

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

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CERTIFIED QUESTIONS  
United States District Court

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

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Appellate Case No. 2019-001373  
\_\_\_\_\_

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

v.

KnightBrook Insurance Company,.....Defendant.

\_\_\_\_\_  
**DEFENDANT'S FINAL BRIEF**  
\_\_\_\_\_

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES

CERTIFIED QUESTIONS

STATEMENT OF THE CASE..... 1

I. FACTS ..... 2

II. PROCEDURAL HISTORY..... 8

SUMMARY OF ARGUMENT ..... 11

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 contact does not have control over it?..... 12

A. Under South Carolina law, a durational term keyed to the occurrence of a future, specific event is enforceable only if the future, specific event is objective..... 12

B. *Childs, Carolina Cable, and Prestwick* are consistent with decisions in other jurisdictions..... 17

C. South Carolina and Illinois law are the same in all material respects ..... 22

D. Other states consistent with Illinois and South Carolina reject perpetual interpretations of contracts..... 24

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? ..... 35

A. A nonbinding “agreement to agree” on the formation of a new entity is not an objective event that renders a contract sufficiently definite in duration ..... 35

B. The parties did not intend that KnightBrook would be obliged to pay the finder’s fee for the life of the program..... 39

C. The cases on which Tower Street relies are inapposite ..... 39

CONCLUSION..... 44

## TABLE OF AUTHORITIES

### CASES

|  |  |
|--|--|
| <i>Adrikos Real Estate Holding LLC v. Murphy</i> , 904 N.W.2d 408 (Wisc. Ct. App. 2017) .....  | 39   |
| <i>Besco, Inc. v. Alpha Portland Cement Co.</i> , 619 F.2d 447, 448 (5th Cir. 1980) .....  | 43   |
| <i>Cape v. Greenville Cnty. Sch. Dist.</i> , 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) .....   | 24, 25                                     |
| <i>Carolina Cable Network v. Alert Cable TV, Inc.</i> , 316 S.C. 98, 447 S.E.2d 199 (1994) .....   | 13, 15, 16, 17, 19, 23, 25, 25, 28, 37, 45 |
| <i>Carter White-Lead Co. v. Kinlin</i> , 66 N.W. 536, 536 (Neb. 1896) .....  | 43   |
| <i>Cf. Mid-Southern Toyota</i> , 453 S.W.2d at 549 .....   | 41   |
| <i>Chambers v. Pingree</i> , 351 S.C. 442, 451, 570 S.E.2d 528, 532 (Ct. App. 2002) .....  | 42   |
| <i>Childs v. City of Columbia</i> , 87 S.C. 566, 70 S.E. 296, 298 (1911) .....   | 15, 31, 32, 44                             |
| <i>City of Big Spring v. Bd. of Control</i> , 404 S.W.2d 810, 815 (Texas 1966) .....   | 43   |
| <i>City of Superior v. Douglas Cnty. Tel. Co.</i> , 122 N.W. 1023, 1027 (Wis. 1909) .....  | 43   |
| <i>Copylease Corp. of Am. v. Memorex Corp.</i> , 403 F. Supp. 625, 632 (S.D.N.Y. 1975) .....   | 43   |
| <i>Dobyns v. SC Dept. of Parks, Recreation and Tourism</i> , 325 S.C. 97, 100 n.5, 480 S.E.2d 81, 83 n.5 (1997) .....  | 13   |
| <i>Don King Prods., Inc. v. Douglas</i> , 742 F. Supp. 741, 763 (S.D.N.Y. 1990) .....  | 43   |
| <i>Georgetown Mfg. &amp; Warehouse Co. v. S.C. Dep't of Ag.</i> , 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990) .....   | 24   |
| <i>Glacial Plains Cooperative v. Chippewa Valley Ethanol Co.</i> , 912 N.W.2d 233, 236 (Minn. 2018) .....  | 28, 37, 38                                 |
| <i>H&amp;R Block Tax Services, LLC v. Franklin</i> , 691 F.3d 941,944 (8th Cir. 2012) .....  | 26   |
| <i>Holden v. Alice Mfg., Inc.</i> , 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) .....   | 24   |
| <i>Jespersen v. Minnesota Mining &amp; Manufacturing Co.</i> , 681 N.E.2d 67 (Ill. App. Ct. 1997) (“ <i>Jespersen I</i> ”), <i>aff'd</i> , 700 N.E.2d 1014 (1998) .....  | 18, 19, 22                                 |
| <i>Jespersen v. Minnesota Mining &amp; Manufacturing Co.</i> , 681 N.E.2d 67 (Ill. App. Ct. 1997) (“ <i>Jespersen II</i> ”), <i>aff'd</i> , 700 N.E.2d 1014 (1998) ..... | 18, 20                                     |
| <i>Klamath Off-Project Water Users, Inc. v. Pacificorp</i> , 240 P.3d 94 (Or. Ct. App. 2010) .....   | 31, 32                                     |
| <i>Koon v. Fares</i> , 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) .....   | 24, 39, 45                                 |
| <i>Laff v. John O. Butler Co.</i> , 381 N.E.2d 423, 434 (Ill. Ct. App. 1978) .....   | 43   |
| <i>Liberty Indus. Sales, Inc. v. Marshall Steel Co.</i> , 272 F.2d 605, 606-07 (7th Cir. 1959) .....   | 43   |
| <i>Mid-Southern Toyota, Ltd. v. Bug's Imports, Inc.</i> , 453 S.W.2d 544 (Ky. Ct. App.   |  |

|   |                |
|---|----------------|
| 1970) .....   | 29, 30         |
| <i>Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc.</i> , 815 N.E.2d 911, 915<br>(Ill. App. Ct. 2004).....  | 25             |
| <i>Moss v. Porter Brothers, Inc.</i> , 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987).....   | 41             |
| <i>MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust</i> , 864 N.W.2d 83<br>(Wisc. 2015).....  | 44, 45         |
| <i>Open Lake Sporting Club v. Lauderdale Haywood Angling Club</i> , 511 S.W.3d 494<br>(Tenn. Ct. App. 2015).....  | 34, 35         |
| <i>Payroll Express Corp. v. Aetna Cas. &amp; Surety Co.</i> , 659 F.2d 285, 292 (2d Cir.<br>1981).....  | 43             |
| <i>Phelps v. Shawprint, Inc.</i> , 103 N.E.2d 687, 689 (Mass. 1952).....  | 43             |
| <i>Preferred Physicians Mutual Management Group, Inc v. Preferred Physicians<br/>Mutual Risk Retention Group, Inc.</i> , 961 S.W.2d 100 (Mo. Ct. App. 1998) ..... | 25, 26, 37, 45 |
| <i>Prestwick Golf Club v. Prestwick Limited Partnership</i> , 331 S.C. 385, 503 S.E.2d<br>184 (1999).....   | 16, 17, 23, 45 |
| <i>R.J.N. Corp. v. Connelly Food Products, Inc.</i> , 529 N.E.2d 1184 (Ill App. Ct.<br>1988).....   | 18, 22, 37, 38 |
| <i>Rico Indus., Inc. v. TLC Group, Inc.</i> , 6 N.E.3d 415 (Ill. App. Ct. 2014) 18, 20, 22, 23, 25, 26, 29,<br>37, 38   |                |
| <i>Rico Indus., Inc. v. TLC Grp., Inc.</i> , 2014 Ill. App (1st) 131522, 6 N.E.3d 415.....  | 10             |
| <i>Thorne v. True-Hixson Lumber Co.</i> , 148 So. 388, 389 (Miss. 1933).....  | 43             |
| <i>Trapani Constr. Co. v. Elliot Grp., Inc.</i> , 64 N.E.3d 132, 144 (Ill. App. Ct. 2016).....  | 23             |
| <i>Trient Partners I Ltd. v. Blockbuster Entertainment Corp.</i> , 83 F.3d 704 (5th Cir.<br>1996).....  | 27             |
| <i>W.P. Iverson &amp; Co. v. Dunham Mfg. Co.</i> , 152 N.E.2d 615, 619 (Ill. Ct. App.<br>1958).....   | 43             |
| <i>Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.</i> , 178 F. Supp. 655<br>(S.D.N.Y. 1959).....   | 44             |
| <i>Watson v. Underwood</i> , 407 S.C. 443, 454–55, 756 S.E.2d 155, 161 (Ct. App.<br>2014).....  | 23             |
| <i>Wyeth Pharmaceuticals, Inc. v. Borough of West Chester</i> , 126 A.3d 1055 (Pa.<br>Commw. Ct. 2015).....   | 32, 33         |

## STATUTES

|             |        |
|-------------|--------|
| § 4.01..... | 19, 20 |
|-------------|--------|

## **CERTIFIED QUESTIONS**

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

The litigation giving rise to the Certified Questions arises from a finder's fee Agreement (the "Agreement") between Plaintiff Tower Street Capital Management, Inc. ("Tower Street"), a statutory close corporation, and Defendant KnightBrook Insurance Company ("KnightBrook"). KnightBrook agreed to pay Tower Street a fee for introducing KnightBrook to DGU Insurance Associates, LLC ("DGU"). The introduction eventually led to KnightBrook acting as the insurance carrier for an insurance program managed by DGU, the "Equity Protection Program."<sup>1</sup> The Agreement provided that KnightBrook's obligation to pay the finder's fee would continue until the parties had reached agreement to establish a new entity, provisionally denominated "Newco," as outlined in a nonbinding Letter of Intent ("LOI").

