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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

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CERTIFIED QUESTIONS

Joseph F. Anderson, Jr., United States District Court Judge

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Appellate Case No.: 2019-001373

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Tower Street Capital Management Inc.....Plaintiff,

v.

KnightBrook Insurance Company,.....Defendant.

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**PLAINTIFF'S OPENING BRIEF**

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Table of Authorities ..... ii

Statement of Issues ..... 1

Statement of the Case ..... 1

Statement of Facts..... 2

Argument ..... 6

    I.    Under South Carolina law, when a contract’s durational term is keyed to the occurrence of a future, specific event, must the future, specific event be an objective event such that one party to the contract does not have control over it? ..... 6

        A.    South Carolina Law Holds that Contracts Similar to the Finder’s Fee Agreement Contain a Defined, Durational Term ..... 7

        B.    This Court Should Not Rewrite Contract Terms as the Illinois Courts Have Done..... 11

    II.   If the answer to Question #1 is yes, does a contract that requires the two parties to the contract to form a corporation together in the future in order to terminate the contract qualify as an objective event that renders the contract sufficiently definite in duration such that it is not perpetual and thus not terminable at will? ..... 17

        A.    Commission Payment Obligations are Enforceable after Termination of the Finder’s Fee Agreement ..... 17

        B.    The Creation of Newco as the Terminating Event is Sufficient to Prevent Termination At Will ..... 20

Conclusion ..... 24

**TABLE OF AUTHORITIES**

**Cases**

Altrutech, Inc. v. Hooper Holmes, Inc., 6 F. Supp. 2d 1269 (D. Kan. 1998)..... 12

Baldwin Piano, Inc. v. Deutsche Wurlitzer GMBH, 03 C 2105, 2004 WL 46243, at \*2 (N.D. Ill. Jan. 7, 2004).....6

Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993).....6

Besco, Inc. v. Alpha Portland Cement Co., 619 F.2d 447 (5th Cir. 1980).....20

Carolina Cable Network v. Alert Cable TV, Inc., 447 S.E.2d 199 (S.C. 1994).....6, 8, 9, 11

Carter White Lead Co. v. Kinlin, 66 N.W. 536 (Neb. 1896).....22

Childs v. City of Columbia, 70 S.E. 296 (S.C. 1911).....8, 9, 13

City of Big Spring v. Board of Control, 404 S.W.2d 810 (Tex. 1966) .....21

City of Superior v. Douglas County Telephone Co., 122 N.W. 1023 (1909) .....21

Clemons v. Zimmer Broad. Co., Inc., 159 S.W.3d 508 (Mo. Ct. App. 2005)..... 19

Consolidated Labs., Inc. v. Shandon Scientific Co., 413 F.2d 208 (7th Cir. 1969) ..... 12

Copylease Corp. of America v. Memorex Corp., 403 F.Supp. 625 (S.D.N.Y. 1975).....20

Don King Productions, Inc. v. Douglass, 742 F.Supp 741(S.D.NY 1990) .....22

Ehrenworth v. Stuhmer & Co., 128 N.E. 108 (N.Y. 1920) .....22

Ellis v. Taylor, 449 S.E.2d 487 (S.C. 1994) ..... 14

ESA Services, LLC v. S.C. Dept of Revenue, 707 S.E.2d 431 (S.C. Ct. App. 2011).....7

Fuchs v. United Motor Storage Co., 21 N.E.2d 669 (Ohio 1939) .....22, 23

Grattan v. Sociea Per Azzioni Cotonificio Cantonie, 151 N.YS.2d 875 (1956)..... 17, 18

Jespersen v. Minnesota Mining & Mfg. Co., 681 N.E.2d 67 (Ill. App. Ct. 1997), aff'd, 700 N.E.2d 1014 (Ill. 1998).....9, 10, 11, 12, 13, 14, 15

Jugla v. Trouttet, 23 N.E. 1066 (N.Y. 1890) .....22

<u>Laff v. John O. Butler Co.</u> , 381 N.E.2d 423 (Ill. App. Ct. 1978) .....	20
<u>Liberty Industrial Sales. Inc. v. Marshall Steel Co.</u> , 272 F.3d 605 (7th Cir. 1959).....	20
<u>Madden v. Bent Palm Investments, LLC</u> , 688 S.E.2d 597 (S.C. Ct. App. 2010).....	7
<u>McFeely v. Seneca Wire &amp; Mfg. Co.</u> , 07-10596, 2008 WL 2355602, at *5 (E.D. Mich. June 5, 2008) .....	18
<u>McGill v. Moore</u> , 672 S.E.2d 571 (S.C. 2009).....	7
<u>Miller v. Paul M. Wolff Co.</u> , 316 P.3d 1113 (Wash. Ct. App. 2014).....	18
<u>Moss v. Porter Bros., Inc.</u> , 357 S.E.2d 25 (S.C. App. 1987) .....	17, 18
<u>MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.</u> , 864 N.W.2d 83 (Wis. 2015) .....	21
<u>Payroll Express Corp. v. Aetna Casualty &amp; Surety</u> , 659 F.2d 285 (2d Cir. 1981).....	20
<u>Phelps v. Shawprint. Inc.</u> , 328 Mass. 352, 103 N.E.2d 687 (Mass. 1952) .....	22, 23
<u>Phillips v. U.S. Bank, N.A.</u> , 781 N.W.2d 540 (Wis. App. 2010) .....	18, 19
<u>Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship</u> , 503 S.E.2d 184 (S.C. Ct. App. 1999) .....	8, 9, 10, 11, 12, 15, 16, 20
<u>Richland Wholesale Liquors v. Glenmore Distilleries</u> , 818 F.2d 312 (4th Cir. 1987).....	9
<u>Rico Industries, Inc. v. TLC Group, Inc.</u> , 6 N.E.3d 415 (Ill. App. Ct. 2014).....	11, 14, 15, 16
<u>R.J.N. Corp. v. Connelly Food Products, Inc.</u> , 529 N.E.2d 1184 (Ill. App. Ct. 1988).....	11, 16
<u>Schulmeyer v. State Farm Fire &amp; Cas. Co.</u> , 579 S.E.2d 132 (S.C. 2003) .....	7, 8
<u>Stevens Aviation, Inc. v. DynCorp Int’l LLC</u> , 715 S.E.2d 655 (S.C. Ct. App. 2011) .....	7
<u>TEG–Paradigm Env’tl., Inc. v. U.S.</u> , 465 F.3d 1329 (Fed. Cir. 2006) .....	7
<u>Thorne v. True-Hixon Lumber Co.</u> , 148 So. 388 (Miss. 1933).....	20
<u>Wachovia Bank v. Blackburn</u> , 716 S.E.2d 454 (S.C. Ct. App. 2011) .....	8
<u>Ward v. W. Oil Co.</u> , 692 S.E.2d 516 (S.C. 2010) .....	6
<u>Warner v. Warner</u> , 311 S.E.2d 78 (S.C. 1983) .....	7

