. Curran's separation from employment), in order to sell or attempt to sell an automobile or other product or service similar to those provided by MAG. Mr. Curran further agrees that he shall not, for a period of 18 months immediately following separation from employment with MAG for any cause, directly or indirectly, solicit any of MAG's employees to leave MAG or to sever their relationship with MAG.

"Mr. Curran shall not engage in direct competition with MAG, and shall not engage in any of the following activities for a period of 18 months following his separation from employment with MAG (whether the separation is voluntary or involuntary): (1) own or operate as an individual, principal, director, shareholder with a ten percent (10%) interest or more, (2) be employed by or act as a consultant or independent contractor to, or (3) act as an agent or representative of the following: any entity or business, which is engaged in or about to be engaged in the business of selling, leasing, and/or servicing new or used European Vehicles, as defined below, unless the number of European Vehicles sold or leased is 2% or less of the total number of motor vehicles sold or leased by such business in the 12 months before or after Mr. Curran's separation from employment. This covenant shall extend in geographic scope throughout Franklin and Delaware counties, and shall also extend to any other clients or prospective clients of MAG who reside or have a principal place of business within 100 miles of MAG's headquarters in Dublin, Ohio.

"The term European Vehicle is defined for purposes of this Agreement as any motor vehicle manufactured in Europe or manufactured elsewhere by a company which has its headquarters in Europe, including, without limitation, Audi, Saab, BMW, Volkswagen, Land Rover, Ferrari, Rolls-Royce, Bentley, Lotus, Aston Martin, Porsche, Mercedes-Benz, and Jaguar.

"If any of the provisions of this section of the Agreement are held to be unreasonable or unenforceable by any court, those provisions will be automatically amended so as to apply only to the extent that they are reasonable and enforceable."

The trial court declined to grant an injunction enforcing this clause on the grounds that MAG had failed to carry its burden of proof on any of the three elements set forth in *Raimonde*.

MAG challenges the trial court's conclusions that it failed to carry its evidentiary burden on the first *Raimonde* element as against the manifest weight of the evidence.

A judgment will be reversed as against the manifest weight of the evidence only where there is no competent, credible evidence to support it. C E

[141 Ohio App 3d 648]

Morris Co. v. Foley Const. Co. (1978), 54 Ohio St 2d 279, 280, 8 O O 3d 261, 261-262, 376 N E 2d 578, 578. The resolution of conflicting evidence is generally a matter best left to the trier of fact. *G F Business Equip., Inc. v. Liston* (1982), 7 Ohio App 3d 223, 226, 7 OBR 285, 287-288, 454 N E 2d 1358, 1361, and a judgment will not be reversed as against the manifest weight of the evidence "merely because the evidence sustaining it is open to suspicion or does not impress the reviewing court, or the court is not satisfied that such verdict is right, or would have rendered a different verdict or decided differently if it had heard the case in the first instance." *Hines v. Amole* (1982), 4 Ohio App 3d 263, 267, 4 OBR 480, 485, 448 N E 2d 473, 477.

With respect to the first *Raimonde* element, the trial court found that MAG had not shown that it had legitimate business interests sufficient to justify enforcement of the noncompete clause. Specifically, the trial court found that (1) Curran did not take any confidential or proprietary documents from MAG's place of business, (2) much of the information that MAG claims to be trade secrets is in fact not trade secrets, as it was either known to Curran when he came to MAG as a result of his extensive prior experience selling Audi automobiles, or is readily available to the public, and (3) the value of whatever proprietary information or trade secrets Curran did take with him when he left MAG was of limited usefulness to MAG's competitors and would rapidly become stale with the passage of time.

In response to the trial court's conclusion that the evidence did not establish that enforcement of the noncompete clause was necessary to protect MAG's legitimate business interests, MAG argues that it presented evidence establishing the existence of three legitimate business interests, any one of which is sufficient to require enforcement of the noncompete clause.

MAG first asserts that it presented evidence that, while Curran was employed at MAG, he had access to various trade secrets and proprietary business information which, if made available to a competitor of MAG such as Byers Imports, would provide such competitor with an unfair competitive advantage.

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It is true that MAG's owner, Mark Brentlinger, testified that, as MAG's Audi and Saab sales manager, Curran had access to MAG's business plan for the year 2000, as well as advertising, pricing, and inventory information, all of which Brentlinger described as proprietary information or trade secrets that would be very damaging to MAG in the hands of a competitor. Clearly, if accepted by the trial court, Brentlinger's testimony would have justified enforcement of the noncompete clause. However, Kevin King, the General Manager for Byers Imports, testified that much of the information which Brentlinger classified as trade secrets was either readily available to his dealership or of little or no value to it.

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The trial court's decision indicates that, on the issue of trade secrets and proprietary information, the court generally accepted King's testimony and heavily discounted Brentlinger's testimony. As the finder of fact, the trial court was in the best position to judge Brentlinger's and King's credibility. *In re Michael* (1997), 119 Ohio App 3d 112, 133, 694 N.E.2d 538, 552, and was free to believe or disbelieve their testimonies in whole or in part as it saw fit. Accordingly, we cannot say that the trial court's finding that Curran is not in possession of proprietary information or trade secrets sufficient to justify enforcement of the noncompete clause was against the manifest weight of the evidence.

MAG also asserts that it presented evidence establishing that the loss of a "key" employee, such as Curran, causes severe disruption to its business and that the prevention of such disruption is a legitimate business interest which justifies enforcement of the noncompete clause.

MAG unquestionably presented testimony that the loss of Curran as its Audi and Saab sales manager was extremely disruptive to MAG's business, however, this fact does not make such disruption a business interest which will justify enforcement of a noncompete clause against a former employee.

Generally, the only business interests which have been deemed sufficient to justify enforcement of a noncompete clause against a former employee are preventing the disclosure of the former employer's trade secrets or the use of the former employer's proprietary customer information to solicit the former employer's customers. *Jesko, supra*.

MAG, however, cites *Parma Internatl, Inc v. Bartos* (Feb. 7, 1990), Lorain App. No. 89CA004573, unreported, 1990 WL 11716, for the proposition that protecting against the business disruption caused by the loss of an important or "key" employee is sufficient to justify enforcement of a noncompete clause.

In *Parma*, the Ninth District Court of Appeals was faced with the issue of whether a noncompete clause could be enforced against a former employee who did not possess any trade secrets, but who, during a six-year period of employment, was "involved in every facet of [his former employer's business]" and had been instrumental in his former employer's growth from a "cottage industry [in]to a \$5,000,000 a year business." Relying on a line of cases decided by the New York Court of Appeals that hold that, where an "employee's services are truly "special, unique or extraordinary" and not merely of high value to his employer," enforcement of a noncompete clause may be appropriate even though trade secrets or customer information is not involved, the *Parma* Court held that it was reasonable to enforce a one-year covenant not to compete in order to give

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the employer time to find a replacement for an employee who had been such an "integral part of the company." *Parma* (citing *Columbia Ribbon & Carbon Mfg. Co., Inc v. A-1-A Corp.* [1977], 42 N.Y.2d 496, 499, 398 N.Y.S.2d 1004, 1006, 369 N.E.2d 4, 6, *Purchasing Assoc., Inc v. Weitz* [1963], 13 N.Y.2d 267, 246 N.Y.S.2d 600, 605-606, 196 N.E.2d 245, 249).

Although the Ninth District did not discuss what characteristics make an employee "special, unique, or extraordinary" in *Parma*, the New York cases cited therein indicate that "[m]ore must *** be shown *** than that the employee excels at his work or that his performance is of high value to his employer. It must also appear that [the employee's] services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury." *Weitz*. Although the court in *Parma* did not discuss the "special, unique, or extraordinary" standard, the employee at issue therein, who, during a six-year period of employment had been "involved in every facet of [his former employer's business]" and who had been critical to his employer's growth from a "cottage industry [in]to a \$5,000,000 a year business," clearly satisfied the standard.

In the present case, MAG has not argued that Curran was a "special, unique, or extraordinary" employee similar to the employee in *Parma*. Moreover, given that Curran held a position at MAG that was at best middle-level management, that he held the position for only three months, and that the position involved work with only two of the dealerships' eleven automobile lines, Curran was not the type of invaluable and virtually irreplaceable employee with which the court was faced in *Parma*.

Further, we find MAG's argument that enforcement of the noncompete clause is justified by the need to protect its business from the disruption caused by the loss of a valuable employee unpersuasive for several additional reasons. First, in order to be entitled to have the noncompete clause enforced by means of an injunction, MAG must show that such enforcement will prevent it from suffering irreparable harm. However, the disruption caused to MAG's business by Curran's departure has already occurred and enforcement of the noncompete clause will not cure or alleviate that disruption. While it might be argued that an injunction enforcing the noncompete clause against Curran would protect MAG against future disruption by deterring other employees who have signed similar noncompete clauses from leaving MAG for competitors, the deterrence of speculative future harm caused by persons other than the defendant herein is not a proper basis on which to grant injunctive relief. See *Arthur Murray Dance Studios v. Witter* (C.P. 1952), 62 Ohio Law Abs. 17, 41-44, 105 N.E.2d 685, 701-703 (lengthy discussion of the irreparable injury requirement for injunctive relief, in the context of enforcement of noncompetition clauses).

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Second, MAG's contention that Curran's departure caused its business irreparable disruption is belied by its conduct in terminating Curran's employment almost immediately after he submitted his two-week notice of resignation. If Curran's departure was as disruptive as MAG claims, it seems that the more sensible course would have been for MAG to have allowed Curran to complete his final two weeks of employment and to have used that time to prepare for his departure and to seek a replacement.

Finally, the mere fact that the loss of an employee to "greener pastures" is disruptive to a business does not justify the business's limiting the rights of its employees to obtain the highest possible return for their services.

MAG's third asserted legitimate business interest justifying enforcement of the noncompete clause is the protection of its relationships with its existing customers and with Audi's factory representative.

With respect to MAG's interest in protecting its relationship with the Audi factory representative, MAG presented evidence at trial that explains why it is important for MAG to maintain a positive relationship with the Audi factory representative, and that Curran became Byers Imports' principal contact with the Audi factory representative as soon as he started serving as Byers Imports' Audi sales manager. However, there is nothing in the record that shows, and MAG has never explained, how its relationship with the Audi factory representative will be damaged by Curran's having contact with that representative as an employee of Byers Imports. MAG simply asserts that such harm will occur. Such conclusory allegations are not sufficient to support injunctive relief.

MAG's asserted interest in protecting its customer relationships is somewhat stronger. Preventing a former employee from using his former employer's customer lists or contacts to solicit those customers is one of the traditional grounds for enforcing noncompete clauses. *Jasko, supra*. While there is no evidence that Curran took any documents containing MAG's customer lists with him when he left MAG, there is some evidence that Curran used a customer contact which he obtained while he was employed at MAG to solicit business for Byers Imports. Specifically, the evidence showed that, on Curran's first day at Byers Imports, he discussed the purchase of an Audi with a potential customer with whom he had had similar discussions at MAG only two days earlier. While this evidence does not conclusively establish that Curran used his prior MAG contact to solicit this individual for Byers Imports, as the individual could have come into Byers to comparison-shop on his own, it at least suggests that the possibility that such solicitation occurred. Thus, the possibility that Curran will use whatever MAG customer information he retains in his memory to solicit MAG customers for Byers Imports is a matter that MAG has a legitimate

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business interest in preventing. However, the trial court provided reasonable protection against a violation of any abuse in this respect by prohibiting disclosure of confidential information of the above nature (customer information), which the court found was about all information of any value which he obtained. Given the limited information of a confidential nature found by the court to be obtained by Curran during his short term of employment, supported by testimony of King and Curran, and given the prohibition against revealing or using the customer contact information Curran may have obtained, we do not find that the trial court abused its discretion in refusing to enforce the noncompete clause. The trial court's factual findings justify the court's discretionary holding that appellant failed to prove by clear and convincing evidence that there were sufficient business interests recognized under *Raimonde* to make it necessary to enforce the noncompete clause for the protection of appellant's legitimate business interests.

Thus, appellant failed to establish the first requirement of the *Raimonde* test, which requires affirmation of the trial court's judgment regardless of other errors in the trial court findings, since the requirements of *Raimonde* must all be proved. Under the trial court's finding, the noncompete clause was already limited to the extent that the trial court found, within its discretion, to be enforceable. Thus, the fifth assignment of error is not valid.

For the foregoing reasons, appellant's first, second, and fifth assignments of error are overruled.

We now turn to the second *Raimonde* element, that the noncompete clause does not impose undue hardship on the employee, which is the subject of appellant's third assignment of error.

The trial court concluded that MAG had failed to prove that enforcement of the noncompete clause would not cause Curran undue hardship. In particular, the trial court concluded, given Curran's brief tenure with MAG and the fact that he brought most of his experience and skill as a sales manager of European automobiles, and particularly Audis, with him to MAG, that prohibiting him from working for any dealer of European automobiles in Franklin or Delaware Counties would impose undue hardship on him.

The evidence presented at trial indicated that all of the European automobile dealers in the greater Columbus metropolitan area are located in Franklin or Delaware counties. Thus, enforcement of the noncompete clause would probably prevent Curran from working in his area of specialty, the sale of European automobiles, in the area in which he currently resides. However, certainly much of Curran's experience in selling automobiles would be transferable to the sale of other types of cars, so that the prohibition, limited in time, area, and types of

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cars, would not be a prohibitive one. The evidence, by a clear and convincing standard, leaves ample room for Curran to continue working in the automobile sales field, even in types of foreign automobile sales, and restricted only from working in a very small geographical area eliminating only a small percentage of his possible employers. While we believe that the trial court's finding in this respect is against the manifest weight of the evidence, we find that the error was not prejudicial given our disposition of the first assignment of error. Appellant's fourth assignment of error is overruled.

With respect to the third *Raimonde* element set forth in the fourth assignment of error, the trial court held that enforcement of the noncompete clause was "not necessary to protect the public interest." MAG argues that the trial court applied the wrong standard in reaching this conclusion. We agree.

The trial court appears to have believed that the third *Raimonde* element required MAG to show that enforcement of the noncompete clause was necessary to protect the public interest. In fact, the third *Raimonde* element required MAG to show only that enforcement of the noncompete clause would not harm the public.

The third *Raimonde* element is primarily concerned with the public's interest in promoting fair business competition. See *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (1997), 124 Ohio App.3d 308, 319-320, 706 N.E.2d 336, 343-344 (holding that enforcement of a noncompete clause which required a hospital to close its sleep disorder center for a two-year period was not harmful to the public where there were twelve other sleep disorder centers in the same greater metropolitan area). Thus, where enforcement of a noncompete clause would result in an employer's having a near monopoly for its products or services in a given market, enforcement may be denied on the grounds that it would harm the public.

Here, MAG presented evidence that there are six automobile dealers, in addition to its own, in the central Ohio area which sell at least one line of European automobiles. The competition among these various dealers, and the resulting advantage to the public, will not be altered in any significant way by enforcement or nonenforcement of the noncompete clause. However, as with the third assignment of error, the error was not prejudicial. Appellant's fourth assignment of error is overruled.

In summary, given that MAG's legitimate business interests in enforcing the noncompete clause were found to be limited to protecting a few undefined trade secrets that are of limited value to MAG's competitors, and whatever customer information Curran is able to remember, the trial court did not abuse its discretion in refusing to enforce the noncompete clause's prohibition against

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Curran working for any automobile dealer in Franklin and Delaware Counties that sells European automobiles for a period of eighteen months.

MAG's five assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

TYACK and LAZARUS, JJ., concur.

JOHN W. McCORMAC, J., retired, of the Tenth Appellate District, was assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C.A. No. 2013-CP-10-5579
Joshua Fay,	)	
	)	TOTAL QUALITY LOGISTICS, LLC'S
Plaintiff,	)	("TQL") SUPPLEMENTAL
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
Total Quality Logistics, LLC,	)	AND IN OPPOSITION TO PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
Defendant,	)	

The Defendant, Total Quality Logistics, LLC ("TQL"), hereby files its supplemental memorandum in support of its motion for summary judgment, and in opposition to Plaintiff's motion for summary judgment.

I. Background.

The Court heard oral arguments Friday, January 31, 2014. During the argument, and included in his initial Memorandum of Law, Plaintiff argued that three of the restrictive covenants, the two geographic noncompetes (paragraphs 9(b)(i) & 9(b)(ii)) and the provisions prohibiting the misuse and disclosure of confidential information (Second Recital, paragraphs 3, 4, 6, and 7) are so onerous that they cannot be enforced in South Carolina.

Plaintiff argued that the geographic noncompetes ban Plaintiff from working at all in the intermodal transportation industry in the Continental United States. *See* Plaintiff's Memorandum of Law, p.7.

Plaintiff argued that the geographic noncompetes are not reasonably limited in territory. *See* Plaintiff's Memorandum of Law, p.6-7.

Plaintiff also argued that under the covenant restricting the disclosure of trade secrets and confidential information, "any information that plaintiff received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the

ROA 000168

public domain or had been obtained by TQL from another competitive business.” See Plaintiff’s Memorandum of Law, p.10.¹ Moreover, Plaintiff argued that, in the event the Court agreed that the restrictive covenants are overbroad, the Court could not apply Ohio law to enforce more narrow restrictions, because South Carolina law does not permit “blue penciling” covenants not to compete. This misstates South Carolina law, which honors choices of law in noncompete agreements.

These arguments also significantly overstate the scope of TQL’s restrictive covenants. Without violating the geographic noncompetes or the provisions prohibiting the misuse and disclosure of confidential information, there are many jobs Plaintiff could hold within the intermodal transportation industry at which he is free to use all of the general experience and knowledge he gained as an employee of TQL. What he may not do is work for a freight brokerage company or third party logistics provider that hauls full truckload and less-than-truckload freight within the Continental United States. Also, he may not misuse Confidential Information.

II. Argument.

A. The restrictive covenants are narrowly tailored to protect the legitimate business interests of TQL.

The geographic noncompetes are reasonable. In Section 9, the Plaintiff agreed that, for a period of one year after his employment terminated, he would not “directly or indirectly, own, operate, [or] maintain... any Competing Business...” and that he would not “become employed by or engaged in a Competing Business ..., in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the

¹ Plaintiff does not challenge the scope of the non-solicitation or non-interference covenants in paragraphs 9(b)(iii) & 9(b)(iv), both of which he violated when he began providing freight broker services to The Brandt Companies through his competing company, JF Progressions, Incorporated.

use of TQL's Confidential Information." *See* Agreement, ¶9(b)(i), ¶9(b)(ii) (emphasis added). Thus, because he brokered freight as a Logistics Account Sales Executive in Training for TQL, Plaintiff cannot provide those services to a company engaged in a Competing Business in the Continental United States. His work for his own Competing Business, JF Progressions, Inc., violates the geographic noncompetes.

However, contrary to Plaintiff's argument that he is prevented from working in any capacity in the intermodal transportation industry, his noncompete clearly permits him to hold literally hundreds of positions, including, by way of example, the following jobs:

1. Dispatcher for a truck company.
2. Driver for a truck company.
3. Carrier compliance coordinator.
4. Safety compliance officer with a motor carrier.
5. Carrier coordinator with a motor carrier.
6. Logistics planner for any company other than a freight broker.
7. Freight broker for an ocean or air freight company.
8. Freight broker for a non-vessel operating common carrier, barge or intermodal freight company.
9. Customs broker or international freight broker.
10. Produce broker.
11. Lumber broker.
12. Alloy broker.

Similarly, the definition of Confidential Information comes nowhere close to covering "any information [i.e., everything] that plaintiff received during his employment with TQL..." *See* Plaintiff's Memorandum of Law, p.10. Rather, the definition focuses on genuinely secret and/or proprietary information concerning TQL and/or its customers:

WHEREAS, TQL develops and maintains confidential proprietary Information (hereinafter referred to as, "Confidential Information"), including but not limited

to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This Information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; ...

See Agreement, Second Recital. Thus, as an employee of TQL, Plaintiff learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information:

1. How to price loads for customers and to the motor carriers.
2. How to price multiple loads in different lanes depending on the commodity.
3. How to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.
4. How to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving.
5. How to make appointments at shipping points and receivers and how long it should take to unload each.
6. How to talk to a carrier about sealing the doors to their trailers.
7. How to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock.

8. How to calculate how long it should take for the carrier to haul a load and communicate that to the customer.
9. How to tell a carrier how to run its refrigerated unit during transit.
10. How to locate flag cars and permits for a motor carrier hauling a wide or unusual load.
11. What is required to move cargo across international lines.
12. How to read and analyze all types of bills of lading.
13. How to approach carriers and convince them to take a load and haul it and still earn a profit margin.
14. Pricing to haul certain products during certain periods of the year (e.g., produce, landscaping, building materials).
15. Where products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed—this will help brokers understand when truck costs and availability will “tighten up” because of increased demand.
16. How to obtain backhauls for motor carriers and how to price them.

Thus, the restrictive covenants at issue permit the Plaintiff to remain in the intermodal transportation industry without competing unfairly with TQL. Plaintiff’s suggestion that they are facially overbroad is mere overstatement intended to raise insincere doubts about the enforceability of TQL’s reasonable covenants.

- B. The geographic scope, the Continental United States is reasonable, because it is where TQL does business and represents the area within which Plaintiff was able to establish contact with TQL’s customers.

As explained in TQL’s initial memorandum of law, Ohio courts have already approved of the geographic scope of its Agreement. *See Jeffrey A. Dangelo vs Total Quality Logistics, LLC*, Case No. 1:09cv512 (S.D. Ohio 2009). But the geographic scope also satisfies South Carolina law as well. A geographic restriction 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. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961).

Here, Plaintiff was able to establish contact with TQL's customers and prospects across the United States and Canada. *See* Supplemental Affidavit of Hillary Kotlarz, ¶4 (filed herewith). For example, TQL's records show that he contacted customers and prospects located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico. *Id.* at ¶5.

Clearly, the geographic scope of the Agreement is enforceable. Indeed, it is drawn more narrowly than the actual areas within which Plaintiff was able to establish contacts, which included Hawaii and Puerto Rico.

- C. Because Ohio law applies, the "rule of reasonableness" permits this Court to narrow any covenant it finds overbroad, and so doing does not violate the public policy of South Carolina.

Unlike South Carolina, Ohio noncompete law permits a court to determine, on the basis of all the available evidence, what restrictions would be reasonable between the parties. *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 25, 325 N.E.2d 544, 547 (1975). Essentially, this "rule of reasonableness" differs from the "blue pencil" approach in the manner of modification allowed. It permits a court to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and in light of all the factors comprising "reasonableness" in the context of employee covenants. *Id.*

The factors used by Ohio courts are the following: whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only

unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during the employment, and whether the forbidden employment is merely incidental to the main employment. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992).

Here, the covenants are reasonable because there are time and geographic limits—one year over the Continental United States. Plaintiff had contact with many customers. Plaintiff was provided a range of confidential information including pricing, profitability, margins, customer needs, TQL's sales process and methods. The Agreement only prohibits unfair competition. It does not stifle whatever inherent skills and experience Plaintiff may have developed over his work life. As set forth above, there are several jobs within the intermodal transportation industry he could hold. And it is clear that because of his prior experience and only brief time as a freight broker, he possesses other means of support. Thus, no "rule of reasonableness" is necessary to enforce the covenants.

Plaintiff mistakenly argues both that the covenants at issue are overbroad and that this Court may not apply Ohio's rule of reasonableness in light of the holding of *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005). Plaintiff suggested at oral argument that the South Carolina Supreme Court refused to add a geographic limitation to a New Jersey covenant not to compete because South Carolina's public policy forecloses "blue penciling." A close reading of the Court's framing of the issue and its holding demonstrates that, rather, our Supreme Court refused to add the geographic term because no *New Jersey* court had ever done so. Thereafter, because the "resulting agreement" under New Jersey

law lacked the required geographic limitation, it could not be enforced consistent with South Carolina's public policy. The following passages from the opinion demonstrate this conclusively:

Pursuant to Rule 228, SCACR, we accepted the following questions on certification from the United States District Court for the District of South Carolina:

I. May a non-compete agreement that contains a New Jersey choice-of-law provision but no geographical limitation be reformed (or "blue penciled") in accordance with New Jersey law and then enforced in South Carolina?

