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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

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Appellate Case No. 2022-000368

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Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe .. Respondents,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babcock Borsig Power,

Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries. Defendants,

of which

Cleaver-Brooks, Inc. is the................................................................ Petitioner.

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REPLY BRIEF OF CLEAVER-BROOKS, INC.

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## INTRODUCTION

The Plaintiffs' return brief is notable less for what it says than for what it omits. Cleaver-Brooks's core argument is that it was improperly sanctioned ***after trial*** for producing documents ***during trial*** that were never requested ***before trial***. This core argument has gone unrebutted.

In its opening brief, Cleaver-Brooks challenged the Plaintiffs to identify a single discovery request to which documents regarding a boiler in Illinois would have possibly been responsive prior to Mr. Welker's in-trial testimony. (Opening Br. at 2 & n.1, 24–25, 29–30.) The Plaintiffs' response? ***Silence.***

In its opening brief, Cleaver-Brooks discussed this Court's established standard for evaluating purported discovery violations: by comparing the specific request to the specific response and assessing whether the response was complete. This is hornbook law, yet the trial court wrongly deemed it "irrelevant." (Opening Br. at 28–33.) The Plaintiffs' response? ***Silence.***

In its opening brief, Cleaver-Brooks explained that there was no possible confusion as to whether its pretrial production of records related to a single boiler because its corporate designee testified over and over again at two different depositions that the entire production set related to a single boiler. (Opening Br. at 8–12, 35–38.) The Plaintiffs' response? ***Silence.***

These dispositive points are never addressed in the Plaintiffs' return brief. The closest the Plaintiffs come to any of them is a passing reference to the fact that standard discovery in asbestos cases involves producing materials related to the specific jobsites where a plaintiff worked. (Return Br. at 3–4, 11–12.) But by definition, documents related to a boiler in a facility in Illinois where Mr. Howe never worked and that was never mentioned prior to Mr. Welker's in-trial testimony are beyond the scope of any of the standard asbestos discovery requests, and the Plaintiffs don't really contend otherwise.

Left with neither facts nor law to support the trial court's order, the Plaintiffs devote their entire return brief to reframing the sanctions order as one that Cleaver-Brooks just generally deserves—the same tack they took when opposing certiorari and trying to sidestep any *de novo* review of the record below.

First, they back away from the legal basis actually cited in the sanctions order. Now, the Plaintiffs argue that the Court should consider sanctioning Cleaver-Brooks under Rule 11 and the Court's "inherent equitable powers" instead of Rule 37, and they suggest that the Court should look for "any grounds appearing in the Record of Appeal [sic]" to sustain the sanctions order. (Return Br. at 20–21.) This is a nonstarter, as there is no rule or equitable principle that would allow Cleaver-Brooks to be sanctioned for not producing unrequested, irrelevant documents.

Next, the Plaintiffs pivot from the trial court's stated "factual" basis for the sanction and now complain that Cleaver-Brooks should be generally sanctioned for discovery below. They throw around charged rhetoric—not evidence—to support their argument. For instance, three times they accuse Cleaver-Brooks of engaging in a "pattern of discovery obstruction." (*Id.* at 1, 3, 29.) They twice accuse Cleaver-Brooks of "abuse of the discovery process." (*Id.* at 6, 34.) They even repeat the phrase "untimely, incomplete, misleading, and false" seven times to describe Cleaver-Brooks's production of documents related to its single boiler at Bowater. (*Id.* at 2, 14 (twice), 18 (twice), 20, 34.) And they misstate the record at every turn when making these arguments.

It a telltale sign that the circuit court's order is in error when a respondent begs this Court to find any reason to sustain it other than the one given by the trial court itself. But the record does not come close to supporting any of the Plaintiffs' hyperbole or their argument as a whole. The sanctions order should be vacated accordingly.

# ARGUMENT

## I. The record speaks for itself, and it directly rebuts each of the Plaintiffs' attempts to misconstrue what occurred below.

As reiterated throughout Cleaver-Brooks's opening brief and confirmed in the Plaintiffs' return, this Court reviews the record in the case *de novo* and finds the facts for itself. S.C. Const. art. V, § 5; *Father v. S.C. DSS*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003) ("So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts." (citing S.C. Const. art. V, § 5)).

Despite acknowledging the *de novo* standard of review in their brief (Return Br. at 13), the Plaintiffs both embrace and reject the trial court's order. First, they repeatedly ask the Court to blindly give the trial court deference. (*E.g.*, *id.* at 14–18.) There are at least three problems with this argument.

First, the South Carolina Constitution requires otherwise. S.C. Const. art. V, § 5. Second, the only "deference" that could possibly be shown during a *de novo* review is with respect to evaluating witness credibility, which is not at issue here because there was never any live testimony taken regarding the sanctions issue. *See Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) ("However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses."). Third, there is no way this Court can defer to the trial court's findings when those findings are flatly contradicted by the actual record, which is true even under an abuse-of-discretion standard. *See Father*, 353 S.C. at 261, 578 S.E.2d at 14 ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.").