Without the fault of either party, Newco was never formed. KnightBrook nevertheless paid Tower Street under the Agreement for five years, until April 2017. KnightBrook then terminated the Agreement and ceased making payments to Tower Street. This litigation ensued. KnightBrook contends, *inter alia*, that it was within its rights to terminate the Agreement because it was indefinite as to duration, perpetual, and therefore terminable at will with reasonable notice. Tower Street contends that the Agreement is not terminable at will.

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<sup>1</sup> The Agreement records that KnightBrook also acted as the insurance carrier for the "Second Mortgage Protection Program." The parties dispute whether this is one program or two programs, but for purposes of the Certified Questions, the dispute is immaterial. For ease of reference, KnightBrook will refer only to the Equity Protection Program.

## I. FACTS

The negotiations that led to the Agreement (and ultimately to this litigation) began in August 2011. Prior to that time, Curtis Stewart, Madison Cone, and Rex Boylston worked together at Companion Property and Casualty Insurance Company (“Companion”), a subsidiary of BlueCross BlueShield of South Carolina. Stewart started at Companion in 1999 as the Chief Financial Officer and was promoted to Chief Operating Officer in 2011. Boylston started at Companion in 1997 as a manager and eventually became Director of Business Development. Cone started at Companion as an analyst in 2008, shortly after he graduated from college. Stewart was at the top of the chain of command, with Boylston reporting to Stewart and Cone reporting to Boylston.

During Stewart, Boylston, and Cone’s time at Companion, the company focused on insurance program business. An insurance program is simply an insurance product offered to a specialized industry; it is often a niche insurance product. Generally, the insurer contracts with an intermediary to manage one or more of the three components of an insurance program—selling, underwriting, and claims handling. A Managing General Agency (“MGA”) manages all three components,<sup>2</sup> while a General Agency (“GA”) manages only one or two components, with the insurer retaining control over the others.

Companion effectively fired Cone in late 2010. He became an employee of DGU Insurance Associates, LLC (“DGU”), an MGA working with Companion on certain insurance programs. Cone continued to work from his office at Companion and retained

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<sup>2</sup> See Int’l Risk Mgmt. Inst., Inc., “Managing General Agent (MGA),” *available at* <https://www.irmi.com/term/insurance-definitions/managing-general-agent> (last visited Dec. 14, 2019).

his Companion email address. After only a few months, Cone had a falling out with DGU's vice president and was made a contractor rather than an employee. Cone formed Tower Street in January 2011 for the purpose of contracting with DGU. This relationship was also short-lived, ending in May 2011. Also in May 2011, Stewart and Boylston both left Companion.

In May 2011, when Stewart and Boylston left, Companion was transitioning out of the insurance program business. This meant that the programs previously insured by Companion, roughly 18 in total, needed to be placed with a new insurance company. Cone, Stewart, and Boylston, operating through Tower Street, set out to transfer these programs to new insurance companies.

Over the next few months, Tower Street met with several insurance companies, including KnightBrook, to present the various programs for possible transfer. From the time of their initial meeting in August 2011, Tower Street and KnightBrook discussed KnightBrook providing insurance for up to 18 programs currently at Companion and forming a new entity to manage the business. This was the genesis of Newco, envisioned as a joint venture between KnightBrook and Tower Street, where Stewart, Cone, and Boylston, as principles of Tower Street, would work full-time for Newco and would oversee and manage insurance programs insured by KnightBrook.

At the same time these discussions were taking place, Stewart was involved in a legal dispute with Companion over a non-compete agreement. Because of this, he could not be directly involved in Tower Street's dealings but used Cone and Boylston as his "proxies" until his legal matter was resolved.

On September 2, 2011, Tower Street and KnightBrook executed a nonbinding Letter of Intent (“LOI”) for the “the development of a managing general agency and third party administrator (“MGA/TPA”) to manage the business of one or more Programs.” (Joint Appendix (“J.A.”) 25.) The LOI states that “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.” (*Id.*) The LOI identifies the intended relationship between the parties, the expected due diligence period by KnightBrook and requires as an additional condition the negotiation and execution of definitive agreements in the future containing the terms, conditions, representations, and warranties and indemnification customary for transactions of this nature. (J.A. 25-27.) Further, the LOI identifies three “Phase 1” programs as the initial programs “anticipated ... to be implemented,” subject to KnightBrook’s approval. (J.A. 27.)

In the midst of the parties’ discussions regarding Newco, and as KnightBrook was vetting the Phase 1 programs, Tower Street arranged a meeting between KnightBrook and DGU. As the MGA for the Equity Protection Program, DGU controlled that book of business, and it was looking for a carrier to replace Companion. An introductory meeting occurred on September 20, 2011, attended by KnightBrook, DGU, and Tower Street. Following this initial meeting, KnightBrook independently vetted the Equity Protection Program, with no involvement from Tower Street, over the ensuing months. (ECF Nos. 48-3, 24-25.) Eventually, on November 30, 2011, KnightBrook CEO Eric Jarvis informed Cone that KnightBrook had decided to move forward with the Equity Protection Program with DGU. Of the various programs Tower Street had originally presented to KnightBrook

in August 2011, the Equity Protection Program was the first one KnightBrook decided to accept. KnightBrook rejected the other Phase 1 programs.

The day after Jarvis had informed Cone that KnightBrook was going act as the insurance carrier for the Equity Protection Program, Cone prepared and sent Jarvis a proposed finder's fee agreement. Of particular significance in Cone's initial draft is the language regarding the duration of payments:

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 [*i.e.*, Tower Street] a fee per the following schedule **for the life of the program:**

- 2% of the Gross Written Premium on both programs

(ECF No. 48-11, at 5 (emphasis added).)

KnightBrook was fundamentally opposed to paying anyone a finder's fee for an indefinite period or for the life of the program. In fact, KnightBrook had never paid, and its corporate representative had never seen, an agreement to pay finder's fees for longer than five years. In responding to Cone's draft, therefore, Jarvis rejected the "life of the program" language. Jarvis asked Cone, "[W]ould you OK **fixing the % of gross for two years** – Hopefully Curtis's legal issues will have abated and you can be more directly involved." (ECF No. 48-12, at 2 (emphasis added).)

This email also highlights an underlying dynamic of the relationship between Tower Street and KnightBrook, which was that KnightBrook's real interest was in doing business with Stewart rather than Cone or Boylston. Both Stewart and Jarvis testified that Stewart's

legal issues were one of the main holdups in forming Newco because Newco could not be functional until Stewart was available to be CEO. The parties' mutual recognition of the importance of Stewart's involvement establishes why the parties agreed to enter into the finder's fee arrangement at that time. The finder's fee arrangement was a stopgap temporary measure until Stewart's legal issues were resolved and he could run Newco.

Cone responded to Jarvis's rejection of the "life of the program" durational term by proposing to replace it with language tying the duration of KnightBrook's obligation to pay the finder's fee to the intended and expected formation of Newco:

Instead of making it for 2 years, it may make more sense (especially since Curtis' lawyer thinks his non-compete expires in January) to just make it a % of gross **until the agency starts**. That way if it's less than 2 years, we are not getting double compensated and (God forbid) **if it's more than two years we still have some income to pay the small team that we are putting together to process this workload**.

(ECF No. 48-12, at 2 (emphasis added).) Cone attached a revised draft of the Agreement to his email making this suggestion. The revised draft **deleted** "for the life of the program" and replaced it with language reflecting the parties' intent and expectation that the finder's fee arrangement would provide interim funding until Newco could be established and begin providing the MGA/TPA services outlined in the LOI:

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

(J.A. 21 (emphasis added).) On January 17, 2012, Jarvis, on behalf of KnightBrook, executed the final version of the Agreement.

It is undisputed that Newco was never created. Although the reasons for this may be disputed, both parties agree that they did not intend for the Finder's Fee Agreement to operate as a perpetual contract. Additionally, it is clear that the scope of the business ultimately accepted by KnightBrook was extremely small and did not require a new entity for management services or full-time employment by Stewart, Cone, and Bolyston. Additionally, Stewart's legal issues with his non-compete continued for several years. Neither Tower Street nor KnightBrook has ever sought to form Newco and during this long litigation, neither has demanded that the other create Newco. Finally, Stewart, the anticipated CEO of Newco, has died.

Tower Street performed no services for KnightBrook beyond the initial introduction of DGU to KnightBrook in August 2011. KnightBrook performed all of the due diligence for the Equity Protection Program, and DGU continued to act as the MGA. Nevertheless, KnightBrook faithfully paid Tower Street two percent of the gross written premium for five years. During that time, Tower Street's only act was to send KnightBrook a monthly invoice. After paying Tower Street for five years, KnightBrook notified Tower Street that it was terminating the Agreement, and it ceased making payments to Tower Street. (ECF

No. 48-13.) A few months after terminating the Agreement with Tower Street, KnightBrook also terminated its MGA Agreement with DGU. KnightBrook continues to insure the Equity Protection Program with a new MGA.

