STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-21932

COVENANT EQUIPMENT CORPORATION, D/B/A WHOLESALE FORK LIFTS,

Plaintiff,

vs.

FORKLIFT PRO, INC., BUCKY W. CALDWELL, TIMOTHY SMITH and WILLIAM CARNIE,

Defendants.

DEFENDANT BUCKY W. CALDWELL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Bucky W. Caldwell, ("Caldwell"), by and through counsel, files this Memorandum in support of his Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, which Motion was timely filed contemporaneously with his Answer. In support of his Motion, Caldwell respectfully shows unto the Court as follows:

INTRODUCTION

Caldwell's Motion to Dismiss is limited to Plaintiff's Sixth Cause of Action in the Complaint, which alleges that Caldwell breached the confidentiality provision (the "Provision") contained in Section 4 of a document captioned "Noncompetition Agreement" (the "Noncompetition Agreement"). The Agreement also contains sections captioned "Non-Competition" (Section 2) and "No Solicitation" (Section 3), both of which expired in 2006 and neither of which Plaintiff alleges were violated.

The Noncompetition Agreement provides that South Carolina substantive law applies. Under South Carolina law, when a confidentiality provision has the effect of a covenant not to

compete, a court must subject it to the same scrutiny as a covenant not to compete. Carolina Chem. Equip. Co., Inc. v. Muckenfuss, 471 S.E.2d 721 (S.C. Ct. App. 1996). In the instant case, both the stated and practical effects of the Provision, which has unlimited duration and geographic scope, are to restrict Caldwell's ability to otherwise lawfully compete with the Plaintiff. Moreover, when held to the same standards as any other covenant not to compete, the Provision is overly broad and unenforceable as a matter of law.

ARGUMENT

The Rule 12(b)(6) Standard

A motion under Rule 12(b)(6) tests the legal sufficiency of a claim. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970). Among other things, a legal insufficiency may be shown by the absence of law to support a claim, or the disclosure of a fact that necessarily defeats a claim. Oberlin Capital, L.P., v. Slavin, 147 N.C. App. 52, 554 S.E.2d 840 (2001).

When ruling on a Rule 12(b)(6) motion, a court is permitted to consider documents that are the subject of a complaint and specifically referred to in a complaint, even if they are presented by the moving party. Id. In this case, while the Noncompetition Agreement is not attached to the Complaint, it is specifically referred to therein and may therefore be considered by the Court. A copy of the Noncompetition Agreement is attached hereto as Exhibit A and is incorporated herein by reference.

As a court considers a motion under Rule 12(b)(6), it must construe the complaint liberally, treating its allegations as true. See, e.g., Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987). In the case *sub judice*, treating all allegations in the Complaint as true, the Plaintiff's Sixth Cause of Action must fail, because the applicable Provision of the Noncompetition Agreement is unenforceable as a matter of law.

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South Carolina Substantive Law Applies

Section 11 of the Noncompetition Agreement provides that the agreement is to be construed in accordance with South Carolina law. As previously noted by this Court, North Carolina will enforce such a provision, and will apply a foreign jurisdiction's substantive law so long as it is not "contrary to a fundamental policy" of North Carolina. Tanglewood Land Co. v. Byrd, 299 N.C. 260, 261 S.E.2d 655 (1980); Cable Tel Servs. v. Overland Contracting, Inc., 154 N.C. App. 639, 643, 574 S.E.2d 31, 34 (2002).

Under South Carolina Law, if a Restriction Has the Effect of a Covenant Not to Compete, It Must be Held to the Same Standards as a Covenant Not to Compete

The South Carolina Court of Appeals has directly addressed the treatment of overly broad confidentiality agreements, which have the effect of restricting competitive employment activities. In Muckenfuss, the Court observed that the confidentiality agreement in question had the practical effect of a covenant not to compete, and therefore interpreted it under the standards applicable to such covenants. Muckenfuss, supra. Because the agreement at issue was unlimited as to time or territory, the Court held that it was unenforceable as a matter of law. Id.