The Plaintiffs are therefore forced to retreat from their initial defense of the trial court's order and pivot to arguing that there must be something, somewhere in the record that could justify a sanction. They vastly distort the record in order to create the illusion that Cleaver-Brooks must have done something wrong below. But the actual record does not support sanctions of any kind.

**Size of Cleaver-Brooks's Production.** Cleaver-Brooks begins its reply with an easy example of how the Plaintiffs have habitually misstated the record. Cleaver-Brooks produced a set of sales records, start-up records, and engineering drawings and specifications for the single boiler it shipped to Bowater. That set was 61 pages long, and the Plaintiffs themselves introduced the entire set as their own Exhibit 55 at trial. (R. pp. 678–738.) The Plaintiffs' counsel even confirmed this exact page count in depositions. (*See* R. p. 1806, at 160:16–18 (confirming "that there were documents produced, about 61 in total number, related to the Bowater paper facility").)

Yet, as explained in Footnote 8 of Cleaver-Brooks's opening brief (and in Footnote 1 of Cleaver-Brooks's reply in support of certiorari review), the Plaintiffs have attempted to bolster their narrative that Cleaver-Brooks was somehow derelict in discovery by saying over and over in their appellate filings that Cleaver-Brooks produced only 25 pages of materials regarding the boiler at Bowater. They have done so yet again in their return brief on Pages 4, 7, 8, 9, 10, 11, 12, 14, 15, 16, 20, 25, 27, 28, and 30.

This is inexplicable. The set of materials is at Pages 678 through 738 of the record. It is 61 pages long. The Plaintiffs themselves introduced the entire set as an exhibit at trial. Cleaver-Brooks does not know why the Plaintiffs insist on repeatedly misstating this indisputable fact.

* * * * *

**Source of Typographical Error.** The Plaintiffs first revealed their "two boilers" theory during their in-trial questioning of Mr. Welker—a third-party witness called by the Plaintiffs—

regarding a typographical error within Cleaver-Brooks's production set. But there is no dispute that the production set contained sales records, start-up records, and engineering drawings and specifications for only one boiler. (R. pp. 678–738.) There is also no dispute that John Tornetta, Cleaver-Brooks's Rule 30(b)(6) designee, testified throughout his depositions that those materials all related to the same boiler. (*See* Opening Br. at 5–6, 8–12, 35–38 (cataloguing numerous instances during those depositions where Mr. Tornetta confirmed all the records produced related to "the same 15-pound steam boiler," a point that the Plaintiffs have never rebutted or even acknowledged).)

Nevertheless, the Plaintiffs attempt to justify their misguided "two boilers" theory before this Court by highlighting the typographical error and then arguing that Cleaver-Brooks is "misleading" the Court regarding the source of the error. (Return Br. at 4–5, 16.) As they put it: "This statement [that the typographical error appears in third-party records] is misleading in two ways, as the records at issue 1) include handwritten references to O-18344 (R 1205, 1208), and 2) appear on Cleaver-Brooks documents (R. 1203, 1205, 1208)." (*Id.* at 16.)

The Court should not credit this argument at all. For one, the source of the error makes no difference; everyone—the Plaintiffs, Cleaver-Brooks, and the trial judge—agreed through all pretrial proceedings that this case was about the location of a single boiler on the Bowater campus, and Mr. Tornetta testified repeatedly that all of the materials produced in advance of trial related to that boiler. (Opening Br. at "Statement of the Case" §§ I–III.) How a typographical error came into being does not change these facts.

Its irrelevance notwithstanding, the Plaintiffs are wrong about the source of the typographical error. The record shows that the error appears on two "field reports" created by an engineer named Robert M. Tiner—an employee of Applied Engineering Company out of

Orangeburg, South Carolina. Those field reports were created on February 10 and 11, 1958, and they are found at Pages 1205 through 1210 (and 684 through 689) of the record.

These are the two "handwritten" instances where the Unit Number O-18344 appears. In their return brief, the Plaintiffs suggest several times that the handwritten number was done by someone at Cleaver-Brooks, and that this is somehow proof that Cleaver-Brooks acknowledged sending a second boiler to Bowater. (Return Br. at 4–5, 16, 28.) But they know that is not true, because during the depositions of Cleaver-Brooks, the Plaintiffs specifically confirmed that the handwriting on these field reports was Mr. Tiner's, not that of a Cleaver-Brooks employee:

> Q: Okay. And so these notes that we're looking at at BPM 9, they are likely written by Mr. Tiner, correct?
>
> A: It looks that way, and that was—in my experience in looking at these, those are—that's a sheet that's usually used for any type of narrative report someday decides they want to document on a site.

(R. p. 1781, at 59:13–18.)

Applied Engineering attached Mr. Tiner's two field reports to an invoice to Cleaver-Brooks, and Applied Engineering appears to have copied Mr. Tiner's mistaken unit number on its invoice. (*See* R. pp. 683, 1204 (invoice from Applied Engineering Company to Cleaver-Brooks, with the narrative: "Starting service by our Engineer, R.M. Tiner on Cleaver-Brooks Boiler Model P723-30S; Unit #0-18344 on February 10 & 11, 1958 located at Carolina Bowaters Corp. in Catawba, S.C.").) The Cleaver-Brooks accounting department then picked up that same typographical error when processing the Applied Engineering invoice. (R. pp. 682, 1203.)