## II. PROCEDURAL HISTORY

Tower Street filed its complaint in June 2017, asserting claims for breach of contract (*i.e.*, the Agreement) and for attorneys' fees pursuant to the Agreement. KnightBrook answered the complaint and asserted the following counterclaims: (1) declaratory judgment holding that the Agreement is terminable upon reasonable notice or, in the alternative, that the Agreement is void *ab initio* for lack of an essential durational term; (2) reformation of the Agreement to include a reasonable durational term in order to align with the parties' intent; (3) payment by mistake of fact seeking return of payments erroneously made to Tower Street for programs not subject to the Agreement; and (4) unjust enrichment for return of the erroneous payments.

Following discovery, the parties cross-moved for summary judgment. KnightBrook seeks summary judgment as to Tower Street's claims and its counterclaims for declaratory judgment and reformation of the Agreement. KnightBrook's motion seeks to resolve the central dispute between the parties, namely, whether KnightBrook was within its rights to terminate the Agreement after paying Tower Street for five years, when it was clear that Newco would never be formed. Tower Street seeks summary judgment on its claims for breach of the Agreement and for attorneys' fees, as well as on all of KnightBrook's counterclaims.

In their respective summary judgment motions, both Tower Street and KnightBrook

agree that the parties did not intend to form a perpetual contract and that the Agreement lacks the language necessary to create a perpetual contract under South Carolina law. Tower Street and KnightBrook dispute, however, the implications of the undisputed fact that Newco has not been formed. Tower Street contends that the Agreement unambiguously provides that KnightBrook's obligation to pay the finder's fee continues until (a) Newco is formed, or (b) KnightBrook stops insuring the Equity Protection Program. KnightBrook points out that Tower Street's position would effectively resurrect the "for the life of the program" provision that KnightBrook specifically rejected and Tower Street deleted from the draft Agreement, and would have the effect of creating a perpetual contract. Instead, KnightBrook contends that because the Agreement lacks essential terms (duration and price) and is, therefore, indefinite and perpetual, there are only three possibilities for the duration of the Agreement: (1) it was void *ab initio*; or (2) it is a perpetual contract without an express perpetual term, and therefore is terminable at will under South Carolina law; or (3) it terminated when KnightBrook terminated DGU as the MGA for the Equity Protection Program.

Prior to the hearing on summary judgment, the district court entered an order providing, in part:

The parties are instructed to read the following cases prior to the hearing: (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 Ill. App (1st) 131522, 6 N.E.3d 415. The parties should come to the hearing fully prepared to discuss these cases and any other cases the parties deem relevant.

(ECF No. 59.) Both parties filed supplemental memoranda addressing these cases.

Following the summary judgment hearing, the district court entered an order certifying questions to the Supreme Court of South Carolina. (J.A. 3-17.) The questions certified were:

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?

(J.A. 17.) This Court accepted the certified questions by order dated September 19, 2019.

(J.A. 1.)

## SUMMARY OF ARGUMENT

Tower Street and KnightBrook entered into the Agreement as a temporary measure to provide some level of funding until the parties could form Newco under the terms set forth in the LOI. The parties agree that they did not intend to create a perpetual contract when they entered into the Agreement, and nothing in the text of the Agreement suggests otherwise. Tower Street now seeks to take advantage of the reality—unanticipated when the Agreement was executed—that Newco will never be formed, seeking to transmute a short-term accommodation into a never-ending revenue stream.

South Carolina law will not countenance the result sought by Tower Street. Consistent with the jurisprudence of other states, South Carolina courts disfavor perpetual contracts and will enforce them only if the parties' intent to form a perpetual contract is made explicitly clear. This does not mean that every contract must be for a defined term of years, months, or days. South Carolina courts will enforce a contract with a durational term tied to a specific, future event, provided the event is objective and not within the control of a party to the contract. Otherwise, the contract will be treated by the courts as indefinite and subject to termination at will, upon reasonable notice.

The Agreement between Tower Street and KnightBrook ties termination to a possible, future event: the formation of Newco. However, formation of Newco is not an objective event, because its occurrence requires the agreement and cooperation of both parties. Thus, either party can make the Finder's Fee Agreement effectively perpetual by simply doing nothing. Because formation of Newco is not an objective event, the Agreement is not sufficiently definite in duration and thus it is terminable at will.

## 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 contact does not have control over it?**

This question should be answered “yes.” Consistent with other states, decisions by this Court and by the Court of Appeals have distinguished between (1) a durational term that is keyed to a future, specific event that is *objective*, in that no party to the contract has the ability to control the event’s occurrence or non-occurrence; and (2) a durational term that is keyed to a future, specific event that is not objective, because one or both parties can control the event’s occurrence or non-occurrence. A durational term keyed to an objective future event renders the contract sufficiently definite and not terminable at will. In contrast, when a durational term is keyed to a subjective future event, the contract will be treated as one for an indefinite term that is terminable by either party on reasonable notice.

**A. Under South Carolina law, a durational term keyed to the occurrence of a future, specific event is enforceable only if the future, specific event is objective**

South Carolina law disfavors perpetual contracts. *See Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994). A contract will be recognized as perpetual “*only* where the perpetual nature of the agreement is an *express* term of the contract.” *Id.* (emphasis added); *see also Dobyys v. SC Dept. of Parks, Recreation and Tourism*, 325 S.C. 97, 100 n.5, 480 S.E.2d 81, 83 n.5 (1997) (“In *Carolina Cable*, this Court recognized that perpetual contracts are not favored and will be upheld

only where the perpetual nature of the contract is an **express term.**” (emphasis in original)).

A trio of decisions by this Court and the Court of Appeals establishes that in South Carolina, a durational term keyed to a specific, future event is valid and enforceable only if the future event is “objective,” *i.e.*, not dependent upon the will of either party to the contract. Otherwise, South Carolina courts will consider the contract to be one for an indefinite duration that is terminable by either party upon reasonable notice.

1. ***Childs v. City of Columbia***

The question of whether a future event may provide the durational term in a contract appears to have been addressed for the first time in *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911). *Childs* involved a contract in which the City of Columbia agreed to provide water service “at the customary and usual price” to Childs, who lived outside city limits. *Id.*, 70 S.E. at 297. After the City increased the price to a level Childs considered intolerable, he sued. Childs contended, in essence, that under the contract the City could neither stop providing water nor charge “exorbitant and unreasonable” prices. *Id.*

This Court affirmed the trial court, holding that Childs’s complaint “allege[d] a contract indefinite as to the price and duration of the service.” *Id.* at 298. With respect to duration, this Court observed that there was “no allegation whatever that the plaintiff was bound to take, or that the city was bound to furnish, water for any specified time.” *Id.* Accordingly, *either* party could terminate the contract at any time, upon reasonable notice:

Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, *it*

***would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.***

*Id.* (emphasis added).

*Childs* was decided over 100 years ago and just a few years after the initial typewriter had become common in offices. Even then, our Supreme Court recognized that South Carolina along with a multitude of other states cited by the Court disfavored the inadvertent creation of a perpetual contract. Today, in the 21st century, with computers, the internet, and a global economy, this principle and the policy reasons for it are even more established and necessary because of the rapidly changing nature of our modern sophisticated economy. As a result, *Childs* remains relevant and instructive to our state's jurisprudence.

## **2. *Carolina Cable Network v. Alert TV, Inc.***

Subsequently, this Court held that the contract at issue in *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994), lacked a sufficiently definite durational term and thus was terminable at will. With that decision, this Court affirmed its holding in *Childs* and specifically cited the language discussed above. Whereas, in *Childs*, the contract lacked any durational term, the contract in *Carolina Cable* contained durational terms; however, the terms were under the sole control of one party to the contract. In the contract, Alert Cable TV, Inc. ("Alert") agreed to let Carolina Cable Network ("CCN") provide local cable programming and advertising, in exchange for

which CCN would pay Alert \$.12 per subscriber, per month. The contract specified an initial term of one year but gave CCN a unilateral right to renew the contract, year after year. In contrast, Alert could only terminate the contract for nonpayment or misuse of equipment by CCN. *Id.* As a result, as long as CCN paid the fee, did not damage the equipment and renewed the contract each year, the contract would continue perpetually. Alert had no ability to terminate the agreement.

After the parties had operated under the contract for six years, Alert attempted to terminate the agreement because the \$.12-per-subscriber payment was well below market rates. CCN sued Alert for breach of contract, among other claims. The jury returned a verdict in favor of CCN on the contract claim. This Court reversed, agreeing with Alert that “since there is by law no perpetual right of renewal, the contract was terminable at will” upon reasonable notice. *Carolina Cable Network*, 316 S.C. at 101, 447 S.E.2d at 201.

### 3. *Prestwick Golf Club v. Prestwick Limited Partnership*

The decisions in *Childs* and *Carolina Cable*, involved contracts that either lacked a durational term (*Childs*) or that contained a durational term keyed to a future event within the control of a party to the contract (*Carolina Cable*). In *Prestwick Golf Club v. Prestwick Limited Partnership*, 331 S.C. 385, 503 S.E.2d 184 (1999), the Court of Appeals considered the other side of the coin, *i.e.*, a durational term keyed to a future, specific event that was *objective*, in that its occurrence or nonoccurrence was not within the control of either party to the contract. The Court of Appeals reversed the trial court’s determination that the contract had an indefinite duration.

