IN THE SUPREME COURT OF MISSISSIPPI

HERRING GAS COMPANY, INC.	APPELLANT
V.	CASE NO.: 2007-TS-01554
PINE BELT GAS, INC., LLOYD BROOM, JASON STRINGER, STEVEN STRINGER, and JIMMY RUTLAND	APPELLEES

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR HERRING GAS COMPANY, INC.

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ARGUMENT

I. The Defendants Do Not Have Standing to Complain of Lack of Consideration

Pine Belt Gas, Inc., Lloyd Broom, Jason Stringer, Steven Stringer, and Jimmy Rutland (sometimes hereinafter collectively referred to as "Defendants") argued below, and in their principal brief, that the assignment Broome LP Gas, LLC (sometimes hereinafter referred to as "Broome Gas") executed which specifically provided Herring Gas Company, Inc. (sometimes hereinafter referred to as "Herring Gas") "all right, title, and interest" (R. at 17), to the covenant not to compete between Broome Gas and Jimmy Rutland was invalid. The Defendants stated Herring Gas's position that they lack standing to complain about the contract between Herring Gas and Broome Gas is "nonsensical". (App. Brief Pg. 42). Despite this statement, there is significant authority which demonstrates that an individual who is not a party to the contract may not argue that the contract was invalid.

"The original debtor may not raise the defense that an assignment was made without consideration when sued by the assignee; the assignee may generally recover in an action against the original debtor or obligor, even though there was no consideration for the transfer between the assignor and the assignee. Although consideration is necessary as between an assignor and an assignee, as between an assignee who has acquired legal title to the chose and the obligee in the chose, consideration is unnecessary." 6 Am.Jur.2d Assignments § 130.(emphasis added). This principal was demonstrated in *527-9 Lenox Ave. Realty Corp. v. Ninth Street Associates*, where a mortgagor filed a counterclaim against the mortgagee. 200 A.D.2d 531, 532 (N.Y.A.D. 1994). The mortgagor claimed the contract sued upon failed for lack of consideration. *Id.* However, the court held that as the defendants were not parties to the underlying contract, they had no standing to claim the contract was invalid, and the counterclaim was dismissed. *Id.* Similarly, the court in *Brooks v. Land Drilling Co.*, found that as they were not "party to the contract, plaintiffs have no standing to contest the adequacy of consideration ..." 564 F.Supp. 1518, 1521 Fn 1 (D.C. Colo. 1983). Herring Gas cited these authorities in its principal brief as support for its contention that the Defendants did not have standing to complain about lack of consideration. However, the Defendants did not attempt to distinguish these authorities from the instant case.

Even though the Defendants were put on notice that substantial authorities contradicted their position they could claim the contract between Herring Gas and Broome Gas was invalid, the extent of authority they cited in support was *Ex parte Howell Engineering and Surveying, Inc.*, 2006 WL 3692536 (Ala. 2006). This case is easily distinguishable as the *party who purportedly lacked standing to sue was a party to the contract*. *Id.* at 1. In fact, this case is not applicable to the instant case at all.

In *Howell*, Crown Castle USA, Inc. (sometimes hereinafter referred to as "Crown") and Howell Engineering and Surveying, Inc. (sometimes hereinafter referred to as "HES") entered into a contract wherein Crown agreed not to hire any individuals employed by HES during their agreement and for a period of one year thereafter. *Id.* After learning that an HES employee was moonlighting by doing projects for Crown, HES sued Crown, alleging it breached the agreement executed by HES and Crown. *Id.* at 2. Crown argued the agreement was void under § 8-1-1 Ala.Code 1975,[1] because HES did not have a covenant