The defendant in Muckenfuss ("Muckenfuss") was a former shareholder of a closely held corporation, Carolina Chemical Equipment Company ("Carolina Chemical"). When Muckenfuss sold his stock back to Carolina Chemical, he executed a document containing a covenant not to compete and a confidentiality agreement. While the covenant not to compete contained specific restrictions as to time and territory, the confidentiality agreement contained no such restrictions. Instead, it was unlimited as to both time and territory.

After the period contained in the covenant not to compete had expired, Muckenfuss began working for a competitor of Carolina Chemical. Carolina Chemical filed suit against

Muckenfuss for (in pertinent part) breach of contract, and claimed that Muckenfuss breached the terms of his confidentiality agreement.

Although the confidentiality agreement at issue was captioned "Covenant Not to Divulge Trade Secrets," it restricted the use of much more than the statutory definition of a "trade secret." Instead, the term "trade secret" was defined to include the following:

> [A]ny knowledge or information concerning any process, product, or customer of [Carolina Chemical] and more generally any knowledge or information concerning any aspect of the business of [Carolina Chemical] which could, if divulged to a direct or indirect competitor, adversely affect the business of [Carolina Chemical], its prospects or competitive position.

Id. at 723.

The Court held that based on the scope of the above restriction, Muckenfuss' competitive employment activities would be restricted. Id. His legitimate efforts to earn a livelihood would be curtailed. Id. Therefore, the Court ruled that the purported confidentiality agreement must be subjected to the same scrutiny as a covenant not to compete. Id.

Examining the above-referenced confidentiality agreement as a covenant not to compete, the Muckenfuss Court noted that it was unlimited as to time and territory, and was "far greater than necessary to protect any legitimate business interest." Id. at 723 (citing other South Carolina cases, including those where overly broad time and territory restrictions were not upheld). The Muckenfuss Court went on to hold that the confidentiality agreement was unenforceable as a matter of law. As such, Carolina Chemical's breach of contract claim against Muckenfuss, as it related to the confidentiality agreement, was dismissed.

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<u>The Instant Confidentiality Provision Should be Construed as a Covenant Not to Compete</u>

As in <u>Muckenfuss</u>, the instant confidentiality Provision has the practical effect of a covenant not to compete. As will be shown below, the Provision is worded so broadly that if enforced, Caldwell's efforts to earn a livelihood would be curtailed in perpetuity.

First, the scope of information sought to be restricted under the Provision is extremely broad. The Provision attempts in pertinent part to restrict "non-public," "confidential," and "proprietary" information relating to the "Business." The term "Business" is broadly defined twice in the Noncompetition Agreement as follows:

> [T]he business of the wholesale sale, service and maintenance of used forklifts and related equipment, including, without limitation, battery packs, forks, accessories, and other parts and replacement parts, and all related activities.

"Business" is not limited to the specific business of the Plaintiff or Wholesale Fork Lifts, Inc. (Caldwell's business, which was selling assets to Plaintiff). By its own terms, it encompasses "the wholesale sale… of used forklifts and related equipment… and all related activities." It is manifestly broader than necessary to protect any legitimate interest of the Plaintiff, and passes into the realm of a restrictive covenant. Additionally, the only examples of "non-public," "confidential," and "proprietary" information that are set forth in the Noncompetition Agreement are "contacts with customers" and "know-how."

The above terms are extraordinarily broad. They subsume the general skills, knowledge, and expertise acquired by Caldwell from his years in the wholesale forklift industry. For example, Caldwell's "know-how" would include his many years of experience in evaluating and pricing forklifts for purchase and sale.

Second, the Provision restrictions encompassing the above terms are also exceptionally broad. In pertinent part, the Provision seeks to restrict Caldwell from "directly or indirectly…

disclos[ing] or furnish[ing] any non-public, proprietary or confidential information obtained from or relating to the Business, [Wholesale Fork Lifts, Inc.] or the [Plaintiff]...." Applying the reasoning set forth in Muckenfuss, the practical effect of the Provision, if enforced, would be to prevent Caldwell from using the skills, knowledge, and expertise acquired from his experience to continue to earn a living in the wholesale forklift industry, even after the "non-competition" and "no solicitation" provisions in the Noncompetition Agreement had long since expired.