The contract at issue in *Prestwick* was between the Partnership (a developer) and

the Club (the members) and established a tee-time schedule for the golf course. The contract provided that a certain percentage of tee times would be reserved for members-only play, with the remainder open to members and non-members alike. *Id.* at 388, 503 S.E.2d at 185-86. As club membership increased, so would the percentage of members-only tee times. When the club reached its full membership of 550 people, the contract would terminate and all tee times would be for members only.

The Partnership modified the schedule and the Club through its members sued. The trial court granted summary judgement in favor of the Partnership holding that the tee-time schedule was not a contract because it was gratuitous, lacked essential terms, was too indefinite, was for an indefinite duration, and violated the statute of frauds. *Id.* at 388, 503 S.E. 2d at 186. The Court of Appeals reversed and remanded the case for trial.

In its opinion, the Court of Appeals, viewing the evidence in the light most favorable to the Club, held that the contract “contained a specific duration,” namely, that the tee-time schedule would remain in place until the Club reached 550 members. Specifically, the Court discussed evidence in the form of affidavits from the president of the Club and a member expressing their expectation that the Club would attain 550 members and become a “private” club with no need for the tee-time schedule agreement. Therefore, the Court noted that there was evidence that the durational event was attainable in the future.

Thus, the Court of Appeals contrasted the tee-time schedule with the contract in *Carolina Cable*, where CCN had a unilateral right to renew. The critical difference between *Prestwick* and *Carolina Cable* was that the duration of the contract in *Prestwick* was keyed to a future event that was specific, clearly ascertainable, and outside the control

of either party. Attaining 550 members for a golf club is under the control of the new members, not the parties. Therefore, the contract in *Carolina Cable* was subjective (under the control of one party) and terminable upon reasonable notice while the contract in *Prestwick* was objective (ascertainable and under the control of third parties) and remained terminable upon the Club attaining 550 members.

**B. *Childs, Carolina Cable, and Prestwick* are consistent with decisions in other jurisdictions**

Prior to issuing the Certification Order, the district court directed the parties to submit supplemental briefing on the “Illinois cases”: *Jespersen v. Minnesota Mining & Manufacturing Co.*, 681 N.E.2d 67 (Ill. App. Ct. 1997) (“*Jespersen I*”), *aff’d*, 700 N.E.2d 1014 (1998) (“*Jespersen II*”), and *Rico Indus., Inc. v. TLC Group, Inc.*, 6 N.E.3d 415 (Ill. App. Ct. 2014), as well as a case relied upon by both *Jespersen* and *Rico*, *R.J.N. Corp. v. Connelly Food Products, Inc.*, 529 N.E.2d 1184 (Ill App. Ct. 1988). These three cases are a small part of a rich body of jurisprudence developed by Illinois courts on the enforceability of durational terms keyed to future, specific events. They confirm the result suggested by the smaller body of South Carolina law: a durational term keyed to a future, specific event is enforceable only if the event is objective, *i.e.*, not within the control of a party to the contract. Further, *Jespersen* was cited favorably by the Court of Appeals in *Prestwick*.

1. *Jespersen v. Minnesota Mining & Manufacturing Co.*

The parties to the contract in *Jespersen* were Victor Jespersen and Trim-Line, Inc.<sup>3</sup> Under the agreement, Jespersen became the exclusive distributor for Trim-Line in the Chicago area. The contract provided that it would continue indefinitely absent the occurrence of one of five events listed in § 4.01 of the contract, each of which was entirely within Jespersen's control. Therefore, the *Jespersen* contract can be described as a "for cause" termination contract where the triggering duration event occurs when one party breaches the contract. In this case and similar to *Carolina Cable*, only Jespersen could trigger the termination of the contract. Eventually, 3M, which acquired Trim-Line in the early 1980s, terminated the contract in 1991. Jespersen sued, contending in part that 3M had breached § 4.01 of the contract by terminating him without cause. The trial court dismissed this claim on the basis that the contract "expressly provided that it was to last indefinitely and was thus terminable at will." *Jespersen I*, 681 N.E.2d at 69. On appeal, Jespersen contended that § 4.01 "contained definite termination events," such that the contract was not terminable at will. *Id.*

The court of appeals affirmed. Initially, the court recognized that "a contract which ... provides that it will terminate upon the occurrence of a specific event" is neither perpetual nor terminable at will. *Id.* at 70. However, "[t]he event upon which the contract will terminate must be an 'objective event' so as to make the contract sufficiently definite in duration." *Id.* The court held that the terminating events listed in § 4.01 did not establish

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<sup>3</sup> Trim-Line was subsequently acquired by Minnesota Mining & Manufacturing Co., a/k/a "3M."

a durational term for the contract because Jespersen controlled whether they would occur:

Inasmuch as the occurrence of a termination-triggering event ... was within the complete control of Jespersen, ... a durational term cannot be ascertained from the [contract]. The events in section 4.01 cannot be considered objective events that would have had the effect of making the agreement sufficiently definite in duration. Rather, section 4.01 indicates an indefinite duration of the agreement ***based upon Jespersen's complete control over the occurrence of those events.***

*Id.* (emphasis added). Thus, the Illinois Court of Appeals recognized that a contract duration term based on a future event under the control of a party was subjective and terminable by either party upon reasonable notice.

The Supreme Court of Illinois affirmed on essentially the same reasoning.<sup>4</sup> *See Jespersen II*, 700 N.E.2d at 1016-17. In the opinion, the Illinois Supreme Court states an important policy reason as to why perpetual contracts are disfavored and why courts should not condone or enforce contracts that become perpetual through inadvertent drafting or passive-aggressive or bad faith conduct. Specifically, the court stated:

'Forever' is a long time and few commercial concerns remain viable for even a decade. Advances in technology, changes in consumer taste, competition mean that once profitable businesses perish regularly. Today's fashion will tomorrow or the next day inevitability fall the way of the buggy whip, the eight-track tape, and the leisure suit. Men and women of commerce know this intuitively and achieve the flexibility

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<sup>4</sup> Tower Street contends that the Supreme Court of Illinois affirmed on substantially different grounds, Pl.'s Br. at 13-14. Even a cursory review of the Supreme Court's opinion, however, establishes that the premise of both decisions was the same: both the court of appeals and the Supreme Court rejected Jespersen's argument that the termination-triggering events listed in § 4.01 resulted in the contract not being terminable at will.

needed to respond to market demands by entering into agreements terminable at will.

*Id.* at 1017.

**2. *Rico Industries, Inc. v. TLC Group, Inc.***

The situation in *Rico* is most closely analogous to the circumstances between Tower Street and KnightBrook, namely, the durational term requires the future agreement of both parties; *i.e.*, the parties agree that they will agree in the future. Under the contract at issue in *Rico*, TLC Group served as the exclusive sales representative of Rico's products to Walmart stores. The contract provided that it could only be terminated by the written agreement of both parties. Rico filed an action seeking a declaratory judgment that the contract was terminable at will because the agreement would otherwise be perpetual in duration, contrary to Illinois public policy disfavoring perpetual contracts. The trial court certified the following question to the Illinois Court of Appeals:

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?

*Rico Indus.*, 6 N.E.3d at 417.

The court of appeals answered this question “no,” reasoning that a contract terminable only upon the mutual agreement of the parties is *inherently* indefinite: “[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. Such agreements “are contracts of indefinite duration

and, thus, terminable at will.” *Id.* 423.

The logic of the opinion is obvious. An agreement to agree in the future is not an enforceable agreement. It also allows a passive-aggressive party to extend the agreement in perpetuity when the parties have never agreed to a perpetual contract.

### 3. *R.J.N. Corp. v. Connelly Food Products, Inc.*

Both *Jespersen* and *Rico* relied on an older case, *R.J.N.* In that case, the parties entered into a contract under which Connelly Food Products (“CFP”) would deliver ice cream to R.J.N.’s customers. The contract provided that the agreement “would remain in effect ‘for as long as [CFP] serves [R.J.N.’s] customers.’” *R.J.N.*, 529 N.E.2d at 1186. After CFP terminated the contract, R.J.N. sued for breach of contract, arguing that the contract had a definite duration and thus was not terminable at will. The trial court granted summary judgment to CFP and the court of appeals affirmed, reasoning as follows:

[T]he clause that “this agreement will remain in effect *for as long as [CFP] serves [R.J.N.’s] customers,*” (emphasis added) cannot be construed as an “objective event,” the occurrence of which terminates the contract thereby making it sufficiently definite in duration. Rather, a practical construction of the clause indicates an *indefinite* duration of the contract based upon CFP’s apparent option/decision to not serve Rich’s customers at some point in time. In other words, the contract would remain in effect *only as long as* CFP served Rich’s customers and, therefore, *when* CFP would decide to no longer serve RJN’s customers could not be ascertained, making the duration of the contract indefinite and terminable at will.

*Id.* at 1187 (emphasis added; citations omitted).

The Illinois decisions recognize the key principle that a contract may be of indefinite duration, and therefore terminable at will, despite the presence of a durational term keyed

to a future, specific event. To serve as an enforceable durational term, “[t]he event upon which the contract will terminate *must be an ‘objective event’* so as to make the contract sufficiently definite in duration.” *Jespersen I*, 681 N.E.2d at 70 (citing *R.J.N.*, 529 N.E.2d at 1187) (emphasis added).