Warner-Lambert v. Pharm. Co. v. John J. Reynolds, Inc., 178 F.Supp. 655 (S.D.N.Y. 1959), *aff'd*  
\*11 280 F.2d 197 (2d Cir. 1960) .....23

Werner v. Biederman, 28 N.E.2d 957 (Ohio Ct. App. 1940) .....20, 21

W.P. Iverson & Co. v. Durham Mfg. Co., 152 N.E.2d 615 (Ill. App. Ct. 1958).....20

Zee Medical Distributor Ass'n, Inc. v. Zee Medical, Inc., 94 Cal. Rptr. 2d 829  
(Cal. Ct. App. 2000) .....13, 14

**Rules**

17 Am. Jur. 2d Contracts § 193 (2004) ..... 11

Restatement (Second) of Agency § 454 (1958).....19

## **STATEMENT OF ISSUES**

1. Under South Carolina law, when a contract's durational term is keyed to the occurrence of a future, specific event, must the future, specific event be an objective event such that one party to the contract does not have control over it?
  
2. If the answer to Question #1 is yes, does a contract that requires the two parties to the contract to form a corporation together in the future in order to terminate the contract qualify as an objective event that renders the contract sufficiently definite in duration such that it is not perpetual and thus not terminable at will?

## **STATEMENT OF THE CASE**

This is an action involving a finder's fee agreement (Finder's Fee Agreement, December 14, 2011, JA 21-23) between Tower Street Capital Management, Inc. (Tower) and KnightBrook Insurance Company (KnightBrook). In exchange for Tower's introduction of KnightBrook to DGU Insurance Services, KnightBrook is to pay 2% of the Gross Written Premiums on two programs – Equity Protection Program (“EPP”) and Second Mortgage Protection Program (“2MP or MSP”). Defendant KnightBrook paid the finder's fees until the summer of 2017 when it abruptly stopped payment on the premise that the Finder's Fee Agreement is unenforceable.

On June 2, 2017, Tower filed suit against KnightBrook in the Richland County Court of Common Pleas alleging breach of contract. KnightBrook removed the case to the United States District Court for the District of South Carolina on July 7, 2017. (ECF 1<sup>1</sup>). KnightBrook thereafter answered alleging in part that the Finder's Fee Agreement is void for indefiniteness and asserted counterclaims for declaratory judgment and disgorgement of payments made to Tower under theories of payment by mistake of fact, unjust enrichment, and reformation of the agreement. (ECF

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<sup>1</sup> Reference to ECF is to the Case Management/Electronic Case Filing system for the United States District Court for the District of South Carolina and can be accessed at <https://ecf.scd.uscourts.gov/cgi-bin/login.pl> using case number 3:17-cv-1781-JFA

21). After the completion of pre-trial discovery both Tower and KnightBrook moved for summary judgment and filed briefs in support of their respective motions and in opposition to the others' motion. (ECF 48, 50, 51, 52, 53, 54).

The District Court subsequently requesting additional briefing on the applicability of two Illinois cases. (ECF 59). Tower and KnightBrook filed supplemental memoranda as ordered. (ECF 68, 72). Thereafter on August 16, 2019, the District Court issued an Order for Certification requesting this Court answer the following questions pursuant to Rule 244 SCACR:

1. Under South Carolina law, when a contract's durational term is keyed to the occurrence of a future, specific event, must the future, specific event be an objective event such that one party to the contract does not have control over it?
2. If the answer to Question #1 is yes, does a contract that requires the two parties to the contract to form a corporation together in the future in order to terminate the contract qualify as an objective event that renders the contract sufficiently definite in duration such that it is not perpetual and thus not terminable at will?

(Certification Order, JA 3-17).

This Court issued an Order dated September 19, 2019 (JA 1) agreeing to answer the above questions. Tower and KnightBrook thereafter requested the District Court supplement the record with additional documents. The District Court entered an order on October 30, 2019 (JA 18-28) supplementing the record with the Finder's Fee Agreement (JA 20-23) and the Letter of Intent (JA 25-28).

### **STATEMENT OF FACTS**

Defendant KnightBrook is a reinsurer with its principal place of business on Wilshire Boulevard in Los Angeles. (ECF 50-4, KnightBrook 30(b)(6) Dep. 39:5-20, Sept. 12, 2018). It is owned by billionaire Don Hankey. (Id. at 41:6-13). Plaintiff Tower is a South Carolina corporation with two voting shareholders – Madison Cone and the late Curtis Stewart. (ECF 50-

5, Pl.'s Second Supp. Answers to Def.'s First Set of Interrog. #1).<sup>2</sup> Cone and Stewart previously worked together at Companion Property and Casualty Insurance Company. (ECF 50-6, Cone Dep. 13:4-17, June 1, 2018). Cone is a graduate of the Citadel and holds an MBA from Duke's Fuqua School of Business. (Id. at 243:7-25). Stewart was a graduate of the Citadel and the University of South Carolina School of Law. (ECF 50-7, Stewart Dep. 5:22 – 6:21, Nov. 9, 2018). He was an accountant, lawyer, and former CFO and COO of Companion. (Id. at 8:4 – 9:7). Cone now lives in Montgomery, Alabama. Stewart lived in Columbia until he recently passed away from natural causes.

As noted, Stewart was CFO and COO of Companion, and therefore had accumulated a substantial amount of contacts in the insurance industry. (ECF 50-4 at 98:19 – 99:15, “When you come to Knight and say, I [Stewart] control \$600,000,000 worth of business, you get an audience with us.”). When Companion changed top management in 2011, Stewart was squeezed out. (ECF 50-7 at 13:16 – 14:20; 32:21 – 33:11.) He became general counsel for Tower, whose shareholders at the time were Madison Cone and Rex Boylston. (ECF 50-5, Interrog. #1). Stewart later became a shareholder of Tower, in addition to his role as general counsel. (Id.) Tower's business was to introduce certain insurance programs, previously written by Companion, to KnightBrook. (ECF 50-7 at 34:25 – 35:14; 75:25 – 76:4). KnightBrook would be the risk taker and benefit from Tower's ability to bring it programs that would make KnightBrook a lot of money. Two of those programs are EPP and 2MP/MSP which KnightBrook continues to write today. (ECF 50-4 at 96:23-24).<sup>3</sup> EPP is a “good program” and is one reason for the “impetus for [KnightBrook's] assets growing and profitability growing[.]” (Id. at 32:16 – 33:5).