366 S.C. 156, 158, 621 S.E.2d 352-3 (2005).

In the present case, the non-compete agreement does not contain a geographical limitation, and we have been unable to find a single case from New Jersey in which a court has added a geographical term when one was previously omitted. We hold, therefore, that the contract may not be reformed or blue-penciled so as to add an entirely new term to which neither of the parties agreed.

366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005). The holding merely demonstrates what blue penciling cannot accomplish—under any state's law—the addition of terms to which the parties never agreed.

Here, the inherent logic behind *Stonhard*'s holding dictates that Ohio law be applied first, and that if any covenants are overbroad, the "rule of reasonableness" be used to fashion enforceable covenants based on all the Ohio factors. If applied correctly, the resulting reasonable covenants are also enforceable under South Carolina law.

D. Because South Carolina will enforce separate provisions separately, the geographic noncompetes, the non-solicitation covenant, the non-interference covenant, and the provisions prohibiting the misuse and disclosure of confidential information (Second Recital, paragraphs 3, 4, 6, and 7) are each separately enforceable, independent of the others.

Even if the Court determines that, notwithstanding the parties' selection of Ohio law to govern the Agreement, South Carolina law applies and forecloses the "rule of reasonableness," each covenant is separately enforceable independent of the others. Although South Carolina does

not blue pencil noncompetes, it will enforce separate provisions separately. *Café Associates, Ltd. V Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 165 (1991) citing *Oxman v Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961) (“Where there are several different restrictive agreements in a covenant, the Court has invalidated one and upheld another in the same document.”).

Here, the geographic noncompetes are expressed, separately, in paragraphs ¶9(b)(i) & 9(b)(ii). Each can be enforced independently of the other restrictive covenants.

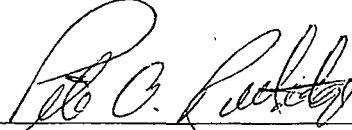
The nonsolicitation covenant is expressed in paragraph ¶9(b)(iii). Plaintiff did not argue that this provision is overbroad. Because the Agreement is supported by consideration, it is enforceable.

The non-interference covenant is expressed in paragraph ¶9(b)(iv). Plaintiff did not argue that this provision is overbroad. Because the Agreement is supported by consideration, it is enforceable.

The covenants prohibiting the misuse of confidential information are yet separate from those above and are expressed in the Second Recital, and in paragraphs 3, 4, 6, and 7. Finally, although the Plaintiff argued that the protection against the misuse or disclosure of confidential information was void because it lacked time and geographical limitations, South Carolina’s General Assembly addressed that aspect of noncompete law in response to *Carolina Chemical Equipment Co., Inc v Muckenfuss*. See S.C. Code Ann. § 39-8-30(D) “A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.” The covenant, therefore, is not overbroad.

III. Conclusion.

For the foregoing reasons, the Plaintiff's motion for summary judgment should be denied, and TQL's motion for summary judgment should be granted.



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Counsel for Defendant Total Quality Logistics, LLC

February 7, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2013-CP-10-5579
	)	
THOMAS JOSHUA FAY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TOTAL QUALITY LOGISTICS, LLC,	)	
	)	
Defendant.	)	
	)	

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 J. ARISTOTLE
 CLERK OF COURT
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**PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION OF
 THE GRANT OF SUMMARY JUDGMENT AND DECLARATORY JUDGMENT TO
 DEFENDANT AND MEMORANDUM IN SUPPORT THEREOF**

On December 13, 2013, Plaintiff moved this Court for Judgment on the Pleadings or, in the alternative, an Order of Summary Judgment declaring the Non-Compete, Confidentiality and Non-Solicitation Agreement (Non-Compete Agreement) between the parties invalid and unenforceable as to Plaintiff. Thereafter, Defendant moved for Summary Judgment on its counterclaims for breaches of contract on the ground that the Non-Compete Agreement was reasonable and enforceable.

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff respectfully requests that the Court reconsider its grant of Defendant's causes of action for breach of contract because there are genuine issues of material fact in dispute which preclude the grant of summary judgment on these claims.

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of

material fact.” Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc., 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (internal citations omitted). “[A]n issue is ‘material’ if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action. PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct. App. 1988) (citing Austin v. Wilder, 26 N.C.App. 229, 215 S.E.2d 794 (1975)). The grant of summary judgment is a “drastic remedy” and “should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues.” Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002) (citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). In deciding a motion for summary judgment, the court “neither makes factual determinations nor considers the merits of competing testimony.” David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). “If triable issues exist, those issues must go to the jury.” Singleton v. Sherer, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct. App. 2008) (citing Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

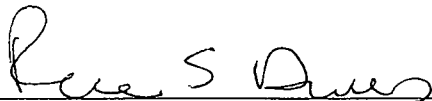
Here, Defendant has not, and cannot, demonstrate the absence of a genuine issue of material fact. To the contrary, there exist material facts which are in dispute and necessitate an amendment of this Court’s order. First, Plaintiff denies that that he received any information during his employment with Defendant which could be considered confidential information or a trade secret as such information was generally available in the public domain. (Aff. of Plaintiff, ¶¶ 7, 9) Plaintiff further denies that he relied on or disclosed any information he received during his limited employment with Defendant to provide services to Brandt Engineering. (Aff. of Plaintiff, ¶ 9; Aff. of KellyLyttle, ¶ 3). Finally, Plaintiff has presented unrefuted evidence that Brandt Engineering is a mechanical/electrical/plumbing construction and engineering firm, does

not provide freight forwarding services, and is not in competition with Defendant. (Aff. of Plaintiff, ¶ 12 Aff. of KellyLyttle, ¶ 2).

These facts, construed in the light most favorable to Plaintiff, are substantive defenses to Defendant's claims for breach of contract and could affect the ultimate result of the case. With due respect to the Court, the portion of the Order granting Defendant's claims for breach of contract makes improper factual findings based on conflicting testimony from the parties.¹ The standard for a grant a summary judgment is clear that where there are competing factual issues, the must be submitted to a jury for determination.

For these reasons, Plaintiff would respectfully request that the Court reconsider its Order and deny Defendant's claims for breach of contract.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor
Rene S. Dukes
P.O. Box 893
Charleston, SC 29402
(843) 577-6726 (O)
(843) 724-8036 (F)

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
April 25, 2014

¹ Plaintiff would also point out that the "findings of fact" enumerated on pp. 11-12 of the Order are completely unsupported in the record. Although the language in the Non-Compete identifies particular information that it allegedly maintains as confidential, there is no evidence that Plaintiff actually "learned" all of the information enumerated in the Court's Order.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-5579

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HONOLULU DISTRICT COURT
OFFICE OF THE CLERK
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HONOLULU HI 96813

3. At approximately 9:00 a.m., I attended a training class with approximately five other new employees. During that class, representatives of Defendant distributed a packet of information to the new hires, including me, and instructed us to complete and sign the forms. This packet contained an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (Non-Compete Agreement).

4. The Non-Compete Agreement had never been provided to me nor had it been discussed during my prior interviews. I was offered and accepted employment before I was required to sign the Non-Compete Agreement, and I signed it after I had already begun working for Defendant.

5. When the Non-Compete Agreement was presented to me, I had no choice but to sign it. In response to Defendant's offer of employment, I quit the previous job I had and would be jobless if the form was not signed and returned. I did not have a contract with Defendant, and my employment was solely at-will.

6. Throughout the short course of my employment with Defendant, I performed my work competently and was required to work well in excess of a forty-hour work week. Despite my work product and ethic, I was terminated by Defendant without basis on June 17, 2013, after only six months of employment.

7. While working at Defendant company, I initiated contact with Brandt Engineering to provide services. Although Brandt was on a potential customer list, the list was not generated through company connections, but rather by brokers simply checking the internet or telephone books for trucking companies and entering them into the system. All this information is within the public domain and could be accessed by checking the internet or telephone listings for trucking companies.

8. Through my solicitation, I hired Brandt as a customer for Defendant. However, Defendant wanted me to discontinue my relationship with Brandt because their margins were too low and they were power only runs; whereas, Defendant wanted to work with providers which carried refrigerated and full truck load freight.

9. At the time of my termination, Brandt had several truck runs on the road which I had retained them to make. As a courtesy, I called Brandt to advise them that I was no longer working with Defendant and I would not be available to assist them on those runs. At the time I made that contact, I had no employment contract or relationship with Defendant.

10. Brandt expressed its desire to continue working with me on June 17, 2013. Four weeks later I followed up with Brandt. At that time they expressed a deep disdain for the quality of service being provided by Defendant, and had decided to cease business with Defendant. At that time I created JF Progressions Incorporated and, on August 1, 2013, entered into a contract with Brandt to provide qualified carriers, manage logistics, provide support, and handle claims and documentation.

11. All information that I obtained in order to be of service to Brandt, was received solely from Brandt. There was nothing unique that I learned from my training with Defendant. On information and belief, the same business approach that Defendants uses is used by most other freight forwarding companies.

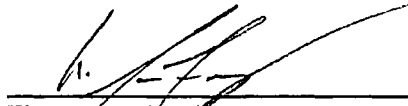
12. Brandt does not compete with Defendant. Brandt is an engineering company which manufactures construction piping. They are not a freight forwarding enterprise. Brandt does transport some of its own products, but more often it employs independent carriers to deliver the materials. My function with Brandt is to locate these carriers solely on behalf of Brandt.

13. After learning of my association with Brandt, Defendant threatened me with litigation if I did not immediately discontinue my relationship with Brandt because it violated the Non-Compete Agreement. On September 23, 2013, I filed a Complaint requesting the Court declare the Non-Compete Agreement unenforceable and to award me unpaid overtime.

14. In retaliation, on October 18, 2013, Defendant filed a separate suit in the Court of Common Pleas of Clermont County, Ohio, against Brandt, alleging in part that Brandt interfered in Defendant's business relationships and caused me to breach the Non-Compete Agreement.

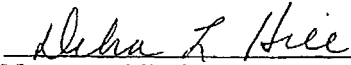
15. As a result of Defendant's malicious conduct in bringing a lawsuit against Brandt, Brandt has terminated its working relationship with me until the Ohio case is resolved. Because of Defendant's actions in interfering with my contract with Brandt, I now have no job and no income.

FURTHER DEPONENT SAYETH NOT.



Thomas Joshua Fay

SWORN to before me this
20th day of December, 2013



Notary Public for South Carolina
My commission expires: 9-8-2020

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-5579

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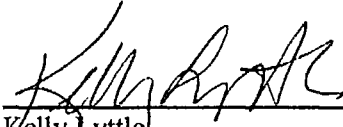
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1. I am the General Counsel for The Brandt Companies, LLC (Brandt). I am over 18 and am competent to testify to the matters herein.

3. Brandt began working with Joshua Fay, the Plaintiff in this action, as an independent contractor to accommodate Brandt's Specialty Deliveries. There is nothing about Mr. Fay's job duties that requires the disclosure of confidential information, trade secrets, or any other data which would be unique to a freight forwarding business such as Total Quality

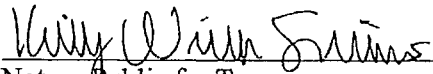
Logistics, Inc. Furthermore, during the course of Brandt's contractual relationship with Mr. Fay,
it has neither requested nor received any such information.

FURTHER DEPONENT SAYETH NOT.



Kelly Lyttle

SWORN to before me this
17th day of December, 2013



Notary Public for Texas
My commission expires: 01-23-2017



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Joshua Fay,)
Plaintiff,)
vs.)
Total Quality Logistics, LLC,)
Defendant,)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-79

**AFFIDAVIT OF HILLARY KOTLARZ
IN SUPPORT OF TOTAL QUALITY
LOGISTICS, LLC's
MOTION FOR SUMMARY JUDGMENT**

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JULIAN R. HARRIS
CLERK OF COURT

Personally appeared before me the undersigned Hillary Kotlarz who, after first being duly sworn, deposes and says as follows:

1. My name is Hillary Kotlarz. I am 18 years of age or older and am competent to testify as to the facts set forth herein, all of which are within my personal knowledge.

2. I am currently employed as the Group Sales Manager in the Charleston, South Carolina location of Total Quality Logistics, LLC ("TQL").

3. TQL is engaged in the business of providing third-party logistics services by supplying freight brokerage services in every state in the continental United States, Canada, and Mexico.

4. The Plaintiff, Joshua Fay, was formerly employed by TQL as a Logistics Sales Account Executive in training. His employment started on December 10, 2012.

5. As with all our applicants, Mr. Fay was required to sign an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), at the inception of his employment on his first day with TQL.

6. As a Logistics Sales Account Executive, Mr. Fay's job included developing his own "book of business" through the pursuit of new customers and by selling to existing TQL customers. Through this process, he would obtain freight orders from these customers and

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arrange transportation of the freight. His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose.

7. Mr. Fay underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. As part of his training and employment, Mr. Fay had access to TQL's proprietary software system - Load Manager – which contained much of the above information and also contained marketing and business strategy for TQL's sales employees.

8. Before he was employed by TQL, Mr. Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. Before he was hired, Mr. Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. In fact, at the time of his hire Mr. Fay was unemployed having previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry.

9. TQL was actively prospecting the Brandt Companies ("Brandt") as a customer before it hired Mr. Fay. TQL's Load Manager is a massive database constructed over many years with massive amounts of information on customers and prospects and numerous algorithms and metrics to best appeal to each particular customer and to assist with efficiencies in moving customers' freight. Mr. Fay was specifically instructed how to target Brandt and how to sell

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himself to that customer. To this end, Mr. Fay met with a sales training specialist to help craft a tailored approach to help develop his "book of business" which included targeting Brandt.

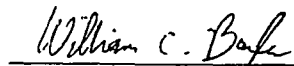
10. Mr. Fay's employment ended June 17, 2013. A few weeks after, we learned that Brandt had begun doing business with a competing business Mr. Fay established, JF Progressions, Incorporated.

FURTHER AFFIANT SAYETH NOT.


Hillary Kotlarz

Sworn to and subscribed before me

this 21st day of January, 2014.

 (L.S.)
Notary Public for the State of South Carolina
My Commission Expires: 04/30/2013 ^{WAD}

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JULIE J. ANTHONY
CLERK OF COURT

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Joshua Fay,

Plaintiff,

vs.

Total Quality Logistics, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-557

**AFFIDAVIT OF ANNA LONGAR/WOLF
IN SUPPORT OF TOTAL QUALITY
LOGISTICS, LLC's
MOTION FOR SUMMARY JUDGMENT**

Personally appeared before me the undersigned Anna Longar, formerly Anna Wolf, who, after first being duly sworn, deposes and says as follows:

1. My maiden name was Anna Wolf. I have recently married and now go by Anna Longar. I am 18 years of age or older and am competent to testify as to the facts set forth herein, all of which are within my personal knowledge.

2. I am currently employed as the National Recruitment Team Lead for the Defendant in this lawsuit, Total Quality Logistics, LLC ("TQL").

3. The Plaintiff, Joshua Fay, was formerly employed by TQL as a Logistics Sales Account Executive.

4. I extended the offer of employment in writing to Josh Fay in an email dated November 20, 2012. A copy of the body of that email is attached to this affidavit as Exhibit A. The email was sent to the email address Mr. Fay had provided to TQL as part of his employment application.

5. In addition to describing Mr. Fay's salary and benefits, the offer of employment also informed him that it was contingent on passing a drug screen, a completed background check, satisfactory references, and his ability to provide proper documentation for work authorization within the United States.

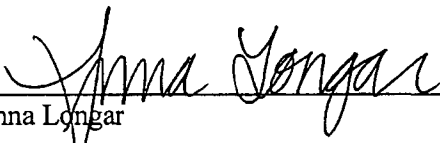
ROA 000190

6. Also, the offer of employment specifically informed Mr. Fay that: "[y]ou are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer."

7. It is standard procedure to condition offers of employment with TQL on a candidate's willingness to enter into the non-compete/non-disclosure agreement on their first day of employment.

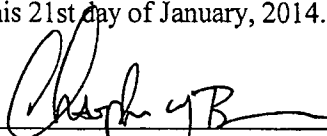
8. As set forth in the email, if Mr. Fay accepted the offer of employment, his first day would be Monday, December 10th, 2012, which was twenty days thereafter.

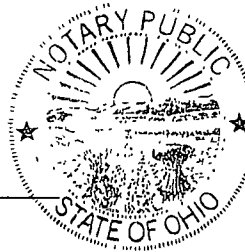
FURTHER AFFIANT SAYETH NOT.


Anna Longar

Sworn to and subscribed before me

this 21st day of January, 2014.


Notary Public for the State of OHIO
My Commission Expires: D/N/A



CHRISTOPHER M. BROWN, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date.
Section 147.03 O. R. C.

ROA 000191

Print messages**Email**

From Anna Longar
To Thomas Fay
Date 11/20/2012 9:41 AM
Subject TQL Offer of Employment

Josh Fay
1439 Swamp Fox Ln
Charleston, SC 29412

Dear Josh,

Congratulations! We are thrilled you have accepted our offer for the position of Logistics Sales Account Executive. Your salary will be \$35,000 per year. You will be paid bi-weekly and can elect to have direct deposit.

You are eligible for benefits with TQL beginning the first of the month following the completion of thirty (30) days of employment. TQL offers Health, Dental, Life Insurance/AD&D, Voluntary Life, Short Term and Long Term Disability along with 401(k) and Paid Vacation. Please click on this link to access information regarding TQL benefits, a company overview and your first day activities: [http://job1.tql.com/Portals/0/site_pages/newhires/Benefits%20Summary%20\(Web\).pdf](http://job1.tql.com/Portals/0/site_pages/newhires/Benefits%20Summary%20(Web).pdf)

Proper documentation to verify your identity as well as work authorization in the United States is required. You MUST bring this documentation on your first day. A list of examples of proper documentation is provided at the link mentioned above.

Please note that this offer of employment is contingent upon passing a drug screen. This drug screen must be completed as soon as possible after your official acceptance. Additionally, this offer is contingent upon a completed background check, satisfactory references and your ability to provide proper documentation for work authorization within the United States. You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer.

We look forward to you joining our TQL team on Monday, December 10th, 2012. If you should have any questions, please contact Anna at 513-831-2600 EXT 51541.

Sincerely,

Anna Wolf
National Recruitment Team Lead

ROA 000192

<https://tal.icims.com/icims2/servlet/icims2?module=AnnSearchAction&action=printNotes&slot=S...> 1/21/2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joshua Fay,

Plaintiff,

vs.

Total Quality Logistics, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-105579

SUPPLEMENTAL AFFIDAVIT OF
HILLARY KOTLARZ

FILED
2014 FEB 20 AM 11:59
JULIE J. ARMSTRONG
CLERK OF COURT

Personally appeared before me the undersigned Hillary Kotlarz who, after first being duly sworn, deposes and says as follows:

1. My name is Hillary Kotlarz. I am 18 years of age or older and am competent to testify as to the facts set forth herein, all of which are within my personal knowledge.

2. I am currently employed as the Group Sales Manager in the Charleston, South Carolina location of Total Quality Logistics, LLC ("TQL").

3. In my previous affidavit, I pointed out that TQL is engaged in the business of providing third-party logistics by supplying freight brokerage services in every state in the continental United States, Canada, and Mexico.

4. A review of TQL's records related to Mr. Fay's employment shows that he contacted customers and prospects to place loads in the following cities in the Continental United States, Hawaii, Puerto Rico, and Canada: Beaverlodge, AB; Calgary, AB; Edmonton, AB; Berry, AL; Birmingham, AL; Brundidge, AL; Cherokee, AL; Dolomite, AL; Saraland, AL; Benton, AR; Conway, AR; Fayetteville, AR; North Little Rock, AR; Pine Bluff, AR; Gilbert, AZ; Mesa, AZ; Nogales, AZ; Phoenix, AZ; Rio Rico, AZ; Tolleson, AZ; Armstrong, BC; Chilliwack, BC; Coldstream, BC; Delta, BC; Langley, BC; Pitt Meadows, BC; Richmond, BC; Telkwa, BC; Vancouver, BC; Victoria, BC; Anaheim, CA; Arcadia, CA; Arcata, CA; Brawley, CA; Buena

ROA 000193

Park, CA; Burlingame, CA; Cerritos, CA; City of Industry, CA; Clovis, CA; Commerce, CA; Compton, CA; Concord, CA; Corona, CA; Corona Del Mar, CA; Crescent City, CA; Fontana, CA; Foothill Ranch, CA; Fremont, CA; Fresno, CA; Gardena, CA; Inglewood, CA; Irvine, CA; King City, CA; Le Grand, CA; Lodi, CA; Los Angeles, CA; Madera, CA; Manteca, CA; Merced, CA; Millbrae, CA; Modesto, CA; Montebello, CA; Mountain View, CA; Murrieta, CA; Napa, CA; North Hollywood, CA; Ontario, CA; Oxnard, CA; Paramount, CA; Pasadena, CA; Pico Rivera, CA; Pittsburg, CA; Pomona, CA; Rancho Cucamonga, CA; Riverside, CA; Rosemead, CA; Salinas, CA; San Diego, CA; San Francisco, CA; San Gabriel, CA; San Jose, CA; San Marcos, CA; San Ramon, CA; Santa Clara, CA; Santa Clarita, CA; Santa Fe Springs, CA; Springville, CA; Stockton, CA; Sunnyvale, CA; Torrance, CA; Union City, CA; Vernon, CA; Visalia, CA; Vista, CA; Littleton, CO; Longmont, CO; Wheat Ridge, CO; Baltic, CT; Bloomfield, CT; Bridgeport, CT; Brookfield, CT; Danbury, CT; Fairfield, CT; Norwalk, CT; Storrs Mansfield, CT; Stratford, CT; Wallingford, CT; Washington, DC; Apopka, FL; Atlantic Beach, FL; Bagdad, FL; Belle Glade, FL; Bunnell, FL; Chipley, FL; Coconut Creek, FL; Dade City, FL; Deland, FL; Delray Beach, FL; Doral, FL; Haines City, FL; Hallandale Beach, FL; Hialeah, FL; Jacksonville, FL; Kendall, FL; Lake Worth, FL; Lakeland, FL; Largo, FL; Lutz, FL; Miami, FL; Miami Beach, FL; Miami Lakes, FL; Naples, FL; Orlando, FL; Palmetto, FL; Plant City, FL; Pompano Beach, FL; Riverview, FL; Rockledge, FL; Ruskin, FL; Saint Petersburg, FL; Sarasota, FL; Southwest Ranches, FL; Stuart, FL; Tallahassee, FL; Tampa, FL; Vero Beach, FL; West Palm Beach, FL; Atlanta, GA; Blackshear, GA; Covington, GA; Decatur, GA; Fayetteville, GA; Jonesboro, GA; Marietta, GA; Royston, GA; Sandersville, GA; Stockbridge, GA; Stone Mountain, GA; Tifton, GA; Toccoa, GA; Wrens, GA; Honolulu, HI; Altoona, IA; Bancroft, IA; Fredericksburg, IA; Mason City, IA; Sioux City, IA; Wall Lake, IA;