The recitations in the Noncompetition Agreement (the "Recitations," set forth in the section of the Noncompetition Agreement captioned "Background Statement:") confirm that the purpose of the Provision was to further restrict Caldwell's ability to compete with the Plaintiff, over and above the terms of the "non-competition" and "no solicitation" provisions therein. The second paragraph of the Recitations states that Caldwell is "capable of utilizing such information, know-how and contacts to compete with [Plaintiff]...." The subsequent paragraph states that one of the purposes of the agreement was to make certain that Caldwell "do[es] not use such non-public, confidential and proprietary information, contacts and [Caldwell's] know-how to compete with [Plaintiff]...."

As in Muckenfuss, the Provision "basically has the effect of a covenant not to compete." Id. at 723. Moreover, the attempt to preclude "contacts with customers" as part of the perpetual and worldwide restrictions in the Provision is further indication that its practical effect is to restrict competition. Therefore, as mandated by the Muckenfuss Court, this Court should treat the Provision as a covenant not to compete, and subject it to the corresponding level of scrutiny.

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As a Covenant Not to Compete, the Instant Provision is Unenforceable as a Matter of Law

In addition to being unlimited as to geographic scope, the Provision is of unlimited duration. Under South Carolina law, such a restrictive covenant not to compete is unenforceable as a matter of law. See, e.g., Id., Sermons v. Caine & Estes Ins. Agency, Inc., 273 S.E.2d 338 (S.C. 1980).

From a public policy standpoint, this Court has previously noted that covenants not to compete are generally disfavored in both North and South Carolina, and the requirements for enforcement are similar in both States. Compare, e.g., Rental Unif. Serv., Inc. v. Dudley, 301 S.E.2d 142 (S.C. 1983), and Stringer v. Herron, 424 S.E.2d 547 (S.C. Ct. App. 1992), with United Lab, Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988). North Carolina has similar requirements that covenants not to compete be reasonable as to both territory[1] and time[2], and such an agreement would likewise be unenforceable under this state's substantive law.

Even assuming *arguendo* that the Provision was otherwise enforceable with respect to time and territory, based on the above definitions, Caldwell would be required to "erase from his mind all of the general skills, knowledge and expertise acquired through his experience" if he wanted to continue to do the same type of work in the wholesale forklift industry. Id. (citing ILG Indus. v. Scott, 273 N.E.2d 393, 396 (Ill. 1971)) Moreover, as broadly as the term "Business" is defined, Caldwell would also be prevented from applying his "know-how" or "contacts with customers" to work in "related activities" that did not even directly compete with the activities of the Plaintiff. On this additional basis alone, the Provision would be unenforceable under South Carolina law. See, e.g., Faces Boutique, Ltd. v. Gibbs, 455 S.E.2d 707 (S.C. Ct. App. 1995)

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[1] See, e.g., Prof'l Liab. Consultants v. Todd, 345 N.C. 176, 478 S.E.2d 201 (1996) (holding that a covenant with an undefined geographic scope was unenforceable); see also Eng'g Assoc., Inc. v. Pankow, 268 N.C. 137, 150 S.E.2d 56 (1966).

[2] See, e.g., Pankow, supra (holding that only extreme conditions would support a five-year covenant not to compete).

(holding that a covenant not to compete was overly broad where it restricted an individual from working for a competitor in a different capacity)

CONCLUSION

Among other things, the terms and restrictions contained in the Provision seek to restrict Caldwell's application of his "know-how," "contacts with customers," and other information related to the wholesale forklift business in general, and have the practical effect of a covenant not to compete. Applying South Carolina law to the Provision, the Muckenfuss decision mandates that the Provision be subjected to the same scrutiny and standards as a covenant not to compete. For the foregoing reasons, including the fact that the Provision is unlimited as to both time and geographic scope, such a covenant not to compete is invalid and unenforceable as a matter of law.