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<sup>2</sup> Rex Boylston is also a shareholder, but he is not a voting shareholder.

The producer for these programs was a general managing agent – DGU – located in Red Bank, New Jersey. (Finder’s Fee Agreement, JA 21-23). Companion had a prior relationship with DGU, and Madison Cone had worked for DGU while maintaining his office at Companion. (ECF 50-6 at 27:3-16). DGU controlled the market for these programs, but needed a carrier to insure them after Companion pulled away. (ECF 50-7 at 31:19 – 32:7). Tower introduced KnightBrook to DGU. (JA 21, 1st Whereas Clause). KnightBrook became the 100% reinsurer of the DGU business that was fronted by State National Insurance Company.<sup>4</sup> (ECF 50-5 at 136:5 – 137:19).

These circumstances are substantially set forth in the Finder’s Fee Agreement, particularly in Paragraph 1 on the first page. (JA 21). In addition, there is a merger clause in paragraph 3 and an important indemnity flowing from KnightBrook to Tower Street in paragraph 6, to include attorneys’ fees and costs. (JA 22). Paragraph 7 includes a termination provision with a survival of paragraphs 1 (payment) and 6 (indemnity) upon termination of the Agreement. (JA 23).

Paragraph 1 of the Finder’s Fee Agreement states as follows:

***In exchange for identifying and introducing KNIGHTBROOK to the program administrator, . . . KNIGHTBROOK shall pay FINDER [TOWER] a fee per the following schedule until the time that Knightbrook agency (as provisionally identified as “Newco” in the Letter of Intent dated 9/1/11 and agreed to by Cone & Boylston and Knightbrook) is established. At such time Cone & Boylston will continue to be compensated for the Transaction, but subject to the Newco operating agreement. Until that time, KNIGHTBROOK agrees to pay:***

- ***2% of the Gross Written Premium on both programs [Equity Protection Program & Second Mortgage Protection Program]***

(JA 21) (emphasis added).

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<sup>4</sup> When a reinsurer like KnightBrook underwrites the entire risk of a policy issued by a direct insurer like State National, the resulting contact is a “fronting contract.” (ECF 50-10, Jarvis Dep. 24:15 – 25:3, September 13, 2018).

Paragraph 7 of the Finder's Fee Agreement provides that any party may terminate the agreement upon ten (10) days-notice. (JA 23). However, the Agreement provides that TOWER is entitled to post-termination commission payments for Transactions entered into during the term of the engagement:

*The term of this Agreement shall commence at the date first written above between KNIGHTBROOK and FINDER. Notwithstanding the foregoing, either party may terminate this Agreement upon ten (10) days prior notice to the other party. However, KNIGHTBROOK's obligations pursuant to paragraphs 1, 2, 6<sup>5</sup> and 7 hereof will survive the completion of our engagement hereunder in accordance with the terms of those respective paragraphs, any withdrawal or termination of any Transaction or decision not to proceed with any Transaction or the expiry or other termination or purported termination of this Agreement.*

(Id.) (emphasis added).

While there had been a previous discussion of a Newco managing agent to run the two programs, it has not been created, and therefore, the parties are left with the agreement to pay 2% of the Gross Written Premiums.<sup>6</sup> In sum, the EPP and 2MP/MSP programs are up and running today. KnightBrook paid Tower the finder's fee from 2011 until the summer of 2017 when it unilaterally stopped. Yet, KnightBrook continues to make a fortune from these programs brokered by Tower.<sup>7</sup>

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<sup>5</sup> Paragraph 2 of the Agreement is a warranty disclaimer provision and paragraph 6 is an indemnity provision.

<sup>6</sup> Newco has not yet been formed. Curtis Stewart asked KnightBrook if it wanted to form Newco, and the answer was "no." "That was their call, not ours." (ECF 50-7 at 134:13-18).

<sup>7</sup> From EPP alone, KnightBrook has made over \$25 million in net profit from 2012 through April 2017. (ECF 50-4 at 181:6-19).

## ARGUMENT

### **I. Under South Carolina law, when a contract's durational term is keyed to the occurrence of a future, specific event, must the future, specific event be an objective event such that one party to the contract does not have control over it?**

The correct answer to the District Court's first certified question is no; a contract's durational term is not required to be keyed to an objective event. Our courts enforce the terms of a contract according to the parties' intent. Thus, if the parties intended for the contract to end at a future event which is not "objective" as defined in the District Court's certified question, the contract is nevertheless enforceable under South Carolina law. Unlike Illinois law, perpetual contracts are not per se unenforceable in this State. See Carolina Cable Network v. Alert Cable TV, Inc., 447 S.E.2d 199, 201-02 (S.C. 1994) ("Historically perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract."). Compare Baldwin Piano, Inc. v. Deutsche Wurlitzer GMBH, 03 C 2105, 2004 WL 46243, at \*2 (N.D. Ill. Jan. 7, 2004) ("Perpetual contracts are contrary to Illinois public policy...")

South Carolina courts will only refuse to enforce contracts as intended by the parties in very limited circumstances. These situations principally occur where the enforcement of the contract will cause some act to be done in violation state law or public policy. See Ward v. W. Oil Co., 692 S.E.2d 516, 519 (S.C. 2010); Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (S.C. 1993). There is absolutely no claim that enforcing the durational term that the parties agreed to, the creation of a Newco, will cause an illegal or unlawful act to occur or otherwise violate public policy of this State.

A. South Carolina Law Holds that Contracts Similar to the Finder's Fee Agreement Contain a Defined, Durational Term.

The Finder's Fee Agreement states that the payment term of the contract is 2% of the Gross Written Premium on the EPP and MSP/2MP programs "until that time" that Newco is formed. (JA 21 ¶ 1.) Applying well-established South Carolina law, the plain language of the contract reveals the parties' intended that the obligation to pay under the Finder's Fee Agreement ends once Newco is formed.<sup>8</sup>

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Madden v. Bent Palm Investments, LLC, 688 S.E.2d 597, 600 (S.C. Ct. App. 2010) (quoting McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009)). To determine the parties' intention, courts first look to the contractual language. Warner v. Warner, 311 S.E.2d 78, 79 (S.C. 1983). Contracts are "unambiguous if they are not 'susceptible to more than one reasonable interpretation . . .'" Stevens Aviation, Inc. v. DynCorp Int'l LLC, 715 S.E.2d 655, 659 (S.C. Ct. App. 2011) (quoting TEG-Paradigm Env'tl., Inc. v. U.S., 465 F.3d 1329, 1338 (Fed. Cir. 2006)). The determination of whether the language of a contract is unambiguous is a question of law for the court. ESA Services, LLC v. S.C. Dept of Revenue, 707 S.E.2d 431, 436 (S.C. Ct. App. 2011).

