IN THE SUPREME COURT OF MISSISSIPPI
CASE NO.: 2007-TS-01554

HERRING GAS COMPANY, INC. **APPELLANT**

V.

PINE BELT GAS, INC., LLOYD STRINGER, JASON STRINGER, STEVEN STRINGER, and JIMMY RUTLAND **APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal.

1. Plaintiff/Appellant Herring Gas Company, Inc.;

2. Defendants/Appellees Pine Belt Gas, Inc., Lloyd Stringer, Jason Stringer, Steven Stringer, and Jimmy Rutland;

3. John L. Maxey II, Esq.; Paul H. Kimble, Esq. - Attorneys for Appellant

4. David M. Ott, Esq. Esq. - Attorney for Appellees

5. Honorable Johnny L. Williams, Marion County Chancery Court

Paul H. Kimble

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant believes oral argument would aid the resolution of the appeal before this Court and respectfully requests that the Court grant Appellant's request for oral argument. This appears to be a case of first impression in this State, and oral argument will therefore assist the Court in stating the law concerning the enforceability and transferability of covenants not to compete.

STATEMENT OF THE ISSUES

I. Whether Jimmy Rutland Breached a Covenant Not to Compete.

II. Whether Herring Gas and Broome LP Gas Executed a Valid Asset Purchase Agreement.

III. Whether a Covenant Not to Compete May be Enforced by a Purchaser.

STATEMENT OF THE CASE

On November 8, 2006, Plaintiff Herring Gas Company, Inc. (sometimes hereinafter referred to as "Herring Gas") filed suit, alleging a former employee, Jimmy L. Rutland (sometimes hereinafter referred to as "Rutland"), breached a covenant not to compete wherein Rutland agreed to refrain from selling propane gas within a seventy-five (75) mile radius of Purvis, Mississippi, and that Rutland tortiously interfered with contracts between Herring Gas and its customers. Herring Gas sought preliminary and permanent injunctions restraining Rutland from calling on or soliciting Herring Gas customers, as well as compensatory damages which arose from Rutland's breach. Herring Gas filed a Motion for Preliminary Injunction, which the Court denied on December 4, 2006, after a hearing held the previous week. Pine Belt Gas, Inc., Lloyd Broom, Jason Stringer, Steven Stringer, and Rutland (sometimes hereinafter collectively referred to as "Defendants") filed a Motion to Dismiss or for Summary Judgment on December 1, 2006, and an Order dismissing all claims was entered on August 23, 2007. Aggrieved, Herring Gas appealed to this Court on August 31, 2007.

STATEMENT OF FACTS

Herring Gas is a company which is engaged in the sale of propane. Rutland was employed by Broome LP Gas, LLC (sometimes hereinafter referred to as "Broome Gas"), and entered into a contract memorializing the employment agreement on March 20, 2000. (R. at 14-6). In the contract, Rutland agreed to "not associate himself with or engage in, directly or indirectly, as an employee, owner, partner, shareholder, or in any manner, any business engaged in the business of selling propane gas and propane related equipment within a 75 mile radius of Purvis, Mississippi" for three years after the termination of his employment. (R. at 15). Rutland also agreed to not "divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information concerning any matters affecting or relating to the business of the Employer including ... any of its customers ..." (R. at 14). As consideration for entering into this non-competition agreement, Rutland was paid $500.00. (R. at 14). In return for the consideration paid, Rutland also agreed "for a period of five (5) years after the termination of his employment hereunder, he shall not on behalf of himself or on behalf of any other person, firm or corporation, call on any of the customers of the Employer." (R. at 15). On or about April 19, 2006, Herring Gas purchased the assets of Broome Gas, including assignment of all right, title and interest to the March 20, 2000, Employment Contract entered into by Broome Gas and Rutland. (R. at 17).

On April 24, 2006, Rutland resigned from his position with Herring Gas and went to work for Pine Belt Gas. (R. at 98). The office of Pine Belt Gas is located at 55 Pine Belt Lane in Columbia, Mississippi – well within the area proscribed by Rutland's Employment Contract. In addition, Rutland works the same area for Pine Belt Gas which he previously

serviced on behalf of Herring Gas. Jimmy Rutland has violated, and continues to violate the non-competition provision of the Employment Agreement he signed as well as the non-solicitation provisions of that Agreement for which he received separate consideration. (R. at 14-6; 149). Soon after Rutland began to work for Pine Belt Gas, approximately two hundred individuals who were previously customers of his indicated they wished to discontinue their service with Herring Gas. (R. at 103).

Gas companies spend substantial amounts in materials and man-hours inspecting and ensuring its customers' hardware comply with all applicable regulations. The customer list of Herring Gas also represents a substantial investment and asset which has been wrongfully appropriated by Rutland and his employer Pine Belt Gas. (R. at 103). Rutland was the sole representative of Herring Gas so far as many of the customers on his route were concerned. (R. at 103). Herring Gas's loss of customers was due solely to the personal relationship between Rutland and the customers serviced by him. (R. at 103).

SUMMARY OF THE ARGUMENT

Jimmy Rutland entered into a contract wherein he was paid $500.00 to agree to refrain from competing with his employer and from calling on its customers. It is undisputed that Rutland has breached and continues to breach this covenant not to compete. Rutland unapologetically states that he is working for a competitor and that he routinely calls upon Herring Gas customers. He admits he began doing these things immediately after leaving employment with Herring Gas. Jimmy Rutland has breached his employment agreement.

Herring Gas has the right to enforce the covenant not to compete and the non-solicitation provision of the agreement. The assignment of Rutland's restrictive covenant was valid. Broome Gas acknowledged the assignment of the covenant not to compete. In addition, Rutland has no standing to complain there was a lack of consideration as he was neither a party to the contract nor a third party beneficiary.

A covenant not to compete should be enforceable by a subsequent purchaser of a business. A covenant not to compete is not a personal contract such that it may not be assigned. Rather than forcing the signer into involuntary servitude as in a personal services contract, it is simply an agreement to refrain from a certain behavior. Also, the majority of the values small businesses such as Broome Gas has derives from its relationships with its customers – and its right to protect those relationships. If small businesses such as Broome Gas cannot pass along covenants not to compete for which it provided valuable consideration, much of the value of those businesses will evaporate.

