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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000780
Case No. 2018-CP-40-04841

Bierer and Associates, Inc., Appellant,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Of whom, Trystar LLC and Travis Pattern & Foundry Inc. are Respondents.

AND

Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.

RECORD ON APPEAL
VOLUME ONE

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ELECTRONICALLY FILED - 2019 Feb 26 4:52 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Bierer and Associates, Inc., Plaintiff, vs. Jan F. Kennerly, Jr., and R&D Utility Products, LLC, Defendants. _____ Jan F. Kennerly, Jr., Defendant/Third-Party Plaintiff, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.	IN THE COURT OF COMMON PLEAS CASE NO.: 2018-CP-40-04841 **ORDER FOR CASE ASSIGNMENT TO THE BUSINESS COURT**

It is hereby ordered that assignment to the Business Court for Richland County is **granted**. It is further ordered that exclusive jurisdiction over this case be assigned to the **Honorable R. Lawton McIntosh** to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

Charleston, South Carolina

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Richland Common Pleas

Case Caption: Bierer And Associates Inc vs Jan F Kennerly Jr , defendant, et al

Case Number: 2018CP4004841

Type: Order/Case Assignment to Business Court Approved

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

ELECTRONICALLY FILED - 2023 Jan 06 10:44 AM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-40-04841

BIERER AND ASSOCIATES INC. ET AL.
PLAINTIFF(S)

JAN F. KENNERLY JR. ET AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

THE COURT RELUCTANTLY GRANTS TRYSTAR AND TRAVIS PATTERNS' MOTIONS FOR SUMMARY JUDGMENT. PLAINTIFF WAS ON INQUIRY NOTICE AS EARLY AS APRIL 9, 2013, BUT CERTAINLY AS OF OCTOBER 14, 2015. NOTWITHSTANDING THE DEFENDANT KENNERLY'S DENIALS, PLAINTIFF'S REASONABLE INVESTIGATION COULD HAVE REVEALED THE COMPLAINED UPON MISCONDUCT BY KENNERLY. THEREFORE, THE COURT FINDS THE STATUTE OF LIMITATIONS BARS ALL OF PLAINTIFF'S LEGAL CAUSES OF ACTION. FURTHERMORE, PLAINTIFF'S EQUITABLE CAUSES OF ACTION FOR ACCOUNTING AND CONSTRUCTIVE TRUST ARE BARRED BY THE DOCTRINE OF LACHES. COUNSEL FOR RESPECTIVE DEFENDANTS TO PREPARE A FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2155	
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Richland Common Pleas

Case Caption: Bierer And Associates Inc , plaintiff, et al vs Jan F Kennerly Jr , defendant, et al

Case Number: 2018CP4004841

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

ELECTRONICALLY FILED - 2023 Feb 06 4:27 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendant. Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **ORDER GRANTING SUMMARY JUDGMENT TO TRAVIS PATTERN & FOUNDRY, INC. AND TRYSTAR LLC**

This matter is before the Court on motions for summary judgment filed pursuant to Rule 59, S.C. R. Civ. P., by Travis Pattern & Foundry, LLC ("Travis Pattern") on September 28, 2022, and Trystar LLC ("Trystar") on October 26, 2022 (the "Moving Defendants"). On December 29, 2022, Bierer and Associates, Inc. ("Plaintiff") filed opposition briefs to both motions. On December 30, 2022, Trystar filed a reply brief in support of its motion. On January 3, 2023, Travis Pattern filed a reply brief in support of its motion.

A hearing took place by WebEx on January 4, 2023. Appearing for Trystar were attorneys Brian Duffy and John Ursu. Attorneys John Beach and Lyndey Bryant appeared for Travis Pattern. Jim Griffin and Maggie Fox appeared as counsel for Plaintiff. Also present at the hearing, but not submitting any argument on behalf of their clients, were Bill Padget, counsel for Defendants Jan F.

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Kennerly, Jr., Danielle Kennerly, EUSA, LLC, and J&D Farms, LLC; Kurt Rozelsky, counsel for Defendant Illinois Tool Works, Inc.; and John Kelchner, counsel for Defendant David Deinek.

The Court concludes Plaintiff was on inquiry notice as early as April 9, 2013, and as late as October 14, 2015, of the existence of potential claims against the Moving Defendants. Plaintiff contends that, following such notice, Defendant Jan Kennerly ("Kennerly") denied or fraudulently concealed the existence of any wrongdoing to Plaintiff. But a reasonable investigation would have revealed to Plaintiff the complained-upon misconduct more than three years before Plaintiff filed claims against the Moving Defendants. Plaintiff failed to conduct a reasonable investigation. Accordingly, South Carolina's three-year statutes of limitation bar all of Plaintiff's legal claims against the Moving Defendants. Likewise, Plaintiff's equitable causes of action against the Moving Defendants are barred by laches.

As more fully set forth below, the Court concludes there are no genuine issues of material fact as to any of Plaintiff's claims against the Moving Defendants. Therefore, pursuant to Rule 56, S.C. R. Civ. P., the Court grants summary judgment in favor of Travis Pattern and Trystar.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, "a court cannot ignore facts unfavorable to [the nonmovant], and it

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must determine whether a verdict for that party would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (quotation omitted).

FINDINGS OF FACT[1]

A. Kennerly's employment with Plaintiff and his known dissociative actions in 2012

Kennerly began working for Plaintiff in 2003. In 2009, Plaintiff tasked Kennerly with finding cable and clamp products from other manufacturers, as part of Plaintiff's initiative to expand services into the utility grounding business. At the direction of Plaintiff's principal owner, Walter Bierer, and in furtherance of the Plaintiff's new grounding assembly initiative, Kennerly identified Travis Pattern as a manufacturer for clamps and Trystar as a manufacturer for cable. Thereafter, Kennerly initiated a business relationship with Travis Pattern and Trystar on Plaintiff's behalf. As early as 2011, Plaintiff purchased products from Travis Pattern and Trystar. Plaintiff continued in its business relationships with Travis Pattern and Trystar for years.

In 2012, Plaintiff was aware that Kennerly was taking steps to purportedly distance himself from his employment with Plaintiff. Plaintiff was aware that Kennerly switched his email and phone from Plaintiff's company accounts to personal accounts. Walter Bierer, as well as his sons, Joe Bierer and Brent Jeffries, both of whom were in management roles with Plaintiff, noticed Kennerly's dissociative activities and, later, characterized them as obvious. Kennerly also reduced the amount of credit card receipts and reports he submitted to Plaintiff from his sales trips. Walter Bierer also noticed Kennerly ceased introducing representatives from other companies to Plaintiff in a work capacity. Plaintiff admits in this litigation that it failed to "regulate outside employment" activities Kennerly was conducting outside of what Kennerly reported himself.

[1] The facts recited herein are not genuinely or materially disputed by the Plaintiff in opposing the Motions for Summary Judgment.

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B. Plaintiff's actual knowledge of the Moving Defendants' alleged wrongdoing

On April 9, 2013, Joe Bierer, on behalf of Plaintiff, wrote to Trystar's Dan Moerke, stating:

> It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and [Kennerly] in Louisville almost two years ago and discussing this very topic.

Later, on December 5, 2013, Joe Bierer wrote an email about Trystar to Kennerly and another of Plaintiff's sales representatives, Defendant Deniek. That communication stated:

> It is obviously too late in this case, but yes, another line was crossed with Trystar.
>
> You can chalk that business (First Energy) up as lost, at least for Bierer anyway. Trystar has a history (two other product lines) of undermining any and all business that Bierer has introduced them to by simply having a product shipped directly to the customers location that Bierer foolishly supplied to them, as in this case. We supposedly put a stop to this sometime ago, until now.
>
> Please inform Bierer if you are ever required to contact one of our vendors.

One of the many indicators of Kennerly's outside activities that Plaintiff was aware of arose approximately a year later. On October 24, 2014, Travis Pattern presented a technical seminar at Pacific Gas and Electric ("PG&E") in New Jersey. The seminar was publicly advertised in the Institute of Electrical Engineers ("IEEE") newsletter in 2014. The brochure provided a biography for the two presenters, Kennerly and Dick Pelletier. Kennerly's biography read, in relevant part, that he "has worked for Bierer Meters as an engineering and operations manager for 15 years and Travis [Pattern] for 2 years."

Walter Bierer conceded in his deposition that he was aware of the IEEE brochure in November 2014.[2] At a weekly company meeting, which took place at that time, Bierer informed

[2] In opposition affidavits, Walter Bierer and Joe Bierer testified they were not aware of the IEEE brochure until 2015 or 2016. The Moving Defendants have pointed out such testimony contradicts sworn testimony at deposition and under cross examination. The Moving Defendants have characterized the affidavits as "sham affidavits" and asked that the Court disregard contradictory language in the affidavits.

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Kennerly that he had seen the IEEE brochure. Kennerly allegedly "laughed off" the notion he worked for Travis Pattern and attempted to convince Plaintiff the biography contained an error. Plaintiff claims it simply accepted Kennerly's explanation and conducted no further investigation into the matter. For instance, Plaintiff did not attempt to contact anyone associated with the IEEE, PG&E, Travis Pattern, or any of the potential participants at the seminar to inquire further.[3]

Another year later, on October 14, 2015, Walter Bierer confronted Kennerly by email regarding Kennerly's lack of reporting, Kennerly's "outside activities," and Kennerly's distancing himself from Plaintiff's business. Bierer wrote:

> I think it is important that you understand my current thoughts. I see your lack of reporting your activities (itinerary and reports) as a symptom of a larger issue which is your lack of accountability to anyone and everyone in our company including me. More and more I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time. For years I have trusted you were always doing the 'right thing' but my trust is waning.
>
> Your outside activities seem almost chaotic –in that almost everything you are currently doing seems to put you at odds with everyone in our company about something. What feedback I do get from the field, you have no respect for any of your fellow employees and are quick to throw anyone of them under the bus as being incompetent and that you, basically and single handily, run Bierer & Associates. While this may enhance your stature, it demeans everyone else in our company including me.
>
> You have purposefully separated yourself from Bierer by maintaining private telephone and e-mail accounts which leads me to wonder what other activities you may be conducting on my dime when you are gone for weeks at a time with no reporting. As I said before, my trust is waning.
>
> I think it may be time for you to begin looking for employment elsewhere unless you can think of some way to resolve and reverse all of the issues mentioned.
>
> You do have many wonderful traits and it may be that you have simply outgrown our company.
>
> Carefully think over what I have said and then I would like to hear your thoughts on this.

Even if the Court accepts Walter Bierer and Joe Bierer's suggestion that they did not learn of the IEEE affidavit until 2015 or 2016, having such actual knowledge at that time still renders their claims against the Moving Defendants barred by the statutes of limitation and laches, as Plaintiff's claims against the Moving Defendants were not filed until April 2021, between five and six years after actual knowledge of the IEEE brochure. In any event, the IEEE brochure is one of several independent reasons for the Court's decision.

[3] Plaintiff had exactly the same information at this point that it would have in 2018 when it actually follow-up and made inquiries.

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In April 2016, Kennerly emailed Bierer stating that while traveling to San Antonio, Texas, for work for Plaintiff, he would be spending some "off" time to meet with industry representatives. Bierer forwarded Kennerly's email to Plaintiff's managers, Joe Bierer, Jamie Bierer, and Brent Jeffries. Jeffries said: "From talking with [another sales representative], [Kennerly] helps many people with other manufacturer's products[.] . . . I never realized that 'off' time was a factor." Walter Bierer and his wife, Billie Bierer, responded: "You should reserve comment on [Kennerly's] activities until you understand what [it] means and how it effects [sic] the future of your company" and "you should not vent – No need. Rick is doing business."

On July 13, 2018, in Plaintiff's termination email to Kennerly, Bierer stated the "obvious" concerns he had with Kennerly's conduct over the years. Bierer wrote, "it has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years." Bierer admitted "no other business. . . would have tolerated this for any period of time."

CONCLUSIONS OF LAW

I. PLAINTIFF'S LEGAL CLAIMS ARE BARRED BY THE STATUTES OF LIMITATION.

Plaintiff's allegations against the Moving Defendants revolve around these Defendants' alleged efforts to work in concert with Kennerly to divert orders from Plaintiff. (*See* Third Am. Compl. at ¶¶ 25-48.) Plaintiff alleged, for example, that Trystar wrongfully used Plaintiff's confidential information to "usurp sales and customers" from Plaintiff, and that Trystar "intentionally interfered with prospective and future contractual and business relationships between [Plaintiff] and its customers." (*Id.*, ¶¶ 98(b), 123.) Plaintiff contends Kennerly surreptitiously worked with Travis Pattern to "open[] a new production division" and serve as its

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sales representative for which Kennerly received a commission from Travis Pattern. (*Id.*, ¶ 45.)

Plaintiff's legal claims against the Moving Defendants—in Counts 3, 5, 7, 9, 14, and 15 of the Third Amended Complaint—are governed by a three-year limitations period. *See* S.C. Ann. § 15-3-530(5) (applying to claims for "injury to the person or rights of another" that are "not arising on contract"); S.C. Ann. § 39-8-70 (applying to trade secret claims).

Under South Carolina law, a statute of limitations begins to run when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016) (citing *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989)); *see also Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405-406, 680 S.E.2d 778, 782 (Ct. App. 2009) ("The limitations period … begins to run when the plaintiff 'knew or by the exercise of reasonable diligence should have known that he had a cause of action.") (quoting S.C. Code Ann. § 15-3-535)).

The limitations period is triggered even if the plaintiff does "not know the exact nature of the wrong" where the plaintiff is nevertheless "aware of their injuries." *Brown v. Pearson*, 483 S.E.2d 477, 482 (S.C. App. 1997); *see also Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) ("[T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer."). In other words, South Carolina courts do not wait until "after a full-blown theory of recovery has developed[.]" *Id.* (quotation omitted). Instead, the exercise of reasonable diligence requires "some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Majstorich v. Gardner*, 361 S.C. 513, 520, 604 S.E.2d 728, 732 (Ct. App. 2004) (quotation omitted).

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Under these authorities, there is no genuine dispute Plaintiff was on inquiry notice of some claim against the Moving Defendants more than three years before Plaintiff filed its claims against them in April 2021. From the undisputed evidence of record, it was "obvious" (using Plaintiff's own words) to Plaintiff that Kennerly began to dissociate himself as early as 2012, the same time that Plaintiff was establishing business arrangements with the Moving Defendants, and others, through Kennerly. Such evidence gave Plaintiff a basis on which later facts, discussed below, should have put Plaintiff on notice of potential claims.

In Plaintiff's April 9, 2013, email to Trystar, Plaintiff acknowledged it had "notic[ed] a drop in cable/jumper sales" and believed "Trystar may possibly be circumventing [Plaintiff's] efforts to establish and support new sales." This email proves Plaintiff was on notice as early as 2013 "that some claim against [Trystar] might exist." *Brown*, 483 S.E.2d at 482. Accordingly, the three-year limitations period against Trystar began running as early as that date. *See, e.g.*, S.C. Stat. Ann. § 15-3-535. Plaintiff had three years to investigate and bring a claim against Trystar but failed to do so until eight years later in April 2021. *See, e.g.*, *Dean v. Ruscon Corp.*, 468 S.E.2d 645, 647 (S.C. 1996) (affirming summary judgment; "fact that the injured party may not comprehend the full extent of the damage is immaterial"); *Dorman*, 500 S.E.2d at 789-90 (same); *Brown*, 483 S.E.2d at 482 (same).

A year later, in October 2014, Plaintiff had actual knowledge of an industry-wide, publicly-available seminar brochure listing Kennerly as "working for . . . Travis [Pattern] for 2 years" (since 2012, when Kennerly's obvious dissociative activities began). Accordingly, by this date, Plaintiff's duty to investigate further compounded as to Trystar and triggered, as to Travis Pattern, Plaintiff's notice of potential claims. However, Plaintiff failed to do anything other than ask Kennerly about

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his affiliation with Travis Pattern. In doing only this, Plaintiff failed to exercise reasonable diligence in investigating its potential claims.

Bierer conceded it was "public knowledge" and "in national newsletters" that Kennerly was "working with Travis and Bierer in 2014." While Plaintiff may not have known *the extent* of Kennerly's relationship and activities with either Trystar or Travis Pattern, the evidence of such relationships, and Plaintiff's knowledge of potential injury, when considered along with all the other factors, would have prompted a reasonable person to look further into Kennerly's activities. The information that Plaintiff's rights had allegedly been invaded was readily available to Plaintiff and Plaintiff failed to diligently consider it. The applicable law does not excuse a plaintiff from its obligation to exercise reasonable diligence because the plaintiff blindly "trusts" the potential defendant, here Kennerly. Plaintiff has pointed the Court to no case authority to the contrary.

Finally, as late as October 14, 2015, Bierer wrote to Kennerly making clear that Plaintiff knew or should have known of a potential claim against the Moving Defendants by this date. Bierer's "thoughts" included concerns of "a larger issue," including "lack of [Kennerly's] accountability to . . . the company," Kennerly's course of "disappear[ing] for weeks at a time," and "outside activities" which "seem to put [Kennerly] at odds with everyone in our company[.]" Bierer acknowledged Kennerly was "purposefully separat[ing] [himself] . . . by maintaining telephone and email accounts[.]" These actions "le[d] [Bierer] to wonder what other activities [Kennerly] may be conducting on [Plaintiff's] dime when [Kennerly] [was] gone for weeks at a time with no reporting." Indeed, Plaintiff's concern on October 14, 2015 about Kennerly's actions were sufficiently serious for Plaintiff to threaten termination, by stating: "I think it may be time for you to begin looking for employment elsewhere unless you can think of some way to resolve and reverse all of the issues mentioned." Based on this email, the Court concludes that a person of

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common knowledge and experience would be on notice that some claim against another party. *See Stokes-Craven Holding Corp.*, 416 S.C. at 526, 787 S.E.2d at 489.

Put another way, Plaintiff knew or should have known of claims against the Moving Defendants by October 14, 2015, at the latest. That Plaintiff's claims against the Moving Defendants were not filed until April 2021 render them time barred.

The Court is not convinced by Plaintiff's counter-arguments. First, Plaintiff alleges it was "not aware" of certain facts until within the limitations period. Whether Plaintiff had actual knowledge of any facts at all, however, is irrelevant. "[T]he discovery rule does not require ***actual notice*** of anything, or knowledge of the full extent of the damage." *Ashley River Indus., Inc. v. Mobil Oil Corp.*, 135 F. Supp. 2d 733, 743 (D.S.C. 2000) (emphasis added); *see also Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (holding that the fact that an injured party may not comprehend the full extent of the damage is immaterial for purposes of the statute of limitations). What matters under South Carolina's discovery rule is whether Plaintiff knew "or by the exercise of reasonable diligence *should have known* that he had a cause of action." S.C. Ann. § 15-3-535 (emphasis added). The Court has concluded that Plaintiff's own emails make plain that Plaintiff should have known of a potential cause of action against the Moving Defendants as early as April 2013 and as late as October 2015.

Next, Plaintiff argues that the facts necessary to trigger the limitations period included whether the Moving Defendants were *paying* Kennerly commissions. However, South Carolina cases do not require that much. As stated in *Christensen v. Mikell*, 476 S.E.2d 692, 694 (1997), "even if [Plaintiff] did not know the exact nature of the wrong or the extent of the damages in [2013], [it] should have known" then that it might have a claim. *Id.* And Plaintiff had already identified losses to the company as potentially having been caused by actions at issue: "noticing a

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drop in cable/jumper sales" and "chalk[ing] that business (First Energy) up as lost." In any event, Joe Bierer testified that the language "working for" (which was the exact language used in the IEEE seminar brochure to describe Kennerly's relationship with Travis Pattern) meant a *paying* relationship. This testimony undermines Plaintiff's assertion it lacked actual or constructive knowledge of a paying relationship between the Moving Defendants and Kennerly sufficient to trigger the limitations period.

Based on the undisputed record, Plaintiff had three years from April 2013, and as late as October 2015, to file its claims against the Moving Defendants. Under either date Plaintiff waited too long, not filing any claims against the Moving Defendants until 2021, well after the limitations period had expired. Summary judgment is appropriate in these circumstances and the Court dismisses all legal claims against the Moving Defendants with prejudice based on the running of the three-year limitations period.

II. THE LIMITATIONS PERIOD WAS NOT TOLLED BY KENNERLY'S ALLEGED FRAUDULENT CONCEALMENT.

Plaintiff argues the doctrine of fraudulent concealment equitably tolled its discovery trigger and limitations period as to the Moving Defendants on all claims. Plaintiff relies upon alleged denials, misrepresentations, and fraudulent concealment by *Kennerly* as the basis for this position. However, Plaintiff did not submit any evidence to create a genuine issue of material fact as to fraudulent concealment by either Trystar or Travis Pattern directly. Moreover, the record shows that alleged Plaintiff had actual knowledge of facts sufficient to trigger an inquiry long before filing suit against Trystar and Travis Pattern and well outside the applicable limitations period.

Under South Carolina law, Plaintiff must show that Trystar and Travis Pattern, themselves, fraudulently concealed from Plaintiff their alleged wrongful conduct in order to survive summary judgment based on the running of the statute of limitations and/or laches. "Whether *the defendant's*

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actions lulled the plaintiff into a false sense of security is usually a question of fact; however, summary judgment is proper if there is no evidence of conduct on *the defendant's* part warranting estoppel." *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 618-19, 698 S.E.2d 879, 883 (Ct. App. 2010) (citing *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)) (emphasis added).

In *Pro Slab, Inc. v. Argos USA, LLC*, No. 2:17-cv-3185-BHH, 2021 WL 7366656 (D.S.C. Mar. 24, 2021), the South Carolina federal court held: "a plaintiff 'must establish that (1) *the party pleading the statute [of limitations]* fraudulently concealed facts which are the basis of a claim; and that (2) the [plaintiff] failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Id.* at *4 (quotation omitted) (emphasis in original). The court concluded: "Because Cook and Baird are the parties pleading the statute of limitations, Plaintiffs must demonstrate *that Cook and Baird* concealed facts that are the basis of a claim. In other words, Plaintiffs must point to affirmative acts of fraudulent concealment *by these Defendants* (and not by any other Defendants), and Plaintiffs must set forth those facts with the degree of particularity required by Federal Rule of Civil Procedure 9(b)." *Id.* (emphasis in original).

Instead of pointing to any actions by Trystar or Travis Pattern constituting alleged fraudulent concealment, Plaintiff argues that *Kennerly* committed fraudulent concealment which should be *imputed* to the Moving Defendants. However, Plaintiff cites no record evidence of any kind that Kennerly's alleged fraudulent concealment was within the scope of any purported "agency relationship" with Trystar or Travis Pattern. Not only did Plaintiff fail to establish record evidence of agency, Plaintiff also failed to adduce evidence to establish the scope of that agency or that Kennerly's conduct fell within it. Nor is there any record evidence submitted by Plaintiff that Trystar or Travis Pattern took actions to cloak Kennerly in any apparent authority as to these

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alleged fraudulent representations.

Under South Carolina law, Plaintiff cannot create an agency relationship between the Moving Defendants and Kennerly based solely on what *Kennerly* did (or did not do). Instead, "apparent authority must be established based upon manifestations by the principal, not the agent." *Shropshire v. Prahalis*, 309 S.C. 70, 71, 419 S.E.2d 829, 829-30 (Ct. App. 1992). Plaintiff has not come forward with any evidence to create a genuine issue of material fact that the Moving Defendants authorized Kennerly to fraudulently conceal their relationships.

Plaintiff's citation to *West v. Serv. Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816 (1951), is inapposite. In *West*, the Court aptly stated:

> It is a general doctrine of law that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent **in the course of his employment**, although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them.

Id. at 202, 66 S.E.2d at 817 (emphasis added). Plaintiff conspicuously omits the emphasized language in its opposition briefs and the Court finds that the absence of any evidence to show Kennerly was acting "in the course of his employment" when making the purported misrepresentations to Plaintiff undercuts Plaintiff's theory.

To the contrary, the record is clear the Moving Defendants considered their respective relationships with Kennerly to be out in the open, to the electrical utility industry and to Plaintiff. For instance, Travis Pattern publicly promoted Kennerly as having "worked for" Travis Pattern for two years. In July 2018 when Plaintiff asked the Moving Defendants, directly, about their relationships with Kennerly, the Moving Defendants readily acknowledged that Kennerly was their respective sales representative.

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Plaintiff's argument that Kennerly's *denial* of the mere existence of such relationships would be in the course and scope of his relationship with the Moving Parties defies common sense. "A motion for a summary judgment speaks in terms of 'no genuine issue as to material facts.' It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Id.* This is especially so where, as here, Plaintiff has identified no record evidence in support of this theory.

Moreover, unreasonable reliance on a misrepresentation does not save a plaintiff from its own failure to exercise reasonable diligence. "[T]he fraudulent concealment doctrine does not toll the statute of limitations where the plaintiff knew or should have known of his claim despite the defendant's misrepresentation or omission." *See Mest v. Cabot Corp.*, 449 F. 3d 502, 516 (3rd Cir. 2006). "Where common sense would lead the plaintiff to question a misrepresentation, the plaintiff cannot reasonably rely on that misrepresentation." *Id.* This was plainly the case here. In 2016, Plaintiff wrote of Kennerly's work during off hours and that such work required follow-up.

For negligent misrepresentation cases, a plaintiff must show evidence that its reliance on a misrepresentation was "*justifiable*." *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (emphasis added). "There is no liability for casual statements, misrepresentations . . . or matters which plaintiff could ascertain on his own in the exercise of due diligence." *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" *McLaughlin v. Williams*, 379 S.C.

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451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (*quoting Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)).

Plaintiff had multiple, independent, reasons to question Kennerly's activities and on which to know of the existence of potential claims against the Moving Defendants from 2012 to 2016. It is undisputed Plaintiff was on notice and had actual knowledge, on multiple separate and distinct occasions, during these years, of Kennerly's potentially conflicting business affiliations with other companies, including the Moving Defendants. "To claim the protection of the discovery rule, the injured party must have been reasonably diligent in discovering whether a cause of action existed." *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001) (citing *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000)). In these circumstances, it was not reasonable or justifiable for Plaintiff to rely on Kennerly's numerous purported misrepresentations and such conduct does not toll the statute of limitations or stay the period for laches as to the Moving Defendants.

III. PLAINTIFF'S EQUITABLE CLAIMS ARE BARRED BY LACHES.

Plaintiff's remaining two claims against the Moving Defendants (Counts 10 and 13)—for an accounting and a constructive trust—are equitable claims that are barred by laches. As explained above, all of Plaintiff's claims at law are barred by the statute of limitations. A party cannot avoid dismissal of claims merely by asserting parallel equitable claims to which the statute of limitations does not strictly apply. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 329, 721 S.E.2d 447, 450–51 (Ct. App. 2011) (collecting cases and stating "the possibility the statute of limitations may have potentially barred the [plaintiff] from obtaining a legal remedy is no ground in itself for allowing the [plaintiff] to seek equitable relief."). In evaluating a laches defense, courts may apply the statute of limitations by analogy. *See Thomerson v. DeVito*, 430 S.C. 246, 251, 844

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S.E.2d 378, 381 (2020) ("the statute of limitations may be applied by analogy in a court of equity").

"In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009). The untimely assertion of amounts purportedly due from one party to the other constitutes such unreasonable delay. *Id.* Here, that is just the situation.

Plaintiff is seeking, via its equitable claims, an accounting of amounts purportedly due to it and/or imposition of a constructive trust over those funds as a consequence of the Moving Defendants' alleged *legal* misconduct.[4] As described above, Plaintiff knew or should have known that the Moving Defendants were involved in alleged wrongful conduct to divert Plaintiff's profits or use Plaintiff's employee (Kennerly) for allegedly competitive sales as early as April 2013 (as to Trystar) and October 2014 (as to Travis Pattern). Plaintiff did not bring its claims against either Trystar or Travis Pattern until April 2021. It is unreasonable for Plaintiff to have delayed for that long. Moreover, the Moving Defendants suffered prejudice from Plaintiff's unreasonable delay, as the Court concludes it would be inequitable to require Defendants to account for monies they received from conduct barred by the statute of limitations or impose a trust over the specific funds at issue which Plaintiff could not recover under any legal theory due to the limitations period. The practical ability for the Court to impose such equitable relief over funds for such a long period of time is necessarily prejudicial to Defendants.

[4] *See* Third Am. Compl. at ¶ 142, as to Accounting ("Bierer is entitled to an equitable accounting of all sums wrongfully received by all Defendants, as a result of the wrongful activities set forth herein."); *id.* at ¶¶ 154; as to Constructive Trust ("[Defendants] wrongfully obtained monies in bad fath as a result of Kennerly's breach of his duties of trust and loyalty and in violation of his fiduciary duty to Bierer, in an amount to be determined at the trial of this case, but including at least the total sum of all profits and/or commissions made by [Defendants] on all sales of products that compete with Bierer products. Bierer is entitled to recover all such monies herein, including the current value of such sums.").

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In opposing summary judgment, Plaintiff raised no additional counterarguments against the Moving Defendants specifically with regard to Plaintiff's claims for a constructive trust or an accounting. It therefore forfeited any such argument. *See, e.g.*, *Cunningham v. Anderson County*, 414 S.C. 298, 303, 778 S.E.2d 884, 886-87 (2015). Regardless, Plaintiff cannot save its case by affixing equitable claims on top of its claims at law. The Moving Defendants are entitled to summary judgment on those claims as well.

CONCLUSION

Plaintiff was on inquiry notice of potential claims against Travis Pattern and Trystar as early as April 2013 and as late as October 2015. Yet, here, Plaintiff failed to file a lawsuit against Travis Pattern or Trystar until April 2021, years after the statutes of limitation expired. Likewise, as explained more fully herein, Plaintiff's equitable claims are barred by laches, as Plaintiff unreasonably delayed its assertion of a known right against the Moving Defendants and the Court concludes that such delay caused prejudice to the Moving Defendants.

Accordingly, for the reasons stated in this order, the Court hereby grants the Motions for Summary Judgment filed by Travis Pattern and Trystar, and, accordingly, Plaintiff's claims against the Moving Defendants are hereby ended, with prejudice.

IT IS SO ORDERED.

_____

Lawton McIntosh, Business Court Judge

_____, South Carolina

January _____, 2023

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Richland Common Pleas

Case Caption: Bierer And Associates Inc , plaintiff, et al vs Jan F Kennerly Jr , defendant, et al

Case Number: 2018CP4004841

Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-40-04841

BIERER AND ASSOCIATES INC. ET AL.
PLAINTIFF(S)

JAN F. KENNERLY JR. ET AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER IS DENIED. MR. JOHN URSU, ESQ. TO PREPARE A FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2155 **Judge Code**	**Date**

ELECTRONICALLY FILED - 2023 Apr 03 2:20 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

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For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Richland Common Pleas

Case Caption:	Bierer And Associates Inc , plaintiff, et al vs Jan F Kennerly Jr , defendant, et al
Case Number:	2018CP4004841
Type:	Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

ELECTRONICALLY FILED - 2023 May 05 2:03 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER**
Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	

This matter is before the Court on Plaintiff Bierer and Associates, Inc.'s ("Plaintiff" or "Bierer") motion to reconsider the Court's February 6, 2023 Order granting summary judgment as to Plaintiff's claims against Travis Pattern & Foundry, Inc. ("Travis") and Trystar, LLC ("Trystar"). Bierer filed the motion to reconsider on February 16, 2023. On February 23, 2023, Travis and Trystar each filed a memorandum in opposition to this motion. On December 30, 2022, Trystar filed a reply brief in support of the motion. A hearing took place on March 30, 2023, at which time the Court heard oral arguments. Attorneys John Beach and Lyndey Bryant appeared for Travis. Appearing for the Trystar were attorneys Brian Duffy and John Ursu. Attorneys Jim Griffin and Maggie Fox appeared

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for Plaintiff. On March 31, 2023, Plaintiff supplemented the record with the slide deck that its counsel presented during the hearing.

The Court entered summary judgment in favor of Defendants because "Plaintiff was on inquiry notice as early as April 9, 2013, and as late as October 14, 2015, of the existence of potential claims against the Moving Defendants." (Feb. 6 Order at 2.) The Court further considered and rejected Plaintiff's claim that the facts underlying its claim were fraudulently concealed, and that therefore the statute of limitations allegedly should not have run until they actually discovered the specifics of the alleged fraud. The Court concluded that "a reasonable investigation would have revealed to Plaintiff the complained-upon misconduct more than three years before Plaintiff filed claims" and that "Plaintiff failed to conduct a reasonable investigation." (*Id.*) As a result, the Court concluded that all of Plaintiff's legal claims are barred by South Carolina's three-year statute of limitations and its equitable claims by laches.

In support of its motion for reconsideration, Plaintiff cites to the affidavits it submitted in response to Trystar's and Travis's motions for summary judgment, which affidavits provide Plaintiff's contentions for why certain emails and other documents did not put it on actual or inquiry notice of its claims. However, these affidavits were previously before the Court, and the Court concludes that it properly held that these affidavits are insufficient to avoid summary judgment. Fundamentally, Plaintiff's argument is not supported under South Carolina law, which asks objectively whether the plaintiff knew or should have known about its injuries. Plaintiff's argument is that it was not subjectively aware of the injuries. But, as the Court previously held, the objective evidence shows that Plaintiff was aware of facts that, at a minimum, put it on inquiry notice of its claims at the latest as of October 2015, and therefore the statute of limitations began to run as of that date. Because Plaintiff's claims were filed more than three years after that date,

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the Court properly granted summary judgment pursuant to S.C. Ann. § 15-3-530(5) and under the doctrine of laches. Accordingly, Plaintiff's motion for reconsideration is denied.

LEGAL STANDARD

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 567 S.E.2d 857, 860 (S.C. 2002). However, "a court cannot ignore facts unfavorable to [the nonmovant], and it must determine whether a verdict for that party would be reasonably possible under the facts." *Bloom v. Ravoira*, 529 S.E.2d 710 (S.C. 2000).

The Court applied this standard in its February 6, 2023 Order granting summary judgment. Pursuant to South Caroline law, Plaintiff now asks the Court to reconsider its decision, as it is permitted to do even if its argument involves "rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22 602 S.E.2d 772, 778-79 (2004). Even so, motions for reconsideration should be granted "sparingly," *Rouse v. Nielson*, 851 F. Supp. 717, 734 (D.C.S. 1994), and only under three specific conditions: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice," *Pacific Ins. Co. v. American Nat'l Fire Assoc.*, 148 F.3d 396, 402 (4th Cir. 1998).[1] Plaintiff's motion does not satisfy these conditions. Plaintiff

[1] Application of Federal Court precedent applying Fed. R. Civ. P. 59(e) is appropriate here because SCRCP 59 is "substantially the Federal Rule." SCRCP, Notes; *see also Elam*, 361 S.C. at 22-23,

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does not identify any intervening change in controlling law nor any new evidence not previously available. Rather, Plaintiff's motion argues that the Court did not properly consider the evidence previously submitted. However, there is no clear error of law or manifest injustice here, where the Court properly considered and rejected the same evidence and arguments Plaintiff raises again in its motion to reconsider.

CONCLUSIONS OF LAW

I. The Court Properly Based Its Decision On The Objective Information Available To Plaintiff When Evaluating The Limitations Period.