Similarly, "the construction of a clear and unambiguous contract is a question of law for the court." Id. "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d

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<sup>8</sup> However, the parties further intended that both Cone and Boylston would continue to be compensated for the Transaction even after the formation of Newco. The Finder's Fee Agreement specifically provides that "*At such time [that Newco is established] Cone & Boylston will continue to be compensated for the Transaction, but subject to the Newco operating agreement.*" (JA 21 ¶ 1) (emphasis added).

132, 134 (S.C. 2003). When a contract is clear and unambiguous, courts must give the contractual terms contained in the document their plain, ordinary, and popular meaning. Wachovia Bank v. Blackburn, 716 S.E.2d 454, 457-58 (S.C. Ct. App. 2011).

The three South Carolina cases that consistently appear regarding South Carolina's approach toward durational terms in contracts are (1) Childs v. City of Columbia, 70 S.E. 296 (S.C. 1911); (2) Carolina Cable Network v. Alert Cable TV, Inc., 447 S.E.2d 199 (S.C. 1994); and (3) Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 503 S.E.2d 184 (S.C. Ct. App. 1999). Under the law established by these three cases, the Finder's Fee Agreement has a definite, durational term and cannot be construed as a perpetual contract.

First, Childs involved a non-resident of the City of Columbia who agreed with the City of Columbia that the City would furnish his residence, along with other houses owned by the plaintiff that were outside the City limits, with water "at the customary and usual price." Childs, 70 S.E. at 297. The City increased the water rate to the plaintiff by over four times the maximum price charged to residents and purportedly threatened to cut off the supply if he did not pay the new, increased rate. Id. The plaintiff sought to enjoin the City from stopping his water supply and charging him the new rate. Id. The South Carolina Supreme Court disagreed, stating "[t]he fatal defect of the complaint is that it alleged a contract indefinite as to the price and duration of the service . . . ." Id. at 298. It then went on to establish a test for determining the existence of a durational term, which is as follows:

1. Determine if the contractual parties *expressed a durational period*;
2. If not, look to "*the nature of the contract or from the circumstances surrounding them*" to determine if a definite time can be implied; and,
3. Finally, if a durational term is not expressed or cannot be implied, the court must impute to the parties "that the contract may be terminated by either, on giving reasonable notice of his intention to the other."

Id. (emphasis added).

Second, Carolina Cable Network v. Alert Cable TV, Inc. added some contours to the law announced by Childs. It stated that “historically” perpetual contracts are not favored, but they are upheld if the perpetual nature is an express term of the contract. 447 S.E.2d at 201. The Court also noted that the contract in Childs was “completely devoid of any term of duration and we were forced to interpret the contract absent evidence of the parties’ intentions.” Id. It then recited the test from Childs and concluded that the contract was perpetual, and therefore, terminable at will because a party had a unilateral right to renew. Id. at 201-02. After concluding the contract was perpetual, it proceeded to the next step of determining whether the termination was reasonable. Id. at 202. The Court looked to wrongful termination actions to determine the reasonableness of termination, and concluded that an unreasonable termination occurs when the termination was done “arbitrarily, maliciously or in bad faith.” Id. (citing Richland Wholesale Liquors v. Glenmore Distilleries, 818 F.2d 312, 315 (4th Cir. 1987)).

Finally, in Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, South Carolina continued to refine its jurisprudence regarding durational terms. The Prestwick court declared that the durational term did not have to be a specific calendar day. 503 S.E.2d at 187-88. More specifically, a definite durational term could be a future event. Id. at 188. The court quoted the first Jespersen v. Minnesota Mining & Mfg. Co. (“Jespersen I”) opinion, stating ““a contract which . . . provides that it will terminate upon the occurrence of a specific event is not deemed perpetual in duration and is not terminable at will.”” Id. (quoting Jespersen, 681 N.E.2d 67, 70 (Ill. App. Ct. 1997)). However, the court noted that the Jespersen I case was on appeal, suggesting the court knew this principle of law was sound, but the remainder of the opinion (or future opinions) may not be on all fours with South Carolina law.

In Prestwick Golf Club, Inc., the members of a golf club filed suit against the golf course's owners and developers over a tee-time schedule. 503 S.E.2d at 185. The members were frustrated over non-members' use of the course and the availability of tee-times. Id. In 1990, the members and owners negotiated a tee-time schedule to allow for both member and non-member play ("1990 Tee-Time Schedule"). Id. It designated certain times for member play, and as the number of members increased, the percentage of tee-times for member play only increased. Id. When the club reached a full membership of 550 members, all tee-times would be member play exclusively. Id. at 185-186. In 1996, the owners sent a letter to the members, changing the 1990 Tee-Time Schedule, specifically increasing tee-times available to non-members. A lawsuit followed, and the owners argued, among other things, that the 1990 Tee-Time Schedule was perpetual, and therefore, terminable at will. Id.

The South Carolina Court of Appeals disagreed, holding that the 1990 Tee-Time Schedule was not perpetual. Id. at 187-188. It provided that non-member play, and therefore the 1990 Tee-Time Schedule, ended when membership reached full capacity at 550 members. Id. at 185.<sup>9</sup> The court concluded this language was sufficient to create an express, durational term. More specifically, the court stated "[j]ust because the rights of the parties were keyed to membership levels rather than calendar time does not mean that the schedule should be considered an indefinite period." Id. 187-188. "[A] contract which . . . provides that it will terminate upon the occurrence of a specific event is not deemed perpetual in duration and is not terminable at will." Id. at 188 (quoting Jespersen, 681 N.E.2d at 70). In other words, a definite durational term is not limited to a calendar date.

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<sup>9</sup> It is worth noting that the fact that membership might never reach 550 did not make the contract perpetual and unenforceable.

