THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 08 2019
S.C. SUPREME COURT

CERTIFIED QUESTIONS

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

Appellate Case No.: 2019-001373

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

v.

KnightBrook Insurance Company, ...Defendant.

JOINT APPENDIX

James M. Griffin
Margaret N. Fox
Griffin Davis LLC
4408 Forest Drive, Suite 300
Columbia, SC 29206
803-744-0800

Thornwell F. Sowell, III
Bess J. DuRant
Sowell & Durant, LLC
1325 Park Street, Suite 100
Columbia, SC 29201
(803) 722-1100

Attorneys for Plaintiff

James G. Long, III
Emily Dobson Glober
Nexsen Pruet, LLC
P.O. Box 2426
Columbia, SC 29202
803-771-8900

Attorneys for Defendant

Table of Contents

Supreme Court of South Carolina Order
Filed September 19, 2019 1

Order for Certification
Filed August 16, 2019 3

Order
Filed October 30, 2019 18

Finder's Fee Agreement
Dated December 14, 2011 20

Letter of Intent
Dated September 1, 2011 24

The Supreme Court of South Carolina

Tower Street Capital Management Inc., Plaintiff,

v.

KnightBrook Insurance Company, Defendant.

Appellate Case No. 2019-001373

ORDER

Pursuant to Rule 244, SCACR, the Court will answer the following questions certified to this Court by order of the Honorable Joseph F. Anderson, Jr., United States District Court Judge for the District of South Carolina:

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?

The parties shall proceed to serve and file briefs as provided by Rule 244(d), SCACR. The parties are reminded Rule 244, SCACR, does not provide for the filing of initial brief; therefore, only final briefs should be filed in this matter.

FOR THE COURT C.J.

Columbia, South Carolina

September _19_, 2019

cc:
The Honorable Joseph F. Anderson, Jr.
Bess Jones DuRant, Esquire
Thornwell F. Sowell, III, Esquire
Emily Dobson Glober, Esquire
James Grant Long, III, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Tower Street Capital Management Inc., Plaintiff, vs. KnightBrook Insurance Company, Defendant.	C/A No.: 3:17-cv-01781-JFA ORDER FOR CERTIFICATION

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SOUTH CAROLINA SUPREME COURT

This Court has determined that the above-captioned case involves questions of law of the State of South Carolina, which are most probably determinative of the parties' cross motions for summary judgment (ECF Nos. 48 & 50) pending before this Court. There appears to be no controlling precedent in the decisions of the Supreme Court of the State of South Carolina and minimal precedent in the decisions of the Court of Appeals of the State of South Carolina concerning contracts that terminate upon the occurrence of a specific, future event instead of a future calendar date. Further, there appears to be no controlling precedent addressing whether the future, specific event must be an objective event. Accordingly, pursuant to South Carolina Appellate Court Rule 228, the United States District Court hereby certifies the questions of law addressed below to the Supreme Court for instructions based on the following facts and procedural background:

I. INTRODUCTION

Tower Street Capital Management Inc. ("Plaintiff" or "Tower Street"), initiated this action alleging Breach of Contract and Attorney's Fees and Costs against KnightBrook Insurance

Company ("Defendant" or "KnightBrook") resulting from an alleged breached Finder's Fee Agreement. This Court has diversity jurisdiction over this action because complete diversity exists between Plaintiff and Defendant and the amount in controversy exceeds $75,000.00. Plaintiff is a citizen of South Carolina and Defendant is a citizen of Delaware, its state of incorporation, and California, the state of its principal place of business.

II. BACKGROUND FACTS

This case arises out of a dispute over a Finder's Fee Agreement ("the Agreement"), which Plaintiff and Defendant negotiated on December 14, 2011 and executed on January 17, 2012.

Plaintiff and Defendant are both businesses in the insurance industry. Tower Street is a South Carolina statutory close corporation created by Madison Cone on January 13, 2011. Madison Cone ("Cone"), the late Curtis Stewart ("Stewart"), and Rex Boylston ("Boylston") owned Tower Street together. Prior to the creation of Tower Street, Cone, Stewart, and Boylston worked at Companion Property and Casualty Insurance Company ("Companion") together. Cone left Companion at the end of 2010. Stewart and Boylston left Companion in May 2011. Around the time Stewart and Boylston left Companion, Companion was transitioning out of the insurance program business.

As a result, the insurance programs that were previously insured by Companion needed to be placed with a new insurance company in order to continue. Here, "program business" means insurance products offered to specialized industries, and the programs identified in the Agreement were offered to banks and credit unions. The producer of these insurance programs was the managing general agent, DGU Insurance Associates, LLC ("DGU"). DGU controlled the market for these programs but needed a new carrier to insure them because Companion had pulled away. According to Plaintiff, its business, in part, was to introduce insurance programs previously written by Companion to Defendant.

Plaintiff and Defendant were in negotiations together from about August 2011 until January 2012. Plaintiff introduced Defendant to the managing agent DGU for Defendant to serve as the insurance carrier for programs administered by DGU. Initially, Plaintiff proposed eighteen insurance programs to Defendant. Ultimately, Defendant became the insurance carrier of two programs identified in the Agreement—(1) the Equity Protection Program, and (2) the Second Mortgage Protection Program (collectively "the two[1] insurance programs"). The two insurance programs were managed by DGU.