That is the sum total of the typographical error's appearances in the record. Cleaver-Brooks was not the source of the error, and its back-office personnel apparently copied that same error from materials that a local engineering firm attached to an invoice.

And this is exactly what Mr. Tornetta explained to the jury when questioned by the Plaintiffs' counsel at trial about the error:

> Q: It's not just that that number [O-1844] is referenced, it's referenced from different people in different contexts at different times, true?
>
> A: It was referenced initially by a Mister I believe it's Tiner who did the start-up, which then in my mind at least carried through to the invoice which is on BPM six, because they would have used his start-up report to create that invoice and then actually that invoice carried over to our remittance request, which is what they used to create the remittance request. So to me it seemed a little bit like the pass-it-down-the-lane type thing where one person said it wrong and then it kept being said wrong, that's the way I interpret it. But once I looked at the records for 18344 and saw where it was, it was very clear in my mind that this was a typographical error.

(R. pp. 338–39, at 688:12–689:1.)

Had the Plaintiffs inquired about the typographical error at all in discovery—a complete failure that they explain away as protecting their counsel's "mental impressions," an argument that in no way frees them from the consequences of their decision to never inquire about the error prior to in-court questioning of a witness (Return Br. at 26)—they would have known about the error's origin prior to questioning Mr. Tornetta about it with the jury watching.

Accordingly, to the extent the Court believes that the source of the typographical error matters—it doesn't—it should not credit the Plaintiffs' story that Cleaver-Brooks somehow handwrote the wrong unit number on its own records and created the supposed confusion that prompted the Plaintiffs to present their "two boilers" theory to the jury. It's just not true.[1]

* * * * *

---

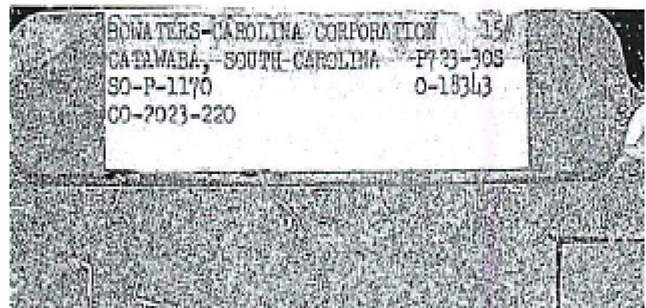
[1] The Plaintiffs presented this theory to the jury despite being told directly, under oath, during multiple depositions that the records all related to a single boiler. The Plaintiffs never responded to this indisputable and now-undisputed point in their return brief, instead arguing that Cleaver-Brooks is "bringing the legal profession into disrepute" by pointing out the implausibility of their counsels' affidavits. (Return Br. at 34.) The record speaks for itself.

**Irrelevance of an Index Card.** In their return brief, the Plaintiffs also make much ado about Cleaver-Brooks's index card system, which is how the company historically kept track of boilers it manufactured and distributed. In fact, in the Plaintiffs' bullet-point list of ways they believe the record supports their position, they reference an index card five times. (Return Br. at 14–16.) And in their proposed order below, which the circuit court adopted as its own, the Plaintiffs reproduced the index card concerning the boiler that was shipped to Bowater as if it has some independent value in this case that was wrongly withheld in discovery—even though there is no motion to compel its production anywhere in the record. (R. p. 10.) But the index card does not have any independent value, and the Plaintiffs have known that all along.

The index card does nothing more than replicate the data that is on the cover of the file folder containing the records for the boiler Cleaver-Brooks sent to Bowater. Below is a side-by-side comparison of the index card on the left (R. p. 739) and the top of the file folder on the right (R. p. 678, which was the Plaintiffs' trial exhibit 55):

Name BOWATERS-CAROLINA CORPORATION
Street Address
City CATAWABA
State SOUTH CAROLINA

Model Number P-723-30S
Unit Number 0-18343
S. O. Number P-1170


BOWATERS-CAROLINA CORPORATION 15
CATAWABA, SOUTH CAROLINA P723-30S
SO-P-1170 0-18343
CO-2023-220

Just as a card in a library's card catalog system does not contain anything other than information found on the spine of a book, this Cleaver-Brooks index card does not contain any information that was not already found on the cover of the file folder that Cleaver-Brooks produced and that the Plaintiffs themselves put into evidence at trial. Both contain the name of the customer

(Bowaters–Carolina Corporation); the boiler's destination (Catawba, South Carolina); the boiler's model number (P-723-30S); the boiler's unit number (O-18343); and the sales order number (P-1170). There is not one piece of information contained on the index card that had not already been produced in the case.