ARGUMENT

I. Standard of Review

The Court employs a *de novo* standard of review of a lower court's grant of summary judgment. *Thomas v. Columbia Group, LLC*, 969 So.2d 849, ¶ 10 (Miss. 2007) (citation omitted). "The moving party must show that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Miss. R. Civ. P. 56(c)). All evidence must be viewed in the light most favorable to the party against whom the motion has been made, as it is given the benefit of every reasonable doubt. *Id.* (citation omitted).

The traditional standard of review for the grant or modification of an injunction is abuse of discretion. *Moses v. Washington Parish School Board*, 379 F.3d 319, 327 (5th Cir. 2004). However, where the grant or denial of an injunction involves a question of law, the review is *de novo*. *St. Paul Mercury Ins. Co. v. Williamson*, 332 F.3d 304, 308 (5th Cir. 2003). This Court, of course, likewise follows the rule that issues of law are reviewed *de novo*. *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss. 2006). The lower court ruled as a matter of law that a covenant not to compete is not enforceable by a subsequent purchaser. (R. at 163). Therefore, the proper standard of review regarding Herring Gas Company, Inc.'s request for an injunction is *de novo*.

II. Whether Jimmy Rutland Breached a Covenant Not to Compete

Rutland was employed by Broome Gas and entered into a contract memorializing the employment agreement on March 20, 2000. (R. at 14-6). Rutland was paid $500 in consideration for his execution of the covenant not to compete. (R. at 14). It is

indisputable that Rutland breached and continues to breach the covenant not to compete with Herring Gas or to solicit its customers. Rutland agreed to "not associate himself with or engage in, directly or indirectly, as an employee, owner, partner, shareholder, or in any manner, any business engaged in the business of selling propane gas and propane related equipment within a 75 mile radius of Purvis, Mississippi" for three years after the termination of his employment. (R. at 15). Instead, immediately after voluntarily leaving his position at Herring Gas, Rutland went to work for Pine Belt Gas, Inc. (R. at 98). Rutland also agreed to not "divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information concerning any matters affecting or relating to the business of the Employer including ... any of its customers ..." (R. at 14). Using the experience gained and contacts developed when working at Herring Gas and its predecessor in interest, Rutland is conveying information about Herring Gas' customers to his new employer. In fact, according to Rutland, one reason he services so many former Herring Gas customers is the previous system for servicing these customers. (R. at 150). The customers would call Rutland at home, and he would then go out and service them. (R. at 150). The customers would never contact the office when they needed service. Rutland did not take a physical copy of a customer list to his new employer but acknowledged he brought Herring Gas customer information to Pine Belt "in his head." (R. at 148).

Rutland also agreed "for a period of five (5) years after the termination of his employment hereunder, he shall not on behalf of himself or on behalf of any other person, firm or corporation, call on any of the customers of the Employer." (R. at 15). When asked why he worked at all at Herring Gas if he did not plan on working there long term, Rutland

responded "because I intended to carry [Herring Gas's customers] with me if I could." (R. at 149). Rutland acknowledges he intended to breach his contract by servicing customers of Herring Gas and further acknowledges that he did, in fact, do so. (R. at 150). It is indisputable that Rutland's contract provided that he could not work for a competitor for three years after leaving his employment, that he could not provide customer information to another entity, and that he could not call upon Herring Gas customers for five years. It is indisputable that he did all these things immediately after voluntarily leaving his employment with Herring Gas. It is indisputable that Jimmy L. Rutland breached the employment contract for which he received consideration.

III. Herring Gas and Broome Gas Entered into a Valid Asset Purchase Agreement

It was suggested below that because the intent of Herring Gas and Broome Gas was made clear in an addendum rather than in the original asset purchase agreement, the contract between the two is somehow invalid. While Herring Gas would suggest the original asset purchase agreement provides Herring Gas with the benefit of the covenant not to compete, such is immaterial as Broome Gas specifically conveyed to Herring Gas "all right, title, and interest in the agreement between Jimmy L. Rutland and Broome LP Gas ..." on May 12, 2006. (R. at 17). By its very nature, an addendum is executed after the original contract. An addendum creates an additional enforceable clause of a contract. See *Patriot Commercial Leasing Co. v. Jerry Enis Motors, Inc.*, 982 So.2d 856 (Miss. 2006); *Patel v. Telerent Leasing Corp.*, 574 So.2d 3 (Miss. 1990); *Delta Construction Co. of Jackson v. City of Jackson*, 198 So.2d 592 (Miss. 1967). The fact that the parties to the contract clarified their intent in an addendum has no impact on its enforceability. As a general rule, contracts are freely assignable, and the May 12, 2006, assignation was an

effective transfer of the rights under the employment agreement. See Restatement (Second) of Contracts § 317.

"Under basic contract rules, there must be an offer and acceptance, and consideration." *Infinity Insurance Company v. Patel,* 737 So.2d 366, 367 (Miss.Ct.App.1998). Consideration is the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. Black's Law Dictionary 306 (6th ed.1990). Some right, interest, profit or benefit must accrue to one party, or some forbearance, detriment, loss or responsibility must be given, suffered or undertaken by the other party. *Id.* 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 Rutland's 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 its date of execution is immaterial. Therefore, Herring Gas is entitled to protections contained within the covenant not to compete.

In any event, Rutland was not a party to the contract between Broome Gas and Herring Gas, and a basic tenet of contract law dictates that Rutland does not have standing to claim there was a lack of consideration for the assignment of his covenant not to compete. "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) If Broome Gas were to challenge the sufficiency of the consideration for the assignment of Rutland's covenant not to compete – which they emphatically are not – then Herring Gas would have to show it delivered adequate consideration for the assignment. Given Rutland's lack of standing to challenge the sufficiency of consideration, the supposed lack of same is not relevant.

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). Among other things, 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 raise the issue of lack of consideration, and the counterclaim was dismissed. *Id.* (see also *Davis v. Blige*, 419 F.Supp.2d 493, 501 (S.D.N.Y. 2005); *Barker v. Danner*, 903 S.W.2d 950 (Mo.App. W.D. 1995) (the obligor under a contract lacked standing to challenge the presence of consideration in an assignment; the obligor was not prejudiced by the presence or absence of consideration, as long as it was not obligated to perform for more than one party). 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).