The circumstances surrounding the introduction are set forth in the Finder's Fee Agreement. The Agreement provides that in exchange for Plaintiff's introduction of Defendant to DGU, Defendant will pay 2% of the gross written premiums on the two insurance programs.

During negotiations, and before signing the Finder's Fee Agreement, Plaintiff and Defendant discussed forming a new corporation to underwrite and manage the insurance programs. The parties referred to this non-existent corporation as "Newco."[2] About three months before Plaintiff and Defendant executed the Finder's Fee Agreement, on September 2, 2011, Plaintiff and Defendant executed a Letter of Intent regarding the formation of "Newco." By its terms, the Letter of Intent has expired.[3] This Letter of Intent is referenced in the Finder's Fee Agreement. The

[1] The parties dispute whether there are two separate programs or whether the programs are the same program. However, this issue is irrelevant to the questions presented in this certification order. For purposes of this order, the Court will assume, without deciding, they are two separate programs as identified in the Agreement.

[2] The parties use "Newco" and the "Knightbrook Agency" interchangeably. For purposes of this order, the Court will refer to the non-existent corporation as "Newco."

[3] The Letter of Intent stated: "This LOI will automatically be withdrawn and cancelled on the earlier of: (1) 60 days following the execution of this LOI by Cone and Boylston, unless the parties mutually agree in writing to an extension of such date; (2) the execution of the Definitive Agreements; or (3) the mutual written agreement of the parties[.]"

Finder's Fee Agreement was negotiated on December 14, 2011 and ultimately executed on January 17, 2012.

The Finder's Fee Agreement does not contain a termination date keyed to a calendar date. Regarding duration,[4] in pertinent part, the Agreement states:

> In exchange for identifying and introducing KNIGHTBROOK to the program administrator, where KNIGHTBROOK will act as the at-risk carrier for the new program administrator, defined as the transaction ("Transaction"), **KNIGHTBROOK shall pay FINDER 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

Finder's Fee Agreement (emphasis added).

Thus, the Agreement provides that Defendant will pay the finder's fee "until the time" that "Newco" is established. It is undisputed that Plaintiff and Defendant never formed "Newco."

Defendant paid the finder's fee from June 2012 until April 2017. According to Defendant, it then orally notified Plaintiff it was exercising its option to terminate the Agreement and sent a formal letter to counsel to confirm termination. Although Defendant ceased making payments to Plaintiff, the two insurance programs are still running today with Defendant as the insurance carrier.[5]

---

[4] Plaintiff also argues that Paragraph 7 in the Agreement includes a termination provision. Paragraph 7 states that "either party may terminate this Agreement upon ten (10) days prior notice to the other party." However, upon termination in Paragraph 7, Paragraph 1 (the payment of 2% of gross premium profits) and Paragraph 6 (indemnity) still survive upon termination of the Agreement, so the Agreement does not really terminate under Paragraph 7.

[5] DGU is no longer the managing general agent and there is a different managing general agent.

Plaintiff claims Defendant breached the Agreement when it stopped making payments. Plaintiff claims as a result of Defendant's breach, it has been damaged in the amount of unpaid fees of $484,764 and projected fees of $1.5 million to $5 million.

III. PROCEDURAL HISTORY AND NATURE OF THE CONTROVERSY

On December 28, 2018, the parties filed cross motions for summary judgment. (ECF Nos. 48 & 50). Defendant argues that the Finder's Fee Agreement lasts in perpetuity and thus is terminable at will.[6] It is undisputed by both parties that they did not intend for the Agreement to be perpetual. Plaintiff argues that the formation of Newco is the durational term in the Agreement.[7]

Both parties rely heavily on the two South Carolina Supreme Court decisions addressing South Carolina law on perpetual contracts. In *Childs v. City of Columbia*, the City agreed to furnish water to the plaintiff "at the customary and usual price." *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296, 298 (1911). The agreement did not have a termination date. *Id.* The South Carolina Supreme Court found the contract to be a perpetual contract and thus terminable by either party with reasonable notice. *Id.* In 1994, the Supreme Court of South Carolina cited *Childs* with approval in *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994). In *Carolina Cable*, the contract had no termination date and provided the plaintiff a unilateral right to renew the contract as long as it made payment and did not damage the equipment offered by the defendant. *Id.* 316 S.C. at 102, 447 S.E.2d at 201–02. The South Carolina Supreme Court found

[6] Plaintiff and Defendant both assert other arguments as to why the Agreement is or is not enforceable. However, for the purposes of this certification order, the Court will only focus on the argument regarding whether the Agreement is perpetual and thus terminable at will.

[7] Plaintiff also argues there is an implied durational term, which is the termination of the two insurance programs. However, the Court rejects this argument and, in any event, it is irrelevant for purposes of this certification order.

the contract to be a perpetual contract and thus terminable by either party with reasonable notice. *Id.* 316 S.C. at 102–03, 447 S.E.2d at 202.

Although instructive on perpetual contracts, neither *Childs* nor *Carolina Cable* involve contracts that terminate upon the occurrence of a specific, future event.

Both parties also rely heavily on the South Carolina Court of Appeals case *Prestwick Golf Club, Inc. v. Prestwick Limited Partnership*, 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998), which involved a contract that terminated upon the occurrence of a specific, future event. In *Prestwick*, the dispute was over a tee-time schedule between the members of the club and the owners of the golf course. *Id.*, 331 S.C. at 388, 503 S.E.2d at 185. Due to an increase in non-members, the members became worried about the availability of tee times for members. *Id.* As a result, the parties adopted the 1990 tee-time schedule. *Id.* The tee-time schedule allotted specific times for members to play on the course. *Id.* Per the tee-time schedule, "[o]ver time, as the number of Club members increased, the percentage of tee times reserved for members also increased. When the Club reached full membership of 550 people, all of the tee times would be exclusively reserved for members." *Id.*, 331 S.C. at 388, 503 S.E.2d at 185–86.