As such, the Plaintiff's Sixth Cause of Action against Caldwell for breach of contract is ripe for dismissal under Rule 12(b)(6), and Defendant Caldwell respectfully requests that his Motion to Dismiss be granted.

Respectfully submitted,

This the 2nd day of May, 2008.

NEXSEN PRUET, PLLC

By: /s/ C. Grainger Pierce, Jr.
C. Grainger Pierce, Jr., NC Bar No. 27305
201 South Tryon Street, Suite 1200
Charlotte, NC 28202
Telephone: (704) 338-5321
Facsimile: (704) 805-4712
E-mail: gpierce@nexsenpruet.com

CERTIFICATE OF COMPLIANCE

I do hereby certify that the foregoing **DEFENDANT BUCKY W. CALDWELL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** complies with Rule 15.8 of the General Rules of Practice for the North Carolina Business Court.

This the 2nd day of May, 2008.

NEXSEN PRUET, PLLC

By: /s/ C. Grainger Pierce, Jr.
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201 South Tryon Street, Suite 1200
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E-mail: gpierce@nexsenpruet.com

CERTIFICATE OF SERVICE

I do hereby certify that service of the foregoing **DEFENDANT BUCKY W. CALDWELL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was this date served on the parties and counsel of record by electronically filing with the Business Court and was also served on the parties and counsel of record by electronic mail, as previously agreed upon by the parties, to the following:

Rex Morgan
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This the 2nd day of May, 2008.

NEXSEN PRUET, PLLC

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

NONCOMPETITION AGREEMENT

THIS NONCOMPETITION AGREEMENT (this "Agreement") is entered into this 3rd day of June, 2004, by and between COVENANT EQUIPMENT CORPORATION, a South Carolina corporation with its principal place of business in York County, South Carolina (the "Purchaser"), WHOLESALE FORK LIFTS, INC., a North Carolina corporation (the "Seller"), and BUCKY W. CALDWELL (the "Selling Shareholder") and his spouse, JANET H. CALDWELL, citizens and residents of Mecklenburg County, North Carolina. The Seller, the Selling Shareholder, and Janet H. Caldwell are referred to herein, jointly and severally, as the "Sellers."

Background Statement:

The Seller has been engaged in the engaged in the business of the wholesale sale, service and maintenance of used forklifts and related equipment. The Selling Shareholder and Janet H. Caldwell (collectively, the "Caldwells") are all of the shareholders, the managing directors and officers, and key employees of the Seller. Simultaneously with the execution of this Agreement, the Purchaser and the Sellers entered into an Asset Purchase Agreement (the "Asset Purchase Agreement"), whereby the Purchaser agreed to acquire substantially all of the assets of the Seller. As part of the consideration for the purchase of said assets pursuant to the Asset Purchase Agreement, the Purchaser executed and delivered to the Seller a Promissory Note dated June 3, 2004, in the principal amount of $130,000 (the "$130,000 Note"), and a Promissory Note dated June 3, 2004, in the principal amount of $90,000 (the "$90,000 Note"). The $130,000 Note and the $90,000 Note are referred to herein together as the "WFLI Promissory Notes."

The parties to this Agreement recognize that the Sellers have contributed greatly to the success of the Business and have created much personal goodwill with the customers of the Business. Further, the Sellers have had complete access to all non-public, confidential and proprietary information relating to the Seller and the Business, including, without limitation, contacts with customers. The Sellers are capable of utilizing such information, know-how and contacts to compete with the Purchaser and, as a result, would cause substantial and severe damage to the Purchaser and the Business if the Sellers, or any of them, engaged in competitive activities. The Purchaser has purchased the assets of the Seller based upon the Sellers' representations that none of them will compete with the Purchaser, and if the Sellers had not agreed to refrain from competing with the Purchaser, the Purchaser would not have purchased the assets of the Seller.