[1]Section 8-1-1 provides, in pertinent part: "(a) Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind *otherwise than is*

not to compete with the subject employee. *Id.* HES argued Crown could not argue § 8-1-1 Ala.Code 1975 rendered their agreement invalid because only those with a direct interest in § 8-1-1 should have standing to invoke that section. *Id.* The court noted "[s]tanding requires injury in fact." *Id.* at 3 *(citing Kid's Care, Inc. v. Alabama Dep't of Human Res.*, 843 So.2d 164, 166 (Ala. 2002)). As Crown had sustained damage in defending the suit – and had, in fact, a judgment of more than $600,000 entered against it – the Alabama court recognized that Crown had been injured. *Id.* In other words, the sole authority the Defendants cited to support their claim they have standing to claim the contract was invalid is a case where the entity sued had executed the agreement in question and merely raised an Alabama statute – for which, needless to say, there is no Mississippi equivalent – to argue the contract was void. Clearly, *Howell* is inapplicable to the instant case, and the Defendants lack standing to claim the contract between Herring Gas and Broome Gas was invalid.

II. The Assignment Was Valid

Even if this Court finds the Defendants have standing to object to the validity of the contract between Herring Gas and Broome Gas, Herring Gas still possesses all rights under the covenant not to compete as Broome Gas executed a valid assignment of those rights. Mississippi law permits an assignment of contractual rights. *Board of Trustees of State Institutions of Higher Learning v. Peoples Bank of Miss.*, 538 So.2d 361, 366

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provided by this section is to that extent void. (b) ... [O]ne who is employed as an agent, servant or employee *may agree* with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein." (emphasis added)

(Miss.1989). Assigned contractual rights may be enforced by the assignee-who essentially "stands in the shoes" of the assignor and who "takes no rights other than those" which the assignor had possessed. *Indian Lumbermen's Mut. Ins. Co. v. Curtis Mathes Manufacturing Co.*, 456 So.2d 750, 755 (Miss.1984). "Thus, a valid assignment may take effect notwithstanding the obligor's refusal to provide consent." *Great Southern National Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282, 1287 n. 5 (Miss. 1992). Broome Gas acknowledges the enforceability of the May 12, 2006, addendum to the asset purchase agreement. Broome Gas stated plainly it was conveying its interest in Jimmy Rutland's (sometimes hereinafter referred to as "Rutland") covenant not to compete for the consideration and mutual agreements set forth in the asset purchase agreement. The addendum is a valid part of the contract, and the date of its execution is immaterial. Therefore, Herring Gas is entitled to protections contained within the covenant not to compete.

The Defendants raise the following reasons to find the assignment invalid: 1) failure to include the covenant not to compete in the original contract between Broome Gas and Herring Gas because those agreements were so important; 2) Herring Gas should have consulted Rutland and other truck drivers and negotiated new covenants not to compete with them; and 3) the covenant not to compete was voided by the Asset Purchase Agreement.

As to the supposed failure to include the covenant not to compete in the original contract between the Broome Gas and Herring Gas, the Plaintiff points out that Broome Gas specifically conveyed its rights under Rutland's covenant not to compete in an addendum to the contract executed on May 12, 2006. The Defendants cite no authority as to why this addendum to the Asset Purchase Agreement was ineffective. Presumably, the Defendants claim the fact that twenty-four days elapsed between the executions of the Asset Purchase Agreement and the addendum somehow causes the addendum to be invalid. The Defendants do not provide any authority to support such a position. A basic tenet of contract law is that a valid addendum is as enforceable as any other term of the contract. The Plaintiff suggests the Defendants' argument that "if the truck salesman were so important to the operation of its business, Herring Gas should have included their employment contracts in the Asset Purchase Agreement" is not sufficient to hold the addendum invalid.

The Plaintiff next suggests Herring Gas should have contacted him prior to its purchase of Broome Gas and sought his approval for the sale. In other words, Rutland suggests a deal worth well in excess of $1,000,000.00 (and all other deals involving similar businesses which may involve far more money and many more employees) depends upon the acquiescence of a single employee who has no ownership stake in the business. In addition, while the parties dispute its assignability, Rutland had already been paid to execute a valid covenant not to compete, and Broome Gas conveyed its rights under that contract to Herring Gas. While the arguments the Defendants put forward about whether it is "unfair" for a subsequent purchaser to enforce a covenant not to compete may be germane to analysis of the assignability of the covenant, the Plaintiff suggests it is not relevant to a determination as to whether the agreement between Broome Gas and Herring Gas was valid.