In 1996, six years later, the Partnership sent a letter to the Club members informing them of an increase from 50% to 64% in tee times available for non-members. *Id.*, 331 S.C. at 388, 503 S.E.2d at 186. As a result of these changes, the members asserted a claim for breach of contract of the 1990 tee-time schedule. *Id.* The South Carolina Court of Appeals reversed the trial court's grant of summary judgment on the breach of contract claim. *Id.*

Among other things, the court found that the trial court incorrectly relied on *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994), when it found that the tee-time schedule was terminable at will by either party. *Id.*, 331 S.C. at 391, 503 S.E.2d at 187. The

court reasoned that they were not dealing with a unilateral perpetual right of renewal like the case was in *Carolina Cable. Id.*

The South Carolina Court of Appeals reasoned:

> While the schedule contained a sliding scale for allotting tee times, with the Club receiving more tee times as its membership increased, the schedule did not expire and never needed renewing. In addition, [. . .] the schedule contained a specific duration. In a letter to the Club members about the implications of the tee-time schedule, the President of the Board of Governors of Prestwick Golf Club wrote, "This policy places the membership on track for an eventual members and their guests only 'private' golf course." In addition, Richard Berry, a Club member, expressed in an affidavit "that once the membership of the club reached 550 memberships, the County Club would again return to fully private status, thus ending the need for the 1990 Agreement to exist." Just 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. *See Jespersen v. Minnesota Mining & Mfg. Co.,* 288 Ill. App.3d 889, 224 Ill. Dec. 85, 88, 681 N.E.2d 67, 70 (holding that "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."), *appeal allowed,* 174 Ill.2d 564, 227 Ill. Dec. 6, 686 N.E.2d 1162 (1997). Thus, we believe that the trial court erred by ruling that the schedule was for an indefinite duration.

Id., 331 S.C. at 391–92, 503 S.E.2d at 187–88.

This Court also discovered an unpublished opinion by the South Carolina Court of Appeals echoing that South Carolina law allows the occurrence of a specific event to qualify as a durational term in a contract. *Premier Holdings, LLC v. Barefoot Resort Golf Club II, LLC* states: "However, as noted by the master in his order, the requirement of a specific duration for the enforcement of a contract is not limited solely to a calendar date, but may be provided upon the occurrence of a specific event." *Premier Holdings, LLC v. Barefoot Resort Golf Club II, LLC*, No. 2008-UP-336, 2008 WL 9843982, at *2 (S.C. Ct. App. July 2, 2008) (citing *Prestwick*, 331 S.C. at 392, 503 S.E.2d at 187–88).

As an initial matter, this Court agreed with Plaintiff that in *Prestwick*, the South Carolina Court of Appeals established under South Carolina law, a definite, durational term in a contract

can be tied to the occurrence of a specific, future event. The parties did not provide any and this Court did not find any other South Carolina case law discussing specific, future events as a termination date in a contract. Based on the limited case law in South Carolina, this Court turned to Illinois law because in *Prestwick*, the South Carolina Court of Appeals cited to the Appellate Court of Illinois by stating:

> *See Jespersen v. Minnesota Mining & Mfg. Co.*, 288 Ill. App.3d 889, 224 Ill. Dec. 85, 88, 681 N.E.2d 67, 70 (holding that "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."), *appeal allowed*, 174 Ill.2d 564, 227 Ill. Dec. 6, 686 N.E.2d 1162 (1997).

Prestwick, 331 S.C. at 392, 503 S.E.2d at 188.

Under Illinois law, a future event that will terminate a contract must be an "objective event" so as to render the contract sufficiently definite in duration. Since the parties did not brief this issue, the Court ordered the parties to submit additional briefing on the applicability of the Illinois cases (1) *Jespersen v. Minnesota Min. & Mfg. Co.*, 288 Ill. App. 3d 889, 681 N.E.2d 67 (1997), *aff'd*, 183 Ill. 2d 290, 700 N.E.2d 1014 (1998) and (2) *Rico Indus., Inc. v. TLC Grp., Inc.*, 2014 IL App (1st) 131522, 6 N.E.3d 415 to this case.

Prestwick and *Premier Holdings* appear to establish that a specific, future event may qualify as a termination date in a contract; however, these two cases do not discuss the requirements, if any, of the future, specific events. Thus, it is not clear if South Carolina law, like Illinois law, requires the specific, future event to be an objective event such that neither party to the contract has control over it. This Court seeks guidance from the South Carolina Supreme Court on this issue.

In the unpublished opinion in *Premier Holdings*, the South Carolina Court of Appeals held that the master in equity did not err when it determined the agreement was enforceable and to last

"for as long as" the plaintiff "continued doing business" at the defendant's place of business. *Premier Holdings*, 2008 WL 9843982 at *1. In that case, the plaintiff arguably had unilateral control over terminating the contract because it could stop doing business at the defendant's place of business at any time. However, in *Prestwick*, as Plaintiff argues, the parties to the contract did not have control over the future event because the parties did not control whether the golf club membership level reached 550.