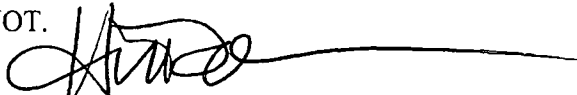
Boise, ID; Caldwell, ID; Meridian, ID; Middleton, ID; Bellwood, IL; Bolingbrook, IL; Chicago, IL; Cicero, IL; Dixon, IL; Franklin Park, IL; Hoffman, IL; Hoffman Est, IL; Itasca, IL; Lake Bluff, IL; Lansing, IL; Lemont, IL; Lisle, IL; Mokena, IL; Naperville, IL; Niles, IL; North Aurora, IL; Oak Brook, IL; Princeville, IL; Rantoul, IL; Rockford, IL; Salem, IL; Schiller Park, IL; Waukegan, IL; Willowbrook, IL; Dubois, IN; Evansville, IN; Fort Wayne, IN; Indianapolis, IN; Richmond, IN; Lenexa, KS; Covington, KY; Henderson, KY; Louisville, KY; Harahan, LA; Many, LA; New Orleans, LA; Thibodaux, LA; Beverly, MA; Boston, MA; Brookfield, MA; Buzzards Bay, MA; Chicopee, MA; Dedham, MA; East Walpole, MA; Haverhill, MA; Hyde Park, MA; Malden, MA; Mansfield, MA; Nahant, MA; Oxford, MA; Peabody, MA; Worcester, MA; Cordova, MD; Fulton, MD; Germantown, MD; Hyattsville, MD; Owings Mills, MD; Parsonsburg, MD; Reisterstown, MD; Salisbury, MD; Silver Spring, MD; Belfast, ME; Algonac, MI; Beaverton, MI; Brighton, MI; Coldwater, MI; Detroit, MI; Farmington Hills, MI; Flint, MI; Lawrence, MI; Lincoln Park, MI; Madison Heights, MI; Marysville, MI; Rochester Hills, MI; Roseville, MI; Saint Clair Shores, MI; Warren, MI; Chatfield, MN; Circle Pines, MN; Gaylord, MN; Lakeville, MN; Litchfield, MN; Minneapolis, MN; Monticello, MN; Morris, MN; Concordia, MO; Joplin, MO; Kansas City, MO; Marshall, MO; Mexico, MO; Saint Louis, MO; Springfield, MO; Houston, MS; Petal, MS; Robinsonville, MS; Tupelo, MS; Billings, MT; Bozeman, MT; Missoula, MT; Polson, MT; Woodstock, NB; Burlington, NC; Castalia, NC; Garner, NC; Hendersonville, NC; Lowland, NC; Morganton, NC; Valdese, NC; Norfolk, NE; Manchester, NH; Newmarket, NH; Wentworth, NH; Atlantic City, NJ; Berlin, NJ; Bordentown, NJ; Budd Lake, NJ; Carlstadt, NJ; Clifton, NJ; East Brunswick, NJ; Egg Harbor Township, NJ; Freehold, NJ; Howell, NJ; Ledgewood, NJ; Livingston, NJ; Matawan, NJ; Maywood, NJ; North Haledon, NJ; Parsippany, NJ; Paterson, NJ; Phillipsburg, NJ; Ramsey, NJ; Rockleigh, NJ;

Roseland, NJ; Somerset, NJ; Toms River, NJ; Trenton, NJ; Union, NJ; West Berlin, NJ;
 Westwood, NJ; Albuquerque, NM; Goffs, NS; Halifax, NS; Lake Charlotte, NS; Sparks, NV;
 Bronx, NY; Brooklyn, NY; Buffalo, NY; Canal Street, NY; Cheektowaga, NY; Commack, NY;
 Fairport, NY; Farmingdale, NY; Geneva, NY; Hampton Bays, NY; Lindenhurst, NY; Maspeth,
 NY; New York, NY; Patterson, NY; Port Jefferson Station, NY; South Glens Falls, NY; Water
 Mill, NY; Watertown, NY; Yonkers, NY; Avon, OH; Broadview Heights, OH; Centerville, OH;
 Cincinnati, OH; Columbus, OH; Lakewood, OH; Marion, OH; Milford, OH; Newark, OH;
 Racine, OH; Solon, OH; Strongsville, OH; Toronto, OH; Van Wert, OH; Warren, OH;
 Youngstown, OH; Durant, OK; Enid, OK; Oklahoma City, OK; Tulsa, OK; Brampton, ON;
 Burlington, ON; Cambridge, ON; Dryden, ON; Mississauga, ON; Queensville, ON;
 Scarborough, ON; St Mary's, ON; Toronto, ON; Vineland Station, ON; Winchester, ON;
 Albany, OR; Beaverton, OR; Central Point, OR; Eugene, OR; Hubbard, OR; McMinnville, OR;
 Portland, OR; Tangent, OR; Camp Hill, PA; Clarks Mills, PA; Delmont, PA; East Earl, PA; Erie,
 PA; Kittanning, PA; Lansdale, PA; New Castle, PA; New Holland, PA; Pittsburgh, PA; Pittston,
 PA; Reading, PA; Saxonburg, PA; Springdale, PA; Warren, PA; Warrendale, PA; Wynnewood,
 PA; San Juan, PR; Longueuil, QC; Montreal, QC; Saint-Laurent, QC; Fort Mill, SC; Hartsville,
 SC; Lexington, SC; Lydia, SC; Spartanburg, SC; Sioux Falls, SD; Knoxville, TN; Lebanon, TN;
 Memphis, TN; Nashville, TN; Amarillo, TX; Angleton, TX; Austin, TX; Brenham, TX; Canyon,
 TX; Carrollton, TX; Conroe, TX; Corpus Christi, TX; Daingerfield, TX; Dallas, TX; El Paso,
 TX; Fort Worth, TX; Garland, TX; Hidalgo, TX; Houston, TX; Longview, TX; McAllen, TX;
 New Braunfels, TX; Richardson, TX; San Antonio, TX; Sanger, TX; Schertz, TX; Seadrift, TX;
 South Houston, TX; Stafford, TX; Sugar Land, TX; Texas City, TX; Vernon, TX; Draper, UT;
 Sandy, UT; Alexandria, VA; Burgess, VA; Chesapeake, VA; Exmore, VA; Martinsville, VA;

Newport News, VA; Roanoke, VA; Virginia Beach, VA; Barre, VT; Williston, VT; Bellingham, WA; Issaquah, WA; Moses Lake, WA; Othello, WA; Seattle, WA; Spokane Valley, WA; Westport, WA; Allouez, WI; Appleton, WI; Boyceville, WI; Eden, WI; Franksville, WI; Knowles, WI; Lisbon, WI; Marathon, WI; Middleton, WI; Milwaukee, WI; Nekoosa, WI; Oak Creek, WI; Plainfield, WI; Racine, WI; Superior, WI; Turtle Lake, WI; Wausau, WI; Bluefield, WV.

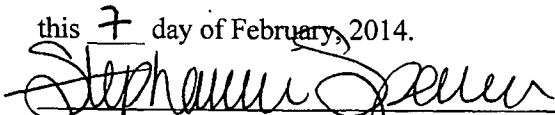
5. Thus, TQL's records show that the Plaintiff contacted customers and prospects located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico.

FURTHER AFFIANT SAYETH NOT.

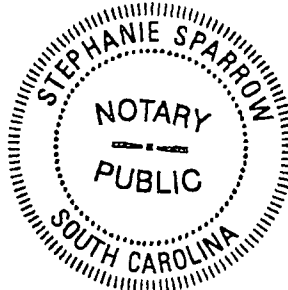

Hillary Kotlarz

Sworn to and subscribed before me

this 7 day of February, 2014.

 (L.S.)
Notary Public for the State of South Carolina
My Commission Expires: _____

My Commission Expires
May 17, 2023



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joshua Fay,

Plaintiff,

vs.

Total Quality Logistics, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-10-5579

SECOND SUPPLEMENTAL AFFIDAVIT
OF HILLARY KOTLARZ

FILED
2014 JUN -3 PM 3:04
JUL 1 2014
CLERK OF COURT
BY [Signature]

Personally appeared before me the undersigned Hillary Kotlarz who, after first being duly sworn, deposes and says as follows:

1. My name is Hillary Kotlarz. I am 18 years of age or older and am competent to testify as to the facts set forth herein, all of which are within my personal knowledge.

2. I am currently employed as the Group Sales Manager in the Charleston, South Carolina location of Total Quality Logistics, LLC ("TQL").

3. In my previous affidavit, I pointed out that a review of TQL's records related to Mr. Fay's employment shows that he contacted customers and prospects to place loads located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico.

4. Fay's argument that his noncompete prevents him from working in any capacity in the intermodal transportation industry is overstated: his noncompete permits him to hold several positions, including, by way of example, the following jobs: dispatcher for a truck company, driver for a truck company, carrier compliance coordinator, safety compliance officer with a motor carrier, carrier coordinator with a motor carrier, logistics planner for any company other than a freight broker, freight broker for an ocean or air freight company, freight broker for

ROA 000198

a non-vessel operating common carrier, barge or intermodal freight company, customs broker or international freight broker, produce broker, lumber broker, and an alloy broker.

5. Fay's argument, that under the covenant restricting the disclosure of trade secrets and confidential information, any information that Fay received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the public domain or had been obtained by TQL from another competitive business, also overstates the effect of the Agreement. As an employee of TQL, Fay learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigerated unit during transit; how to locate flag cars and permits for a motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain periods of the year (e.g., produce, landscaping, building materials); where

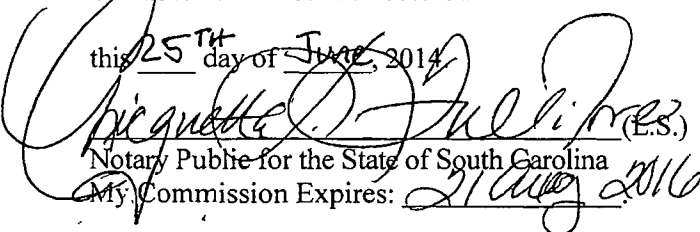
products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed--
this will help brokers understand when truck costs and availability will "tighten up" because of
increased demand and how to obtain backhauls for motor carriers and how to price them.

FURTHER AFFIANT SAYETH NOT.


Hillary Kotlarz

Sworn to and subscribed before me

this 25TH day of June, 2014


Notary Public for the State of South Carolina

My Commission Expires: 21 Aug 2016

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2013-CP-10-05579

JOSHUA FAY,	)	
	)	
Plaintiff,	)	TRANSCRIPT OF RECORD
	)	
-vs-	)	January 31, 2014
	)	
TOTAL QUALITY	)	
LOGISTICS, LLC,	)	Charleston, South Carolina
	)	
Defendant.	)	

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Alice Paylor, Esquire
Attorney for the Plaintiff

Peter Rutledge, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

ROA 000201

1 (January 31, 2014.)

2 THE COURT: All right. Is everybody ready?

3 MS. PAYLOR: Yes, Your Honor.

4 MR. RUTLEDGE: Yes, Your Honor.

5 THE COURT: This is Fay versus Total Quality
6 Logistics, and I appear to have competing motions for
7 summary judgment.

8 MS. PAYLOR: Yes.

9 MR. RUTLEDGE: That's correct, Your Honor.

10 THE COURT: So what's it going to be?
11 Summary judgment means no discovery needs to be done, but
12 I was reading through some of the stuff you gave me, and
13 I've got questions as to maybe what is going on
14 factually, but maybe you can alleviate my concern about
15 that.

16 So who filed first? Who does it make sense
17 to go first?

18 MS. PAYLOR: I filed first.

19 THE COURT: Okay.

20 MS. PAYLOR: Thank you, Your Honor.

21 I represent Joshua Fay, who is here with me
22 today, and he went to work for Total Quality Logistics,
23 which calls itself TQL, in December of 2012. And TQL --
24 I looked on the Internet before I wrote my notes, and
25 it's a truckload brake brokerage firm. It's based in

ROA 000202

1 Ohio, but it has an office here in Charleston.

2 Mr. Fay came to work here in December of
3 2012. He worked about 50 hours a week until he was
4 terminated in June of 2013.

5 He has two causes of action, Your Honor,
6 which are not subject to the motion for summary judgment,
7 and that would be the claim to eliminate overtime as well
8 as adherence to the contract. We're just going forward
9 on the declaratory judgment cause of action which has to
10 do with the noncompete and the confidentiality
11 agreement --

12 THE COURT: All right.

13 MS. PAYLOR: -- in this, today. And I
14 understand TQL -- I also believe we're entitled to
15 summary judgment as to all of TQL's counterclaims. When
16 Mr. Fay went to -- he accepted the job, and then on
17 November 20th, he received the e-mail which was attached
18 to one of TQL's affidavits that said, Thank you for
19 accepting our job.

20 And in that e-mail, which he got, as he says
21 in his affidavit, after he had quit his other job, they
22 first mentioned a noncompete.

23 He actually ended up going to work on
24 December 20th, and several hours after being there, they
25 gave him the actual noncompete, and that was the first

ROA 000203

1 time that he had ever seen it. He didn't think he had
2 any option. He had already quit his other job and that
3 was where he was. He signed the noncompete.

4 Our motion for summary judgment has many
5 different elements, each of which, we believe, entitles
6 Mr. Fay to summary judgment. When you look at
7 noncompetes, the South Carolina courts are very clear
8 that they are strictly construed against the employer,
9 and if an employer does not have reasonable restrictions,
10 then the entire agreement is not valid. South Carolina
11 does not allow blue pencil.

12 Now, in the noncompete, there is a choice of
13 law, and in there it says Ohio law applies, so the first
14 issue is which law applies?

15 South Carolina law is very clear: In the
16 Stonhard, Inc. vs. Carolina Flooring Specialists case,
17 the South Carolina Supreme Court stated terms of a
18 noncompete agreement may be construed according to the
19 law of another state, but if the resulting agreement is
20 invalid as a matter of law or contrary to public policy
21 in South Carolina, our Courts will not enforce the
22 agreement.

23 In that case, the Supreme Court held that
24 when a noncompete could be blue pencilled under the law
25 of another state in order to make it valid, that

ROA 000204

1 noncompete is not valid in South Carolina because our
2 courts do not allow agreements to be blue pencilled.
3 Blue pencilling an agreement is looking at it and saying,
4 You have an overly broad restriction, but we can cut it
5 back and make it reasonable.

6 South Carolina does not allow that, and they
7 find that when an employer gives out an unreasonable
8 agreement that it's invalid in its entirety.

9 There are numerous cases on that fact, Your
10 Honor. TQL in their brief argued that Ohio Courts have
11 validated TQL's standard agreement, and they cite two
12 trial court opinions, but neither of those establish that
13 the TQL agreement here is valid as a matter of law.

14 And, instead, if you look at the federal case
15 that they cite, I believe that that case proves that
16 agreement, which had to be blue pencilled in that case in
17 order to make it reasonable, is invalid as a matter of
18 law and contrary to the public policy in South Carolina.

19 The second case that they attached was a
20 motion for a temporary restraining order where the
21 defendant, who was the employee, did not even appear
22 although he was given notice, but, by all standards, it
23 was an ex parte motion for a temporary restraining order
24 because the defendant presented no evidence whatsoever,
25 and they got their temporary restraining order.

ROA 000205

1 There is also no evidence that the agreement
2 is the same. There's no affidavit saying that it's the
3 same, and if you look at the agreement which has been
4 attached to numerous documents, at the bottom left-hand
5 corner, it has the initials SC on it. I think it means
6 it's a South Carolina version of their agreement. I
7 could be wrong, but I don't see any other reason for
8 having that down there.

9 But I do know that the language regarding
10 business is different from what was stated in the
11 DeAngelo vs. TQL case that they attached to their brief.
12 Neither of those cases, by the way, make any finding that
13 the agreement was enforceable. They were both before the
14 Court on motions for temporary restraining orders, and,
15 as I said earlier, in the federal court case, the Court
16 found the noncompete restriction was overly broad in blue
17 pencil. That's not allowed in South Carolina, and so
18 that agreement was invalid in South Carolina and would
19 not be enforceable here.

20 This Court must look at this agreement, and
21 if it is not valid as a matter of law and is contrary to
22 the public policy of South Carolina, it must find that
23 the agreement was not enforceable, and Mr. Fay is
24 entitled to summary judgment on its declaratory judgment
25 action.

ROA 000206

1 Now, if you look at the agreement, it's
2 entitled Total Quality Logistics, LLC, South Carolina.
3 Employee noncompete confidentiality and nonsolicitation
4 agreement.

5 First, there have been a lot of cases on
6 consideration for a noncompete. Mr. Fay did receive an
7 e-mail that one of the affiants attached to her
8 affidavit, but that was after he had accepted TQL's,
9 offer and, as he states in his affidavit, after he had
10 already quit his previously job. So he showed up and
11 they gave it to him, and he really had no choice other
12 than to sign it and go to work. There was no
13 consideration given there. He had accepted the job over
14 a month earlier.

15 In the Poole vs. Incentives Unlimited case,
16 which we've cited in our brief, the South Carolina
17 Supreme Court held a covenant passes the threshold
18 validity test when it is exchanged for a promise of
19 initial employment.

20 THE COURT: Didn't that initial e-mail,
21 though, say you're going to have to sign a noncompete
22 your first day before you start?

23 MS. PAYLOR: It did say that. It didn't give
24 him the actual agreement so he could see it and be able
25 to weigh whether or not that was something he wanted to

ROA 000207

1 do; plus, it was after they had already made an offer and
2 he had quit his other job.

3 They had never mentioned a noncompete up
4 until that time, so he was already in a situation where
5 he was going to take the job. There was no consideration
6 given for the agreement because he had already accepted
7 it long before.

8 In addition, Your Honor, to the failure of
9 consideration, the agreement is overbroad when
10 considering TQL's interest. The agreement was not
11 enforceable because it violates the public policy of
12 South Carolina.

13 If you go to the agreement and look at
14 paragraph number four, it's entitled confidential
15 agreement, TQL's use only, and it says: Unless employee
16 has prior written consent from TQL, employee shall not at
17 any time, at any time -- there is no time restriction --
18 during the course of his or her employment by TQL and at
19 all times thereafter use for any purpose, and then it
20 goes through and it says confidential information.

21 TQL defines confidential information as every
22 piece of information given to the employee. This becomes
23 a noncompete, Your Honor, and this was discussed in the
24 case of Carolina Chemical Equipment Company, Inc. vs.
25 Muckenfuss.

ROA 000208

1 It says that because there are no
2 restrictions on geography or time, then it becomes a
3 noncompete, and it's an unreasonable noncompete because
4 there are no restrictions whatsoever.

5 And if you read TQL's memo and the affidavit
6 of Hillary Kotlarz, they say everything that Josh learned
7 while an employee was confidential. So there is no way
8 that Mr. Fay, under this agreement, could ever enter into
9 any employment in this trucking industry.

10 THE COURT: Let me ask you, it seems to me
11 that part of your argument is he's really not in a
12 business that competes against them. He worked for a
13 company that occasionally ships things.

14 MS. PAYLOR: That's correct.

15 THE COURT: But he really is not working for
16 even the same kind of company, is that it?

17 MS. PAYLOR: That's also correct. That's
18 another one of our issues. I think there are, like, four
19 or five separate concerns about this agreement that make
20 it unenforceable, but these are on the face of the
21 agreement itself.

22 THE COURT: So is there anything that your
23 client is doing that actually could conceivably violate
24 this? I mean, what is your client doing in his new job
25 that is causing them heartache?

ROA 000209

1 MS. PAYLOR: All he's doing is arranging
2 trucks to take their equipment to places. They're not
3 doing anything --

4 THE COURT: He's just taking -- the company
5 that he works for now, he's just arranging for them to
6 ship their products?

7 MS. PAYLOR: Well, when he was working for
8 them -- they've interfered in his contract, which is
9 another cause of action, but he's working right now. But
10 when he was working, that's all he was doing. He had an
11 exclusive agreement with them. They're an engineering
12 company.

13 They make products and they build things and
14 they have to ship things around to get their equipment
15 different places. He was arranging that for them.

16 THE COURT: All right. But that isn't what
17 he used to do for the defendant. He was -- help me
18 understand what he used to do for them.

19 MS. PAYLOR: What he did for the defendant --
20 he was basically a salesman, was part of it. He would
21 have to find customers who needed trucking services, and
22 then he would arrange with the different carriers to
23 carry what they needed from point A to point B, and it
24 would be a whole variety of different customers using the
25 trucks.

ROA 000210

1 They would get the maximum benefit from the
2 loads and always have them filled up, and that's not what
3 he was doing for the Brandt company. That's not their
4 business. They are not a competing business of TQL.
5 TQL, that's all they do is arrange truckloads.

6 THE COURT: All right. And so they're saying
7 that -- as I understand your argument, they're saying you
8 can't do anything that uses our information anywhere in
9 the United States forever.

10 MS. PAYLOR: Yes, sir.

11 THE COURT: Okay.

12 MS. PAYLOR: And that's what the face of the
13 agreement says, because if you look at paragraph six,
14 presumption regarding confidential information, the
15 agreement says, Employee agrees that employee's engaging
16 in an employment relationship with a competing business
17 in a position similar to employee's position at TQL or in
18 any other position in which the knowledge or use of TQL's
19 confidential information would be beneficial would
20 necessarily and inevitably result in employee revealing,
21 basing judgments and decisions upon, or otherwise using
22 TQL's confidential information to unfairly compete with
23 TQL.

24 So they're basically saying everything that
25 he learned during his short tenure of six months was

ROA 000211

1 confidential, so whether or not you can find it on the
2 Internet doesn't matter, and that's basically -- I mean,
3 what he learned was general information about trucking
4 and carriers and things like that.

5 In its memo, TQL argues that there's only a
6 one-year restriction on competition, but it states that
7 everything Fay knows about the motor carrier business he
8 learned from TQL and that he is barred under the
9 confidentiality agreement from working for a competitor
10 or anybody who uses the services of a motor carrier.

11 That provision has no time or geographical
12 restrictions. Confidentiality provision is a noncompete
13 because it prevents him from working in this industry.
14 It is way outside of what South Carolina allows because
15 it has no time restrictions and no geographical
16 restrictions. It's unlimited in time and territory.

17 There's a line of cases that says if the
18 noncompete says you cannot solicit current customers, and
19 that's the basic, you don't have to have a geographical
20 restriction, but that's not what this says. This says
21 everything: Basically, you can't do anything in the
22 entire country having to do with the motor carrier
23 business.

24 And there was another case that Judge Duffy
25 across the street held that a confidentiality provision

ROA 000212

1 was not valid because it did not meet the noncompete
2 requirements for it to be valid. There's another problem
3 with this noncompete, Your Honor. When you do look at
4 the noncompete provision, its purported application is
5 nationwide.

6 Under a South Carolina case, Team 1A vs.
7 Lucas, our Court of Appeals held that a nationwide
8 territorial restriction was, on its face, overly broad.
9 TQL cites to another case, Wolfe vs. Colonial Life and
10 Accident Insurance Company, for the fact that it can be
11 nationwide, but in that case, they said you can have a
12 nationwide application if you have customers throughout
13 the nation, but your limitation or restriction in the
14 noncompete has to be to your customers, and that's what
15 it was in that Wolfe case.

16 The Wolfe case didn't say you can't go out
17 and work for an insurance company anywhere in the United
18 States. What it said was you can't contact the existing
19 customers who are located throughout the United States,
20 and that was upheld.

21 This says you can't work for a trucking
22 company anywhere in the United States. That was another
23 reason why this agreement is overly broad and is not
24 enforceable in South Carolina.

25 Your Honor, for all of those reasons, any one

ROA 000213

1 of them is sufficient for you to find that his agreement
2 is invalid and not enforceable against Mr. Fay, and we
3 would ask that we're entitled to summary judgment on the
4 declaratory judgment action having to do with it's not
5 being enforceable, both for their claim for breach of
6 contract and also their breach of confidentiality
7 provision because that, in itself, is a noncompete.

8 They have one other counterclaim, which is
9 for conversion, misappropriation of proprietary
10 information in violation of Ohio and the South Carolina
11 Trade Secrets Act. I don't see how the Ohio Trade
12 Secrets Act applies, Your Honor. He was an employee at
13 will in the State of South Carolina, and although this
14 says Ohio law applied to this contract, it doesn't say
15 that the Ohio Trade Secrets Act applies, so I think we're
16 dealing solely with the South Carolina Trade Secrets Act.