In order for Rutland to be able to object to the assignment based upon a lack of consideration, he must be a third party beneficiary of the asset purchase agreement. "In order for a third person beneficiary to have a cause of action, the contracts between the

original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. This obligation must have a legal duty which connects the beneficiary with the contract. In other words, the right (of action) of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself." *Doe v. Wright Sec. Services, Inc.*, 950 So.2d 1076, 1080 (Miss. 2007) (citation omitted). It is obvious Rutland is not a third party beneficiary. While the agreement does acknowledge that Broome Gas's "current employees provide the buyer incentive to close this purchase ... ", the contract specifically states under the Employees of the Sellers section "[t]he Buyer and Sellers agree that this Asset Purchase Agreement does not create any contract of employment ..." In other words, there is no direct benefit to Rutland under the sales agreement between Herring Gas and Broome Gas. Herring Gas had no legal obligation or duty as a result of the agreement. In fact, the agreement goes out of its way to specifically state no such obligation exists. It is clear Rutland was not a third party beneficiary of the contract and that he is not entitled to complain there was insufficient consideration for the assignment of his covenant not to compete.

IV. Whether a Covenant Not to Compete Can Be Enforced by a Subsequent Purchaser

The crux of the trial court's decision was that, as a matter of law, a purchaser of a business entity cannot enforce a covenant not to compete entered into by the purchased entity and its employee that would otherwise be a valid. (R. at 162). Herring Gas respectfully suggests the trial court erred in making this determination. A covenant not to compete is valid unless the terms of the agreement are unreasonable. *Frierson v.*

Sheppard Building Supply Co., 247 Miss. 157, 172, 154 So.2d 151 (1963).

The trial court declined to enforce the covenant not to compete because it held the agreement to be a personal contract and therefore not transferrable. (R. at 160-62). Mississippi case law, however, contradicts this ruling. "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)). Restated, 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. There is no language within the employment agreement making the non-solicitation and non-competition provisions personal covenants. The general rule is rights under a contract may be assigned. *South Mississippi Planning and Development District v. Alfa General Insurance, Corp.*, 790 So.2d 818, 821 (Miss. 2001).

The instant circumstances give this Court an opportunity to affirm the value of small businesses which depend upon route salesman. The majority of the value of Broome Gas and similar companies derives from its 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. Because of this, Mississippi law allows Broome and similar businesses to protect their assets by enforcing covenants not to compete. See *Redd Pest Control Company, Inc. v. Foster*, 761 So.2d 967, 973 (Miss. 2000). 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. 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 – or to allow such a person to shake down the parties conducting the transaction in order to get his approval. Without an assignable covenant not to compete, Broome Gas is worth no more than its physical asset. As made clear by *Foster*, 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 serves to protect the assets of Broome Gas in the instant case; if it cannot convey its principal asset – its relationship with its customers – it approaches worthlessness.

A. Mississippi

Mississippi courts have allowed the assignment of covenants not to compete. In *Cooper v. Gidden*, Harry Cooper (sometimes hereinafter referred to as "Cooper") sold Blackwell Sand Company to Larry Stewart. 515 So.2d 900, 901 (Miss. 1987). Cooper entered into an contract in which he agreed to refrain from competing with Blackwell Sand Company within one hundred miles for a period of ten years. *Id.* at 901-2. Larry Stewart subsequently assigned all his interest in Blackwell sand company to Lamar Gidden

(sometimes hereinafter referred to as "Gidden"). *Id.* at 902. After Cooper began preparations to compete with Blackwell Sand Company, Gidden filed suit to enjoin Cooper from violating the covenant not to compete. *Id.* Cooper claimed the covenant not to compete was a personal covenant only enforceable by Blackwell Sand Company; the Supreme Court disagreed, stating "[i]t is not necessary that the original transfer should have been expressly made to the vendee 'and his assigns' nor is it necessary that on the sale to a new vendee the right that the original vendor shall not compete shall be specifically mentioned." *Id.* (citing 4 Corbin on Contracts § 885, p. 555 (1951)). "Thus, on subsequent re-sale of a business, all contractual rights received by an original purchaser, including the goodwill of the company, could be validly assigned." *Id.* at 903 (citing 38 Am.Jur.2d *Goodwill* § 11 (1968)). While it is true *Cooper* is not directly on point as the covenant was entered into by a seller of a business rather than an employee as in the instant case, it is also true that the Supreme Court has definitively held that covenants not to compete *are* assignable, and Herring Gas respectfully suggests it has the right to enforce the restrictive covenant at issue in the instant case.

Herring Gas Co., Inc. v. Whiddon, also involved the assignment of a covenant not to compete. 616 So.2d 892 (Miss. 1992). There, Curtis Dufour purchased Gaston's LP Gas Company, Inc., whose sole shareholder was C. Gaston Whiddon (sometimes hereinafter referred to as "Whiddon"). *Id.* at 893. Whiddon executed a contract as part of the sale wherein he agreed not to compete with Gaston's LP Gas Company, Inc for nine years. *Id.* Herring Gas then purchased the assets – but not the stock – of Gaston's LP Gas Company, Inc. *Id.* at 894. After learning of Whiddon's plan to violate his covenant not

to compete, Herring Gas filed suit. *Id.* Again, the Supreme Court indicated that specific language must be included in a covenant not to compete in order to create an unassignable personal services contract. *Id.* at 897. Like *Cooper*, *Whiddon* involves a seller of a business rather than an employee[1], but, just as in *Cooper*, the *Whiddon* decision makes clear a covenant not to compete is assignable.

B. Other Jurisdictions

While a determination as to whether a covenant not to compete can be enforced against an employee – rather than a vendee – is a case of first impression in Mississippi, a number of other jurisdictions have upheld the value of small businesses which depend on route salesman by allowing a subsequent purchaser to enforce covenants not to compete which the employee entered into with the original employer.