And, once again, the Plaintiffs know that their argument is directly contrary to the record. Mr. Tornetta explained all of this to the Plaintiffs' counsel during his deposition. In response to specific questions, Mr. Tornetta described what each data point on the file folder meant:

> Q: Okay. I want you to start with the very first page, BPM000001 [the cover of the file folder].
>
> A: Okay.
>
> Q: And it indicates Bowater's Carolina Corporation; is that correct?
>
> A: Yes.
>
> Q: And right beside it it says 15 pounds. What does that 15 pounds mean?
>
> A: That's the abbreviation that's normally used to show the maximum working pressure of the boiler is 15 pounds per square inch. So it would be a 15 psi boiler.
>
> Q: Okay. The next line is Catawba, South Carolina; is that correct?
>
> A: Correct.
>
> Q: And then it has P723-30S. Is that the model number?
>
> A: Yes.
>
> Q: And what other information is contained on page 1?
>
> A: The next line on that label you've been reading off of is I believe what was the sales order number, which is the SO-P-1170. And then on that same line on the right-hand side is the O-18343 which is the unit number we talked about before. And then I believe the next line is the—looks like CO or OO-2023-220, that looks to be the purchase order number. If you look back at BPM19, the 2023-220 is the same

> number as the purchase order number on the Crane Co. document for purchasing the boiler.

(R. pp. 1775–76, at 49:8–50:10.) When the Plaintiffs' counsel asked why Cleaver-Brooks had not produced the index card for this boiler, Mr. Tornetta explained that the index card "doesn't add anything to the information" that he had just detailed from the file folder. (R. p. 1776, at 50:11–20.) Or, as he put it during his second deposition: "It's our version of the Dewey decimal system." (R. p. 1818, at 172:23–24.)

The suggestion that this index card could have possibly added new information or changed anything about the case below is untrue. The Court should reject the Plaintiffs' repeated insinuation to the contrary. *See, e.g.*, *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

* * * * *

**No Prior Adverse Discovery Rulings.** The Plaintiffs do not limit their misstatements of the record to the specific facts rebutted above. They also try to create a general sense that Cleaver-Brooks did not honor its discovery obligations throughout the litigation. (*See generally* Return Br. at 3–7 (arguing that "[t]he record establishes Cleaver-Brooks engaged in a pattern of discovery obstruction that continued even after the trial court's warning that sanctions would result from this misconduct").)

As before, this simply is not true. The details of the actual record again reveal the impropriety of the Plaintiffs' argument to this Court.

The first motion filed regarding discovery in this case was actually filed by Cleaver-Brooks. On January 18, 2018, Cleaver-Brooks moved for a protective order seeking the trial court's assistance in scheduling its Rule 30(b)(6) deposition, as the Plaintiffs were apparently

pushing for the deposition to take place on a date on which "Cleaver-Brooks does not have a 30(b)(6) designee available." (R. p. 871.) In that motion, Cleaver-Brooks documented that it had already produced "a collection of documents regarding its shipment of ***a boiler*** to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs' counsel." (R. p. 870 (emphasis added).)

On January 22, 2018, the Plaintiffs filed a motion to compel, but it was not targeted at Cleaver-Brooks specifically. Instead, the Plaintiffs filed a motion against fifteen defendants at once, alleging that the Plaintiffs were dissatisfied with virtually everyone's discovery responses and asking the trial court to declare that the defendants will "have forfeited the right to go forward with summary judgment motions" if they did not immediately capitulate to the Plaintiffs' discovery demands. (R. pp. 874–76.)

Two days later, the trial court heard those discovery motions. The Plaintiffs' counsel began the portion of the hearing involving Cleaver-Brooks by conceding that she "learned in January ***on[e] of the boilers*** sold to Bowater was Cleaver-Brooks," and explained that she was trying to marshal discovery from Cleaver-Brooks about more cases than only the *Howe* case. (R. p. 662, at 57:6–23 (emphasis added).) Cleaver-Brooks's counsel responded:

> Ms. Dean is correct. We have largely resolved the issue. Cleaver-Brooks searched their records and they did determine that they shipped ***a boiler*** to the Bowater Papermill in Catawba, South Carolina. ***It is a very small boiler*** and our information, based on several other things that are not up for dispute today but just for some context, is that ***that boiler*** was never in the powerhouse at Bowater.

(R. p. 623, at 58:4–11 (emphasis added).) The Plaintiffs' counsel then conceded that the parties' discovery issues had been resolved and that they would work together to schedule the Rule 30(b)(6) deposition. (R. pp. 624–26, at 59:23–61:5.)

The Plaintiffs deposed Mr. Tornetta on February 2, 2018, about the boiler Cleaver-Brooks shipped to Bowater. Pages 8 through 10 of Cleaver-Brooks's opening brief contain scores of

excerpts from his testimony about that boiler, including the fact that all materials produced by Cleaver-Brooks related to that same boiler.

In their return brief, the Plaintiffs suggest to this Court that Mr. Tornetta was somehow unprepared to testify about Mr. Howe's case during that deposition, forcing a second deposition. (*See, e.g.*, Return Br. at 5, 15 (twice arguing that Mr. Tornetta's "lack of preparation to discuss the Bowater plant and failure to produce all requested documents" prompted a second deposition).) But, as with the prior points, they know this is not true.

In their final pretrial filing to the trial court, the Plaintiffs expressly confirmed that Mr. Tornetta had properly provided testimony relevant to this case, but they wanted his unfamiliarity with ***other cases*** to serve as the basis for denying summary judgment ***in this case***:

> As mentioned in Plaintiffs' initial responses, when Plaintiffs took the initial deposition of Cleaver Brooks on February 1, 2018 [sic: February 2], the corporate representative was unprepared to discuss any facility where James Sizemore, Wayne Howe, or Lewis Childers had worked ***except Bowater Paper Mill in Rock Hill, South Carolina***, despite the fact that Plaintiffs had provided Cleaver Brooks with a comprehensive list of worksites.