17 The information by the trucking industry, by
18 Mr. Fay during his short tenure with TQL, is not a trade
19 secret. It was readily available on the Internet from
20 other trucking companies. If you look at the agreement
21 for what TQL considers to be confidential, it's
22 everything that he learned. Whether he learned it from
23 going to the Internet while he was working, which is
24 primarily what he did, it doesn't matter. It was all
25 confidential and proprietary. You got to have more than

ROA 000214

1 that to have a trade secret.

2 The act, South Carolina Trade Secrets Act,
3 defines trade secrets as: Information including, but not
4 limited to, a formula, pattern, compilation, program,
5 device, method, technique, product, system or process,
6 design, prototype, procedure, or code.

7 None of that is present in this case, Judge.
8 There's nothing that fits that definition based on just
9 information he was provided. TQL's argument is that
10 everything he learned about the trucking business he
11 learned from TQL, so it was proprietary and confidential.

12 THE COURT: The company he went to work for
13 was an engineering company that just contracted to ship
14 its products through freight companies?

15 MS. PAYLOR: Yes, but what they did was they
16 sued that company in Ohio, so that company quit doing
17 business with Mr. Fay in August.

18 THE COURT: What do you mean, quit? They
19 fired him? He was an employee?

20 MS. PAYLOR: He was an independent
21 contractor. He was not an employee, but they told him
22 they could not do any business with him as long as they
23 were in litigation with TQL, and that is still pending.

24 They allegedly had set it up. They
25 contacted an attorney today for Brandt, and she said

ROA 000215

1 nothing has been finalized.

2 THE COURT: That is a little bit different
3 than saying he was an employee whose job was to find
4 their product to ship. He was an independent contractor.

5 MS. PAYLOR: That's correct.

6 THE COURT: Basically, that was his little
7 business, was acting as a little freight company.

8 MS. PAYLOR: Basically. That's correct, yes,
9 sir, Yes, sir.

10 THE COURT: Okay.

11 MS. PAYLOR: But they sued Brandt saying they
12 were a competing business, and I don't know what happened
13 to that.

14 In any event, Your Honor, we believe that
15 Mr. Fay is entitled to summary judgment as to the breach,
16 as to the allegation that he has violated the South
17 Carolina Trade Secrets Act because there is no evidence,
18 and nothing has been put forth, of any secret or
19 proprietary information that he took with him, and we
20 have an affidavit from Brandt that we submitted saying he
21 had not provided any confidential or proprietary
22 information to them.

23 So, Your Honor, just to summarize, we believe
24 Mr. Fay is entitled to summary judgment as to all of
25 TQL's counterclaims, and he is entitled to summary

ROA 000216

1 judgment as to his declaratory judgment action, which
2 would leave remaining Mr. Fay's claims for violation of
3 the Fair Labor Standards Act and intentional interference
4 with a contract claim, both of which he seeks damages.

5 Thank you, Your Honor.

6 THE COURT: All right.

7 MR. RUTLEDGE: May it please the Court: Your
8 Honor, Peter Rutledge.

9 Your Honor, I think if, it's okay with you, I
10 would like to address the points that counsel has made as
11 well as any questions that you have for me.

12 She first started talking about what South
13 Carolina's approach is in the noncompete world with
14 regard to noncompete agreements and twist of law
15 provisions.

16 It's clear from South Carolina law, both from
17 the Standard Register case from '61, more recently the
18 Stonhard case from 2005, that South Carolina will honor
19 its choice of law provision and apply the laws of another
20 state and, if the resulting agreement is valid under that
21 state's law and if the resulting agreement does not
22 offend our public policy, apply the law.

23 This is a noncompete agreement that would be
24 subject to Ohio law. The holding in Stonhard --

25 THE COURT: Well, it's actually a play on

1 words, isn't it? I mean, because the basis of saying
2 that we don't approve of a certain noncompete agreement
3 is because it violates public policy.

4 MR. RUTLEDGE: Your Honor, for years what
5 we've told folks is if you've got a noncompete agreement
6 that you agree applies to the law of Florida or Georgia
7 or somewhere else, it's best -- you'll have a much better
8 outcome if the noncompete satisfies that law, and South
9 Carolina will try to enforce it here.

10 It's unclear exactly what other than that the
11 public policy could mean, but when you read that kind of
12 formulation from other states, you could have an
13 agreement that was satisfying Ohio law but perhaps as
14 applied was a monopoly situation, and South Carolina
15 might not want to do that.

16 But yeah, as a practical matter, I'm arguing
17 to the Court, and my brief certainly is, it satisfies
18 both Ohio law and South Carolina law.

19 But the Stonhard case, when my former partner
20 certified this question to the Supreme Court out of the
21 federal court and they asked the question, What would you
22 do if you were applying the law to a state like New
23 Jersey that does blue pencil agreements? Can you do that
24 and then enforce the agreement here?

25 And just so that we're very technical about

ROA 000218

1 this, blue pencilling is different from what Ohio does.
2 Technically, blue pencilling is if there is an overbroad
3 covenant, if it's divisible from the balance of the
4 agreement, if you strike it and if you can enforce the
5 balance of the agreement, you enforce it.

6 Ohio actually doesn't follow blue pencil
7 rule. Ohio follows the rule of reasonableness. The rule
8 of reasonableness says that if there are overbroad
9 covenants, divisible or not, if, from all the evidence
10 the Court can determine that the parties intended to
11 enter into an agreement, the Court is empowered to
12 effectuate one that is reasonable under the
13 circumstances, and that's what the Court did in the
14 Dangelo case by taking some prohibitive language that
15 included something other than logistics and narrowed it
16 to apply to a person who had the same job as Mr. Fay did.

17 What our Court did, our Supreme Court did in
18 Stonhard, is, it said, yeah, we can blue pencil a
19 noncompete agreement applying the rules of New Jersey,
20 but we've looked. Your noncompete agreement, Mr. Martin,
21 doesn't have a geographic term, and we can't find a
22 single case in New Jersey that has supplied a geographic
23 term out of nothing. So there is nothing to blue pencil.
24 We can't help you.

25 That's what Stonhard did, and I just want to

ROA 000219

1 make sure that's clear.

2 The next point that we discussed is
3 consideration, and I just -- you know, my reading of
4 Mr. Fay's affidavit and my reading of what TQL's ongoing
5 process is, is that after being made a job offer on
6 November the 20th, which made it clear that entering into
7 a noncompete, nonsolicitation, and nondisclosure
8 agreement was going to be a term or condition of his
9 employment, he showed up on the first day and, as I read,
10 about 15 minutes into his first hour of employment he's
11 presented with a noncompete agreement.

12 Now, Poole vs. Incentives Unlimited in 2001
13 finally resolved the question that was left open from
14 Standard Register, Reidman vs. Jarosh, Williams vs.
15 Reidman, and finally answered the question of whether
16 mere continued at will employment would be sufficient
17 consideration to support a noncompete, and the answer was
18 no. A noncompete agreement is supported by consideration
19 if it is entered into at the inception of at will
20 employment.

21 What we know from the Poole case is that that
22 agreement had been entered into three years after the at
23 will employment, so three years is not the onset of at
24 will, and I think that's obvious, but I don't think Poole
25 or any other South Carolina case stands for the

ROA 000220

1 proposition that your first day is not the inception of
2 employment, and I challenge anybody to find that rule
3 under South Carolina law.

4 We borrowed the rule. It was a 1944 case
5 called Kadis vs. Britt from North Carolina, and I'm
6 told -- and I looked a little bit. There are some cases
7 in North Carolina that bring these issues forward, Judge,
8 and say if you enter into the agreement on your first day
9 of employment or shortly thereafter, so long as you knew
10 that was going to be a term and condition of your
11 employment, that's the inception of employment.

12 And, interestingly, Judge, we cited to you in
13 our brief the Basicomputer Corp. case from the Sixth
14 Circuit in 1992 where the Court held, Employee begins
15 work with the understanding that a covenant is a
16 condition of employment. The covenant is adequately
17 supported by consideration even if it is not signed until
18 later.

19 And just to flesh that out, there were three
20 employees that worked for a small computer company that
21 was acquired by a big computer company. They were
22 considering going to work for the big computer company
23 and they were told, yes, you can come work for us, but if
24 you do, you're going to have to sign a noncompete.

25 They did eventually come, and 10 days

ROA 000221

1 later -- not 15 minutes later, but 10 days later -- they
2 signed the agreements. The Sixth Circuit said that's
3 good consideration.

4 I'm not entirely sure that we wouldn't defer
5 to Ohio law on consideration for this agreement, but even
6 if we don't, I'm satisfied that Poole vs. Incentives
7 Unlimited gives us first day of employment is the
8 inception of employment.

9 We also had a little discussion about there
10 not being a time restriction on the confidentiality
11 provision in our agreement, and, frankly, combined with
12 what I think is a mischaracterization of the scope of the
13 confidentiality provision, we get this concept that it's
14 essentially a de facto noncompete agreement in
15 perpetuity, okay? It's not.

16 If someone reads it and thinks that it is,
17 then Ohio's rule of reasonableness can easily be used to
18 come up with what would be a reasonable restriction. I'm
19 pretty sure that TQL wants to protect trade secrets and
20 confidential information, not prevent somebody from
21 working, quote, in the trucking industry forever.

22 On the time restriction issue, I can only
23 read Muckenfuss about once a year. It's a hard thing for
24 me to read, but I remember the holding, and what I
25 remember from the holding is if you have a

ROA 000222

1 confidentiality provision that is as broad as I think my
2 opponent is trying to mischaracterize this one, then it
3 has the effect of a noncompete, and then you have to go
4 through a five-part South Carolina test.

5 Before, you didn't have to worry about that.
6 The consideration was the exchange of information. It
7 was confidential information. You had to protect it.
8 The General Assembly -- and I don't have the cite for
9 Your Honor because I didn't know it was going to part of
10 today's argument -- but the General Assembly of South
11 Carolina actually amended our Trade Secret Act
12 specifically because of Muckenfuss and said it's okay if
13 you don't have a time limit on a reasonable restriction
14 for confidential information. It's in that title.

15 If I had known we were going to do this
16 today, I would have brought that cite for you. But
17 that's why the General Assembly did that, because if it's
18 truly confidential, then it should remain so, so long as
19 it is confidential. That's not a problem.

20 You know, if you read -- the definition of
21 confidential information is actually in the preamble, one
22 of the preambles, of the agreement, and while it's
23 robust, I would not say it would prevent somebody from
24 using anything and everything they know about trucking in
25 their new position. I think it's an overstatement.

ROA 000223

1 You know, it's operating policies and
2 procedures, computer databases, software, methods,
3 information about customers, potential customers, and
4 motor carriers, and, of course, you have to have a fairly
5 robust definition going into this. But if you read the
6 affidavit of Hillary Kotlarz, what you see is there is a
7 very specific list of the kinds of information about
8 pricing, profits, margins, individualized customer needs.

9 All of that is in their load manager
10 database, all of which he had access to, and is, frankly,
11 the only way at this juncture that he was able to work
12 with the Brandt Companies.

13 The Brandt Companies, let's deal with that
14 one next. You know, here's the way I see this: Mr. Fay
15 was an employee of TQL. He was provided and exposed to
16 all this confidential information. He was taught how to
17 develop a book of business, how to build a load, how to
18 prospect for customers, and to the extent the customers
19 were in the database and we had information on what we
20 knew about them, he was given that information as well,
21 and he was actually taught to sell to the Brandt
22 Companies. That's in Hillary's affidavit.

23 Then, after his termination, however, on the
24 day of his termination, he, I think, admits that he
25 called them, you know: Hey, going somewhere else. Not

ROA 000224

1 going to be here anymore.

2 And I don't know how many times I've told
3 clients solicitation is in the eye of the beholder. Be
4 very careful what you do on the last day, picking up the
5 phone.

6 Sometime thereafter we learned that he's
7 providing, essentially, freight brokering services for
8 the Brandt Companies, not as an employee of Brandt. I
9 mean, for goodness sake, the point is not whether Brandt
10 is a competitor. I don't think anybody has ever said
11 they were. The point is, they are a customer. The point
12 is that JF Progressions, Incorporated, which is Mr. Fay's
13 business, is the competitor in this model. That's
14 something he's not permitted to do in the prohibitive
15 language of his noncompete.

16 Moreover, the prohibitive language of his
17 noncompete is not so broad as you would be led to
18 believe. It simply says, at least for the noncompete
19 part of it, he cannot work in a capacity similar to that
20 in which employees engaged by TQL, or, and this is the
21 alternative, in a capacity in which an employee is in a
22 position to use or benefit from our confidential
23 information.

24 And so the point is that he's not permitted
25 to work for a competing company in a similar capacity.

ROA 000225

1 It's JF Progression in this model. He's also not
2 permitted to solicit business away from TQL for Brandt,
3 and I don't think their motion or their memo even seeks
4 to declare that separate provision somehow unenforceable.

5 I mean, as we know under South Carolina law,
6 a nonsolicitation provision has long since been held to
7 be a reasonable substitute for geography, if there is a
8 problem with geography. I'm not saying there is.

9 We did cite to the Wolfe case for the
10 proposition that there are some circumstances under which
11 a nationwide protection is necessary. And while I will
12 grant you that in the Wolfe case, what was actually at
13 issue was a prohibitive act section that was indexed to
14 existing policyholders: Thou shalt not ask them to
15 surrender their policies; and, two, you can't accept
16 business from accounts that we have for products that are
17 paid forth through payroll deduction.

18 The complaint in that case was exactly the
19 same complaint that Mr. Fay is making, and that is it's
20 too broad. It's nationwide, and what the master said and
21 the Court approved of on appeal was, Well, wait a minute.
22 Just because these accounts happen to be nationwide
23 doesn't make this overbroad. Colonial does business
24 nationwide, and one of the particular arguments in the
25 Dangelo case that was advanced at the preliminary

ROA 000226

1 injunction stage was very similar to that, which was it's
2 too broad because -- it was actually different there.

3 The former employer in that case made the
4 argument that because freight brokering can be done
5 worldwide that it essentially amounted to a worldwide
6 restriction, and the Court said, No, it's really a
7 nationwide restriction, and that's appropriate because
8 TQL does business nationwide.

9 As a practical matter, you can arrange
10 freight between shippers who need goods moved and
11 carriers who have loads and routes ready to go and it
12 doesn't matter where you are. TQL did business -- does
13 business nationwide and in Canada and Mexico, I might
14 add. So, in fact, this geographic scope is more narrow,
15 and I'm not aware at all that Mr. Fay was limited in any
16 geography.

17 I think their job was you build up a
18 business. You find shippers, find carriers for them, and
19 you do it wherever they need it done, so the nationwide
20 protection is appropriate, and the Courts have held that
21 in this case and in South Carolina before.

22 The other argument that we heard from counsel
23 about was the Trade Secrets Act issue. The South
24 Carolina Trade Secrets Act actually permits the very
25 kinds of things that Hillary Kotlarz discusses in her

ROA 000227

1 affidavit as protective trade secrets, provided that it
2 is a method, a process, or a compilation that they derive
3 economic income from because it's not readily known. And
4 this idea that you might go off and find a customer name
5 or a contact here and something there, the idea that that
6 somehow unravels the trade secret protection, that's not
7 the law.

8 The law is that so long as what we're talking
9 about is a bunch of information that someone has compiled
10 and has the benefit of that and then imparts that to you,
11 so long as it's nonpublic information and is the subject
12 of reasonable efforts to guard its secrecy, including
13 entering into these kinds of agreements, it can qualify
14 as a trade secret.

15 We've alleged in paragraph 64 of our
16 counterclaim a robust list of things that we know he had
17 access to and that we believe he had to use or did use or
18 could use with the Brandt Company. This business about
19 the Brandt Company has already gotten a little overstated
20 because it's not as though Mr. Fay has said that the
21 agreement is unenforceable to the extent that I want to
22 go do this for Brandt, he said strike down the entire
23 agreement.

24 This agreement does protect legitimate
25 business interests of TQL because it protects their

ROA 000228

1 customer relationships. It protects their confidential
2 information, and Brandt is just one among very many
3 customers.

4 Judge, if you have any other questions about
5 what you've read or what you have heard, I'll be happy to
6 answer them.

7 THE COURT: All right. Well, I don't have
8 anything right this moment.

9 So you have any reply, Ms. Paylor?

10 MS. PAYLOR: Just briefly, Your Honor.

11 If you look at Stonhard, it basically says --
12 this is a quote: To add and enforce such a term, which
13 is a new term, which is what he's talking about with the
14 blue pencilling, whatever, making it reasonable, to add
15 and enforce such a term requires this Court to bind these
16 parties to a term that does not reflect the parties'
17 original intention, and South Carolina will not do that,
18 and that was a direct quote from that case.

19 The consideration, Your Honor -- this goes
20 back to the inception of employment -- is when the offer
21 and acceptance was made, and that was before November
22 20th. So he didn't go to work until December 17th of
23 2012, so it was a month before that. So it's not -- the
24 consideration also wasn't there, Your Honor.

25 And if you look at the Muckenfuss case, this

ROA 000229

1 confidentiality agreement is exactly what they're talking
2 about in the Muckenfuss case, as being a noncompete, and
3 it doesn't meet any requirements to be a valid
4 noncompete.

5 They talk about the load manager database.
6 He didn't take anything with him. He left with himself,
7 so, basically, what they're saying is, you know, just
8 because he got trained by them, everything he learned,
9 you know, he can't use, and that's impossible.

10 He didn't take the load manager database with
11 him, and there's no claim by them that he did. He didn't
12 take their software, their proprietary software, and
13 there is no claim by them that he did. All they're
14 saying is that he was trained and then he left, and he
15 has confidential information. That cannot be sufficient
16 to --

17 THE COURT: Well, they're saying he went and
18 set up his own little competing business and called on an
19 old client.

20 MS. PAYLOR: Well, if you look at his
21 affidavit, what happened was he called them the day he
22 got fired because he was the one who arranged it and
23 said, I just wanted to let you know I'm no longer with
24 TQL, so if you have any problems, you're going to need to
25 contact someone else.

ROA 000230

1 And they said they were sorry, because they
2 had enjoyed working with him. And they said, If you want
3 to do business with us in the future, let us know.

4 So he did call them back, you know, after he
5 got out and he didn't have any work, and they entered
6 into this arrangement where he did do, just for them,
7 arrange this. So, you know --

8 THE COURT: That was his only client?

9 MS. PAYLOR: That was his only client, and I
10 don't believe -- contractually. It was an exclusive
11 arrangement with them. It was an independent contract
12 where he was their exclusive agent and he didn't work for
13 anyone else.

14 THE COURT: There has got to be more to it
15 than this. I mean, I can't imagine that y'all were
16 losing that much money from one client.

17 MS. PAYLOR: Nobody else will hire him at
18 all. He was making 100 something thousand a year doing
19 that, Your Honor.

20 THE COURT: For one client?

21 MS. PAYLOR: For one client.

22 THE COURT: Maybe there is a lot of business
23 there.

24 MS. PAYLOR: He's been out of work now for
25 six months, so he's got quite a few damages, and that's

ROA 000231

1 our intentional interference with the contract claim.

2 What we're hoping is that we can get
3 declaratory judgment on this so he can go back and start
4 working so he can get clients, or go back and work with
5 Brandt, is what he would like to do. And they had told
6 him that once this was done and cleared up, then they
7 will go back working with him.

8 Thank you, Your Honor.

9 MR. RUTLEDGE: Your Honor, I would just add
10 that particularly in light of the facts that are being
11 presented today that don't necessarily have a foundation
12 for, I think Baughman v. AT&T is a fairly robust
13 precedent that would say that for our conversion,
14 misappropriation, and Trade Secret Act claims, without
15 benefit of discovery, that would be premature. Some or
16 none of this that they're saying may bear out on
17 discovery, but I don't have the benefit of discovery yet,
18 so I would just remind the Court of that.

19 THE COURT: Well, I would agree certainly
20 with you on that. I think the only one that is perhaps
21 appropriate at this time would be whether or not this
22 agreement itself as a matter of law is overbroad, overly
23 restrictive, and violates South Carolina law.

24 I learned something from the argument, so I
25 need to just go back and reread this and these cases.

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1 Again, maybe it was just not close reading on my part.
2 Maybe it was artful drafting on Ms. Paylor's part, but I
3 was of the impression he was not an independent
4 contractor as much as he was going to work as an employee
5 of this Brandt Company, which, seeing as he is an
6 independent contractor, puts it in a different light.

7 So let me think about that, and I'll let
8 y'all know what I decide. Okay?

9 MS. PAYLOR: The agreement stands on its own,
10 no matter what he ends up doing, so it's either valid on
11 its face or it's not valid and unenforceable, so that
12 would be my line, Your Honor.

13 MR. RUTLEDGE: Well, of course, but
14 consideration is a factual issue.

15 THE COURT: Well, the consideration factor
16 doesn't cause me as much problem. I read an e-mail in
17 there that said, Hey, congratulations. You got a job.
18 Start this day. By the way, you're going have to sign a
19 noncompete agreement when you start the job.

20 Now, whether or not it got signed the very
21 first day he showed up or five days later, he knew when
22 he showed up he was going to have to sign the noncompete
23 agreement, and I don't think there is a consideration
24 problem.

25 Mine is which laws to apply, and if it's Ohio

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1 with a hybrid South Carolina, that is a new issue for me
2 to digest, and if it was a straight up South Carolina
3 time restriction, geographic restriction, it might be a
4 little easier to rule for the plaintiff, but I'll think
5 about that.

6 MR. RUTLEDGE: I certainly appreciate your
7 willingness to do so and just ask that you read the
8 Stonhard case very closely.

9 THE COURT: Well, if y'all want to, based on
10 the questions that I've raised, supplement your briefs,
11 how about get them to me a week from today. I'm going to
12 be doing General Sessions in Moncks Corner next week, and
13 I can most assuredly say I'm not going to have any chance
14 to work on it before then, but I would like to try to get
15 some of these things that I got under advisement sooner
16 rather than later.

17 So, if y'all can, by the end of the day next
18 Friday, e-mail a supplemental brief to Caroline, and
19 she'll get it to me.

20 MS. PAYLOR: Thank you, Your Honor.

21 MR. RUTLEDGE: Thank you, Your Honor.

22 - - -

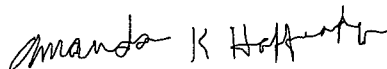
23 (Whereupon, the proceedings were concluded.)

24 - - -
25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 31st of January 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 23, 2014

A handwritten signature in cursive script, appearing to read "Amanda K. Haffenden", is written over a horizontal line.

Circuit Court Reporter

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I N D E X

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* * NO EXHIBITS WERE INTRODUCED * *

ROA 000243

1 Tuesday, July 1, 2014

2 THE COURT: All right. We are back on this Fay vs.
3 Total Quality Logistics. I granted summary judgment
4 earlier and Mr. Fay filed for reconsideration, partial
5 reconsideration, and so I decided to let you all come in
6 and let Ms. Paylor try to convince me I was wrong, and
7 you try to convince me I was right.

8 So, Ms. Paylor, whenever you are ready.

9 MS. PAYLOR: Thank you, Your Honor. I had a little
10 different presentation in mind before I perceived
11 Saturday night.

12 THE COURT: As long as you are not as longwinded as
13 Richard you can do just about whatever you want.

14 MS. PAYLOR: I promise you I will not do that.

15 I received a second supplemental affidavit. This
16 was something that was not filed before the first
17 argument, Your Honor.

18 THE COURT: I'm not sure that I got it.

19 MS. PAYLOR: Well, I got it Saturday night and I
20 believe I got it in the mail on Monday, so I'm assuming
21 it probably got filed up there.