In *Jespersen*,[8] the Illinois Appellate Court stated:

> Although it is well established that contracts of perpetual duration are terminable at will by the parties, a contract which nonetheless provides that it will terminate upon the occurrence of a specific event is not deemed perpetual in duration and is not terminable at will, but is terminable upon the occurrence of any of the conditions enunciated.

Jespersen v. Minnesota Min. & Mfg. Co., 288 Ill. App. 3d 889, 893, 681 N.E.2d 67, 70 (1997), *aff'd*, 183 Ill. 2d 290, 700 N.E.2d 1014 (1998).

The Illinois court went on to explain: "The event upon which the contract will terminate must be an '**objective event**' so as to make the contract sufficiently definite in duration. '[I]f one of the parties could institute a termination-triggering event, then the contract should be considered terminable at will.'" *Id.* (emphasis added) (internal citations omitted). *Id.*

In *Jespersen*, the agreement provided that it would continue indefinitely unless one of the five events listed in the agreement occurred. *Id.*, 288 Ill. App. 3d at 894, 681 N.E.2d at 70. The court stated that the five events for termination were under the control of one party, the plaintiff. *Id.* The court reasoned: "It is impossible to ascertain whether or when [the plaintiff] would institute

[8] At the time *Prestwick* cited *Jespersen*, the case was on appeal but had not yet been decided. Subsequently, the Illinois Supreme Court affirmed the Illinois Court of Appeals in a published opinion. *Jespersen v. Minnesota Min. & Mfg. Co.*, 288 Ill. App. 3d 889, 893, 681 N.E.2d 67, 70 (1997), *aff'd*, 183 Ill. 2d 290, 700 N.E.2d 1014 (1998).

such an event, therefore, the agreement offered the possibility of perpetual duration and was terminable at will by the parties." *Id.*, 288 Ill. App. 3d at 893, 681 N.E.2d at 70.

The facts in this case are distinguishable because in *Jespersen*, the court reasoned the occurrence of the event was within complete control of only one party—the plaintiff. In contrast, here, the termination triggering event—the formation of "Newco"—is controlled by either of the parties. Both parties are critical to the creation of Newco and thus, the Agreement cannot be terminated unless the parties, acting together, form Newco. The facts in this case are also different because although one party cannot unilaterally terminate the Agreement, it appears that one of the parties could ensure that the Agreement is never terminated by refusing to form Newco.

In a more recent case, *Rico Industries, Inc. v. TLC Group, Inc.*, the plaintiff filed a declaratory judgment action, seeking judgment that the agreement was terminable at will because the termination provision created a perpetual contract and thus was contrary to Illinois public policy. *Rico Indus., Inc. v. TLC Grp., Inc.*, 2014 IL App (1st) 131522, ¶ 7, 6 N.E.3d 415, 417. The termination provision in the agreement stated: "Any change to, cancellation of, or termination of this Agreement shall be made in writing by [the plaintiff] and [the defendant]." *Id.* at ¶ 5. The trial court held that the termination provision was not contrary to Illinois public policy because the mutual agreement of the parties was an objective event that would terminate the agreement. *Id.* at ¶ 10.

Upon motion by the plaintiff, the trial court certified the following question for interlocutory appeal:

> "Does a sales representative agreement 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 not terminable at will?"

Id. at ¶ 11.

The Appellate Court of Illinois responded: "For the following reasons, we answer the certified question 'no'. . . ." *Id.* at ¶ 2. The issue on appeal was "whether the agreement was sufficiently definite to escape the label of a 'perpetual contract.'" *Id.* at ¶ 16.

The Illinois Court of Appeals first discussed the public policy disfavoring perpetual contracts and quoted *Jespersen* by stating: "'Forever is a long time and few commercial concerns remain viable for even a decade. Advances in technology, changes in consumer taste and competition mean that once-profitable businesses perish-regularly.'" *Id.* at ¶ 19.

In *Rico*, the court reasoned that another Illinois case was instructive, which determined that an "agreement to run until cancelled by mutual consent of both parties or changed by mutual consent" was for an indefinite period of time and thus terminable at will. *Id.* at ¶ 28. The *Rico* court also reasoned: "In addition, 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 ¶ 27.

The Illinois Court of Appeals ultimately determined that the "agreement terminable only upon the mutual agreement of the parties is not sufficiently definite in duration and is terminable at will." *Id.* at ¶ 35.

Significant for purposes of this certification is Defendant's position that the Finder's Fee Agreement is indefinite because the creation of Newco is not an objective event since one party has control over ensuring the Agreement never terminates by refusing to form Newco. Thus, it is Defendant's position that South Carolina law (1) follows Illinois law by requiring the future, specific event to be objective, and (2) the mutual agreement of the parties to create Newco in the future is not an objective event to render the agreement sufficiently definite in duration.

Defendant argues that the three South Carolina cases discussing perpetual contracts are consistent with Illinois law. Defendant sets forth that the two South Carolina Supreme Court cases, *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) and *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E. 2d 199 (1994), both concluded that that the contracts at issue in each case were perpetual contracts and therefore terminable at will. Defendant explains that in *Childs* and in *Carolina Cable*, the contracts were under the exclusive control of one of the parties. Defendant also argues that *Prestwick* is consistent with Illinois law because in that case, the termination event was objective because attaining 550 members at the golf club was not under the control of the parties to the contract.