Therefore, the parties hereto are entering into this Agreement for the purposes of preserving the proprietary rights, going business value and goodwill of the Business by making certain that during the Non-Compete Period (hereinafter defined) and in the Restricted Territory (hereinafter defined) the Sellers do not compete with the Purchaser and the Business, and Sellers do not use such non-public, confidential and proprietary information, contacts and the Sellers' know-how to compete with the Purchaser and the Business. For this Agreement, the term the

EXHIBIT
A

"Business" shall be defined as follows: "the business of the wholesale sale, service and maintenance of used forklifts and related equipment, including, without limitation, battery packs, forks, accessories, and other parts and replacement parts, and all related activities."

Recognizing that the Caldwells control the Seller, the Purchaser has executed and delivered to the Caldwells a third Promissory Note dated June 3, 2004, in the principal amount of $60,000 (the "$60,000 Note") in consideration for the Caldwells' execution and delivery of this Agreement. The $60,000 Note and the WFLI Notes are referred to herein together as the "Promissory Notes."

The Sellers represent and warrant that each of them has read this Agreement, understands its terms and intends to be bound by this Agreement.

Statement of Agreement

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements contained herein, and in consideration of Purchaser entering into the Asset Purchase Agreement, the parties hereto hereby agree as follows:

1. Definitions. In addition to other terms defined elsewhere in this Agreement, unless the context shall expressly or by necessary implication indicate to the contrary, as used herein, the following terms shall have the following meanings:

(a) "Business" is as defined hereinabove.

(b) "Restricted Territory" means:

(i) York County, South Carolina;

(ii) all counties within or without the State of South Carolina that border York County, South Carolina;

(iii) any geographic territory within 100 miles of the Sellers' current Business location at 3030 Lesslie Highway, Rock Hill, South Carolina; and

(iv) any geographic territory in which a Customer maintains a place of Business.

(c) "Non-Compete Period" means the period commencing on the date of this Agreement and ending two (2) years thereafter.

(d) "Customer" means any customer of the Seller as of the date of this Agreement and any other customers, if any, to whom the Seller has sold goods or services within the twelve (12) months prior to the date of this Agreement, including without limitation the customers listed on Schedule 1 attached hereto and incorporated herein by reference.

2. Non-Competition. During the Non-Compete Period, the Sellers (none of them), any entity owned (in whole or in part) by them or any of them, including, without limitation, the Seller, and any employee, agent or independent contractor controlled by them or any of them, shall not, directly or indirectly, either individually or as an employee, agent, independent contractor, partner, shareholder, member, investor, director, consultant, lender or in any other capacity, participate or engage in, or assist others, including but not limited to employees, customers, agents, independent contractors or salespeople, in participating or engaging in, the Business in the Restricted Territory or with any Customer. The Caldwells may, however, (i) own securities representing five percent (5%) or less ownership in a publicly traded entity which does or may engage in said activities or Business and (ii) engage in the specific and limited business of the retail sale of forklifts and related equipment as an employee or independent contractor of a retail dealer of forklifts and related equipment.

3. No Solicitation. During the Non-Compete Period, the Sellers (none of them), any entity owned (in whole or in part) by them or either of them, including, without limitation, the Seller, and any employee, agent or independent contractor controlled by them or either of them, shall not, directly or indirectly: (i) request, induce or attempt to influence any person who is a Customer, supplier, past supplier or potential supplier of the Seller or Purchaser to curtail, restrict or terminate any Business relationship with the Purchaser or not to enter into or engage in any potential or future Business transaction or relationship with the Purchaser; (ii) solicit for employment or consulting or employ or solicit for an independent contractor arrangement, any person who is an employee or independent contractor of the Purchaser, except where such person's employment or consulting or contractual agreement has been terminated by the Purchaser; and (iii) influence or attempt to influence any employee or independent contractor of the Purchaser to terminate his employment or consulting or contractual agreement.