22 Do you have an extra copy we can hand to the Judge?

23 MR. RUTLEDGE: I'll look for it.

24 MS. PAYLOR: Anyway, Your Honor, and I will give
25 you mine but it is the only one I have with me, but it

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1 basically sets forth a bunch of facts that were not
2 before the Court. So when I got this I was a little
3 puzzled and then I said to myself, Well, they must agree
4 there's something wrong with the Judge's order because
5 they are trying to supplement the record.

6 So what I did, Your Honor, was I read through it
7 and in here she, Ms. Kotlarz -- he's going to hand you, I
8 believe, the same thing that I got, Your Honor.

9 I've got this affidavit and she in paragraph four,
10 you'll see, that she says that Fay's arguments that the
11 noncompete prevents him from working in any capacity in
12 the intermodal transportation industry is overstated.
13 Then she gives all of these -- or about, I don't know, 10
14 positions that he could hold under the noncompete.

15 Your Honor, I got an agreement that speaks for
16 itself. So she's now trying to interpret the agreement
17 because I guess there's some concern there. But one of
18 the things she specifically says that he can do and not
19 be in violation of his noncompete is be a logistics
20 planer for any company other than a freight broker.

21 That is precisely the job that Mr. Fay held that
22 they said he was in violation of the noncompete. He was
23 working solely for one company. He had an exclusive
24 contact with them. They are not a freight broker. They
25 are an engineering company and he was arranging their

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1 hauls for them. That was his job.

2 He was doing it through his company, JF
3 Progressions as an LLC, for whatever reason, but it was
4 him doing it and -- or the company doing it, but either
5 one of them, that's what they were doing, Your Honor.

6 So based on this supplemental affidavit I believe
7 you got to rule with my client because that's exactly
8 what he was doing, and at the very least there's now a
9 question of fact as to whether or not he was in violation
10 of the noncompete.

11 She's basically -- the other thing she's doing and
12 then on paragraph five she sets forth all of this
13 information that she says is not protected by the
14 noncompete confidentiality and non solicitation
15 agreement; however, she is ignoring paragraph six of the
16 agreement, Your Honor.

17 Paragraph six says, Presumption regarding
18 confidential information. Employee agrees that employees
19 engaging in an employment relationship with a competing
20 business, which he's not -- well, they say that's what he
21 had, in a position similar to employee's position at TQL
22 or in any other position in which the knowledge or use of
23 TQL's confidential information would be beneficial would
24 necessarily and inevitably result in his revealing TQL's
25 confidential information.

1 Now, Your Honor, when you look at the confidential
2 paragraph, paragraph four, it says, Unless employee has
3 prior written consent from TQL, which the employee did
4 not have, employee shall not at any time during the
5 course of her employment and at all times thereafter,
6 forever.

7 He cannot compete, basically, when you look at
8 paragraph six. He cannot utilize, disclose confidential
9 information.

10 Your Honor, there's a case right on point and, you
11 know, this is real simple. Jean Toal wrote the decision
12 -- I'm sorry, Justice Cureton -- I apologize, the Court
13 of Appeals in 1996 heard Carolina Chemical Equipment
14 Company vs. Daniel Muckinfuss, and that was a case where
15 they held that confidential information --

16 THE COURT: What's the citation? You got a copy?

17 (A document was handed to the Court.)

18 THE COURT: Thank you.

19 MS. PAYLOR: I'm not reading very well, so I'll
20 hand it up to you.

21 That's a case where when you get to the
22 confidential information part, all that had to do with
23 confidential information, and they determine that the
24 confidential information provision was so broad that it
25 amounted to a noncompete. That's what we have here, Your

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1 Honor. This is a noncompete to confidential information.

2 So Ohio law applies, and in Ohio law they could
3 probably blue pencil that because there are no
4 geographical restrictions and there are no time
5 restrictions, but Jean Toal in 2005 in the case of
6 Stonehard vs. Carolina Flooring Specialists said South
7 Carolina law, even if you are applying the law of another
8 state to a noncompete, South Carolina law will not allow
9 you to blue pencil the contract to make it pass.

10 Your Honor, this contract is an invalid noncompete
11 and it must be struck. There's no time restriction,
12 there's no geographical restriction and you can't blue
13 pencil it in South Carolina.

14 The Stonehard case is right on point, and
15 Mr. Rutledge's order that he drafted for you, Your Honor,
16 did not address this argument. So that's why -- that was
17 the reason why I made the motion in the first place, was
18 to bring this to your attention. Because the only way I
19 see that you can grant summary judgment -- deny summary
20 judgment to my client and grant it to TQL is to go
21 against the precedent of the Muckinfuss case and the
22 Stonehard case, Your Honor. They are directly on point
23 and they require that you find that this is an invalid
24 noncompete, and it's all in one agreement, Your Honor, so
25 the whole thing has to get struck down.

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1 So I'm basically here, really, with these two --
2 Ms. Kotlarz is now trying to rewrite the agreement by
3 putting in all of this stuff that she says he can do,
4 which I can tell you is exactly what he is doing so he's
5 not in violation according to her, but she's trying to
6 rewrite the agreement to make it so that it passes
7 muster, but she can't rewrite the agreement, Your Honor.

8 This agreement is not valid under South Carolina
9 law and that's what you have to look to if you are going
10 to blue pencil it. In Ohio this agreement wouldn't be
11 valid either but they would blue pencil it, but Stonehard
12 says you cannot do that.

13 One last issue -- which if you grant my request you
14 wouldn't get to, but you did say that -- you granted, I
15 guess, and this isn't clear so I think whatever happens,
16 if you are still keeping your original ruling then this
17 needs to be clarified.

18 It appears from the order that the Court ruled that
19 Mr. Fay had breached the confidential information
20 provisions even though he denied using or providing any
21 confidential information in his work with Brandt, and so
22 I need some clarification if whether or not you are
23 saying there's no question of fact as to whether or not
24 he violated when he says he didn't, it seems like there
25 would be, and if that should still be before the Court if

ROA 000249

1 you don't grant our motions for summary judgment.

2 And then the last thing, Your Honor, is if you
3 continue with the order the way you have it we would
4 request that you certify the questions so we can go ahead
5 and appeal it because I think that the central question
6 to this whole matter is really one of law, whether or not
7 the noncompete agreement is valid, and so we would also
8 request that, Your Honor.

9 But basically it's because of the overreaching
10 confidentiality provision and their being no restrictions
11 on it, no time, no geography, forever, the agreement is
12 invalid. And under Stonehard, in South Carolina even the
13 law of the state which applies says you can blue pencil
14 you cannot blue pencil in South Carolina, Your Honor.

15 The second is that under Ms. Kotlarz's affidavit
16 Mr. Fay is not even violating their noncompete by what
17 she says that he can do both with the confidential
18 information and with the position that he has. So we
19 would ask -- that's the second basis for granting our
20 motion for summary judgment or at least saying that
21 there's a question of fact, Your Honor.

22 And if you rule that the confidentiality provision
23 is valid and the noncompete is valid we need some
24 guidance on exactly what makes up the summary judgment
25 grant that you had for Mr. Rutledge's client. And last,

ROA 000250

1 if you uphold your prior order we would ask that you
2 certify it to the Supreme Court. Thank you.

3 THE COURT: Okay. What would you like to say?

4 MR. RUTLEDGE: Thank you, Your Honor. I want to
5 make sure that I characterize for the Court what I think
6 Ms. Paylor's argument is about the noncompete. It
7 appears that she argues not that the geographic
8 noncompete expressed in 9(b) is problematic or overbroad
9 or that the non-solicitation clause in 9(b) is
10 unenforceable or that the noninterference clause is a
11 problem. Rather she argues that because our
12 confidentiality provision is so overbroad and likens it
13 to the provision that was discussed in the Muckinfuss
14 case that this Court must construe the confidentiality
15 provisions of the agreement as a de facto noncompete
16 agreement which has to meet the same test.

17 Okay. She achieves that simply by argument of
18 counsel. She argued from the get-go that the
19 confidentiality provision prevented him from using
20 anything he learned with TQL, forever. She argued from
21 the get-go that the confidentiality provision prevented
22 Mr. Fay from holding any job whatsoever in the intermodal
23 transportation industry. These were arguments of counsel
24 unsupported by any facts.

25 Okay. We responded to that in our memo to the

ROA 000251

1 Court, our supplemental memo to the Court in part by
2 demonstrating a list of about 12 or 15 jobs that we
3 concede -- in the intermodal transportation industry that
4 we concede Mr. Fay could do. We responded to argument of
5 counsel also by demonstrating a handful of intermodal
6 transportation concepts that we believe aren't covered by
7 the confidentiality provision because they are not
8 proprietary.

9 Again responding to argument of counsel, in their
10 motion for reconsideration they faulted the order for not
11 having cites to the record for that. So we thought,
12 well, out of an abundance of caution we'll go ahead and
13 supplement the record with Ms. Kotlarz's affidavit.

14 I don't think we needed to. I think if you read
15 the confidentiality provision and you look at what he did
16 and you look at what the information is that we say he
17 could freely use that's all fairly inferable from the
18 papers. It's interesting that, again, Ms. Paylor who is
19 not apparently familiar with this segment of the industry
20 continues to argue things that have no basis in fact.

21 Again, it appears that the plaintiff continues to
22 obscure the importance of who JF Progressions is, that's
23 Mr. Fay's company, and the Brandt Companies. JF
24 Progressions prospectively is doing what TQL does, so
25 that's what we say he cannot do. JF Progressions is the

ROA 000252

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19 not apparently familiar with this segment of the industry
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22 obscure the importance of who JF Progressions is, that's
23 Mr. Fay's company, and the Brandt Companies. JF
24 Progressions prospectively is doing what TQL does, so
25 that's what we say he cannot do. JF Progressions is the

ROA 000252

1 competitor that he set up by himself. The Brandt
2 Companies is the customer.

3 The fact that the Brandt Companies don't engage in
4 logistics or they are not a freight forwarder,
5 irrelevant, in as much as it doesn't weigh in favor of
6 the plaintiff's argument. So Ms. Kotlarz's affidavit
7 does not suggest that what Mr. Fay is doing with his own
8 company is permitted by the agreement, rather to the
9 contrary. Okay. Because JF progressions is the
10 competitor.

11 All right. The one thing I would say again, I said
12 it at the hearing on January 31st, is that the South
13 Carolina Trade Secrets Act, and I don't have the pinpoint
14 and cite in my head but it's in my initial brief,
15 responded to Muckinfuss in as much as it said no
16 agreement protecting the confidentiality of information
17 shall be void for lack of a time provision.

18 And that was the way the General Assembly at least
19 codified in protecting, so long as information is
20 confidential. So long as information remains a trade
21 secret and is confidential this notion that it's a
22 forever agreement is not a problem.

23 Now, of course, once information becomes known or
24 stale and does not derive economic -- does not provide
25 economic benefits to the company because of a trade

ROA 000253

1 secret it's no longer protectable. But I did want to
2 respond to that as well.

3 This bit about the whole agreement being infected,
4 while it is true that under South Carolina law we still
5 will not blue pencil an overbroad noncompete we will
6 enforce separate provisions separately, and that's almost
7 a direct quote from several cases. And that's why we
8 drew the Court's attention in our opposition to the
9 motion for reconsideration that he's still violating, or
10 he was violating the noncompete, the non solicitation and
11 the noninterference provision.

12 The reason that the order doesn't address Ohio's
13 approach to noncompetes in terms of whether they are
14 overbroad or not is that your ruling specifically to us
15 was it was valid under Ohio law anyway.

16 Moreover, just to tighten up the language here,
17 Ohio does not blue pencil. Ohio follows the rule of
18 reasonableness and in the history of noncompete
19 jurisprudence those are different approaches, but because
20 we don't have to even apply Ohio's rule of reasonableness
21 we don't get into the issue that Ms. Paylor has argued
22 about the Stonehard V. Carolina Flooring case. We are
23 just not there in this case.

24 The reason that we are not is, again, the
25 confidentiality provision is not the overbroad

1 unenforceable noncompete that she argues it is, again,
2 without basis and fact. Ms. Kotlarz's affidavits are
3 unopposed by Mr. Fay. They demonstrate that this is a
4 very reasonable agreement that can be fully enforced
5 under Ohio law.

6 I've already addressed this but the blanket denial,
7 Mr. Fay denies that he received anything confidential.
8 That's actually not what he denied. What he said in his
9 affidavit is the customer list that I got to work from is
10 something that could have been pulled together from any
11 number of public sources.

12 What he didn't deny is receiving the laundry list
13 of confidential information that Ms. Kotlarz indicated he
14 did receive as part of his training in her initial
15 affidavit. We think you ruled correctly, obviously, and
16 hope that you stand by that ruling. And I'll answer any
17 questions that you have.

18 THE COURT: Ms. Paylor, as my memory gets refreshed
19 it seemed to me that one of the sticking points that I
20 had that caused me to rule in their favor was not that he
21 went to go work for another company in the same capacity
22 but that he went and set up his own company which then
23 directly competed for his old company's clients. Isn't
24 that really what he did? Because when you focus on this
25 language in which she says, Oh, he can go be a logistics

ROA 000255

1 officer for a freight forwarding company, and that's
2 exactly what he did, well, that's not exactly so, is it?

3 MS. PAYLOR: That's exactly what he --

4 THE COURT: I thought he went and set up his own
5 company.

6 MS. PAYLOR: Well, he had his own company which --

7 THE COURT: He's not working for anybody else.

8 MS. PAYLOR: He's working an exclusive agreement
9 with Brandt, which is not a freight forwarding company,
10 and in his agreement he said he was going to plan their
11 logistics for getting their hauling done.

12 THE COURT: And that Brandt company used to be a
13 client of the old company he worked for.

14 MS. PAYLOR: They were but they had told him to
15 quit doing work for them. But, Your Honor, what you got
16 to do is look at the agreement.

17 THE COURT: Okay. Well, help me understand first,
18 what does he do now?

19 MS. PAYLOR: Well, right now he's not doing
20 anything with regards to intermodal transportation.

21 THE COURT: Well, what does he want to do now that
22 he was doing before I stopped him?

23 MS. PAYLOR: What he was doing was he had a company
24 set up, for whatever reason, and he used that to contract
25 with Brandt. He could have done it himself as a person.

1 THE COURT: But he's probably the sole employee --

2 MS. PAYLOR: He is the sole employee. He's the
3 sole owner. They are one in the same, Your Honor.

4 THE COURT: Correct.

5 MS. PAYLOR: He and the company.

6 THE COURT: Okay.

7 MS. PAYLOR: And he -- Brandt asked him to plan
8 their freight hauling which is what he was doing only for
9 Brandt. It was an exclusive agreement and what he did
10 was, you know, they said we got to move this from there
11 to there, which is what they say he could do in
12 Ms. Kotlarz's affidavit.

13 So it says he can use pricing information. Well,
14 you know, they were arguing that he couldn't use pricing
15 information before. All he's doing is what she says he
16 can do. And she says he is freely permitted to use this
17 information, how to price loads for customers and to the
18 motor carrier. Okay. That's what he's doing. How to
19 know what to tell a carrier when they are hauling high
20 value cargo. Okay. How to know what type of trailer is
21 needed. Okay. How to make appointments at shipping
22 points and receivers. She says in there that's all okay.

23 Well, he wasn't doing anything other than that,
24 Your Honor. It was just like he went inhouse with this
25 group and worked as their logistics planner which is

ROA 000257

1 exactly what she says he could do in her affidavit. The
2 fact that he has got a company that he's working through,
3 he could have done it as an independent contractor
4 himself. They are alter egos of each other. They are
5 the same. You know, he just had it and thought it was
6 the thing to do whenever he did it. He's a young guy.

7 He's out of business now. So he's not doing
8 anything but, you know, he still has his claims and, you
9 know, I think when you look at the four corners of this
10 agreement they were just getting him every way they
11 could, every one of their employees every way they could,
12 and I don't believe that you can sever those provisions.
13 It's one noncompete and it's all together and if it's
14 invalid, it's invalid.

15 And I feel very comfortable with telling you that,
16 and I think that when you look at the whole agreement
17 together that's what it is. It's a noncompete, and it's
18 forever and it has no geographical restrictions. And so
19 they are trying to rewrite it by putting in this
20 affidavit. So to me they are telling the Court we don't
21 feel comfortable with what you had before so let's
22 rewrite this agreement some more, which they can't do.

23 And I don't care what he calls it. In order to
24 make it valid you have to rewrite it and Stonehard says
25 you can't do it, whether it's blue penciling or the law

ROA 000258

1 of reasonableness or whatever that would require some
2 time restriction and some geographical restriction. It's
3 not in here and this agreement is not valid, Your Honor,
4 under South Carolina law. And I think my client is
5 entitled to summary judgment on that and to go forward
6 with that. And if you don't want to rule with me I would
7 just ask that you certify it so we can get it heard --

8 THE COURT: I've never had anybody ask me to
9 certify one of my rulings before. I've just ruled and
10 they've appealed. What is this certification?

11 MS. PAYLOR: Well, there's still -- there's a few
12 -- well, I'll tell you. We've had actually a cause of
13 action for unpaid overtime, FLSA, which is totally
14 severable from this, and we could sever that and go
15 forward. His claims, he now wants to collect damages
16 from my guy for, you know, the alleged violation of this
17 noncompete.

18 Well, to me if the noncompete is not valid and the
19 Court rules we've wasted Court's time, it's just not
20 within the efficiency of the Court to have us go through
21 and take discovery then have a trial on what they claim
22 are their damages under his violation of this agreement.
23 So I guess what I'm asking is you have to certify the
24 simple question as to the validity of this to go up and
25 let them rule on it now and if they agree with you then

1 it would come back and we would do that. Otherwise --

2 THE COURT: Well, I guess, I mean, it's coming up
3 on my 18th year of being a judge and I've never had
4 anybody ask me to quote, unquote, certify a ruling for
5 appellate purposes. What exactly do you want me to
6 write? I mean, I've just never done it, so I'm not sure
7 what you are asking me to do.

8 MS. PAYLOR: She's looking up the rule. There is a
9 rule --

10 THE COURT: There's plenty of rules I don't know
11 about but if somebody doesn't like my ruling they appeal
12 and then a couple years later they tell me I was right or
13 I was wrong. I actually had the unusual experience of
14 telling me recently that I was wrong and then it turned
15 out they got the judge wrong, which made me feel a lot
16 better because I was going crazy trying to remember the
17 case and I just thought I'd lost my mind. Turns out it
18 wasn't me.

19 MS. PAYLOR: Well, that's kind of --

20 THE COURT: That was unusual. I'll tell you --

21 MS. PAYLOR: That would definitely --

22 THE COURT: For a couple of weeks though I thought,
23 well, maybe it's time for me to stop doing this because
24 the dementia issue is starting to come in.

25 (PAUSE.)

1 MS. PAYLOR: Well, It had to do with the right to
2 appeal that would be an interlocutory appeal unless you
3 certified it basically saying that since this kind of
4 governs everything going on with regard to his claims for
5 damages might as well get it heard now.

6 THE COURT: All right. According to Ms. Paylor
7 your affidavit says this guy can do certain things, and
8 she's saying, well, that's exactly what he does. What is
9 wrong with that argument?

10 MR. RUTLEDGE: Two things. Number one, it's simply
11 wrong, not based upon the facts. That's just argument of
12 counsel. Two, she seems to suggest that because Mr. Fay
13 set up -- that it was okay for him to set up his own
14 company, a sort of one-client TQL, if you will, and do it
15 that way.

16 Well, if he can do it for the Brandt Companies
17 through JF Progressions he can do it for anybody through
18 JF Progressions and but for our counterclaims against him
19 and requests that he stop competing maybe he would have.
20 We don't know.

21 The point is, JF Progressions is his company that
22 he replicated the TQL model, if you will, at least so far
23 as the Brandt Companies were concerned. That's not
24 permitted under the geographic noncompete. It's not
25 permitted under the non solicitation clause. It's not

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1 permitted under the noninterference clause. And so,
2 again, the fact that he sets up a competing business
3 called JF Progressions that weighs in our favor.

4 THE COURT: Well, I don't think that is the issue
5 as much as -- and, again, some of these things where you
6 put a label on what it is that you do doesn't necessarily
7 clear the air but she says his noncompete permits him to
8 hold several positions including, by way of example, the
9 following jobs, and she says a logistics planner for any
10 company other than a freight broker.

11 MR. RUTLEDGE: Judge, he set up JF Progressions as
12 a freight broker. We've got his motor carrier number.

13 THE COURT: So he is a logistics planer for -- in
14 other words, your argument is he can be a logistics
15 planer but just not for a freight broker, and this new
16 company is a freight broker?

17 MR. RUTLEDGE: Yes, 'sir. That's my argument.

18 THE COURT: Okay. Okay.

19 MR. RUTLEDGE: He has a motor carrier number and
20 he's got a freight broker number and we have that on FOIA
21 request from the FMCSA.

22 THE COURT: All right. Well, let me take a few
23 minutes this morning and reread these things that you
24 have sent me and I will let you all know much sooner
25 rather than later what my decision is, hopefully by the

1 end of this week at the latest. Depending what, maybe
2 even today. Okay?

3 MS. PAYLOR: Thank you, Your Honor.

4 MR. RUTLEDGE: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (WHEREUPON, the hearing was concluded.)

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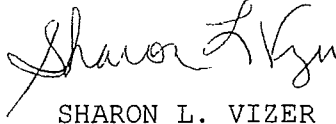
ROA 000263

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 1st day of July 2014.

I do further certify that I am neither of kin, counsel nor have an interest to any party hereto.

November 18, 2014



SHARON L. VIZER

CIRCUIT COURT REPORTER

ROA 000264

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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

JOSHUA FAY, ...Appellant-Respondent,

vs.

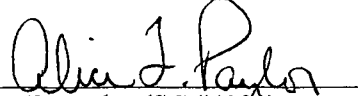
TOTAL QUALITY LOGISTICS, LLC, ...Respondent-Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 26, 2015

Respectfully submitted,

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ROA 00265

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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vs.

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

FINAL BRIEF OF APPELLANT-RESPONDENT

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ARGUMENT

I. THE AGREEMENT IS NOT VALID UNDER OHIO LAW, AND NO OHIO COURT HAS UPHELD THE AGREEMENT AT ISSUE.

In its Brief before this Court, TQL states that the issue of whether the agreement would be found valid by Ohio courts was not addressed by the trial court and should not be considered by this Court. The crux of this appeal is whether the agreement is valid under Ohio law or South Carolina law, and that is what that argument addresses. Because Ohio law provides that Ohio courts will not enforce choice of law provisions when there is no substantive relationship to Ohio and would instead look to the law of the state where the contract was performed. In this case, that state is South Carolina where the agreement is not valid, so the agreement is also not valid under Ohio law.

TQL argues that two Ohio lower courts have found that the TQL agreement is a valid noncompete agreement. From a review of the two orders proffered by TQL, that is not the case. Both of these Ohio courts issued orders on motions for restraining orders under a TQL agreement. Neither order set forth the terms of the TQL agreement being examined in the present case. In one of the opinions, the Court quoted one term that was different from the term contained in the Fay Agreement, so there is no basis for TQL's statement that these courts found the agreement that was signed by Fay to be valid. In addition, both of those cases concerned TQL agreements entered into, and to be performed, in Ohio and not in South Carolina.

Contrary to TQL's arguments, the only court to address whether the TQL agreement before it was reasonable found that it was not. The other court made no finding that the agreement before it was valid under Ohio law. In Jeffrey A. Dangelo v.