**C. South Carolina and Illinois law are the same in all material respects**

Despite the fact that *Jespersen* is cited in the *Prestwick* opinion, Tower Street urges the Court to disregard the Illinois cases “because they are contrary to this Court’s well-established precedent of enforcing the terms of the contract to which the parties agree.” Pl.’s Br. at 11. That is incorrect. In South Carolina, “[t]he cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract.” *Watson v. Underwood*, 407 S.C. 443, 454–55, 756 S.E.2d 155, 161 (Ct. App. 2014) (internal quotation marks omitted). Illinois law recognizes the identical principles of contract interpretation. *See Trapani Constr. Co. v. Elliot Grp., Inc.*, 64 N.E.3d 132, 144 (Ill. App. Ct. 2016) (“When interpreting a contract, the primary goal is to give effect to the parties’ intentions at the time the contract was formed. The best indication of the parties’ intent is ascertained from the plain language of the contract.” (citation omitted)). At the same time, courts in both states disfavor perpetual contracts. *See Childs*, 70 S.E. at 298; *Rico Indus.*, 6 N.E.3d at 420. The difference, which is irrelevant to this case, is that South Carolina courts will enforce a perpetual contract if “the perpetual nature of the agreement is an *express* term of the contract,” *Carolina Cable Network*, 316 S.C. at 101, 447 S.E.2d at 201,

while Illinois courts appear to hold that perpetual contracts are always void as a matter of public policy.<sup>5</sup> See *Rico Indus.*, 6 N.E.3d at 420.

South Carolina courts' insistence that the parties expressly state their intent to enter into a perpetual contract comports with longstanding rules of contract interpretation. This Court has recognized that "[a]n interpretation [of a contract] which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). Similarly, the Court of Appeals has held that courts should avoid, if possible, a "construction that makes the [contract] unusual or extraordinary" in favor of "another construction which is equally consistent with the language employed [that] would make it reasonable, fair and just." *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994); see also *Georgetown Mfg. & Warehouse Co. v. S.C. Dep't of Ag.*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990) ("Common sense and good faith are the leading touchstones of the construction of a contract[.]").

In *Koon*, the question was whether a landlord could evict tenants when the lease provided that after the initial term, the lease could "continue month to month [and] Tenant shall provide a 30 day written notice prior to moving." *Id.* at 152-53, 666 S.E.2d at 232. Pointing to the text of the lease agreement, the tenants asserted they could not be evicted. This Court rejected the tenants' interpretation of the lease agreement because it "essentially trumps Landlord's fee simple interest in the residence and gives Tenants a perpetual

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<sup>5</sup> This minor difference is immaterial. There is no dispute that Tower Street and KnightBrook never intended to form a perpetual contract.

tenancy in the rental property,” an “absurd result that could not possibly have been intended by Landlord when she agreed to rent the residence.” *Id.* at 155, 666 S.E.2d at 233.

Finally and most critically, both South Carolina and Illinois hold that an indefinite contract is subject to termination at will. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) (“An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause.”); *Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 915 (Ill. App. Ct. 2004) (“A contract of indefinite duration such as the one here is not deemed perpetual and, thus, is terminable at will.”). Both states recognize the best (and only) remedy for a perpetual contract without an express perpetual term: termination at will with reasonable notice.

**D. Other states consistent with Illinois and South Carolina reject perpetual interpretations of contracts**

**1. Missouri**

In *Preferred Physicians Mutual Management Group, Inc v. Preferred Physicians Mutual Risk Retention Group, Inc.*, 961 S.W.2d 100 (Mo. Ct. App. 1998), the Missouri Court of Appeals addressed a contract with automatic renewals unless both parties assented to termination. With this contract, the Management Group agreed to provide management and operational services to the Risk Retention Group. The contract had an initial term tied to the calendar that “shall automatically be renewed for terms of five (5) years thereafter, unless terminated as permitted by [this contract by Risk Retention Group for cause] or both of the parties hereto give written notice of their intent not to renew this Agreement.” *Id.* at

102. Therefore, the contract in that case had an automatic renewal like *Carolina Cable*, a for-cause provision applicable to only one party like *Jespersen*, and mutual assent to terminate like *Rico*. In a lengthy analysis of the contract, the Missouri Court examined the requirement of mutual assent to avoid an automatic renewal and found “the practical effect of the agreement would be to create a perpetual, never-ending contract.” *Id.* at 103. Therefore, the contract was an unenforceable perpetual contract terminable by either party. *See id.*

In *H&R Block Tax Services, LLC v. Franklin*, 691 F.3d 941 (8th Cir. 2012), the Eighth Circuit applied *Preferred Physicians* in refusing to interpret a contract as perpetual. The contract at issue in *H&R Block* was a franchise agreement that allowed the franchisee to terminate at will but restricted the franchisor to termination for cause. The court rejected franchisee’s assertion that the automatic renewal provision implied that the agreement was a perpetual contract. The court began its analysis by noting that Missouri courts disfavor perpetual contracts and quoting *Preferred Physicians* for the rule that “a contract which purports to run in perpetuity must be adamantly clear that this is the parties’ intent.” *H&R Block Tax Servs.*, 691 F.3d at 944 (quoting *Preferred Physicians*, 961 S.W.2d at 103). Since there was no such “adamantly clear” language in the franchise agreement, the court rejected the franchisee’s argument.

As in *Preferred Physicians* and *H&R Block*, Tower Street’s interpretation of the Finder’s Fee Agreement would create a perpetual, never-ending contract. Just as in South Carolina, Missouri allows a party to enter into a perpetual contract but only if the perpetual obligation is unequivocally expressed. In *Preferred Physicians* and *H&R Block*, the

Missouri Court found that there was no expressed intent to form a perpetual contract and therefore, the court would not enforce the contract perpetually. Missouri is entirely consistent with South Carolina.

## 2. Texas

One of the leading indefinite/perpetual contract cases is *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*, 83 F.3d 704 (5th Cir. 1996). The contract at dispute in that case involved a license agreement and lease between Trient Partners, a video store operator with 43 separate Blockbuster Superstore locations, and Blockbuster. Trient and Blockbuster began to have disagreements with one another that evolved into litigation and ultimately Trient decided to exit the retail video market and liquidate its leases and assets. Blockbuster sued to prohibit the liquidation. The Fifth Circuit was faced with determining the effect of the termination clause in the license agreement between the parties. The contract provided that it continued indefinitely until terminated and listed four provisions for termination: (1) defaults by either party; (2) death or incapacity of one of Trient's partners if Blockbuster does not consent to the transfer of the deceased partner's interest; (3) transfer or change of control of Trient's partnership without Blockbuster's approval; (4) insolvency of either party. *See id.* at 709. Therefore, the termination provisions in the Trient contract were under the control of Blockbuster or it required insolvency. The court held that the termination provisions were "not the kind of determinable events that transform a contract of indefinite duration into one of definite duration." *Id.* The court held that the contract was terminable at will by either party.

In reaching this conclusion, the court made two important points particularly

relevant to this case. First, it noted that every contract can be terminated by a breach by the other party. Thus, a contract that is limited to a “for cause” termination event is not converted into a contract of definite duration. Second, the court stated that a contract “confined in time only by ‘termination provisions’ which contain conditions that are likely never to transpire” is not definite in duration. *Id.* The court thus recognized the importance of requiring future termination events to be likely to transpire because such events will give the contract the certainty to support a finding that the durational term is objective and sufficiently definite. In this case, Newco will not transpire and therefore, Newco is not an objective event sufficiently definite in duration.

### 3. Minnesota

Recently, the Supreme Court of Minnesota reversed its Court of Appeals citing our state’s own *Carolina Cable* decision and other states’ decisions to “construe ambiguous language regarding duration against perpetual duration.” *Glacial Plains Cooperative v. Chippewa Valley Ethanol Co.*, 912 N.W.2d 233, 236 (Minn. 2018). The contract at issue in *Glacial Plains* provided that Glacial Plains would provide grain-handling services to Chippewa and stated that it would “continue indefinitely until either terminated by the terms of this agreement [for cause provisions], or by the *mutual agreement of both parties.*” *Id.* at 235 (internal quotation marks omitted; emphasis added). Glacial Plains sued when notified of Chippewa’s intent to terminate the agreement. *Id.* at 236. The Minnesota Supreme Court stated that “[t]he core question before us is whether the contract ... is one of perpetual duration or of indefinite duration,” a question it answered against the backdrop of Minnesota policy disfavoring perpetual contracts. *Id.* While the court found that some

provisions of the contract suggested the parties contemplated a permanent relationship, this suggestion was undermined by the parties' use of the words "indefinitely until" rather than words like "forever," "perpetually," or "permanently." *See id.* The court concluded:

Because the durational language of the contract is ambiguous, we will construe it against perpetual duration. As there is no definite duration expressed in the contract, we conclude that the contract must be one of indefinite duration. A contract of indefinite duration is terminable at will upon reasonable notice to the other party after a reasonable time has passed.