(R. p. 1133 (emphasis added).) While Messrs. Sizemore and Childers may have worked at multiple location, Bowater was Mr. Howe's only relevant jobsite for his claim against Cleaver-Brooks, and the Plaintiffs confirmed to the trial court that Mr. Tornetta was properly prepared to offer deposition testimony regarding the boiler at Bowater.

There is no mention of discovery problems in this case because there were none. Cleaver-Brooks timely produced its materials regarding the boiler it shipped to Bowater, and Mr. Tornetta then fully testified about that boiler. Despite the Plaintiffs' insinuations there were pervasive discovery problems below, the record categorically rejects such an implication. It's just not true.

## II. There was never any mention of the Plaintiffs' "two boilers" theory prior to Mr. Welker's in-trial testimony.

In Section III of its Statement of the Case, Cleaver-Brooks catalogued a landslide of authority demonstrating that "[a]ll of the parties' pretrial activities focused on the location of the single Cleaver-Brooks boiler at Bowater." (Opening Br. at 6–13.) In an apparent effort to rebut this crush of evidence, the Plaintiffs argue in their return brief that on two occasions Cleaver-Brooks conceded it sold multiple boilers to Bowater prior to the Plaintiffs revealing their "two boilers" theory during Mr. Welker's in-trial testimony: during the final pretrial hearing, and again during opening statements. As above, the record does not support this argument in any way.

**March 9th Pretrial Hearing.** On Pages 6 and 7 of their return brief, the Plaintiffs claim that during a March 9, 2018 hearing, "Cleaver-Brooks acknowledged it sold multiple boilers to Bowater." They cite a single question-and-answer exchange between the trial judge and Cleaver-Brooks's counsel to support this statement. (Return Br. at 6–7.)

This is remarkably misleading. At the March 9th hearing, everyone—counsel for the Plaintiffs, counsel for Cleaver-Brooks, and the trial judge herself—acknowledged over and over again that there was only a single Cleaver-Brooks boiler at issue. Below are pages and pages of excerpts from that hearing that demonstrates how misleading the Plaintiffs' argument truly is.

At that hearing, the Plaintiffs were frustrated because Cleaver-Brooks did not have any documents showing where, exactly, on the Bowater campus its boiler had been installed. The argument began with counsel for the Plaintiffs confirming that the parties' factual contention was about the location of a single Cleaver-Brooks boiler:

> Ms. Dean: Sorry, in *Howe* is limited. They told me for the very first time that they have ***a boiler*** sent to Bowater on January 11th. They told us ***it*** was in the power house, but they wanted to limit the documents because he [*i.e.* Mr. Howe] was never inside of ***it***. I then gave them evidence. No, you're wrong

> about that; here's the testimony where he was inside. Then it became the day before I first met you that they said we were wrong. We don't believe ***it*** was in the power house. We believe ***it*** was in the admin building.
>
> * * *
>
> For the first time, six weeks before trial, they said nope. We did sell ***a boiler***. ***It*** had a lot of asbestos in it, but ***it*** was somewhere else. I immediately took them up on the hearing of looking at the documents they produced on the 24th or 25th. It didn't show what they said. It doesn't show ***it's*** in the admin building. I then went to Bowater, the premises location, and asked them if that what was they knew. No. The admin did have a package boiler, but it was sold in '86. ***Their boiler was sold almost thirty years earlier in 1957.*** I then started calling coworkers. Everyone I knew—
>
> The Court: Well, did you find out that ***it*** was in the power house?
>
> Ms. Dean: I did.

(R. pp. 632–33, at 16:8–17:11 (emphasis added).)

From there, the trial court had a lengthy exchange with counsel for Cleaver-Brooks regarding whether it had records showing where on the Bowater campus the boiler was located:

> The Court: . . . What I want to understand from you is what your position is on the very late disclosure or really no—she says you never really made any disclosure that ***this boiler*** was in the power house. That she had to go out and find the coworker, and she finally found somebody named Bogan that could identify ***the Cleaver Brooks boiler*** as being in there even though she says you've got witnesses that said that was known by the corporation some time before this late date.
>
> Mr. Pugh: In short, Ms. Dean is incorrect.
>
> The Court: Well, then what is the facts about—when did you disclose the information?
>
> Mr. Pugh: We disclosed our Bowater documents in accordance with your prior order. The deposition of our 30(b)(6) designee was in accordance with your prior order.
>
> The Court: But give me real specifically. Where did you—

Mr. Pugh: We sold, we sold—

The Court: —disclose, where did you disclose the location of ***one of your boilers*** in the power house at Bowater?

Mr. Pugh: We provided documents to the plaintiff—

The Court: Please don't, please don't tell me—

Ms. O'Neill: Your Honor.

The Court: —a big document dump that—

Mr. Pugh: No, no, no, no.

The Court: —that has a whole bunch—tell me specifically what document it was and when it was provided that said that ***one of your boilers*** was in the—

Mr. Pugh: We provided—

The Court: —power house at Bowater.