Total Quality Logistics, LLC, Case No. 1:09cv512 (S.D. Ohio 2009), the agreement at issue was a different agreement than the one being interpreted in the present case. Although the entire agreement is not set forth in the opinion, the definition of “Business” in the Dangelo agreement is different from the definition in the Fay agreement. In addition, the Fay Agreement actually has the initials, “SC,” on the bottom of it indicating that it was prepared especially for South Carolina. TQL has not produced in this action any other agreements for other states, including Ohio, to show that they are the same as the Fay Agreement. In Dangelo, the court denied the Plaintiff employee’s motion for temporary restraining order but also denied the Defendant TQL’s motion to dismiss. The denial of the restraining order came after the court modified the overbroad noncompete provision to make it “reasonable.” Dangelo opinion, p. 9 (R. p. 110). South Carolina courts do not allow such blue penciling or modification of an agreement in order to make it reasonable and, in fact, would find that the agreement violated public policy if it needed to be modified in order to be enforceable. See Standard Register Co. v. Kerrigan, 238 S.C. 54, 70, 119 S.E.2d 533, 541-42 (1961); and Stonhard v Carolina Flooring Specialists, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005) (“Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy.”) Thus, the Dangelo court found that the agreement was not reasonable contrary to the assertion of TQL in its brief.

In the second Ohio lower court decision, Total Quality Logistics, LLC v. Siano, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011), the Court granted TQL’s motion for a temporary restraining order after a hearing

at which the Defendants did not appear and put nothing in the record, so the Order was based solely on the evidence and argument presented by TQL. (R. pp. 113-15) As in Dangelo, there is no way to determine whether the agreement at issue is even the same agreement as the one before this Court. Contrary to TQL's assertions, that court made no findings as to the reasonableness or validity of the agreement. Indeed, the order was set to expire by its own terms 14 days after its entry. TQL produced no other orders in that case.

Neither of these lower court opinions has any precedential value with regard to the pending appeal. The Ohio trial courts' interpretation of a different agreement entered into and performed in the State of Ohio has no bearing on any issues in this case. As the Ohio Supreme Court held in Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co., 453 N.E.2d 683, 684 (1983), it would not enforce the parties' choice of law in Ohio if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." Ohio courts would use South Carolina law if this case were brought in Ohio, so South Carolina law clearly applies.

The Fay Agreement is not valid under South Carolina law because it violates public policy. Therefore, it is not valid under Ohio law, which requires that its courts interpret the contract in accordance with South Carolina law.

II. FAY DID NOT VIOLATE THE TERMS OF THE AGREEMENT WHEN HE PROVIDED LOGISTICS MANAGEMENT SERVICES UNDER AN EXCLUSIVE AGREEMENT WITH BRANDT.

TQL admits in the Supplemental Affidavit of Hillary Kotlarz and in its Brief that Fay's "noncompete permits him to hold several positions, including... logistics planner for any company other than a freight broker..." (R. pp. 198; Respondent's Brief, p. 10). Brandt is not a freight broker, and Fay provided logistics planning services under an exclusive agreement with Brandt. TQL's argument appears to be that Fay could have done the job individually and not violated the noncompete, but, because he did it through an LLC, he is violating the agreement. What legitimate business purpose can be served by that?

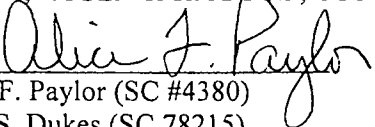
TQL further argues that "Fay presumably hoped to compete by diverting business from other TQL customers, not just Brandt." Respondent's Brief, p. 13. However, there is absolutely no evidence in the record to support this assertion. In fact, the evidence is to the contrary as Fay's agreement with Brandt was an exclusive agreement, so he would not have been able to contract with other companies as TQL argues. In addition, Fay only sought to have the agreement declared invalid after TQL brought an action in Ohio against Brandt, which ceased doing business with Fay because of that. Because Fay, doing business as JF Progressions, was performing a job that TQL admits did not violate the agreement, Fay is entitled to summary judgment.

CONCLUSION

Because the noncompete agreement at issue in this action is not valid under South Carolina or Ohio law and, even if it were, TQL admits that Fay did not violate it, the decision of the lower court should be reversed and summary judgment awarded to Fay with regard to his declaratory judgment action requesting that the agreement be declared invalid.

Respectfully submitted,

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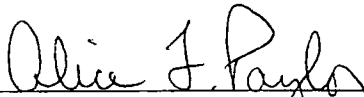
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CERTIFICATE OF COUNSEL

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

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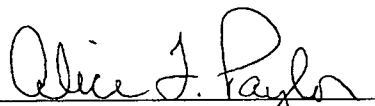
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ARGUMENT

I. THE AGREEMENT IS NOT VALID UNDER OHIO LAW, AND NO OHIO COURT HAS UPHELD THE AGREEMENT AT ISSUE.

In its Brief before this Court, TQL states that the issue of whether the agreement would be found valid by Ohio courts was not addressed by the trial court and should not be considered by this Court. The crux of this appeal is whether the agreement is valid under Ohio law or South Carolina law, and that is what that argument addresses. Because Ohio law provides that Ohio courts will not enforce choice of law provisions when there is no substantive relationship to Ohio and would instead look to the law of the state where the contract was performed. In this case, that state is South Carolina where the agreement is not valid, so the agreement is also not valid under Ohio law.

TQL argues that two Ohio lower courts have found that the TQL agreement is a valid noncompete agreement. From a review of the two orders proffered by TQL, that is not the case. Both of these Ohio courts issued orders on motions for restraining orders under a TQL agreement. Neither order set forth the terms of the TQL agreement being examined in the present case. In one of the opinions, the Court quoted one term that was different from the term contained in the Fay Agreement, so there is no basis for TQL's statement that these courts found the agreement that was signed by Fay to be valid. In addition, both of those cases concerned TQL agreements entered into, and to be performed, in Ohio and not in South Carolina.

Contrary to TQL's arguments, the only court to address whether the TQL agreement before it was reasonable found that it was not. The other court made no finding that the agreement before it was valid under Ohio law. In Jeffrey A. Dangelo v.

Total Quality Logistics, LLC, Case No 1:09cv512 (S.D. Ohio 2009), the agreement at issue was a different agreement than the one being interpreted in the present case. (R. pp. 102-03) Although the entire agreement is not set forth in the opinion, the definition of “Business” in the Dangelo agreement is different from the definition in the Fay agreement. (R. pp. 108-09) In addition, the Fay Agreement actually has the initials, “SC,” on the bottom of it indicating that it was prepared especially for South Carolina. TQL has not produced in this action any other agreements for other states, including Ohio, to show that they are the same as the Fay Agreement. In Dangelo, the court denied the Plaintiff employee’s motion for temporary restraining order but also denied the Defendant TQL’s motion to dismiss. The denial of the restraining order came after the court modified the overbroad noncompete provision to make it “reasonable.” (R. p. 110) South Carolina courts do not allow such blue penciling or modification of an agreement in order to make it reasonable and, in fact, would find that the agreement violated public policy if it needed to be modified in order to be enforceable. *See Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70, 119 S.E.2d 533, 541-42 (1961); and *Stonhard v. Carolina Flooring Specialists*, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005) (“Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy.”) Thus, the Dangelo court found that the agreement was not reasonable contrary to the assertion of TQL in its brief.

In the second Ohio lower court decision, Total Quality Logistics, LLC v Siano, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011), the Court granted TQL’s motion for a temporary restraining order after a hearing

at which the Defendants did not appear and put nothing in the record, so the Order was based solely on the evidence and argument presented by TQL. (R. pp. 113-15) As in Dangelo, there is no way to determine whether the agreement at issue is even the same agreement as the one before this Court. Contrary to TQL's assertions, that court made no findings as to the reasonableness or validity of the agreement. Indeed, the order was set to expire by its own terms 14 days after its entry. TQL produced no other orders in that case.

Neither of these lower court opinions has any precedential value with regard to the pending appeal. The Ohio trial courts' interpretation of a different agreement entered into and performed in the State of Ohio has no bearing on any issues in this case. As the Ohio Supreme Court held in Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co., 453 N E 2d 683, 684 (1983), it would not enforce the parties' choice of law in Ohio if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." Ohio courts would use South Carolina law if this case were brought in Ohio, so South Carolina law clearly applies.

The Fay Agreement is not valid under South Carolina law because it violates public policy. Therefore, it is not valid under Ohio law, which requires that its courts interpret the contract in accordance with South Carolina law.

II. FAY DID NOT VIOLATE THE TERMS OF THE AGREEMENT WHEN HE PROVIDED LOGISTICS MANAGEMENT SERVICES UNDER AN EXCLUSIVE AGREEMENT WITH BRANDT.

TQL admits in the Supplemental Affidavit of Hillary Kotlarz and in its Brief that Fay's "noncompete permits him to hold several positions, including... logistics planner for any company other than a freight broker..." (R. p. 199 ¶ 4; Respondent's Brief, p. 100. Brandt is not a freight broker, and Fay provided logistics planning services under an exclusive agreement with Brandt. TQL's argument appears to be that Fay could have done the job individually and not violated the noncompete, but, because he did it through an LLC, he is violating the agreement. What legitimate business purpose can be served by that?

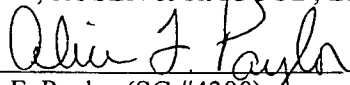
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CONCLUSION

Because the noncompete agreement at issue in this action is not valid under South Carolina or Ohio law and, even if it were, TQL admits that Fay did not violate it, the decision of the lower court should be reversed and summary judgment awarded to Fay with regard to his declaratory judgment action requesting that the agreement be declared invalid.

Respectfully submitted,

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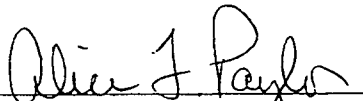
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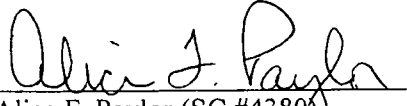
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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE LOWER COURT ERR IN DENYING TQL'S MOTION FOR SUMMARY JUDGMENT AS TO TQL'S CLAIMS THAT FAY HAD BREACHED THE AGREEMENT AT ISSUE EVEN THOUGH FAY DENIED SUCH CLAIMS?**

STATEMENT OF THE CASE

Fay adopts the Statement of the Case that he set forth in his Initial Appellant-Respondent's Brief.

FACTS

Fay adopts the Facts set forth in his Initial Appellant-Respondent's Brief with the addition of the following:

TQL's counterclaims, which are the subject of this appeal, allege that Fay violated the noncompetition and trade secret portions of the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (Agreement) (R. pp. 34-45). Fay denies that he competed with TQL or that he misappropriated any of TQL's trade secrets. (R. pp. 181-86).

TQL's factual account claims that Fay "underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information ...". However, Fay denied in his affidavit that he learned any trade secrets or even needed any alleged trade secrets from TQL to provide logistics planning services for Brandt Engineering:

While working at [TQL], I initiated contact with Brandt Engineering to provide services. Although Brandt was on a potential customer list, the list was not generated through company connections, but rather by brokers simply checking the internet or telephone books for trucking companies and entering them into the system. All this information is within the

public domain and could be accessed by checking the internet or telephone listing for trucking companies.

...

All information that I obtained in order to be of service to Brandt was received solely from Brandt. There was nothing unique that I learned from my training with Defendant.

(R. p. 182 ¶ 7; p. 183 ¶ 11. TQL's Group Sales Manager, Hillary Kotlarz, stated that Fay could serve as a logistics planner without violating the Agreement. (R. p. 198 ¶ 4). Logistics planning is what Fay was doing for Brandt, which necessarily means he was not in breach of the Agreement. Ms. Kotlarz further testified that Fay could use certain information that he obtained while working for TQL and still not be in violation of the trade secrets provision:

As an employee of TQL, Fay learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the produce is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigerated unit during transit; how to locate flag cars and permits for a motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain period of the year (e.g., produce, landscaping, building materials), where products originate ... and where they are headed – this will help brokers understand when truck costs and availability will 'tighten up' because of increased demand and how to obtain backhauls for motor carriers and how to price them.

(R. pp. 199-200). There is no evidence in the record that Fay ever used or received information that was not included in the list above or within the public domain.

LEGAL ARGUMENTS

I. APPLICABLE STANDARD OF REVIEW

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)). “Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law.” Id. (citing S.C.R. Civ. P. 56(c)) When determining whether a material issue of fact exists, the appellate court must view all evidence and the inferences to be drawn in a light most favorable to the non-moving party. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). If more than one inference can be drawn, then the task is one for the jury, and summary judgment should not be granted. Id. (citing Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006)).

II. THE TRIAL COURT CORRECTLY RULED THERE WAS A MATERIAL QUESTION OF FACT AS TO WHETHER FAY HAD VIOLATED THE AGREEMENT AND DENIED TQL'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY.

A. THE TRADE SECRETS PORTION OF THE AGREEMENT IS INVALID, BECAUSE IT PROHIBITS ANY COMPETITION BY FAY WITHOUT ANY RESTRICTIONS ON TIME OR PLACE.

Under the terms of the Agreement, "Confidential Information" includes every piece of information gleaned by, or provided to, the Employee while employed by TQL.

(R. p. 23). The Agreement limits the use of "Confidential Information" as follows:

4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose or publish, or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential. Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof. [Section 8 deals with property rights and assignment with regard to any work product created by the Employee. This is not an issue in this case.]

(R. p. 25) emphasis added).

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

TQL's covenant not to compete set forth in its confidentiality provision has no time or geographic limitations and prevents Fay from engaging in a competitive

enterprise at any place at any time now or in the future. In both South Carolina and Ohio, such a covenant is not enforceable. See Faces Boutique, Ltd. v. Gibbs, 318 S.C. 35, 41-42, 455 S.E. 2d 707, 708-09 (Ct. App. 1995), (“A covenant not to compete will be upheld only if it is : ... (2) reasonably limited in its operation with respect to time and place...”); Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App.1987) (“We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere... and at any time...was reasonably necessary to protect the covenantee’s legitimate business interests....”).

Because the trade secret provisions of the Agreement are so broad and overarching, they amount to a covenant not to compete and are invalid. Thus, Fay can have no liability for violating the trade secrets provisions, because they are invalid.

B. EVEN IF THE COURT DETERMINES THAT THE NONCOMPETITION AGREEMENT IS VALID, TQL HAS ADMITTED THAT FAY HAS NOT VIOLATED THE NONCOMPETE AGREEMENT OR HAS CREATED A QUESTION OF FACT AS TO THIS ISSUE BY THE AFFIDAVIT OF HILLARY KOTLARZ.

Fay incorporates his arguments set forth in his Appellant-Respondent’s Briefs previously filed with regard to the invalidity of the multiple provisions of the Agreement. TQL has admitted that performing logistics planning services for a company other than a freight brokerage is not a violation of the Agreement. (R. p. 198 ¶ 4). Despite the sworn testimony of its own agent, TQL now argues that Fay violated the Agreement by performing logistics planning services for Brandt, an engineering company which moves its own products, but does not broker freight.

The only evidence in the record relative to the relationship between TQL and Brandt is that TQL directed Fay to stop doing business with Brandt because TQL did not consider the business to be lucrative. (R. p. 182 ¶ 8). It is further undisputed that Brandt solicited Fay to perform logistics planning for the company. (R. p. 183 ¶ 10). Therefore, the factual record establishes that Fay did not interfere with any business or contractual relationship between TQL and Brandt.

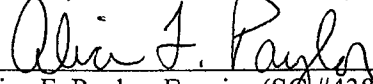
TQL states in its brief that JF Progressions, LLC was a freight broker licensed by the Department of Transportation. However, there is nothing in the record that supports this statement. The only evidence is that JF Progressions, LLC, is a wholly owned limited liability company of Fay. If Fay would not be in violation of the noncompete agreement but for his working through a wholly owned LLC, how could his performance of the same duties through that LLC violate it?

CONCLUSION

For all of the reasons stated herein and in the Appellant-Respondent's Briefs previously filed, the Agreement between TQL and Fay is invalid and unenforceable. Furthermore, based on TQL's admissions, the activities performed by Fay did not violate the noncompete or the trade secrets provisions of the Agreement. Therefore, this Court should affirm the trial court's decision that TQL is not entitled to summary judgment as to its alleged violations of the Agreement.

Respectfully submitted,

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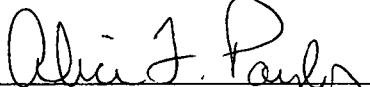
TOTAL QUALITY LOGISTICS, LLC, ...Respondent-Appellant

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

March 17, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 20 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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

JOSHUA FAY, ...Appellant-Respondent,

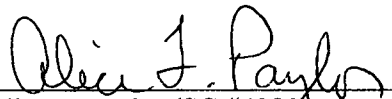
vs.

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

PROOF OF SERVICE

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March 17, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-
Respondent,

vs.

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

APPELLANT'S FINAL BRIEF OF THE RESPONDENT-APPELLANT

RECEIVED

MAR 30 2015

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN FAILING TO FIND THAT APPELLANT-RESPONDENT BREACHED THE NONCOMPETE PROVISIONS, IN LIGHT OF ITS DENIAL OF FAY'S MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

Appellant-Respondent Joshua Fay (hereinafter "Fay") was previously employed by Respondent-Appellant Total Quality Logistics, LLC (hereinafter "TQL") as a Logistics Sales Account Executive in Training. Following his termination on June 17, 2013, he immediately began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to a TQL customer, the Brandt Companies ("Brandt"), the same services that he had provided to Brandt while employed by TQL. Fay established and competed through his own brokerage company, JF Progressions, which had its own broker authority with the U.S. Department of Transportation.

Fay filed this lawsuit on September 23, 2013, alleging violations of the Fair Labor Standards Act and seeking a declaratory judgment that the Agreement is invalid and unenforceable. Fay amended his Complaint on November 12, 2013, to add a claim for interference with contract, after Brandt ceased its dealings with him as the result of litigation TQL filed against Brandt to enforce its rights under the Agreement.

The parties filed cross motions for summary judgment. Fay filed his motion for judgment on the pleadings, or for summary judgment in the alternative, to ask the lower court to rule that his Agreement is unenforceable. Fay has also asked the court—prematurely, without the benefit of any discovery—to rule against TQL on its counterclaim for conversion and misappropriation of confidential information and trade secrets, arguing that he had not in fact violated the Agreement.

By order dated April 14, 2014, the lower court correctly held that the Agreement is enforceable under Ohio law and could be enforced in South Carolina because it does not violate the public policy of South Carolina. The court also correctly denied Fay's motion for summary judgment on TQL's claims for breaches of contract, and in so doing, implicitly found that he had violated his Agreement. However, in response to Fay's motion for partial reconsideration, by order dated August 4, 2014, the lower court revoked its finding that Fay had breached the Agreement, upheld its ruling that the Agreement is enforceable, and certified the issue for an immediate appeal.

Fay appealed those orders August 21, 2014. TQL filed and served its Notice of Cross-Appeal September 2, 2014.

FACTS

A. TQL'S offer of employment to Fay.

TQL is an Ohio corporation providing logistics services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. (R. p. 34) ¶51; (R. p. 187) ¶3.

TQL offered Fay employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. (R. p. 190) ¶4. The offer of employment specifically informed Fay that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." (R. p. 191) ¶6.

Thereafter, TQL employed Fay on December 10, 2012. (R. p. 34) ¶52; (R. p. 187) ¶4. At the inception of his employment, and as an inducement to TQL's employing him, Fay entered into the subject Employee Non-Compete, Confidentiality and Non-

Solicitation Agreement (the “Agreement”). (R. pp. 35-39) ¶53; (R. p. 187) ¶5. Fay admits he signed the Agreement on his first day of employment. (R. pp. 181-182) ¶¶3-5.

B. The Agreement contains reasonable covenants against competition.

1. The Agreement restricts competition and solicitation in Section 9.

In Section 9, Fay agreed that, for a period of one year after his employment terminated, he would not “become employed by or engaged in a Competing Business ..., in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL’s Confidential Information.” (R. p. 49) ¶9(b), ¶9(b)(ii). The parties agreed that a “Competing Business” is “any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.” (R. p. 50-51) ¶9(d). The parties agreed that “the Business” is “providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States.” (R. p. 46) First Recital.¹

Fay also agreed that for a period of one year after his employment terminated, he would not “directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL.” (R. pp. 49-50) ¶9(b), ¶9(b)(iii). He also agreed that for a period of one year after his employment terminated, he would not “directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective

¹ Thus, Fay’s arguments on pages 13, and 15 of his initial brief, that the restriction lacks a geographic limit and that it would prohibit Fay from working in Europe, are specious.

contractual relationship, between TQL and any Customer² ..., or otherwise take any action to divert Business from TQL.” (R. pp. 49-50) ¶9(b), ¶9(b)(iv).

2. The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that “All Confidential Information as described herein is proprietary and the sole property of TQL.” (R. p. 48) ¶3. The Agreement prohibits Fay from “us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information.” (R. p. 48) ¶4.

Fay agreed that “engaging in an employment relationship with a Competing Business ... in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL’s Confidential Information to unfairly compete with TQL.” (R. p. 48) ¶6.

² “Customer” is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee’s employment with TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee’s employment by TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason.

Contrary to the position he takes now, Fay agreed that “TQL’s trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL’s Business and operations, access to and knowledge of which are essential to performance of Employee’s duties hereunder... .” (R. pp. 48-49) ¶7. The parties agreed that the term Confidential Information was defined in the Third Recital of the Agreement.

C. Fay’s extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Fay’s job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. (R. pp. 187-188) ¶6. Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. Id. His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. Id.

Fay underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL’s customers, as well as their contact information. (R. p. 188) ¶7. As part of his training and employment, Plaintiff had access to TQL’s proprietary software system—Load Manager—which contained much of TQL’s Confidential Information as well as marketing and business strategy for TQL’s sales employees. Id.

Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (R. p. 188) ¶8. Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. Id. In fact, at the time of his hire Fay had previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry. Id.

D. Fay establishes JF Progressions and begins competing.

Although he now seeks to re-characterize his work through his competing brokerage company, JF Progressions, Incorporated, as not competition that violates the Agreement, it plainly is, because Fay did through JF Progressions exactly what he did with TQL. And he did so for a former TQL customer, Brandt. (R. pp. 181-184) In his affidavit, Fay admits that he created JF Progressions and entered into a contract with Brandt "to provide qualified carriers, manage logistics, provide support, and handle claims and documentation." (R. p. 183) ¶10. This violates his Agreement, and Fay initiated the declaratory judgment action in hopes of having it declared invalid, so that he could continue competing.

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO FIND THAT APPELLANT-RESPONDENT BREACHED THE NONCOMPETE PROVISIONS.

When it issued its Order Amending April 14, 2014 Order and Certifying Case for Appeal Under SCRCP 54(b), the lower court clarified that it had not found that Fay had in fact breached the Agreement. This was error, because there is no genuine issue of

material fact that he violated the Agreement. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Fay breached the Agreement, operating as JF Progressions, Incorporated, a brokerage company with its own broker authority from the Department of Transportation, in the following ways:³

- a. by violating the noncompete: by “becom[ing] employed by or engag[ing] in a Competing Business [**here, JF Progressions, Incorporated**]..., in a capacity similar to that in which Employee [wa]s engaged by TQL...” (R. p. 49) ¶9(b), ¶9(b)(ii);
- b. by violating the non-solicitation clause: by “directly or indirectly, solicit[ing] any Customer [**here, Brandt**]... for any business purpose in competition with or in conflict with the Business of TQL.” (R. pp. 49-50) ¶9(b), ¶9(b)(iii); and
- c. by violating the non-interference clause: by “directly or indirectly, interfer[ing] with, tamper[ing] with, disrupt[ing], or attempt[ing] to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer .

³ Fay did not challenge the scope of the non-solicitation or non-interference covenants in paragraphs 9(b)(iii) & 9(b)(iv), both of which he violated when he began providing freight broker services to The Brandt Companies through his competing company, JF Progressions, Incorporated.

[here, Brandt] ..., or otherwise tak[ing] any action to divert Business from TQL.” (R. p. 50) ¶9(b), ¶9(b)(iv).

These facts are simply not in dispute in light of Fay’s admissions in his affidavit. Moreover, TQL met its burden to demonstrate that because Fay had no prior experience in the industry, he had to call upon the knowledge and information he learned from TQL in order to service Brandt. Thus, he did in fact use TQL’s confidential and proprietary information.