4. Confidential Information. From and after the date hereof, the Sellers (none of them), any entity owned (in whole or in part) by them or either of them, including, without limitation, the Seller, and any employee, agent or independent contractor controlled by them or either of them, will not, directly or indirectly, except to (a) professionals employed by the Caldwells or the Seller to provide professional services or advice for purposes of and related to the transaction contemplated by the Asset Purchase Agreement and (b) as required by tax returns to be filed by the Caldwells or the Seller: (i) disclose or furnish any non-public, proprietary or confidential information obtained from or relating to the Business, the Seller or the Purchaser to any third party not associated with the Business, the Seller or the Purchaser as an officer, director, shareholder or employee; or (ii) disclose or furnish to any third party, the terms of Purchaser's acquisition of the assets of the Seller. From and after the date hereof, the Sellers (none of them), or any person or entity controlled, directly or indirectly, by them or either of them will not, directly or indirectly, use the names "Wholesale Fork Lifts" or "Wholesale Forklifts," or any similar names or variations thereof.

5. Remedies for Breach; Right of Offset. In the event of a breach of this Agreement by the Sellers, or any of them, Purchaser shall be entitled to all rights and remedies available at law or in equity, including, without limitation, recovery of damages. The Sellers acknowledge and agree that Purchaser's remedies at law for a breach or threatened breach of this Agreement relating to Sections 2, 3 and 4 herein would be inadequate and, in recognition of this fact, in the event of a breach or threatened breach by any Seller of Sections 2, 3 and 4 of this Agreement or any portion thereof, it is agreed that, in addition to its remedies at law, Purchaser shall be entitled and have the right to seek equitable relief in the form of specific performance, temporary restraining order, temporary or permanent injunction, or any other equitable remedy on the grounds that adequate remedies at law are available. Such legal or equitable remedy shall be cumulative and non-exclusive and shall be in addition to any other remedy to which Purchaser may be entitled. In the event the Sellers, or any of them, shall be determined liable to Purchaser under Sections 2, 3 and/or 4 of this Agreement and fail to pay Purchaser the amount of said liability within ten (10) days after demand therefor from Purchaser, Purchaser may offset the amount of said liability against any payment due the Sellers from Purchaser, including, without limitation, the payments due under the terms of the Promissory Notes. The exercise of the right of offset granted herein shall not preclude or operate as a waiver of any other rights or remedies Purchaser may have at law or in equity against the Sellers, and Purchaser may exercise any or all of those rights, one or more times, without having waived any or all other rights it may have. Further, the exercise of the right of offset granted herein is not the Purchaser's exclusive remedy for breach of this Agreement, and neither the right of offset nor the amount allocated to this Agreement by the Asset Purchase Agreement shall in any manner limit or restrict the Purchaser's right or ability to recover damages or the amount of damages recoverable for breach hereof. Provided, however, that the restrictions in Sections 2 and 3 of this Agreement will be unenforceable and the Purchaser will not be entitled to exercise any remedies for breach hereof at any time after the Purchaser is in default of Purchaser's payment obligations under the Promissory Notes, or either of them, for a period of fifteen (15) days beyond any grace and/or applicable notice and cure period.

6. Severability of Covenants. It is expressly understood and agreed that, although the parties hereto consider the restrictions contained in Sections 2, 3 and 4 of this Agreement to be reasonable for the purpose of preserving the proprietary rights, going business value and goodwill of the Business, if a final judicial determination is made by a court having jurisdiction that the time or territory or any other restriction contained in this Agreement is an unenforceable restriction against the Sellers, or any of them, the provisions of such restriction shall not be rendered void but shall be deemed reduced as to duration or scope or otherwise amended to such extent as such court may judicially determine or indicate to be reasonable. Alternatively, if the court referred to above finds that any restriction contained in this Agreement is unenforceable, and such restriction cannot be amended so as to make it enforceable, such finding shall not affect the enforceability of any of the other restrictions contained herein.

7. Assignment. This Agreement is personal to the Sellers and the Sellers may not assign their, his or her respective rights and obligations hereunder. The Purchaser may assign this Agreement without the consent of any Seller.

8. Notices. All notices or other communications given pursuant to this Agreement shall be in writing and shall be deemed to have been duly given when personally delivered or

delivered by a recognized overnight courier service, or telefaxed during the hours of 8:00 a.m. to 5:00 p.m. Eastern time, as follows:

If to the Sellers, or any of them:

Bucky W. Caldwell
Janet H. Caldwell
Wholesale Fork Lifts, Inc.
6427 Scarlet Oak Lane
Charlotte, NC 28226

If to the Purchaser:

Mark A. Sowka
Covenant Equipment Corporation
1123 Baron Road
Waxhaw, NC 28173

9. Amendment. This Agreement may not be amended except by a writing signed by all of the parties hereto.

10. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which together shall constitute one agreement.