South Carolina law is clear that the date on which the limitations period begins to run is measured by the objective evidence showing when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016). Where, as here, the objective evidence shows that such facts and circumstances existed well outside the applicable limitations period, summary judgment is proper. *See, e.g., Brown v. Pearson*,326 S.C. 409, 418-19, 483 S.E.2d 477, 482 (Ct. App. 1997) (granting summary judgment where plaintiffs "became aware of their injuries" even if they "did not know the exact nature of the wrong" outside the limitations period); *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) ("The date on which discovery should have been made is an objective rather than subjective question" and affirming summary judgment based on objective evidence).

In its motion, Plaintiff contends that the Court's summary-judgment Order erroneously did not view all facts in the light most favorable to Plaintiff, as the non-moving party. (Pl. Mot. at 2-3.) But this is incorrect, as the Court's Order was based on the undisputed, objective facts,

602 S.E.2d at 779 (noting that "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical" and applying Federal court precedent to interpreting the rule).

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including relevant emails, demonstrating that the claim accrued outside the limitations period. South Carolina courts hold that it is proper to grant summary judgment based on such objective evidence. *See Graham v. Welch, Roberts and Amburn, LLP*, 404 S.C. 235, 239-40, 743 S.E.2d 860, 863 (Ct. App. 2013) (granting summary judgment based on objective written evidence that would have put "a reasonable person of common knowledge and experience" on notice, despite plaintiff's testimony that its subjective belief was different); *Maher v. TieTex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (reversing jury verdict in favor of a plaintiff where plaintiff was on notice of the objective facts showing that "some right of [the plaintiff's] has been invaded . . . ."). In short, "South Carolina's statute of limitations requires very little to start the clock." *Maher*, 331 S.C. at 380, 500 S.E.2d at 208.[2]

In its memorandum and at the hearing, Plaintiff argued that the 2013, 2014, and 2015 documents at issue did not put it on notice of its claims. Rather, Plaintiff argues that the affidavits of Walter Bierer and Joe Bierer show that these documents only put it on notice of legal competition. But as the Court previously held, these attempts to identify Plaintiff's subjective understanding of those documents cannot overcome the objective fact that those documents, at a minimum, put Plaintiff on notice of the harm underlying its claims.

A. The 2013 emails show objective evidence to start the limitations period.

Plaintiff's Motion for Reconsideration, like its original summary judgment opposition, further argues that emails Joe Bierer sent to Trystar in 2013 show that Plaintiff was upset with

[2] Plaintiff cites *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 679 (2000) in support of its motion. But that case has no bearing here. In *Moriarty*, the South Carolina Supreme Court ruled that "suppressed memory" of childhood sexual abuse could toll the statute of limitations where there is sufficient expert evidence to support such a claim. *Id.* at 333, 534 S.E.2d at 679. There is of course no such claim here, which involves the objective facts about what Plaintiff knew regarding the alleged damage that forms the basis of its claims.

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Trystar's alleged legitimate competition, and thus did not put it on notice of potential claims. (*Compare* Pl. Mot. at 4-6 *with* Pl. Resp. to Trystar S.J. at 10-12.) But what those 2013 emails actually show on their face is that Plaintiff knew that it had "a drop in cable/jumper sales," that "Trystar may possibly be circumventing [Bierer's] efforts to establish and support new sales" and that Trystar was "cross[ing] another line" and "undermining" Bierer's business. (Feb. 6 Order at 4 (quoting April 9, 2013, and December 5, 2013 emails, respectively).) Those diversions of sales are exactly what Plaintiff's claimed damages are based on in this case. And as a result, the Court properly held that the three-year statute of limitations period began to run by those dates. (Feb. 6 Order at 8.)

Plaintiff argues again that it believed at the time that Trystar was engaged in legal competition that is common in the industry, by directly selling to Bierer's customers once it had sufficient information about those customers. But this is not sufficient to create a material question of fact. Whether Bierer believed the notion that there was a legitimate basis for its injury, and not an allegedly actionable one, does not change the fact that Plaintiff was undisputedly on notice of that injury and the potential claim. South Carolina law is clear that a party has three years to investigate and bring a claim once the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996); *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998); *Brown v. Pearson*,326 S.C. 409, 418-19, 483 S.E.2d 477, 482 (Ct. App. 1997).

As a result, Plaintiff's argument that the "most [it] could do to remedy the situation as it understood it at that time was remind Trystar of its indication to Bierer in 2009 that it was not

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interested in selling directly to Bierer customers and to stop [selling directly] for future orders" does not properly address the standards of South Carolina law. (*See* Pl. Mar. 31 Supp. at 5.) Nor does the fact that Trystar did not reply change the Court's conclusion. (*See id.* at 8.) Rather, the test under South Carolina law is whether the plaintiff was on objective notice of the facts of its injury. It undoubtedly was, and the fact that it may have had a mistaken belief about the basis for that injury does not prevent the statute of limitations from running.

B. The 2014 IEEE brochure is another instance of Plaintiff being on notice of objective facts sufficient to start the limitations period.

As the Court previously held, in 2014, Plaintiff became aware of a seminar, which was announced in an Institute of Electrical Engineers ("IEEE") newsletter. (Feb. 6 Order at 4.) That announcement expressly stated that Jan Kennerly had worked for Travis [Pattern] for 2 years." Plaintiff now argues, as it did in opposition to Travis Pattern's motion for summary judgment, that it was entitled to rely on Kennerly's claim, when confronted, that this was a misprint. (Pl. Mot. at 6; Pl. Resp. to Travis Pattern S.J. at 6-8, 14.) Once again, however, South Carolina law imposes an objective test on this evidence, and this brochure plainly put Plaintiff on notice that it should investigate further, particularly given the other information Plaintiff had about Kennerly's alleged misconduct. The issue is not whether Plaintiff exercised "reasonable care" as in a negligence case (*see* Pl. Mar. 31 Supp. at 18), but whether Plaintiff was on notice of facts on which its claim is based. This notice of Kennerly's purported work with Travis was clearly such notice. Court properly held that this evidence also supported summary judgment.

C. Bierer's October 14, 2015 email shows knowledge of facts sufficient to start the limitations period.

Plaintiff also contends that there is an issue of fact regarding Walter Bierer's October 14, 2015 email in which he confronts Jan Kennerly about his "outside activities" and "purposefully

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separat[ing]" himself from the company, based on Bierer's affidavit in which he claims that these were not related to "evidence of a suspicion on his part that Kennerly was providing sales services to Trystar." (Pl. Mot. at 3-4.) This argument is also identical to what Plaintiff raised in opposition to Trystar's summary judgment motion. (Pl. Resp. to Trystar S.J. at 12-13.)

The Court properly rejected this argument. The issue is not what Walter Bierer subjectively understood at the time, but whether the facts as described in that letter were objectively enough to put a "person of common knowledge and experience" on notice of some claim against another party. The Court concludes that it correctly held that this email also supported summary judgment.

Plaintiff's argument that Bierer's affidavit is not a "sham" affidavit is therefore beside the point. Similarly, the fact that Walter Bierer was not given the opportunity to explain what he meant by the email during his deposition is not material. (*See* Pl. Mar. 31 Supp. at 20.) The point is that the email shows that Bierer was objectively on notice of Kennerly's lack of accountability, outside activities, and distancing himself from Plaintiff's business. That objective knowledge was sufficient to start the running of the statute of limitations.

D. Kennerly's actions do not toll the statute of limitations.

Plaintiff also argues, as it had in its original opposition to the summary judgment motions, that Kennerly was an agent of Trystar and/or Travis Pattern and therefore his alleged fraudulent concealment of his conduct can be imputed to them. (Pl. Mot. at 6-8; Pl. Resp. to Trystar S.J. at 4-5, 14-15; Pl. Resp. to Travis Pattern S.J. at 2, 16-17.) Plaintiff must rely on this alleged agency relationship because, as the Court properly found, there are no allegations that either Trystar or Travis Pattern directly concealed any conduct. (Feb. 6 Order at 11-12.)

However, Plaintiff's argument is immaterial. As the Court found, the record shows that "Plaintiff has actual knowledge of facts sufficient to trigger an inquiry long before filing suit

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against Trystar and Travis Pattern and well outside the applicable limitations period." (Feb. 6 Order at 11.) The Court further held that any alleged reliance on Kennerly's concealment would have been unreasonable. (*Id.* at 14-15.) Given Plaintiff's actual knowledge of objective facts that began the limitations period, and its failure to reasonably follow up on them, the alleged concealment does not alter the Court's conclusion.

Notably, Plaintiff did not challenge that ruling in its motion for reconsideration. Instead, it argued that any concealment of Kennerly is relevant because of his purported agency relationship. As the Court held, however, Plaintiff "cites no record evidence of any kind that Kennerly's alleged fraudulent concealment was within the scope of any purported 'agency relationship' with Trystar or Travis Pattern." (Feb. 6 Order at 12.) In its reconsideration motion, Plaintiff still points to no such evidence and instead asserts that Kennerly was a sales representative of Trystar and Travis. But that does not show that he committed any concealment within his alleged agency role. The mere assertion that Kennerly was an agent of Trystar and/or Travis in some capacity is not evidence concealed his efforts on Trystar's or Travis's behalf. Accordingly, Plaintiff gives the Court no basis for reconsidering its prior order.

III. Plaintiff's Remaining "Outstanding Issues" Do Not Require Reconsideration.

Plaintiff provides a bullet-point list of other issues that it contends were raised in Defendants' briefing but not expressly addressed in the Court's order. (Pl. Mot. at 8-9.) None of those issues require reconsideration of the Court's order. Indeed, the issues raised in the list provide further evidence that Plaintiff had notice of its claims outside the limitations period.

The first of Plaintiff's bullets is a contention that it did not have notice as early as 2012 of its potential claims. But the Court did address Plaintiff's awareness that Kennerly "was taking

steps to purportedly distance himself from his employment" in 2012. (Feb. 6 Order at 3.) At a minimum, that was the beginning of the further notice to Plaintiff in 2013 and following.

The remaining bullet points in Plaintiff's list address various other pieces of evidence that existed outside the limitations period, as well as Plaintiff's July 11, 2018 email in which it acknowledged having information about Kennerly's activity for some time. As with the evidence discussed above, all these facts only lend weight to the Court's order. Thus, no reconsideration is required or appropriate.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion for reconsideration. The Court's February 6, 2023 Order granting summary judgment to Trystar and to Travis remains in effect.

_____
Lawton McIntosh, Presiding Judge

May __, 2023
_____, South Carolina

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Richland Common Pleas

Case Caption: Bierer And Associates Inc , plaintiff, et al vs Jan F Kennerly Jr , defendant, et al

Case Number: 2018CP4004841

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., and R&D Utility Products, LLC, Defendants.	Civil Action No.: 2018-CP-40- **SUMMONS** **(NON-JURY)**

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers, at their office, 1230 Main Street, Suite 700, Post Office Drawer 2426, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Val H. Stieglitz
Val H. Stieglitz, S.C. Bar #5356
Emily L. Dobson, S.C. Bar #102689
NEXSEN PRUET, LLC
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Attorneys for Plaintiff, Bierer and Associates, Inc.

September 11, 2018
Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., and R&D Utility Products, LLC, Defendants.	Civil Action No.: 2018-CP-40- **COMPLAINT** **(NON-JURY)**

Plaintiff, Bierer and Associates, Inc. ("Bierer and Associates"), complains against the Defendants Jan F. Kennerly, Jr. ("Kennerly") and R&D Utility Products, LLC ("R&D"), as follows:

PARTIES, JURISDICTION, AND VENUE

1. Bierer and Associates is a corporation organized and existing under and by virtue of the laws of the State of South Carolina, with its principal place of business located in Richland County, South Carolina.

2. Bierer and Associates is informed and believes that:

   (a) Kennerly is a citizen and resident of Lexington County, South Carolina, and a former employee and officer of Bierer and Associates;

   (b) R&D is a limited liability corporation organized under the laws of the State of Michigan, and was established by Kennerly as a vehicle for carrying out certain of the wrongful activities set forth herein. Upon information and belief, Kennerly is an owner, officer, and/or manager of R&D, which entered into contracts performed in whole or in part in South Carolina, and which has substantial contacts in and with South Carolina.

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3. This Court has personal jurisdiction over the parties to this action and has subject matter jurisdiction with respect to all claims stated herein. Venue is proper in this forum.

FACTUAL ALLEGATIONS

4. Bierer and Associates is a family-owned and operated company. Walter Bierer ("Mr. Bierer") founded the company in 1987. Today he runs it, together with his daughter and two sons.

5. Bierer and Associates manufactures and sells high voltage test equipment for the utility industry. The company offers a comprehensive line of voltage detectors, voltmeters, phasing voltmeters, phasing testers, personal grounding assemblies, high voltage jumper assemblies, cabling, and high current ground and jumper testers.

Kennerly's Employment with Bierer and Associates

6. Kennerly is an engineer by education and training. Mr. Bierer first hired him as an engineer in or about 2003. Subsequently, and upon Kennerly's request, Kennerly became Vice President of Engineering and Operations, and later an officer in the company.

7. In 2009, Bierer and Associates separated from a company that had previously handled its marketing, and began marketing its own products. Kennerly requested and assumed responsibility for sales, and became Vice President of National Sales.

8. Kennerly was particularly valuable to Bierer and Associates because, with both sales and engineering skills and experience, he could supply industry-specific insight into Bierer and Associates' products in a way that was most relatable to a wide variety of customers.

9. At a point in time after he became Vice President of National Sales, Kennerly began using his personal cell phone and his personal e-mail account [rickkennerly@gmail.com], for work-related purposes.

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10. Thus, from that point forward, Kennerly received and stored the company's confidential and sensitive business information, and his business communications in general, on his personal devices. His company and business-related e-mails came and went from his personal Gmail account.

11. Kennerly's cell phone and e-mail switch was one of several steps he took to "disassociate" himself from Bierer and Associates in the eyes of competitors and in the utility-manufacturing industry generally, and shield his wrongful activities from scrutiny. For example, Bierer and Associates is informed and believes that, at some point while he was employed by, and an officer of, Bierer and Associates, and without its authorization, Kennerly began presenting himself to customers and others in the industry as, essentially, an independent marketing expert or broker.

12. In March 2015, Kennerly signed an acknowledgement form indicating that he had received and understood a copy of the Bierer and Associates Employee Handbook ("Handbook"). The Handbook contains several sections relevant to this action.

13. The Handbook's "Non-disclosure/Confidential Information" policy provided express notice that Bierer and Associates' confidential information and intellectual property "*may not be released to any outside entity except as required in the normal performance of duties, or as authorized in writing by Ownership*." The policy further stated that:

> *Unauthorized disclosure [of Confidential Information], even if inadvertent, compromises both you and the company and erodes customer confidence. Improper transfer of such material or disclosure of information, whether or not such action infers direct or indirect benefit to the employee, will incur disciplinary action, up to and including termination and legal action.*

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14. The Handbook also provided notice that the company's "Outside Employment" policy required that employees "*immediately disclose outside employment to management*." Only if so disclosed, and absent a "conflict of interest," was outside employment permitted:

> *[A]s long as such employment does not interfere with the performance of your duties at Bierer and Associates,* ***is non-competitive in nature*** *as determined by Bierer and Associates,* ***does not cause any conflict of interest****, loyalty or obligation,* ***is not detrimental or contrary to the image****, integrity, goodwill, business or reputation of Bierer and Associates, and* ***is not under the direct or indirect employ of any Bierer and Associates serviced client****.* (Emphasis added.)

15. The Outside Employment policy also expressly barred the:

> *[U]se of any Bierer and Associates resources, unless granted in writing by ownership, including, but not limited to, computer hardware and software, telephones, facsimile machines, copiers, tools or equipment for [or] in connection with any non-Bierer and Associates work.*

16. This policy also prohibited performing non-Bierer and Associates work on company time or on company premises.

17. Finally, the "Ethics & Conflict of Interest" section of the Handbook stated that it is "essential" to "treat information about customers, our internal operations, and internal records with absolute confidentiality" and that the employee must "*disclose all conflicts of interest to management.*"

18. One "conflict of interest" described in the Handbook is particularly relevant to this Complaint: "*[c]onducting [company] business for personal gain.*"

19. As the Vice-President of National Sales, Kennerly did exceedingly well for himself. The company initially paid him a yearly salary of approximately $100,000.00, along with generous benefits.

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20. Among other benefits, Bierer and Associates provided Kennerly with a company American Express credit card for company-related expenses, and a company vehicle.

21. Bierer and Associates also paid for all of Kennerly's travel on all company business. Kennerly traveled frequently, usually two to three weeks per month, attending trade shows, speaking events, and visiting customers.

22. Moreover, Bierer and Associates shares essentially all of its profits with its employees. Most employees share at the 1% level. Kennerly, as Vice President of National Sales, was one of four senior staff members and, therefore, shared at the 20% level.

23. Consequently, between his salary and Bierer and Associates' profit sharing, Kennerly earned between $400,000 and $500,000, per year, for the last several years. Apparently, however, this was not enough to satisfy Kennerly.

The Manufacturing and Distribution Process

24. Bierer and Associates sells its products primarily to public and private utility companies. Bierer and Associates sells its products through several channels: direct to customers through its own salesmen; via its website; through distributors; and through ten regional manufacturer's representatives.

25. Manufacturer's representative firms are independent companies, with their own sales forces, and are paid a commission to sell product "lines" within their areas of expertise and within defined geographic areas. A manufacturer's rep can generally sell as many "lines" as it likes, so long as none of its "lines" feature products or companies that directly compete with each other.

26. In the utility sales business, the manufacturer's representatives' "customer," i.e., the end-user of the product, is usually an electrical engineer working for a utility company. The

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salesmen working for manufacturing representative firms do not typically have an engineering background—they are salesmen—who must speak two "languages."

27. Their first "language" is that spoken by their "principal," i.e., the manufacturer for whom they are selling. To a manufacturer's rep, Bierer and Associates is a principal. The manufacturer's rep must learn and understand everything there is to know about the principal's product.

28. The second "language" is that spoken by the end-user customer who, again, is typically an engineer. The manufacturer's rep must also learn and understand what the end-user engineer is looking for in a particular product and look for opportunities to advance the particular "line" of the product he or she is offering.

29. The manufacturer's representative firm (and its salesman) receives a commission for each sale within their geographic territory. For example, one manufacturer's representative might sell or distribute Bierer and Associates' products in North Carolina, South Carolina, and Georgia, while another, wholly independent company, could sell the same Bierer and Associates products in Pennsylvania, Ohio, and Michigan.

30. These manufacturer's representatives are on the front line for most manufacturers, and theirs is often the only "face" of the product that the end-user engineer sees. Manufacturer's representatives can either take a purchase order from the end-user or refer the end-user directly to the manufacturer. Either way, the manufacturer's rep firm receives a commission.

31. For Bierer and Associates (and for many manufacturers selling nationwide) one or more *internal* regional sales representatives "sells" Bierer and Associates' product to the commissioned *external* manufacturer's representatives. They do not literally sell the product but,

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rather, ensure that their manufacturer's reps are pushing their product line, i.e., they "sell to the seller."

32. These internal regional sales reps are also critically important because, although manufacturer's representatives cannot sell directly competing products, they do not have unlimited time and unlimited resources. The internal regional sales rep must be able to educate and persuade the external manufacturing rep to push their product when they (the manufacturing rep) meets with the end-user engineers.

33. Moreover, because manufacture's reps are paid a commission and are not employees of the manufacturer, they can, and often do, push the products for the manufacturer with whom they have the best personal relationship—the decision is up to them.

34. In short, because manufacturer's representatives often sell dozens of "lines," their motivation to sell a particular product for a particular manufacturer to the end-user engineers is critically important to the manufacturer. If one or more manufacturer's representatives or distributors decides—for whatever reason—to stop promoting and selling a particular manufacturer's product line, that manufacturer's sales will plummet.

35. Principal manufacturers also deal with a separate set of sellers, known as "distributors." Distributors are somewhat analogous to a physical storefront. Distributors may physically hold the product and end-users sometimes purchase directly from them, or after consulting with a manufacturing rep.

36. Overseeing this complex set of relationships for Bierer and Associates, and most similarly situated manufacturers, is their National Sales Manager. The National Sales Manager coordinates the strategy for the internal regional sales reps, the external manufacturing reps, and the distributors. He or she also attends trade shows to learn what end-user customers are looking

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for, speaks at industry events as the face of the company and, for the most important accounts, calls directly on the end-user, usually in combination with his or her manufacturing rep for that area.

37. The National Sales Manager also hires and fires manufacturing rep firms, selects appropriate distributors, determines who can sell what, trains everyone on the company's product, and determines whether, where, and how much they can sell.

38. The National Sales Manager is the person with whom internal regional sales reps, external manufacturing reps, distributors, and end-user customers, most associate the company—he or she more or less *is* the company—as far as most people in a particular industry are concerned. In short, a great deal of faith and trust is bestowed on this individual. It is one of the most critical positions in most manufacturing companies. This is particularly so for Bierer and Associates, a relatively small manufacturer.

Kennerly's Work for Bierer and Associates' Competitors and Representatives

39. On July 10, 2018, Bierer and Associates discovered on the Internet an old event announcement for an Institute of Electrical and Electronics Engineers ("IEEE") seminar in New Jersey. The October 24, 2014, IEEE seminar featured "Rick Kennerly of Travis" as a speaker on the topic of "Personal Protection Fault Current Devices"—a product that Bierer had invested many hundreds of thousands of dollars and hundreds of man-hours developing, testing, and marketing.[1]

40. According to Kennerly's IEEE biography, that each speaker had to personally approve prior to the IEEE event, he "ha[d] worked for Bierer Meters as an engineering and operations manager for 15 years and Travis UGD for 2 years."

[1] Kennerly is commonly referred to, and prefers to be called, "Rick."

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41. Travis UGD and Bierer and Associates are competitors. Travis UGD manufactures portable grounding equipment and supplies some of the materials used in Bierer and Associates' manufacturing process. Bierer and Associates and Travis also directly compete with each other in the sale of grounding cables and grounding cable assemblies.

42. Apparently – hidden from and completely unbeknownst to Bierer and Associates – in 2014 Kennerly had been working for Travis for two (and now for six), years.

43. After further investigation, Bierer and Associates learned from Travis PDU[2] that Kennerly was "their representative for grounding products."

44. The company next learned that Kennerly was also "representing" two other companies: Restore-Lite SNC Manufacturing ("SNC") and Trystar Power Distribution Systems ("Trystar").

45. SNC is a manufacturer and marketer of electrical transformers (among other things) and Trystar manufactures power distribution equipment, cable, and generator docking systems.

46. Bierer and Associates purchases some supply-side products from Trystar but also competes with Trystar in the sale of other products.

47. SNC markets and sells a product that Kennerly claims to have invented. In fact, Kennerly and Mr. Bierer—while on Bierer and Associates' time and using Bierer and Associates' resources—worked on and improved this product. For each sale of this product, upon information and belief, Kennerly (but not Bierer and Associates) has been earning a royalty payment.

48. On July 10, 2018, after learning that Kennerly was working for and with Travis UGD, SNC, and Trystar while employed by Bierer and Associates, and that Kennerly had done

[2] Travis PDU is a subsidiary of Travis UGD. It distributes Travis UGD's products.

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so on Bierer company time, using Bierer company resources, and without disclosing any of these conflicts to anyone at Bierer and Associates, his employment was terminated, effective July 13, 2018.

49. Confronted with the above, Kennerly:

(a) Denied "working" for Travis PDU, but admitted that he "helped Travis UGD develop a new line of grounding products";

(b) Admitted to a "relationship" with SNC;

(c) Said he was "guilty as charged" regarding working for Trystar, and admitted having entered into a "consultation agreement" with Trystar; and,

(d) In a personal exit meeting with Mr. Bierer, stated to the effect that he "knew" Mr. Bierer would eventually "catch him."

50. Post-termination, Bierer and Associates' investigation continued and even more instances of Kennerly's disloyalty, breach of company policy, breach of duty, and wrongful conduct became known. Several examples follow, and demonstrate the impact of Kennerly's actions.

51. On or about March 30, 2015, Kennerly combined with one of Bierer's manufacturing representatives in Michigan, to form R & D Utility Products, LLC. Bierer was never informed of the establishment of R&D.

52. R&D, by and through Kennerly, soon became a supplier for some of the production products used by Bierer and Associates.

53. Thus, Kennerly set up an independent company, without notifying Bierer and Associates; and, using his position at Bierer and Associates, ensured that Bierer and Associates purchased certain supplies from R&D. In other words, Kennerly, a Bierer and Associates employee and officer, used Bierer and Associates funds to buy products from himself.

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54. In September of 2016, and again in November of 2016, Kennerly took trips to British Columbia, Canada, to visit Powertech. Plaintiff is informed and believes that Kennerly took several other trips to visit Powertech.

55. Bierer was only aware of one of Kennerly's visits to Powertech at the time of the actual visit. Kennerly informed Bierer that he went there to test, demonstrate, and promote, Bierer and Associates products. The remainder of Kennerly's visits to Powertech were made without Bierer's knowledge or consent. However, Bierer is informed and believes that it paid Kennerly's expenses for all of his visits to Powertech, including those not devoted to Bierer and Associates businesses.

56. Bierer and Associates recently learned that on both occasions (and likely on at least one additional occasion), Kennerly signed in at Powertech by identifying himself as a Travis UGD employee.

57. All of Kennerly's British Columbia trips were taken on Bierer and Associates company time and at Bierer and Associates' expense.

58. Upon information and belief, while at Powertech for a presentation and demonstration in front of representatives of potential utility company customers, including Duke Energy representatives, Kennerly did not promote or demo any Bierer and Associates products. Instead, Kennerly promoted Travis and Trystar's products. More specifically, he ensured that a Trystar cable would outperform the cables made by Trystar's competitors, Southwire and SafetyTest.

59. Kennerly later admitted to a SafetyTest representative that he (Kennerly) stood to gain financially if the Trystar cable outperformed the others.

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60. In other words, Bierer and Associates paid for Kennerly's trips to Powertech and, once he arrived, he signed in as a Travis UGD employee and promoted products for Trystar, for which Bierer is informed and believes Kennerly stood to receive financial gain for products in direct competition with Bierer products.

61. SafetyTest is a manufacturer and distributor of certain products and has, in the past, promoted and sold Bierer and Associates' product line. Indeed, SafetyTest was Bierer and Associates' top distributor for many years.

62. Beginning in early 2015, SafetyTest removed Bierer and Associates' products from its website and its representatives stopped promoting Bierer and Associates' products in what Bierer and Associates recently learned was "retaliation" for certain actions taken by Kennerly. Bierer products were removed from the SafetyTest website, trade catalogs, and were no longer displayed by them at multiple trade show events.

63. More specifically, Bierer and Associates is informed and believes that when SafetyTest made this "retaliation" decision, SafetyTest management incorrectly believed Kennerly was acting upon Bierer and Associates' authority when he intentionally promoted the product lines of Travis UGD and Trystar (competitors of both Bierer and Associates and SafetyTest) to Duke Energy. Kennerly, of course, had no such authority or approval.

64. After Kennerly's termination, SafetyTest learned that he had acted on his own behalf (and not under Bierer and Associates' authority) when he promoted Trystar and Travis UGD products to the detriment of SafetyTest products. SafetyTest then agreed to return to again promote and sell Bierer and Associates products.

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65. However, the nearly three-year period in which SafetyTest did not sell or promote Bierer and Associates products due to Kennerly's actions caused a significant decline in Bierer and Associates' sales, revenue, and profits.

66. Texas Metering Devices ("TMD") was another disgruntled distributor of Bierer and Associates products. After learning that Kennerly no longer worked for Bierer and Associates, a TMD employee contacted Bierer and Associates and informed it of the following:

(a) TMD had spent several months working with Oncor Electric, a major utility, on a large cable assembly order;

(b) According to TMD, and upon information and belief, Kennerly (on Bierer and Associates company time) contacted Oncor in early 2018 and attempted to convince Oncor to purchase its cables from Trystar and Travis UGD—instead of from TMD;

(c) Believing that Kennerly had been acting with the authority and approval of Bierer and Associates, TMD stopped promoting Bierer and Associates' products;

(d) After learning that Kennerly had not been acting on Bierer and Associates' authority, TMD agreed to again promote and sell Bierer and Associates' product line; and

(e) However, as with SafetyTest, the time period during which TMD stopped doing business with Bierer and Associates based on Kennerly's actions cost Bierer and Associates a significant amount of lost sales and profits. These two known instances ended with two previously excellent Bierer distributors losing faith and trust in Bierer.

67. Finally, Plaintiff is informed and believes that, while working for Bierer and Associates, Kennerly negotiated sales of Travis UGD products and/or Trystar products to Duke Energy, Pacific Gas & Electric, and possibly others, diverting potentially millions in dollars of sales away from Bierer and Associating, but receiving substantial commissions for himself.

68. Each of the above incidents has significantly damaged Bierer and Associates in both tangible (monetarily) and intangible (its reputation in the electric utility industry) ways. Bierer and Associates' investigation into Kennerly's wrongful actions is ongoing.

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69. The damage caused by Kennerly is particularly acute, and will be particularly difficult to undo, given Kennerly's high-level position (Vice President of National Sales) at Bierer and Associates, the complex nature of the manufacturing distribution process described above, the number of people in the industry with whom Kennerly interacted and who believed him to be acting on behalf of Bierer and Associates and with its authority, and the length of time his subterfuge was concealed.

70. In sum, the Defendants' wrongful actions have caused—and will continue to cause—serious damage to both Bierer and Associates' sales, revenues, and profits, as well as to its carefully crafted and responsible corporate image in a very competitive industry.

71. The wrongful actions described herein were conducted in reckless, willful, wanton disregard of Bierer and Associates rights, such that Bierer and Associates is entitled to recover punitive damages herein.

72. The Defendants are jointly and severally liable for the wrongful actions described herein relating to R&D, as set forth more fully below.

FOR A FIRST CAUSE OF ACTION
(Breach of the Duty of Loyalty - as to Kennerly)

73. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

74. Kennerly, as a highly paid, senior, and trusted employee, and Vice President of National Sales at Bierer and Associates, owed the company a duty of loyalty.

75. Kennerly negligently, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally breached his duty of loyalty to Bierer and Associates as set forth in more detail above, including, but not limited to, the following:

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(a) Violating the "Non-Disclosure and Confidential Information" provisions of the employee handbook;

(b) Violating the "Outside Employment" provision of the handbook;

(c) Violating the "Ethics and Conflict of Interest" provision of the handbook;

(d) Using Bierer and Associates' confidential and proprietary information in excess of his authority;

(e) Spending and using Bierer company resources to compete directly with Bierer and Associates as outlined above;

(f) Spending and using Bierer company resources to enrich himself personally and without disclosing his conflicts to Bierer and Associates as outlined above;

(g) Working for Bierer and Associates competitors and/or other companies in the same industry while on Bierer company time and Bierer company business;

(h) Expressly or impliedly informing Bierer and Associates manufacturing representatives and distributors that he had the authority and permission to sell (directly to the end-user customer and bypassing Bierer) non-Bierer company product lines including, but not limited to, Trystar and Travis UGD products;

(i) Entering into an agreement with SNC in which SNC sold and distributed for his own benefit a product invented by Kennerly and Mr. Bierer on Bierer and Associates time and using company resources;

(j) Creating R&D and using Bierer company funds to purchase R&D products and supplies and without Bierer and Associates' knowledge or authority;

(k) Misrepresenting and/or failing-to-disclose his disloyal activities;

(l) Diversion of business and corporate opportunities from Bierer and Associates to competing companies; and

In additional respects to be determined during Bierer and Associates' on-going investigation and during discovery in this case.

76. As a result of the intentional and illegal breach of the duty of loyalty by Kennerly, Plaintiff has suffered actual damages in at least the following respects, and is entitled to recover

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said damages from Kennerly in an amount and in a manner to be determined at the trial of this case, including:

(a) Lost past and future sales, and lost past and future profits;

(b) All wages, profit sharing, benefits, credit card reimbursement, and any other form of remuneration paid to Kennerly by Bierer and Associates during any period of disloyalty by Kennerly;

(c) Disgorgement of all revenues realized by Kennerly from activities on behalf of competing companies, and for sales of products that competed with Bierer and Associates products;

(d) A full and complete accounting of R&D and any other company Kennerly may have established during any period of disloyalty;

(e) Disgorgement of revenues realized by R&D on any sale by R&D to Bierer and Associates;

(f) Disgorgement of any funds earned by any other company Kennerly may have established or created during his period of disloyalty;

(g) Diversion of business and corporate opportunities from Bierer and Associates to competing companies; and

(h) Punitive damages, due to Kennerly's willful, wanton, intentional, and malicious acts.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty – As to Kennerly)

77. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim.

78. Kennerly, by virtue of his position as an officer and the high degree of trust reposed in him, and also pursuant to S.C. Code Ann 33-8-420, owed the company a fiduciary duty.

79. Kennerly negligently, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally breached this fiduciary duty to Bierer and Associates as set forth in more detail herein, and in at least the following respects:

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(a) Violating the "Non-Disclosure and Confidential Information" provisions of the employee handbook;

(b) Violating the "Outside Employment" provision of the handbook;

(c) Violating the "Ethics and Conflict of Interest" provision of the handbook;

(d) Using Bierer and Associates' confidential and proprietary information in excess of his authority and contrary to the interests of Bierer and Associates;

(e) Spending and using Bierer company resources to compete directly with Bierer and Associates as outlined above;

(f) Spending and using Bierer company resources to enrich himself personally and without disclosing his conflicts to Bierer and Associates as outlined above;

(g) Working for Bierer and Associates competitors and/or other companies in the same industry while on Bierer company time and Bierer company business;

(h) Expressly or impliedly informing Bierer and Associates manufacturing representatives and distributors that he had the authority and permission to sell (directly to the end-user customer and bypassing Bierer) non-Bierer company product lines including, but not limited to, Trystar and Travis UGD products;

(i) Entering into an agreement with SNC in which SNC sold and distributed for his own benefit a product invented by Kennerly and Mr. Bierer on Bierer and Associates time and using company resources;

(j) Creating R&D and using Bierer company funds to purchase R&D products and supplies and without Bierer and Associates' knowledge or authority;

(k) Misrepresenting and/or failing-to-disclose his disloyal activities;

(l) Diverting business opportunities from Bierer and Associates; and

(m) In additional respects to be determined during Bierer and Associates' on-going investigation and during discovery in this case.

80. Kennerly's breaches of fiduciary duty were fraudulently concealed. As a result of the intentional, illegal, and fraudulently concealed breaches of fiduciary duty by Kennerly, Plaintiff has suffered actual damages in at least the following respects, and is entitled to recover

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said damages from Kennerly in an amount and in a manner to be determined at the trial of this case, including:

(a) Lost past and future sales, and lost past and future profits;

(b) All wages, profit sharing, benefits, credit card reimbursement, and any other form of remuneration paid to Kennerly by Bierer and Associates during any period of disloyalty by Kennerly;

(c) Disgorgement of all revenues realized by Kennerly from activities on behalf of competing companies, and for sales of products that competed with Bierer and Associates products;

(d) A full and complete accounting of R&D and any other company Kennerly may have established during any period of disloyalty;

(e) Disgorgement of revenues realized by R&D on any sale by R&D to Bierer and Associates;

(f) Disgorgement of any funds earned by any other company Kennerly may have established or created during his period of disloyalty;

(g) The value of the business opportunities wrongfully diverted by Kennerly; and

(h) Punitive damages, due to Kennerly's willful, wanton, intentional, and malicious acts.