1. Sixth Circuit

The 6th Circuit decided a case where a salesman had entered into an agreement with his employer to refrain from competing it or soliciting its customers for two years. *Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 926 (6th Cir. 2000). Most of the employer's assets, including its rights to the employment agreement, were sold to another entity. *Id.* The Court noted the employee had the opportunity "to develop strong business relationships with [the employer]'s customers ..." *Id.* There was no mention in the agreement as to the assignability of the non-competition and non-solicitation

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[1]The Court cites a fifty year old A.L.R. section stating a distinction exists between the assignability of a covenant not to compete against the seller of a business and against employees of that business. As shown below, however, that distinction has evaporated; in fact, many more jurisdictions now allow the assignment of an employee's covenant not to compete to a subsequent purchaser than refuse to enforce such a restrictive covenant.

provisions. *Id.* at 927. The employee argued the employment agreement was a personal services contract and the non-competition and non-solicitation provision could not be assigned. *Id.* at 929. The Court disagreed, noting "a non-competition clause only requires that one of the parties abstain from certain activities." *Id.* (citation omitted). "[T]he noncompetition clause does not require any affirmative action on the part of [the employee], and is thus assignable." *Id.* at 930. The defendants complained the management style and character changed when the new entity purchased the employer. *Id.* The Court stated this was "irrelevant to the issue of whether the noncompetition clause is assignable because the clause was not tied to the management style or 'character' of [the employer]. [The employer] could have changed its management at any time and [the employee] would still have been bound by the noncompetition clause." *Id.* Just like the employee engaged as a route salesman in *Kethan*, Rutland had the opportunity to develop strong business relationships with Broome Gas Gas's customers. The agreement at issue in the instant case is silent as to assignability, just as was the one at issue in *Kethan*. Rutland's dissatisfaction with Herring Gas is not at issue, as the non-competition and non-solicitation clauses are not tied the Herring Gas's management style or character. *Kethan* makes clear agreements such as the one at issue in the instant case are assignable.

2. North Carolina

In *Reynolds and Reynolds Co. v. Tart*, Reynolds and Reynolds Company (sometimes hereinafter referred to as "Reynolds") purchased many of the assets of Jordan Graphics, Inc. 955 F.Supp. 547, 551 (W.D.N.C. 1997). In connection with the acquisition, Reynolds was assigned the employment agreements of salesmen Robert Wheeler

(sometimes hereinafter referred to as "Wheeler") and Harry Tart (sometimes hereinafter referred to as "Tart").[2] *Id.* Reynolds offered to continue to employ Wheeler and Tart after the acquisition, albeit at a lower salary and with different benefits and a more restrictive covenant not to compete. *Id.* at 552 After not receiving a response to its offer in nine days, Reynolds informed Wheeler and Tart that if they did not execute the covenant not to compete within five days, they would be terminated. *Id.* After their termination, Wheeler and Tart argued their covenants not to compete were not assignable to, and consequently not enforceable by, Reynolds. *Id.* at 556. The court held the "right to performance of a personal service contract requiring special skills based upon the personal relationship between the parties cannot be assigned without the consent of the party rendering those services." *Id.* (citation omitted). However, the court then noted "'some of such contracts may be assigned when the character of the performance and the obligation will not be changed.'" *Id.* (citation omitted). The court found the character of the performance and the obligation "did not change when Reynolds took over their contracts – the Defendants, before and after the assignment, were to be at-will salesman of the same products to the same customers in the same area. The fact that Reynolds proposed to reduce compensation, change benefits, and increase obligations would not change the fundamental character or the employee's situation ..." *Id.* at 556-57. The character of Rutland's performance and obligation would have been no different under Herring Gas; he was to be an at-till employee selling liquid propane in the same area to the same customers.

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[2]It should be noted the salesmen were paid $1.00 – in contrast to the $500.00 Rutland was paid – as consideration for executing the covenant not to compete.

The court recognized there was another ground to enforce the covenant not to compete, finding "[l]imitations on an employer's liberty to assign the right to enforce personal service contracts, like restrictions on an employee's liberty to delegate her duty to perform under an employment contract, involve different issues than assignment of covenants not to compete." *Id.* at 557. "[W]hile the former two primarily involves the relationship between the employer and employee, the later concerns an employer's investment in its employee and the possibility of that investment being pawned off to a rival competitor." *Id.* "Covenants not to compete facilitate and protect capital investment." *Id.* "[A] covenant not to compete with a business is assignable." *Id.* Interestingly, the court noted North Carolina law made a distinction between a covenant not to compete incident to the sale of a business and a contract of employment "**but only to determine under what standard to judge the covenant's reasonability, not its assignability**."[3] *Id.* at 556 (citing *Keith v. Day*, 81 N.C.App. 185, 193-94, 343 S.E.2d 562, 567-68 (1986) (emphasis added). In *Reynolds*, as in the instant case, route salesmen – and the relationships they had developed with their customers – were an integral part of the purchased entity. In order to protect this asset, the purchased entity had had their salesmen execute covenants not to compete. In order to facilitate and protect capital investment, covenants such as Rutland's – for which he was paid $500.00 – must be enforced. Otherwise, many small businesses will become nearly worthless.

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[3]The Defendants claim the *Cooper* and *Whiddon* cases are distinguishable from the instant case because the assignments in these cases were entered into incident to the sale of a business rather than as part of an employment agreement. *Reynolds* makes clear that distinction is unimportant as to a restrictive covenant's assignability.

3. Maine

In *Katahdin Insurance Group v. Elwell*, an insurance agency was purchased by Katahdin Insurance Group (sometimes hereinafter referred to as "Katahdin"). 2001 WL 1736572, 1 (Me.Super., 2001). Kimberly Elwell (sometimes hereinafter referred to as "Elwell") had entered into a covenant not to compete with her employer, the purchased entity. *Id.* Despite this, Elwell opened her own agency and began soliciting customers of Katahdin. *Id.* at 3. Katahdin filed suit, seeking to enjoin her from competing with the agency, but Elwell claimed the covenant not to compete was not effectively assigned. *Id.* The court disagreed "because non-compete provisions are freely assignable ..." *Id.* at 4.

4. Minnesota

In *Saliterman v. Finney*, Dr. L.M. Saliterman and Associates, P.A. (sometimes hereinafter known as "Saliterman"), purchased a dental practice from Dr. Richard W. Rother. 361 N.W.2d 175, 176 (Minn.App. 1985). Included in the transfer were the rights Dr. Richard W. Rother held under an independent contractor agreement with Dr. Mark Finney (sometimes hereinafter referred to as "Finney"). *Id.* The agreement included a covenant not to compete which Finney violated after terminating his employment. *Id.* The trial court held the covenant was not assignable, and Saliterman appealed. *Id.* at 176-77. The appellate court disagreed, stating, "[a] noncompete covenant in an employment agreement will be enforced when necessary to protect the goodwill of the employer's business." *Id.* at 177. It further stated, "a covenant not to compete in an employment agreement is assignable ancillary to the sale of a business to protect the goodwill of that business." *Id.* at 178. The uncontroverted evidence has established the enforcement of

Rutland's covenant not to compete is necessary to protect the goodwill the entity it purchased – Broome Gas Gas. Indeed, as established in the court below, Rutland's flagrant breaches of the agreement has led to the loss of hundreds of customers. An older Minnesota case also supports Herring Gas's position. *Peterson v. Johnson Nut Co.*, 283 N.W. 561 (Minn. 1939). "[A] valid covenant not to compete may be assigned unless by its peculiar nature it cannot be." *Id.* at 569. There is no language in the agreement at issue in the instant case which states that it cannot be assigned.