Defendant argues that Illinois law is also consistent with South Carolina law because the public policy disfavoring perpetual contracts is applicable in both states. *See Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (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."). *See also Jespersen*, 183 Ill. 2d at 295, 700 N.E.2d at 1017 ("[P]erpetual contracts are disfavored.").

Defendant also cites *R.J.N. Corporation v. Connelly Food Products*, 175 Ill. App. 3d at 659, 529 N.E.2d at 1187 in support of its argument. In that case, the Illinois Appellate Court determined that a contract to "remain in effect for as long as [the defendant] served [the plaintiff's] customers" was indefinite and terminable at will because the termination event was not objective. *Id.*, 175 Ill. App. 3d at 660, 529 N.E.2d at 1187. The court reasoned: "the contract would remain in effect *only as long as* [the defendant] served [the plaintiff's] customers and, therefore, *when* [the defendant] would decide to no longer serve [the plaintiff's] customers could not be ascertained, making the duration of the contract indefinite and terminable at will." *Id.*

This Court notes that *Premier Holdings*, the unpublished South Carolina Court of Appeals opinion, appears to conflict with the analysis in *R.J.N. Corp.* because in *Premier Holdings*, the court found that the master in equity did not err when it determined the agreement was enforceable and to last "for as long as" the plaintiff "continued doing business" at the defendant's place of business. *Premier Holdings*, 2008 WL 9843982 at *1.

In response to Defendant, Plaintiff argues that the Illinois cases should not be relied on because they are "incongruous with South Carolina law."

Plaintiff points out that in *Jespersen*, the agreement explicitly provided that unless it was terminated under a certain article, it "shall continue indefinitely." Plaintiff argues that South Carolina law differs from Illinois law because South Carolina law allows for perpetual contracts if the parties clearly express their desire to create a perpetual contract, whereas Illinois does not allow for perpetual contracts under any circumstances.

Plaintiff states that the *Jespersen* court reasoned, "[i]t is impossible to ascertain whether or when [the plaintiff] would institute such an event, therefore, the agreement offered the possibility of perpetual duration and was terminable at will by the parties." According to Plaintiff, this reliance in *Jespersen* on the mere possibility of perpetual duration is contrary to South Carolina law because in *Prestwick*, there was a possibility that the membership level would never reach 550 members, but the court still determined the trial court erred in ruling that the schedule was for an indefinite duration.

Plaintiff also cites to *Zee Medical Distributor Association, Inc. v. Zee Medical, Inc.*, 94 Cal. Rptr. 2d 829 (Cal. Ct. App. 2000), where the California Court of Appeals stated that California law differs from Illinois law because it permits the express contract terms of indefinite duration,

which is similar to South Carolina law. Plaintiff points out that the *Zee* court "refused to follow *Jespersen*."

Next, Plaintiff argues that in *Rico*, 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." Plaintiff argues this is contrary to *Prestwick* because the *Prestwick* court was not concerned with the possibility that the parties could not foresee when membership levels would reach 550 members nor was it concerned with the possibility that the membership levels may never be reached.

Plaintiff argues the *R.J.N. Corp.* case also does not apply because just like in *Rico*, the Illinois court was focused on the fact that the parties could not directly determine when the contract would end. Plaintiff argues that this is in contrast to *Prestwick* because "*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."

Lastly, Plaintiff argues that the Illinois cases have no application in this case because here, in contrast to the Illinois cases, the entire deal would not go away if the Agreement was terminated because Defendant would continue to receive the premiums flowing from the introduction, but Plaintiff would receive nothing.

In sum, the South Carolina Court of Appeals has established a contract may terminate upon the occurrence of a future, specific event. *Prestwick*, 331 S.C. at 392, 503 S.E.2d at 188 ("Just 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."). Further, according to the South Carolina Supreme Court, it is clear that perpetual contracts are not allowed unless they are expressly provided for in the contract. Thus, contracts that last in perpetuity are terminable at will.

See Carolina Cable, 316 S.C. at 101, 447 S.E.2d at 201. However, it is not clear whether South Carolina law requires the occurrence of a future, specific event to be an objective event as described herein.

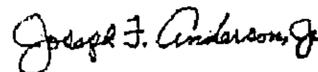
IV. Questions Certified

Plaintiff's and Defendant's Supplemental Memorandums brief this issue of state law, and the Court has determined that the answer under existing South Carolina precedent is not clear. Accordingly, pursuant to South Carolina Appellate Court Rule 228, the United States District Court for the District of South Carolina hereby certifies the following questions to the South Carolina Supreme Court:

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?

IT IS SO ORDERED.



August 16, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Tower Street Management, Inc.,	)	C/A: 3:17-1781-JFA
	)	
Plaintiff,	)	
v.	)	ORDER
	)	
KnightBrook Insurance Company,	)	
	)	
Defendants.	)	

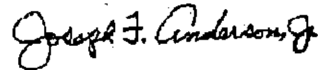
This matter is now pending before the Supreme Court of South Carolina upon certification of a question of law from this court. The parties have returned to this court asking this court to supplement the record before the South Carolina Supreme Court. Each party has suggested a large number of documents that they suggest are necessary in deciding the certified question.

Upon review of the documents proposed to the court, and after reflecting upon the issues presented in this case and the court's certification order, this court is of the opinion that most, if not all, of the documents sought to be added to the record are not necessary for the Supreme Court's determination.