FOR A THIRD CAUSE OF ACTION
(Tortious Interference with Existing Contractual Relations – as to Kennerly)

81. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

82. Upon information and belief, Kennerly intentionally interfered with existing contracts, for example, purchase orders, between Plaintiff and its customers, manufacturing representatives, and distributors, among others.

83. Kennerly, in his capacities as National Sales Manager and Vice-President of National Sales, had actual knowledge of the contracts and purchase orders Plaintiff maintains

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and receives with and from its customers, manufacturing representatives, and distributors, and had no justification to interfere with such contracts.

84. Kennerly's actions in these respects were done with an improper purpose and by improper methods.

85. As set forth herein and upon information and belief, Kennerly's interference with existing contractual relations includes, but is not limited to:

(a) Efforts to induce Bierer and Associates' manufacturing representatives to push, promote, and advance product lines in both direct and indirect competition with Bierer and Associates including, but not limited to, product lines from Travis UGD and Trystar;

(b) Efforts to have SafetyTest "stand down" and promote non-Bierer and Associates products;

(c) Efforts to have TMD "stand down" and promote non-Bierer and Associates products; and

(d) In additional respects to be determined during Bierer and Associates' on-going investigation and during discovery in this case.

86. As a direct and proximate result of Defendant's tortious interference with Plaintiff's existing contractual relationships, Plaintiff has suffered and will continue to suffer damages.

87. As a direct and proximate result of Defendant's tortious interference with Plaintiff's existing contractual relationships, Plaintiff is entitled to recover its damages from Kennerly.

88. Plaintiff is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious actions of Kennerly.

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FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations – As to Kennerly)

89. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

90. Kennerly intentionally interfered with prospective and future contracts between Plaintiff and its customers, manufacturing representatives, and distributors, among others.

91. Kennerly, in his capacities as National Sales Manager and Vice-President of National Sales, had actual knowledge of the relationships and contracts Plaintiff maintains with its customers, manufacturing representatives, and distributors and had no justification to interfere with such contracts.

92. Kennerly's actions in these respects were done with an improper purpose and by improper methods.

93. As set forth herein and upon information and belief, Kennerly's interference with prospective contractual relations includes, but is not limited to:

(a) Representing himself as an agent of the competitors of Bierer and Associates' manufacturing representatives and distributors in such a manner as to cause them to "retaliate," damaging future contractual relationships;

(b) Otherwise interfering with and damaging Bierer and Associates' relationships with customers, manufacturing representatives, and distributors with whom Bierer and Associates has had longstanding relations and with whom Bierer and Associates intends to enter into future and prospective contracts, as set forth more fully above;

(c) In additional respects to be determined during Bierer and Associates' on-going investigation and during discovery in this case.

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94. As a direct and proximate result of Defendant's tortious interference with Plaintiff's prospective contractual relationships, Plaintiff has suffered and will continue to suffer damages.

95. As a direct and proximate result of Defendant's tortious interference with Plaintiff's prospective contractual relationships, Plaintiff is entitled to recover its damages from Kennerly.

96. Plaintiff is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious actions of Kennerly.

FOR A FIFTH CAUSE OF ACTION
(Unjust Enrichment – As to All Defendants)

97. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

98. Plaintiff conferred a benefit on Kennerly by, among other things, paying him a salary, benefits, credit card reimbursement, and profit sharing during a time in which he was disloyal to the Company.

99. Kennerly realized, received, and accepted the above-referenced benefits from Bierer and Associates.

100. Allowing Kennerly to retain the benefits he received, including salary, benefits, credit card reimbursement, profit sharing, and profits and funds gained from and by his independent companies, would be unjust and inequitable.

101. R&D received a benefit from Bierer and Associates in the form of payments for goods. R&D accepted and has retained these benefits. Allowing R&D to retain these benefits would be unjust and inequitable.

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102. Bierer and Associates is entitled to recover, and Kennerly and R&D should disgorge, all benefits unjustly received by Kennerly and R&D as set forth above, in an amount to be determined at the trial of this case.

FOR A SIXTH CAUSE OF ACTION
(Civil Conspiracy - As to All Defendants)

103. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

104. Kennerly and R&D combined together, and with other person(s), and committed overt acts, for the purpose of injuring Bierer and Associates, and caused Bierer and Associates to sustain special damages, which it is entitled to recover from the Defendants herein, jointly and severally.

FOR A SEVENTH CAUSE OF ACTION
(Accounting – As to All Defendants)

105. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

106. Bierer and Associates is entitled to an equitable accounting of all sums wrongfully received by Kennerly and/or R & D as a result of the wrongful activities set forth herein.

FOR AN EIGHTH CAUSE OF ACTION
(Fraudulent Misrepresentation – As to Kennerly)

107. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

108. By continuing to accept salary and benefits from Bierer and Associates, Kennerly fraudulently misrepresented that he was in compliance with the policies set forth in its Handbook, with his duties of loyalty, and his fiduciary duties. Said representation was false; was material; was known to be false when made; was intended to be acted upon by Bierer and

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Associates; its falsity was unknown to Bierer and Associates; was relied upon; was rightfully and justifiably relied upon; and caused Bierer and Associates to sustain damages as set forth herein, which it is entitled to recover, along with punitive damages.

FOR A NINTH CAUSE OF ACTION
(Fraudulent Non-Disclosure – As to Kennerly)

109. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

110. Kennerly had a duty to disclose to Bierer and Associates his activities undertaken on behalf of competing companies and on behalf of R&D. Kennerly breached this obligation. As a result of this breach, Bierer and Associates continued paying salary and benefits to Kennerly, and holding him out as National Sales Manager, and sustained lost sales and sales opportunities as Kennerly continued his wrongful activities. Each day that Kennerly accepted salary and benefits from Bierer and Associates, but failed to disclose his wrongful activities, constituted an act of fraudulent, material non-disclosure.

111. Bierer and Associates is entitled to recover its actual and punitive damages herein as a result of Kennerly's wrongful conduct.

FOR A TENTH CAUSE OF ACTION
(Constructive Trust – As to All Defendants)

112. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

113. Kennerly was in a confidential and fiduciary relationship with Plaintiff, whereby Plaintiff reposed special confidence in Kennerly, such that he owed Plaintiff a duty of loyalty, a duty to act in the utmost good faith, and with due regard to Plaintiff's interests.

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114. Kennerly breached his duties of loyalty and good faith and violated his fiduciary duty to Plaintiff by engaging in the activities set forth herein.

115. Kennerly wrongfully obtained monies through breaching his duties of trust and loyalty, violating his fiduciary duty, and in bad faith, in an amount to be determined at the trial of this case. Bierer and Associates is entitled to recover all such monies herein.

116. All wrongfully-obtained monies do not equitably belong to Kennerly, but belong to Plaintiff, entitling Plaintiff to the imposition of a constructive trust upon all monies wrongfully obtained by Kennerly or as a result of his actions, regardless of the location or holder of those funds.

FOR AN ELEVENTH CAUSE OF ACTION
(SCUTPA – As to All Defendants)

117. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

118. The activities set forth herein constitute unfair methods of competition or unfair and deceptive acts and practices in the conduct of trade and commerce, adversely affecting the public interest, and are knowing and willful violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20, *et. seq*.

119. As a result of said wrongful activities, Bierer and Associates has sustained an ascertainable loss of money, which it is entitled to recover herein, trebled, along with attorneys' fees and costs.

WHEREFORE, Plaintiff, Bierer and Associates, Inc., having complained of the Defendants herein, prays for judgment against Defendants Jan F. Kennerly, Jr., and R&D Utility Products, LLC, jointly and severally, and an Order for the following legal and equitable relief:

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1. As to Kennerly:

(a) To refrain from using or disclosing confidential, proprietary, and/or trade secret information owned by or relating to Plaintiff, including but not limited to Plaintiff's confidential customer information, pricing information, and commercial strategies, to any person or entity;

(b) To return to Plaintiff any and all information, records, documents, and copies, whether electronic or otherwise, that include any confidential, proprietary, and/or trade secret information owned by or relating to Plaintiff;

(c) To refrain from altering, forwarding, deleting, destroying, or otherwise tampering with any electronic or hard-copy files related to, containing, or formerly containing confidential, proprietary, and/or trade secret information owned by or relating to Plaintiff;

(d) To return to Plaintiff any and all information, records, documents, and copies, whether electronic or otherwise, created or used by Kennerly while conducting business on Bierer and Associates' behalf or on his own behalf while employed by Bierer and Associates;

(e) To refrain from altering, forwarding, deleting, destroying, or otherwise tampering with any records contained within Kennerly's personal and/or business computers, laptops, cell phones, and any other electronic devices on which Kennerly has conducted business on Bierer and Associates' behalf or on his own behalf while employed by Bierer and Associates;

(f) Disgorgement of any funds earned by Kennerly from any company other than Bierer and Associates on any purchase or order placed with that company by Bierer and Associates while Kennerly was working for Bierer and Associates;

(g) Disgorgement of any funds earned by Kennerly from any company other than Bierer and Associates on any purchase or order placed with that company by any company solicited by Kennerly while he was working for Bierer and Associates;

(h) That Plaintiff be awarded actual, compensatory, and consequential damages, including, but not limited to, any and all wages, profit sharing, benefits, credit card reimbursement, and any other form of remuneration paid to Kennerly by Bierer and Associates during any period of disloyalty by Kennerly;

(i) That Plaintiff be awarded, and Kennerly be required to disgorge, any and all profits, payments, or any other form of remuneration Kennerly earned

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from any other source during any period of disloyalty to Bierer and Associates, and any such profits, payments, or remuneration paid to Kennerly in the future, based on any actions he took during any period of disloyalty to Bierer and Associates; and

(j) A full accounting.

2. As to R&D:

(a) A full and complete accounting of R&D;

(b) Disgorgement of funds earned by R&D on any purchase or order placed with R&D by Bierer and Associates;

(c) Disgorgement of any funds earned by R&D on any purchase or order placed with R&D by any company solicited by Kennerly while he was working for Bierer and Associates;

3. That Plaintiff be awarded trebled damages and attorneys' fees and costs under its claim for violation of the South Carolina Unfair Trade Practices Act;

4. That Plaintiff be awarded punitive damages;

5. That Plaintiff be awarded attorneys' fees and costs associated with bringing and prosecuting this action;

6. That Plaintiff be awarded prejudgment interest; and

7. That Plaintiff be awarded such other and further legal and equitable relief as this Court deems just and proper.

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s/ Val H. Stieglitz
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Attorneys for Plaintiff, Bierer and Associates, Inc.

September 11, 2018
Columbia, South Carolina

ELECTRONICALLY FILED - 2021 Apr 15 4:29 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	Civil Action No.: 2018-CP-40-04841 **SUMMONS** ***(JURY TRIAL DEMANDED)***
Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	

TO: TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC.; AND DAVID DEINEK, THE ABOVE-NAMED DEFENANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers, at their office, 4408 Forest Drive, Suite 300 (29206), Post Office Box 999, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

ELECTRONICALLY FILED - 2021 Apr 15 4:29 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Respectfully Submitted,

By: *s/ James M. Griffin*
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April 15, 2021

Columbia, South Carolina.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **THIRD AMENDED COMPLAINT** ***(JURY TRIAL DEMANDED)***
Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	

Plaintiff, Bierer and Associates, Inc. ("Bierer"), hereby amends its Complaint as follows:

PARTIES

1. Bierer and Associates, Inc. ("Bierer") is a corporation organized and existing under the laws of the State of South Carolina, with its principal place of business located in Richland County, South Carolina.

2. At the time of filing of the original Complaint and at all times relevant herein, Jan F. Kennerly, Jr. ("Kennerly") was a citizen and resident of Lexington County, South Carolina, and a former employee and officer of Bierer.

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3. At the time of filing of the original Complaint and at all times relevant herein, Danielle Kennerly ("Danielle Kennerly") was a citizen and resident of Lexington County, South Carolina, and is the spouse of Kennerly. Danielle Kennerly is the sole Member of Defendant EUSA, LLC, and the registered agent of Defendant J&D Farms, LLC.

4. EUSA, LLC ("EUSA") is a limited liability corporation organized under the laws of the State of South Carolina, formed by Danielle Kennerly. Upon information and belief, EUSA has received Bierer's confidential and trade secret information from Kennerly and is wrongfully utilizing that information in furtherance of its business.

5. J&D Farms, LLC ("J&D Farms") is a limited liability corporation organized under the laws of the State of South Carolina and was formed by or with the involvement of Kennerly, Danielle Kennerly, or both, to be used as a vehicle for the fraudulent conveyance of property as set forth herein.

6. Trystar, LLC ("Trystar"), formally known as Bridgewater Tech, Inc., is a limited liability corporation organized under the laws of Minnesota with its registered principal place of business at 15765 Acorn Trail, Faribault, Minnesota 55021. At all times relevant to this action, Trystar routinely sold its cabling to Bierer in South Carolina which Bierer then assembled into products in South Carolina for distribution to its customers nationwide. Unbeknownst to Bierer, Trystar also retained and made arrangements with Kennerly, a South Carolina resident, who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. Trystar made monthly commission payments to Kennerly in South Carolina for such services from at least 2013-2018 totaling over approximately $850,000, without Bierer's knowledge or consent. To date, Trystar has sold product worth approximately $3.8 Million to Bierer in South Carolina.

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7. Travis Pattern & Foundry, Inc. ("Travis") is a for-profit corporation organized under the laws of Washington with its registered principal office located at 1413 E Hawthorne Road, Spokane, Washington 99218. At all times relevant to this action, Travis routinely sold its clamps to Bierer in South Carolina which Bierer then assembled into products in South Carolina for distribution to its customers nationwide. Unbeknownst to Bierer, Travis also retained and made arrangements with Kennerly, a South Carolina resident who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. Travis made monthly commission payments to Kennerly in South Carolina for such services from at least 2013-2018 totaling over approximately $1.4 Million without Bierer's knowledge or consent. To date, Travis has sold product worth approximately $1.5 Million to Bierer in South Carolina.

8. Illinois Tool Works, Inc. is a for-profit foreign corporation organized under the laws of Delaware registered to do business in South Carolina with its registered agent located in Richland County in Columbia, South Carolina. Beginning in 2012 and through 2018, Paslode, a division of Illinois Tool Works, Inc. ("ITW Paslode"), routinely sold its staplers and related products to Bierer in South Carolina for distribution to Bierer customers nationwide. Unbeknownst to Bierer, ITW Paslode also retained and made arrangements with Kennerly, a South Carolina resident who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. ITW Paslode monthly commission payments to Kennerly in South Carolina for such services from at least 2015-2018 totaling approximately $200,000 without Bierer's knowledge or consent. To date, ITW Paslode has sold product worth approximately $663,000 to Bierer in South Carolina.

9. David Deinek is a resident of the state of Michigan and at all times relevant herein, the owner and operator of BDL & Associates, LLC ("BDL"). BDL and Deinek were retained as

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a regional sales representative for Bierer products in 2009. While under contract with Bierer, Mr. Deinek routinely sold product on behalf of Bierer and sent monthly sales reports to Bierer apprising them of the actions taken on Bierer's behalf. Mr. Deinek's company BDL also received monthly commission payments from Bierer from 2009 until he was terminated in July 2018 totaling approximately $757,000. In addition, and unbeknownst to Bierer, Mr. Deinek formed a Michigan company with Kennerly, R&D Utility Products, LLC ("R&D"), in 2015 for the purpose of distributing products that directly competed with Bierer products. Through R&D, Deinek and Kennerly made sales of component materials to Bierer in South Carolina without Bierer knowing that Kennerly and Deinek were personally profiting from these sales in violation of their contracts with Bierer.

JURISDICTION & VENUE

10. The Court has personal jurisdiction over the parties to this action and has subject matter jurisdiction with respect to all claims stated herein.

11. The Court has personal jurisdiction over Defendants Trystar, Travis, ITW Paslode, and Deinek under S.C. Code Ann. Section 36-2-803 because the claims alleged herein arise from Defendants doing business in this State, directly and through their agent Kennerly; contracts entered into by Defendants to be performed in whole or in part in this State; and the tortious acts were committed by Defendants directly and through their agent Kennerly in this State; and Defendants regularly conduct business in South Carolina and have caused injury to Bierer in South Carolina as a result of their tortious acts occurring outside of the state, to wit:

a. Beginning in at least 2011, Defendant Trystar sold and delivered more than $3.8 Million of industrial wire cable and related component products to Bierer in South Carolina pursuant to purchase order contracts with Bierer. The wire cable and

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related components were designed by Bierer for use by Bierer's electrical utility customers;

b. Beginning in at least 2011, Defendant Travis sold and delivered more than $1.5 Million of industrial clamps and other component products to Bierer in South Carolina pursuant to purchase order contracts with Bierer. These clamps and other component products were designed by Bierer for use by Bierer's electrical utility customers;

c. Beginning in at least 2012, Defendant ITW Paslode sold and delivered more than $600,000 of heavy-duty pneumatic and gas-powered staplers and related products, designed at Bierer's request to Bierer in South Carolina pursuant to purchase order contracts with Bierer. These staplers were specifically designed by Bierer for use by Bierer electrical utility customers;

d. Defendants Trystar, Travis and ITW Paslode induced Kennerly to breach his employment agreement with and duty of loyalty owed to Bierer by paying commissions directly to Kennerly to divert product sales from Bierer and instead sell directly to Bierer's electrical utility customers using Bierer's national network of sales representatives;

e. From 2012 through 2018, Trystar made more than $850,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

f. From 2012 through 2018, Travis made more than $1,400,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

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g. From 2015 through 2018, ITW Paslode made more than $200,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

h. Defendants Trystar, Travis and ITW Paslode, directly and through their agent Kennerly, misappropriated Bierer's trade secrets and confidential business information, to include its proprietary customer contact and detailed sales information, located in South Carolina;

i. Defendants Trystar, Travis and ITW Paslode through its agent Kennerly diverted sales leads and purchase orders intended for Bierer to themselves;

j. Deinek entered into a manufacturer's representative agreement with Bierer whereby Deinek received monthly commission payments from Bierer in South Carolina to which Deinek was not entitled because he was secretly competing against Bierer and profiting from direct sales to Bierer through his and Kennerly's undisclosed interest in R&D;

k. From 2009 until July 2018, Bierer paid Deinek more than $750,000. These commission payments were delivered at least quarterly.

l. To obtain payment and as required by the terms of his agreement with Bierer, Deinek routinely submitted monthly sales reports to Bierer in South Carolina apprising management of actions taken to further his sales of Bierer projects. In addition, Deinek regularly communicated with Kennerly, who resides in South Carolina, about his business dealings for Bierer and R&D.

12. Venue is proper in Richland County because it is the county where the most substantial part of the acts and omissions giving rise to Bierer's causes of action against the resident

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individual defendants occurred. Richland County is also the proper venue because it is the county where Bierer's principal place of business was located at the time its causes of action arose against the nonresident individual defendant and domestic corporate defendant. See S.C. Code Ann. § 15-7-30 (B), (C), (D), & (E).

FACTUAL ALLEGATIONS

I. Kennerly's Employment with Bierer

13. Bierer is a family-owned and operated company, founded by Walter Bierer in 1988. Bierer manufactures and sells a variety of equipment and products in the electric utility industry.

14. Kennerly was formerly employed with Bierer and was also formerly an officer of the company. Kennerly was initially hired as an engineer in or about July 2002. In 2005, Bierer's Board of Directors appointed Kennerly as an officer, with the title of Vice President of Engineering and Operations. The operations he oversaw in this position pertained to activities in the sales field and were outside of Bierer's physical plant.

15. Over time, Kennerly increasingly acted in a sales role for Bierer. He was also appointed to initiate and oversee a newly developed Grounding Department at Bierer. Kennerly remained a full-time employee, Vice President, and officer of Bierer from the time of his appointment in 2005, until his termination on July 13, 2018.

16. While employed by Plaintiff, Kennerly was provided with the Bierer Employee Handbook ("Handbook").

17. The Handbook contained the following provision governing "Outside Employment" :

> It is expected that Bierer & Associates is your primary employment, if you are a full-time Bierer & Associates employee. Bierer & Associates does not regulate outside employment but employees **must immediately disclose** outside employment to management. There shall be no conflict of interest as long as such

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employment does not interfere with the performance of your duties at Bierer & Associates, is **non-competitive in nature** as determined by Bierer & Associates, **does not cause any conflict of interest, loyalty or obligation, is not detrimental or contrary to the image, integrity, goodwill, business or reputation of Bierer & Associates**, and is not under the direct or indirect employ of any Bierer & Associates serviced client. An employee who takes a outside job with a Bierer & Associates client is subject to immediate termination. **Use of any Bierer & Associate resources, unless granted in writing by ownership, including, but not limited to, computer hardware and software, telephones, facsimile machines, and copiers, tools or equipment for/ in connection with any non-Bierer & Associates work is prohibited.** Employees who perform any non-Bierer & Associates work/task on Bierer & Associates premises or perform any non-Bierer & Associates work during normal Bierer & Associates business hours will be terminated.

(emphasis added).

18. The Handbook also contained the following provision governing "Conflicts of Interest":

As an employee of Bierer & Associates, **your primary responsibility is to this company and requires that employees not compromise the company**, its customers, partners or suppliers for personal gain. Since we serve utilities and other organizations, it is **essential that co-workers treat information about customers, our internal operations, and internal records with absolute confidentiality**. Additionally, co-worker's personal relationships should in no way compete with or compromise the company's interests. The following guidelines, when strictly adhered to, will help you avoid situations where a conflict of interests could occur:

1) Do not accept gifts or other favors of value that are offered as a result of carrying out your duties for the company.

2) Do not request or grant favors that are offered as a result of carrying out your duties for the company

3) Co-operation with management in resolving conflicting situations involving yourself or your family.

4) **Conducting business for personal gain**.

5) Report another employee's, vendor's, or client's dishonest activities or damaging conduct

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> By observing these guidelines, you will protect yourself and the company from difficulties and/or legal repercussions, which naturally result from conflict of interests. **Employees are required to disclose all conflicts of interest to management**. Failure to do may result in disciplinary action, up to and including termination.
>
> (emphasis added).

19. The last page of the Handbook is an employee acknowledgment that Bierer requires each of its employees to sign. The employee acknowledgement serves to document the employee's receipt of the Handbook and agreement that the employee "understand[s] that [the Handbook] is [the employee's] responsibility to read, understand, become familiar with, and comply with the standards" set forth therein.

20. Kennerly signed the employee acknowledgment found in the Handbook and returned the same to Plaintiff.

21. Throughout his employment with Bierer, Kennerly was a highly trusted, full-time employee and officer of Bierer. Over time, he developed a very close, quasi-familial relationship with Walter Bierer. As a trusted and longtime employee, friend, and officer of the company, Kennerly enjoyed a handsome salary and generous benefits. In addition to receiving a generous salary from Bierer, Kennerly also shared in Bierer's profits at the 20% level, which is reserved for only four management-level employees. During the last several years of employment with Bierer, Kennerly was paid between $400,000 and $500,000 per year earning approximately $580,000 during his last full year of employment in 2017.

22. Bierer also provided Kennerly with a company credit card and vehicle, which were intended to be used for Bierer-related purposes. Bierer paid for all of Kennerly's travel-related expenses for company business. Kennerly traveled frequently, attending trade shows, speaking events, and visiting Bierer customers. As will be described more fully below, Kennerly used his

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company credit card and engaged in work for Defendants Travis, Trystar, ITW Paslode and other third parties, in violation of his duties to Bierer, while he represented to Bierer that he "always put Bierer first and foremost" and was working exclusively on Bierer-related matters.

23. In his capacity as an officer and Vice President of Engineering and Operations, and later Vice President of National Sales, Kennerly had access to the innermost workings of Bierer, including all of Bierer's confidential and trade secret information; and, specifically, sensitive information regarding existing and potential customers. Kennerly also attended and participated in Bierer's company meetings, which are restricted to management-level employees. In these highly confidential meetings, Bierer discussed all matters relating to the company, such as corporate budgets, costs, profit margins, marketing and sales strategies, and product research and development.

24. In his position with Bierer, Kennerly was the "face" of the company to others in the industry, specifically including Bierer's customers. Kennerly was effectively the central repository of all Bierer's customer information, which included not only the identity of existing and potential customers, but also more sensitive and commercially-advantageous information of these customers such as their: key decision-makers for purchasing; purchasing patterns, preferences, and product needs. His position also afforded him unique and strategically advantageous inroads with the customers concerning business opportunities with Bierer and insight into potential product improvements emerging from the feedback and information he received from the same. All of this information is confidential and trade secret, and was controlled by Kennerly during his employment. At all times during Kennerly's employment, Bierer zealously guarded and protected this information and strictly limited those authorized to access the same. At all times relevant to

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this action, Kennerly had a duty to utilize this information for the exclusive benefit of Bierer and not for himself or others.

II. Kennerly's Wrongful Activities on Behalf of Competitors and Distributors

25. While a key employee and officer with Bierer, Kennerly engaged in numerous wrongful activities, breaching his duties to Bierer. These wrongful activities include, but are not limited to, the following:

A. Trystar and Travis

26. In mid-2009, Bierer separated from its third-party marketing company and began marketing its own products. At the same time, Kennerly requested and was granted responsibility for sales and marketing of all Bierer products. In this position he oversaw regional sales representatives retained by Bierer to promote its products. He also had unlimited access to all confidential information used by Bierer, including product information, vendor information, financial information, financing strategies, supply and service information, marketing information, personnel information, supplier information, customer information, and busines information.

27. That same year, in or around August 2009, Bierer tasked Kennerly with securing a cable manufacturer and clamp manufacturer to provide material for several new cabling products that Bierer intended to bring to market to launch Bierer's entry into the Grounding business. Included in the directive given to Kennerly by the President Walter Bierer, was that Kennerly seek to obtain a reciprocal exclusivity agreement with the material providers he procured on behalf of Bierer. Thus, Bierer would only order its materials from the manufacturers selected by Kennerly in exchange for the manufacturers' agreement that they would not provide their material to Bierer's competitors.

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i. Trystar

28. Trystar is a manufacturer of electrical cable and electrical power panel distribution equipment. Prior to its provision of cable to Bierer, Trystar did not sell the specific cabling products requested by Bierer in the electric utilities market and had no presence therein.

29. Trystar was first approached by Kennerly, on behalf of Bierer, in or around October 2009, at a tradeshow in Louisville, Kentucky. At the time of this meeting, Trystar was known as Bridgewater. Kennerly, along with Bierer Executive Vice President Mr. Joe Bierer, attended a dinner with the then Vice President of Sales for Trystar, Mr. Dan Moerke, to discuss a potential relationship in which Trystar would agree to provide its cable to Bierer for use in Bierer's production of its grounding assembly products. At the time of this meeting, Trystar did not manufacture or sell the specific type of cable requested by Bierer and only sold products in the commercial and industrial markets.

30. At the dinner, Bierer and Trystar discussed a potential exclusivity arrangement as desired by Walter Bierer. Under such agreement, if Bierer provided Trystar with an opportunity to enter the utility business then Trystar would agree to refrain from providing its cable to any competitor of Bierer in the electric utility industry.

31. Thereafter, Kennerly informed Walter Bierer that such an agreement with Trystar was not possible; however, Trystar did agree to private label all cable coming to Bierer with Bierer insignia wherein the end customer would not know the origin of the cabling. Bierer spent several months and expended company resources and money working with Trystar to develop a specific type of cable suitable for use in grounding assembly products that could be utilized by Bierer's customers in the electric utility industry.

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32. After finalizing the new cable with Trystar, Bierer placed its first order for the cable with Trystar on January 5, 2010.

33. Bierer continued to procure the cable for its grounding assembly products from Trystar throughout Kennerly's employment with Bierer.

34. Following Kennerly's termination on July 13, 2018, Bierer learned that, secretly and without Bierer's knowledge or consent, Kennerly became a consultant for Trystar and promoted Trystar products beginning in or around 2011. Kennerly formalized his arrangement with Trystar in a sales representative agreement dated January 2, 2013, executed by Kennerly and Mr. Moerke. Under the terms of the Agreement, Kennerly was entitled to receive a commission from Trystar for all sales he made on behalf of Trystar.

35. From the beginning of Kennerly's provision of consultation and/or sales services on behalf of Trystar, upper management at Trystar, including Dan Moerke, was aware that Kennerly was an employee for Bierer and had knowledge of his role as Vice President of Engineering and Operations in sales and the grounding assembly products he was responsible for promoting and selling for Bierer.

36. For example, on more than one occasion, email communications between Kennerly and Trystar reflect a concerted effort to divert orders from Bierer customers to Trystar for fulfillment.

37. Despite this knowledge, and at the suggestion of Kennerly, Trystar agreed to an arrangement with Travis wherein Trystar sold the cable it developed with Bierer to Travis and Travis then completed the final production of its competing grounding assembly products at its facility using the clamps Travis developed with Bierer. Not only do such products directly

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compete with Bierer grounding assembly products, but Kennerly then sold these competing products to Bierer customers through Bierer regional sales representatives.

38. Trystar made monthly commission payments to Kennerly as its sales representative during 2013-2018 totaling over approximately $850,000. Such compensation includes commission for sales Kennerly made to Bierer, as well as sales of competing Trystar products facilitated by Kennerly to customers of Bierer.

39. In addition to utilizing Bierer's customer base and sales force to promote Trystar products, Kennerly also took products originally developed at Bierer, such as portable power cables and primary restoration carts, and passed them on to Trystar. Such conduct and efforts by Kennerly on behalf of Trystar were accomplished by Kennerly utilizing the resources of Bierer.

ii. Travis

40. Travis is a manufacturer of electric utility products, which after doing business with Bierer, now include specific grounding products and clamps designed by Bierer. Prior to its provision of clamps to Bierer, Travis did not sell the multitude of specific clamps requested by Bierer to the electric utility market and had no presence therein.

41. In 2011, fulfilling the directive given to him from Walter Bierer, Kennerly identified Travis as the manufacturer best suited to provide Bierer with the wide assortment of clamps it required to produce its grounding assembly products.

42. Thereafter, Kennerly, on behalf of Bierer, spent his time during the workday and expended Bierer company resources and money working with Travis to develop clamps suitable for use in grounding assembly products that could be utilized by customers in the electric utility industry. By his own admission, during 2010-2011 Kennerly "helped Travis develop a new line of grounding products" for Travis.

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43. Bierer placed its first order for clamps with Travis in June 2011.

44. Bierer continued to procure its clamps for its grounding assembly products from Travis throughout Kennerly's employment with Bierer.

45. Following Kennerly's termination on July 13, 2018, Bierer learned that, secretly and without Bierer's knowledge or consent, Kennerly began working for Travis in or around 2013 and served as the sales representative for Travis grounding products. Notably, around this same time, Travis opened a new production division, Travis UGD, specifically to handle the large number of grounding products requested by Bierer. For his services, Kennerly received a commission from Travis for all sales he made on behalf of Travis.

46. From the beginning of Kennerly's provision of consultation and/or sales services on behalf of Travis, upper management at Travis, including Alex Martin, was aware that Kennerly was an employee for Bierer and had knowledge of his role as Vice President of Engineering and Operations in sales and the grounding assembly products he was responsible for promoting and selling for Bierer.

47. Despite this knowledge, and at the suggestion of Kennerly, Travis agreed to an arrangement with Trystar wherein Travis purchased Trystar cable (the type developed for Bierer) for assembly with Travis' clamps (the type developed for Bierer) in Trystar's production of grounding assembly products at a Trystar facility. Not only do such products directly compete with Bierer grounding assembly products, but Kennerly then sold these competing products to Bierer customers through Bierer regional sales representatives.

48. Travis made monthly commission payments to Kennerly as its sales representative during 2013-2018 totaling over approximately $1,500,000. Such compensation includes

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commission for sales Kennerly made to Bierer, as well as sales of competing Travis products facilitated by Kennerly to customers of Bierer.

B. ITW Paslode

49. Kennerly also took personal advantage of a sole-source distributor relationship Bierer had with a company called Paslode, which is a division of Defendant ITW.

50. ITW Paslode is a leading manufacturer of pneumatic and gas-powered hand tools, namely nailers and staplers.

51. In or about 2012, Bierer's customers started expressing a need for a product that would more effectively secure their copper wiring to a utility pole. Consequently, Bierer began investigating staple drivers and came across Paslode, a division of ITW located in New Zealand, that manufactures staple drivers.

52. Bierer reached out to ITW Paslode to discuss a potential exclusivity arrangement, wherein Bierer would procure staple drivers from ITW Paslode for distribution to its customers, thus providing ITW Paslode an opportunity to enter the electric utility market. In exchange for Bierer's orders, ITW Paslode would agree to refrain from providing its staple drivers to any competitor of Bierer in the electric utility industry.

53. Kennerly reported to Bierer that ITW Paslode would only agree to an exclusivity agreement if Bierer would agree to set up a ITW Paslode repair facility. Bierer proceeded to establish a repair facility only to then learn from Kennerly that ITW Paslode had already begun to sell the staple drivers it developed with Bierer to other distributors. Prior to its dealing with Bierer, ITW Paslode had not sold any staplers of the type jointly developed by Bierer and ITW Paslode, staples or accessories in the electric utility market.

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54. Bierer expended considerable time and money working with ITW Paslode on technical improvements to their staple drivers and staples that would make the staple drivers more attractive to the electric utility industry. Bierer also expended considerable time and money purchasing samples for its sales reps nationwide as well as incurring marketing costs at major trade shows demonstrating ITW Paslode staplers. In addition, Bierer established a fully-stocked ITW Paslode repair facility and trained several Bierer employees to repair ITW Paslode equipment at considerable expense to Bierer.

55. Bierer began selling ITW Paslode's staple drivers to Bierer customers in the fall of 2012.

56. Subsequently, after Bierer had invested its time, money, and resources, Bierer sales of these ITW Paslode products quickly plateaued and then began to decline. Kennerly encouraged, and Bierer did in fact, drop the ITW Paslode product line.

57. However, despite Bierer's distributorship arrangement with ITW Paslode and Kennerly's employment with Bierer, Kennerly simultaneously and secretly entered into a personal agreement with ITW Paslode to sell ITW Paslode's products himself, effectively diverting such sales away from Bierer, once again using Bierer's nationwide network of regional sales representatives. From the beginning of Kennerly's provision of consultation and/or sales services on behalf of ITW Paslode, upper management at ITW Paslode, including Lorne Gibson, was aware that Kennerly was an employee for Bierer and had knowledge of his role as Vice President of Engineering and Operations in sales.

58. Pursuant to his arrangement with ITW Paslode, Kennerly received monthly commission payments from ITW Paslode while employed as a full-time employee with Bierer totaling approximately $200,000.

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59. By so doing, Kennerly earned substantial commissions from ITW Paslode for himself, while Bierer lost sales it would have otherwise made, and revenues it otherwise would have received.

60. In addition to Kennerly's wrongful activities assisting Defendants Trystar, Travis, and ITW Paslode, Kennerly also aided distributor SNC Manufacturing Co., Inc. ("SNC"). SNC manufactures a temporary, portable power restoration product marketed under the tradename Restore-Lite. At a point in time prior to 2014, a utility approached Bierer about developing a portable power restoration product. Bierer, at Kennerly's urging, put time, money, and resources into developing such a product. Ultimately, however, after Bierer had invested its resources, Kennerly advised Bierer there was not a sufficient market for such a product, and that it should be dropped. Subsequently, however, Kennerly assisted SNC in developing, fine-tuning, and promoting this product, which became the SNC Restore-Lite product; thereby diverting a substantial sales opportunity from Bierer all while he was an employee and officer of Bierer, owing Bierer the benefit of his efforts. Kennerly has been paid substantial sums of money by SNC, and in fact, currently serves as SNC's national sales manager.