Finally, the Defendants claim the "non compete agreement became null and void as of the date of the closing of the Asset Purchase Agreement." (App. Brief Pg. 15). The Defendants state this is because "Rutland entered into a covenant not to compete with Broome Gas, not Herring Gas." (App. Brief Pg. 15). The Defendants cite *Cain v. Cain* as support for their position that the covenant not to compete was voided by the contract between Broome Gas and Herring Gas.[2] 967 So.2d 654 (Miss.Ct.App. 2007). In *Cain*, an independent contractor filed suit, alleging, among other things, the defendant violated a no-hire provision in a contract for the provision of rehabilitation services. *Id.* at 658. A determination as to the enforceability of a no-hire provision would have been a matter of first impression, but, instead, the chancellor found the provision unenforceable as it was ambiguous. *Id.* at 663. In other words, the only authority the Defendants cite to support their claim that the covenant not to compete was is enforceable because it was not properly assigned does not deal with an assignment of a restrictive covenant – in fact, it does not even turn on the reasonableness of such covenants. Instead, *Cain* turns on the specificity and ambiguity of the provision prohibiting a party from hiring another party's employees. The Defendants have put forth no authority to support their claim that the covenant not to compete which Rutland signed and was paid for was not properly assigned. A valid assignment is part of the record in this case, and Herring Gas respectfully suggests that, provided such covenants may be assigned as discussed below, it is entitled to the protections contained within the covenant not to compete.

III. The Cases Cited by the Defendants Are Distinguishable

The Defendants cite *Hess v. Gebhard & Co., Inc.*, as support for their argument that

[2]It should be noted that this is the *only* authority cited by the Defendants to support their claim that the covenant not to compete is unenforceable because it was not properly assigned.

covenants not to compete should not be enforceable by a subsequent purchaser. 808 A.2d 912 (Pa. 2002). In *Hess*, an insurance agent took employment with an agency and, as part of his employment, executed an agreement not to compete with his employer. *Id.* at 914-15. The assets of the agency were sold to another entity, including the employment agreement, which was expressly valued at $0.00. *Id.* at 915. The Pennsylvania Court held assignment of the employment agreement rendered it unenforceable. *Id.* at 922. The significant part of *Hess* in analyzing the instant case are the reasons the Pennsylvania court gave for making that determination. First, the court stated the "rule in deciding whether restrictive covenants are assignable is that the employment contract ... is personal ..." *Id.* However, this proposed rule is inapplicable in the instant case as the Mississippi Supreme Court has previously decided that covenants such as the one at issue in the instant case are not "personal". "A covenant not to compete will be given general application unless, by its own terms, it specifically expresses an intent that it be a personal covenant flowing only to the original obligee." *Cooper v. Gidden*, 515 So.2d 900, 904 (Miss. 1987) (emphasis added) (see also *Herring Gas v. Whiddon*, 616 So.2d 892 (Miss. 1993)). The Mississippi Supreme Court has clearly established covenants not to compete are *not* personal contracts and may only be considered so if there is specific language creating a personal covenant within the contract itself. Another rationale the Pennsylvania court used to hold the covenant was not enforceable was the fact that the employment agreement had no value, according to the asset purchase agreement. *Id.* The court questioned how something with no monetary value provides a legally protectible business interest. *Id.* In the instant case, of course, the Asset Purchase Agreement states that

Broome Gas's "current employees provide the Buyer incentive to close this purchase ..." (R. at 31). Indeed, the fact that Rutland was paid $500.00 to execute the agreement obviously indicates that the covenant not to compete had substantial value. (R. at 14). Clearly, Herring Gas and Broome Gas did not view the employment agreement as worthless, especially given that the parties executed a specific addendum to their contract to provide Herring Gas with "all right, title, and interest in the agreement ..." To the covenant not to compete. (R. at 17). The underpinnings of the *Hess* decision demonstrate that it is distinguishable from the case at bar.