The present case mirrors Prestwick. The Finder's Fee Agreement, regarding payment of 2% of the gross written premiums, ends upon the occurrence of a specific event. More specifically, it terminates once Newco is formed. It could form tomorrow or twenty years from now. As testified by Curtis Stewart, "I would have done the Newco deal in a heartbeat if Eric [Jarvis] would have agreed[,]"; there was never a time when he said he no longer wanted to work for Newco; and "I wanted to do it [Newco]. Still would." (ECF 50-7 at 146:3-9 & 153:10). This matter is "on all fours" with Prestwick. See also 17 Am. Jur. 2d *Contracts* § 193 (2004) ("Words which fix an ascertainable fact or event, by which the term of a contract's duration can be determined, make the contract definite and certain."). This Court should find that the Finder's Fee Agreement has a definite, durational term, as a matter of law.

B. This Court Should Not Rewrite Contract Terms as the Illinois Courts Have Done.

The two Jespersen cases, Jespersen v. Minnesota Mining & Mfg. Co., 681 N.E.2d 67 (Ill. App. Ct. 1997), aff'd, 700 N.E.2d 1014 (Ill. 1998), Rico Industries, Inc. v. TLC Group, Inc., 6 N.E.3d 415 (Ill. App. Ct. 2014), and R.J.N. Corp. v. Connelly Food Products, Inc., 529 N.E.2d 1184 (Ill. App. Ct. 1988), should not be relied upon by this Court because they are contrary to this Court's well-established precedent of enforcing the terms of a contract to which the parties agree.

i. The Jespersen Opinions

In Jespersen, 3M, successor to Trim-Line, terminated several sales distribution agreements, one of which was with Jespersen. Jespersen I, 681 N.E.2d at 68. Notably, the sales distribution agreement with Jespersen provided explicitly that unless it was terminated under a certain article, it "*shall continue in force indefinitely*["] Id. at 70 (emphasis added). In addition to this express term of perpetual term, which is allowed by South Carolina under Carolina Cable, it provided 3M/Trim-Line with five occasions to terminate the contract. Id. The Jespersen I court held it was

a perpetual contract, in part, because if none of the five occurrences happened, “the agreement shall continue in force indefinitely.” Id. It then held that because if Jespersen did not complete any of those five occurrences, it had sole control over whether the contract was terminated. Id. “Consequently, a durational term cannot be ascertained from the sales distribution agreement.”<sup>10</sup> Id.

Additionally, “[i]t is impossible to ascertain whether or when Jespersen would institute such an event, therefore, *the agreement offered the possibility of perpetual duration* and was terminable at will by the parties.” Id. (emphasis added). This reliance on the mere possibility of perpetual duration is in stark contrast to South Carolina law as the Prestwick court held that a term of attaining 550 members constitutes a definite, durational term. 503 S.E.2d at 187-188. There is a possibility that this membership level would never be reached, but it did not stop the Prestwick court both from declaring it a definite, durational term and from even citing Jespersen I for this proposition. This is true even though South Carolina disagrees with the position that an agreement that “offered the possibility of perpetual duration” constituted a terminable at-will contract.

Finally, the Jespersen I court noted that California law should govern the dispute because the agreement provided that it should be construed under California law. However, the court went on to conclude that it could apply Illinois law because “California law and Illinois law are

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<sup>10</sup> This holding has been called into question, and a district court has concluded that the Jespersen I court misapplied Illinois law. Altrutech, Inc. v. Hooper Holmes, Inc., 6 F. Supp. 2d 1269, 1275-76 (D. Kan. 1998). Noting that the Seventh Circuit in Consolidated Labs (applying Illinois law) had already held that “a contract is not for indefinite period of time even when the events upon which the contract may be terminated are under the exclusive control of one party,” the district court concluded that “Jespersen misapplied Illinois law.” Id.; see Consolidated Labs., Inc. v. Shandon Scientific Co., 413 F.2d 208, 212 (7th Cir. 1969) (applying Illinois law and concluding “[t]he contract is not for an indefinite period of time, but rather is terminable upon the occurrence of two specified events, both of which are in the sole control of Shandon of London.”).

consistent in holding that contracts of indeterminate duration are terminable at will by the parties . . .” 681 N.E.2d at 69. It stated that because of this purported consistency, “the determination of this matter is not altered.” *Id.* This is not so. In Zee Medical Distributor Ass’n, Inc. v. Zee Medical, Inc., 94 Cal. Rptr. 2d 829 (Cal. Ct. App. 2000), the California Court of Appeals explicitly stated that California law is not the same as Illinois law with respect to perpetual contracts. 94 Cal. Rptr. at 836-38. Noting that California courts permit express contract terms of indefinite duration – like South Carolina<sup>11</sup> – the Zee court refused to follow Jespersen. It held as follows:

Similarly, *Jespersen* was decided by the Illinois Supreme Court under Illinois law. It also involved a distribution contract that “shall continue in force indefinitely” unless terminated in the manner provided in the contract. Contrary to California law, Illinois law provides that such indefinite contracts are terminable at will.

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We decline to follow *Trient* and *Jespersen*, and reject the Association’s claim that California law is consistent with their holdings.

*Id.* at 837-38. The basis of the Jespersen I opinion is flawed.

After Jespersen I was issued, the Supreme Court of Illinois agreed to hear the case, resulting in Jespersen II. Jespersen II still holds that the contract is perpetual, but it reads as if it is another case. However, the logic is still flawed and inconsistent with South Carolina law. Jespersen II focuses on the permissive language with the five occurrences. Specifically, the court focuses on the language that says “Trim Line *may* . . . terminate this agreement for any of the following [five] reasons:[.]” 700 N.E.2d at 1016. The Jespersen II court states that this language creates an “inference . . . that those grounds are not the sole or exclusive basis for termination[.]” rendering

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<sup>11</sup> Like South Carolina, the Zee Court also employs the three-step process announced in Childs. “The court first seeks an express term. If one is absent, the court determines whether one can be implied from the nature and circumstances of the contract. If neither an express nor an implied term can be found, the court will generally construe the contract as terminable at will.” 94 Cal. Rptr. at 835.

it perpetual. *Id.* at 1016. The second ground for its holding is that the five termination occurrences are “instances of material breach, and *any* contract is terminable upon the occurrence of a material breach.” *Id.* (emphasis in original). The support for these positions is the court believes when the parties have not conclusively determined a durational term, “it would be inappropriate for a court to step in and substitute its own judgment for the wisdom of the parties.” *Id.* at 1017.

But as noted by the dissent, this is exactly what the court is doing. *Id.* at 1017-18 (Harrison, J., dissenting). “Flexibility is important to commerce, as the majority observes, but it is not so important that it justifies excusing parties from their valid contractual obligations.” *Id.* at 1018. South Carolina follows suit. “The court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Ellis v. Taylor*, 449 S.E.2d 487, 488 (S.C. 1994).