*Id.*

Minnesota joins many other states in rejecting the strict enforcement of perpetual contracts without an express agreement to create such a perpetual obligation. *Glacial Plains* is another case with a for-cause termination like *Jespersen* or a requirement of mutual assent like *Rico*. The Supreme Court of Minnesota rejects these future events as establishing a sufficiently definite duration and thereby violating the policy against perpetual contracts without express and unambiguous intent to contract in perpetuity.

#### 4. Kentucky

In *Mid-Southern Toyota, Ltd. v. Bug's Imports, Inc.*, 453 S.W.2d 544 (Ky. Ct. App. 1970), the Kentucky Court of Appeals considered, and rejected, an argument similar to the one Tower Street makes in this case. The contract at issue in *Mid-Southern Toyota* was one for vehicle warehousing. Under the contract, Bug's Imports agreed to select dealers in certain parts of Kentucky to sell Toyota cars and to warehouse vehicles for distribution to those dealers, in exchange for a \$100 rebate on each car it distributed. Additionally, Bug's Imports was entitled to \$50 for every vehicle Toyota shipped directly to a dealer

within Bug's Imports' territory. The contract provided that it would run for "a period of one (1) year," until June 6, 1968, and "will be renewed at the end of this period" provided Bug's Imports maintained a certain level of sales. *Id.* at 547 (internal quotation marks omitted).

The parties' relationship quickly fell apart, and Bug's Imports sued for breach of the agreement. Bug's Imports contended that its right to serve as a distributor continued "without limit of time," *i.e.*, in perpetuity, so long as it met its sales quota. The court rejected this argument on the grounds that the text of the contract did not compel a conclusion that the parties intended a perpetual contract, and therefore such a construction was to be avoided under Kentucky law. *See id.* at 549. Instead, the court held that the agreement was terminable after a reasonable time.<sup>6</sup>

Of particular relevance to this case, the court also rejected Bug's Imports' argument that, even after termination of the contract, it would still be entitled to the \$50 payment for vehicles shipped directly to dealers in its territory:

[T]o construe the clause of the contract providing for a payment of \$50 each for cars delivered directly to the dealers ... as providing [Bug's Imports] some kind of perpetual premium for having initially located dealers for [Toyota], strikes us as being so extreme as not to be considered a reasonable construction. Bug's Imports is a corporation, and surely it could not have been intended that the corporation would receive premiums forever.

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<sup>6</sup> As discussed in Part II(C), *infra*, some courts have held that a contract with a durational term like the one in *Mid-Southern Toyota*, *i.e.*, continuing so long as a minimum sales quota is met, is a contract for a definite term. However, it does not appear that either party in *Mid-Southern Toyota* made such an argument. The only argument addressed by the court was Bug's Imports' argument that the contract was perpetual, which the court properly rejected.

*Id.*

Thus, in *Mid-Southern Toyota*, the Kentucky Court of Appeals rejected an interpretation that would have made payment of the \$50 fee perpetual through inadvertent or incomplete drafting of the contract.

## 5. Oregon

In *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 240 P.3d 94 (Or. Ct. App. 2010), the Oregon Court of Appeals considered a contract very similar to the one at issue in this Court's decision in *Childs*. In 1956, the predecessor of defendant Pacificorp agreed to sell electric power for agricultural purposes to the predecessor of plaintiff Klamath Off-Project Water Users, Inc. ("Klamath"), at a specified rate. The contract said "nothing one way or the other about its duration or about the authority of [Pacificorp] to seek an increase in the rates for the power to be sold to" Klamath. *Id.* at 96. Nearly 50 years later, Pacificorp filed a request with the public utilities commission for an increase in the rates charged to Klamath. Klamath sued, contending that the agreement "was a valid and binding contract that, with no termination provision, was of perpetual duration," such that Pacificorp's attempt to increase rates constituted a breach. *Id.* at 97.

The Court of Appeals prefaced its holding with an extended analysis of decisions applying Oregon law that "perpetual agreements are disfavored." *Id.* at 99 (internal quotation marks omitted). The decisions reviewed by the court included one in which the contract expressly provided for perpetual duration, and another in which certain terms of a contract indicated that, while not perpetual, the agreement could not be terminated at will. *See id.* at 99-100. Comparing these cases to the contract between Pacificorp and Klamath,

the court concluded:

In this case, the ... agreement is silent as to duration. Moreover ... there is no wording in the ... agreement that, when reasonably construed, is capable of even suggesting that the agreement was not terminable at will. Nor is there anything about the nature of the agreement that suggests that it was not intended to be terminable at will. Certainly plaintiffs have failed to cite a single provision or anything else related to the nature of the agreement that suggests that ... the contract was intended to continue in perpetuity.

*Id.* at 100. In light of the text of the contract and the regulatory context, the court concluded that the contract “was, as a matter of law, terminable at will.” *Id.*

Like the contract to provide water service at issue in *Childs*, the contract in *Klamath* was silent as to its duration, and the court was required to consider the plaintiff’s argument that silence as to duration indicated perpetuity. Oregon, like South Carolina, disfavors perpetual contracts and will not recognize a contract as perpetual in the absence of explicit language to that effect. Like this Court in *Childs*, the Oregon Court of Appeals in *Klamath* held that mere silence as to duration does not create a perpetual contract, but rather results in a contract that is terminable at will.

## 6. Pennsylvania

Like this Court in *Childs* and the Oregon Court of Appeals in *Klamath*, the Pennsylvania Commonwealth Court<sup>7</sup> considered a utilities contract without a durational term in *Wyeth Pharmaceuticals, Inc. v. Borough of West Chester*, 126 A.3d 1055 (Pa.

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<sup>7</sup> The Pennsylvania Commonwealth Court is an intermediate appellate court primarily responsible for matters involving state and local governments and regulatory agencies. See <http://www.pacourts.us/learn> (last visited Dec. 28, 2019).

Commw. Ct. 2015). In 1984, Wyeth agreed to contribute to the costs of upgrading a wastewater treatment plant that processed water discharged from a facility where Wyeth manufactured penicillin. The contract between Wyeth and the Borough of West Chester called for Wyeth to contribute to capital costs and ongoing operational and maintenance costs. Ongoing costs were separated into variable and fixed costs. The contract lacked an express durational term but provided in part, “In no event ... shall [Wyeth] be charged and pay less than its share of the fixed costs of the Operating and Maintenance expenses” described in the contract. *Id.* at 1061.

Wyeth shut down the facility in 2004, at which point its variable costs ceased because it was no longer discharging water for treatment by the plant. The Borough contended, however, that Wyeth’s obligation to pay its share of fixed costs continued for the life of the plant, based on the contract’s statement that “[i]n no event” would Wyeth pay less than its share of fixed costs. Contesting this, Wyeth pointed to the contract’s preamble, which referred to Wyeth’s obligation to pay its share of “*annual* operating and maintenance expenses.” *Id.* at 1057 (emphasis in original; internal quotation marks & initial capitals omitted). Wyeth contended that the contract was terminable in 2006, when it no longer had a connection to the plant. Alternatively, Wyeth contended that the contract was indefinite and thus terminable at will. The Borough contended that Wyeth’s obligations continued for as long as the plant continued to operate; i.e., that the contract was perpetual.

The Commonwealth Court held for Wyeth that the contract between Wyeth and the Borough was subject to the generally applicable rule that “a contract for an indefinite period

will be construed to be for a reasonable time or terminable at will unless the intention of the parties can be ascertained.” *Id.* at 1064 (internal quotation marks omitted). The court reasoned that without contractual language clearly showing the parties intended to enter into a perpetual contract, “for a court to infer an intent on the part of contracting parties so drastic and absolute would be unreasonable.” *Id.* (internal quotation marks & alteration omitted).

The decision of the Pennsylvania Commonwealth Court is relevant to the questions propounded herein because the court rejected an interpretation that would create a perpetual contract when the parties failed to anticipate that Wyeth would one day close its facility and no longer use the plant. Likewise, the Agreement herein never addresses the failure to create Newco. Pennsylvania clearly held that such circumstances cannot be interpreted to be perpetual. Rather, such contracts are terminable at will, after a reasonable period of time.

## 7. Tennessee

In *Open Lake Sporting Club v. Lauderdale Haywood Angling Club*, 511 S.W.3d 494 (Tenn. Ct. App. 2015), the Tennessee Court of Appeals considered a contract that was intended to resolve litigation between parties but which also provided a durational term. The Open Lake Sporting Club (“Open Lake”) and the Lauderdale Haywood Angling Club (“LHAC”) engaged in lengthy litigation over their respective rights to access a lake for hunting and fishing purposes. The parties settled the litigation in October 1992 by entering into a contract that spelled out their respective rights in detail. With respect to duration, the contract provided:

The initial term of this agreement shall be for a period of ten years. It is the intent of both clubs that this agreement settle once and for all the lengthy controversy existing between the clubs. This agreement will end all litigation between the clubs ... and, as long as the parties abide by the agreement, will be renewed under terms similar to those outlined in the agreement.

*Id.* at 497.

In May 2012, shortly before the end of the agreement's first renewal term, Open Lake sought a declaratory judgment to the effect that the agreement would expire at the end of one renewal term. LHAC argued, in opposition, that the terms of the contract meant "that it would be renewed into the future for as long as the parties abided by its terms." *Id.* at 498. The Court of Appeals summarized this dispute as "whether their rights and obligations under the agreement are subject to *perpetual* renewal." *Id.* at 501 (emphasis in original).