The Defendants next cite an Alabama case that is nearly forty years old as support for their claim that Herring Gas cannot enforce Rutland's covenant not to compete. *Sisco v. Empiregas, Inc.*, 237 So.2d 463 (Ala. 1970). This case is also distinguishable from the instant case, as the Defendants' brief makes clear. The Defendants acknowledge that the Alabama court based its finding that the covenant not to compete was not enforceable was that it constituted a personal services contract. (App Brief Pg. 21) (see also *Empiregas*, 237 So.2d at 467). A significant distinction – and perhaps the reason the Alabama court found the contract to be personal – was that it was part of a larger employment contract. *Id.* at 465. There was no such employment contract in the instant case. As shown above, the Mississippi Supreme Court has found that covenants not to compete such as the one at issue in the instant case are only personal services contracts if, "by its own terms, it specifically expresses an intent that it be a personal covenant ..." *Cooper*, 515 So.2d at 904. No such express provision was included within the covenant not to compete Rutland was paid $500.00 to execute. *Empiregas* is distinguishable from the case at bar. In any event, the rationale the Alabama court based their decision upon in *Empiregas* seem hopelessly out of date today. The court – incidentally quoting the *Smith, Bell & Hauck v. Cullins* case, discussed below – stated "[the employee's] confidence in his employer might be such that he could scarcely anticipate any rupture between them. As to that particular employer, if a break did occur, he might be willing to pledge that his fidelity would continue after the employment had ended, even at the cost of forsaking the vocation for which he was best suited." *Empiregas, Inc.*, 237 So.2d at 467 (quoting *Smith, Bell & Hauck v. Cullins*, 183 A.2d 528, 532 (Vt. 1962)). A more modern analysis reveals covenants not to compete are enforced because of the money and time spent training employees and because they are a reasonable method to protect employers' most valued asset, their relationships with customers. (See *Redd Pest Control Co., Inc. v. Foster*, 761 So.2d 967, 973 (Miss.Ct.App. 2000); *ACI Chemicals Inc. v. Metaplex, Inc.*, 615 So.2d 1192, 1197 (Miss. 1993) (stating "*since it may be difficult to determine, as a matter of law, what is a trade secret, the covenant not to compete is a pragmatic solution to the problem of protecting confidential information.*") (emphasis in original); *Redd Pest Control v. Heatherly*, 157 So.2d 133 (Miss. 1963).

The next case cited by the Defendants, *Smith, Bell & Hauck v. Cullins*, is distinguishable for the same reasons. Just as in *Empiregas*, the Vermont court found the covenant not to compete to be a personal services contract. *Cullins*, 183 A.2d. at 532. Just as in *Empiregas* – but unlike the instant case – the covenant not to compete was part of a employment contract. *Id.* at 530. Again, the rationale upon which the *Cullins* decision is rendered is far out of touch with modern economic realities. *Cullins* is distinguishable because it is based upon a premise specifically disavowed by Mississippi courts – that a covenant not to compete is a personal services contract.

The Defendants next cite *Trinity Transport, Inc. v. Ryan*, an unpublished opinion from a chancery court in Delaware. 1986 WL 11111 (Del.Ch.Ct. 1986). *Trinity Transport* is distinguishable because the outcome relies upon a determination that the covenant not to compete is a personal services contract.[3] The Mississippi Supreme Court indicated that specific language must be included in a covenant not to compete in order to create an unassignable personal services contract. *Whiddon*, 616 So.2d at 897. The chancellor also relied upon his finding there was a fact issue in whether the covenant was executed as a prerequisite to employment and a lack of evidence of breach of the agreement in declining to enter a temporary restraining order. *Trinity Transport*, 1986 WL 11111 at 3.