11. Governing Law and Jurisdiction. This Agreement and all amendments hereof shall be governed by and construed in accordance with the laws of the State of South Carolina applicable to contracts made and to be performed therein.

12. No Waiver. Failure to insist upon strict compliance with any provision hereof shall not be deemed a waiver of such provision or any other provision hereof.

IN WITNESS WHEREOF, intending to be legally bound, the parties have executed this Noncompetition Agreement under seal the day and year first above written.

SELLERS:

WHOLESALE FORK LIFTS, INC.

By:____________________[SEAL]
Bucky W. Caldwell, President

________________________[SEAL]
Bucky W. Caldwell

________________________[SEAL]
Janet H. Caldwell

PURCHASER:

COVENANT EQUIPMENT CORPORATION

By:____________________ [SEAL]
Mark A. Sowka, President

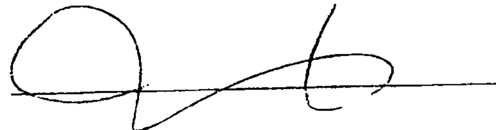
NORTH CAROLINA
MECKLENBURG COUNTY

Corporate Acknowledgement
(N.C.G.S. 47-41.01(c))

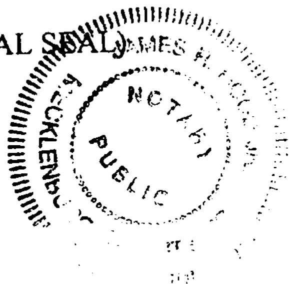
I, **James R. Hood, Jr.**, Notary Public, certify that **Bucky W. Caldwell** personally came before me this day and acknowledged that he is **President** of **Wholesale Fork Lifts, Inc.**, a North Carolina corporation, and that he, as President, being authorized to do so, executed the foregoing **Noncompetition Agreement** on behalf of the corporation.

Witness my hand and official seal, this the 3rd day of **June, 2004.**

My commission expires: **11/11/2005**



(OFFICIAL SEAL)



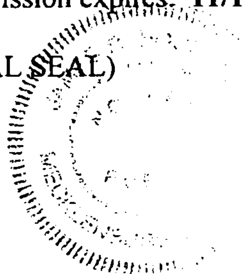
NORTH CAROLINA
MECKLENBURG COUNTY

I, **James R. Hood, Jr.**, Notary Public, certify that **Bucky W. Caldwell and Janet H. Caldwell** personally came before me this day and acknowledged their execution of the foregoing **Noncompetition Agreement**.

Witness my hand and official seal, this the 3rd day of **June, 2004.**

My commission expires: **11/11/2005**

(OFFICIAL SEAL)



NORTH CAROLINA
MECKLENBURG COUNTY

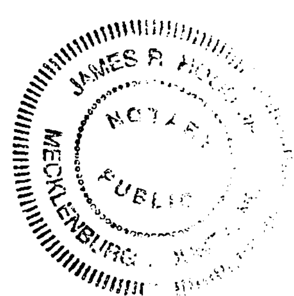
Corporate Acknowledgement
(N.C.G.S. 47-41.01(c))

I, **James R. hood, Jr.**, Notary Public, certify that **Mark A. Sowka** personally came before me this day and acknowledged that he is **President** of **Covenant Equipment Corporation**, a South Carolina corporation, and that he, as President, being authorized to do so, executed the foregoing **Noncompetition Agreement** on behalf of the corporation.

Witness my hand and official seal, this the 3rd day of **June, 2004.**

My commission expires: **11/11/2005**

(OFFICIAL SEAL)



Schedule 1
Customer List

Five (5) page Wholesale Fork Lifts, Inc. Customer Contact List as of May 18, 2004 attached hereto and incorporated herein.