61. In addition to the wrongful conduct above, Kennerly and Travis knowingly and intentionally misappropriated Bierer's proprietary injection molds for making plastic parts used by Travis in some of its products. Chris Meeks, a Duke Energy Employee, knowingly aided and abetted Bierer and Travis in this misappropriation by taking a Bierer sales manual given to him by Kennerly and rewording it to conform with the Travis products containing the discharge sticks made from the misappropriated Bierer moldings.

62. Kennerly also worked with a company named Kam Technologies LLC ("Kam-Tech") to design and manufacture products that directly compete with Bierer's core metering

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products. For example, while Kennerly was employed with Bierer, a Bierer customer requested the development of a de-energized wireless identification tool. Based on Bierer's existing product line, development of this tool was a task Bierer could have easier completed in house, thus fulfilling a need of its customer and generating sales. However, Kennerly usurped this opportunity from Bierer and instead directed the request to Kam-Tech, a company that directly competes with Bierer's core business – metering products. Additionally, while employed with Bierer, Kennerly received at least one sales commission payment from Kam-Tech for his efforts on behalf of Kam-Tech.

63. In assisting companies other than Bierer in developing and marketing electric utility products, Kennerly utilized detailed customer and product information, such as customer contacts, preferences, buying patterns, and product needs, on behalf of Bierer's competitors, bestowing a significant competitive advantage to those competitors that should have been reserved for Bierer alone.

64. The foregoing activities of Kennerly represent only the most egregious examples of Kennerly's work on behalf of Bierer's competitors. Upon information and belief, Kennerly acted on behalf of numerous other companies to the detriment of Bierer. Bierer asserts the right to recover against Kennerly and all other liable third parties for all losses and other sums resulting from said wrongful activities.

III. Kennerly's Corruption of Bierer's Sales Representatives

65. Bierer sells products through multiple sales channels. One such channel is through regional sales representatives ("sales reps"). Bierer contracts with sales rep firms across the country, who promote and sell Bierer's products to customers in the rep's particular region and earn a commission on those sales. Bierer's contract with these sales reps provides that they will

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not sell products that compete with Bierer. At all times relevant hereto, Kennerly had actual knowledge of these contractual provisions.

66. In his position with Bierer, Kennerly was in charge of selecting, hiring, and terminating Bierer's sales reps, as well as overseeing their activities. Upon information and belief, rather than ensuring that Bierer's reps were promoting and selling Bierer's products per their contractual obligations, Kennerly wrongly induced all Bierer sales reps to promote and sell the products of Bierer's competitors, under his direction, thereby converting reps, who were supposedly exclusively working for Bierer, into his own personal reps, for his own personal benefit, and in violation of his duties to Bierer.

67. Kennerly was so effective at converting Bierer's sales reps as described above that Bierer has been informed that some of its reps even referred to themselves as "Rick's reps," and Kennerly referred to them as his "minions."

IV. Kennerly's Secret Company – R&D Utility Products

68. In March 2015, Kennerly secretly formed his own company – R&D Utility Products ("R&D") – with David Deinek. Mr. Deinek owned and managed BDL - one of Bierer's sales rep firms located in Michigan.

69. Kennerly arranged for R&D to become a supplier of some of the production products used by Bierer. He did not inform Bierer that he was a co-owner of R&D, or that the other owner was also the owner of one of Bierer's sales reps.

70. Beyond failing to disclose his co-ownership of R&D, Kennerly took affirmative steps to conceal from Bierer his affiliation with R&D. Specifically, Kennerly routed R&D invoices through a third-party manufacturer and distributor named SafetyTest as a "cover." On one occasion, Joe Bierer was confused about the arrangement and asked Kennerly who "R&D" was.

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In response to this question, Kennerly stated that "R&D" was the "Research and Development" division of SafetyTest. This was a false statement.

71. R&D was not only selling products to Bierer without Bierer's knowledge of Kennerly's or Deinek's ownership in the company, but Kennerly also assisted R&D in manufacturing and selling products in competition with Bierer. As to at least one of these products, R&D's version of the product includes a feature that Bierer had specifically discussed in a management-level company meeting, and which Kennerly had used Bierer personnel and resources to work on developing. Upon information and belief, Kennerly capitalized on these confidential, trade secret discussions by using them to improve the Bierer product for R&D to manufacture and sell; thereby diverting what should have been a Bierer business opportunity, to his and Deinek's financial benefit.

72. The activities described above breached Kennerly's duties to Bierer as both an employee and an officer.

V. Bierer's Discovery of Kennerly's Wrongful Conduct and Relationships

73. Bierer did not know of Kennerly's misconduct and improper financial relationships with Defendants Trystar, Travis, ITW Paslode and Deinek until on or after July 10, 2018.

74. On or about July 10, 2018, a Bierer employee contacted Travis to inquire if Kennerly worked for Travis after Walter Bierer read a seminar announcement containing biographical information regarding Kennerly that included a statement that Kennerly was employed by Travis. Travis employee John O'Connor stated that Kennerly was a representative of Travis and provided the Bierer employee with Kennerly's telephone number.

75. Following this conversation with Travis, the Bierer employee called Trystar to inquire if Kennerly worked for Trystar and was advised that Kennerly was a consultant for Trystar.

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76. On July 10, 2018, Walter Bierer provided Kennerly with notice of termination of his employment with Bierer effective Friday, July 13, 2018 in an email.

77. Bierer subsequently learned of the extent of Kennerly's financial relationships with Trystar and Travis, as well as his relationships with ITW Paslode and Deinek, while investigating the extent of Kennerly's misconduct.

VI. The Formation and Activities of EUSA, LLC, as a "Front" For Continued Wrongful Conduct

78. Approximately one week and a half after Kennerly was terminated from Bierer, his spouse, Danielle Kennerly, formed EUSA, and is the sole member of the company. Danielle Kennerly has no background in the electric utility industry, or knowledge of its products and markets.

79. Shortly thereafter, EUSA and Trystar, for which Kennerly had secretly been working for years, entered into a sales representative agreement, which was memorialized into a writing dated August 14, 2018 (only a month after Kennerly's termination). Pursuant to this agreement, EUSA agreed to be "an independent sales representative for Trystar to develop new customers and sales and to solicit orders for Trystar's products."

80. Despite having no experience in the electric utility industry and no prior relationship with Trystar, Danielle Kennerly is identified as the signatory on behalf of EUSA on the agreement.

81. Upon information and belief, EUSA was established by Kennerly and Danielle Kennerly acting in concert to create a "front" for Kennerly's continued misuse of Bierer's confidential, trade secret information acquired while employed at Bierer, and to shield monies derived from Kennerly's wrongful activities.

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VI. Fraudulent Conveyances by Kennerly and Danielle Kennerly

82. On Monday, July 16, 2018, the next business day after Kennerly's termination from Bierer, Walter Bierer sent Kennerly a letter instructing him to preserve all potential evidence that may be subject to disclosure in a lawsuit by Bierer against him. Two days later, on July 18, 2018, counsel for Bierer sent Kennerly a similar letter, again notifying him to avoid deleting any potential evidence as any deletion would constitute destruction of evidence in a legal matter. Kennerly was, therefore, on actual notice of a potential claim as of these points in time.

83. On July 25, 2018, J&D Farms, LLC was formed, with Danielle Kennerly as its registered agent. Upon information and belief, Kennerly and Danielle Kennerly formed J&D Farms, and one or both are the sole owners of this entity.

84. The day after J&D Farms was formed, Kennerly and Danielle Kennerly transferred numerous properties they owned to J&D Farms. Presently, Bierer is aware of five properties, which are located in Calhoun and Lexington Counties, that Kennerly and Danielle Kennerly transferred to J&D Farms, and one property, which is located in Lexington County, they transferred to Danielle Kennerly solely. The deeds reflecting these transfers are attached hereto as Exhibit 1.

85. Upon information and belief, Kennerly and Danielle Kennerly voluntarily and fraudulently conveyed their interests in these properties for the purpose and with the intent of shielding these properties from any judgment rendered herein.

FOR A FIRST CAUSE OF ACTION
(Breach of the Duty of Loyalty – as to Kennerly)

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86. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

87. Kennerly, as an officer and trusted, highly-paid, full-time employee of Bierer, owed Bierer a duty of loyalty.

88. Kennerly willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally breached his duty of loyalty to Bierer as set forth in more detail above, including, but not limited to, the following:

a. Working as a sales representative for Bierer's material suppliers and competitors, as well as at least one distributor, thus intercepting and diverting sales and profits away from Bierer, while earning substantial commissions for himself;

b. Wrongfully disclosing and using Bierer's confidential and trade secret information;

c. Sharing Bierer's product ideas with Bierer's competitors, and at least one distributor, and assisting these third parties in developing and selling those products to Bierer's existing and/or potential customers;

d. Wasting significant amounts of Bierer's resources by taking product ideas to competitors, and at least one distributor, that Bierer had invested time and money in researching and developing, rather than developing those ideas through Bierer;

e. Converting Bierer's sales representatives into his own personal sales team to promote and sell the products of Bierer's competitors;

f. Disclosing confidential, proprietary Bierer information to distributors;

g. Secretly forming R&D and profiting from Bierer's purchase of R&D's products by way of an intentionally concocted scheme to conceal his affiliation with R&D;

h. Wrongfully disclosing and using Bierer's confidential and trade secret information to develop products for R&D;

i. Spending and using Bierer company resources while engaging in the disloyal conduct described herein;

j. Failing to appropriately inform Bierer of numerous business opportunities, denying Bierer the ability to explore those opportunities;

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k. Intentionally misrepresenting and/or concealing the disloyal activities set forth herein from Bierer; and

l. In additional respects to be determined during Bierer's on-going investigation and discovery in this case.

89. Kennerly's numerous breaches of his duty of loyalty were fraudulently concealed from Bierer.

90. As a result of Kennerly's intentional and illegal breaches of the duty of loyalty, Bierer has suffered actual damages in at least the following respects, and is entitled to recover said damages from Kennerly in an amount and in a manner to be determined at the trial of this case, including:

a. Lost past and future sales, and lost past and future profits;

b. All wages, profit sharing, benefits, credit card charges, and any other form of remuneration paid to Kennerly by Bierer during any period of disloyalty by Kennerly;

c. Disgorgement of all monies received by Kennerly from his disloyal activities described herein;

d. Disgorgement of Kennerly's share of R&D's profits;

e. Disgorgement of any funds received by EUSA, J&D Farms, and any other company or entity which has received funds resulting from Kennerly's wrongful conduct;

f. The value of the business opportunities wrongfully diverted from Bierer by Kennerly; and

g. Punitive damages based on Kennerly's willful, wanton, intentional, and malicious acts.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty – as to Kennerly)

91. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

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92. Kennerly, by virtue of his position as an officer and the high degree of trust reposed in him, and also pursuant to S.C. Code Ann. Section 33-8-420, owed Bierer a fiduciary duty.

93. Kennerly willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally breached his duty of loyalty to Bierer as set forth in more detail above, including, but not limited to, the following:

a. Working as a sales representative for Bierer's competitors, thus diverting sales and profits away from Bierer, while earning substantial commissions for himself;

b. Wrongfully disclosing and using Bierer's confidential and trade secret information;

c. Sharing Bierer's product ideas with Bierer's competitors, and at least one distributor, and assisting those third parties in developing and selling those products to Bierer's existing and/or potential customers;

d. Wasting significant amounts of Bierer's resources by taking product ideas to competitors, and at least one distributor, that Bierer had invested time and money in researching and developing, rather than developing those ideas through Bierer;

e. Converting Bierer's sales representatives into his own personal sales team to promote and sell the products of Bierer's competitors;

f. Disclosing confidential, proprietary Bierer information to distributors;

g. Secretly forming R&D and profiting from Bierer's purchase of R&D's products by way of an intentionally concocted scheme to conceal his affiliation with R&D;

h. Wrongfully disclosing and using Bierer's confidential and trade secret information to develop products for R&D;

i. Spending and using Bierer company resources while engaging in the disloyal conduct described herein;

j. Failing to appropriately inform Bierer of numerous business opportunities, denying Bierer the ability to explore those opportunities;

k. Intentionally misrepresenting and/or concealing the disloyal activities set forth herein from Bierer;

l. Continuing to breach his fiduciary duty by masterminding the formation of EUSA and negotiating a sales representative agreement between EUSA and Trystar;

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m. Intentionally fixing Bierer pricing to make it non-competitive, that maximizing sales to Trystar and Travis and his resulting commissions therefrom; and

n. In additional respects to be determined during Bierer's on-going investigation and discovery in this case.

94. Kennerly's breaches of his fiduciary duty were fraudulently concealed from Bierer.

95. As a result of the intentional and illegal breaches of fiduciary duty by Kennerly, Bierer has suffered actual damages in at least the following respects, and is entitled to recover said damages from Kennerly in an amount and in a manner to be determined at the trial of this case, including:

a. Lost past and future sales, and lost past and future profits;

b. All wages, profit sharing, benefits, credit card charges, and any other form of remuneration paid to Kennerly by Bierer during any period of disloyalty by Kennerly;

c. Disgorgement of all monies received by Kennerly from his disloyal activities described herein;

d. Disgorgement of Kennerly's share of R&D's profits;

e. Disgorgement of any funds received by EUSA, J&D Farms, and any other company or entity which has received funds resulting from Kennerly's wrongful conduct;

f. The value of the business opportunities wrongfully diverted from Bierer by Kennerly; and

g. Punitive damages based on Kennerly's willful, wanton, intentional, and malicious acts.

FOR A THIRD CAUSE OF ACTION
(Aiding &Abetting Breach of Fiduciary Duty – as to Trystar, Travis, ITW Paslode, and Deinek)

96. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

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97. Kennerly, by virtue of his position as an officer and the high degree of trust reposed in him, and also pursuant to S.C. Code Ann 33-8-420, owed Bierer a fiduciary duty.

98. Trystar, Travis, ITW Paslode, and Deinek had actual knowledge of Kennerly's employment with Bierer and the fiduciary duty Kennerly owed to Bierer. Despite such knowledge, Trystar, Travis and ITW Paslode willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally aided and abetted Kennerly's breach his fiduciary duty to Bierer as set forth in more detail above, including, but not limited to, the following:

a. Engaging Kennerly to provide consulting and/or sales services for competing, non-Bierer products, thus diverting sales and profits away from Bierer;

b. Wrongfully utilizing Bierer's confidential, proprietary and/or trade secret information- including customer names and contact information, vendors, pricing, machines/devices used in production, and internal processes, strategies, and procedures- disclosed by Kennerly to usurp sales and customers from Bierer;

c. Capitalizing on product ideas received from Kennerly that were originated and developed using Bierer resources and selling such products to Bierer's existing and/or potential customers;

d. Selling non-Bierer products through Bierer's regional sales reps;

e. Distributing non-Bierer products through R&D;

f. Working with Kennerly and/or R&D to undercut Bierer pricing;

g. Engaging in unfair competitive practices which Kennerly carried out using Bierer company resources, as well as Bierer's confidential, proprietary and/or trade secret information;

h. Usurping business opportunities from Bierer that would not have been possible absent Kennerly's disloyal conduct in redirecting potential business from existing and/or prospective Bierer customers and/or concealing the same from Bierer;

i. Selling products that directly compete with Bierer products;

j. Promoting competing business interests through Kennerly while Kennerly utilized the financial resources of Bierer to pay for travel, meals, and lodging and other expenses incidental to his disloyal sales efforts;

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k. Utilizing Bierer resources, and confidential, proprietary and/or trade secret information provided by Kennerly to establish a presence in the electric utility market; and

l. Paying Kennerly and/or R&D commissions and any other form of renumeration for the disloyal conduct described herein.

99. Deinek had actual knowledge of Kennerly's employment with Bierer and the fiduciary duty Kennerly owed to Bierer. Despite such knowledge, Deinek willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally aided and abetted Kennerly's breach his fiduciary duty to Bierer as set forth in more detail above, including, but not limited to, the following:

a. Forming R&D with Kennerly in an effort to directly compete with Bierer despite their actual knowledge of the prohibition of competitive activity set forth in the regional sales rep agreement;

b. Wrongfully utilizing Bierer's confidential, proprietary and/or trade secret information - including customer names and contact information, vendors, pricing, machines/devices used in production, and internal processes and procedures- disclosed by Kennerly to usurp sales and customers from Bierer for the benefit of R&D;

c. Capitalizing on product ideas received from Kennerly that were originated and developed using Bierer resources and selling such products to Bierer's existing and/or potential customers;

d. Selling non-Bierer products through R&D either personally or through Bierer's regional sales reps;

e. Distributing non-Bierer products through R&D;

f. Working with Kennerly to undercut Bierer pricing on behalf of R&D;

g. Engaging in unfair competitive practices which Kennerly carried out using Bierer company resources, as well as Bierer's confidential, proprietary and/or trade secret information;

h. Usurping numerous business opportunities on behalf of R&D from Bierer by redirecting potential business from existing and/or prospective Bierer customers and/or concealing the same from Bierer;

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i. Paying commissions through R&D to Bierer sales reps for sales of products that compete with Bierer and were a result of the disloyal conduct described herein; and

j. Promoting R&D's competing business interests through Kennerly while Kennerly utilized the financial resources of Bierer to pay for travel, meals, and lodging and other expenses incidental to his disloyal sales efforts.

100. Kennerly's breaches of his fiduciary duty were fraudulently concealed from Bierer, and Trystar, Travis, ITW Paslode and Deinek perpetuated such concealment through fraudulent representations or intentional omissions.

101. As a result of Trystar, Travis, ITW Paslode, and Deinek aiding and abetting the intentional and illegal breaches of fiduciary duty by Kennerly, Bierer has suffered actual damages in at least the following respects, and is entitled to recover said damages from Trystar, Travis, ITW Paslode, and Deinek in an amount and in a manner to be determined at the trial of this case, including:

a. Lost past and future sales, and lost past and future profits;

b. All monies received by Trystar, Travis, ITW Paslode, and Deinek as a result of Kennerly's disloyal activities described herein;

c. Disgorgement of Kennerly's and Deinek's share of R&D's profits;

d. The value of the business opportunities wrongfully diverted from Bierer; and

e. Punitive damages based on the willful, wanton, intentional, and malicious acts of Trystar, Travis, ITW Paslode, Deinek, and Kennerly.

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Existing Contractual Relations – as to Kennerly)

102. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

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103. Upon information and belief, and as set forth above, Kennerly intentionally interfered with existing contractual relations between Bierer and its customers, manufacturing representatives, sales representatives, and distributors, among others.

104. Kennerly, in his long-term role as Vice President at Bierer, had actual knowledge of Bierer's contractual relations with its customers, sales representatives, and distributors, and had no justification to interfere with such contracts.

105. Kennerly's conduct in interfering with said relationships was committed with an improper purpose and by improper methods.

106. As a direct and proximate result of Kennerly's tortious interference with Bierer's existing contractual relationships, Bierer has suffered and will continue to suffer actual damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of Kennerly's conduct.

FOR A FIFTH CAUSE OF ACTION
(Tortious Interference with Existing Contractual Relationship – as to Trystar, Travis, ITW Paslode, and Deinek)

107. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

108. Defendants Trystar, Travis, ITW Paslode, and Deinek had actual knowledge that Kennerly was a Vice President for Bierer and were aware of the fiduciary duty Kennerly owed to Bierer.

109. Trystar, Travis, and ITW Paslode were introduced to Kennerly as a Bierer employee and conducted business with him in his capacity as a Bierer employee. At the beginning

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of their relationship with Bierer, each routinely communicated with Kennerly regarding Bierer business.

110. Similarly, Deinek, as a Bierer sales representative, routinely communicated with Kennerly regarding sales for Bierer.

111. Given their routine dealings with Kennerly, Trystar, Travis, ITW Paslode, and Deinek had actual knowledge of Kennerly's intimate familiarity with Bierer's research and development of products, customers, sales representatives, and distributors.

112. Trystar, Travis, ITW Paslode, and Deinek interfered with Bierer's oral employment contract with Kennerly by engaging in unfair competitive practices with the assistance of Kennerly to the detriment of Bierer in violation of the fiduciary duty owed to Bierer.

113. Trystar, Travis, and ITW Paslode incentivized Kennerly's disloyal conduct towards Bierer by paying him commissions on sales he made on behalf of these defendants and usurped from Bierer as a result of Kennerly's improper disclosure of Bierer's research and development of products, customers, sales representatives, and distributors.

114. Deinek incentivized Kennerly's disloyal conduct towards Bierer through the formation of R&D which afforded Kennerly an opportunity to not only receive a salary from Bierer, but to also receive commissions on sales made by Kennerly, Deinek, and/or R&D and usurped from Bierer as a result of Kennerly's improper disclosure of Bierer's research and development of products, customers, sales representatives, and distributors.

115. The conduct of Trystar, Travis, ITW Paslode, and Deinek in interfering with Bierer's employment relationship with Kennerly was committed with an improper purpose and by improper methods.

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116. As a direct and proximate result of the tortious interference of Trystar, Travis, ITW Paslode, and Deinek with Bierer's existing employment/contractual relationship with Kennerly, Bierer has suffered and will continue to suffer actual damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of the conduct by Trystar, Travis, ITW Paslode, and Deinek.

FOR A SIXTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual and Business Relations – As to Kennerly)

117. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

118. Kennerly intentionally interfered with prospective and future contractual and business relationships between Bierer and its customers, sales representatives, and distributors, among others.

119. Kennerly, in his long-term role as a Vice President at Bierer, had actual knowledge of the relationships Bierer maintains with its customers, sales representatives, and distributors, and had no justification to interfere with such relationships.

120. Kennerly's actions in these respects were done with an improper purpose and by improper methods.

121. As a direct and proximate result of Kennerly's tortious interference with Bierer's prospective contractual and business relationships, Bierer has suffered and will continue to suffer damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of Kennerly's conduct.

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FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual and Business Relations – As to Trystar, Travis, ITW Paslode, & Deinek)

122. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

123. Trystar, Travis, ITW Paslode, and Deinek intentionally interfered with prospective and future contractual and business relationships between Bierer and its customers, sales representatives, and distributors, among others.

124. Trystar, Travis, and ITW Paslode were all brought into new segments of the electric utility market through requests from Bierer to develop specific products. Through these arrangements, Trystar, Travis, and ITW Paslode became familiar with Kennerly and the role he played at Bierer.

125. Without justification, Trystar, Travis, and ITW Paslode worked with Kennerly to usurp business opportunities and sales from Bierer through the improper utilization of Bierer's customers, sales representatives, distributors, and product research and development.

126. Without justification, Deinek worked with Kennerly to create R&D as a vehicle to usurp business opportunities and sales from Bierer through the improper utilization of Bierer's customers, sales representatives, distributors, and product research and development.

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127. Through concealment of potential opportunities, including sales as well as product development, and undercutting Bierer pricing, Trystar, Travis, ITW Paslode and Deinek improperly interfered with Bierer's prospective future sales and business relations.

128. The actions of Trystar, Travis, ITW Paslode and Deinek were done with an improper purpose and by improper methods.

129. As a direct and proximate result of the tortious interference by Trystar, Travis, ITW Paslode and Deinek with Bierer's prospective contractual and business relationships, Bierer has suffered and will continue to suffer damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of the conduct of Trystar, Travis, ITW Paslode and Deinek.

FOR AN EIGHTH CAUSE OF ACTION
(Unjust Enrichment – As to Kennerly)

130. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

131. Bierer conferred a benefit on Kennerly by, among other things, paying him a salary, benefits, paying his credit card charges, and profit sharing, during a time in which he was acting as a sales representative for competitive companies, as well as at least one distributor, and breaching his duty of loyalty and fiduciary duties to Bierer. Kennerly received, accepted, and has retained these benefits from Bierer. Kennerly also received, accepted, and has retained the commissions he wrongfully received from these competitive companies, and at least one distributor.

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132. Kennerly also received a benefit from Bierer, through R&D, in the form of payments to R&D for goods sold to Bierer by R&D. Kennerly, as an owner of R&D, accepted and has retained these benefits.

133. Allowing Kennerly to retain the benefits he received from Bierer through his Bierer salary, benefits, credit card charges, profit sharing, as well as the commissions he was paid from competitive companies, and at least one distributor, while breaching his duties to Bierer, as well as the benefits he received through R&D, would be unjust and inequitable.

134. Bierer is entitled to recover, and Kennerly should disgorge, all said monies and other benefits unjustly received by Kennerly, in an amount to be determined at the trial of this case.

FOR AN NINTH CAUSE OF ACTION
(Unjust Enrichment – As to Trystar, Travis, ITW Paslode, & Deinek)

135. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

136. Bierer conferred the following benefits on Trystar, Travis, and ITW Paslode, by, among other things:

a. expending time, money, and other resources working with each to modify its offerings so as to make them attractive/useful to customers in the electric utility market;

b. agreeing to purchase product for distribution to its customers thereby giving each an opportunity to establish themselves in an industry in which they previously did not have a footprint for such products; and,

c. purchasing such products.

Trystar, Travis, and ITW Paslode received, accepted, and retained these benefits from Bierer.

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137. Bierer conferred the benefit of payment of sales commission to Deinek through his company BDL for his sales of Bierer products. Such commission was paid by Bierer without knowledge that Deinek, as the owner of BDL, was selling competing products and, thus, in violation of his sales rep agreement with Bierer. Despite his improper conduct, Deinek received, accepted, and retained these benefits from Bierer.

138. Through the actions of Kennerly, but unbeknownst to Bierer, Trystar, Travis, ITW Paslode, and Deinek were provided with Bierer's confidential, proprietary and/or trade secret information- including customer names and contact information, vendors, pricing, machines/devices used in production, and internal processes and procedures- which they used to their benefit for financial gain. Trystar, Travis, ITW Paslode and Deinek received, accepted, and retained these benefits from Bierer.

139. Allowing Trystar, Travis, ITW Paslode and Deinek to retain the benefits they received from Bierer through their improper, deceitful, and unfairly competitive conduct detailed herein would be unjust and inequitable.

140. Bierer is entitled to recover, and Trystar, Travis, ITW Paslode and Deinek should disgorge, all said monies and other benefits they unjustly received, in an amount to be determined at the trial of this case.

FOR A TENTH CAUSE OF ACTION
(Accounting – As to All Defendants)

141. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

142. Bierer is entitled to an equitable accounting of all sums wrongfully received by all Defendants, as a result of the wrongful activities set forth herein.

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FOR AN ELEVENTH CAUSE OF ACTION
(Fraudulent Misrepresentation – As to Kennerly)

143. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

144. Kennerly fraudulently concealed and misrepresented his affiliation with R&D by misrepresenting to Bierer that R&D was the "Research and Development" division of SafetyTest when, in fact, it was a company he co-owned with one of Bierer's sales representatives.

145. Moreover, Kennerly fraudulently misrepresented that he was upholding his duties of loyalty and his fiduciary duties to Bierer by continuing to accept a salary and benefits from Bierer and submitting fraudulent trip reports to Bierer management, while at the same time engaging in numerous disloyal activities harmful to Bierer.

146. The foregoing representations by Kennerly were false; were material; were known to be false when made; were intended to be acted upon by Bierer; their falsity was unknown to Bierer; were relied upon; were rightfully and justifiably relied upon; and caused Bierer to sustain actual damages as set forth herein, which it is entitled to recover, along with punitive damages.

FOR A TWELVETH CAUSE OF ACTION
(Fraudulent Non-Disclosure – As to Kennerly)

147. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

148. Kennerly had a duty to disclose to Bierer his activities undertaken on behalf of competing companies, and at least one distributor, on behalf of himself, and on behalf of R&D. Kennerly breached this obligation. As a result of this breach, Bierer continued paying Kennerly salary and benefits and holding him out as a Vice President of Engineering and Operations, and

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later Vice President of National Sales, and sustained lost sales and sales opportunities as Kennerly continued his wrongful activities. Each day that Kennerly accepted salary and benefits from Bierer, but failed to disclose his wrongful activities, constituted an act of fraudulent, material non-disclosure.

149. Bierer is entitled to recover its actual damages as well as punitive damages herein as a result of Kennerly's willful, wanton, and wrongful conduct.

FOR A THIRTEENTH CAUSE OF ACTION
(Constructive Trust – As to Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

150. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

151. Kennerly was in a confidential and fiduciary relationship with Bierer, whereby Bierer reposed special confidence in him, such that he owed Bierer a duty of loyalty, a duty to act in the utmost good faith, and with due regard to Bierer's interests.

152. Kennerly breached his duties of loyalty and good faith and violated his fiduciary duty to Bierer by engaging in the activities set forth herein. EUSA, Trystar, Travis, ITW Paslode, and Deinek are beneficiaries of Kennerly's continued misuse of confidential information, in breach of his duties owed to Bierer.

153. Kennerly wrongfully obtained monies in bad faith and through breaches of his duties of trust and loyalty and violation of his fiduciary duty, in an amount to be determined at the trial of this case, but including at least the total sum of all commissions paid to him by competing companies (including their current value, as any such commissions have been invested and gained value). Bierer is entitled to recover all such monies herein, including the current value of all sums

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wrongfully paid to Kennerly, as said sums have gained value. Bierer is also entitled to all sums paid to or received by EUSA resulting from a breach of duty.

154. Trystar, Travis, ITW Paslode, and Deinek wrongfully obtained monies in bad faith as a result of Kennerly's breach of his duties of trust and loyalty and violation of his fiduciary duty to Bierer, in an amount to be determined at the trial of this case, but including at least the total sum of all profits and/or commissions made by Trystar, Travis, ITW Paslode, and Deinek on all sales of products that compete with Bierer products. Bierer is entitled to recover all such monies herein, including the current value of such sums.

155. Said wrongfully obtained monies do not equitably belong to Kennerly, EUSA, Trystar, Travis, ITW Paslode, or Deinek, but belong to Bierer, entitling Bierer to the imposition of a constructive trust upon all monies wrongfully obtained by Kennerly, EUSA, Trystar, Travis, ITW Paslode, and Deinek or as a result of Kennerly's wrongful actions, regardless of the location or holder of those funds.

FOR A FOURTEENTH CAUSE OF ACTION
(Common Law Unfair Competition –
As to Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

156. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

157. The activities of Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek as described herein, constitute common law unfair competition, for which they are jointly and severally liable herein.

158. As a result of Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek's unfair competition, Bierer has sustained actual damages, which Bierer is entitled to

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recover in an amount to be proven at trial, in addition to punitive damages based on the Defendants' willful, wanton and wrongful conduct.

FOR A FIFTEENTH CAUSE OF ACTION
(South Carolina Trade Secrets Act –
As to Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

159. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

160. Bierer is the owner of various trade secrets, as defined in the South Carolina Trade Secrets Act at S.C. Code Ann. § 39-8-20.

161. Bierer's trade secrets as described herein derive independent economic value from not being generally known to, or readily ascertainable through proper means by, the public, or any other person who can obtain economic value from their disclosure or use.

162. Bierer has undertaken reasonable efforts under the circumstances to maintain the secrecy of its trade secrets, including, but not limited to: requiring its employees, including Kennerly specifically, to agree to and sign its Employee Handbook, which contains detailed "Non-Disclosure/Confidential Information" provisions; password-protecting its computers; restricting company meetings to department heads and officers only; keeping hard-copy documents under lock and key; and strictly limiting access to its building through key cards which only allow admittance to employees at their shift times and only provide 24-hour access to officers.

163. During his employment with Bierer, Kennerly was informed of, and should reasonably have known from the circumstances, the confidential nature of Bierer's trade secrets, and his duty not to use, misuse, or disclose such trade secrets without Bierer's express authorization.

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164. Kennerly misappropriated Bierer's trade secrets, including, but not limited to, information related to Bierer's customers, product research, development and manufacturing, marketing and sales strategies, financial information, and other highly confidential company matters, by using, misusing, and/or disclosing these trade secrets without Bierer's consent when Kennerly knew or had reason to know that he had a duty to maintain the secrecy of this information and use it only for the benefit of Bierer.

165. Kennerly intentionally used and/or disclosed Bierer's trade secrets in order to derive benefits for himself, as well as for Bierer's competitors, at the expense of Bierer and in breach of his fiduciary duty and duty of loyalty owed to Bierer.

166. Danielle Kennerly and EUSA aided, abetted, and are actively participating in and benefitting from the ongoing misappropriation of Bierer's trade secrets by providing Kennerly the vehicle (EUSA) through which to breach his continuing fiduciary duties and confidentiality obligations. Furthermore, Danielle Kennerly and EUSA failed to take reasonable measures to ensure that they were not using Bierer's trade secrets in the furtherance of EUSA's business.

167. Trystar, Travis, and ITW Paslode aided and abetted Kennerly's breach of his fiduciary duty and duty of loyalty to Bierer, and are actively participating in and benefitting from the ongoing misappropriation of Bierer's trade secrets in order to derive financial gain for themselves at the expense of Bierer. Furthermore, Trystar, Travis, and ITW Paslode deliberately failed to take reasonable measures to ensure that they were not using Bierer's trade secrets in the furtherance of their respective businesses.

168. Deinek aided and abetted Kennerly's breach of his fiduciary duty and duty of loyalty to Bierer, by amongst other things, creating R&D so he may actively continue to participate

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in and benefit from the ongoing misappropriation of Bierer's trade secrets in order to derive financial gain for himself through profits received

169. Defendants' violations of the South Carolina Trade Secrets Act have directly and proximately caused Bierer to suffer actual losses as well as substantial future losses. Bierer is therefore entitled to an award of actual damages against the Defendants, jointly and severally, in an amount to be proven at trial.

170. Defendants have been unjustly enriched by receiving benefits from their misappropriation of Bierer's trade secrets, requiring Defendants to disgorge to Bierer any amounts received through their violation of the South Carolina Trade Secrets Act.

171. Bierer is entitled to reasonable royalties for Defendants' unauthorized disclosure and/or use of Bierer's trade secrets.

172. Defendants acted in willful, wanton, and reckless disregard of Bierer's rights, entitling Bierer to an award of exemplary damages in an amount two times Bierer's actual damages.

173. In addition, Bierer is entitled to attorney's fees and costs due to the willful nature of Defendants' misappropriation.

174. Finally, Bierer is entitled to injunctive relief, on a preliminary and permanent basis, to prevent any further actual or threatened misappropriation of Bierer's trade secrets by Defendants.

FOR A SIXTEENTH CAUSE OF ACTION
(Federal Defend Trade Secrets Act –
As to Kennerly, Danielle Kennerly, and EUSA)

175. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

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176. Bierer is the lawful and exclusive owner of various trade secrets related to its customers, product research, development and manufacturing, marketing and sales strategies, financial information, and other highly confidential company matters, all of which are used in interstate commerce.

177. Bierer has taken reasonable measures to maintain the secrecy of its trade secrets, such as requiring its employees, including Kennerly specifically, to sign an Employee Handbook, which includes specific non-disclosure/confidential information provisions, as well as password-protecting its computers and limiting access to its confidential information by other means.

178. Bierer's trade secrets derive independent economic value, actual and potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

179. Kennerly knew or had reason to know of the confidential nature of Bierer's trade secret information and his duty not to use, misuse, or disclose such trade secrets without Bierer's express authorization.