The *Zee* Court also found *Jespersen II*’s logic lacking. After describing the permissive argument – “Trim Line *may* . . . terminate” – the *Zee* Court declared “[w]e neither agree with this conclusion nor find it pertinent to the analysis.” *Zee Medical*, 94 Cal. Rptr. 2d at 837. It continued with “[w]e cannot interfere in a carefully contracted-for-business relationship that the parties themselves explicitly established by finding implicit terms that are not present.” *Id.* at 838.

*ii. The Rico Case*

In *Rico Industries, Inc. v. TLC Group, Inc.*, 6 N.E.3d 415 (Ill. App. Ct. 2014), the Illinois Court of Appeals ruled on a discrete question: “does a sales representative that can only be terminated upon the express written consent of both parties contain a specific objective event that renders the agreement sufficiently definite in duration such that it is terminable at will?” 6 N.E.3d at 417. It ruled “no,” but it limited its analysis to this question only and did not address any other matter in the litigation. *Id.* at 424. TLC Group, Inc. (“TLC”) was the exclusive sales representative

of Rico Industries, Inc's ("Rico") products for Wal-Mart. Id. at 416. The agreement between the parties provided that it was terminable upon the written mutual agreement of the parties. Id. at 417. TLC argued the agreement was not perpetual on two grounds: (1) the agreement is terminable upon mutual agreement; and (2) the agreement can also be terminated by Rico's decision to stop selling products to Wal-Mart. Id.

*Importantly*, the second question was never answered because only the first question was certified to the Illinois Court of Appeals, and it limited its ruling solely to the certified question. Id. at 424. The second position is similar to Tower's argument that the Finder's Fee Agreement has a definite duration because the programs could go away. In other words, KnightBrook could stop doing business with the programs that Tower introduced to it, and the finder's fees, and thus the Finder's Fee Agreement, would stop.<sup>12</sup> But that has not happened. KnightBrook continues to collect premium dollars and refuses to compensate Tower for its services. The Rico court, however, never addressed this argument.

Relying heavily on Jespersen II, the Rico court concluded the agreement was perpetual. The court concluded "a contract terminable only upon the written agreement of the parties is indefinite because you cannot foresee when that will happen and it may never happen, and therefore it is of an indefinite duration." Id. at 422. Again, this is contrary to Prestwick. The Prestwick court was not concerned with the possibility that the parties could not foresee when the

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<sup>12</sup> The District Court states in the Order of Certification that it rejects Tower's argument that there is an implied durational term, which is the termination of the two insurance programs. The District Court further states that this issue is irrelevant for purposes of the certification order. (JA 7). Tower respectfully disagrees. As explained infra at II, this issue is inextricably intertwined with the question of whether under South Carolina law KnightBrook can unilaterally void its contractual obligation to pay Tower post-termination commissions as provided in paragraph 7 of the Finder's Fee Agreement simply because one triggering event for termination of the Finder's Fee Agreement is the creation of Newco. (JA 23).

membership level would reach 550 members. Nor was it concerned with the possibility that it may never happen. The level of certainty required by Illinois courts simply is not present in South Carolina's jurisprudence regarding perpetual contracts.

*iii. The R.J.N. Case*

KnightBrook heavily relies on R.J.N. Corp. v. Connelly Food Products, Inc., 529 N.E.2d 1184 (Ill. App. Ct. 1988). In R.J.N., the court held that the phrase “[the agreement] will remain in effect for as long as [defendant] serves [plaintiff’s] customers” was not an “objective event” which makes it sufficiently definite, and therefore, the contract was terminable at-will. 529 N.E.2d at 1187. First, KnightBrook overstates the import of this case. Specifically, it contends that the court *held* that the occurrence of two later events could not inform the court about the parties’ intent regarding the contract because the events were not expressly included in the contract. This is not true. The court found this issue was not preserved for review. *Id.* at 1187. Rather, the court simply “observed” this point, and at best, this statement is *dicta*. *Id.* Second, the R.J.N. court applied its law that is much too broad for South Carolina. It states “the contract would remain in effect *only as long as* [defendant] served [plaintiff’s] customers and, therefore, *when* CFP would decide to no longer serve RJN’s customers could be not ascertained, making the duration indefinite and terminable at will.” *Id.* (emphasis in original). As evidenced by the court’s italics, and as in Rico, the court is focused on the fact that the parties cannot directly determine “when” the contract will end. But Prestwick does not go to such lengths to write-in a specific durational term so that the golfers and golf club would know precisely “when” the tee-time schedule would end. To the contrary, the Prestwick court left the tee-time schedule alone and concluded that attaining 550 members is sufficient to create a definite, durational term, regardless of the fact that the parties may not know exactly (or even if) it would occur.

This Court has consistently enforced contracts according to the parties' intent as expressed in the language used. Only in very limited circumstances has this Court voided commercial contracts entered into between sophisticated parties, such as where enforcement of the agreement will result in illegal conduct or violate the public policy of this State. This Court should reject the approach of the Illinois courts which often inject themselves to impose terms to which no party agreed or contemplated.

**II. If the answer to Question #1 is yes, does a contract that requires the two parties to the contract to form a corporation together in the future in order to terminate the contract qualify as an objective event that renders the contract sufficiently definite in duration such that it is not perpetual and thus not terminable at will?**

A. Commission Payment Obligations are Enforceable after Termination of the Finder's Fee Agreement.

As noted above, there is no requirement under South Carolina law that a durational term triggered by a future event be objective as defined in the District Court's certification order. Furthermore, and most importantly, South Carolina, and a majority of other jurisdictions, enforce commission payment obligations after the term of an agency or employment relationship has terminated unless the parties have expressly agreed otherwise. See Moss v. Porter Bros., Inc., 357 S.E.2d 25, 27 (S.C. App. 1987) ("It is established law that an agent who renders services on a commission basis is entitled to commissions on orders procured prior to termination of the employment and filled subsequently, in the absence of an agreement to the contrary.") (citing Grattan v. Sociea Per Azzioni Cotonificio Cantonie, 151 N.Y.S.2d 875, 884 (1956)). In Moss, the Court of Appeals affirmed summary judgment for a former employee on his claim to commissions for sales that were shipped and invoiced after his employment terminated. Id.

In McFeely v. Seneca Wire & Mfg. Co., 07-10596, 2008 WL 2355602, at \*5 (E.D. Mich. June 5, 2008), the United States District Court examined Michigan law in the context of an agent's

right to recover post-termination commissions on sales where the agent was the “procuring cause.”