Ms. O'Neill: Your Honor, may I respond to that?

The Court: You know, I'm never going to get finished with the thing if I have this kind of thing where people clear their throats by arguing their whole case. I've got a real specific question here about this real specific thing, which is sanctions. So, I want to know exactly when it was disclosed.

Mr. Pugh: We—

Ms. O'Neill: We didn't. That's the answer, Your Honor.

The Court: You did not disclose?

Ms. O'Neill: We did not because we don't have any evidence that ***it*** was in the power house. We don't believe ***it*** was in the power house.

The Court: So, you're going to dispute that—

Ms. O'Neill: Yes, ma'am.

The Court: —despite the evidence that's submitted, you just dispute that any —

Ms. O'Neill: Yes. Yes, ma'am. Bowater—that is correct. We dispute that ***the boiler*** was in the power house. We have the testimony from the—

The Court: So, is the—

Ms. O'Neill: Bowater corporate rep that doesn't identify it. Cleaver Brooks doesn't know where its boilers went.

The Court: Yeah, that's what I want to know. What information did you give that discloses—you apparently know that you sold some boilers to Bowater.

Mr. Pugh: Correct.[2]

The Court: What information did you give them about where they were located?

Mr. Pugh: We didn't—

Ms. O'Neill: We didn't have any. We gave them all the documents we have which says we sent ***a boiler***—we sold ***it*** to Bowater. We don't—

The Court: Well, why wouldn't you just step up to the plate and say that then instead of—

Mr. Pugh: That's—

The Court: —all this kind of we disclosed to them?

Mr. Pugh: That's what I was attempting to get to. I was trying to tell you—

The Court: Well, get to that right away. Don't start it up with all this we disclosed this and we disclosed that. And that implies that—

Mr. Pugh: Right.

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[2] This is the single question and answer that the Plaintiffs cite in support of their argument that "Cleaver-Brooks acknowledged it sold multiple boilers to Bowater." (Return Br. at 6–7.)

The Court: —you had some information and you disclosed it. You didn't disclose anything period about where your boilers were, as I understand it.

Mr. Pugh: We disclosed the document that said we sold ***a boiler*** to Bowater. What Bowater did with ***that boiler***, we don't have that document to disclose. . . .

(R. pp. 636–39, at 20:19–23:25 (emphasis added).)

The trial judge then returned to the Plaintiffs' counsel and summarized the parties' respective positions:

The Court: Well, Ms. Dean, Ms. Dean, this is a dispute between—you don't have anything from anybody on a piece of paper that says where ***it's*** located, nor do they. You have got a witness that you found who says that ***it*** was in the power house, and they've got written material from the boiler inspection people at the state and some other and the testimony of the Bowater's corporate rep which you all are relying on for location in a lot of places where the defendants don't know where ***it*** is that says ***it's*** in the admin building. ***So, it's just a simple factual dispute between the two of y'all as to where this boiler is located.*** They're not disputing ***it*** was sold. They are saying that all their—they don't have any records, they say, that say the location, just a sales thing, and they say ***it's*** in the admin.

(R. p. 641, at 25:6–20 (emphasis added).)

It is disingenuous to suggest that the above exchange somehow suggested in any way that Cleaver-Brooks sent multiple boilers to Bowater. The entire discussion was about whether anyone had records showing where a specific boiler was located on the Bowater campus—the sole factual dispute on which the parties took this case to trial.[3]

[3] It turned out that Bowater itself—which was not a party to this case—had just such a record, and it produced that document on the evening of the first day of trial. (R. pp. 851–55.) That document showed that the Cleaver-Brooks boiler was in the administration building, destroying the Plaintiffs' case. (R. p. 854.) Only after this revelation did the Plaintiffs reveal their "two boilers" theory, and they did so through questioning Mr. Welker, who was a Bowater employee.

* * * * *

**Opening Statements at Trial.** It is equally disingenuous to argue, as the Plaintiffs do, that both parties acknowledged during their opening statements that there may have been multiple Cleaver-Brooks boilers at Bowater. (Return Br. at 7, 16.) To the contrary, both parties confirmed that the Cleaver-Brooks records showed only a single boiler at Bowater.

In their opening statement, the Plaintiffs specifically told the jury that the Cleaver-Brooks records showed a single boiler being shipped to Bowater: "This is an example of ***the Cleaver-Brooks boiler*** that we have a record of from the 1950's, ***it's called a fire tube boiler***." (R. p. 139, at 50:20–22 (emphasis added).) This excerpt is from the very same page of the record that the Plaintiffs cite in in support of their argument, and it makes obvious how misleading the Plaintiffs' argument is on this point.