180. Kennerly misappropriated Bierer's trade secrets, including, but not limited to, information related to Bierer's customers, product research, development and manufacturing, marketing and sales strategies, financial information, and other highly confidential company matters, by using, misusing, and/or disclosing these trade secrets without Bierer's consent when Kennerly knew or had reason to know that he had a duty to maintain the secrecy of this information and use it only for the benefit of Bierer.

181. Kennerly intentionally used and/or disclosed Bierer's trade secrets in order to derive benefits for himself, as well as for Bierer's competitors, at the expense of Bierer and in breach of his fiduciary duty and duty of loyalty owed to Bierer.

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182. Danielle Kennerly and EUSA aided, abetted, and are actively participating in and benefitting from the ongoing misappropriation of Bierer's trade secrets by providing Kennerly the vehicle (EUSA) through which to breach his continuing fiduciary duties and confidentiality obligations. Furthermore, Danielle Kennerly and EUSA failed to take reasonable measures to ensure that they were not using Bierer's trade secrets in the furtherance of EUSA's business.

183. Defendants Kennerly, Danielle Kennerly and EUSA's violations of the Federal Defend Trade Secrets Act have directly and proximately caused Bierer to suffer actual and future losses. Bierer is therefore entitled to an award of actual damages against the Defendants, jointly and severally, in an amount to be proven at trial.

184. Defendants Kennerly, Danielle Kennerly and EUSA have been unjustly enriched by receiving benefits from their misappropriation of Bierer's trade secrets, requiring Defendants to disgorge to Bierer any amounts received through their violation of the Federal Defend Trade Secrets Act.

185. Bierer is entitled to reasonable royalties for Defendants Kennerly, Danielle Kennerly and EUSA's unauthorized disclosure and/or use of Bierer's trade secrets under the Federal Defend Trade Secrets Act.

186. Defendants Kennerly, Danielle Kennerly and EUSA willfully and maliciously misappropriated Bierer's trade secrets, entitling Bierer to an award of exemplary damages in an amount two times the amount of actual damages as well as an award of attorney's fees and costs under the Federal Defendant Trade Secrets Act.

187. Bierer is also entitled to a preliminary and permanent injunction to prevent any further actual or threatened misappropriation of its trade secrets by Defendants Kennerly, Danielle Kennerly, and EUSA under the Federal Defend Trade Secrets Act.

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FOR A SEVENTEENTH CAUSE OF ACTION
(Fraudulent Conveyances without Consideration – As to Kennerly, Danielle Kennerly, and J&D Farms)
Pursuant to SCRCP 18(b)

188. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

189. On July 25, 2018, twelve days after Kennerly was terminated from Bierer, J&D Farms was formed. As of this date, Kennerly and Danielle Kennerly were the joint owners of certain real property located in Lexington and Calhoun Counties.

190. The following day, July 26, 2018, five properties jointly owned by Kennerly and Danielle Kennerly were transferred to J&D Farms, and one property jointly owned by them was transferred to Danielle Kennerly solely. A copy of said deeds are attached hereto as Exhibit 1 and incorporated herein by reference.

191. Kennerly and Danielle Kennerly's conveyances of these properties were without consideration. The deeds contain mere boilerplate language stating the consideration for the conveyances as $5.00. The deeds contain no further information to show that any other consideration was given for the conveyances.

192. At the time of these conveyances, and currently, Kennerly and Danielle Kennerly were and continue to be indebted to Bierer for a substantial amount.

193. Kennerly and Danielle Kennerly's conveyances of these properties was voluntary.

194. As a result of these conveyances, upon information and belief, Kennerly and Danielle Kennerly failed to retain sufficient property to pay their indebtedness to Bierer.

195. Upon information and belief, J&D Farms was created as a vehicle to hold title to the said properties in order to shield the properties from Bierer's judgment.

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196. Upon information and belief, one of the properties was transferred to Danielle Kennerly solely to shield the property from Bierer's judgment.

197. Kennerly, Danielle Kennerly and J&D Farms knew or should have known of Bierer's claims against them at the time of the conveyances of said properties, and these Defendants formulated, designed, participated in and/or acquiesced in the fraud perpetrated upon Bierer by devising, preparing, executing, accepting, and/or recording the documents to make the conveyances of the properties.

198. Bierer is informed and believes that the conveyances to J&D Farms and Danielle Kennerly were fraudulent conveyances made in violation of S.C. Code Ann. § 27-23-10, and, as such, should be declared null and void and of no effect whatsoever.

FOR AN EIGHTEENTH CAUSE OF ACTION
(Fraudulent Conveyances without Adequate Consideration –
As to Kennerly, Danielle Kennerly, and J&D Farms)
Pursuant to SCRCP 18(b)

199. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

200. To the extent the Court deems consideration was exchanged in the conveyances to J&D Farms and Danielle Kennerly, Bierer would show unto the Court that the conveyances were without adequate consideration, and were made with the intent to hinder, delay and defraud Bierer, with the further intent to prevent and hinder Bierer from receiving the proceeds from any sale of the properties upon execution or otherwise.

201. Kennerly, Danielle Kennerly, and J&D Farms knew or should have known of Bierer's claims against them at the time of the conveyances of said properties, and these Defendants formulated, designed, participated in and/or acquiesced in the fraud perpetrated upon

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Bierer by devising, preparing, executing, accepting, and/or recording the documents to make the conveyances of the properties.

202. Bierer is informed and believes that the aforementioned conveyances to J&D Farms and Danielle Kennerly were fraudulent conveyances made in violation of S.C. Code Ann. § 27-23-10, and, as such, should be declared null and void and of no effect whatsoever.

FOR A NINETEENTH CAUSE OF ACTION
(Civil Conspiracy - As to Kennerly, Danielle Kennerly, EUSA, and J&D Farms)

203. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

204. Kennerly combined together with Danielle Kennerly, EUSA, and J&D Farms, and committed one or more overt acts in furtherance of said conspiracy, for the purpose of injuring Bierer, and caused Bierer to sustain special damages, including attorneys fees, in an amount to be proven at trial, which Bierer is entitled to recover from the Defendants herein, jointly and severally, along with punitive damages.

FOR A TWENTIETH CAUSE OF ACTION
(Injunction – As to Kennerly, Danielle Kennerly, and J&D Farms)

205. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

206. Bierer has no adequate remedy at law and irreparable injury to Bierer will result, as well as unjust enrichment to Kennerly, Danielle Kennerly, and J&D Farms, unless the Court enjoins these Defendants from encumbering, alienating, or otherwise conveying or disposing of the aforementioned transferred properties, or from encumbering, alienating or otherwise conveying or disposing of any other properties in an attempt to shield the properties from a potential judgment in this case.

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207. Bierer hereby moves the Court for an Order enjoining and restraining the Defendants from encumbering, alienating, or otherwise conveying or disposing of the transferred properties, and any other assets currently owned by Defendants, for the purposes of shielding the properties from a potential judgment in this case.

WHEREFORE, Plaintiff having complained of the Defendants herein, prays for judgment against Defendants Kennerly, Danielle Kennerly, EUSA, J&D Farms, Trystar, Travis, ITW Paslode, and Deinek, jointly and severally, and for an Order for the following legal and equitable relief:

1. That Bierer be awarded its lost past and future sales, and lost past and future profits, due to Defendants' wrongful conduct described herein;

2. That Bierer be awarded the value of all business opportunities wrongfully diverted away from Bierer by Defendants;

3. Disgorgement of Kennerly of all wages, profit sharing, benefits, credit card charges, and any other form of remuneration paid to him by Bierer during the period of his disloyalty and breach of duty to Bierer;

4. Disgorgement of all past, present, or future monies received by Defendants as a result of any breach or violation by Kennerly, of his duties to Bierer;

5. Disgorgement of Kennerly's and Deinek's shares of R&D's profits;

6. Disgorgement of all amounts by which Kennerly or any other Defendant, has been unjustly enriched due to any breach of duty by Kennerly to Bierer, including but not limited to disgorgement of all sums (with interest and accumulated value) that Kennerly, received from any competitive company for promotions, sales, or other activities, or resulting from misappropriation of Bierer's trade secrets, and/or reasonable royalties for the same;

7. That Bierer be awarded damages for its actual and future losses due to Defendants Kennerly's, Danielle Kennerly's, EUSA's, Trystar's, Travis', ITW Paslode's and Deinek's misappropriation of Bierer's trade secrets in violation of the South Carolina Trade Secrets Act, as well as its wrongful conduct constituting common law unfair competition against Bierer, to include exemplary damages of two times the amount of Bierer's actual damages;

8. That Bierer be awarded damages for its actual and future losses due to Defendants Kennerly's, Danielle Kennerly's, and EUSA's misappropriation of Bierer's trade

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secrets in violation of the Federal Defend Trade Secrets Act, to include exemplary damages of two times the amount of Bierer's actual damages;

9. That Bierer be awarded, and Defendants Kennerly and Deinek be required to disgorge, any and all profits, payments, or any other form of remuneration Defendants earned from any other source during any period of Kennerly's disloyalty to Bierer, and any such profits, payments, or remuneration paid to Defendants in the future, based on any actions initiated or information acquired during Kennerly's employment with Bierer;

10. Preliminary and permanent injunction preventing the use or disclosure of Bierer's trade secret information;

11. A full and complete accounting of all sums received by Defendants Kennerly, Danielle Kennerly, EUSA, J&D Farms, and Deinek as a result of Kennerly's breaches of duty;

12. That all fraudulent conveyances by Defendants Kennerly, Danielle Kennerly, and J&D Farms be declared null and void;

13. A restraining order and preliminary and permanent injunction preventing Defendants from further encumbering, alienating or otherwise conveying any property or asset for the purpose of shielding the property from a potential judgment;

14. That Plaintiff be awarded punitive damages;

15. That Plaintiff be awarded attorneys' fees and costs under the South Carolina Trade Secrets Act, as well as for bringing and prosecuting this action, against Defendants Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode and Deinek;

16. That Plaintiff be awarded attorneys' fees and costs under the Defend Trade Secrets Act, as well as for bringing and prosecuting this action, against Defendants Kennerly, Danielle Kennerly, and EUSA;

17. That Plaintiff be awarded prejudgment interest on all recoverable damages;

18. That all judgments and damages be joint and several, as proper under law;

19. For imposition of a constructive trust as to all sums Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, and Deinek receive, resulting from Kennerly's wrongful conduct; and

20. That Plaintiff be awarded such other and further legal and equitable relief as this Court deems just and proper.

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Respectfully Submitted,

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April 15, 2021

Columbia, South Carolina

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STATE OF SOUTH CAROLINA) **)** **COUNTY OF RICHLAND)**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Bierer and Associates, Inc., PLAINTIFF, vs. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, DEFENDANTS.	**Civil Action: 2018-CP-40-04841** **Hon. R. Lawton McIntosh, Business Court** **DEFENDANT TRAVIS PATTERN & FOUNDRY, INC.'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT**
Jan F. Kennerly, Jr., DEFENDANT/ THIRD PARTY PLAINTIFF, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, THIRD-PARTY DEFENDANTS.	

Defendant Travis Pattern & Foundry, Inc. ("Travis Pattern") hereby answers the Third Amended Complaint of Plaintiff Bier and Associates, Inc. ("Plaintiff"), filed on April 15, 2021 ("Third Amended Complaint"), and would show to the Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Third Amended Complaint not specifically admitted, qualified or explained in this Answer is hereby expressly denied.

2. Responding to Paragraph 1 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore denies the same.

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3. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 2, 3, 4, 5, and 6 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

4. Responding to the allegations in Paragraph 7 of Plaintiff's Third Amended Complaint, Travis Pattern admits that it is a corporation organized under the laws of the State of Washington, with its registered principal office located at 1413 E Hawthorne Road, Spokane, Washington 99218. Travis Pattern admits that it has from time-to-tome sold its products to Plaintiff. Travis Pattern relies on purchase orders and/or other documentation evidencing the amount of sales of products between Travis Pattern and Bierer and denies any allegations in the Third Amended Complaint inconsistent therewith. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegation that Bierer assembled its products in South Carolina for distribution nationwide. Travis Pattern admits that it had a business relationship with Kennerly, in his capacity as an independent contractor, and that it paid Kennerly compensation in the form of commissions for his services. Travis Pattern denies all remaining allegations in this paragraph and demands strict proof thereof.

5. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 8 and 9 of Plaintiff's Third Amended Complaint. Travis Pattern therefore denies the allegations in these paragraphs and demands strict proof thereof.

6. The allegations in Paragraph 10 of Plaintiff's Third Amended Complaint state legal conclusions to which no response is required. Travis Pattern does not contest this Court's personal jurisdiction over Travis Pattern.

7. The allegations of Paragraph 11, through the words "to wit" with regard to personal jurisdiction state legal conclusions to which no response is required. To the extent a response is

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required, Travis Pattern denies same. Travis Pattern expressly denies that it is liable for any acts of Kennerly, or that Travis Pattern committed any tortious actions, either directly or through Kennerly. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(a). Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

8. Answering the allegations set forth in the first sentence in Paragraph 11(b) of Plaintiff's Third Amended Complaint, Travis Pattern relies on purchase orders and/or other documentation evidencing the amount of sales of products between Travis Pattern and Bierer and denies any allegations in the Third Amended Complaint inconsistent therewith. Travis Pattern denies the allegations of the second sentence of Paragraph 11(b), as stated.

9. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(c). Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

10. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(d) as to defendants Trystar and ITW Paslode. Travis Pattern denies the allegations in this paragraph as to Travis Pattern and demands strict proof thereof.

11. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(e). Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

12. Answering the allegations in Paragraph 11(f) of Plaintiff's Third Amended Complaint, Travis Pattern relies on all commission statements and/or other documentation evidencing the amount of commissions paid to Kennerly by Travis Pattern in his capacity as

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independent contractor and denies any allegations in the Third Amended Complaint inconsistent therewith.

13. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(g). Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

14. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(h) as to defendants Trystar and ITW Paslode. Travis Pattern denies the allegations in this paragraph as to Travis Pattern and demands strict proof of allegations in this paragraph.

15. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(i) as to defendants Trystar and ITW Paslode. Travis Pattern denies the allegations in this paragraph as to Travis Pattern and demands strict proof of allegations in this paragraph.

16. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 11(j), 11(k), and 11(l). Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

17. The allegations in Paragraph 12 of Plaintiff's Third Amended Complaint state legal conclusions to which no response is required. Travis Pattern expressly denies it engaged in any wrongful acts or omissions. Travis Pattern does not contest venue.

18. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

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19. Travis Pattern denies the allegations in Paragraph 37 of Plaintiff's Third Amended Complaint and demands strict proof thereof.

20. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 38 and 39 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

21. Responding to the allegations in Paragraph 40 of Plaintiff's Third Amended Complaint, Travis Pattern admits that it is, in part, a manufacturer of electric utility products, including grounding products and clamps. Travis Pattern denies all remaining allegations in this paragraph and demands strict proof thereof.

22. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 41 and 42 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

23. Travis Pattern admits the allegations in Paragraph 43 of Plaintiff's Third Amended Complaint upon information and belief.

24. Responding to Paragraph 44, Travis Pattern admits only that Plaintiff continued to procure clamps for grounding assembly products from Travis, and denies the remaining allegations of this paragraph.

25. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 45 of Plaintiff's Third Amended Complaint to the extent it alleges what Plaintiff learned after Kennerly's termination. Further responding to allegations in this paragraph, Travis Pattern admits that it had a business relationship with Kennerly, in his capacity as independent contractor, and that it paid Kennerly compensation in the form of

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commissions for his services. Travis Pattern denies all remaining allegations in this paragraph and demands strict proof thereof.

26. Responding to the allegations in Paragraph 46 of Plaintiff's Third Amended Complaint, Travis Pattern admits only that Travis Pattern was aware that Kennerly provided sales services to Plaintiff. Travis Pattern denies all remaining allegations in this paragraph and demands strict proof thereof.

27. Responding to the allegations in Paragraph 47 of Plaintiff's Third Amended Complaint, Travis Pattern admits only that Travis Pattern bought products from Trystar from time-to-time. Travis Pattern denies all remaining allegations in this paragraph and demands strict proof thereof.

28. Responding to the allegations in Paragraph 48 of Plaintiff's Third Amended Complaint, Travis Pattern admits only that Travis Pattern had a business relationship with Kennerly, in his capacity as an independent contractor, and that it paid Kennerly compensation in the form of commissions for his services. Further responding to allegations in this paragraph, Travis Pattern craves reference to the commission records and denies all allegations in Plaintiff's Third Amended Complaint inconsistent therewith.

29. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

30. Responding to the allegations in Paragraph 60 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the

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truth of the allegations as to defendants Trystar, ITW Paslode, and SNC. Travis Pattern denies the allegations in this paragraph as to Travis Pattern and demands strict proof thereof.

31. Travis Pattern denies the allegations in Paragraph 61 of Plaintiff's Third Amended Complaint and demands strict proof thereof.

32. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 62 and 63 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

33. Responding to the allegations in Paragraph 64 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to other defendants. Travis Pattern denies the allegations in this paragraph as to Travis Pattern and demands strict proof thereof.

34. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 65, 66, 67, 68, 69, 70, 71, 72, and 73 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

35. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 74 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

36. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, and 85 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

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37. Responding to the allegations in Paragraph 86 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

38. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 87, 88, including subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l), 89, and 90, including subparagraphs (a), (b), (c), (d), (e), (f), and (g), of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

39. Responding to the allegations in Paragraph 91 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

40. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 92, 93, including subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), and (n), 94, and 95, including subparagraphs (a), (b), (c), (d), (e), (f), and (g), of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

41. Responding to the allegations in Paragraph 96 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

42. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 97 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

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43. Responding to the allegations in Paragraph 98, including subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l), of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to defendants Trystar, ITW Paslode, and Deinek. Responding to the allegations in this paragraph as to Travis Pattern, Travis Pattern admits only so much as is alleged that Travis Pattern was aware that Kennerly provided sales services to Plaintiff. Travis Pattern denies all remaining allegations in this paragraph, including all subparagraphs, against Travis Pattern and demands strict proof thereof.

44. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 99, including subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l), of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph, including all subparagraphs, and demands strict proof thereof.

45. Responding to the allegations in Paragraph 100 of Plaintiffs' Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to defendants Trystar, ITW Paslode, and Deinek. Further responding, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph. Travis Pattern denies the allegations of this paragraph and demands strict proof thereof.

46. Responding to the allegations in Paragraph 101, including subparagraphs (a), (b), (c), (d), and (e), of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to Plaintiff's alleged damages. Travis Pattern denies all allegations in this paragraph against Travis Pattern and demands strict proof thereof.

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47. Responding to the allegations in Paragraph 102 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

48. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 103, 104, 105, and 106, of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

49. Responding to the allegations in Paragraph 107 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

50. Responding to the allegations in Paragraphs 108 and 109 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to defendants Trystar, ITW Paslode, and Deinek. Travis Pattern admits only so much as is alleged that Travis Pattern was aware that Kennerly provided sales services to Plaintiff. Travis Pattern denies all remaining allegations in this paragraph against Travis Pattern and demands strict proof thereof.

51. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 110. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

52. Travis Pattern denies the allegations of Paragraphs 111, 112, and 113 as they relate to Travis Pattern. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations of these Paragraphs as they apply to defendants Trystar, ITW Paslode, and Deinek. Travis Pattern therefore denies the same and demands strict proof thereof.

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53. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 114. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

54. Responding to the allegations in Paragraph 115 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to defendants Trystar, ITW Paslode, and Deinek. Travis Pattern denies the allegations in this paragraph against Travis Pattern and demands strict proof thereof.

55. Responding to the allegations in Paragraph 116 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to Plaintiff's alleged damages or as to any alleged wrongdoing by defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph against Travis Pattern and demands strict proof thereof.

56. Responding to the allegations in Paragraph 117 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

57. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 118, 119, 120, and 121 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

58. Responding to the allegations in Paragraph 122 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

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59. Responding to the allegations in Paragraphs 123, 124, 125, 126, 127, and 128 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to defendants Trystar, ITW Paslode, and Deinek. Travis Pattern denies the allegations in these paragraphs as they are asserted against Travis Pattern and demands strict proof thereof.

60. Responding to the allegations in Paragraph 129 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to Plaintiff's alleged damages or as to any alleged wrongdoing by defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph as they are asserted against Travis Pattern and demands strict proof thereof.

61. Responding to the allegations in Paragraph 130 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

62. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 131, 132, 133, and 134 of Plaintiff's Third Amended Complaint. Travis Pattern therefore denies the allegations in these paragraphs and demands strict proof thereof.

63. Responding to the allegations in Paragraph 135 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

64. Responding to the allegations in Paragraph 136, including subparagraphs (a), (b), and (c), of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against

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defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph, including all subparagraphs, as they are asserted against Travis Pattern and demands strict proof thereof.

65. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 137 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

66. Responding to the allegations in Paragraphs 138 and 139 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in these paragraphs as they are asserted against Travis Pattern and demands strict proof thereof.

67. Responding to the allegations in Paragraph 140 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph as they are asserted against Travis Pattern and demands strict proof thereof.

68. Responding to the allegations in Paragraph 141 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

69. Responding to the allegations in Paragraph 142 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek.

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Travis Pattern denies the allegations in this paragraph as they are asserted against Travis Pattern and demands strict proof thereof.

70. Responding to the allegations in Paragraph 143 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

71. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 144, 145, and 146 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

72. Responding to the allegations in Paragraph 147 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

73. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 148 and 149 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

74. Responding to the allegations in Paragraph 150 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

75. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 151 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

76. Responding to the allegations in Paragraph 152 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the

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truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph as they are asserted against Travis Pattern and demands strict proof thereof.

77. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 153 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

78. Responding to the allegations in Paragraphs 154 and 155 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in these paragraphs as they are asserted against Travis Pattern and demands strict proof thereof.

79. Responding to the allegations in Paragraph 156 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

80. Responding to the allegations in Paragraphs 157 and 158 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek and as to Plaintiff's alleged damages. Travis Pattern denies the allegations in these paragraphs as they are asserted against Travis Pattern and demands strict proof thereof.

81. Responding to the allegations in Paragraph 159 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

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82. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraphs 160, 161, 162, 163, 164, 165, and 166 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

83. Responding to the allegations in Paragraph 167 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in this paragraph as they are asserted against Travis Pattern and demands strict proof thereof.

84. Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 168 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

85. Responding to the allegations in Paragraphs 169, 170, 171, 172, 173, and 174 of Plaintiff's Third Amended Complaint, Travis Pattern is without knowledge or information sufficient to form a belief as to the truth of the allegations as to allegations against defendants Trystar, ITW Pasload, and Deniek. Travis Pattern denies the allegations in these paragraphs as they are asserted against Travis Pattern and demands strict proof thereof.

86. Responding to the allegations in Paragraph 175 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

87. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraphs 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, and 187 of

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Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

88. Responding to the allegations in Paragraph 188 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

89. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraphs 189, 190, 191, 192, 193, 194, 195, 196, 197, and 198 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

90. Responding to the allegations in Paragraph 199 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

91. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraphs 200, 201, and 202 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

92. Responding to the allegations in Paragraph 203 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

93. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraph 204 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in this paragraph and demands strict proof thereof.

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94. Responding to the allegations in Paragraph 205 of Plaintiff's Third Amended Complaint, Travis Pattern hereby realleges and incorporates by reference the preceding allegations of its Answer as if fully restated herein verbatim.

95. Travis Pattern is without knowledge or information sufficient to respond to the allegations in Paragraphs 206 and 207 of Plaintiff's Third Amended Complaint. Travis Pattern denies the allegations in these paragraphs and demands strict proof thereof.

96. Travis Pattern denies Plaintiff is entitled to any of the relief requested in the "Wherefore" clause of Plaintiff's Third Amended Complaint as against Travis Pattern and demands strict proof thereof.

FOR A SECOND DEFENSE

97. Plaintiff's Third Amended Complaint, in whole or in part, fails to state facts sufficient to support a claim upon which relief can be granted and accordingly the claims in the Third Amended Complaint should be dismissed by Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

98. Plaintiff's claims are barred in whole or in part by the applicable statutes of limitation and/or laches.

FOR A FOURTH DEFENSE

99. The damages incurred by Plaintiff, if any, were proximately caused and occasioned by its failure to exercise reasonable care to minimize the damages allegedly incurred, and therefore, the doctrine of mitigation of damages acts as a bar to Plaintiff's claims for damages.

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FOR A FIFTH DEFENSE

100. The damages incurred by Plaintiff, if any, are limited and/or excluded by the parties' agreement(s), course of performance, course of dealing, or usage of trade.

FOR A SIXTH DEFENSE

101. The damages incurred by Plaintiff, if any, are limited and/or excluded by the South Carolina Uniform Commercial Code.

FOR A SEVENTH DEFENSE

102. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, authorization or permission.

FOR AN EIGHTH DEFENSE

103. Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

FOR A NINTH DEFENSE

104. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

FOR A TENTH DEFENSE

105. Plaintiff's claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in one or more of the following particulars:

a. that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees;

b. that, even if a standard governing the award of punitive damages does exist, this standard is void for vagueness or arbitrariness; and

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c. that the amount of punitive damages awarded is based upon the wealth of Defendant in violation of its right to equal protection of the laws.

106. Travis Pattern has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Accordingly, Travis Pattern gives notice of its intent and expressly reserves the right to raise additional affirmative and other defenses that its information-gathering process may indicate is supported by fact and/or law.

WHEREFORE, having fully answered Plaintiff's Third Amended Complaint, Travis Pattern prays that all claims against Travis Pattern be dismissed with prejudice, for an award in favor of Travis Pattern to include the taxable costs of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted:

ADAMS AND REESE LLP

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June 23, 2021

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STATE OF SOUTH CAROLINACOUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.;Illinois Tool Works, Inc.; and David Deinek, Defendants. Jan F. Kennerly, Jr., Defendant/Third PartyPlaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	Civil Action No.: 2018-CP-40-04841 **ANSWER TO THIRD AMENDED COMPLAINT BY DEFENDANT TRYSTAR, LLC** **Jury Trial Demanded**

Defendant Trystar, LLC ("Trystar") for its Answer and defenses to Plaintiff's Third Amended Complaint states as follows:

FOR A FIRST DEFENSE

1. Bierer and Associates, Inc. ("Bierer") is a corporation organized and existing under the laws of the State of South Carolina, with its principal place of business located in Richland County, South Carolina.

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RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 1 and therefore denies the same and demands strict proof thereof.

2. At the time of filing of the original Complaint and at all times relevant herein, Jan F. Kennerly, Jr. ("Kennerly") was a citizen and resident of Lexington County, South Carolina, and a former employee and officer of Bierer.

RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 2 and therefore denies the same and demands strict proof thereof

3. At the time of filing of the original Complaint and at all times relevant herein, Danielle Kennerly ("Danielle Kennerly") was a citizen and resident of Lexington County, South Carolina, and is the spouse of Kennerly. Danielle Kennerly is the sole Member of Defendant EUSA, LLC, and the registered agent of Defendant J&D Farms, LLC.

RESPONSE: Trystar is without sufficient information to admit or deny the allegations of Paragraph 3 and therefore denies them.

4. EUSA, LLC ("EUSA") is a limited liability corporation organized under the laws of the State of South Carolina, formed by Danielle Kennerly. Upon information and belief, EUSA has received Bierer's confidential and trade secret information from Kennerly and is wrongfully utilizing that information in furtherance of its business.

RESPONSE: Trystar is without sufficient information to admit or deny the allegations of Paragraph 4 and therefore denies them.

5. J&D Farms, LLC ("J&D Farms") is a limited liability corporation organized underthe laws of the State of South Carolina and was formed by or with the involvement of Kennerly, Danielle Kennerly, or both, to be used as a vehicle for the fraudulent conveyance of

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property as set forth herein.

RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 5 and therefore denies the same and demands strict proof thereof.

6. Trystar, LLC ("Trystar"), formally known as Bridgewater Tech, Inc., is a limited liability corporation organized under the laws of Minnesota with its registered principal place of business at 15765 Acorn Trail, Faribault, Minnesota 55021. At all times relevant to this action, Trystar routinely sold its cabling to Bierer in South Carolina which Bierer then assembled into products in South Carolina for distribution to its customers nationwide. Unbeknownst to Bierer, Trystar also retained and made arrangements with Kennerly, a South Carolina resident, who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. Trystar made monthly commission payments to Kennerly in South Carolina for such services from at least 2013-2018 totaling over approximately $850,000, without Bierer's knowledge or consent. To date, Trystar has sold product worth approximately $3.8 Million to Bierer in South Carolina.

RESPONSE: Defendant Trystar admits that it is owned by parent company Bridgewater Tech, Incorporated. Trystar further admits that its address is 15765 Acorn Trail, Faribault, Minnesota 55021. Trystar further admits that it sells cabling and has sold cabling to Bierer. Trystar further admits that it contracted with Kennerly and made commission payments for services under that contract. Trystar denies that Bierer was not aware of any arrangements between Kennerly and Trystar and denies that the relationship was without Bierer's knowledge. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 6 and therefore denies the same and demands strict proof thereof.

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7. Travis Pattern & Foundry, Inc. ("Travis") is a for-profit corporation organized under the laws of Washington with its registered principal office located at 1413 E Hawthorne Road, Spokane, Washington 99218. At all times relevant to this action, Travis routinely sold its clamps to Bierer in South Carolina which Bierer then assembled into products in South Carolina for distribution to its customers nationwide. Unbeknownst to Bierer, Travis also retained and made arrangements with Kennerly, a South Carolina resident who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. Travis made monthly commission payments to Kennerly in South Carolina for such services from at least 2013-2018 totaling over approximately $1.4 Million without Bierer's knowledge or consent. To date, Travis has sold product worth approximately $1.5 Million to Bierer in South Carolina.

RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 7 and therefore denies the same and demands strict proof thereof.

8. Illinois Tool Works, Inc. is a for-profit foreign corporation organized under the laws of Delaware registered to do business in South Carolina with its registered agent located in Richland County in Columbia, South Carolina. Beginning in 2012 and through 2018, Paslode, a division of Illinois Tool Works, Inc. ("ITW Paslode"), routinely sold its staplers and related products to Bierer in South Carolina for distribution to Bierer customers nationwide. Unbeknownst to Bierer, ITW Paslode also retained and made arrangements with Kennerly, a South Carolina resident who at the time was a full-time employee of Bierer, to sell its products through Bierer's network of regional sales representatives. ITW Paslode monthly commission payments to Kennerly in South Carolina for such services from at least 2015-2018 totaling approximately $200,000 without Bierer's knowledge or consent. To date, ITW Paslode has sold product worth approximately $663,000 to Bierer in South Carolina.

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RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 8 and therefore denies the same and demands strict proof thereof.

9. David Deinek is a resident of the state of Michigan and at all times relevant herein, the owner and operator of BDL & Associates, LLC ("BDL"). BDL and Deinek were retained as regional sales representatives for Bierer products in 2009. While under contract with Bierer, Mr. Deinek routinely sold products on behalf of Bierer and sent monthly sales reports to Bierer apprising them of the actions taken on Bierer's behalf. Mr. Deinek's company BDL also received monthly commission payments from Bierer from 2009 until he was terminated in July 2018 totaling approximately $757,000. In addition, and unbeknownst to Bierer, Mr. Deinek formed a Michigan company with Kennerly, R&D Utility Products, LLC ("R&D"), in 2015 for the purpose of distributing products that directly competed with Bierer products. Through R&D, Deinek and Kennerly made sales of component materials to Bierer in South Carolina without Bierer knowing that Kennerly and Deinek were personally profiting from these sales in violation of their contracts with Bierer.

RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 9 and therefore denies the same and demands strict proof thereof.

JURISDICTION & VENUE

10. The Court has personal jurisdiction over the parties to this action and has subject matter jurisdiction with respect to all claims stated herein.

RESPONSE: Paragraph 10 of the Plaintiff's Third Amended Complaint contains a legal conclusion to which a response is not required. To the extent a response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

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11. The Court has personal jurisdiction over Defendants Trystar, Travis, ITW Paslode, and Deinek under S.C. Code Ann. Section 36-2-803 because the claims alleged herein arise from Defendants doing business in this State, directly and through their agent Kennerly; contracts entered into by Defendants to be performed in whole or in part in this State; and the tortious acts were committed by Defendants directly and through their agent Kennerly in this State; and Defendants regularly conduct business in South Carolina and have caused injury to Bierer in South Carolina as a result of their tortious acts occurring outside of the state, to wit:

a. Beginning in at least 2011, Defendant Trystar sold and delivered more than $3.8 Million of industrial wire cable and related component products to Bierer in South Carolina pursuant to purchase order contracts with Bierer. The wire cable and related components were designed by Bierer for use by Bierer's electrical utility customers;

b. Beginning in at least 2011, Defendant Travis sold and delivered more than $1.5 Million of industrial clamps and other component products to Bierer in South Carolina pursuant to purchase order contracts with Bierer. These clamps and othercomponent products were designed by Bierer for use by Bierer's electrical utility customers;

c. Beginning in at least 2012, Defendant ITW Paslode sold and delivered more than $600,000 of heavy-duty pneumatic and gas-powered staplers and related products,designed at Bierer's request to Bierer in South Carolina pursuant to purchase ordercontracts with Bierer. These staplers were specifically designed by Bierer for use by Bierer electrical utility customers;

d. Defendants Trystar, Travis and ITW Paslode induced Kennerly to breach his employment agreement with and duty of loyalty owed to Bierer by paying commissions directly to Kennerly to divert product sales from Bierer and instead sell directly to Bierer's electrical utility customers using Bierer's national networkof sales representatives;

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e. From 2012 through 2018, Trystar made more than $850,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

f. From 2012 through 2018, Travis made more than $1,400,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

g. From 2015 through 2018, ITW Paslode made more than $200,000 in commission payments to Kennerly in South Carolina. These payments were delivered at least quarterly to Kennerly in South Carolina.

h. Defendants Trystar, Travis and ITW Paslode, directly and through their agent Kennerly, misappropriated Bierer's trade secrets and confidential business information, to include its proprietary customer contact and detailed sales information, located in South Carolina;

i. Defendants Trystar, Travis and ITW Paslode through its agent Kennerly diverted sales leads and purchase orders intended for Bierer to themselves;

j. Deinek entered into a manufacturer's representative agreement with Bierer whereby Deinek received monthly commission payments from Bierer in South Carolina to which Deinek was not entitled because he was secretly competing against Bierer and profiting from direct sales to Bierer through his and Kennerly'sundisclosed interest in R&D;

k. From 2009 until July 2018, Bierer paid Deinek more than $750,000. These commission payments were delivered at least quarterly.

l. To obtain payment and as required by the terms of his agreement with Bierer, Deinek routinely submitted monthly sales reports to Bierer in South Carolina apprising management of actions taken to further his sales of Bierer projects. In addition, Deinek regularly

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communicated with Kennerly, who resides in South Carolina, about his business dealings for Bierer and R&D.