The fact that Brandt is not a competitor of TQL’s is not dispositive of TQL’s claim for breaches of contract. This is true because in this situation, Brandt is the customer, whereas JF Progressions, Incorporated is the competitor. That Fay continues to obscure Brandt’s significance as a Customer is troubling, particularly given the fact that he instituted a claim for declaratory relief so that he could continue to service Brandt.

At summary judgment, Fay did not deny receiving “detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL’s customers, as well as their contact information.” (R. p. 188) ¶7. Neither did he deny having had “access to TQL’s proprietary software system—Load Manager—which contained much of TQL’s Confidential Information as well as marketing and business strategy for TQL’s sales employees.” *Id.* And he has admitted and even alleged that he provided freight brokering services to a TQL customer operating through J.F. Progressions.

Thus, at most, Fay simply disagreed with the Court’s legal conclusions that the information he did receive merits protection under the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the “Agreement”) he signed. This does

not constitute a disputed material fact. See e.g., Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (“A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.”); See also Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984) (term “genuine issue for trial” connotes genuine *factual* issues, not issues involving legal conclusions to be drawn from facts).

CONCLUSION

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

Respectfully submitted,



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March 26, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579
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JOSHUA FAY.....Appellant-
Respondent,

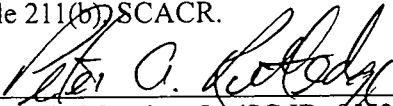
vs.

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Appellant.

CERTIFICATE OF COUNSEL

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March 26, 2015


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JOSHUA FAY Appellant-Respondent,

vs.

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

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APPELLANT'S FINAL REPLY BRIEF OF THE RESPONDENT-APPELLANT

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ARGUMENT IN REPLY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

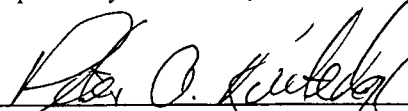
(D) A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.

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

CONCLUSION

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

Respectfully submitted,



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March 26, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-
Respondent,

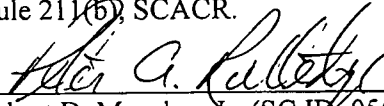
vs.

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

CERTIFICATE OF COUNSEL

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

March 26, 2015


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JOSHUA FAY Appellant-Respondent,

vs.

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

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RESPONDENT'S FINAL BRIEF OF THE RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. IN PARTIALLY GRANTING TQL'S MOTION FOR SUMMARY JUDGMENT, DID THE LOWER COURT DECIDE CORRECTLY THAT THE NONCOMPETE PROVISIONS ARE ENFORCEABLE AS A MATTER OF LAW AND COMPORT FULLY WITH THE PUBLIC POLICY OF THE STATE OF SOUTH CAROLINA?

STATEMENT OF THE CASE

Appellant-Respondent Joshua Fay (hereinafter "Fay") was previously employed by Respondent-Appellant Total Quality Logistics, LLC (hereinafter "TQL") as a Logistics Sales Account Executive in Training. Following his termination on June 17, 2013, he immediately began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to a TQL customer, the Brandt Companies ("Brandt"), the same services that he had provided to Brandt while employed by TQL. Fay established and competed through his brokerage own company, JF Progressions, which had its own broker authority with the U.S. Department of Transportation.

Fay filed this lawsuit on September 23, 2013, alleging violations of the Fair Labor Standards Act and seeking a declaratory judgment that the Agreement is invalid and unenforceable. Fay amended his Complaint on November 12, 2013, to add a claim for interference with contract, after Brandt ceased its dealings with him as the result of litigation TQL filed against Brandt to enforce its rights under the Agreement.

The parties filed cross motions for summary judgment. Fay filed his motion for judgment on the pleadings, or for summary judgment in the alternative, to ask the lower court to rule that his Agreement is unenforceable. Fay has also asked the court—prematurely, without the benefit of any discovery—to rule against TQL on its

counterclaim for conversion and misappropriation of confidential information and trade secrets, arguing that he had not in fact violated the Agreement.

By order dated April 14, 2014, the lower court correctly held that the Agreement is enforceable under Ohio law and could be enforced in South Carolina because it does not violate the public policy of South Carolina. The court also correctly denied Fay's motion for summary judgment on TQL's claims for breaches of contract, and in so doing, implicitly found that he had violated his Agreement. However, in response to Fay's motion for partial reconsideration, by order dated August 4, 2014, the lower court revoked its finding that Fay had breached the Agreement, upheld its ruling that the Agreement is enforceable, and certified the issue for an immediate appeal.

Fay appealed those orders August 21, 2014. TQL filed and served its Notice of Cross-Appeal September 2, 2014.

FACTS

A. TQL'S offer of employment to Fay.

TQL is an Ohio corporation providing logistics services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. (R. p. 34) ¶51; (R. p. 187) ¶3.

TQL offered Fay employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. (R. p. 190) ¶4. The offer of employment specifically informed Fay that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." (R. p. 191) ¶6.

Thereafter, TQL employed Fay on December 10, 2012. (R. p. 34) ¶52; (R. p. 187) ¶4. At the inception of his employment, and as an inducement to TQL's employing him, Fay entered into the subject Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"). (R. pp. 35-39) ¶53; (R. p.187) ¶5. Fay admits he signed the Agreement on his first day of employment. (R. pp. 181-182) ¶¶3-5.

B. The Agreement contains reasonable covenants against competition.

1. The Agreement restricts competition and solicitation in Section 9.

In Section 9, Fay agreed that, for a period of one year after his employment terminated, he would not "become employed by or engaged in a Competing Business ..., in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." (R. p. 49) ¶9(b), ¶9(b)(ii). The parties agreed that a "Competing Business" is "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." (R. pp.50-51) Agreement, ¶9(d). The parties agreed that "the Business" is "providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States." (R. p. 46) First Recital.¹

Fay also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL." (R. pp. 49-50) ¶9(b), ¶9(b)(iii). He also agreed that for a period of one year after his employment terminated,

¹ Thus, Fay's arguments on pages 13, and 15 of his initial brief, that the restriction lacks a geographic limit and that it would prohibit Fay from working in Europe, are specious.

he would not “directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer² ..., or otherwise take any action to divert Business from TQL.” (R. pp. 49-50) ¶9(b), ¶9(b)(iv).

2. The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that “All Confidential Information as described herein is proprietary and the sole property of TQL.” (R. p. 48) ¶3. The Agreement prohibits Fay from “us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information.” (R. p. 48) ¶4.

Fay agreed that “engaging in an employment relationship with a Competing Business ... in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and

² “Customer” is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee’s employment with TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee’s employment by TQL during the twelve (12) month period prior to termination or cessation of Employee’s employment with TQL for any reason.

decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL." (R. p. 48) ¶6.

Contrary to the position he takes now, Fay agreed that "TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder..." (R. pp. 48-49) ¶7. The parties agreed that the term Confidential Information was defined in the Third Recital of the Agreement.

C. Fay's extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Fay's job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. (R. pp. 187-188) ¶6. Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. Id. His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. Id.

Fay underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (R. p. 188) ¶7. As part of his training and employment, Plaintiff had access to TQL's proprietary software system—Load Manager—which contained much of

TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. Id.

Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (R. p. 188) ¶8. Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. Id. In fact, at the time of his hire Fay had previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry. Id.

D. Fay establishes JF Progressions and begins competing.

Although he now seeks to re-characterize his work through his competing brokerage company, JF Progressions, Incorporated, as not competition that violates the Agreement, it plainly is, because Fay did through JF Progressions exactly what he did with TQL. And he did so for a former TQL customer, Brandt. (R. pp. 181-184). In his affidavit, Fay admits that he created JF Progressions and entered into a contract with Brandt "to provide qualified carriers, manage logistics, provide support, and handle claims and documentation." (R. p. 183) ¶10. This violates his Agreement, and Fay initiated the declaratory judgment action in hopes of having it declared invalid, so that he could continue competing.

ARGUMENT

- I. IN PARTIALLY GRANTING TQL'S MOTION FOR SUMMARY JUDGMENT, THE LOWER COURT DECIDED CORRECTLY THAT THE NONCOMPETE PROVISIONS ARE ENFORCEABLE AS A MATTER OF LAW AND COMPORT FULLY WITH THE PUBLIC POLICY OF THE STATE OF SOUTH CAROLINA.

A. The Agreement is valid under Ohio law and does not offend the public policy of South Carolina.

Terms in a non-compete agreement may be construed according to the law of another state. Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005), citing Standard Register Co. v. Kerrigan, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961). So long as the resulting agreement is valid as a matter of law and comports with public policy in South Carolina, our courts will enforce the agreement. Id.

Here, the restrictive covenants in the Agreement are valid under Ohio law, and they comport fully with South Carolina's public policy which generally requires the enforcement of contracts entered into freely. Oxman v. Profit, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Under Ohio law, they are no greater than is required for the protection of TQL; they do not impose undue hardship on Fay; and they are not injurious to the public. Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975).

Under Ohio law, the Court must examine a non-competition covenant to determine the reasonableness of the restrictions. Id. To make that determination, the court should consider the absence or presence of a long list of factors: whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during

the employment, and whether the forbidden employment is merely incidental to the main employment. Id.

The Agreement imposes time and geographic limits; the restrictive covenants run for one year after Fay's employment terminates and are limited to the Continental United States. (R. 49 pp. 50-51) ¶9(b), ¶9(d). Fay's argument that the geographic scope either is lacking altogether or is somehow overbroad ignores the reach of TQL's business and its need for a nationwide noncompete. Moreover, Fay was able to establish contact with TQL's customers and prospects across the United States and Canada. (R. pp. 193-197) ¶4. For example, TQL's records show that Fay contacted customers and prospects located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental *United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico.* (R. p. 197) ¶5. Clearly, the geographic scope of the Agreement is enforceable. Indeed, it is drawn more narrowly than the actual areas within which Fay was able to establish contacts, which included Hawaii and Puerto Rico. Obviously, Fay had contact with many customers—and he admits for example that he had contact with The Brandt Companies ("Brandt"). (R. pp. 182-183) ¶¶7-12. In any case, his argument that the covenant would prevent him from working in Europe is nonsense.

Fay possesses TQL's confidential information and trade secrets. Fay underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (R. p. 188) ¶7. As

part of his training and employment, Fay had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. Id.

TQL's Agreement only bars unfair competition. Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (R. p. 188) ¶8. Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. Id. In fact, at the time of his hire Fay had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. Id. As a result, there is nothing unfair about preventing Fay from competing in this business, from soliciting TQL's clients, or from diverting business of TQL's clients away from TQL to Fay's competing business, JF Progressions, Incorporated.

Finally, by its terms, the restrictions were not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL. (R. p. 48) ¶4. Fay's argument that his noncompete prevents him from working in any capacity in the intermodal transportation industry is overstated: his noncompete permits him to hold several positions, including, by way of example, the following jobs: dispatcher for a trucking company, driver for a trucking company, carrier compliance coordinator, safety compliance officer with a motor carrier, carrier coordinator with a motor carrier, logistics planner for any company other than a freight broker, freight broker for an ocean or air freight company, freight broker for a non-vessel

operating common carrier, barge or intermodal freight company, customs broker or international freight broker, produce broker, lumber broker, and an alloy broker. (R. pp. 198-199) ¶4.

The covenants do not stifle the Fay's inherent skill and experience, because at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. The benefit to TQL in enforcing the Agreement is not disproportionate to the Plaintiff's detriment. At oral argument, Fay's counsel represented to the Court that Plaintiff was earning as much as \$100,000 annually from his work with Brandt alone. (R. p. 231) These are substantial damages to TQL.

Fay also argues that under the covenant restricting the disclosure of trade secrets and confidential information, any information that Fay received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the public domain or had been obtained by TQL from another competitive business. This again overstates the effect of the Agreement. Although the definition of Confidential Information in the Agreement is certainly a robust expression of the information protected, a close reading shows that it genuinely focuses on secret and/or proprietary information concerning TQL and/or its customers:

WHEREAS, TQL develops and maintains confidential proprietary Information (hereinafter referred to as, "Confidential Information"), including but not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and

procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This Information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; ...

Agreement, Third Recital. (R. 46-47)

Thus, as an employee of TQL, Fay learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigerated unit during transit; how to locate flag cars and permits for a motor carrier hauling a wide or

unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain periods of the year (e.g., produce, landscaping, building materials); where products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed—this will help brokers understand when truck costs and availability will “tighten up” because of increased demand and how to obtain backhauls for motor carriers and how to price them. (R. pp. 199-200) ¶5.

The Agreement has always been upheld as valid under Ohio law; in fact, no court has ever held otherwise. Moreover, courts in Ohio that have considered whether TQL’s Agreement should be enforced with a preliminary injunction or temporary restraining order, both drastic remedies, have held that it is enforceable and granted the preliminary relief. See Jeffrey A. Dangelo vs. Total Quality Logistics, LLC, Case No. 1:09cv512 (S.D. Ohio 2009); and Total Quality Logistics, LLC vs. Michael Siano, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011). (R. pp. 101-115).

B. The Agreement is also enforceable under South Carolina law.

In South Carolina, a non-compete agreement will be upheld if it is: (1) necessary for the protection of the legitimate interests of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of public policy; and (5) supported by a valuable consideration. Rental

Uniform Serv. Of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct.App.1992).

Here, Fay makes the frankly inexplicable argument that the Agreement does not protect a legitimate business interest of TQL because Brandt is not a competitor of TQL. The point is that Brandt is, or was, a *customer* of TQL, one Fay serviced as a TQL employee, and one that Fay admits he diverted business from through his new company, JF Progressions, Incorporated, which is the *competitor* in this situation. (R. pp. 182-183) ¶¶7-12. Moreover, in seeking to have the Agreement declared unenforceable, Fay presumably hoped to compete by diverting business from other TQL customers, not just Brandt. Thus, as the *Dangelo* Court wrote, "For him to use the knowledge and experience he gained while working at TQL to divert business from TQL is a legitimate business interests [sic] and no greater than required to protect those interests, especially given that the restriction is only limited to one year." Jeffrey A. Dangelo vs. Total Quality Logistics, LLC, Case No. 1:09cv512, p.8 (S.D. Ohio 2009); see also Wolf v. Colonial Life and Accident Ins. Co., 309 S.C. 100, 420 S.E.2d 217 (Ct.App.1992) (holding that protecting existing business contacts, accounts and customers from pirating by a former employee is a legitimate business interest).

The Agreement is reasonably limited as to time and place. It restricts unfair competition throughout the Continental United States. South Carolina will enforce a nationwide protection when a company does business nationwide. Wolf v. Colonial Life and Accident Ins. Co., 309 S.C. 100, 420 S.E.2d 217 (S.C. Ct.App.1992) ("The fact that Colonial does business nationwide shows that it needs nationwide protection."). Fay's argument, that the covenant not to compete lacks a geographic scope altogether evinces

either a complete misunderstanding how contract provisions work together, or it is just specious. In any case, Fay cites to no case law supporting his argument that the geographic scope expressed in paragraph 9(d) cannot be incorporated by paragraph 9(b). Moreover, he did not argue this to the lower court. Rather, he argued that the nationwide scope was overbroad. Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989) (an appellate court will not consider issues raised for the first time on appeal).

The duration of the non-compete is for one year following termination. South Carolina courts have upheld time restrictions from two to five years as reasonable. Rental Uniform Serv. Of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983) (three years valid).

The Agreement is not unduly harsh or oppressive; it only prohibits unfair competition for one year, and Fay has worked in other fields before he joined TQL³. To suggest that it is unduly harsh to prevent Fay from working in a field in which he was employed for a mere six months is untenable. He has other work experience and employment skills. The Agreement is also reasonable from the standpoint of sound public policy, which generally requires the enforcement of contracts entered into freely. Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Moreover, the prohibitions reasonably protect TQL's legitimate interest in protecting its business contacts and trade secrets, an interest shared by all businesses. See Wolf v. Colonial Life and Accident Ins. Co., 309 S.C. 100, 108, 420 S.E.2d 217, 221 (S.C. Ct. App. 1992).

³ At the second hearing, Fay's counsel indicated that he no longer worked in transportation and had in fact moved on to other pursuits. (R. p. 256, p. 258)

Finally, there is no doubt that the Agreement is supported by valuable consideration. Fay admits he signed the Agreement on his first day of employment. (R. pp. 181-182) ¶¶3-5. Under South Carolina law, at-will employment is sufficient consideration to support a noncompete that is entered into at the inception of employment, and the rationale behind the rule is fairly straightforward:

...[O]rdinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, 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. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944). Therefore, we adopt the rule that when a covenant 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.

Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) (covenant entered into three and a half years after inception of employment not supported by consideration) (emphasis added).

C. Fay's Argument that the Courts of Ohio would apply South Carolina is irrelevant and was neither argued below nor ruled on by the lower court.

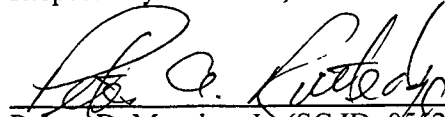
Fay argues, for the first time, that were this matter being decided by the courts in Ohio, they would apply South Carolina law, and he relies on an opinion involving the interpretation of a covenant not to compete that would have been enforced in California, which has generally outlawed noncompetes altogether. This argument is irrelevant, because the Agreement here fully satisfies South Carolina law, as the lower court already so held. It ignores and is flatly contradicted by the opinions from Ohio that apply Ohio law to the Agreement. See Jeffrey A. Dangelo vs. Total Quality Logistics, LLC, Case No. 1:09cv512 (S.D. Ohio 2009); and Total Quality Logistics, LLC vs. Michael Siano, Case

No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011). Finally, because it was not argued or ruled upon below, it cannot be considered here for the first time. Rives v. Balsa, 325 S.C. 287, 291, 478 S.E.2d 878, 880 (Ct. App. 1996) citing, Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59 motion to obtain a ruling, the appellate court may not address the issue); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989) (an appellate court will not consider issues raised for the first time on appeal).

CONCLUSION

For the foregoing reasons, TQL respectfully requests that the order of the lower court, holding that the Agreement is valid and enforceable under Ohio law and comports fully with the public policy of South Carolina be affirmed.

Respectfully submitted,



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March 26, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-
Respondent,

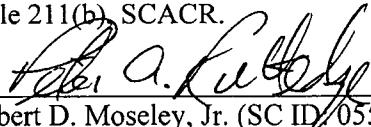
vs.

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

CERTIFICATE OF COUNSEL

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

March 26, 2015


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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY Appellant-Respondent,

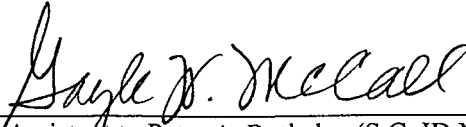
vs.

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

PROOF OF SERVICE

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joshua Fay, Appellant-Respondent,

v.

Total Quality Logistics, LLC, Respondent-Appellant.

Appellate Case No. 2014-001828

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5471
Heard November 17, 2016 – Filed March 1, 2017

REVERSED IN PART AND DISMISSED IN PART

Alice F. Paylor and Rene Stuhr Dukes, both of Rosen
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Respondent.

Robert Daniel Moseley, Jr. and Peter Andrew Rutledge,
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for Respondent-Appellant.

THOMAS, J.: This cross-appeal concerns the validity of an employment agreement entered into by Appellant-Respondent Joshua Fay and Respondent-Appellant Total Quality Logistics, LLC (TQL). Fay initiated this action by seeking a declaratory judgment that the employment agreement was invalid and unenforceable. The parties filed cross summary judgment motions, and the circuit court partially granted TQL's motion finding the employment agreement was valid

and enforceable. However, the circuit court denied TQL's motion as to its counterclaims for breach of the employment agreement and misappropriation of trade secrets. Fay appeals the circuit court's determination that the employment agreement was valid and argues the circuit court erred by finding Ohio law applied to the agreement and the agreement was valid and enforceable under either Ohio or South Carolina law. TQL appeals the circuit court's denial of summary judgment on its counterclaims and argues there was no genuine issue of material fact regarding Fay's breach of the agreement. We reverse the circuit court's partial grant of summary judgment to TQL, and we dismiss TQL's cross-appeal.

FACTS/PROCEDURAL HISTORY

TQL is based in Ohio and provides motor carrier transport and related services including logistics and brokerage services. TQL offered Fay employment as a Logistics Sales Account Executive in November 2012. The offer of employment informed Fay he was "required to complete, sign, and return a TQL non-compete/non-disclosure agreement on [his] first day of employment." Fay accepted the offer of employment and began working in December 2012. Fay admitted he signed TQL's Employee Non-Compete, Confidentiality, and Non-Solicitation Agreement (the Agreement) on his first day of employment.

The Agreement contained noncompete and nondisclosure provisions and claimed it was to be "interpreted and enforced under the laws of the State of Ohio." The purported nondisclosure provisions were contained primarily in paragraph four. It prohibited Fay from disseminating or making use of "Confidential Information" without TQL's permission. By signing the Agreement, Fay agreed "all information disclosed to [him] or to which [he had] access during the period of his . . . employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential." Additionally, the Agreement defined Confidential Information as

[TQL's] operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of

doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures.

The nondisclosure provisions did not include a time restriction and provided it was binding "at all times" following Fay's employment with TQL. Additionally, the nondisclosure provisions provided its restrictions were "not intended and shall not be construed to prohibit [Fay] from disclosing or using the general skills and knowledge [he] acquired as an employee of TQL." Paragraph six stated that if Fay engaged in an employment relationship with a Competing Business "in a position similar" to his position with TQL it would "necessarily and inevitably result in [Fay] revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL." A "Competing Business" included "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." The Agreement defined the "Business" as "providing motor transport and related services, including third-party logistic[s] services, motor freight brokerage services and supply-chain management services."

In June 2013, TQL terminated Fay, and he founded JF Progressions, LLC (JF) through which Fay allegedly worked as the "exclusive shipping agent" for The Brandt Companies, LLC (Brandt). According to Fay, in August 2013, TQL notified him it intended to pursue legal action if he failed to "cease working as a broker" for Brandt through JF. As a result, Fay acted proactively and filed this action against TQL in November 2013, seeking a declaratory judgment that the Agreement was invalid and unenforceable. The complaint asserted the Agreement lacked a geographical limitation and, if enforced, would prevent Fay "from working in the truck shipping industry in any capacity in the entire United States." The complaint generally alleged the Agreement was "overly broad and not necessary for the reasonable protection" of TQL.

In its answer, TQL asserted counterclaims alleging Fay misappropriated trade secrets and breached the Agreement, which it claimed was valid and enforceable. TQL also sought injunctive relief. In December 2013, Fay filed a motion for judgment on the pleadings or, alternatively, summary judgment. Fay asserted the Agreement was invalid and unenforceable and, as a result, he was entitled to summary judgment on his declaratory judgment action and TQL's counterclaims for breach of contract and misappropriation of trade secrets. In January 2014, TQL filed a motion for summary judgment and argued the Agreement was reasonable and enforceable.

TQL offered several affidavits from one of its managers, Hillary Kotlarz. Kotlarz's third affidavit attempted to define the contours of the Agreement. Kotlarz asserted the Agreement did not prevent Fay from working in all capacities in the transportation industry. Kotlarz contended the nondisclosure provision does not prohibit Fay from utilizing all information he learned while working for TQL. The affidavit listed several positions Fay could have held in the transportation industry and many examples of nonconfidential information he learned while working for TQL.

During the circuit court's hearing, Fay argued the court must invalidate the Agreement if it was contrary to South Carolina public policy even if Ohio law applied. He asserted the Agreement violated public policy because it was "overbroad when considering TQL's interest." Fay contended the nondisclosure provisions were in effect noncompete provisions because the Agreement defined "confidential information as every piece of information given to the employee." Because the nondisclosure provision was actually a noncompete provision, according to Fay, it had to comport with the public policy of South Carolina regarding noncompete agreements.