The Court of Appeals held that the contract terminated after one renewal. In reaching its decision, the court accepted what "appears to be the prevailing rule," that an intent for perpetual renewal "must be clearly and certainly" stated. *Id.* at 502 (internal quotation marks omitted). Relying on this prevailing view, the court held that "[w]henver there is any uncertainty as to whether an agreement was intended to be renewable in perpetuity, it will ... be construed as importing but one renewal." *Id.* at 503 (internal quotation marks omitted).

The Tennessee Court of Appeals' analysis is consistent with this Court's analysis in *Carolina Cable*, which also rejected a claim that a contract was perpetually renewable, and held that it was terminable at will upon reasonable notice.

**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?**

The answer to this question is “no.” Courts, in South Carolina and elsewhere, have consistently recognized that when a contract’s duration is tied to a future event that is in the control of one or both parties, the contract is indefinite and therefore is terminable at will. A contract that terminates only if the parties reach agreement on the formation of a business entity in accordance with a *non-binding* letter of intent is, functionally, even less definite than a contract that terminates only upon the mutual agreement of the parties. In either case, the requirement of an objective event is not satisfied because the terminating event is entirely within the parties’ control, and neither party is under any duty to cause the event to occur. From the moment of execution, either party has the power to bind the other to the contract forever, and the consequence is that the contract is effectively perpetual. Courts have consistently held that such contracts are terminable at any time with reasonable notice.

**A. A nonbinding “agreement to agree” on the formation of a new entity is not an objective event that renders a contract sufficiently definite in duration**

The Agreement provides that it will terminate when “the KnightBrook Agency (as provisionally identified as “Newco” in the Letter of Intent dated 9/1/11 and agreed to by Cone and Boylston and KnightBrook) is established.” (J.A. 21.) The Letter of Intent, in turn, “is not intended as a binding agreement” to form Newco. (J.A. 25.) Thus, the Agreement provides that KnightBrook’s obligation to pay the finder’s fee will terminate

when/if the parties agree to form Newco, which they are not obligated to do.

The formation of Newco is obviously not an objective event because its occurrence depends entirely on each party deciding to act when neither is required to do so. Formation of Newco requires additional, mutual agreement by both parties, but neither party is under any obligation to pursue such an agreement. Under the terms of the Agreement, it is impossible to determine if termination will ever be triggered.

Because neither party has any obligation to “agree to agree” on the formation of Newco, the Agreement suffers from the same flaw as the contracts in *Carolina Cable Network*, the *Rico* decision from Illinois, the *Preferred Physicians* decision from Missouri, and the *Glacial Plains* decision from Minnesota. The circumstances in *Rico* and *Glacial Plains* are particularly analogous. The contracts in those cases provided for termination only if both parties agreed to do so. Just like the Finder’s Fee Agreement in this case, termination of the contracts in those cases required additional, mutual agreement by the parties, when neither was under any obligation to make such an agreement. Thus, there is no meaningful distinction between an “agreement to terminate,” as in *Rico* and *Glacial Plains*, and an “agreement to agree,” as in this case. In both circumstances, termination of the contract rests entirely in the parties’ hands, and neither party is obligated to take any action to terminate the contract. Courts consistently hold that such agreements are terminable at will.

The *R.J.N.* decision, which was relied on by *Jespersen* and cited extensively by *Rico*, also demonstrates that formation of Newco is not an objective event so as to make the Agreement sufficiently definite in duration. In *R.J.N.*, the agreement provided it would

remain in effect for as long as the defendant served the plaintiff's customers. The court held that this was not an objective event, reasoning as follows:

[A] practical construction of the clause indicates an *indefinite* duration of the contract based upon [the defendant's] apparent option/decision to not serve [the plaintiff's] customers at some point in time. In other words, 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.*

*R.J.N.*, 529 N.E.2d at 1187 (emphasis added).<sup>8</sup>

In addition to Tower Street's incentive to avoid creating Newco, there is also a practical reality that neither the Court nor the parties can ignore: Newco will never be formed. There is abundant evidence showing why this is so:

- The parties intended that Newco would manage certain insurance programs for KnightBrook, but those programs never came to fruition, so there is nothing for Newco to do;
- Neither party has done anything to create Newco since the effective date of the Agreement in December 2011;
- The parties have not even discussed Newco since 2012;
- Curtis Stewart was going to run Newco, but he has died;

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<sup>8</sup> Importantly, there is one notable difference between the Agreement in this case and the contracts in *Rico*, *Glacial Plains*, and *R.J.N.* that makes the Agreement here even more subjective. In *Rico*, *Glacial Plains*, and *R.J.N.*, both parties had ongoing obligations under the contract and both were performing their respective obligations (selling or producing). In this case, the only party with a continuing obligation is KnightBrook, since the finder's fee is intended to compensate Tower Street for an introduction made in 2011. Thus, one problem with the Agreement is not just that termination of the contract rests entirely in the parties' hands. The additional and very real problem is that the Agreement provides no incentive for Tower Street to participate in the formation of Newco, when it can do nothing and simply continue collecting the finder's fee.

- Prior to his death, Curtis Stewart admitted that Newco “was never going to work”;
- Madison Cone testified Newco was a “dead” deal;
- Madison Cone no longer works in the insurance industry; and
- KnightBrook and Tower are currently in litigation with each other.

(ECF Nos. 52-4, 52-5, 52-6, and 52-7.)

In similar circumstances, the court in *Adrikos Real Estate Holding LLC v. Murphy*, 904 N.W.2d 408 (Wisc. Ct. App. 2017) (unpublished, and therefore, not for precedent), held that a contract was of indefinite duration. The contract in *Adrikos* provided that the seller of a property could continue to occupy it, rent-free, “until such date that [the] parties reach an agreement for the purchase and sale of [Murphy’s business].” *Id.* at \*2. No such agreement was ever reached, with the result that “the agreement may operate as a perpetual lease” because there was no other provision for termination of Murphy’s right to occupy the property.<sup>9</sup> *Id.* Since the contract did not clearly indicate that the parties intended a perpetual lease, the court “imp[lied] a reasonable time for performance.” *Id.* at \*4 (internal quotation marks omitted). This is similar to this Court’s decision in *Koon*, where it refused to interpret a lease as granting the tenants a perpetual right of occupancy, instead construing the contract as a month-to-month lease terminable on 30 days’ notice by either party. *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

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<sup>9</sup> The court cited the well-established rule that an agreement to make an agreement in the future is unenforceable; however, the Wisconsin court found that this “is not an agreement to agree; it is an agreement that has, as one of the triggering conditions, a future agreement.” *Id.* at \*3.

**B. The parties did not intend that KnightBrook would be obliged to pay the finder's fee for the life of the program**

A recurring theme of Tower Street's brief is its contention that the Agreement requires KnightBrook to pay the finder's fee throughout the life of the Equity Protection Program. However, nothing in the Agreement so much as hints at an obligation that continues through the life of the program. No such language appears in the Agreement because KnightBrook rejected Tower Street's original draft of the Agreement, which stated that KnightBrook would pay the finder's fee "for the life of the program." After KnightBrook objected, Tower Street *deliberately deleted* that phrase from the draft Agreement. Obviously, the parties did not intend to create an obligation for the life of the program or an obligation in perpetuity.

**C. The cases on which Tower Street relies are inapposite**

Attempting to avoid the simple logic of KnightBrook's argument, Tower Street floods the final seven pages of its brief with case citations that it apparently believes are similar and relevant to the Certified Questions or that establish Tower Street's right to receive the finder's fee for the life of the Equity Protection Program. For the reasons shown below, none of the cases are dispositive, relevant, or establish such a right. Most importantly, none support an answer of "yes" to the second certified question.

As an initial reminder, it is important to remember that Tower Street made one initial introduction between KnightBrook and DGU in 2011 and has done no other work. Tower Street has never sold a policy, adjusted a claim, established or enforced underwriting guidelines, or interacted with KnightBrook or DGU for this program or any program. As

a practical matter, Tower Street's only function is to collect checks for an introduction made in 2011. For that introduction, Tower Street has been handsomely compensated and fully paid under the Finder's Fee for the five years before KnightBrook terminated the Agreement. Any assertion by Tower Street that it has not been well compensated for this one introduction is preposterous. *Cf. Mid-Southern Toyota*, 453 S.W.2d at 549 (rejecting an argument for a "perpetual premium" for locating Toyota dealers as "so extreme as not to be considered a reasonable construction" of the parties' agreement).

First, Tower Street relies upon *Moss v. Porter Brothers, Inc.*, 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987), for the proposition that courts "enforce commission payment obligations after the term of an agency or employment relationship has terminated unless the parties have expressly agreed otherwise." Pl.'s Br. at 17. This is a gross exaggeration of the meaning of the case. *Moss* is a procured-before-termination case that turned on a straightforward question of contract interpretation. Moss and his former employer disagreed on whether Moss's employment contract entitled him to commissions on sales procured prior to termination but shipped after termination. The Court of Appeals resolved the contract interpretation by holding that under the unambiguous terms of the contract, Moss was entitled to commissions procured before but shipped after termination. *Id.* at 447-48, 357 S.E.2d at 27. *Moss* obviously does not stand for the sweeping proposition claimed by Tower Street in its brief. Further, the Finder's Fee Agreement is not a commission contract. A commission contract, like the one at issue in *Moss*, involves actual work and a continuing effort by the party who earned the commission. This is not the case with the Finder's Fee Agreement; Tower Street simply introduced DGU to KnightBrook,

and KnightBrook took it from there, without any further work or effort by Tower Street.