This court does determine that the Finder's Fee Agreement (ECF No. 1-1, p. 8-11) and the Letter of Intent (ECF No. 48-9) may be helpful and therefore should be added to the record. The court will, contemporaneously with the entering of this order, forward those two

documents to the South Carolina Supreme Court. To the extent both parties request additional documents be added to the record, the motion is respectfully denied.

IT IS SO ORDERED.



October 30, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

Tower Street Capital Management, Inc. v. KnightBrook Insurance Company

EXHIBIT A
Finder's Fee Agreement

TOWER STREET CAPITAL MANAGEMENT

1205 West Colonial Life Boulevard, Columbia, SC 29210 (803) 397-4814

December 14, 2011

Mr. Eric D. Jarvis
4751 Wilshire Blvd.
Los Angeles, CA 90010

REF: FINDER'S FEE AGREEMENT

Dear Mr. Jarvis:

This Fee Agreement is entered into as of December 14, 2011 (this "Agreement") by and between KnightBrook Insurance Company and affiliate companies ("KnightBrook"), having its principal place of business at 4751 Wilshire Boulevard, Los Angeles, CA 90010 AND Tower Street Capital Management, Inc. ("Finder"), having its principal place of business at 1205 W. Colonial Life Blvd, Columbia, SC 29210.

WHEREAS, the FINDER lead KNIGHTBROOK to DGU Insurance Associates ("program administrator") who is seeking a carrier to take risk on two insurance programs (Equity Protection Program & Second Mortgage Protection Program)

WHEREAS, FINDER's introduction leads KNIGHTBROOK to program administrator to serve as the new program administrator's insurance carrier; and

WHEREAS, KNIGHTBROOK agrees to compensate FINDER for the introduction services provided.

NOW, THEREFORE, in consideration of the promises and mutual covenants set forth herein, the parties agree as follows:

1. In exchange for identifying and introducing KNIGHTBROOK to the program administrator, where KNIGHTBROOK will act as the at-risk carrier for the new program administrator, defined as the transaction ("Transaction"), KNIGHTBROOK shall pay FINDER 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

2. KNIGHTBROOK acknowledges the following:

   a. FINDER has not conducted any due diligence with respect to the program administrator or the owners thereof;
   b. All information provided to KNIGHTBROOK which pertains to the program administrator has been prepared by the program administrator without any independent verification by FINDER; and
   c. FINDER makes no representation or warranty as to the accuracy of any information prepared by the program administrator or as to whether KNIGHTBROOK will be suitable to act as a purchase for any potential program administrator.

3. This Agreement represents the entire agreement of the parties and supersedes any and all prior or contemporaneous written or oral agreements between KNIGHTBROOK and FINDER. This agreement may not be amended except in writing and signed by both parties.

4. This Agreement shall be binding on the heirs, assigns, and successors of both KNIGHTBROOK and FINDER, respectively.

5. KNIGHTBROOK and FINDER understand and agree that neither party shall be considered to be the agent of the other for any purpose whatsoever and that neither has the authority to enter into any contract, assume any obligation or to make any warranties or representations on behalf of the other.

6. KNIGHTBROOK agrees to indemnify and save FINDER, its affiliates and all respective directors, officers, employees, and agents (collectively, the "Indemnified Parties" and individually, an "Indemnified Party") harmless from and against any and all losses, claims actions, suits, proceedings, damages, judgments, assessments, demands, costs, expenses, and other liabilities of whatsoever nature or kind, and KNIGHTBROOK will reimburse each such Indemnified Party for all reasonable fees and expenses (including, without limitation, reasonable attorney's fees and expenses; and court costs) as they are incurred in investigating, preparing, pursuing, or defending any claim, action, suit, proceeding or investigation, whether or not an Indemnified Party is a party, relating to or arising out of or in connection with (i) the introduction services rendered by an Indemnified Party pursuant to this Agreement, any Transaction introduction services; (ii) actions taken by or omitted to be taken by KNIGHTBROOK or any affiliates, employees, directors, officers, partners, representatives, or agents of KNIGHTBROOK in connection with any Transaction contemplated by this Agreement, and (iii) any untrue statement or alleged untrue statement of a material fact contained in any document furnished by KNIGHTBROOK to the program administrator, and any omission therein, in light of the circumstances under which they are made, not misleading.

7. 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, 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.

8. This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina, without regard to the application of principles of conflict of laws of that State. The parties hereby agree to the exclusive jurisdiction of any state or federal court located in the State of South Carolina for the resolution of any disputes raising issues regarding the construction, meaning or enforcement of the terms of this agreement and waive any objection that (i) either court is an inappropriate or inconvenient forum to resolve such disputes, or (ii) that either court lacks personal jurisdiction over it. In addition, the parties hereby mutually agree to waive any rights they may otherwise have to trial by jury of any and all such claims.

If you are in agreement with the outline above, please sign below and return to us at your earliest convenience.

If you have any questions, please let us know.

Sincerely,

Madison Cone
President
Tower Street Capital Management

Agreed: ______________________ Date: 1-17-12
Eric D. Jarvis
President
KnightBrook Insurance Company

TOWER STREET CAPITAL MANAGEMENT, INC.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Tower Street Capital Management, Inc.,

Plaintiff,

vs.

KnightBrook Insurance Company,

Defendant.

Civil Action No.: 3:17-cv-1781-JFA

Exhibit 8

Letter of Intent

KNIGHTBROOK
INSURANCE COMPANY

[illegible] WILSHIRE BLVD.
SUITE [illegible]
LOS ANGELES, CA [illegible]
[illegible]
[illegible]
KNIGHTBROOK.COM

September 1, 2011

Mr. Madison Cone
Mr. Reginald Boylston
1201 Colonial Life Boulevard West
Columbia, SC 29210

Re: Letter of Intent.