5. Connecticut

In *Torrington Creamery v. Davenport*, a branch manager entered into a covenant not to compete with The Sunny Valley Corporation. 12 A.2d 780, 781 (Conn. 1940). The Sunny Valley Corporation sold its assets to The Torrington Creamery, although there was no specific assignment made of the contract between the branch manager and The Sunny Valley Corporation. *Id.* at 782. Immediately after the sale was complete, the branch manager was discharged by The Torrington Creamery. *Id.* When the branch manager began competing The Torrington Creamery, it filed suit. *Id.* The court allowed The Torrington Creamery to enforce the agreement, stating "[w]here an employee enters into a restrictive covenant such as the one in this case, it becomes a valuable asset of the business and upon the sale of that business the benefits of the covenant may be assigned to the purchaser." *Id.* at 783. Even though no specific assignment of the restrictive covenant occurred, the court permitted the subsequent employer to enforce it against the branch manager. *Id.* A Florida court, applying Connecticut law, also allowed the enforcement of a covenant not to compete by a purchasing entity. *Magner International*

Corp. v. Brett, 9601 So.2d 841 (Fla.App. 4 Dist. 2007). "Non-compete agreements may be assigned upon the sale of a business or automatically assigned where the entire business is sold to another entity." *Id.* at 844.

6. Tennessee

Similarly, *In re VisionAmerica Inc.*, holds a purchaser may enforce covenants not to compete against employees of a purchased entity. 2001 WL 1097741, 1 (Bkrtcy.W.D.Tenn 2001). VisionAmerica Inc., attempted to convey ophthalmic practices, including its interest in covenants not to compete singed by its employees, to Eye Health Partners, Inc. *Id.* The employees objected, claiming the sale of the practice had terminated their employment and discharged them of their obligations under the covenant not to compete. *Id.* They argued the covenants not to compete constituted personal services contracts which could not be assigned. Id. The court disagreed, holding a "personal services contract, however, requires that one of the parties be bound to render personal services. In contrast, a noncompetition clause only requires that one of the parties abstain from certain activities. Consequently, the noncompetition clause does not require any affirmative action on the part of [the former employee], and is thus assignable." *Id.* at 3 (citation omitted).

7. Colorado

National Propane Corp. v. Miller, also establishes the assignability of covenants not to compete. 18 P.3d 782 (Colo.App. 2000). National Propane Corp. (sometimes hereinafter referred to as "National") purchased All Seasons Propane Inc. *Id.* at 784. The shareholders of All Seasons Propane Inc., agreed not to compete with National within a

radius of fifty miles for five years. *Id.* at 784-85. The defendants claimed the covenant not to compete was not enforceable. *Id.* at 785. The sales contract provided the covenant could only be enforced by an affiliate of the purchaser. *Id.* While this provision is, of course, not in the instant covenant not to compete, if covenants not to compete were not assignable, even such a clause would not allow a subsequent purchaser to enforce a non-competition agreement against an employee.

Another Colorado case establishing the assignability of restrictive covenants is *Flower Haven Inc. v. Palmer*, which allowed the enforcement of such a covenant because, "[i]n the absence of any provision restricting assignment of the covenant, the vendee had a right to assign it in connection with the sale of the assets of the business which he had purchased." 502 P.2d 424, 426-27 (Colo.App. 1972). Similarly, in *Miller v. Kendall*, the Colorado court upheld the assignability of restrictive covenants. 541 P.2d 126 (Colo.App. 1975). "Absent a contrary provision in the contract, a noncompetition agreement may be assigned and enforced by an assignee." *Id.* at 127. There is, or course, no provision in the instant contract restricting the assignment of Rutland's covenant not to compete.

8. Kentucky

In *Gardner Denver Drum, LLC v. Goodier*, Goodier signed a covenant not to compete with his employer for a period of three years. 2006 WL 1005161, 2 (W.D.Ky. 2006). The employer was purchased, and Goodier was demoted and given different responsibilities. *Id.* Goodier resigned and began working for a competitor of his employer. *Id.* After suit was filed to enforce the agreement, Goodier argued the covenant not to compete was not enforceable as his original employer had been purchased and he had not

signed a restrictive covenant with his new employer. *Id.* The district court disagreed and held an " 'assignment does not modify the terms of the underlying contract ... the only thing that changed was the entity now entitled to enforce the terms and conditions that [the employee] had previously agreed to when he entered into his employment agreement.' " *Id.* (citation omitted). "[The purchaser] merely steps into the shoes of [the purchased entity] and is entitled to enforce the Covenant on terms applicable to [the purchased entity] prior to the acquisition." *Id.*

9. Michigan

In *Virchow Krause & Co. v. Schmidt*, the Michigan Court of Appeals reversed a trial court's decision not to enforce covenant not to compete against an accountant who had resigned from her position. 2006 WL 1751835, 5 (Mich.App. 2006). The employee agreed not to provide any accounting services for any client of the employer for twenty-four months after termination of her employment. *Id.* at 2. On October 10, 2003, the employee resigned her position; two months later, the assets of the employer were conveyed to another entity. *Id.* at 1. The employee went to work for a competitor, arguing the covenant not to compete could not be assigned without her assent. *Id.* In addition, the employee argued the original employer had not assigned its rights under the employment contract as there was no provision in the sales agreement which referred to former employees. *Id.* The court reversed the trial court's decision and found the covenant not to compete was not a personal services contract and was therefore assignable without the employee's consent. *Id.* at 2.