RESPONSE: Trystar admits that it paid Kennerly commission payments. Trystar also admits that it delivered cables to Bierer. Trystar denies that those sales involved specially-designed cable, and affirmatively states that the cable designed for Bierer was not ultimately the cable that Bierer purchased on an ongoing basis—rather, Bierer purchased a generic cable that Trystar sold to many customers, and agreed to put Bierer's label on for use in Bierer's supply chain. Trystar denies the remaining factual allegations in Paragraph 11 that pertain to Trystar. Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 11 that pertain to other defendants, and therefore denies the same and demands strict proof thereof. The remainder of Paragraph 11 of the Plaintiff's Third Amended Complaint contains legal conclusions to which a response is not required. To the extent a response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

12. Venue is proper in Richland County because it is the county where the most substantial part of the acts and omissions giving rise to Bierer's causes of action against the resident individual defendants occurred. Richland County is also the proper venue because it is the county where Bierer's principal place of business was located at the time its causes of action arose against the nonresident individual defendant and domestic corporate defendant. See S.C. Code Ann. § 15-7-30 (B), (C), (D), & (E).

RESPONSE: Paragraph 12 of the Plaintiff's Third Amended Complaint contains a legal conclusion to which a response is not required. To the extent a response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

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FACTUAL ALLEGATIONS

I. Kennerly's Employment with Bierer

13. Bierer is a family-owned and operated company, founded by Walter Bierer in 1988 Bierer manufactures and sells a variety of equipment and products in the electric utility industry.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 13 and therefore denies the same and demands strict proof thereof.

14. Kennerly was formerly employed with Bierer and was also formerly an officer of the company. Kennerly was initially hired as an engineer in or about July 2002. In 2005, Bierer's Board of Directors appointed Kennerly as an officer, with the title of Vice President of Engineering and Operations. The operations he oversaw in this position pertained to activities in the sales field and were outside of Bierer's physical plant.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 14 and therefore denies the same and demands strict proof thereof.

15. Over time, Kennerly increasingly acted in a sales role for Bierer. He was also appointed to initiate and oversee a newly developed Grounding Department at Bierer. Kennerly remained a full-time employee, Vice President, and officer of Bierer from the time of his appointment in 2005, until his termination on July 13, 2018.

RESPONSE: Trystar is without sufficient information to admit or deny the allegations of Paragraph 15 and therefore denies the same and demands strict proof thereof.

16. While employed by Plaintiff, Kennerly was provided with the Bierer Employee Handbook ("Handbook").

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RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 16 and therefore denies the same and demands strict proof thereof.

17. The Handbook contained the following provision governing "Outside Employment": It is expected that Bierer & Associates is your primary employment, if you are a full-time Bierer & Associates employee. Bierer & Associates does not regulate outside employment but employees **must immediately disclose** outside employment to management. There shall be no conflict of interest as long as such employment does not interfere with the performance of your duties at Bierer & Associates, is **non-competitive in nature** as determined by Bierer & Associates, **does not cause any conflict of interest, loyalty or obligation, is not detrimentalor contrary to the image, integrity, goodwill, business or reputation of Bierer & Associates**, and is not under the direct or indirect employ of any Bierer & Associates serviced client. An employee who takes a outside job with a Bierer & Associates client is subject to immediate termination. **Use of any Bierer &Associate resources, unless granted in writing by ownership, including, but not limited to, computer hardware and software, telephones, facsimile machines, and copiers, tools or equipment for/ in connection with any non-Bierer & Associates work is prohibited.** Employees who perform any non-Bierer & Associates work/task on Bierer & Associates premises or perform any non-Bierer & Associates work during normal Bierer & Associates business hours will be terminated. (emphasis added).

RESPONSE: Defendant Trystar craves reference to the document which speaks for itself. Trystar is otherwise without sufficient information to admit or deny the allegations of Paragraph 17 and therefore denies the same and demands strict proof thereof.

18. The Handbook also contained the following provision governing "Conflicts of Interest": As an employee of Bierer & Associates, **your primary responsibility is to this**

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company and requires that employees not compromise the company, its customers, partners or suppliers for personal gain. Since we serve utilities and other organizations, it is **essential that co-workers treat information about customers, our internal operations, and internal records with absolute confidentiality**. Additionally, co-worker's personal relationships should in no way compete with or compromise the company's interests. The following guidelines, when strictly adhered to, will help you avoid situations where a conflict of interests could occur:

1) Do not accept gifts or other favors of value that are offered as a result ofcarrying out your duties for the company.

2) Do not request or grant favors that are offered as a result of carrying outyour duties for the company

3) Co-operation with management in resolving conflicting situationsinvolving yourself or your family.

4) **Conducting business for personal gain**.

5) Report another employee’s, vendor’s, or client’s dishonest activities or damaging conduct

By observing these guidelines, you will protect yourself and the company from difficulties and/or legal repercussions, which naturally result from conflict of interests. **Employees are required to disclose all conflicts of interest to management**. Failure to do may result in disciplinary action, up to and including termination.

(emphasis added).

RESPONSE: Defendant Trystar craves reference to the document which speaks for itself. Trystar is otherwise without sufficient information to admit or deny the allegations of Paragraph

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18 and therefore denies the same and demands strict proof thereof.

19. The last page of the Handbook is an employee acknowledgment that Bierer requires each of its employees to sign. The employee acknowledgement serves to document the employee's receipt of the Handbook and agreement that the employee "understand[s] that [the Handbook] is [the employee's] responsibility to read, understand, become familiar with, and comply with the standards" set forth therein.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 19 and therefore denies the same and demands strict proof thereof.

20. Kennerly signed the employee acknowledgment found in the Handbook and returned the same to Plaintiff.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 20 and therefore denies the same and demands strict proof thereof.

21. Throughout his employment with Bierer, Kennerly was a highly trusted, full-time employee and officer of Bierer. Over time, he developed a very close, quasi-familial relationship with Walter Bierer. As a trusted and longtime employee, friend, and officer of the company, Kennerly enjoyed a handsome salary and generous benefits. In addition to receiving a generous salary from Bierer, Kennerly also shared in Bierer's profits at the 20% level, which is reserved for only four management-level employees. During the last several years of employment with Bierer, Kennerly was paid between $400,000 and $500,000 per year earning approximately $580,000 during his last full year of employment in 2017.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 21 and therefore denies the same and demands strict proof thereof.

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22. Bierer also provided Kennerly with a company credit card and vehicle, which wereintended to be used for Bierer-related purposes. Bierer paid for all of Kennerly's travel-related expenses for company business. Kennerly traveled frequently, attending trade shows, speaking events, and visiting Bierer customers. As will be described more fully below, Kennerly used his company credit card and engaged in work for Defendants Travis, Trystar, ITW Paslode and other third parties, in violation of his duties to Bierer, while he represented to Bierer that he "always put Bierer first and foremost" and was working exclusively on Bierer-related matters.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 22 and therefore denies the same and demands strict proof thereof.

23. In his capacity as an officer and Vice President of Engineering and Operations, and later Vice President of National Sales, Kennerly had access to the innermost workings of Bierer, including all of Bierer's confidential and trade secret information; and, specifically, sensitive information regarding existing and potential customers. Kennerly also attended and participated in Bierer's company meetings, which are restricted to management-level employees. In these highly confidential meetings, Bierer discussed all matters relating to the company, such as corporate budgets, costs, profit margins, marketing and sales strategies, and product research and development.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the factual allegations of Paragraph 23 and therefore denies the same and demands strict proof thereof. The remainder of Paragraph 23 of the Plaintiff's Third Amended Complaint contains legal conclusions to which a response is not required. To the extent a response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

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24. In his position with Bierer, Kennerly was the "face" of the company to others in the industry, specifically including Bierer's customers. Kennerly was effectively the central repository of all Bierer's customer information, which included not only the identity of existing and potential customers, but also more sensitive and commercially-advantageous information of these customers such as their: key decision-makers for purchasing; purchasing patterns, preferences, and product needs. His position also afforded him unique and strategically advantageous inroads with the customers concerning business opportunities with Bierer and insight into potential product improvements emerging from the feedback and information he received from the same. All of this information is confidential and trade secret, and was controlled by Kennerly during his employment. At all times during Kennerly's employment, Bierer zealously guarded and protected this information and strictly limited those authorized to access the same. At all times relevant to this action, Kennerly had a duty to utilize this information for the exclusive benefit of Bierer and not for himself or others.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the factual allegations of Paragraph 24 and therefore denies the same and demands strict proof thereof. The remainder of Paragraph 24 of the Plaintiff's Third Amended Complaint contains legal conclusions to which a response is not required. To the extent a response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

II. Kennerly's Wrongful Activities on Behalf of Competitors and Distributors

25. While a key employee and officer with Bierer, Kennerly engaged in numerous wrongful activities, breaching his duties to Bierer. These wrongful activities include, but are not limited to, the following:

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A. Trystar and Travis

26. In mid-2009, Bierer separated from its third-party marketing company and began marketing its own products. At the same time, Kennerly requested and was granted responsibility for sales and marketing of all Bierer products. In this position he oversaw regional sales representatives retained by Bierer to promote its products. He also had unlimited access to all confidential information used by Bierer, including product information, vendor information, financial information, financing strategies, supply and service information, marketing information, personnel information, supplier information, customer information, and busines information.

RESPONSE: Defendant Trystar, LLC is without sufficient information to admit or deny the allegations of Paragraph 26 and therefore denies the same and demands strict proof thereof.

27. That same year, in or around August 2009, Bierer tasked Kennerly with securing a cable manufacturer and clamp manufacturer to provide material for several new cabling products that Bierer intended to bring to market to launch Bierer's entry into the Grounding business. Included in the directive given to Kennerly by the President Walter Bierer, was that Kennerly seek to obtain a reciprocal exclusivity agreement with the material providers he procured on behalf of Bierer. Thus, Bierer would only order its materials from the manufacturers selected by Kennerly in exchange for the manufacturers' agreement that they would not provide their material to Bierer's competitors.

RESPONSE: Defendant Trystar, is without sufficient information to admit or deny the allegations of Paragraph 27 and therefore denies the same and demands strict proof thereof. Trystar further affirmatively states that when requested to enter an exclusivity agreement, Trystar refused. Trystar further states that over the last decade of doing business, it has generally sold to Bierer its

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generic cable that it sells to many customers, labeled with Bierer's logo, making reciprocal exclusivity impossible.

i. Trystar

28. Trystar is a manufacturer of electrical cable and electrical power panel distribution equipment. Prior to its provision of cable to Bierer, Trystar did not sell the specific cabling products requested by Bierer in the electric utilities market and had no presence therein.

RESPONSE: Trystar admits that it is a manufacturer of electrical cable and electrical power panel distribution equipment. Trystar denies that it sold to Bierer any cabling product that it had not previously been supplying to electrical utilities markets, with two exceptions: Trystar affirmatively states that on or about 2009, Trystar and Bierer discussed and worked on a quote for a shiny wire cable that ended up being too stiff, and lead-based, so it was never brought to market production. In 2013, Bierer requested that Trystar extrude a thinly insulated cable to market under the Bierer name, which resulted in approximately five orders totaling $10,000 or less of business. Trystar further states that it has never sold this thinly-extruded cable to anyone else and even Bierer purchased only the few orders. Trystar further states that all other products that Bierer has purchased were products for which Trystar had a significant presence in the market. To the extent any further response is required, Defendant Trystar denies the allegations and demands strict proof thereof.

29. Trystar was first approached by Kennerly, on behalf of Bierer, in or around October 2009, at a tradeshow in Louisville, Kentucky. At the time of this meeting, Trystar was known as Bridgewater. Kennerly, along with Bierer Executive Vice President Mr. Joe Bierer, attended a dinner with the then Vice President of Sales for Trystar, Mr. Dan Moerke, to discuss a

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potential relationship in which Trystar would agree to provide its cable to Bierer for use in Bierer's production of its grounding assembly products. At the time of this meeting, Trystar did not manufacture or sell the specific type of cable requested by Bierer and only sold products in the commercial and industrial markets.

RESPONSE: Defendant Trystar admits that its employee Dan Moerke had a meeting to discuss a cable with Bierer at a trade show. Trystar further incorporates its response to Paragraph 28. Trystar without sufficient information to admit or deny the remaining allegations of Paragraph 29 and therefore denies the same and demands strict proof thereof.

30. At the dinner, Bierer and Trystar discussed a potential exclusivity arrangement as desired by Walter Bierer. Under such agreement, if Bierer provided Trystar with an opportunity to enter the utility business then Trystar would agree to refrain from providing its cable to any competitor of Bierer in the electric utility industry

RESPONSE: Defendant Trystar admits that Kennerly raised the topic of exclusivity, but denies that it ever expressed any form of assent to any potential exclusivity arrangement. Trystar affirmatively states that it communicated to Bierer that it would not consider any exclusivity agreement, because selling cables in the utility markets is and has been a significant portion of its business. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 30 and therefore denies the same and demands strict proof thereof.

31. Thereafter, Kennerly informed Walter Bierer that such an agreement with Trystar was not possible; however, Trystar did agree to private label all cable coming to Bierer with Bierer insignia wherein the end customer would not know the origin of the cabling. Bierer spent several months and expended company resources and money working with Trystar to develop a specific

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type of cable suitable for use in grounding assembly products that could be utilized by Bierer's customers in the electric utility industry.

RESPONSE: Defendant Trystar admits that its position was that an exclusivity agreement was not possible and that it agreed to private label Bierer's logo on certain cables it sold to Bierer. Trystar further incorporates its response to Paragraph 28. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 31 and therefore denies the same and demands strict proof thereof.

32. After finalizing the new cable with Trystar, Bierer placed its first order for the cable with Trystar on January 5, 2010.

RESPONSE: Trystar admits that Bierer placed orders for cable beginning on or about 2010. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 32 and therefore denies the same and demands strict proof thereof.

33. Bierer continued to procure the cable for its grounding assembly products from Trystar throughout Kennerly's employment with Bierer.

RESPONSE: Trystar admits that Bierer placed orders for cable for several years, but denies those orders generally involved any cable created for Bierer specifically. Trystar further incorporates its response to Paragraph 28. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 33 and therefore denies the same and demands strict proof thereof.

34. Following Kennerly's termination on July 13, 2018, Bierer learned that, secretly and without Bierer's knowledge or consent, Kennerly became a consultant for Trystar and promoted Trystar products beginning in or around 2011. Kennerly formalized his arrangement

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with Trystar in a sales representative agreement dated January 2, 2013, executed by Kennerly and Mr. Moerke. Under the terms of the Agreement, Kennerly was entitled to receive a commission from Trystar for all sales he made on behalf of Trystar.

RESPONSE: Trystar admits that Kennerly eventually became a consultant for Trystar. Trystar affirmatively states that it was told Walter Bierer was informed and gave consent to the arrangement. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 34 and therefore denies the same and demands strict proof thereof.

35. From the beginning of Kennerly's provision of consultation and/or sales services on behalf of Trystar, upper management at Trystar, including Dan Moerke, was aware that Kennerly was an employee for Bierer and had knowledge of his role as Vice President of Engineering and Operations in sales and the grounding assembly products he was responsible for promoting and selling for Bierer.

RESPONSE: Trystar admits that it understood Kennerly did work in engineering and sales for Bierer. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 35 and therefore denies the same and demands strict proof thereof.

36. For example, on more than one occasion, email communications between Kennerly and Trystar reflect a concerted effort to divert orders from Bierer customers to Trystar for fulfillment.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 36 and therefore denies the same and demands strict proof thereof.

37. Despite this knowledge, and at the suggestion of Kennerly, Trystar agreed to an arrangement with Travis wherein Trystar sold the cable it developed with Bierer to Travis and

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Travis then completed the final production of its competing grounding assembly products at its facility using the clamps Travis developed with Bierer. Not only do such products directly compete with Bierer grounding assembly products, but Kennerly then sold these competing products to Bierer customers through Bierer regional sales representatives.

RESPONSE: Defendant Trystar admits that it has sold its cables in the utilities market and that Kennerly served as a sales representative. Defendant Trystar, on information and belief, understands that Kennerly at times worked with additional sales representatives under himself and with whom Trystar did not have any direct relationship. Trystar denies that it has any products that compete with Bierer products. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 37 and therefore denies the same and demands strict proof thereof.

38. Trystar made monthly commission payments to Kennerly as its sales representative during 2013-2018 totaling over approximately $850,000. Such compensation includes commission for sales Kennerly made to Bierer, as well as sales of competing Trystar products facilitated by Kennerly to customers of Bierer.

RESPONSE: Defendant Trystar admits that it made commission payments to Kennerly and has produced documents detailing the amounts. Trystar denies that the products are "competing" and denies that any commissions were paid for sales to Bierer. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 38 and therefore denies the same and demands strict proof thereof.

39. In addition to utilizing Bierer's customer base and sales force to promote Trystar products, Kennerly also took products originally developed at Bierer, such as portable power

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cables and primary restoration carts, and passed them on to Trystar. Such conduct and efforts by Kennerly on behalf of Trystar were accomplished by Kennerly utilizing the resources of Bierer.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 39 and therefore denies the same and demands strict proof thereof.

ii. Travis

Defendant Trystar states that paragraphs 40-48 involve Defendant Travis, not Trystar, and so Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the same and demands strict proof thereof.

B. ITW Paslode

Defendant Trystar states that paragraphs 49-64 involve Defendant ITW Paslode, SNC Manufacturing Co., Inc., and Kam Technologies, LLC, not Trystar, and so Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the same and demands strict proof thereof.

III. Kennerly's Corruption of Bierer's Sales Representatives

Defendant Trystar states that paragraphs 65-67 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the same and demands strict proof thereof.

IV. Kennerly's Secret Company – R&D Utility Products

Defendant Trystar states that paragraphs 68-72 involve Defendants Kennerly, Deinek, and R&D Utility Products, not Trystar, and so Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the same and demands strict proof thereof.

V. Bierer's Discovery of Kennerly's Wrongful Conduct and Relationships

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73. Bierer did not know of Kennerly's misconduct and improper financial relationships with Defendants Trystar, Travis, ITW Paslode and Deinek until on or after July 10, 2018.

RESPONSE: Defendant Trystar states that, on information and belief, Walter Bierer was fully informed of the relationship Defendant Kennerly entered into with Defendant Trystar, having been told so at the outset of the parties' contracting relationship. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 73 and therefore denies the same and demands strict proof thereof.

74. On or about July 10, 2018, a Bierer employee contacted Travis to inquire if Kennerly worked for Travis after Walter Bierer read a seminar announcement containing biographical information regarding Kennerly that included a statement that Kennerly was employed by Travis. Travis employee John O'Connor stated that Kennerly was a representative of Travis and provided the Bierer employee with Kennerly's telephone number.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 74 and therefore denies the same and demands strict proof thereof.

75. Following this conversation with Travis, the Bierer employee called Trystar to inquire if Kennerly worked for Trystar and was advised that Kennerly was a consultant for Trystar.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 75 and therefore denies the same and demands strict proof thereof.

76. On July 10, 2018, Walter Bierer provided Kennerly with notice of termination of his employment with Bierer effective Friday, July 13, 2018 in an email.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 76 and therefore denies the same and demands strict proof thereof.

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77. Bierer subsequently learned of the extent of Kennerly's financial relationships with Trystar and Travis, as well as his relationships with ITW Paslode and Deinek, while investigating the extent of Kennerly's misconduct.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 77 and therefore denies the same and demands strict proof thereof.

VI. The Formation and Activities of EUSA, LLC, as a "Front" for Continued Wrongful Conduct

78. Approximately one week and a half after Kennerly was terminated from Bierer, his spouse, Danielle Kennerly, formed EUSA, and is the sole member of the company. Danielle Kennerly has no background in the electric utility industry, or knowledge of its products and markets.

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 78 and therefore denies the same and demands strict proof thereof.

79. Shortly thereafter, EUSA and Trystar, for which Kennerly had secretly been working for years, entered into a sales representative agreement, which was memorialized into a writing dated August 14, 2018 (only a month after Kennerly's termination). Pursuant to this agreement, EUSA agreed to be "an independent sales representative for Trystar to develop new customers and sales and to solicit orders for Trystar's products."

RESPONSE: Defendant Trystar admits that it entered a Sales Representative Agreement on or about August 14, 2018, with EUSA, but states that the document is the best evidence of its contents. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 79 and therefore denies the same and demands strict proof thereof.

80. Despite having no experience in the electric utility industry and no prior

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relationship with Trystar, Danielle Kennerly is identified as the signatory on behalf of EUSA on the agreement.

RESPONSE: Defendant Trystar admits that Danielle Kennerly is the signatory to its Sales Representative Agreement with EUSA. Trystar is without sufficient information to admit or deny the remaining allegations of Paragraph 80 and therefore denies the same and demands strict proof thereof.

81. Upon information and belief, EUSA was established by Kennerly and Danielle Kennerly acting in concert to create a "front" for Kennerly's continued misuse of Bierer's confidential, trade secret information acquired while employed at Bierer, and to shield monies derived from Kennerly's wrongful activities

RESPONSE: Defendant Trystar is without sufficient information to admit or deny the allegations of Paragraph 81 and therefore denies the same and demands strict proof thereof. To the extent these allegations can be construed to pertain in any way to Trystar, Trystar denies those allegations.

VII. Fraudulent Conveyances by Kennerly and Danielle Kennerly

Defendant Trystar states that paragraphs 82-85 involve Defendants Kennerly, Danielle Kennerly, and J&D Farms, not Trystar, and so Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the same and demands strict proof thereof.

FOR A FIRST CAUSE OF ACTION
(Breach of Duty of Loyalty – as to Kennerly)

86. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 86 of Plaintiff's Third Amended Complaint,

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Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 87-90 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty – as to Kennerly)

91. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 91 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 92-95 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

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FOR A THIRD CAUSE OF ACTION
(Aiding & Abetting Breach of Fiduciary Duty – as to Trystar, Travis, ITW Paslode, and Deinek)

96. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 96 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

97. Kennerly, by virtue of his position as an officer and the high degree of trust reposed in him, and also pursuant to S.C. Code Ann 33-8-420, owed Bierer a fiduciary duty.

RESPONSE: Defendant Trystar denies any wrongful conduct. The allegations in Paragraph 97 set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the allegations and demands strict proof thereof.

98. Trystar, Travis, ITW Paslode, and Deinek had actual knowledge of Kennerly's employment with Bierer and the fiduciary duty Kennerly owed to Bierer. Despite such knowledge, Trystar, Travis and ITW Paslode willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally aided and abetted Kennerly's breach his fiduciary duty to Bierer as set forth in more detail above, including, but not limited to, the following

a. Engaging Kennerly to provide consulting and/or sales services for competing, non- Bierer products, thus diverting sales and profits away from Bierer;

b. Wrongfully utilizing Bierer's confidential, proprietary and/or trade secret information- including customer names and contact information, vendors, pricing,

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machines/devices used in production, and internal processes, strategies, and procedures- disclosed by Kennerly to usurp sales and customers from Bierer;

c. Capitalizing on product ideas received from Kennerly that were originated and developed using Bierer resources and selling such products to Bierer's existing and/or potential customers;

d. Selling non-Bierer products through Bierer's regional sales reps;

e. Distributing non-Bierer products through R&D;

f. Working with Kennerly and/or R&D to undercut Bierer pricing;

g. Engaging in unfair competitive practices which Kennerly carried out using Bierer company resources, as well as Bierer's confidential, proprietary and/or trade secret information;

h. Usurping business opportunities from Bierer that would not have been possible absent Kennerly's disloyal conduct in redirecting potential business from existing and/or prospective Bierer customers and/or concealing the same from Bierer;

i. Selling products that directly compete with Bierer products;

j. Promoting competing business interests through Kennerly while Kennerly utilized the financial resources of Bierer to pay for travel, meals, and lodging and other expenses incidental to his disloyal sales efforts;

k. Utilizing Bierer resources, and confidential, proprietary and/or trade secret information provided by Kennerly to establish a presence in the electric utility market; and

l. Paying Kennerly and/or R&D commissions and any other form of renumeration for the disloyal conduct described herein.

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RESPONSE: Defendant Trystar denies the allegations in Paragraph 98 as they pertain to Trystar. Trystar is without knowledge sufficient to admit or deny the allegations as they pertain to other defendants, and as such, denies them and demands strict proof thereof.

99. Deinek had actual knowledge of Kennerly's employment with Bierer and the fiduciary duty Kennerly owed to Bierer. Despite such knowledge, Deinek willfully, wantonly, heedlessly, wrongfully, recklessly, improperly, intentionally, and/or illegally aided and abetted Kennerly's breach his fiduciary duty to Bierer as set forth in more detail above, including, but not limited to, the following:

a. Forming R&D with Kennerly in an effort to directly compete with Bierer despite their actual knowledge of the prohibition of competitive activity set forth in the regional sales rep agreement;

b. Wrongfully utilizing Bierer's confidential, proprietary and/or trade secret information - including customer names and contact information, vendors, pricing, machines/devices used in production, and internal processes and procedures- disclosed by Kennerly to usurp sales and customers from Bierer for the benefit of R&D;

c. Capitalizing on product ideas received from Kennerly that were originated and developed using Bierer resources and selling such products to Bierer's existing and/or potential customers;

d. Selling non-Bierer products through R&D either personally or through Bierer's regional sales reps;

e. Distributing non-Bierer products through R&D;

f. Working with Kennerly to undercut Bierer pricing on behalf of R&D;

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g. Engaging in unfair competitive practices which Kennerly carried out using Bierer company resources, as well as Bierer's confidential, proprietary and/or trade secret information;

h. Usurping numerous business opportunities on behalf of R&D from Bierer by redirecting potential business from existing and/or prospective Bierer customers and/or concealing the same from Bierer;

i. Paying commissions through R&D to Bierer sales reps for sales of products that compete with Bierer and were a result of the disloyal conduct described herein; and

j. Promoting R&D's competing business interests through Kennerly while Kennerly utilized the financial resources of Bierer to pay for travel, meals, and lodging and other expenses incidental to his disloyal sales efforts.

RESPONSE: Defendant Trystar states that paragraph 99 involves Defendants R&D and Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required.

100. Kennerly's breaches of his fiduciary duty were fraudulently concealed from Bierer, and Trystar, Travis, ITW Paslode and Deinek perpetuated such concealment through fraudulent representations or intentional omissions.

RESPONSE: Defendant Trystar denies any wrongful conduct and denies the allegations of Paragraph 100 as they pertain to Trystar. With respect to the other defendants, Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining

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allegations set forth legal conclusions to which no response is required.

101. As a result of Trystar, Travis, ITW Paslode, and Deinek aiding and abetting the intentional and illegal breaches of fiduciary duty by Kennerly, Bierer has suffered actual damages in at least the following respects, and is entitled to recover said damages from Trystar, Travis, ITW Paslode, and Deinek in an amount and in a manner to be determined at the trial of this case, including:

a. Lost past and future sales, and lost past and future profits;

b. All monies received by Trystar, Travis, ITW Paslode, and Deinek as a result of Kennerly's disloyal activities described herein;

c. Disgorgement of Kennerly's and Deinek's share of R&D's profits;

d. The value of the business opportunities wrongfully diverted from Bierer; and

e. Punitive damages based on the willful, wanton, intentional, and malicious acts of Trystar, Travis, ITW Paslode, Deinek, and Kennerly.

RESPONSE: Defendant Trystar denies the allegations of Paragraph 101. Trystar further states that Paragraph 101 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Existing Contractual Relations – as to Kennerly)

102. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein

RESPONSE: In response to Paragraph 102 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set

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forth herein.

Defendant Trystar states that paragraphs 103-106 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A FIFTH CAUSE OF ACTION
(Tortious Interference with Existing Contractual Relationship – as to Trystar, Travis, ITW Paslode, and Deinek)

107. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 107 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

108. Defendants Trystar, Travis, ITW Paslode, and Deinek had actual knowledge that Kennerly was a Vice President for Bierer and were aware of the fiduciary duty Kennerly owed to Bierer.

RESPONSE: Defendant Trystar denies the allegations in Paragraph 108.

109. Trystar, Travis, and ITW Paslode were introduced to Kennerly as a Bierer employee and conducted business with him in his capacity as a Bierer employee. At the beginning of their relationship with Bierer, each routinely communicated with Kennerly regarding Bierer business.

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RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar admits that it was aware that Kennerly worked for Bierer and corresponded with him in regard to work for Bierer. Trystar denies the remaining allegations in Paragraph 109 and demands strict proof thereof.

110. Similarly, Deinek, as a Bierer sales representative, routinely communicated with Kennerly regarding sales for Bierer.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar is without sufficient information to admit or deny the allegations of Paragraph 110 and therefore denies the same and demands strict proof thereof.

111. Given their routine dealings with Kennerly, Trystar, Travis, ITW Paslode, and Deinek had actual knowledge of Kennerly's intimate familiarity with Bierer's research and development of products, customers, sales representatives, and distributors.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar admits that it was aware that Kennerly had some degree of knowledge about Bierer due to doing some work with Bierer. Trystar denies the remaining allegations in Paragraph 111 and demands strict proof thereof.

112. Trystar, Travis, ITW Paslode, and Deinek interfered with Bierer's oral employment contract with Kennerly by engaging in unfair competitive practices with the assistance of Kennerly to the detriment of Bierer in violation of the fiduciary duty owed to Bierer.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar states that paragraph 112 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

113. Trystar, Travis, and ITW Paslode incentivized Kennerly's disloyal conduct towards Bierer by paying him commissions on sales he made on behalf of these defendants and

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usurped from Bierer as a result of Kennerly's improper disclosure of Bierer's research and development of products, customers, sales representatives, and distributors.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar admits that it paid Kennerly commissions on sales pursuant to the parties' contractual obligations. Trystar denies the remaining allegations in Paragraph 113 and demands strict proof thereof.

114. Deinek incentivized Kennerly's disloyal conduct towards Bierer through the formation of R&D which afforded Kennerly an opportunity to not only receive a salary from Bierer, but to also receive commissions on sales made by Kennerly, Deinek, and/or R&D and usurped from Bierer as a result of Kennerly's improper disclosure of Bierer's research and development of products, customers, sales representatives, and distributors.

RESPONSE: Defendant Trystar states that paragraph 114 involves Defendants Deinek, R&D and Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the allegations and demands strict proof thereof.

115. The conduct of Trystar, Travis, ITW Paslode, and Deinek in interfering with Bierer's employment relationship with Kennerly was committed with an improper purpose and by improper methods.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar states that paragraph 115 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

116. As a direct and proximate result of the tortious interference of Trystar, Travis, ITW Paslode, and Deinek with Bierer's existing employment/contractual relationship with Kennerly,

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Bierer has suffered and will continue to suffer actual damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of the conduct by Trystar, Travis, ITW Paslode, and Deinek.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar states that paragraph 116 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

FOR A SIXTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual and Business Relations – As to Kennerly)

117. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 117 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 118-121 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual and Business Relations – As to Kennerly)

122. Each and every allegation contained in the preceding paragraphs is repeated,

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realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 122 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

123. Trystar, Travis, ITW Paslode, and Deinek intentionally interfered with prospective and future contractual and business relationships between Bierer and its customers, sales representatives, and distributors, among others.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar states that paragraph 123 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

124. Trystar, Travis, and ITW Paslode were all brought into new segments of the electric utility market through requests from Bierer to develop specific products. Through these arrangements, Trystar, Travis, and ITW Paslode became familiar with Kennerly and the role he played at Bierer.

RESPONSE: Defendant Trystar denies the allegations and demands strict proof thereof.

125. Without justification, Trystar, Travis, and ITW Paslode worked with Kennerly to usurp business opportunities and sales from Bierer through the improper utilization of Bierer's customers, sales representatives, distributors, and product research and development.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar denies that it worked with Kennerly to usurp business opportunities and sales or to improperly use Bierer's customers, sales representatives, distributors, and product research and development and demands strict proof thereof. The remaining allegations constitute legal conclusions to which no response

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is required. On that basis, Trystar denies the remaining allegations and demands strict proof thereof.

126. Without justification, Deinek worked with Kennerly to create R&D as a vehicle tousurp business opportunities and sales from Bierer through the improper utilization of Bierer's customers, sales representatives, distributors, and product research and development.

RESPONSE: Defendant Trystar states that paragraph 126 involves Defendants R&D, Deinek, and Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

127. Through concealment of potential opportunities, including sales as well as product development, and undercutting Bierer pricing, Trystar, Travis, ITW Paslode and Deinek improperly interfered with Bierer's prospective future sales and business relations.

RESPONSE: Defendant Trystar denies any wrongful conduct. Defendant Trystar denies that it had any duty to Bierer with regard to its business opportunities, sales, product development, and pricing. Trystar further denies that it took any actions not within its competitive rights for business opportunities. Trystar states that paragraph 127 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

128. The actions of Trystar, Travis, ITW Paslode and Deinek were done with an

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improper purpose and by improper methods.

RESPONSE: Defendant Trystar denies the allegations of Paragraph 128.

129. As a direct and proximate result of the tortious interference by Trystar, Travis, ITW Paslode and Deinek with Bierer's prospective contractual and business relationships, Bierer has suffered and will continue to suffer damages, which Bierer is entitled to recover in an amount to be proven at trial. Bierer is also entitled to an award of punitive damages due to the willful, wanton, intentional, and malicious nature of the conduct of Trystar, Travis, ITW Paslode and Deinek.

RESPONSE: Defendant Trystar denies the allegations of Paragraph 128. Defendant Trystar further states that paragraph 129 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

FOR AN EIGHTH CAUSE OF ACTION
(Unjust Enrichment – As to Kennerly)

130. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 130 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 131-134 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the

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allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A NINTH CAUSE OF ACTION
(Unjust Enrichment – As to Trystar, Travis, ITW Paslode, and Deinek)

135. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 135 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

136. Bierer conferred the following benefits on Trystar, Travis, and ITW Paslode, by, among other things:

a. expending time, money, and other resources working with each to modify its offerings so as to make them attractive/useful to customers in the electric utility market;

b. agreeing to purchase product for distribution to its customers thereby giving each an opportunity to establish themselves in an industry in which they previously did not have a footprint for such products; and

c. purchasing such products.

Trystar, Travis, and ITW Paslode received, accepted, and retained these benefits from Bierer.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar denies that Bierer conferred any benefits within the meaning of these allegations; the only time, money, and resource Trystar and Bierer exchanged were pursuant to mutual contractual obligations negotiated in arms-length transactions evidenced by the parties' purchase orders and other agreements. Trystar further states that the remainder of paragraph 136 sets forth legal conclusions to which no response is

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required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

137. Bierer conferred the benefit of payment of sales commission to Deinek through hiscompany BDL for his sales of Bierer products. Such commission was paid by Bierer without knowledge that Deinek, as the owner of BDL, was selling competing products and, thus, in violation of his sales rep agreement with Bierer. Despite his improper conduct, Deinek received, accepted, and retained these benefits from Bierer.

RESPONSE: Defendant Trystar denies any wrongful conduct. Defendant Trystar states that paragraph 137 involves Defendants BDL, Deinek, and Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

138. Through the actions of Kennerly, but unbeknownst to Bierer, Trystar, Travis, ITW Paslode, and Deinek were provided with Bierer's confidential, proprietary and/or trade secret information including customer names and contact information, vendors, pricing, machines/devices used in production, and internal processes and procedures- which they used to their benefit for financial gain. Trystar, Travis, ITW Paslode and Deinek received, accepted, and retained these benefits from Bierer.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar denies the factual allegations in Paragraph 138. Trystar further states that the remainder of paragraph 138 sets forth

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legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

139. Allowing Trystar, Travis, ITW Paslode and Deinek to retain the benefits they received from Bierer through their improper, deceitful, and unfairly competitive conduct detailed herein would be unjust and inequitable

RESPONSE: Defendant Trystar states that paragraph 139 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

140. Bierer is entitled to recover, and Trystar, Travis, ITW Paslode and Deinek should disgorge, all said monies and other benefits they unjustly received, in an amount to be determined at the trial of this case.