Second, Tower Street cites a series of cases decided under the “procuring cause” rule. Pl.’s Br. at 17-19. Under the procuring cause rule, a broker generally “is entitled to a commission when he procures a purchaser who is accepted by the owner of the property and with whom the latter enters into a valid and enforceable contract.” *Chambers v. Pingree*, 351 S.C. 442, 451, 570 S.E.2d 528, 532 (Ct. App. 2002) (internal quotation marks omitted). The rule thus protects brokers from unscrupulous buyers and sellers who hope to avoid paying a commission by cutting the broker out of the deal. The procuring cause rule obviously has no relevance here. Tower Street was never cut out of anything, and KnightBrook certainly did not attempt to avoid paying Tower Street until the Agreement was properly and reasonably terminated after five years.

Third, in section II(B) of its brief, Tower Street cites to a number of cases and circumstances that Tower Street contends stand for the proposition that contracts with durational terms that are under the control of one or more parties are sufficiently definite to prevent termination upon reasonable notice. Simply put, as shown below, the cases do not stand for such a sweeping conclusion and none of the cases are relevant to the Certified Questions or the facts in this case.

Tower Street contends that “courts routinely uphold contractual agreements that obligate one party or the other to perform throughout the life of a commercial enterprise against claims the agreement may be terminated at will.” Pl.’s Br. at 21; *see id.* at 21-24 (citing cases). However, in the cases cited, the parties *explicitly agreed* to such terms, whereas in this case, KnightBrook objected to, and Tower Street deleted, a term requiring

payment of the finder's fee "for the life of the program."<sup>10</sup> The cited cases also involved materially different facts. They generally can be categorized as either a requirement contract or a continuous service contract. In a requirement contract, a party sells what is required and the other party pays for what it bought. In a continuous service contract, a party provides a continuous service and the other party provides a different continuous service. In most of these cases, the court determined *after a trial* that the parties intended for the contract to continue for a very long time. Thus, these cases stand only for the inapplicable rule that a requirement or continuous service contract containing a durational term that is certain to occur is enforceable as one for a definite term, if that was the parties' clear intent, even when the term is not fixed to a calendar. These cases do not help Tower Street because initially, a Finder's Fee Agreement is neither a requirement contract or a

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<sup>10</sup> See *Copylease Corp. of Am. v. Memorex Corp.*, 403 F. Supp. 625, 632 (S.D.N.Y. 1975) (applying California law; agreement renewable for as long as buyer maintained certain level of purchases not indefinite); *City of Big Spring v. Bd. of Control*, 404 S.W.2d 810, 815 (Texas 1966) (agreement to provide water for as long as the state maintained and operated a hospital on the site); *City of Superior v. Douglas Cnty. Tel. Co.*, 122 N.W. 1023, 1027 (Wis. 1909) (agreement to provide telephones to city offices for as long as company maintained an exchange in the city); *Liberty Indus. Sales, Inc. v. Marshall Steel Co.*, 272 F.2d 605, 606-07 (7th Cir. 1959) (applying California law; agreement to serve as exclusive distributor as long as quota maintained); *Payroll Express Corp. v. Aetna Cas. & Surety Co.*, 659 F.2d 285, 292 (2d Cir. 1981) (applying New York law; agreement not to cancel insurance so long as premiums paid and insurer had the right to modify the premium); *Thorne v. True-Hixson Lumber Co.*, 148 So. 388, 389 (Miss. 1933) (agreement to employ for so long as mill operated); *Besco, Inc. v. Alpha Portland Cement Co.*, 619 F.2d 447, 448 (5th Cir. 1980) (exclusive right to buy kiln dust so long as buyer makes minimum annual purchase); *W.P. Iverson & Co. v. Dunham Mfg. Co.*, 152 N.E.2d 615, 619 (Ill. Ct. App. 1958) (agreement for exclusive sales agency until, *inter alia*, the defendant sold the company or ceased making the product); *Phelps v. Shawprint, Inc.*, 103 N.E.2d 687, 689 (Mass. 1952) (agreement to pay \$100 so long as certain persons associated with the business); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 763 (S.D.N.Y. 1990) (applying New York law) (agreement to fight exclusively for promotor throughout time as world heavyweight champion); *Carter White-Lead Co. v. Kinlin*, 66 N.W. 536, 536 (Neb. 1896) (agreement to employ the plaintiff for as long as smelting plant operated or the plaintiff decided to quit).

continuous service contract. Moreover, Tower Street and KnightBrook never agreed that KnightBrook would continue to pay the finder's fee for the life of the program or even for a lengthy period of time. In fact, KnightBrook specifically objected to a "life of the program" durational term, and Tower Street removed it from the Agreement. Consequently, given that Newco will never be formed, the Agreement effectively contains no durational term and is, therefore, terminable by either party.

In addition to the requirement and continuous service contract cases, Tower Street cites two cases involving the payment of royalties in exchange for the rights to exploit intellectual property. *See Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959); *Laff v. John O. Butler Co.*, 381 N.E.2d 423 (Ill. Ct. App. 1978). In both *Warner-Lambert* and *Laff*, a manufacturer agreed to pay royalties to the owner of a trade secret (the formulas for Listerine and a dental product, respectively) for as long as the manufacturer produced the product. In each case, the court rejected the manufacturer's argument that it could terminate the agreement when the formula was no longer a secret, holding that an agreement to pay royalties for as long as the product was produced was determinable and, hence, enforceable. *See Warner-Lambert*, 178 F. Supp. at 661; *Laff*, 381 N.E.2d at 434. These cases are unhelpful to Tower Street for two reasons. First, the Agreement between Tower Street and KnightBrook does not provide that KnightBrook will pay the finder's fee for so long as the programs operate. Second, Tower Street's introduction of DGU to KnightBrook is not analogous to ownership of a trade secret.

Yet another case cited by Tower Street involves a right of first refusal and is likewise not persuasive or relevant to the questions propounded to the Court. *See MS Real Estate*

*Holdings, LLC v. Donald P. Fox Family Trust*, 864 N.W.2d 83 (Wisc. 2015). In that case, the court held that “a right of first refusal contract is definite as to duration when it specifies an event that triggers the right,” at which point the right holder must exercise the right or waive it, “even if the triggering event is not certain to occur.” *Id.* at 266. In a right of first refusal, a right-holder’s contractual obligations *begin* when the triggering event occurs, and the fact that the triggering event may never occur is, presumably, reflected in the consideration paid to obtain the right. In the Agreement between Tower Street and KnightBrook, by contrast, the parties agreed that KnightBrook’s obligations would *end* upon the formation of Newco, an event both parties expected would occur but never will. Nothing in the Agreement suggests that the parties contemplated or bargained over the possibility that Newco would not be formed.

### CONCLUSION

Although the factual context of the Certified Questions may be novel to this Court, there is ample guidance to be found in existing jurisprudence. The decisions of this Court and the Court of Appeals—including *Childs*, *Carolina Cable*, *Prestwick*, and *Koon*—make certain basic principles clear. Perpetual contracts are disfavored, but *Carolina Cable* and *Prestwick* teach that contracting parties may agree to a durational term keyed to an objective, future event if it is not controlled by either party. However, the public policy against perpetual contracts counsels that courts should, whenever possible, reject an interpretation of a contract that has the practical effect of creating a never ending contract, thereby placing one party at the mercy of the other, unless the intent to create a perpetual contract is abundantly and unequivocally clear. *Carolina Cable* and *Koon* establish that

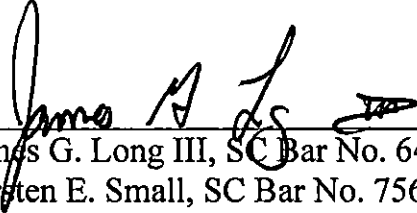
when termination is controlled by a party to the agreement but there is no clear intent to form a perpetual contract, the proper course is to interpret the contract as being indefinite in duration and subject to termination at will after a reasonable period or with reasonable notice.

As KnightBrook’s analysis of the Illinois cases and decisions from other states show, the principles established in South Carolina cases lie squarely within the mainstream. These cases from other states consistently demonstrate that in the absence of words like “forever” or “perpetually,” a contract lacking a durational calendar term, or one with a durational term controlled by a party, will not be given perpetual effect.

For the reasons discussed, this Court should answer the first Certified Question “yes,” and it should answer the second Certified Question “no.”

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Respectfully submitted,



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December 30, 2019  
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*Attorneys for Defendant KnightBrook  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIFIED QUESTIONS  
United States District Court

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

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Appellate Case No. 2019-001373

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

v.

KnightBrook Insurance Company, ..... Defendant.

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**PROOF OF SERVICE**

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I, James G. Long, III, the undersigned attorney of Nexsen Pruet, LLC, attorneys for Defendant, do hereby certify that I have served a copy of the foregoing **Defendant's Final Brief**, in connection with the above-referenced case by electronic mail and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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