In April 2014, the circuit court found the Agreement was valid under Ohio law and did not offend the public policy of South Carolina. Applying Ohio law, the circuit court explained the Agreement's restrictions were no greater than required for TQL's protection, did not impose undue hardship on Fay, and were not injurious to the public. Thus, the circuit court granted TQL's motion for summary judgment to the extent it sought a finding the Agreement was valid and enforceable. In response to a Rule 59(e), SCRCF motion filed by Fay, the circuit court clarified that it did not find Fay breached the Agreement and denied TQL's motion for

summary judgment with regard to breach of the Agreement and misappropriation of trade secrets. This cross-appeal followed.

STANDARD OF REVIEW

The circuit court should grant a motion for summary judgment when the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. An appellate court "reviews the grant of a summary judgment motion under the same standard as the [circuit] court." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). "When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Id.* To defeat a motion for summary judgment, a plaintiff must show "a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007).

FAY'S APPEAL

Fay argues the circuit court erred by finding the Agreement was valid and enforceable because it violated the public policy of South Carolina. Fay argues the nondisclosure provisions located in paragraphs four, six, and seven were essentially noncompete provisions because they restricted competition, rather than protected confidential information. Fay asserts the circuit court should have held the nondisclosure provisions to the same standard as the noncompete provisions, which included requiring a reasonable time restriction. According to Fay, because the nondisclosure provisions failed to include a reasonable time restriction, the Agreement was unenforceable.

In response, TQL argues the circuit court correctly ruled the Agreement was enforceable because it was valid under Ohio law and did not offend the public policy of South Carolina. TQL argues provisions for nondisclosure of trade secrets do not require time or geographical limitations. TQL asserts the legislature enacted section 39-8-30 of the South Carolina Code (Supp. 2016) in response to *Muckenfuss*¹ specifically to obviate any requirement for a time restriction for nondisclosure of trade secret provisions. Also, TQL argues the nondisclosure

¹ *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996).

provisions comported with our public policy because they expressly allowed Fay to use "the general skills and knowledge" he acquired while working for TQL.

We agree with Fay and reverse the circuit court's grant of summary judgment to TQL because the nondisclosure provisions operated as noncompete provisions and did not contain a reasonable time restriction, which violated the public policy of South Carolina. "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, 30, 731 S.E.2d 288, 291 (2012). "We review questions of law de novo." *Id.* "South Carolina does not follow the 'blue pencil' rule and, thus, 'restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms.'" *Palmetto Mortuary Transport, Inc. v. Knight Sys., Inc.*, 416 S.C. 427, 434, 786 S.E.2d 588, 591 (Ct. App. 2016) (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)).

The early common law of England held any agreement restricting a man's right to exercise his trade was void as against public policy because it required him to violate the law. *Milliken*, 399 S.C. at 30–31, 731 S.E.2d at 292. However, there has been some amelioration of this disfavor as the law has developed. *Id.* at 31, 731 S.E.2d at 292. Despite this amelioration, South Carolina courts have maintained that noncompete provisions "are generally disfavored and will be strictly construed against the employer." *Id.* Although we recognize "the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013).

"Terms in a non-compete agreement may be construed according to the law of another state. But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement." *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 354 (2005). Thus, we may assess the validity of a noncompete agreement under the law of another state, but we must also assess whether the agreement comports with the public policy of South Carolina.

In South Carolina, "contracts against competition are held to be unenforceable unless they meet certain criteria . . . [because] they constitute a restraint upon

trade[,] which is against public policy." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961).

An agreement's enforceability depends on whether it is necessary for the protection of the legitimate interest of the employer, is reasonably limited in its operation with respect to time and place, is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, is reasonable from the standpoint of sound public policy, and is supported by a valuable consideration.

Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983). Time restrictions of multiple years have been approved as reasonable. *See id.* (finding a time restriction of three years was reasonable); *Delmar Studios of Carolinas v. Kinsey*, 233 S.C. 313, 319, 104 S.E.2d 338, 341 (1958) (noting a time restriction of two years was reasonable). However, contractual provisions limiting the disclosure of trade secrets "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation. S.C. Code Ann. § 39-8-30(D) (Supp. 2016).

In this case, the circuit court erred by finding the Agreement comported with South Carolina public policy because its nondisclosure provisions effectively prevented Fay from ever working in a similar capacity for one of TQL's competitors. The nondisclosure provisions in paragraphs four and six operated as noncompete provisions with no reasonable time restriction, which violated the public policy of South Carolina. Paragraph four of the Agreement prevented Fay from revealing or using TQL's Confidential Information "at any time during the course of his . . . employment by TQL, and *at all times thereafter*," unless authorized by TQL. (emphasis added). Subsequently, paragraph six stated that if Fay engaged in an employment relationship with a Competing Business "in a position similar" to his position with TQL it would "necessarily and inevitably result in [Fay] revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL." A Competing Business included "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States."

Reading paragraphs four and six in conjunction, Fay could never hold a position similar to his position at TQL with any competitor of TQL without violating the

Agreement. Holding such a position would "necessarily and inevitably" result in him revealing and using TQL's Confidential Information, which the Agreement prohibited Fay from doing "at all times" after his employment with TQL. Thus, these paragraphs restricted Fay's right to use his talents to earn a living for an indefinite time period, if not forever. The paragraphs were not reasonably limited with respect to time. *See Baugh*, 402 S.C. at 12, 738 S.E.2d at 486 (explaining the court recognizes a business's legitimate interest in protecting its clientele and goodwill but is "equally concerned with the right of a person to use his talents to earn a living"); *id.* (requiring a noncompete agreement to be reasonably limited "with respect to time").

Although these paragraphs related ostensibly to nondisclosure of TQL's Confidential Information and, thus, may not have required a reasonable time restriction under *Milliken* and section 39-8-30(D), the paragraphs were so broad they effectively became a noncompete provision and required a reasonable time restriction. *See Milliken*, 339 S.C. at 38-39, 731 S.E.2d at 296 (noting confidentiality agreements do not necessarily require reasonable time restrictions); *Muckenfuss*, 322 S.C. at 293-94, 471 S.E.2d at 723 ("Despite its designation as a 'Covenant Not to Divulge Trade Secrets,' this section would substantially restrict Muckenfuss's competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete."). As described above, paragraphs four and six conspired to restrict Fay's employment activities after leaving TQL, rather than merely prohibiting Fay from revealing TQL's trade secrets or Confidential Information. Because the nondisclosure provisions had the effect of a covenant not to compete, they required a reasonable time restriction like any other noncompete agreement.

As to TQL's argument that section 39-8-30 extinguished any requirement found in *Muckenfuss* for a reasonable time restriction, our supreme court recently reaffirmed this Court's finding in *Muckenfuss* that nondisclosure provisions having the same effect as a noncompete provision are subject to the same scrutiny as noncompete provisions. *See Milliken*, 339 S.C. at 33 n.4, 731 S.E.2d at 293 n.4 ("If upon review, [nondisclosure agreements] are so broad as to effectively become [noncompete] agreements, then they are subject to the higher burden."). Thus, we reject TQL's argument the Agreement's nondisclosure provisions did not require a reasonable time restriction based on section 39-8-30.

With regard to TQL's claim the nondisclosure provisions did not act to restrict Fay's employment opportunities because paragraph four expressly allowed Fay to

use "the general skills and knowledge" he acquired while working for TQL, we disagree. Although this provision allowed Fay to use general skills and knowledge, paragraphs four and six nonetheless prohibited Fay from ever holding a similar position with a competitor of TQL without breaching the Agreement. Such a prohibition was a restriction on Fay's ability to earn a living and was subject to the same level of scrutiny as other noncompete provisions despite the possibility of allowing him to use the general skills and knowledge he acquired from TQL.

We acknowledge other sections of the Agreement contained a time restriction of one year, which otherwise may have been reasonable. However, we cannot infer this one-year restriction into paragraphs four and six because paragraph four expressly contains a time limit of "at all times." Thus, the one-year restriction from paragraph nine cannot replace the express time restriction in paragraph four. Furthermore, under our case law, it would violate public policy for this Court or the circuit court to accept the invitation of paragraph twelve and rewrite portions of the Agreement or insert a reasonable time restriction for paragraphs four and six because it would add a term to the Agreement to which the parties neither negotiated nor agreed.² See *Poynter Invs.*, 387 S.C. at 588, 694 S.E.2d at 18 ("[I]n

² Although the concurrence is well-reasoned and we agree with the general position that a noncompete agreement may be interpreted and modified under the laws of another state pursuant to a valid choice of laws provision, we find it unnecessary to assess the enforceability of the Agreement under Ohio law in this case. We acknowledge our supreme court in *Stonhard* analyzed whether the agreement could be reformed under New Jersey law to add a previously nonexistent geographical term. See *id.* at 159–60, 621 S.E.2d at 353–54. However, the *Stonhard* court subsequently concluded that, even if the agreement could be reformed under New Jersey law to add a geographical term, the agreement would still be unenforceable in South Carolina because adding such a term violates our public policy. See *id.* at 161, 621 S.E.2d at 354 ("Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy."). Likewise, we find the very act of adding a time restriction to paragraphs four and six of the Agreement, even if such a term could be added under Ohio law, would be unenforceable in South Carolina because adding a time restriction not negotiated by the parties would violate our public policy. See *Poynter Invs.*, 387 S.C. at 587–88, 694 S.E.2d at 17 ("[T]his Court has held that it would violate public policy to allow a court to insert a geographical limitation where none existed."); *Lowcountry Open Land Tr. v. Charleston S.*

South Carolina, the restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."); *Stonhard*, 366 S.C. at 160, 621 S.E.2d at 354 ("The agreement fails to limit the covenant to a particular geographical area. To add and enforce such a term requires this [c]ourt to bind these parties to a term that does not reflect the parties' original intention. Therefore, we hold that the covenant, despite any reformation, is void and unenforceable as a matter of public policy.").

Accordingly, because the Agreement contained provisions that were in effect noncompete provisions without a reasonable time restriction, we reverse the circuit court's grant of summary judgment to TQL finding the Agreement was valid and enforceable.

TQL'S APPEAL

TQL argues the circuit court erred by refusing to grant summary judgment on its counterclaims alleging Fay breached the Agreement. TQL claims there was no genuine issue of material fact regarding whether Fay violated the terms of the Agreement. We dismiss TQL's appeal because a party may not appeal the denial of summary judgment. The denial of summary judgment is not appealable even when accompanied by a proper appeal of the grant of summary judgment on a separate issue. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167–68, 580 S.E.2d 440, 443–44 (2003); *see also* *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011) ("Because the circuit court *denied* summary judgment, we are prohibited from reviewing that ruling pursuant to [*Olson*].").

CONCLUSION

Based on the foregoing, we reverse the circuit court's partial grant of summary judgment to TQL because the Agreement violated the public policy of South Carolina. We dismiss TQL's cross-appeal because a party may not appeal the denial of summary judgment.

REVERSED IN PART AND DISMISSED IN PART.

Univ., 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008) ("Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties.").

WILLIAMS, J., concurs.

GEATHERS, J., concurring in a separate opinion: I concur with the majority's dismissal of Total Quality Logistics, LLC's (TQL's) cross-appeal and with its decision to reverse the circuit court's grant of partial summary judgment to TQL. However, I write separately because I believe this court must first apply Ohio law in determining the enforceability of the non-compete agreement before considering whether it violates South Carolina public policy. Through the mechanism of first applying the law of the state governing the agreement, this court could potentially modify a provision that, if left unmodified, would violate South Carolina public policy. Furthermore, if we fail to follow the foregoing approach, the choice of law provision agreed to by the parties in the non-compete agreement would be rendered meaningless.

Fay signed an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement, which stated it was to be "interpreted and enforced under the laws of the State of Ohio." Paragraph nine of the agreement prohibited Fay from owning or working for a Competing Business—an entity providing motor transport or logistics services anywhere in the continental United States—for a period of one year after the termination or cessation of his employment with TQL. The agreement also contained a broad definition of Confidential Information and stated all information Fay received or had access to during his employment at TQL was "presumed to be Confidential Information." Pursuant to section four of the agreement, Fay was prohibited from disclosing or using any of TQL's Confidential Information during the course of his employment at TQL "and at all times thereafter." Section six of the agreement prohibited Fay from working "in a position similar to [his] position at TQL" because such employment "would necessarily and inevitably result in [Fay] revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL."

I agree with the majority that the nondisclosure portion of the agreement should be treated as a non-compete agreement. I also agree with the majority's conclusion that the nondisclosure agreement is overly broad because it prohibits Fay from ever working "in a position similar" to his position at TQL. However, to reach this conclusion, I believe this court must first determine whether the agreement can be modified under Ohio law in light of the agreement's choice of law provision before considering whether the agreement violates South Carolina public policy. *See*

Team IA, Inc. v. Lucas, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) ("Choice of law clauses are generally honored in South Carolina.").

I acknowledge South Carolina does not follow the "blue pencil" rule and does not permit courts to rewrite or modify parties' agreements, while Ohio, as discussed below, permits courts to make reasonable modifications. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) ("[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."). Although our supreme court has explicitly prohibited some modifications, *see Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (holding it would violate public policy to allow a court to insert an entirely new geographical term when none existed), I believe modifying an agreement pursuant to the law of the state governing the agreement would not automatically violate South Carolina public policy. *See Team IA, Inc.*, 395 S.C. at 249, 717 S.E.2d at 109 ("[A] choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy." (quoting *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007))); *see also* 16 Am. Jur. 2d *Conflict of Laws* § 74 (2009) ("Enforcement of a contract or a contract provision [that] is valid by the law governing the contract will not be denied on the ground of public policy unless a 'strong case' for such action is presented; mere dissimilarity of law is not sufficient for application of the public policy doctrine." (footnote omitted)). Thus, I believe Ohio law should be applied in this case.

"Terms in a non-compete agreement may be construed according to the law of another state." *Stonhard, Inc.*, 366 S.C. at 159, 621 S.E.2d at 353. "But if *the resulting agreement* is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement." *Id.* (emphasis added).

In *Stonhard*, our supreme court considered whether a non-compete agreement that did not contain a geographical limitation could be blue penciled according to New Jersey law and then enforced in South Carolina. *Id.* Before considering South Carolina public policy, our supreme court first attempted to modify the agreement pursuant to New Jersey law based on the agreement's choice of law provision. *Id.* at 159–60, 621 S.E.2d at 353–54. Our supreme court found that under New Jersey law, a court may blue pencil a non-compete agreement to make the terms reasonable and noted that if the agreement contained an overly broad geographical limitation, "a court may decrease the limitation to make it reasonable, while at the

same time continuing to enforce other terms in the agreement." *Id.* at 159–60, 621 S.E.2d at 353. Our supreme court further noted the non-compete agreement it was reviewing did not contain a geographical limitation, and our supreme court was "unable to find a single case from New Jersey in which a court ha[d] added a geographical term when one was previously omitted." *Id.* at 160, 621 S.E.2d at 354. Thus, it determined the agreement could not be blue penciled "to add an entirely new term to which neither of the parties agreed." *Id.* Only after determining New Jersey law would not permit the addition of a geographical term when the parties had not included one did our supreme court consider whether the non-compete agreement violated South Carolina public policy. *Id.* It stated, "Because we find no term that may suffice as a substitute for a geographical restriction so as to render the covenant reasonable, we hold that the covenant is unenforceable as against public policy." *Id.*

In Ohio, "a covenant not to compete [that] imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests." *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975). "A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." *Id.* "Courts are empowered to modify or amend employment agreements to achieve such results." *Id.* Ohio's "reasonableness" test "permits courts to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and enables them to evaluate all the factors comprising 'reasonableness' in the context of employee covenants." *Id.* at 546–47.

However, "[t]he use of permissive language in the *Raimonde* decision implies that modification is within the discretion of the trial court." *Profl Investigations & Consulting Agency, Inc. v. Kingsland*, 591 N.E.2d 1265, 1270 (Ohio Ct. App. 1990). In *Kingsland*, the Court of Appeals of Ohio considered a non-compete agreement that contained no temporal or geographic limitations. *Id.* at 1269–70. The *Kingsland* court found the lack of temporal and geographic limitations gave "the covenant a greater restraint than necessary to protect [the employer] and impose[d] an undue hardship on" the employee. *Id.* at 1269. The Court of Appeals of Ohio found that although Ohio courts have "the authority to refashion an unduly restrictive non-competition clause to make it reasonable," a court may decline to modify the restriction if it "could not easily modify existing provisions but might be required to rewrite the entire covenant." *Id.* at 1269–70; *see also LCP Holding*

Co. v. Taylor, 817 N.E.2d 439, 446–47 (Ohio Ct. App. 2004) (finding the modifications requested by the employer "would entail substantial changes to the agreement" and, thus, the trial court did not abuse its discretion in declining to modify the restrictive covenants).

In South Carolina, "public policy demands [non-compete agreements'] scope be subject to judicial review for reasonableness," which includes evaluating "whether the restriction is reasonable in that it is no greater than necessary to protect the employer's legitimate interests, and it is not unduly harsh in that it curtails the employee's ability to earn a living." *Milliken & Co. v. Morin*, 399 S.C. 23, 33, 731 S.E.2d 288, 293 (2012). "The reason that contracts against competition are held to be unenforceable unless they meet certain criteria[] is that they constitute a restraint upon trade[,] which is against public policy." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961).

Applying the *Stonhard* approach to the instant matter, I believe the agreement, which prohibits Fay from working in a similar position to the one he held at TQL without a time limitation, would not pass Ohio's "reasonableness" test because it imposes an undue hardship on Fay and creates "a greater restraint than necessary to protect" TQL. *See Kingsland*, 591 N.E.2d at 1269. Although this court could modify the agreement pursuant to Ohio law, I believe we should decline to do so because the agreement could not easily be modified and this court would be required to rewrite paragraphs four and six, as well as potentially narrow the scope of the Confidential Information definition. I believe it would be difficult for this court to modify these provisions in a way that would ensure we are honoring the intent of the parties. *See Raimonde*, 325 N.E.2d at 547 (permitting courts to fashion reasonable contracts "between the parties, *in accord with their intention at the time of contracting*" (emphasis added)).³ I believe this court would also be prevented from severing certain portions of the agreement pursuant to the

³ The *Stonhard* court's rationale for determining that adding an entirely new term would violate public policy was that adding a new term would "bind [the] parties to a term that [did] not reflect the parties' original intention." 366 S.C. at 160, 621 S.E.2d at 354; *see Poynter Invs., Inc.*, 387 S.C. at 587–88, 694 S.E.2d at 17 ("[T]his [c]ourt has held that it would violate public policy to allow a court to insert a geographical limitation [when] none existed."). Similarly, Ohio courts are only permitted to make modifications that are "in accord with [the parties'] intention at the time of contracting." *See Raimonde*, 325 N.E.2d at 547.

severability clause because of the interrelated nature of the paragraphs. Because the agreement cannot easily be modified, I believe the agreement is unreasonable and unenforceable under Ohio law. Furthermore, I believe the unmodified agreement is unreasonable according to South Carolina public policy because it imposes greater restrictions than necessary to protect TQL's legitimate interests and curtails Fay's ability to earn a living. *See Standard Register Co.*, 238 S.C. at 71, 119 S.E.2d at 542 ("The reason that contracts against competition are held to be unenforceable unless they meet certain criteria[] is that they constitute a restraint upon trade[,] which is against public policy."). Therefore, I would reverse the circuit court's grant of partial summary judgment to TQL.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-Respondent,

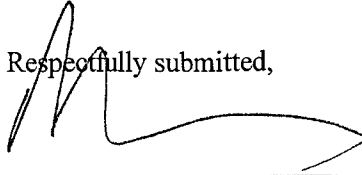
vs.

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

PETITION FOR REHEARING

Appellant-Respondent respectfully submits this Petition for Rehearing and accompanying Memorandum in Support of Petition for Rehearing regarding the Court's decision reversing the lower Court's partial grant of summary judgment to Appellant-Respondent to South Carolina Appellate Court Rule 221. Joshua Fay v. Total Quality Logistics, #5471, filed March 1, 2017.

Respectfully submitted,



Date: March 14, 2017

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

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JOSHUA FAY.....Appellant-Respondent,

vs.

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

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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ARGUMENT

Respondent-Appellant Total Quality Logistics, LLC ("TQL") respectfully submits this Memorandum in Support of its Petition for Rehearing. For the following reasons, the Court should grant the Petition for Rehearing.

The Court's holding in this case departs from the language and legislative intent of S.C. Code Ann. § 39-8-30. The confidentiality provision at issue was not so broad as to render it a non-compete clause. Appellant-Respondent ("Fay") is still be able to find alternative employment without violating the terms of the confidentiality agreement. Further, a confidentiality provision need not contain either a geographic or temporal limitation in order to be valid.

The Court mischaracterizes the confidentiality provision of Fay's agreement as being so broad that it operates a non-compete. Fay v. Total Quality Logistics, No. 5471, slip op. at 7-8 (S.C. App. March 2, 2017). The Court found that the confidentiality provision has the same effect as a non-compete provision and was thus subject to the same scrutiny as a non-compete provision. *Id.* The Court cites particularly to Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) and Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288 (2012) as support for this proposition. However, South Carolina's General Assembly amended the South Carolina Trade Secrets Act in part in response to the decision in Muckenfuss in the following manner:

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

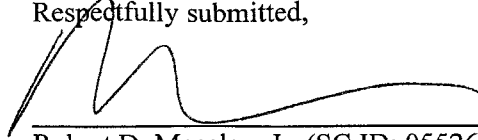
S.C. Code Ann. § 39-8-30.

Although Morin confirmed the theory that a confidentiality provision could be so broad as to become, in essence, a non-compete, the Court misinterpreted TQL's confidentiality provision. This provision is not so broad as to restrict Fay's ability to earn a living; the information defined as confidential is limited to those trade secrets of TQL that Fay learned through his employment with TQL. The South Carolina General Assembly has made clear through its amendments to the South Carolina Trade Secrets Act its intention that confidentiality provisions should not to be treated as non-compete provisions and are not subject to the same geographic and temporal restrictions. Should this interpretation prevail, nearly all confidentiality and non-disclosure agreements would become subject to the same requirements as non-compete provisions regardless of the intention of the parties or the nature of the information. For example, the confidentiality of trade secret information, such as product recipes or proprietary methods of conducting business, would be incapable of protection in perpetuity, which is not the intent of the statute passed by South Carolina legislature. By broadly construing the confidentiality provision and narrowly construing the statute, the Court mistakenly concludes the confidentiality provision of Fay's agreement is expansive enough to be considered a non-compete provision.

Accordingly, S.C. Code Ann. § 39-8-30 applies, and a temporal limitation for the confidentiality provision is unnecessary. Further, the confidentiality provision properly defines confidential information to include only that information necessary for the protection of TQL's business interests. The Court therefore erred when it determined the confidentiality provision was so broad that it must be judged by the same standard as a non-compete provision and required a time limitation to be included.

For these reasons, TQL respectfully requests that the Court grant the Petition for Rehearing in this matter.

Respectfully submitted,



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March 13, 2017

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-Respondent,

vs.

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

PROOF OF SERVICE

The undersigned of the law offices of Smith Moore Leatherwood LLP, attorneys for Respondent-Appellant, does hereby certify that service of the Petition for Rehearing and Memorandum in Support of Petition for Rehearing was made on all counsel of record, specified below, by sending a copy via FedEx, on **March 14, 2017**, to the following address:

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The South Carolina Court of Appeals

Joshua Fay, Appellant-Respondent,

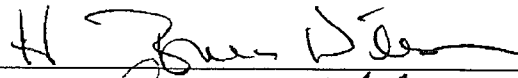
v.

Total Quality Logistics, LLC, Respondent-Appellant.

Appellate Case No. 2014-001828

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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Peter Andrew Rutledge, Esquire

The Honorable Roger M. Young, Sr.

FILED

May 26, 2017