Finally, the Defendants cite *SDL Enterprises, Inc. v. DeReamer*, 683 N.E.2d 1347 (Ind.Ct.App. 1997). Once again, the court based its determination that the covenant not to compete was unenforceable upon a finding that such covenants constitute personal services contracts and are therefore not assignable. *Id.* at 1349. Specifically, the court stated "that the covenants not to compete signed by [the employees] were personal service contracts which were not assignable." *Id.* As made abundantly clear above, Mississippi courts have established that covenants not to compete are only personal if they are specifically identified as such within the covenant itself. It should also be noted that the Indiana court declined to allow a subsequent purchaser to enforce a covenant not to

[3] It should be noted *Trinity Transport* applies Maryland law, but the Delaware court's analysis of Maryland law is called into doubt by *National Instrument, LLC v. Brathwaite*, 2006 WL 2405831 (MD.Cir.Ct. 2006).

compete against the seller of the business, in contrast to Mississippi, which has clearly held such agreements are enforceable. (See *Cooper v. Gidden*, 515 So.2d 900 (Miss. 1987)). The Plaintiff respectfully suggests the authorities cited by the Defendants are distinguishable from the instant case and it is entitled to enforce the covenant not to compete.

IV. The Weight of Authority Supports Enforcement of the Restrictive Covenant

The Defendants claim the "overwhelming weight of authority" shows the covenant not to compete which Rutland signed and for which he was paid $500.00 should not be enforced. Unfortunately for the Defendants, the exact opposite is true; the Defendants' feeble efforts to distinguish the many cases which hold that subsequent purchasers may enforce covenants not to compete only serve to emphasize the similarity between the instant case and the many jurisdictions which upheld the value of small businesses that depend upon route salesmen.

Despite the Defendants' attempts to distinguish cases based on supposed problems with Broome Gas's assignment of its rights under the covenant not to compete, it is clear those cases support Herring Gas's argument for enforcement because, as shown above, the assignment was valid. While some of the cases the Plaintiff cited in its principal brief are not *directly* on point[4] – as it acknowledged in the brief itself – many of the cited cases

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[4]For example, in *Cooper v. Gidden*, a covenant not to compete was enforced by a subsequent purchaser against the seller of a business, not an employee. 515 So.2d 900, 903 (Miss. 1987) (See also *Schnucks Twenty-five, Inc. v. Bettendorf*, 595 S.W.2d 279 (Mo.App. 1979); *Flower Haven, Inc. v. Palmer*, 502 P.2d 424 (Colo.App. 1972); *Sickles v. Lauman*, 169 N.W. 670 (Iowa 1918); and *Safelite Glass Corp. v. Fuller*, 807 P.2d 677 (Kan.App. 1991)). Meanwhile, several cases have held covenants not to compete which contain provisions which permit assignability are enforceable by a subsequent purchaser. *Saliterman v. Finney*, 361 N.W.2d 175 (Minn.App. 1985), *National Propane Corp. v. Miller*, 18 P.3d 782 (Colo.App. 2000), *Orkin Exterminating Co., Inc. v. Burnett*, 146 N.W.2d (Iowa 1996), and *National Linen Service*

do hold that a subsequent purchaser of an entity may enforce a covenant not to compete the purchased entity entered into with one of its employees.

The United States Courts of Appeals for both the Sixth and Tenth Circuits have held subsequent purchasers are entitled to enforce covenants not to compete that individuals entered into with the previous entities. *Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 926 (6th Cir. 2000); *Equifax Services, Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990). As shown above, the Defendants attempt to distinguish *Kethan* from the instant case based upon supposed problems with the assignment must fail; after all, if the assignment itself was flawed, there is no need to look further as Herring Gas would have no rights under the covenant not to compete. Meanwhile, the rationale used by the Defendants to attempt to distinguish *Equifax* is curious. The Defendants bizarrely claim that because the Equifax Services, Inc., obtained the defendants employer through a merger, somehow this distinguishes the case. The Defendants cite no authority for the proposition that an entity that obtains a company through a merger has different rights under a covenant not to compete than one who purchases the assets of a company with cash. The Plaintiff submits that no such distinction should be made.