Nor did Cleaver-Brooks "reference[] multiple boilers sold to Mr. Howe's jobsite in its opening statements," as the Plaintiffs argue. (Return Br. at 7.) The entire passage of Cleaver-Brooks's opening statement on which the Plaintiffs base this argument is reproduced below:

> And you will see some evidence that Cleaver-Brooks boilers[4] sold to the Bowater Paper Mill had some asbestos containing refractory in them, put in at the factory and then sent out. This is a picture of the Bowater Paper Mill, and it's a big facility. And you see those big stacks there, some of those stacks go where field erected boilers are, the big multistoried ones, and that's important because some of these stacks are where the powerhouse is at Bowater, and that's because ***Cleaver-Brooks only sold a package boiler***. They sold ***this boiler*** and we know, we have some documents we believe you will see in evidence, that we sold ***this boiler*** in 1957, built ***it*** in the factory, shipped ***it*** to Bowater. The door gasket, which is—goes around the rear door and the front door, you'll see this—I believe you'll see this exact piece of evidence here on the left, the door gasket was 38 and one quarter inches in diameter. I believe you will hear some evidence that the opening for ***that boiler***, the actual inside was 12 inches. And that's important because some of the questions you're going to be asked in this case is to

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[4] This is the sole word that the Plaintiffs cite multiple times in their brief as "proof" that Cleaver-Brooks was aware of their "two boilers" theory from the outset of trial. (Return Br. at 7, 16.)

> evaluate some evidence about whether or not Mr. Howe was working on ***a Cleaver-Brooks boiler***. Some of the evidence you're going to hear is he was inside the boilers at the powerhouse, and we believe you're going to hear evidence that shows that ***the Cleaver-Brooks boiler*** that got sent to Bowater isn't the kind of boiler that a person can get inside. You will also hear that ***the Cleaver-Brooks boiler that was sold to Bowater in 1957*** did not have any asbestos containing insulation on ***it*** when it was insulated at the factory and covered with metal ***it*** was not asbestos containing insulation.

(R. pp. 170–71, at 81:4–82:7 (emphasis added).)

There is simply no way that the above passage can be construed to suggest that Cleaver-Brooks's counsel told the jury that there may have been more multiple Cleaver-Brooks boilers at Bowater. In fact, both parties confirmed the lone factual dispute for trial involved where on the Bowater campus this boiler was located, and the Court should reject the Plaintiffs' argument to the contrary.

### III. The Plaintiffs cannot shield from scrutiny the only evidence upon which the sanctions order is based by relying on general notions of professionalism for attorneys.

The sanctions order would not exist but for affidavits from Plaintiffs' counsel, in which they claim the Plaintiffs would not have taken this case to trial if they had known there was only a single Cleaver-Brooks boiler at Bowater. (R. p. 1293, Dean Aff. ¶ 14; R. p. 1301, Holder Aff. ¶ 14; R. p. 1430, McVey Aff. ¶ 14.) Cleaver-Brooks has directly challenged those affidavits, both as a matter of law—they were not timely served under Rule 6(d), SCRCP, and should therefore be stricken[5]—and as a matter of fact. Those affidavits are not believable because they are directly contrary to everything in the record, including:

[5] The only response the Plaintiffs muster to this point is a citation to a Court of Appeals decision that did not analyze the actual words of Rule 6(d)—including its requirement that affidavits supporting a motion "shall be served with the motion," which indisputably did not happen here. And, in any event, this Court recently granted certiorari review over the Court of Appeals's summary judgment ruling in that case. *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020), *certiorari granted on summary judgment ruling*, Order in Appellate

- Mr. Tornetta testified repeatedly at his deposition that all of the Cleaver-Brooks records related to "the same 15-pound steam boiler";

- The "two boilers" theory does not appear at any point in the record prior to the Plaintiffs' in-trial questioning of Mr. Welker, and is actually contrary to the dozens of times prior to trial where the parties and the trial judge confirmed that the case was about the location of a single boiler on the Bowater campus;

- If true, the Plaintiffs' affidavits essentially concede that they proceeded with trial after learning that they did not have a good-faith basis for doing so; and

- The Plaintiffs' argument assumes that Cleaver-Brooks knowingly withheld exculpatory evidence. Of course it would have produced materials showing that the "second" boiler was not at Bowater if it had known that was in dispute.

(Opening Br. at 33–40.)

Just as they did when opposing certiorari review, the Plaintiffs do not meet Cleaver-Brooks on the merits of its argument. Instead, they attempt to shield their attorneys' affidavits from scrutiny by claiming any challenge to those affidavits is "inappropriate"; is "contrary to the professional standards which govern attorneys in this State"; is not "dignified"; violates the oath of "fairness, integrity, and civility"; "disparag[es] opposing counsel"; "disparages the judicial process"; and "does nothing more than bring the legal profession into disrepute." (Return Br. at 31–34.)

And just as it was when opposing certiorari review, this posturing is a façade, and a thin one at that. Cleaver-Brooks has never lodged *ad hominem* attacks on opposing counsel at any point in this case; they are fine people and fine lawyers.

But the Court has a constitutional charge to review the record in its entirety and find facts for itself. S.C. Const. art. V, § 5. It also has a constitutional charge to regulate the profession. *Id.* art. V, § 4. Accordingly, it cannot blindly accept sworn statements of lawyers on which the State's

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Case No. 2020-001669 (Aug. 23, 2022). Of course, if the Court applies Rule 6(d) according to its plain language here and strikes the affidavits, it does not need to investigate their merits.

largest-ever discovery sanctions order was based; instead, those statements must be compared against the actual record to see if they withstand scrutiny.