Dear Messrs. Cone & Boylston:

We have collectively discussed the movement of various books of insurance business ("Programs") to KnightBrook Insurance Company ("KnightBrook"). These Programs may be classified as "Fronted", or "At Risk" Programs. The Program opportunities arise from your existing relationships with the producers of the Program business. In addition, we have discussed the development of a managing general agency and third party administrator ("MGA/TPA") to manage the business of one or more Programs, with the most imminent MGA/TPA opportunity relating to a workers' compensation book of business produced by Dallas National Insurance Company. This letter (the "LOI") serves to indicate our mutual desire to enter into a formal arrangement and agreement to accomplish these goals upon mutually agreeable terms. Except as expressly set forth herein, this LOI is not intended as a binding agreement between us, but, if its terms are satisfactory, it shall serve to set forth our mutual understanding that we will work diligently, in good faith, and exclusively with each other, towards the execution of one or more definitive agreements that will contain the terms set forth herein (the "Definitive Agreements").

1. Newco:

A new business entity will be created (provisionally identified as "Newco") which will be owned 50% by KnightBrook or a KnightBrook affiliate, 45% by Madison Burns Cone ("Cone"), 5% by Reginald Wyatt Boylston ("Boylston"). Newco will serve as an MGA/TPA to directly manage the business of one or more Programs, and will also provide oversight of Fronted or At Risk programs on behalf of KnightBrook.

2. Newco Directors and Officers:

KnightBrook shall appoint 50% of the Board, and Cone and Boylston shall collectively appoint 50% of the Board. The officers shall include Cone as President, and Boylston as Executive Vice President.

3. Newco Revenue:

Newco will generate revenue either directly as an MGA/TPA, or as a percentage of profit realized by KnightBrook on Fronted and At Risk programs, as follows:

- 100% of MGA/TPA revenue;
- 25% of the profit realized by KnightBrook on the Fronted Program with Dallas National Insurance Company;
- 20% of the realized profit on all other Fronted Programs;
- 20% of the realized profit on all At Risk Programs.

DEFENDANT'S EXHIBIT
3 6/1/18 KC

CONFIDENTIAL

KNIGHTBROOK 000138

4. Payment of Profit Share:

Fronted Programs: Newco will be paid profit share percentages on all Fronted Programs at the end of each month in which premium which is subject to a fronting fee is written.

At-Risk Programs: Newco will be paid profit share percentages on all At-Risk Programs through a sliding scale, dependent upon the loss performance of the subject business. A portion of the profit share will be paid monthly, based upon a loss pick agreed to by the parties. The remaining portion of the profit share will be paid out quarterly over a period of time following the end of the first year of business, which will be based upon the inception-to-date actual loss ratio of the subject Program. Such profit sharing may be conditioned upon the achievement of productivity goals achieved by Newco, and subject to forfeiture upon termination of the relationship between the parties.

Realized Profit of KnightBrook will be the KBIC Gross Profit, as calculated in the examples on the accompanying spreadsheet.

5. Newco Expenses:

MGA/TPA: All expenses of Newco relating to MGA/TPA business will be borne by Newco. KnightBrook will fund Newco with startup expenses until Newco begins generating sufficient revenue to support its expenses. These startup expenses will be credited to KnightBrook before any profit split among Newco's ownership is made. Startup expenses are currently estimated at between $500,000 and $2,000,000, which amount may be fixed, modified, or supplemented in a mutually agreed-upon budget and business plan. Such expenses may be conditioned upon the achievement of productivity goals achieved by Newco.

Fronted and At Risk Programs: Costs and expenses of Newco relating to the oversight and management of Fronted and At Risk Programs will be borne by KnightBrook on a cost-reimbursed basis, and subject to agreed-upon budgets. Such expenses will be allocated among the various Programs and shall reduce the profitability of such Programs at the KnightBrook level prior to determining the Newco profit share.

6. Legal Fees:

In the event that Newco shall become subject to a legal action against it arising from the prior employment of any management employees of Newco by Companion Property & Casualty Insurance Company, or its parents or affiliates, Newco shall bear the expenses of defending such legal action. Prior to execution of the definitive agreements, KnightBrook shall be given opportunity to conduct such due diligence and legal analysis to satisfy itself as to the nature and extent of such potential legal liability.

7. Distribution of Newco Profits:

Disbursements of profits to the shareholders of Newco may be made as agreed-upon by the shareholders, no less often than annually, pro-rata with their respective shareholder interests. Newco will be subject to an annual financial audit.

3:17-cv-01781-JFA Date Filed 12/28/18 Entry Number 48-9 Page 4 of 5

8. Programs:

Phase 1 Programs: It is anticipated that the initial Programs to be implemented will be the programs identified as:

1. Dallas National Fronting Programs, with MGA & TPA service;
2. All-Star Fronting and At Risk Programs;
3. DGU At Risk Programs;

Each Phase 1 Program will be subject to the approval of KnightBrook, who will diligently review each Program consistently with its established program underwriting protocols. Upon approval of each Program, KnightBrook will increase its capital and surplus in the amounts necessary to support each Program while maintaining KnightBrook's capitalization at levels sufficient to satisfy KnightBrook's regulatory requirements and its A- AM Best rating. We anticipate that the requisite due diligence on the Dallas National Workers Comp Fronting Program shall begin immediately upon execution of this LOI. and shall be completed prior to execution of the Definitive Agreements.