RESPONSE: Defendant Trystar denies the allegations of Paragraph 140.

FOR A TENTH CAUSE OF ACTION
(Accounting – As to All Defendants)

141. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 141 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

142. Bierer is entitled to an equitable accounting of all sums wrongfully received by all Defendants, as a result of the wrongful activities set forth herein.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar further states that paragraph 142 sets forth legal conclusions to which no response is required. To the extent a

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response is required, Trystar denies the allegations and demands strict proof thereof.

FOR AN ELEVENTH CAUSE OF ACTION
(Fraudulent Misrepresentation – As to Kennerly)

143. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 143 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 144-146 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A TWELFTH CAUSE OF ACTION
(Fraudulent Non-Disclosure – As to Kennerly)

147. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein

RESPONSE: In response to Paragraph 147 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 147-149 involve Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further

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responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A THIRTEENTH CAUSE OF ACTION
(Constructive Trust – As to Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

150. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 150 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

151. Kennerly was in a confidential and fiduciary relationship with Bierer, whereby Bierer reposed special confidence in him, such that he owed Bierer a duty of loyalty, a duty to act in the utmost good faith, and with due regard to Bierer's interests.

RESPONSE: Defendant Trystar denies any wrongful conduct. Trystar states that paragraph 151 involves Defendants Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

152. Kennerly breached his duties of loyalty and good faith and violated his fiduciary duty to Bierer by engaging in the activities set forth herein. EUSA, Trystar, Travis, ITW Paslode, and Deinek are beneficiaries of Kennerly's continued misuse of confidential information, in breach

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of his duties owed to Bierer.

RESPONSE: Defendant Trystar denies any allegations of wrongful conduct. Defendant Trystar states that paragraph 152 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

153. Kennerly wrongfully obtained monies in bad faith and through breaches of his duties of trust and loyalty and violation of his fiduciary duty, in an amount to be determined at the trial of this case, but including at least the total sum of all commissions paid to him by competing companies (including their current value, as any such commissions have been invested and gained value). Bierer is entitled to recover all such monies herein, including the current value of all sums wrongfully paid to Kennerly, as said sums have gained value. Bierer is also entitled to all sums paid to or received by EUSA resulting from a breach of duty.

RESPONSE: Defendant Trystar denies any allegations of wrongful conduct. Defendant Trystar states that paragraph 153 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

154. Trystar, Travis, ITW Paslode, and Deinek wrongfully obtained monies in bad faithas a result of Kennerly's breach of his duties of trust and loyalty and violation of his fiduciary dutyto Bierer, in an amount to be determined at the trial of this case, but including at least the total sumof all profits and/or commissions made by Trystar, Travis, ITW Paslode, and Deinek on all sales of products that compete with Bierer products. Bierer is entitled to recover all such monies herein,including the current value of such sums.

RESPONSE: Defendant Trystar denies any allegations of wrongful conduct. Trystar states that paragraph 154 sets forth legal conclusions to which no response is required. To the

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extent a response is required, Trystar denies the allegations and demands strict proof thereof.

155. Said wrongfully obtained monies do not equitably belong to Kennerly, EUSA, Trystar, Travis, ITW Paslode, or Deinek, but belong to Bierer, entitling Bierer to the imposition of a constructive trust upon all monies wrongfully obtained by Kennerly, EUSA, Trystar, Travis, ITW Paslode, and Deinek or as a result of Kennerly's wrongful actions, regardless of the location or holder of those funds.

RESPONSE: Defendant Trystar denies any allegations of wrongful conduct. Trystar states that paragraph 155 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

FOR A FOURTEENTH CAUSE OF ACTION
(Common Law Unfair Competition– As to Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

156. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 156 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

157. The activities of Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek as described herein, constitute common law unfair competition, for which they are jointly and severally liable herein.

RESPONSE: Defendant Trystar denies any allegations of wrongful conduct. Trystar states that paragraph 157 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

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158. As a result of Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek's unfair competition, Bierer has sustained actual damages, which Bierer is entitled to recover in an amount to be proven at trial, in addition to punitive damages based on the Defendants' willful, wanton and wrongful conduct.

RESPONSE: Defendant Trystar denies the allegations in Paragraph 158.

FOR A FIFTEENTH CAUSE OF ACTION
(South Carolina Trade Secrets Act –
As to Kennerly, Danielle Kennerly, EUSA, Trystar, Travis, ITW Paslode, & Deinek)

159. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 159 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

160. Bierer is the owner of various trade secrets, as defined in the South Carolina Trade Secrets Act at S.C. Code Ann. § 39-8-20.

RESPONSE: Defendant Trystar states that paragraph 160 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

161. Bierer's trade secrets as described herein derive independent economic value from not being generally known to, or readily ascertainable through proper means by, the public, or any other person who can obtain economic value from their disclosure or use

RESPONSE: Defendant Trystar states that paragraph 161 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations

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and demands strict proof thereof.

162. Bierer has undertaken reasonable efforts under the circumstances to maintain the secrecy of its trade secrets, including, but not limited to: requiring its employees, including Kennerly specifically, to agree to and sign its Employee Handbook, which contains detailed "Non-Disclosure/Confidential Information" provisions; password-protecting its computers; restricting company meetings to department heads and officers only; keeping hard-copy documents under lock and key; and strictly limiting access to its building through key cards which only allow admittance to employees at their shift times and only provide 24-hour access to officers.

RESPONSE: Defendant Trystar states that paragraph 162 involves Plaintiff Bierer, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

163. During his employment with Bierer, Kennerly was informed of, and should reasonably have known from the circumstances, the confidential nature of Bierer's trade secrets, and his duty not to use, misuse, or disclose such trade secrets without Bierer's express authorization.

RESPONSE: Defendant Trystar states that paragraph 163 involves Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof.

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Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

164. Kennerly misappropriated Bierer's trade secrets, including, but not limited to, information related to Bierer's customers, product research, development and manufacturing, marketing and sales strategies, financial information, and other highly confidential company matters, by using, misusing, and/or disclosing these trade secrets without Bierer's consent when Kennerly knew or had reason to know that he had a duty to maintain the secrecy of this information and use it only for the benefit of Bierer.

RESPONSE: Defendant Trystar states that paragraph 164 involves Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

165. Kennerly intentionally used and/or disclosed Bierer's trade secrets in order to derive benefits for himself, as well as for Bierer's competitors, at the expense of Bierer and in breach of his fiduciary duty and duty of loyalty owed to Bierer.

RESPONSE: Defendant Trystar states that paragraph 165 involves Defendant Kennerly, not Trystar, and so Trystar is without sufficient information to admit or deny the factual

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allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

166. Danielle Kennerly and EUSA aided, abetted, and are actively participating in and benefitting from the ongoing misappropriation of Bierer's trade secrets by providing Kennerly the vehicle (EUSA) through which to breach his continuing fiduciary duties and confidentiality obligations. Furthermore, Danielle Kennerly and EUSA failed to take reasonable measures to ensure that they were not using Bierer's trade secrets in the furtherance of EUSA's business.

RESPONSE: Defendant Trystar states that paragraph 166 involves Defendants Danielle Kennerly and EUSA, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

167. Trystar, Travis, and ITW Paslode aided and abetted Kennerly's breach of his fiduciary duty and duty of loyalty to Bierer, and are actively participating in and benefitting from the ongoing misappropriation of Bierer's trade secrets in order to derive financial gain for themselves at the expense of Bierer. Furthermore, Trystar, Travis, and ITW Paslode deliberately failed to take reasonable measures to ensure that they were not using Bierer's trade secrets in the furtherance of their respective businesses.

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RESPONSE: Defendant Trystar denies the factual allegations in Paragraph 167. Trystar further states that the remainder of paragraph 167 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

168. Deinek aided and abetted Kennerly's breach of his fiduciary duty and duty of loyalty to Bierer, by amongst other things, creating R&D so he may actively continue to participate in and benefit from the ongoing misappropriation of Bierer's trade secrets in order to derive financial.

RESPONSE: Defendant Trystar states that paragraph 168 involves Defendants Deinek and R&D, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

169. Defendants' violations of the South Carolina Trade Secrets Act have directly and proximately caused Bierer to suffer actual losses as well as substantial future losses. Bierer is therefore entitled to an award of actual damages against the Defendants, jointly and severally, in an amount to be proven at trial.

RESPONSE: Defendant Trystar denies the allegations in Paragraph 169.

170. Defendants have been unjustly enriched by receiving benefits from their misappropriation of Bierer's trade secrets, requiring Defendants to disgorge to Bierer any amounts

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received through their violation of the South Carolina Trade Secrets Act.

RESPONSE: Defendant Trystar states that paragraph 170 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

171. Bierer is entitled to reasonable royalties for Defendants' unauthorized disclosure and/or use of Bierer's trade secrets.

RESPONSE: Defendant Trystar states that paragraph 171 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

172. Defendants acted in willful, wanton, and reckless disregard of Bierer's rights, entitling Bierer to an award of exemplary damages in an amount two times Bierer's actual damages.

RESPONSE: Defendant Trystar denies the factual allegations in Paragraph 172 Trystar further states that the remainder of paragraph 172 sets forth legal conclusions to which no response is required. To the extent a response is required, Trystar denies the allegations and demands strict proof thereof.

173. In addition, Bierer is entitled to attorney's fees and costs due to the willful nature of Defendants' misappropriation.

RESPONSE: Defendant Trystar denies the allegations in Paragraph 173.

174. Finally, Bierer is entitled to injunctive relief, on a preliminary and permanent basis, to prevent any further actual or threatened misappropriation of Bierer's trade secrets by Defendants.

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RESPONSE: Defendant Trystar denies the allegations in Paragraph 174.

FOR A SIXTEENTH CAUSE OF ACTION
(Federal Defend Trade Secrets Act –
As to Kennerly, Danielle Kennerly, and EUSA)

175. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 175 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 176-187 involve Defendants Kennerly, Danielle Kennerly, and EUSA, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A SEVENTEENTH CAUSE OF ACTION
(Fraudulent Conveyance without Consideration–
As to Kennerly, Danielle Kennerly, and J&D Farms)
Pursuant to SCRCP 18(b)

188. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 188 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

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Defendant Trystar states that paragraphs 189-198 involve Defendants Kennerly, Danielle Kennerly, and J&D Farms, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR AN EIGHTEENTH CAUSE OF ACTION
(Fraudulent Conveyance without Adequate Consideration–
As to Kennerly, Danielle Kennerly, and J&D Farms)
Pursuant to SCRCP 18(b)

199. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 199 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 200-202 involve Defendants Kennerly, Danielle Kennerly, and J&D Farms, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

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FOR A NINETEENTH CAUSE OF ACTION
(Civil Conspiracy –
As to Kennerly, Danielle Kennerly, and J&D Farms)

203. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 203 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraph 204 involves Defendants Kennerly, Danielle Kennerly, and J&D Farms, not Trystar, and so Trystar is without sufficient information to admit or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A TWENTIETH CAUSE OF ACTION
(Injunction –
As to Kennerly, Danielle Kennerly, EUSA, and J&D Farms)

205. Each and every allegation contained in the preceding paragraphs is repeated, realleged, and reasserted as if fully set forth verbatim herein.

RESPONSE: In response to Paragraph 205 of Plaintiff's Third Amended Complaint, Defendant Trystar incorporates the preceding responses, not inconsistent herewith, as if fully set forth herein.

Defendant Trystar states that paragraphs 206-207 involve Defendants Kennerly, Danielle Kennerly, and J&D Farms, not Trystar, and so Trystar is without sufficient information to admit

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or deny the factual allegations. On that basis, Trystar denies the factual allegations and demands strict proof thereof. Trystar further responds that the remaining allegations set forth legal conclusions to which no response is required. To the extent a response is required, Trystar is without sufficient information to admit or deny the allegations. On that basis, Trystar denies the legal allegations and demands strict proof thereof.

FOR A FIRST DEFENSE
(Rule 12(b)(6) – Failure to State a Claim)

208. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

209. Plaintiff's claims are barred in whole or in part by Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and by its own allegations as Plaintiff has not stated facts upon which constitute a cause of action against Trystar.

FOR A SECOND DEFENSE
(Statute of Limitations and laches)

210. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

211. Plaintiff's claims are barred in whole or in part by the statute of limitations and equitable doctrine of laches.

FOR A THIRD DEFENSE
(Estoppel, unclean hands, waiver, authorization, and/or permission)

212. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

213. Plaintiff's claims are barred in whole or in part by the doctrines of unclean hands, waiver, authorization, and/or permission.

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FOR A FOURTH DEFENSE
(Failure to State Punitive Damages Claim)

214. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

215. Plaintiff's claims are barred, in whole or in part, because Plaintiff's Complaint fails to set forth a claim for punitive damages upon which relief may be granted.

FOR A FIFTH DEFENSE
(Unconstitutionality and Limits of Punitive Damages Claim)

216. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

217. To the extent that Plaintiff's Complaint asserts a claim for punitive damages, Plaintiff's claims are barred, in whole or in part, by the constitutional limits and cannot be awarded or enforced in excess of those limits.

218. To the extent that Plaintiff's Complaint seeks punitive damages, Trystar pleads affirmatively that:

a. An award of punitive damages in this civil action would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of each interested State's Constitution, including but not limited to the South Carolina Constitution.

b. An award of punitive damages would violate the due process provisions mentioned above.

c. An award of punitive damages would amount to an excessive fine in violation of the Eighth Amendment of the same Constitutions mentioned above.

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d. Plaintiff's claim is capped by applicable law and statutes, including S.C. Code § 15-32-510, et seq.

FOR A SIXTH DEFENSE
(Set-off)

219. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

220. Plaintiff's claims are barred, in whole or in part, because any sums adjudged to be due to Plaintiff by Trystar must be set-off against sums due by other Defendants for the same damages at issue.

FOR AN SEVENTH DEFENSE
(Contributory Fault and Failure of Causation)

221. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

222. Plaintiff's claims are barred, in whole or in part, because Plaintiff's damages were proximately caused by its own failure to secure its own rights, its own actions, and not actions of Trystar. Plaintiff's damages are therefore nonrecoverable and barred by applicable law.

FOR AN EIGHTH DEFENSE
(Failure of Damages and Failure to Mitigate)

223. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

224. Plaintiff's damages are barred, in whole or in part, because the damages sought are impermissibly speculative, uncertain, remote, contingent, conjectural, and/or vague.

225. Plaintiff's claims are further barred, in whole or in part, by Plaintiff's failure to mitigate damages.

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FOR A NINTH DEFENSE
(Excluded by Applicable Law, the Parties' Contract Terms, and by the doctrine of Accord and Satisfaction)

226. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

227. Plaintiff's damages are limited and/or excluded by the parties' agreement(s), course of performance, course of dealing, trade usage, and/or the South Carolina Uniform Commercial Code.

228. Plaintiff's claims are barred, in whole or in part, by the doctrine of Accord and Satisfaction.

FOR A TENTH DEFENSE
(Standing and/or Jurisdiction)

229. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

230. Plaintiff's claims are barred, in whole or in part, because this Court lacks jurisdiction and Plaintiff lacks standing to pursue the claims against Trystar because any action for these damages is rightfully asserted against only Kennerly, were not caused by actions of Trystar, and are not redressable by Trystar.

FOR AN ELEVENTH DEFENSE
(Contractual Preemption)

231. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

232. Plaintiff's claims are barred, in whole or in part, because the existence of contracts between the parties bars its equitable claims for Unjust Enrichment, Accounting,

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Constructive Trust, and all claims for obligations that conflict with the parties' negotiated agreements; such claims duplicate and are subsumed by any contractual rights between the parties.

FOR A TWELFTH DEFENSE
(Fair and Justified Competition)

233. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

234. Plaintiff's claims are barred, in whole or in part, by the law of justified and fair competition, because Plaintiff cannot seek recovery for fair market competition.

FOR A THIRTEENTH DEFENSE
(Good Faith)

235. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

236. Plaintiff's claims are barred, in whole or in part, because at all relevant times, Trystar has acted in good faith.

FOR A FOURTEENTH DEFENSE
(Prior Material Breach or Change in Contract)

237. Defendant Trystar incorporates and realleges each and every defense and allegation contained in the above paragraphs as if repeated verbatim herein.

238. Plaintiff's claims are barred, in whole or in part, because Plaintiff engaged in a prior material breach and/or altered the terms of the parties' business relationship.

RESERVATION AND NON-WAIVER

Until further investigation and discovery takes place, Trystar cannot determine whether all defenses set forth in this Answer will be asserted at trial or whether additional defenses are

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available. Trystar therefore reserves and does not waive its right to assert such other and additional defenses as may become available or apparent during the course of discovery.

WHEREFORE, Trystar prays that this Court dismiss the Complaint with prejudice and on the merits, enter an award in Trystar's favor, award Trystar its costs, disbursements, attorneys' fees and witness fees herein, and grant them such other and further relief as is just, proper and equitable.

December 17, 2021

Respectfully submitted,

s/ Blake A. McKie

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STATE OF SOUTH CAROLINA) **)** **COUNTY OF RICHLAND)**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Bierer and Associates, Inc., PLAINTIFF, vs. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, DEFENDANTS.	**Civil Action: 2018-CP-40-04841** **Hon. R. Lawton McIntosh, Business Court** **TRAVIS PATTERN & FOUNDRY, INC.'S MOTION FOR SUMMARY JUDGMENT (STATUTE OF LIMITATIONS)**
Jan F. Kennerly, Jr., DEFENDANT/ THIRD PARTY PLAINTIFF, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, THIRD-PARTY DEFENDANTS.	

Pursuant to Rule 56(e) of the *South Carolina Rules of Civil Procedure*, Travis Pattern & Foundry, Inc. ("Travis Pattern") moves for summary judgment on all claims[1] asserted by Plaintiff Bierer & Associates, Inc. ("Plaintiff"). All of Plaintiff's claims against Travis Pattern are time-barred by the statute of limitations. S.C. Code Ann. §§ 15-3-530(5); 39-5-150.

[1] Cause of Action ("Claim") 3) Aiding & Abetting Breach of Fiduciary Duty, (Claim 5) Tortious Interference with Existing Contractual Relationship, (Claim 7) Tortious Interference with Prospective Contractual and Business Relations, (Claim 14) Common Law Unfair Competition, and (Claim 15) South Carolina Trade Secrets Act.

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SUMMARY OF ARGUMENTS

This lawsuit was filed four years ago by Plaintiff against its former employee of fifteen years, Jan F. Kennerly, Jr. ("Kennerly"), and Kennerly's newly-formed company as of July 2018, R&D Utility Products, LLC ("R&D"). In the original complaint, filed September 11, 2018, Plaintiff alleged Kennerly took "several steps" to "dissociate" himself "in the eyes of competitors in the utility-manufacturing industry, generally, and shield his wrongful activities from scrutiny."[2]

Another manufacturer in the industry is Travis Pattern.[3] Despite having knowledge since 2012 that Kennerly was taking steps to distance himself from Plaintiff's business in order to work with Plaintiff's competitors, allegedly to Plaintiff's detriment, Plaintiff did not name Travis Pattern as a defendant in the original Complaint. Instead, Plaintiff alleged detailed facts of Travis Pattern's alleged improper affiliation with Kennerly in the original Complaint and conducted third-party discovery, serving a subpoena *duces tecum* on or about November 2018, to which Travis Pattern produced a significant number of responsive documents. On April 15, 2021, two and a half years after the lawsuit had been pending, Plaintiff added Travis Pattern as a defendant.[4]

In both the original Complaint and the Third Amended Complaint, Plaintiff alleges it first "discovered" Kennerly was working for Travis Pattern on or about July 10, 2018; however, Plaintiff's principal owner, Walter Bierer,[5] and his son, one of Plaintiff's managers, Joe Bierer,[6] testified to the contrary. The undisputed facts instead prove Plaintiff had actual knowledge that Kennerly was working for Travis Pattern as early as November 2014.

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[2] Compl. (Sept. 11, 2018) at ¶11.

[3] *Id.* at ¶¶ 39-72.

[4] *See generally* Third Am. Compl. (Apr. 15, 2021). Plaintiff also added defendants Trystar, LLC ("Trystar"), Illinois Tool Works, Inc. ("ITW"), and David Deinek ("Deinek").

[5] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1), 142:10-19; 241:2-242:2.

[6] **Exhibit 13**, Joe Bierer Depo. Trans. (Day 1), 149:7-10 (Q: "Did you get any new information in 2018?" A: "Prior to [Kennerly's] termination?" Q: "Yeah." A: "No.").

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In 2014, Plaintiff learned Kennerly was promoting himself as an employee of Travis Pattern in a publicly-available and generally circulated industry publication and marketing brochure as well as at an industry training seminar for one of Plaintiff's customers. Based on this evidence alone, Plaintiff knew or should have known of Travis Pattern's alleged wrongdoing six years before Plaintiff sued Travis Pattern for tortious conduct in this lawsuit.

Other undisputed facts known to Plaintiff from 2012 through 2015, further provided Plaintiff with knowledge of a potential claim against Travis Pattern. For instance, in addition to Plaintiff's admission that it had knowledge as early as 2012 that Kennerly was "distancing himself" from his employment with Plaintiff, Plaintiff also knew Kennerly was working with Travis Pattern as early as 2013. Although this work was purportedly at Plaintiff's direction, Plaintiff acknowledges Kennerly made extensive trips to Travis Pattern, including third-party laboratories in order to develop products.

Moreover, beginning in 2014, certain quotations for products from Travis Pattern to Plaintiff referenced Kennerly as a Travis Pattern "UGD" salesperson. These quotes went directly to Plaintiff's procurement and/or customer service representatives and copied Kennerly's personal Google-mail email address.

Finally, in 2015, Plaintiff acknowledged to Kennerly it was aware of "a larger issue," including lack of accountability, disappearing for weeks at a time, and conflicting outside activities.[7] Indeed, Plaintiff's concern about Kennerly's actions were, at that time, sufficiently serious for Plaintiff to threaten Kennerly with termination.[8]

[7] *Id.*
[8] *Id.* (emphasis added).

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That Plaintiff did not bring any claims against Travis Pattern until 2021 renders Plaintiff's claims against Travis Pattern time-barred by the statute of limitations. Judgment must be entered in Travis Pattern's favor pursuant to Rule 56(e), SCRCP.

ALLEGED[9] AND UNDISPUTED FACTS

A. Kennerly's employment relationship with Bierer & Associates.

Kennerly was hired by Plaintiff in 2003.[10] From December 2003 through July 13, 2018, Kennerly served as Plaintiff's full-time employee.[11] In 2005, Plaintiff alleges Kennerly was named Vice President of Engineering and Operations.[12] In this role, according to Plaintiff, Kennerly's responsibilities included overseeing Plaintiff's sales representatives. Kennerly's responsibilities allegedly again increased around 2009 when Plaintiff tasked him with finding and retaining cable and clamp from other suppliers on Plaintiff's behalf, as part of its initiative to expand services into the utility grounding business.[13]

Allegedly at the direction of Walter Bierer, and in furtherance of the Plaintiff's new grounding assembly initiative, Kennerly identified Travis Pattern as the manufacturer "best suited" to sell clamps to Plaintiff.[14] Thereafter, Kennerly and Travis Pattern initiated a working relationship, allegedly on Plaintiff's behalf.[15] In 2011, Plaintiff placed its first order for clamps

[9] For purposes of this motion only, Travis Pattern assumes certain alleged facts in Plaintiff's Complaint, as amended, to be true. However, Travis Pattern reserves the right to dispute the alleged facts in Plaintiff's Complaint in the event this motion is unsuccessful.

[10] Third Am. Compl. at ¶ 14.

[11] *Id.* at ¶ 15.

[12] *Id.* at ¶ 14. *See also* **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 131:10-17.

[13] Third Am. Compl. at ¶ 26.

[14] *Id.* at ¶ 40. It likewise identified defendant Trystar as best suited to provide cable.

[15] *Id.* at ¶ 42.

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with Travis Pattern.[16] Plaintiff continues to buy clamps from Travis Pattern to this day, even though Kennerly's employment with Plaintiff was terminated in mid-2018.[17]

Beginning as early as 2012 or 2013, Plaintiff was aware that Kennerly began to take steps to distance himself from Plaintiff and his employment with Plaintiff.[18] One of several steps Kennerly took during this time was to switch his email and phone from Plaintiff's company accounts to his own personal accounts.[19] Walter Bierer, as well as his sons, both of whom were in management roles with Plaintiff, Joe Bierer and Brent Jeffries, noticed Kennerly's dissociative activities and characterized them as obvious.

Kennerly also greatly reduced the amount of credit card receipts and reports he submitted to Plaintiff from his sales trips.[20] Walter Bierer also noticed that around this time that Kennerly ceased introducing representatives from other companies to Plaintiff in a work capacity.[21] Plaintiff admits that it failed to "regulate outside employment" activities Kennerly was conducting outside of what Kennerly reported himself.[22]

B. Kennerly establishes a business affiliation with Travis Pattern.

From at least 2014 through 2018, Travis Pattern sent Plaintiff multiple quotations related to sales of Travis Pattern products to Plaintiff.[23] On these quotations, Travis Pattern identified Kennerly as *Travis Pattern's* sales representative, working on behalf of Travis Pattern's utility

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[16] *Id.* at ¶ 43.
[17] *Id.*
[18] **Exhibit 4** (Kennerly 011384-85); **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 114:22-24.
[19] *Id.*
[20] **Exhibit 4** (Kennerly 011384-85).
[21] **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 117:20-25.
[22] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 292:12-294:8; **Exhibit 2**, W. Bierer Depo. Trans (Day 2) at 177:5-6.
[23] In other words, these quotations were not being sent to Rick Kennerly. Instead, they were being provided to Plaintiff's employees in its customer service and/or procurement department(s).

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grounding division ("UGD"). At least six quotations provided by Travis Pattern to Plaintiff in 2014 reflected "Rick Kennerly UGD."[24] Quotations with "Rick Kennerly UGD" from Travis Pattern to Plaintiff continued for years.[25] These quotations were not only provided to Kennerly, but also Chris Watson, Plaintiff's procurement or customer service representative. Plaintiff never asked Travis Pattern to explain why Travis Pattern was identifying Plaintiff's own alleged officer and employee, Kennerly, as a Travis Pattern UGD sales representative for products which Travis Pattern was selling to Plaintiff.

Indeed, as of 2013, Travis Pattern had retained Kennerly as an independent sales representative for Travis Pattern's utility grounding products division ("UGD").[26] For his work on behalf of Travis Pattern UGD, Kennerly received a ten percent commission of all sales made, including Travis Pattern's sale of utility grounding products to Plaintiff.[27] Walter Bierer and others were aware that in some form Kennerly was maintaining a business relationship with Travis Pattern following the initial formation of the relationship.[28] Kennerly often reported back to Plaintiff information regarding lab testing he was assisting Travis Pattern or customers in conducting. None of this testing was paid for by Plaintiff.

C. Kennerly's business affiliation with Travis Pattern was open and obvious.

From Kennerly's and Travis Pattern's perspectives, their business relationship was out in the open, including to Plaintiff, as evident through the above-referenced quotations provided by

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[24] *See* **Exhibit 5**, Combined quotations included within Bierer document production at BIERER_PROD_0018603 (6/16/2014); BIERER_PROD_00018605 (10/28/2014), 19657 (8/5/2014), 19652 (8/29/2014), 18910 (12/4/2014), 17029 (12/9/2014).

[25] *Id.* at BIERER_PROD_00048046 (3/23/2016), 48711 (10/26/2016), and 50751 (5/1/2018).

[26] **Exhibit 6**, Travis Pattern 30(b)(6) Depo. Trans. (S. Chaffin) 18:14-24. *See also* Third Am. Compl. at ¶¶ 7, 45.

[27] **Exhibit 6**, Travis Pattern 30(b)(6) Depo. Trans. (S. Chaffin) at 20:25-4. *See also* Third Am. Compl. at ¶ 45.

[28] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 289:23-290:19.

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Travis Pattern to Plaintiff. Travis Pattern UGD's Manager, Alex Martin, testified he made no attempt to "hide" Kennerly's relationship with Travis Pattern because there was "no need to."[29] He testified that Travis Pattern's relationship with Kennerly was well known in the industry.

> Q: [I]n all of your observations of Mr. Kennerly at … trade shows, did he ever hide his relationship with Travis Pattern or with Bierer from anyone?
> A: That act wasn't apparent at the shows.
> Q: It was not apparent that he was hiding anything or if –
> A: Correct.
> Q: -- people knowing that he was working with both?
> A: Correct, that he was hiding anything.
> Q: … It was apparent that he was not hiding anything? Is that what you said?
> A: That's correct.
> Q: At any point in time did Mr. Kennerly ever ask you to be sure not to mention his role with Travis to anyone?
> A: Never had that discussion with Kennerly.
> Q: All of this was done out in the open in the electrical utility industry.
> A: As far as our concern, yes.[30]

This, of course, makes perfect sense, since a company such as Travis Pattern would *want* its national sales representative to be well-known throughout the industry, as that industry knowledge would serve to increase product sales.

Kennerly also acknowledged his conduct was obvious and he was not attempting to hide his relationships with supposedly conflicting parties from Plaintiff. Kennerly testified: "I recall telling Walter [Bierer] that I worked *with* Travis Pattern & Foundry. There was no hiding that. It was public information. Hundreds of people, maybe thousands of people, know this."[31]

Defendant Trystar is another vendor in the electrical utility industry selling, primarily, cable products. Trystar's corporate designee, Dan Moerke, who works as Trystar's Director of Customer Sales & Support, testified that he was aware of the Kennerly-Travis Pattern relationship

[29] **Exhibit 7**, Travis Pattern 30(b)(6) Depo. Trans. (A. Martin) at 50:7-14.
[30] *Id.* at 106:20-107:15.
[31] **Exhibit 8**, J. F. Kennerly Depo, Trans (Day 1) at 248:8-13.

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and agreed that such relationship was "open and obvious."[32] He testified that neither Mr. Kennerly nor anyone at Travis Pattern asked him to keep their relationship a secret from Bierer.[33]

On October 24, 2014, Travis Pattern presented a technical seminar at Pacific Gas and Electric ("PG&E") in Plainfield, New Jersey. The seminar was publicly advertised in the Institute of Electrical Engineers ("IEEE") regional newsletter in 2014.[34] Kennerly and a Travis Pattern employee, Dick Pelletier, attended and presented on Travis Pattern's behalf.[35] Kennerly and Mr. Pelletier were, in fact, the *only* presenters at this seminar.[36] The brochure for the seminar provided a biography for presenters, and Kennerly's read, in part, that he "ha[d] *worked for* Bierer Meters as an engineering and operations manager for 15 years *and Travis UGD for 2 years*."[37]

Walter Bierer acknowledged he was made aware of the seminar brochure around November 2014.[38] At a weekly company meeting which took place at that time, Mr. Bierer informed Kennerly that he had seen the IEEE brochure listing Kennerly as an employee of Travis Pattern.[39] Mr. Bierer testified that Kennerly "laughed off" the notion that he worked for Travis

[32] **Exhibit 12**, Dan Moerke Depo. Trans. at 171:2-24 (testifying he was "aware that Mr. Kennerly was a sales rep for Travis Pattern," knew Kennerly was "representing or selling" "ferrules and clamps" for Travis Pattern, and neither Mr. Kennerly nor Travis Pattern asked him to "keep [Kennerly's] role as a sales rep for Travis pattern a secret from [Plaintiff]").

[33] *Id.*

[34] *See* **Exhibit 3** at W. Bierer Depo. Exhibit 14.

[35] Compl. at ¶ 39.

[36] **Exhibit 3** at W. Bierer Depo. Exhibit 14.

[37] *Id.* at ¶ 40 (emphasis added).

[38] *But see* **Exhibit 13**, Joe Bierer Depo. Trans. (Day 1) at 87:6-15 (testifying he was made aware of the brochure possibly as late as 2016).

[39] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 142:10-19; 241:2-242:2.

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Pattern.[40] Mr. Bierer testified he accepted Kennerly's explanation and conducted no further investigation into the matter until almost four years later, in July, 2018.[41]

As further evidence of the open nature of Travis Pattern's business relationship with Kennerly, Plaintiff received emails from its customers which revealed that customers were requesting products *from Travis Pattern through Kennerly*. For example, in September 2015, an employee of General Pacific, David Yang, sent an email to Kennerly's Bierer email address (rickkennerly@bierermeters.com).[42] In that email, Mr. Yang states:

> The first thing we need to do is give BPA an understanding of how Travis UG fits in. I believe you said Travis does not have corporate literature showing all the companies that he owns, so use his web site. Look at Travis's web site at this link…. http://wwwtravispattern.com/affiliates.php Notice how all his affiliates are listed, such as Pascor. Very important since BPA pretty much only uses Pascor.
>
> 1) Could you have them update their web site and add PDU?
>
> 2) Could you have them add Travis UG?
>
> Once this is done, then I can send the link to BPA. It then gives Travis UG huge credibility. Otherwise it would be an uphill battle and we would have little chance to succeed.
>
> …
>
> Would you be handling this as Travis' national sales manager or Bierer's or?[43]

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[40] *Id.*

[41] *Id.*; *see also id.* at 246:13-19. At the same time, Plaintiff was selling component parts of a grounding assembly to Travis Pattern (i.e., ferrules). *See* **Exhibit 7**, Travis Pattern 30(b)(6) Depo. Trans. (A. Martin) at 29:19-31:1.

The only reason Travis Pattern would need to buy ferrules would be to put together a utility grounding assembly using Travis Pattern's parts (i.e., clamps, heat shrink, and hot sticks) for Travis Pattern to sell to customers. Plaintiff bases its claims against Travis Pattern in large part on Travis Pattern's manufacture and sale of these grounding assemblies, which Bierer asserts unfairly competed with Plaintiff's own grounding assemblies. *See*, generally, Compl. Plaintiff's accusation that it had no idea Kennerly was part of Travis Pattern's decision to put together utility grounding assemblies has no credibility, given this evidence. Indeed, Brent Jeffries testified during his deposition that he was aware Travis Pattern was selling grounding assemblies prior to 2018 when Kennerly was terminated from Plaintiff's employ.

[42] **Exhibit 9**, Travis Pattern_003787-3791 [without attachment].

[43] *Id.*

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As further evidence that Plaintiff was aware of Kennerly's outside activities and that such activities were generally known in the industry, in April 2016, Kennerly emailed Walter Bierer stating that while traveling to San Antonio, Texas, for Plaintiff, he would be spending some "off" time to meet with industry representatives.[44] Walter Bierer forwarded Kennerly's email to his children, Joe Bierer,[45] Jamie Bierer, and Brent Jeffries, all of whom were in managerial-level roles with Plaintiff.