The Defendants seek to distinguish *Reynolds and Reynolds Co. v. Tart*, 955 F.Supp. 547, 551 (W.D.N.C. 1997), *Katahdin Insurance Group v. Elwell*, 2001 WL 1736572, 1 (Me.Super., 2001), *Torrington Creamery v. Davenport*, 12 A.2d 780, 781 (Conn. 1940), *Magner International Corp. v. Brett*, 9601 So.2d 841 (Fla.App. 4 Dist. 2007),

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Corp. v. Clower, 175 S.E. 460 (Ga. 1934). Although these cases are not directly on point, it is significant and instructive that so many jurisdictions permit some type of assignment of covenants not to compete.

In re VisionAmerica Inc., 2001 WL 1097741 (Bkrtcy.W.D.Tenn 2001), *Virchow Krause & Co. v. Schmidt*, 2006 WL 1751835 (Mich.App. 2006), *Gill v. Poe & Brown of Georgia, Inc.*, 524 S.E.2d 328 (Ga.App. 1999), on the same basis as *Kethan* – because of a supposed defect in Broome Gas's assignment of the contractual right it paid for, Rutland's covenant not to compete. Again, this in no way distinguishes these seven cases from the case at bar. If Broome Gas did not validly convey its interest in Rutland's covenant not to compete[5], then this Court need go no further. This would not "distinguish" the many cases cited above from the instant case; rather, this argument would, if valid, transform the issue in this case from determining the assignability of covenants not to compete to simply analyzing the legitimacy of a contract.

The Defendants also attempt to distinguish a number of cases because of differences in the conveyance of the purchased entity. For example, the Defendants claim the fact that the employer's parent entity changed hands distinguishes *Gardner Denver Drum, LLC v. Goodier*, 2006 WL 1005161 (W.D.Ky. 2006). This is refuted by the Defendants own arguments, however, as they make clear the basis for Rutland's refusal to work for Herring Gas or honor his covenant not to compete is his supposed trust in the treatment he would receive from Broome Gas. The employee in *Goodier* faced the same situation. The fact that the parent company was the purchased entity is irrelevant; the employee was still subject to the demands of different management and, at essence, a different employer. *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311 (Mo.App.E.D.

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[5]As made clear by the arguments above, as well as the fact that the Defendants did not cite any authority to the contrary, the Plaintiff respectfully suggest Broome Gas executed a valid conveyance of its rights under the covenant not to compete.

1986), raises the same issue as *Equifax.* The Defendants' claim that because the transaction was a merger rather than a cash the case is distinguishable. The Plaintiff notes the Defendants cite no authority for this proposition and suggest same does not distinguish the case from the one at bar.

While the Defendants do not attempt to distinguish the many New York cases establishing the assignability of covenants not to compete – which is surprising given the importance of that state's well-developed commercial jurisprudence – they attempt to distinguish *J.H. Renarde, Inc. v. Sims*, 711 A.2d 410 (N.J. 1998), on the grounds that the Asset Purchase Agreement made clear no contract of employment was created with Broome Gas employees. This is curious as it does not appear that the purchase of the employer in *Renarde* gave the employee any such security. This case demonstrates New Jersey is yet another jurisdiction which permits a purchaser to enforce a covenant not to compete.