Additional Programs: Additional Programs presented to KnightBrook by Cone and Boylston, or to be presented to KnightBrook in the future by Newco, will also be supported upon the approval of KnightBrook on a Program by Program basis, in a manner consistent with KnightBrook's established program underwriting protocols.

9. Future Insurance and Reinsurance Participation:

In the event that Cone and Boylston shall form an insurance or reinsurance company, KnightBrook agrees that such company may participate in the reinsurance or fronting of the Programs, as may be mutually agreed-upon by the parties.

10. Additional Conditions:

a. KnightBrook's satisfactory completion of its due diligence of the Phase 1 Programs prior to closing;

b. KnightBrook's satisfactory completion of its due diligence of Cone and Boylston, to include, without limitation, background investigations, credit investigation, and personal and professional referrals;

c. The negotiation and execution of the Definitive Agreements acceptable to KnightBrook, Cone, and Boylston, containing terms, conditions, representations and warranties and indemnification customary for transactions of this nature;

d. Prior to the closing of this transaction, Cone and Boylston will conduct business operations in the ordinary course of business. In the event of a material adverse change in the subject Programs, Cone and Boylston will promptly notify KnightBrook;

e. This LOI will automatically be withdrawn and cancelled on the earlier of: (1) 60 days following the execution of this LOI by Cone and Boylston, unless the parties mutually agree in writing to an extension of such date; (2) the execution of the Definitive Agreements; or (3) the mutual written agreement of the parties;

3:17-cv-01781-JFA Date Filed 12/28/18 Entry Number 48-9 Page 5 of 5

f. Neither party shall disclose the existence of this LOI, nor the pendency of our negotiations, to any media or public forum without the prior written consent of the other, except as may be required by applicable law, regulation or self-regulating body. The timing and content of any announcements, press releases or public statements concerning the proposed acquisition or the other transactions contemplated hereby will be by mutual agreement;

g. Until the expiration of this LOI, Cone and Boylston agree they will not, individually or collectively, take any action to solicit or support any proposal or offer from, furnish any information to, or participate in any negotiations with any entity (other than KnightBrook) regarding movement of the Programs or the subject matter of this LOI, and any such negotiations currently in progress will be terminated or suspended during such period;

h. The parties will pay their own costs and expenses incurred in connection with the proposed transactions, including all legal, accounting and financial advisory fees and expenses, whether or not the acquisition is consummated;

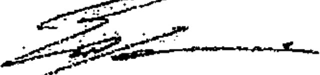
i. This Letter is a statement of the intentions of the parties and, except for the provisions of Paragraphs 10.f, 10.g, 10.h, 10.i, and 10.j (which are intended to be binding), is not intended to be a legally binding agreement or to create any rights in favor of any of the parties with respect to the proposed asset purchase or the other transactions contemplated hereby, and no party shall take any action or fail to take action in detrimental reliance until the Agreement is prepared, approved, and signed by all authorized representatives of all parties involved. The obligations of the parties to consummate the transactions hereby shall be subject in all respects to the negotiation, execution and delivery of the agreements referred to above and to the satisfaction of the conditions contained therein, and none of the parties hereto shall have any liability to any of the others if the parties fail for any reason to execute agreements: and

j. The parties agree that all information exchanged to date and information and knowledge gathered during the due diligence process will be kept confidential.

Upon the signing of this LOI by Cone and Boylston, KnightBrook is prepared to immediately commence due diligence and negotiation of the Definitive Agreements.

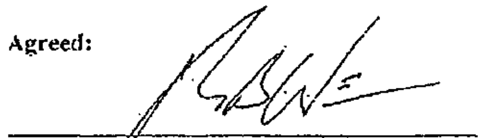
If this LOI is acceptable to you, please sign and return one copy to the undersigned within five (5) business days.

Very truly yours,

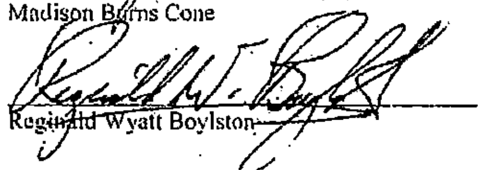


Eric D. Jarvis, President

Agreed:



Madison Burns Cone — Date 9/2/11



Reginald Wyatt Boylston — Date 9/2/11

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 08 2019
S.C. SUPREME COURT

CERTIFIED QUESTIONS

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

Appellate Case No.: 2019-001373

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

v.

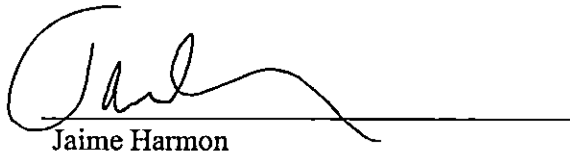
KnightBrook Insurance Company, ...Defendant.

PROOF OF SERVICE

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 **Joint Appendix**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

James G. Long, III
Emily Dobson Glober
Nexsen Pruet, LLC
P.O. Box 2426
Columbia, SC 29202

Thornwell F. Sowell, III
Bess J. DuRant
Sowell & Durant, LLC
1325 Park Street, Suite 100
Columbia, SC 29201



Jaime Harmon

Columbia, South Carolina
November __8__, 2019