10. Florida

The issue of whether a covenant not to compete constituted a personal services contract was also evaluated by *In re Hearing Centers of America, Inc.* 106 B.R. 719 (Bkrtcy. M.D. Fla. 1989). The employee entered into a covenant not to compete with Hearing Centers of America, Inc., which, in bankruptcy proceedings, sought to assign its rights under the contract to Integrated Hearing Services, Inc. *Id.* at 720. The employee objected, arguing the agreement was a personal services contract and unassignable without consent. *Id.* at 721. "As to the argument that the contract is an agreement for personal services and is therefore not assignable without their consent under Florida law, this Court is satisfied that the contract at issue is not a personal service contract in the traditional sense." *Id.* Rather "the contract that the Debtors seeks to assign contains a covenant which attempts to keep the employees from performing, rather than an attempt to assign the performance of a personal service." *Id.* at 722. Herring Gas, through the enforcement of the covenant not to compete assigned to it, is not attempting to force Rutland to provide his services; instead, it simply seeks to prevent Rutland from competing with it – which he agreed to do after being paid $500.00 by Herring Gas's predecessor.

Another Florida case reinforces the assignability of a salesman's covenant not to compete with her employer. *Allegiance Healthcare Corp. v. Coleman*, 232 F.Supp.2d 1329 (S.D. Fla. 2002). Jennifer Coleman (sometimes hereinafter referred to as "Coleman") entered into a covenant not to compete with her employer, Durr Medical Corp. *Id.* at 1331. She also entered into an agreement to refrain from calling upon customers while employed by Bergen Brunswig Corp. *Id.* Allegiance Healthcare Corp. (sometimes hereinafter

referred to as "Allegiance") argued it could enforce those agreements as a successor entity while Coleman claimed the agreements were not assignable. *Id.* The court disagreed stating that "[a]s for courts in other jurisdictions, the majority have held that the surviving corporation in a merger may enforce covenants not to compete without obtaining assignments." "In addition, the acquiring company in a merger should be able to rely on the benefits of existing contracts. **If employees can make them unenforceable simply by refusing assignments, the acquiring company is left with a less valuable entity than expected**." *Id.* at 1333 (emphasis added). If, as Rutland suggests, his approval is required before Herring Gas can enforce the agreement it received from Broome Gas, he could essentially to blackmail the parties to a business deal worth in excess of $1.3 million, despite having no ownership interest or capital investment and only having value to the transaction by virtue of his employment by Broome Gas.

11. Tenth Circuit

The Tenth Circuit examined assignability of covenants not to compete in *Equifax Services, Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990). Steven Hitz (sometimes hereinafter referred to as "Hitz") was employed as a branch manager by White & White with whom he entered into a covenant not to compete. *Id.* at 1357. Equifax Services, Inc. (sometimes hereinafter referred to as "Equifax") purchased White & White; as Hitz objected to the sale, he resigned. *Id.* Shortly thereafter, he became the president and director of a competing organization. *Id.* Hitz argued Equifax could not enforce the covenant not to compete, as White & White's successor, because personal services contract are not assignable. *Id.* at 1361. The Court disagreed, stating "[t]his argument is flawed because it assumes a

contract is only assignable in toto. A contract consists of a bundle of rights and duties, and whether rights are assignable or duties delegable depends on the particular rights and duties at issue." *Id.* "Although an employee's duty to perform under an employment contract generally is not delegable, the right to enforce a covenant not to compete is assignable ... In the case of a merger, as here, the surviving corporation automatically succeeds to the rights of the merged corporations to enforce employees' covenants not to compete." *Id.* (citing Restatement (Second) of Contracts § 317). It should be noted the agreement at issue in the instant case stated: "All Agreements and covenants contained herein are severable and in the event any of them shall be held to be invalid by any competent court, this Agreement shall be interpreted as if such invalid agreements or covenants were not contained herein." (R. at 15).

12. Missouri

In *Schucks Twenty-Five, Inc. v. Bettendorf*, Joseph Bettendorf (sometimes hereinafter referred to as "Bettendorf") sold the stock of Bettendorf Grocery to ACF-Wrigley Stores. 595 S.W.2d 279, 282 (Mo.App. 1979). The sales agreement contained the following covenant not to compete: "The Seller will not directly or indirectly engage in the wholesale or retail food business within a radius of 200 miles of St. Louis, Missouri, for a period of ten years after the Closing Date; and will not at any time after the Closing Date directly or indirectly engage in such business or any business involving the manufacture, distribution or sale of food products within said area under the name Bettendorf, or any combination thereof." *Id.* at 282-83. This entity sold the majority of those stores – along with its rights under the covenant not to compete – to Schnucks Twenty-five, Inc

(sometimes hereinafter referred to as "Schnucks"). *Id.* at 283. Schnucks filed suit against Bettendorf, alleging he violated the covenant not to compete. *Id.* at 282. Bettendorf argued that his covenant not to compete was not assignable to another corporation. *Id.* at 287. The court rejected Bettendorf's reasoning, holding instead that the covenant not to compete was not a personal covenant and was capable of being assigned. *Id.*

Another Missouri court held "a non-competition agreement is a valuable asset for the business when it is in an employment contract rather than a contract to sell the business. It protects the employer's goodwill and his stock of customers in that setting, as well as it does in the context of a sale of the business." *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311, 313 (Mo.App. E.D. 1986). This is what is curious about the Defendants' insistence that *Cooper* and *Whiddon* are distinguishable from the instant case, especially given the Supreme Court's holding that covenants not to compete are not personal services contracts. The point of covenants not to compete in the context of the sale of a business and as part of an employment relationship is exactly the same; the entity seeks to protect itself from someone who has intimate knowledge of their business and strong relationships with their customers from competing with it and lowering the value of the business. Broome Gas Gas, through its agreement with Rutland, is simply trying keep its value as high as possible. If covenants such as this are not enforceable by a purchaser, those businesses will lost the majority of their value.