Instead of the "overwhelming weight of authority" supporting Rutland's ability to ignore a contract he was paid $500.00 to enter into, it is clear the majority of jurisdictions allow subsequent purchasers to enforce covenants not to compete against employees of the purchased entity. The United States Courts of Appeals for both the Sixth and Tenth Circuits have upheld those rights, as have North Carolina, Maine, Connecticut, New York, New Jersey, Missouri, Kentucky, Georgia, Maryland, Tennessee, and Michigan. In addition to these thirteen jurisdictions which are directly on point and have ruled in favor of the purchaser, another six, including Mississippi, permit a subsequent purchaser of an entity may enforce a covenant not to compete the purchased entity entered into with one of its employees, although there are some factual differences between those cases and the instant case. In contrast, the Defendants cite five cases to support their claim the agreement Rutland signed should not be enforced. The persuasive value of all these cases is significantly decreased by the fact that each depended upon a principal specifically disavowed by Mississippi courts – that covenants not to compete constitute personal contracts. In addition, two of those five cases are further distinguishable as they depended upon the fact that the covenant not to compete was part of a larger employment contract, unlike the instant case. Finally, it is significant to examine the age of some of the cases upon which the Defendants depend. The reasoning of those older cases was influenced by the fact that the employer-employee relationship may very well have lasted for an individual's entire working life. Today, of course, employers and employees treat jobs – or even careers – as fungible temporary assignments which may be left at a moment's notice. It is instructive to note that the vast majority of the cases decided in the last two decades allow a subsequent purchaser to enforce a covenant not to compete that an employee signed with the purchased entity. The Plaintiff respectfully suggests this Court should follow the modern trend and prohibit Jimmy Rutland from violating the covenant not to compete he was paid $500.00 to execute.

Another public policy reason to enforce the covenant not to compete is to affirm the value of small businesses which depend upon route salesman. The majority of the value of Broome Gas and similar companies is derived from their customer list and relationship with those customers. By virtue of his employment by Broome Gas, Rutland became the face of his employer and the personification of Broome Gas's relationship with its customers. If businesses depending on route salesmen are not permitted to convey their interest in these valid, enforceable contracts, the value of these businesses would be dramatically reduced.

The operations manager for Herring Gas testified at the hearing below with regard to the importance of these agreements:

> Q. Going back to the employment the Covenant not to compete, are these types of agreements standard in the propane industry?
>
> A. Yes, sir.
>
> Q. What's the purpose of these agreements?
>
> A. Because the truck salesman is one of your key persons in the company because he's going to these persons in rural areas and everything else, and they trust him, and we give him trade secrets and everything else, and it's a very valuable thing to keep because, like I say, he's got trade secrets. He learns everything and everything else.
>
> Q. What's the biggest asset that a propane company such as Herring Gas has?
>
> A. Your employees.

(Transcript, p. 14)

Rutland suggests Herring Gas should have contacted him prior to its purchase of Broome Gas and sought his approval for the sale. In other words, Rutland suggests a deal worth well in excess of $1,000,000.00 (and all other deals involving similar businesses which may involve far more money and many more employees) depends upon the acquiescence of a single employee who has no ownership stake in the business. It does not seem to be sound public policy to allow an person with no ownership interest to cancel multi-million dollar transactions. Without assignable covenants not to compete, Broome Gas is worth no more than its physical assets. The principal asset of these types of businesses is its relationships with its customers, and that rationale is used to uphold covenants not to compete despite the general disfavor with which these restrictive covenants are usually viewed. This same rationale should serve to protect the assets of Broome Gas in the instant case; if it cannot convey its principal asset – its relationships with its customers – its value is dramatically reduced.

CONCLUSION

Jimmy Rutland has breached a covenant not to compete with or solicit customers of his employer. The restrictive covenant was validly conveyed to Herring Gas. In any event, as a non-party, Rutland does not have standing to complain about a lack of consideration for the assignment. Finally, a large majority of jurisdictions have held that subsequent purchasers are able to enforce covenants not to compete between the purchased entity and its employees, and those few cases upon which the Defendants rely are easily distinguishable. Herring Gas Company, Inc., respectfully requests that this Court reverse the holding of the trial court and Order it to enjoin Jimmy Rutland from engaging in behavior in violation of a contract which he signed and to conduct a trial to determine the compensatory damages owed by the Defendants.

This the 23th day of July, 2008.

Respectfully submitted,

Herring Gas Company, Inc.

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<u>**CERTIFICATE OF SERVICE**</u>

I, John L. Maxey II, hereby certify that a true and correct copy of the foregoing ***Reply Brief of Appellants*** has been served by U. S. First Class Mail, postage prepaid, on the following:

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This the 18 day of July, 2008.

John L. Maxey II