They do not. There is no way the Plaintiffs could have genuinely believed that the Cleaver-Brooks records indicated that it had shipped two boilers to Bowater because Mr. Tornetta testified repeatedly during two depositions that the entire production set related to a single boiler. (*See, e.g.*, R. p. 1755, at 9:13–16; R. p. 1768, at 42:18–20; R. pp. 1769–71, at 43:22–45:9; R. p. 1785, at 67:7–11; R. pp. 1788–91, at 70:9–73:25; 1873–1903, at 227:1–257:21 (inquiring about the sales records, installation records, assembly checklist, manufacturing drawings, engineering drawings, and parts descriptions for the single Cleaver-Brooks boiler sent to Bowater, and confirming throughout "[w]e're still talking about the same 15-pound steam boiler, correct?").

The Plaintiffs never address this irrebuttable point in their return brief. But in light of that deposition testimony—along with the case's unbroken record regarding the parties' sole factual dispute being the location on the Bowater campus of a single boiler—the Plaintiffs cannot plausibly suggest they thought Cleaver-Brooks's production set was really about two boilers all along. Mr. Tornetta specifically told them that wasn't true in advance of trial.

Accordingly, the Court should not only carefully examine those affidavits, it should reject them as the evidentiary basis upon which the sanctions order is based, as the record fully exposes the implausibility of those affidavits. However, assuming *arguendo* the Court accepts the averments of Plaintiffs' counsel and finds it somehow plausible that they truly did think that there were two Cleaver-Brooks boilers at Bowater, the Plaintiffs' choice not to investigate this "fact" in discovery and not to disclose this "fact" in advance of mid-trial questioning of a third-party witness fully inoculates Cleaver-Brooks from any sanctions for producing rebuttal materials regarding a boiler in Illinois in direct response to that questioning.

This Court's precedent is unambiguous. "There are times when a party should be permitted to use witnesses, exhibits, photographs, etc. which have not been disclosed ***before*** trial because of circumstances arising ***after*** the trial has begun, *e.g.*, unexpected testimony"—precisely the situation here. *Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) (emphasis supplied by the *Reed* Court); *see Bramlette v. Charter Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990) (reversing the exclusion of evidence that a defendant attempted to introduce in response to surprise in-trial testimony elicited by the plaintiff).

And the Plaintiffs alone have to bear the consequences of their decision not to reveal their "two boilers" theory at any point in advance of trial. *See, e.g.*, *Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) ("A litigant cannot complain of prejudice by reason of an issue he has placed before the court."); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))) (brackets supplied by this Court).[6]

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[6] If the Plaintiffs truly believed all along there were two boilers at the Bowater site, the only conclusion to be drawn from their litigation conduct is that they sought to pull off an ambush at trial. They knew Cleaver-Brooks stated consistently in discovery—including in response to numerous depositions questions—there was only one boiler at Bowater. If their counsels' affidavits are to be believed, the Plaintiffs' supposed "trial strategy" was to spring a typographical error on Cleaver-Brooks in front of the jury and argue there were two boilers at the site, one of which could have been in the powerhouse where Mr. Howe worked. But having pursued this strategy without investigation—without asking a single question about the mistyped unit number during discovery—and without knowing what Cleaver-Brooks's response would be when the error was brought to its attention, the Plaintiffs' strategy simply failed when Mr. Tornetta explained, quite logically, that the reference to the second unit number was nothing more than a typographical error that originated with a third-party contractor. Because of the Plaintiffs' own litigation tactic not to conduct any discovery regarding that error in advance of trial, records regarding a boiler in Illinois only became relevant when the Plaintiffs sprang their secret theory at trial. Under these circumstances, sanctions were improper as a matter of law.

As such, even if the Court believes the implausible affidavits submitted by the Plaintiffs' counsel, the sanctions order fails as a matter of law. It should be vacated accordingly.

## CONCLUSION

The record is 1971 pages long, and Cleaver-Brooks embraces it in full. There is not a single passage or exchange contained in it that supports the largest monetary discovery sanctions award in the history of South Carolina jurisprudence. At every turn, the record squarely rebuts each of the Plaintiffs' attempts to misconstrue what happened below to somehow justify the sanctions ruling. It's not a close call.

At bottom, Cleaver-Brooks responded to an in-trial line of surprise questions the Plaintiffs posed to a third-party witness, through which they improperly suggested Cleaver-Brooks had shipped a second boiler to Bowater. Cleaver-Brooks located and produced records that exact same day to rebut this bogus theory, which the Plaintiffs were supporting with information they knew was not true.

There is not a single discovery request that should have prompted Cleaver-Brooks to produce those records a moment sooner, and no one—not the trial court, not the Court of Appeals, and not the Plaintiffs themselves—has ever identified anything in the record to the contrary. Cleaver-Brooks cannot be sanctioned for not producing records that were never requested in discovery and that had no relevance to the case prior to the Plaintiffs' in-trial decision to misleadingly suggest to the jury—through a third-party witness—that Cleaver-Brooks had somehow shipped a second boiler to Bowater.

Because it finds no support anywhere in the case's record or in this Court's established law regarding discovery practice, the sanctions order should be vacated, and this case should be ended.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR.

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