13. Iowa

Another case which examined the nature of covenants not to compete was *Sickles v. Lauman*, 185 Iowa 37, 169 N.W. 670 (1918). After purchasing a laundry business from Olive Wright (sometimes hereinafter referred to as "Wright"), C.P. Sickles sought to enforce a covenant not to compete J.W. Lauman signed when he sold the business to Wright. *Id.* at 671. J.W. Lauman argued the covenant not to compete was not assignable because it was a personal services contract and, therefore, unenforceable by C.P. Sickles. *Id.* The court disagreed. "To construe such contracts as personal only where the design to so narrow or restrict their effect is not clearly expressed is to deprive them of much, if not most, of their value. The seller expects a better price, and the buyer is willing to pay a better price, than the business would command without it. But the business, when once purchased, is worth on the market only what the owner can reasonably hope to sell for, and if he cannot sell it without destroying its protection against competition by the man who created and built it up, he is quite sure to suffer loss." *Id.* at 672-73. Rutland, of course, did not enter into his covenant not to compete incident to the sale of a business, but the reasoning concerning the enforcement of his covenant not to compete is strikingly similar. Broome Gas Gas's principals built a business, but that business's value is only what someone is willing to pay for it on the open market. In order to preserve the value of that business, Broome Gas Gas must be able to be conveyed without inviting competition from employees whose knowledge of its customers and business practices only derived from their employment with the company. If the purchasers of small businesses cannot enforce covenants not to compete, those small businesses lose significant value, and the owners

of those businesses are denied the fruits of their capital investment and ingenuity.

In *Orkin Exterminating Company, Inc. v. Burnett*, the court examined the covenant not to compete of a route salesman in the pest control industry. 146 N.W.2d 320 (Iowa 1966). Orkin Exterminating Company, Inc. sought to enjoin Robert Burnett (sometimes hereinafter referred to as "Burnett") from competing with it after it terminated him following its purchase of a company with which Burnett had entered a covenant not to compete. *Id.* at 322. The court held the agreement was enforceable because the agreement contemplated assignment when referred to "successors and assigns" in the agreement. Id. at 327. While there is no such language in the instant agreement, this is yet another jurisdiction which allows assignment of covenants not to compete.

14. New York

New York is the state which has the most developed jurisprudence regarding the enforceability of covenants not to compete by a subsequent purchaser. New York courts have repeatedly upheld the assignability of restrictive covenants. In *Eisner Computer Solutions, LLC v. Gluckstern*, the trial court held "the contract alleged was not assignable since it was one for personal services and was silent as to its assignability." 293 A.D.2d 289, 741 N.Y.S.2d 511 (N.Y. 2002). The appellate court disagreed, stating "although personal services contracts are not freely assignable, the agreement sued upon is a covenant not to compete, which is distinguishable from a personal services contract..." *Id.* The court in *Special Products Manufacturing, Inc. v. Douglass*, held "a clear and unambiguous prohibition is essential to effectively prevent assignment" and enforced the covenant not to compete. 159 A.D.2d 847, 849, 553 N.Y.S.2d 506 (N.Y. 1990). The court

based its decision on whether a valid assignment had occurred on the uncontradicted affidavit of an employee of the new entity stating it had acquired all the original employer's contract rights, including the restrictive covenants to which the employee agreed. *Id.* at 848.

In *Norman Ellis Corp v. Lippus*, the court noted the distinction between requiring the performance a personal services contract and the enforcement of a covenant not covenant. 176 N.Y.S.2d 5, 6 (N.Y. 1955). "Plaintiff seeks not to compel [the employee] to work for him, but to restrain her from competing with his business, revealing a secret list of customers, soliciting his customers, etc., all of which she agreed to refrain from doing as a condition of her employment by plaintiff's assignor. Such agreement, the Court holds, was just as assignable as any asset of the business." *Id.* The Mississippi Supreme Court has likewise determined a covenant not to compete is assignable unless 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). This theme was echoed by *Premier Laundry v. Klein*, which allowed assignment of a covenant not to compete signed by an employee. 73 N.Y.S.2d 60, 61 (N.Y. 1947). "[T]he negative covenant is a valuable right which the courts will enforce." *Id.* The covenant not to compete was an asset of Broome Gas Gas, just as it would be an asset of every entity where salesmen develop strong relationships with customers. If this asset is determined to be unenforceable, much of the value of the underlying business will be lost.

15. New Jersey

In *J.H. Renarde, Inc. v. Sims*, the employees entered into a covenant not to compete with their employer. 711 A.2d 410 (N.J. 1998). Some time after the employer was purchased by J.H. Renarde, Inc., the employees left and began operating a competing business. *Id.* at 411. In response to a suit to enjoin the operation of this business, Robin Sims argued the covenant not to compete could not be enforced by J.H. Renarde, Inc., as there was no language within the covenant permitting assignment. *Id.* at 412. However the court stated "contract obligations may be freely assigned in the absence of some express contractual prohibition" and that "no reason can be conjured as to why a successor employer may not enforce such a covenant." *Id.* at 412-13. Therefore, the court permitted J.H. Renarde, Inc., to enforce the covenant not to compete. *Id.* at 413. Another New Jersey case also forcefully affirmed the right of an employer to assign restrictive covenants it entered into with its employees. *A. Fink & Sons v. Goldberg*, 139 A. 408 (N.J. 1927). The defendant was employed as a driver of a delivery truck on specific route and, because of this, had access to a list of customers on the route. *Id.* at 409. A. Fink & Sons purchased the assets of the employer and sought to enforce a covenant not to compete the driver had executed with his employer. *Id.* The court noted a restrictive covenant made in connection with the sale of a business was assignable and that it could "see no reason why a restrictive covenant in a contract between employer and employee should not also be assignable as an incident of the business even if not made so by express words." *Id* at 410. Similarly, there is "no reason" not to enforce the agreement at issue in the instant case. Rutland voluntarily – for $500.00 – entered into an agreement not to

compete with his employer, who then passed its assets, including its interest in the restrictive covenant, to Herring Gas. The defendant also claimed the question in the litigation involved the assignability of a contract for personal services. *Id.* The court emphatically rejected this position and stated "[t]he complainant is not seeking to compel the defendant to work for it. Quite the contrary. It seeks only the benefit of the restrictive covenant contained in the contract of employment." *Id.* "It should be borne in mind that a distinction must exist between compelling one to keep his contract of employment and forbidding him to work for his rival in the same line." *Id.* Herring Gas is not seeking the enforcement of a personal services contract; they are simply attempting to enforce their right to prevent Rutland from working for a direct competitor.