The Court stated:

It would appear that underlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent’s or broker’s services without compensation and imposing upon the principal, regardless of the type of agency or contract, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales may have been consummated by the principal or some other agent.... In Michigan, *the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent nevertheless be permitted to recover the commission if the agent was the procuring cause.*

Id. (emphasis added).

Similarly, under Washington state law, a broker is entitled to post-termination commissions on sales in which he or she was the procuring cause. See Miller v. Paul M. Wolff Co., 316 P.3d 1113, 1116 (Wash. Ct. App. 2014) (“The procuring cause rule states that when a party is employed to procure a purchaser ... to whom a sale is eventually made, he is entitled to a commission ... if he was the procuring cause of the sale. A broker is the procuring cause or agent when he or she sets in motion the series of events culminating in a sale. When an employment relationship ends, the employer ‘cannot terminate an agent’s right to compensation if he or she caused the sale.’”) (internal citations omitted).

Wisconsin law is the same. The Wisconsin Court of Appeals relied on the Restatement of Agency to reach a similar result. In Phillips v. U.S. Bank, N.A., 781 N.W.2d 540, 544 (Wis. App. 2010) the Court explained:

The parties agree that an at-will employee like Phillips can be fired for any reason as long as the reason does not implicate a status protected by law... That does not mean, however, that an at-will employee may be deprived of benefits that accrued before he or she was let go if the firing was to prevent payment of those benefits. Although there is no Wisconsin decision on this precise issue, the law applicable to the principal/agent relationship is directly analogous and applies here. Thus, we have previously recognized the rule as formulated by Restatement (Second) of Agency § 454 (1958):

An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of the agent's prior efforts.

Id.

The Court in Clemons v. Zimmer Broad. Co., Inc., 159 S.W.3d 508, 511 (Mo. Ct. App. 2005) explained that Missouri law differentiates between a manufacturer's representative and a finder when determining whether a party is owed post-termination commissions. The Court stated:

*A manufacturer's representative with servicing responsibilities loses his right to collect commissions on pre-termination business upon termination. (citations omitted). A finder, however, retains the right to commissions on business even after termination. The rationale behind this distinction is that a finder has completed all of the work that needs to be completed and the right to payment vests upon the finding of business, while a manufacturer's representative has continuing duties to service an account.*

Id. (emphasis added).

Here, the Finder's Fee Agreement specifically provides for the continuation of payment even after the Agreement has terminated:

*Notwithstanding the foregoing, either party may terminate this Agreement upon ten (10) days prior notice to the other party. However, KNIGHTBROOK's obligations pursuant to paragraphs 1, 2, 6 and 7 hereof will survive the completion of our engagement hereunder in accordance with the terms of those respective paragraphs.*

(JA 23 ¶ 7) (emphasis added).

Thus, irrespective of whether the Finder's Fee Agreement is terminable at will, the obligation to continue paying commissions on the Transactions cannot be terminated at will. Rather, this commission payment obligation survives the termination of the Agreement under South Carolina law and continues as long as KnightBrook continues receiving the benefits of the Transaction.

B. The Creation of Newco as the Terminating Event is Sufficient to Prevent Termination At Will.

This Court should re-affirm the holding in Prestwick Golf Club, Inc. and join with the majority of courts that have found triggering events to be sufficiently definite to prevent termination at will even if one party or the other has unilateral control over whether the event occurs. Examples of such triggering events include the following: (i) plaintiff's maintenance of a quota of purchases from the defendant, Copylease Corp. of America v. Memorex Corp., 403 F.Supp. 625, 632 (S.D.N.Y. 1975); Liberty Industrial Sales, Inc. v. Marshall Steel Co., 272 F.2d 605, 606 (7th Cir. 1959) (same); (ii) a party's continued payment of premiums, Payroll Express Corp. v. Aetna Casualty & Surety, 659 F.2d 285, 291-92 (2d Cir. 1981); (iii) the period during which a corporation manufactures a particular product, Laff v. John O. Butler Co., 381 N.E.2d 423, 437 (Ill. App. Ct. 1978); (iv) the period during which a corporation maintains a certain level of sales, W.P. Iverson & Co. v. Durham Mfg. Co., 152 N.E.2d 615, 620 (Ill. App. Ct. 1958); (v) employment so long as the business was operating in a specified location, Thorne v. True-Hixon Lumber Co., 148 So. 388, 388 (Miss. 1933); (vi) exclusive right not terminable until either plaintiff's failure to dispose of at least 20 tons of a certain material annually or upon the unavailability of the material due to its use in the cement manufacturing process at defendant's plant, Besco, Inc. v. Alpha Portland Cement Co., 619 F.2d 447, 448 (5th Cir. 1980); (vii) continued provision of same services engaged to originally provide, Werner v. Biederman, 28 N.E.2d 957, 960 (Ohio Ct. App. 1940); (viii) continued operation of telephone system in the city, City of Superior v. Douglas County Telephone Co., 122 N.W. 1023, 1027 (Wis. 1909); and (ix) continued operation of hospital on particular site particular site, City of Big Spring v. Board of Control, 404 S.W.2d 810 (Tex. 1966).

In MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr., 864 N.W.2d 83 (Wis. 2015), the Supreme Court of Wisconsin held that an option of first refusal to purchase real estate was not terminable at will even though the landowner could choose to never sell the property. Id. at 92-92.

The Court explained:

[T]he question here is whether the uncertainty of when—or even if—the triggering event will occur offends Wisconsin's policy disfavoring perpetual contracts. It does not.

We begin our analysis, as we must, by noting that Wisconsin courts do not favor perpetual contracts. We are reluctant to interpret a contract as providing for a perpetual contractual right unless the intention of the contracting parties to provide for the same is clearly stated. When the time that a contract is to endure is indefinite, this court will imply a reasonable time for the duration of the contract. However, we do not require parties to express duration in temporal terms in order to avoid indefiniteness. Rather, parties are free to identify triggering events that give rise to termination of the contract in one form or another...A specified triggering event, though uncertain to occur, may render a right of first refusal contract sufficiently definite and establish the duration of the right...Unless otherwise specified by the parties, a right of first refusal expires when the triggering event occurs and the holder chooses to either exercise or waive the right. Accordingly, so long as the right of first refusal clearly identifies a triggering event, whether certain or uncertain to occur, it is definite as to duration.

Id.

In the above examples, one party could unilaterally decide to cause the triggering event to occur or not to occur. Nevertheless, in each case the court ruled that the triggering event was sufficiently definite. Likewise, the triggering event in the Finder's Fee Agreement is likewise definite. The fact that Newco may never be formed is not determinative.