16. Texas

Texas courts have likewise recognized that restrictive covenants can be enforced by a subsequent employer. In *Thames v. Rotary Engineering Company*, Alonzo Thames agreed not to compete with Rotary Engineering Company for a period of five years after the termination of his employment. 315 S.W.2d 589, 590 (Tex.Civ.App. 1958). The Rotary Engineering Company partnership was dissolved and reformed several times, and all its assets were transferred to a corporation in 1955. *Id.* at 591. The "noncompetitive agreements were transferred into and inherited by each succeeding partnership, and, eventually, the corporation." *Id.* The court ruled the assignment of a covenant not to compete was valid and upheld the injunction restricting Alonzo Thames from competing with the successor entity. *Id.* at 592. *Wells v. Powers*, also permitted the assignment of a covenant not to compete, holding such contracts to be assignable so long as there is

nothing in the contract indicating any intention by the parties that it should not be assigned. 354 W.W.2d 651, 653-54 (Tex.Civ.App. 1962). There are, of course, no indications in the covenant not to compete at issue in the instant case the parties intended that it should not be assignable. Also, *Williams v. Powell Electrical Manufacturing Company, Inc.*, reinforces the assignability of restrictive covenants. 508 S.W.2d 665 (Tex.Civ.App. 1974).

17. Kansas

In *Safelite Glass Corp. v. Fuller*, the court held a subsequent purchaser can enforce a covenant not to compete. 807 P.2d 677, 681 (Kan.App. 1991) "The general rule appears to be that valid covenants not to compete are assignable and enforceable by a subsequent purchaser of a business as an incident of the business, whether or not there is an express assignment by the seller." *Id.* "The covenant not to compete here does not involve contract rights involving personal and confidential relations to which liabilities are attached... Instead, the covenant in this case protects the good will of the business ..." *Id.* at 683. The covenant at issue in the instant case is not a personal services contract and should be enforceable by Herring Gas.

18. Georgia

The Georgia Supreme Court addressed the assignability of covenants not to compete in *National Linen Service Corp. v. Clower*, 175 S.E. 460 (Ga. 1934). W.A. Clover entered into an employment contract with Atlanta Linen Supply Company which included a covenant not to compete. *Id.* at 461. After the restrictive covenant was assigned to National Linen Service Corporation, it sued to enjoin W.A. Clover from competing with it. *Id.* The court noted this agreement, in particular, was assignable as it contained language

concerning its enforcement by successors and assigns. *Id.* at 463. However, it also stated that, more generally, "[a] restrictive covenant whereby an employee agrees that he will not engage in a competitive business either for himself or in behalf of another after the termination of his contract is, if valid, assignable with the business of his employer ..." *Id.* at 461. The court went on to hold this "was not a suit to enjoin a breach of contract for personal services, and the principle that an injunction will not issue to restrain the breach of such a contract ... [T]he suit was to restrain the defendant from violating his agreement not to engage in the same line of business ... after his employment with the plaintiff had been terminated. There is a broad distinction between a breach of contract to render personal services and a violation of a restrictive covenant ancillary to such contract ..." *Id.* at 465. The reasoning was reinforced by *Gill v. Poe & Brown of Georgia, Inc.*, 524 S.E.2d 328 (Ga.App. 1999). The agreement neither explicitly permitted nor prohibited assignment of the restrictive covenant. *Id.* at 581. The court found "no merit in [the employee]'s claim the non-solicitation agreement could not be assigned without his consent." *Id.* at 582. The instant suit was not brought to enjoin a breach of a personal services contract. Rather, the claim was made to restrain Rutland from violating his agreement not to engage compete with his employer's successor or to call upon its customers.

19. Maryland

In *National Instrument, LLC v. Brathwaite*, the employee argued the covenant not to compete to which he agreed could not be enforced as the entity that seeking to enforce the agreement was the successor of the entity with which he contracted. 2006 WL 2405831, 3 (MD.Cir.Ct. 2006). The court enforced the restrictive covenant, holding the

employee's "covenant not to compete with [the employer] was an asset at the time it merged into [the successor entity]. It prevented a valuable employee from leaving to work for a competitor where the employee could share confidential and proprietary information at the expense of the company (s)he left." *Id.* "A covenant not to compete protects its beneficiary by preventing its competition from simply hiring away key employees to obtain valuable competitive information." *Id.* "If there is no material change in the contract obligations and duties of the employee, there is no reason for the transfer of the rights from one entity or form to another to work an assignment putatively prohibited by the rule against assignment of personal services contracts. *Id.* at 4 (citing *Sun World Corp. v. Pennsysaver, Inc.*, 637 P.2d 1088, 1090-92 (Az.App. 1981)). "A successor employer may enforce a covenant not to compete between its predecessor and an employee if there has been no change in the employee's duties and obligations as a result of the merger ..." *Id.* (citing *Munchak Corp. v. Cunningham*, 457 F.2d 721, 725-26 (4th Cir. 1972); *Hexacomb Corp. v. GTW Enterprises Inc.*, 875 F.Supp. 457, 465 (N.D. Ill. 1993)). Again, Rutland's duties and obligations under Broome Gas and Herring Gas were exactly the same; he would be a route salesman in the same area with the same customers.

A number of other cases demonstrate that other jurisdictions also permit the assignment of restrictive covenants. See *Mail-Well Envelope Co. v. C.P. Saley*, 497 P.2d 364 (Or. 1972); *Pino v. Spanish Broadcasting System of Florida, Inc.*, 564 So.2d 186 (Fla. 1990); *Nenow v. L.C. Cassidy & Son of Florida, Inc.*, 141 So.2d 636 (Fla. 1962); *Louisiana Office Systems, Inc. v. Boudreax*, 298 So.2d 341 (La. 1974); *Bradford & Carson v. Montgomery Furniture Co.*, 92 S.W. 1104 (Tenn. 1906); *Seligman & Latz of Pittsburg v.*

Vernillo, 114 A.2d 672 (Pa. 1955); *Hexacomb Corp. v. GTW Enterprises Inc.*, 875 F.Supp. 457, 465 (N.D. Ill. 1993) *Abalene Pest Control Service, Inc. v. Hall*, 220 A.2d 717 (Vt. 1966).

CONCLUSION

Jimmy Rutland has breached a covenant not 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, such covenants are not personal contracts and may be enforced by a purchaser of the employer with whom the employee entered the agreement. Herring Gas Company, Inc., respectfully requests this Court to 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 11th day of March, 2008.

Respectfully submitted,
Herring Gas Company, Inc.

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CERTIFICATE OF SERVICE

I, Paul H. Kimble, hereby certify that a true and correct copy of the foregoing ***Brief of Appellants*** has been served by U. S. First Class Mail, postage prepaid, on the following:

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This the 11th day of March, 2008.

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