In addition, courts routinely uphold contractual agreements that obligate one party or the other to perform throughout the life of a commercial enterprise against claims that the agreement may be terminated at will. See Don King Productions, Inc. v. Douglass, 742 F.Supp 741, 763 n.22 (S.D.N.Y 1990) (“[I]n general, contracts with terms that commit services for a commercial lifetime are not thereby invalid.”); Phelps v. Shawprint, Inc. 103 N.E.2d 687, 689 (Mass. 1952); Carter

White Lead Co. v. Kinlin, 66 N.W. 536, 536 (Neb. 1896) (holding valid as long as employer maintained certain plant); Jugla v. Trouttet, 23 N.E. 1066, 1066 (N.Y. 1890) (holding valid so long as defendant manufactured gloves).

For example, in Ehrenworth v. Stuhmer & Co., 128 N.E. 108, 110 (N.Y. 1920), the New York Court of Appeals, which was conceded to be the Nation's then preeminent commercial court, considered a commercial contract which provided that the plaintiff was to purchase as much bread as he needed for his customers exclusively from the defendant. 128 N.E. at 108. It was to last “as long as the plaintiff and [defendant] remained in business....” Id. The court, on which Mr. Justice (then Judge) Cardozo sat, had “no difficulty” in concluding that the contract had “every element of a contract; [including]... the duration of the contract...” Id. at 110 (emphasis added). There, as here, the contract “was substantially carried out by both parties for a period of eight years,” and it was assumed by the corporate defendant when it was organized to carry on the co-partnership business which had made the contract. Id. at 110.

Fuchs v. United Motor Storage Co., 21 N.E.2d 669 (Ohio 1939), also involved a commercial requirements contract which obligated the defendant to buy all the gasoline used in the defendant's business from the plaintiff. Id. at 671. It was to remain in effect so long as the plaintiff continued to own stock in the defendant or so long as plaintiff 10 remained in the business of selling gasoline, oil and grease. Id. The Ohio Supreme Court found the agreement sufficiently specific as to its duration:

This contract calls for performance, not for a definite term but so long as the plaintiff should own the fifteen shares of stock of the defendant company, or so long as he should continue in the business of selling gasoline, oil and grease. The contract may be uncertain as to point of time when it will terminate, but there is no uncertainty as to the event which will bring about its termination, and in this respect the law is satisfied. Words which stipulate an ascertainable fact or event by which the duration of the term of a contract can be determined, make the contract definite and certain in that particular.

Id. at 671-72.

Likewise, Phelps v. Shawprint. Inc., 103 N.E.2d 687 (Mass. 1952), recognized that the cessation of business can constitute a sufficiently specific durational term:

The contract was not silent on this aspect for it carried its own measure of time. It definitely specified that it was to continue so long as the Rosenbaums were connected with the corporation. Such a contract is not too indefinite or uncertain to be enforceable at least for partial breaches even though it is impossible to predict precisely when the contingency will occur that will bring the contract to an end. Contracts for permanent employment have been construed to mean to last *so long as the employer continued in business* and had work for the plaintiff to do and so long as he was satisfactorily able to do it. Doubtless, such a contract will terminate *if the employer in good faith quits the business; in other words, he is liable only so long as he conducts the business* even if the employee is able and willing to perform his duties.

Id. at 689 (citations omitted) (emphasis added).

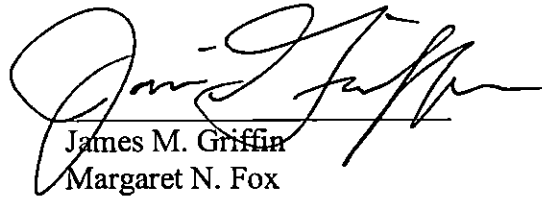
In Warner-Lambert v. Pharm. Co. v. John J. Reynolds. Inc., 178 F.Supp. 655 (S.D.N.Y. 1959), *aff'd* \*11 280 F.2d 197 (2d Cir. 1960), the contract that provided that it was to last so long as Listerine was manufactured or sold by Lambert or its successors was held sufficiently definite. Id. at 661-662.

As with the above contracts which commit services for a commercial lifetime, the Finder's Fee Agreement at issue is likewise limited in duration to the life of the underlying insurance programs. When premiums stop to KnightBrook, finder's fees stop to Tower. The finder's fees are tied to the gross written premiums. KnightBrook's argument that the Finder's Fee Agreement is perpetual has no support under South Carolina law. Without the programs and the agreements governing them, the Finder's Fee Agreement does not exist. In other words, the Finder's Fee Agreement is a pier supported by the programs and the governing documents. If the programs and governing documents fall apart, so does the Finder's Fee Agreement.

Finally, it would be a gross injustice to allow KnightBrook to escape its clear obligation to pay the applicable finders' fees to Tower. KnightBrook knew what it was getting into when it executed the Finder's Fee Agreement by and through its president Eric Jarvis. It is worthy to note that Mr. Jarvis is a lawyer. If he had questions about the operation of the agreement, he should have voiced them at the time of execution, so that Tower could have placed the business elsewhere. Instead KnightBrook took the benefit of the business referred by Tower and continues to benefit today, as it continues to write the business which is quite profitable to KnightBrook. In sum, KnightBrook induced Tower into giving it the book of business and now wants to run away from its plain obligation to pay a finder's fee.

### **CONCLUSION**

If this Court were to conclude that this Finder's Fee Agreement and the post-termination commission obligations may be terminated at will, the consequences will be far reaching and harmful. Such a ruling would jeopardize untold numbers of commission agreements, brokerage agreements, commercial requirements agreements, and other agreements. This Court should refrain from creating a new public policy exception to enforcing contractual terms as agreed upon by the parties. This Court should not re-write the terms of the Finder's Fee Agreement and permit a multi-million dollar insurance company to avoid paying commissions on lucrative business it never would have received but for the services performed by Tower under the Finder's Fee Agreement.



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November 8, 2019  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIFIED QUESTIONS

Joseph F. Anderson, Jr., United States District Court Judge **SC SUPREME COURT**

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Appellate Case No.: 2019-001373

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Tower Street Capital Management Inc. .... Plaintiff,

v.

KnightBrook Insurance Company, ..... Defendant.

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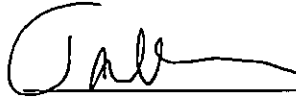
**PROOF OF SERVICE**

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I, Jaime Harmon, the undersigned employee of Griffin Davis LLC, attorneys for Plaintiff, do hereby certify that I have served a copy of the foregoing **Plaintiff's Opening Brief**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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