Mr. Bierer's children questioned what Kennerly meant by "off time." Specifically, Brent Jeffries said: "From talking with [another sales representative], *[Kennerly] helps many people with other manufacturer's products[.]* . . . I never realized that 'off' time was a factor."[46] Walter Bierer and his wife, Billie Bierer, responded, separately: "You should reserve comment on [Kennerly's] activities until you understand what [it] means and how it effects [sic] the future of your company" and "you should not vent – No need. Rick is doing business."[47]

D. Bierer & Associates confronted Kennerly about his dissociation and competitive activities in 2015 and 2018.

On October 14, 2015, Walter Bierer confronted Kennerly by email regarding Kennerly's lack of reporting, Kennerly's "outside activities," and Kennerly's distancing himself from Plaintiff's business. Walter Bierer wrote:

> I think it is important that you understand my current thoughts. **I see your lack of reporting your activities (itinerary and reports) as a symptom of a larger issue** which is your lack of accountability to anyone and everyone in our company including me. **More and more I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time.** For years I have trusted you were always doing the 'right thing' but **my trust is waning**.
>
> **Your outside activities** seem almost chaotic –in that almost **everything you are currently doing seems to put you at odds with everyone in our company**

[44] **Exhibit 14**, BIERER_PROD_00032764.
[45] **Exhibit 13**, Joe Bierer Depo. Trans. (Day 1) at 13:2-14:13.
[46] **Exhibit 14**, BIERER_PROD_00032764-32765 (emphasis added)
[47] *Id.*; *see also* Joe Bierer Depo. Trans. (Day 1) at 14:14-15:12.

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> **about something**. What feedback I do get from the field, you have no respect for any of your fellow employees and are quick to throw anyone of them under the bus as being incompetent and that you, basically and single handily, run Bierer & Associates. While this may enhance your stature, it demeans everyone else in our company including me.
>
> **You have purposefully separated yourself from Bierer by maintaining private telephone and e-mail accounts which leads me to wonder what other activities you may be conducting on my dime when you are gone for weeks at a time with no reporting. As I said before, my trust is waning**.
>
> **I think it may be time for you to begin looking for employment elsewhere** unless you can think of some way to resolve and reverse all of the issues mentioned.
>
> You do have many wonderful traits and it may be that you have simply outgrown our company.
>
> Carefully think over what I have said and then I would like to hear your thoughts on this.[48]

Around the same time, Plaintiff was aware that Kennerly was conducting testing with Travis Pattern in November 2015 for a customer, PG&E.[49] Bierer alleged Kennerly falsely signed his name on the test log-in sheet "as a Travis employee."[50] In a November 12, 2015 email from Kennerly to Walter Bierer, Joe Bierer, and Brent Jeffries, Kennerly reported his attendance at a testing lab with Travis Pattern.[51]

Supposedly, in July 2018, Plaintiff allegedly *again* came across the 2014 IEEE brochure noting Kennerly as a Travis Pattern employee.[52] At the direction of Walter Bierer, his son, Joe Bierer, called Travis Pattern to inquire into whether Kennerly was an employee.[53] A Travis Pattern employee said Kennerly was a Travis Pattern UGD sales representative.[54] Around this time

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[48] **Exhibit 10**, Kennerly Old IPhone at 0003-5 (emphasis added).

[49] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 289:23-290:19; 292:12-294:8; *see also* **Exhibit 11**, BIERER_PROD_00061.

[50] *Id.* at 290:18-19. (It is unclear when Plaintiff discovered this test log-in sheet.)

[51] **Exhibit 11**, BIERER_PROD_00061.

[52] Compl. at ¶ 74: *see also* **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 140:7-16.

[53] *Id.* at 140:22-24.

[54] Compl. at ¶ 74.

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Plaintiff also confirmed that Kennerly had what Plaintiff considered to be conflicting relationships with several other companies: Trystar Power Distribution Systems, ITW Paslode, and R&D.[55]

On July 13, 2018, Plaintiff terminated Kennerly's employment. In an email from Walter Bierer to Kennerly, dated July 10, 2013, Mr. Bierer wrote, "[t]his will serve as your employment termination notice effective Friday July 13th 2018. Conflict of Interest between Bierer Associates, Inc. and Travis Patterson [sic] PDU, Inc. and others."[56]

Two months after terminating Kennerly, in September 2018, Plaintiff filed the first Complaint in this action. Plaintiff did not include Travis Pattern as a defendant in the lawsuit at that time. Instead, Plaintiff conducted third-party discovery as to Travis Pattern, and other co-defendants, including serving a subpoena on Travis Pattern in November 2018. Two and a half years later, on April 15, 2021, Plaintiff added Travis Pattern as a defendant, some six and a half years after Plaintiff first saw the IEEE conference, and five and a half years after Walter Bierer sent the email detailing Kennerly's significant outside activities and knowledge of Kennerly's efforts to hide them from Plaintiff.[57]

STANDARD OF REVIEW

Summary judgment is appropriate when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(e). In evaluating a motion for summary judgment, a court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). If after granting such deference to the non-moving party, it is apparent to the court that "there is no genuine issue as to

[55] *Id.* at ¶ 77.
[56] *Id.* at ¶ 76; *see also* **Exhibit 4** (Kennerly 011381-011385).
[57] *See generally* Third Am. Compl. (Apr. 15, 2021).

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any material fact,'" and the moving party is entitled to judgment "'as a matter of law,'" the court should grant summary judgment. *Id.* (quoting S.C. R. Civ. P. 56(c)).

A motion for summary judgment can be used to seek judgment based on the defense of statute of limitations. *McDonnell v. Consolidated School Dist. Of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). The "[s]tatute of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to well-ordered judicial system." *Moates v. Bobb,* 322 S.C. 172, 470 S.E.2d 402 (Ct.App.1996).

ARGUMENTS

I. PLAINTIFF'S CLAIMS ARE TIME-BARRED.

All of Plaintiff's claims against Travis Pattern are governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530; § 39-5-150, 39-8-70. Because Plaintiff first asserted its claims against Travis Pattern on April 15, 2021, Travis Pattern is entitled to summary judgment if, in exercising reasonable diligence, Plaintiff knew or should have known it possessed claims against Travis Pattern prior to April 15, 2018. S.C. Code Ann. §§ 15-3-535; 39-5-150; 39-8-70. The undisputed evidence shows that Plaintiff knew or should have known of a claim against Travis Pattern as early as 2012 and as late as 2015.

"The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Gibson v. Bank of Am., N.A.,* 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). The fact "that an injured party may not comprehend the full extent of the damage is immaterial . . . ." *Id.* at 782. The statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person

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on notice of the existence of a cause of action against another. *Id.* This is an objective, not a subjective, determination. *Id.* Therefore, "it takes very little to start the clock" in South Carolina. *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994).

Here, all of Plaintiff's claims against Travis Pattern are time barred. Walter Bierer's testimony and a veritable mountain of other evidence support the position that Plaintiff was "on notice" of potential claims against Travis Pattern as early as 2012. Plaintiff continued to receive information and documents from 2012 through 2015 giving Plaintiff continuing reason to know of a potential claim against Kennerly, Travis Pattern, and the other manufacturers for whom Kennerly was working. As a consequence, the instant action brought against Travis Pattern in 2021 is barred by the three-year statute of limitations and must be dismissed with prejudice.

a) Plaintiff had notice of potential claims against Travis Pattern as early as 2012.

Evidence regarding Kennerly's establishment of an allegedly conflicting relationship with competitors, including Travis Pattern, was available to Plaintiff in 2012, close to a decade before Plaintiff commenced the action against Travis Pattern in 2021. The information that Plaintiff had at its disposal beginning in 2012 made clear that Travis Pattern had a relationship with Kennerly that was out in the open to the entire electrical utility industry, including Plaintiff.

Beginning in at least 2012, Plaintiff knew Kennerly was taking steps to "disassociate himself" from Plaintiff's business. These actions included switching his cell phone from a work plan to a personal plan.[58] Walter Bierer testified that this activity was later tied right into the start of "some of [Kennerly's] corrupt activities."[59] Around this same time, Kennerly also switched to

[58] **Exhibit 4** (Kennerly 011384); *see also* **Exhibit 2**, W. Bierer Depo Trans. (Day 2) at 114:24; *see also* **Exhibit 13**, Joe Bierer Depo. Trans. (Day 1) at 213:12-215:22.
[59] **Exhibit 2** at 116:14-16.

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only using a personal email.[60] On Travis Pattern transmittal emails including quotations to Plaintiff related to Plaintiff's purchases of products from Travis Pattern, Travis Pattern included Plaintiff's procurement and customer service departments as well as Kennerly's personal gmail account. This should have placed Plaintiff on notice that Kennerly was communicating with Travis Pattern regularly through his personal email address.

In addition to these actions, Kennerly demonstrated further conduct that should have put Plaintiff on notice of the allegedly conflicting relationships being formed. For instance, Kennerly ceased introducing representatives from other companies to Plaintiff in a work related capacity and began displaying signs of attempting to present himself as an independent entity.[61] Plaintiff alleged that in 2012 "Kennerly began presenting himself to customers and others in the industry as essentially an independent marketing expert or broker."[62]

Walter Bierer confronted Kennerly with a list of his allegedly wrongful dissociative actions in an October 14, 2015 email to Kennerly. Although the email is in 2015, in it Mr. Bierer is clear that he knew of Kennerly's potentially competitive activity as early as 2012, stating:

> I think it is important that you understand my current thoughts. **I see your lack of reporting your activities (itinerary and reports) as a symptom of a larger issue** which is your lack of accountability to anyone and everyone in our company including me. **More and more I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time.** For years I have trusted you were always doing the 'right thing' but **my trust is waning**.
>
> **Your outside activities** seem almost chaotic –in that almost **everything you are currently doing seems to put you at odds with everyone in our company about something**....[63]

[60] *Id.* at 114:20-24.
[61] *Id.* at 117:20-25.
[62] Second Amended Complaint, ¶ 11. *See also*, **Exhibit 2**, W. Bierer Depo Trans. (Day 2) at 117:20-25; *id.* at 155:17-158:3.
[63] **Exhibit 10**, Kennerly Old IPhone at 0003-5 (emphasis added).

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On July 13, 2018, in Plaintiff's termination email to Kennerly, Plaintiff reiterated the "obvious" concerns it had, and had expressed to Kennerly, since 2012 surrounding Kennerly's conduct.[64] Walter Bierer wrote, "*it has been obvious to me* that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry *for many years*."[65] It is unclear why it took so long for Plaintiff to act on these concerns with Kennerly (in 2018), yet Mr. Bierer concedes that Kennerly's conduct was obviously conflicting (at least in his mind)[66] as early as 2012. Mr. Bierer acknowledged in his July 11, 2018 email terminating Kennerly, and later in his deposition testimony, that, "no other business. . . would have tolerated this for any period of time."[67] Further, Mr. Bierer testified it was "probably. . . unreasonable" for Plaintiff to tolerate Kennerly's actions for as long as it did and Plaintiff "should've asked . . . [Kennerly]" more questions about what he was doing.[68]

South Carolina requires that a plaintiff exercise "reasonable diligence" in discovering potential legal claims. S.C. Code Ann. § 15-3-535. Plaintiff was far from reasonably diligent in its treatment of Kennerly's conduct and was on notice of potential claims against Travis Pattern as early as 2012. Plaintiff knew Kennerly was distancing himself from Plaintiff's business as early as 2012, the very time period that Plaintiff was aware that Kennerly was forming a business relationship with Travis Pattern and spending significant periods of time at Travis Pattern's office and test sites.

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[64] **Exhibit 4** (Kennerly 0011384).
[65] *Id.* (emphasis added).
[66] **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 155:12-16.
[67] *See* **Exhibit 4** (Kennerly 0011384); *see also* **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 160:2-10.
[68] *Id.* at 160:7-10; *see also id.* at 161:7-8.

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At any time following 2012, Plaintiff could have simply confirmed the scope of Kennerly's activities with Travis Pattern by calling Travis Pattern, its own business partner, and making an inquiry. Had Plaintiff conducted a simple inquiry into Kennerly's activities, including calling Travis Pattern as Plaintiff eventually did in 2018, Plaintiff would have discovered everything that it ultimately learned in July 2018, when it finally terminated Kennerly. Instead, Plaintiff turned an unreasonable, and perhaps intentional, blind eye to the very claims that it now asserts it "discovered" in 2018. Plaintiff's alleged 2018 "discovery" is belied by the undisputed facts.

For the purposes of the statute of limitations, Plaintiff possessed enough knowledge of facts that its actions against Travis Pattern had accrued as early as 2012. Because all of this predates Plaintiff's filing of claims against Travis Pattern by nine years, Plaintiff's claims against Travis Pattern must be dismissed with prejudice.

b) Plaintiff had notice of potential claims against Travis Pattern in 2014.

Many occurrences in 2014 compounded Plaintiff's duty to exercise reasonable diligence in exploring Kennerly's relationship with Travis Pattern. As early as June 16, 2014, Travis Pattern UGD's General Manager, Alex Martin, sent a quotation for products to both Plaintiff's Customer Service Department (customer_service@bierermeters.com) and also Kennerly's personal email account (rickkennerly@gmail.com). [69] In other words, neither Travis Pattern nor Kennerly were hiding the fact from Plaintiff that Travis Pattern had and used Kennerly's *personal* email account for business communications. Crucial to this motion, the quotation attached to the email noted Mr. Kennerly as "Rick Kennerly *UGD*."[70]

[69] **Exhibit 5** at BIERER_PROD_018602.
[70] *Id.* at BIERER_PROD_018603 (emphasis added).

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On August 5, 2014, Mr. Martin sent to Plaintiff's customer service department another quote.[71] Again, this quote listed Kennerly as "Rick Kennerly *UGD*."[72] Again, on August 29, 2014, Mr. Martin sent another quote to Plaintiff's customer service department, with a copy to Rick Kennerly's personal gmail account.[73] This quote, once again, listed "Rick Kennerly *UGD*."[74]

Seeing "Rick Kennerly UGD" on numerous Travis Pattern quotations to Plaintiff should have raised a red flag to Plaintiff about Kennerly's activities for or on behalf of Travis Pattern, especially combined with his "obvious" dissociative activities, and yet Plaintiff still did nothing. The quotations provide Travis Pattern's address, phone number, fax number, and "Submitted by: Alex Martin." Plaintiff knew who to contact at Travis Pattern to inquire why "Rick Kennerly *UGD*" was on the quotations. Plaintiff failed to contact Travis Pattern and failed to conduct a reasonable inquiry.

On October 24, 2014, Kennerly attended and presented at an industry conference, Institute of Electrical Engineers ("IEEE"), at PG&E's offices in Plainfield, New Jersey.[75] IEEE published a brochure announcing the seminar and providing biographies of the only two individuals who were speaking at the seminar - "Dick Pelletier of Travis" and "Rick Kennerly of Travis." Kennerly's biography provided, in part, that he "ha[d] worked for Bierer Meters as an engineering and operations manager for 15 years and Travis UGD for 2 years."[76] Walter Bierer testified he learned of the seminar and brochure in 2014 and confronted Kennerly about it during one of Plaintiff's company meetings around that time.[77]

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[71] *Id.* at BIERER_PROD_019656.
[72] *Id.*
[73] *Id.* at BIERER_PROD_0019651.
[74] *Id.* at BIERER_PROD_0019652.
[75] Compl. at ¶ 39.
[76] *Id*. at ¶ 40.
[77] **Exhibit 1**, W. Bierer Depo Trans. (Day 1) at 142:10-19; 241:2-242:2.

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Mr. Bierer testified that "everyone in the office saw [the brochure]" and when he "brought it to [Kennerly's] attention in a . . . company meeting [Kennerly just] laughed it off."[78] Mr. Bierer alleges that Kennerly simply asserted that he did not write or have anything to do with the information in the brochure.[79] Mr. Bierer testified: "I accepted him. I trusted what he said, and I believed him," and did not investigate the matter any further."[80] Moreover, Mr. Bierer acknowledge in his deposition that

> vendors see Rick at this conference speaking on behalf of Travis in and around 2014 . . . engineers from around the country come to the conference and see Rick speaking, listed on behalf of Travis…hundreds [of people attend these conferences, including] . . . major people in the industry.[81]

At his deposition, Joe Bierer testified how critical the words "worked for," as used in the brochure, should have been to Bierer when they read this brochure in 2014.

> You're using the word "worked for." And that was the other thing that seemed to be a conflict in the depositions is worked for or worked with. There's no secret he's working with Travis. There's no secret he's working with Travis. I mean, in his trip reports he's going of there to test clamps with Travis…it's not a secret.…The secret is: where does the money go when the [purchase order] is sent out? That's the secret…
>
> So working with and working for -- that's two different things. You work with somebody, you assume you're not getting paid by that company. ***You work <u>for</u> somebody, you're getting paid***. So when he says in a trip report "I'm going up there to work with Travis, you know, on these clamps," that's not a secret. We read that and go on about our daily business. That's not a big deal.[82]

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[78] *Id.* at 142:10-19; 241:2-242:2.

[79] *Id.*; *see also id.* at 246:13-19; *see also* **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 141:4-8 (Q: "Once you became aware of that article from 2014, the only reasonable thing to do would be to call Travis and check it out, correct?" A: "I thought the most reasonable thing to do at the first time was to ask Mr. Kennerly about the validity of it.").

[80] *See* **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at 246:13-19.

[81] *Id.* 245:16–246:1.

[82] **Exhibit 13**, Joe Bierer Depo. Trans. (Day 1) at 91:24-25 – 92:1, 93:19 – 94:1 (emphasis added).

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Yet, in spite of Joe Bierer's clear testimony that "worked for" is a critical phrase – a "big deal" - which should have immediately placed Bierer on notice that Kennerly was "getting paid" by Travis, Bierer failed in 2014 to take any steps to determine Kennerly's relationship with Travis, other than to ask Kennerly himself.

When Plaintiff saw the IEEE seminar brochure listing Kennerly "working ***for*** . . . Travis UGD for 2 years," Plaintiff was under the duty to investigate further. This is particularly true in light of Plaintiff's existing knowledge that Kennerly was dissociating himself from Plaintiff and Travis Pattern was representing Kennerly as its sales agent in the multiple quotes Travis Pattern had submitted to Plaintiff. Moreover, at the time Plaintiff received the IEEE seminar brochure, Plaintiff knew that Travis Pattern regularly communicated with Kennerly using his personal gmail email account. By failing to do anything other than ask Kennerly about his affiliation with Travis Pattern, Plaintiff failed to exercise reasonable diligence in investigating its potential claims.

The law applicable to statutes of limitations does not excuse a plaintiff from its obligation to exercise reasonable diligence because the plaintiff blindly "trusts" the potential defendant, here Kennerly. Walter Bierer conceded it was "public knowledge" and "in national newsletters" that Kennerly was "working with Travis and Bierer in 2014."[83] Notably, the information regarding the brochure accompanied the knowledge Plaintiff already had about the significant time Kennerly had been spending with Travis Pattern in Washington state at its headquarters. Plaintiff knew that Kennerly spent "months in . . . 2010-2011, on and off, for two years" working with Travis Pattern.[84] While Plaintiff may not have known *the extent* of Kennerly's relationship and activities with Travis Pattern, the clear existence of that relationship, when considered along with all the

[83] *Id.* at 242:13-17.
[84] **Exhibit 2**, W. Bierer Depo. Trans. (Day 2) at 197:19-20.

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other factors, should have prompted Plaintiff to look further into Kennerly's activities many years earlier than 2018. The information that Plaintiff's rights had allegedly been invaded was readily available and Plaintiff simply failed to diligently consider it.

Travis Pattern continued providing quotations to Plaintiff throughout 2016, 2017, and May 2018 (before Kennerly was terminated in July 2018). Like the ones previously sent to Plaintiff, these Travis Pattern quotations also listed "Rick Kennerly UGD."

Plaintiff refocused on the 2014 IEEE seminar brochure in June or July 2018. At that time, Plaintiff finally decided to investigate further. When it did so, Mr. Bierer testified "it was amazing what we learned . . . and we didn't even go looking for it. It was dumped right in our lap."[85] When Plaintiff's officer, Joe Bierer, called Travis Pattern to ask if Kennerly worked there, Travis Pattern readily and openly acknowledged that Kennerly was one of its sales representatives. This further supports a finding that the information related to Kennerly's activities for Travis Pattern was open and obvious. Any failure by Plaintiff to learn of its claims prior to April 15, 2018 was directly caused by Plaintiff's failure to exercise reasonable diligence.

At the time Plaintiff terminated Kennerly in 2018, it had materially the same information about Kennerly's outside activities that it had in 2012 and 2014. Joe Bierer testified that Plaintiff received "no" "new information in 2018" prior to Kennerly's termination.[86] In other words, Plaintiff had no more information in 2018 than it had previously against Kennerly (and Travis Pattern, and other defendants) in 2018 than it already had in 2012, and the subsequent years.

Plaintiff's admitted discovery of the IEEE brochure in 2014, combined with Plaintiff's knowledge of Kennerly's efforts to distance himself from Plaintiff in 2012, and Travis Pattern's

[85] **Exhibit 1**, W. Bierer Depo. Trans. (Day 1) at. 161:7-9.
[86] **Exhibit 13**, J. Bierer Depo. Trans. (Day 1) at 149:7-10.

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own communications directly with Plaintiff during this period of time, demonstrate more than enough "factual knowledge" to put a reasonable person on notice of potential claims against Travis Pattern no later than mid-2014.

c) Plaintiff acknowledged having knowledge of Kennerly's conflicting "outside activities" in 2015.

On October 14, 2015, Walter Bierer wrote to Kennerly expressing his "current thoughts."[87] These thoughts included Walter Bierer's concerns of "a larger issue," including "lack of [Kennerly's] accountability to . . . the company," Kennerly's course of "disappear[ing] for weeks at a time," and "outside activities" which "seem to put [Kennerly] at odds with everyone in our company[.]"[88] Walter Bierer expressly acknowledged Kennerly was "purposefully separat[ing] [himself] from Bierer by maintaining telephone and email accounts[.]"[89] These actions Walter Bierer said "le[d] [him] to wonder what other activities [Kennerly] may be conducting on [Plaintiff's] dime when [Kennerly] [was] gone for weeks at a time with no reporting."[90] Indeed, Plaintiff's concern about Kennerly's actions were sufficiently serious for Plaintiff to threaten Kennerly with termination *in 2015,* by stating: "I think it may be time for you to begin looking for employment elsewhere *unless you can think of some way to resolve and reverse all of the issues mentioned*."[91]

Based on this email, Plaintiff undeniably knew or should have known of claims against Kennerly and the third parties with whom he was doing business, including Travis Pattern, as of October 14, 2015. Its claims against Kennerly and these third-parties, as a consequence, should

[87] **Exhibit 10**, Kennerly Old IPhone at 0003-5.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* (emphasis added).

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have been filed no later than October 14, 2018, instead two and one half years later, in April 2021. That the claims were not filed by that time render them barred by the statute of limitations.

The claims in Plaintiff's Third Amended Complaint against Travis Pattern, including: (Cause of Action ("Claim") No. 3) Aiding & Abetting Breach of Fiduciary Duty, (Claim No. 5) Tortious Interference with Existing Contractual Relationship, (Claim No. 7) Tortious Interference with Prospective Contractual and Business Relations, (Claim No. 14) Common Law Unfair Competition, and (Claim No. 15) South Carolina Trade Secrets Act are barred by the statute of limitations. The undisputed evidence reveals that Plaintiff was on notice of potential claims against Kennerly and the third-parties with whom he was doing business, including Travis Pattern, as early as 2012 and continuing through 2014 and 2015. This mountain of evidence makes clear Plaintiff's claims are time barred and must be dismissed with prejudice.

CONCLUSION

Plaintiff was on notice of facts that should have led it to discover its alleged potential claims against Travis Pattern as early as 2012 and as late as 2015. Because Plaintiff did not file its claims against Travis Pattern until 2021, between 6 and 9 years later, Plaintiff's claims against Travis Pattern are barred as a matter of law under the applicable statute of limitations. Travis Pattern is, therefore, entitled to summary judgment against all claims brought by Plaintiff in the operative complaint.

[SIGNATURE ON FOLLOWING PAGE]

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Respectfully submitted,

s/*Lyndey R. Z. Bryant*

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September 28, 2022

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State of South Carolina)
)
County of Richland)

Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC, Travis Pattern & Foundry, Inc., Illinois Tool Works, Inc., and David Deinek, Defendants.

2018-CP-40-04841

Video Deposition

of

Walter Bierer

Jan F. Kennerly, Jr., Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.

Date: February 23, 2022

Time: 10:40 a.m.

Location: Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina

Reported by
Cindy H. Patterson

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Also Present:
Rick Kennerly
Joseph Bierer
Danielle Kennerly (Via Telephone)
Wes Munn, Videographer

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MR. GRIFFIN: Object.

A The second time by -- well, first time by shareholder action.

Q Okay. There -- there was a prior time when he was appointed?

A Yes.

Q So my question is this: If -- if Rick was appointed previously, why does he need to be appointed again?

A We changed his title.

Q What did it change from and then to?

A "Vice president of" -- "vice president of engineering and operations" to "vice president, national sales manager."

Q Okay. And so when was he previously appointed as the vice president?

A In 2005.

Q Okay. And when was he hired as an employee?

A 2002.

Q Were his duties any different in March of 2018 after this appointment?

A No.

Q The duties were the same?

A Yeah.

Q Was there any -- any action taken or any document

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What did you learn?

A I learned that he was a liar and a thief.

Q Okay. Let's be specific. What -- what information did you learn that led you to those conclusions?

A That -- that he had been working for at least three other companies without my knowledge.

Q How did this information come to be learned?

A There was -- I asked Joe to call Trystar -- excuse me -- Travis and ask them, point-blank.

Q Well, who had told you before that Rick was working with Travis?

A I saw it in an IEEE publication. Okay. I brought it to his attention in a Monday morning company meeting. He laughed it off. He said he didn't write -- it said that he had been a -- a Travis employee for two years. He laughed it off, said he didn't write -- he didn't write that. He didn't have anything to do with it. And I accepted him. I trusted what he said, and I believed him.

Q But you still continued this investigation?

A No. This was -- this was years before. There was no -- actually, that -- Joe called me the morning of the 10th -- the morning of the 10th, and somehow this conversation came up again. And I wanted to put it to rest.

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Q To find out what they were doing?
A Well, yeah. I mean --
Q Because you --
A -- we learned a lot --
Q Because you didn't know --
A We learned a lot that afternoon. That -- after Kennerly walked out of the office, it was amazing what we learned that afternoon, and we didn't even go looking for it. It -- it was dumped right in our lap.
Q It was as if all this was just happening in plain sight?
A What's that?
Q It was as all this was happening in plain sight?
A I -- we --
MR. GRIFFIN: Object to the form of the question.
A We had a call from Richard Rindone, worked for SafetyTest. He was one of our best distributors. Also, he and Rick worked together. I always thought it was a great team. He called us and unloaded on Rick, threw him under the bus for an hour or two, on the phone. Told us about everything Rick had been doing. To this day, I can't quite figure out why he did it, but the only

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A Uh-huh. That's right.
Q So Rick's speaking at a IEEE conference in November -- or I'm not sure when the conference is, but in this newsletter dated November of 2014, he's advertised as a speaker regarding personal protection fault current devices?
A That's right.
Q And in this national newsletter, it says Speaker 2 is "Rick Kennerly of Travis." Do you see that?
A That's right.
Q And it says, "Biography: Rick Kennerly is an engineer graduate from the University of South Carolina. He's worked for Bierer Meters as an engineering and operations manager for 15 years, and Travis UDT (verbatim) for two years. And Rick's been a voting member of the ASTM F18 for ten years."
A That's right.
Q Do you see that?
A Yes, sir.
Q So it's publicized in a national publication that Rick works with your company, and he also works with Travis?
A Uh-huh.
Q Is that right?

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A That's right.
Q And this is in November of 2014?
(Sotto voce discussion between Mr. Griffin and Ms. Fox.)
A That's right. And do you want to know what happened in 2014?
Q There's -- I'll ask you about that in just a second. Just -- let's go -- was it 14? Exhibit 14? And 14's the invitation that goes out to the engineering community about this conference, correct?
A I would say yes.
Q My point in all this, Mr. Bierer, is that the information that Rick's working with Travis and your company in 2014 is -- is public knowledge. It's in national newsletters?
A That's right.
MR. GRIFFIN: Object to the form of the question.
THE DEPONENT: What -- what?
MR. GRIFFIN: (To the deponent) You can answer.
Q He -- he's noted an objection for the record.
A Oh. Yeah.
Q But you said yes, it's a -- it -- it's --

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Q Page 7 of Exhibit 13.
A I don't know. Let's take another look at it and see what it says. "He has worked" -- it says, "He has worked for Bierer as a" -- "and Travis," so there's a -- it's not clear whether he was receiving money or not. So --
Q Well, it says he's worked with them for two years, this was as of 2014?
A That's right. So was he getting paid? He was getting paid by me when he was working there, for sure. Was he getting paid by Travis, too?
Q Who all attends these conferences?
A All the electronics and electrical engineers in the country and lots of vendors. Vendors would go to them.
Q So vendors see Rick at this conference speaking on behalf of Travis in and around 2014. The engineers from around the country come to the conference and see Rick speaking, listed on behalf of Travis, sometime in 2014?
A Uh-huh.
Q How many -- I mean, how many people attend these things? Are we talking hundreds?
A Yeah. Probably, yeah, hundreds.
Q And -- and major people in the industry, correct?

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A Yeah.
Q You said all the reps are aware of this, because you said their complicit in it?
A That's right. Well, for sure.
Q You -- you said there that was a meeting afterwards where Rick laughed this off?
A That's right.
Q And were there any -- any -- to your knowledge, is there any minutes of this or an e-mail memorializing that meeting where Rick denied having any involvement with Travis?
A I don't think there is.
Q Did anybody contact Travis in or around 2014 when this occurred --
A No.
Q -- to -- to verify?
A No.
Q That was later?
A Yes.
Q Four years later. Do you believe the customers would know about Rick's affiliation with Travis?
A Certainly. Well, I -- as far as what, being on the take? I don't know.
Q Well, just --
A I mean, they know he was affiliated with Travis via

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Q Well, you're not saying he can't work in the industry forever, are you?
A No. I just wonder why he's getting commissions --
Q For sales.
A -- on products that -- huh?
Q For sales.
A In Brazil? What did he have to do with those? He gets -- he gets commissions for sales anywhere in the world. He doesn't have anything to do with those sales. Why does he get a commission? It's because he helped them build the clamps on my dime, my dollar, my time.
Q Did you ever suggest to Rick back in 2015 that he should consider looking for employment elsewhere due to his outside activities?
A I -- I would have no reason to do that. I never -- I liked Rick as an employee. I thought he was a valuable employee.
Q And you're saying that never happened?
A That never happened. Absolutely not. Never happened. And if Rick told you that, that's one more fabrication.
Q You were aware in 2015 that Rick was conducting testing with Alex Martin from Travis in November of 2015, weren't you?

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A Well, actually, a lot of that was secretive. I didn't know anything it.
Q It's your testimony you didn't know anything about Rick --
A I --
Q -- testing in the labs --
A I wouldn't say nothing -- I didn't know anything about it. I -- I do know that we had "several tentative, big cable sales" going on, and we had one going on with PG&E. And -- and he told me that PG&E was going to conduct their own tests, and I never did inquire to him exactly where they were going to do that, but in -- in the e-mail -- the hundreds of thousands of e-mails we found, that he conducted numerous tests that I didn't know anything about.
Q Okay.
A And in the sign-in log at these tests, Kennerly signed his name as a Travis employee.
Q I'm going to hand you Exhibit 24.

MR. PADGET: (To all counsel) I dumped it in folder.

Exhibit Number 24, E-mail correspondences in reference to "This week report."

MR. BEACH: (To Mr. Padget) I'm sorry. Which

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Q So Rick was informing everybody at Bierer that he was meeting Alex Martin, Travis Pattern to assist in testing on several items. Do you see that?
A Yes.
Q And so he notified everybody of that --
A Uh-huh.
Q -- in November of 2015?
A On at least one test, yeah.
Q And were there others where he notified you about that?
A Not that I recall.
Q He wasn't hiding that he was working with Travis in the lab?
A I instructed him to. I instructed him to. We were developing new clamps, you have to test them. As I recall the conversation on the testing -- and -- and actually, I saw all this material on -- on -- on his computer, he showed it to me. The test results, okay, that -- that PG&E -- he told me that PG&E was conducting all the tests. We sent them tens of thousands of grounds, okay? We sent them to PG&E for test purposes. Kennerly said that he was going to -- that PG&E was going to conduct those tests themselves, okay? -- that -- excuse me -- PG&E was going to conduct them. I didn't ask

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him where.
Q Do you know what year that was that you're referring to?
A Probably 2013/'14, somewhere in there.
Q Well, when you go to a test lab, it's expensive to use it, right?
A Yes. That's right.
Q Do you -- you know, I mean, these things can cost 10/15/$20,000 to use the labs.
A A day, yeah.
Q Now, Rick's mentioning that he's in test lab with Travis.
A Yeah.
Q Does that mean it's associated with a 15/$20,000 expense to be Bierer --
A No.
Q -- for testing your clamps?
A No.
Q So --
A I -- I don't remember which deal this is, but he told me that PG&E was -- in -- in one of the major tests that we sent them all the grounds to test, he told me PG&E was going to pay for it.
Q So PG&E was going to pay the test your grounds?
A That's right.

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Q Is that something that's routine in the industry?
A I would say so. In other words, we coughed up, you know, at least 10/$15,000 worth of grounds, you know, and -- and they test them.
Q And then you sell them to them?
A That's right. But we never did, Kennerly did. Or I would say he received -- if you want to call it that -- "commissions."

MR. PADGET: I'm at a good stopping point right now.

MR. GRIFFIN: Great.

MS. FOX: Perfect.

MR. GRIFFIN: I think it's a long day for everybody.

MR. PADGET: Before -- before we go off, let me just put something on the record real quick. Mr. Bierer, we're going to conclude the deposition for today; we're going to continue tomorrow. (To all counsel) What time do we want to start? Nine or ten?

MR. ROZELSKY: I'd rather start at nine.

MR. PADGET: Let's do it at nine. Is that okay with y'all?

MR. ROZELSKY: If that works for y'all?

MR. GRIFFIN: Let's say 9:30.

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State of South Carolina)
)
County of Richland)
)
Bierer and Associates, Inc.,) 2018-CP-40-04841
Plaintiff,)
v.) Continuation of
)
Jan F. Kennerly, Jr.,) Video Deposition
Danielle Kennerly, EUSA,)
LLC, J&D Farms, LLC,) of
Trystar LLC, Travis Pattern)
& Foundry, Inc., Illinois) Walter Bierer
Tool Works, Inc., and David)
Deinek,)
)
Defendants.)
_____)
Jan F. Kennerly, Jr.)
)
Third-Party Plaintiff,)
v.)
)
Walter Bierer, Brent)
Jeffries, and Joseph)
Bierer,)
)
Third-Party Defendants.)

Date: February 24, 2022

Time: 9:31 a.m.

Location: Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina

Reported by
Cindy H. Patterson

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Also Present:
Rick Kennerly
Joseph Bierer
Wes Munn, Videographer

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assumption that amended -- you know, the last amended complaint is what you're working under; is that not true?

Q I want to -- this is a factual set of questions that I have for you here --

A Uh-huh.

Q -- about whether the facts -- whether you asserted things in the -- in this complaint that were true.

A Even though it's been superseded?

Q Yes. Absolutely.

A Yeah. Okay.

Q All right. Would you please open that up, and I want you to read Paragraph 11. And would you do that for the benefit of the jury, please?

A Do what?

Q Would you read it aloud for the benefit of the jury?

A Okay. Are these people the jury?

Q Well, this is being videotaped, right?

A Okay.

Q Yes.

A It's a video jury. "Kennerly's cell phone and e-mail switch was one of the several steps he took to disassociate himself from Bierer and Associates in the eyes of competitors in the utility-

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Coast.

Q Yes.

A Said he had lost his cell phone --

Q Yes.

A -- and that he could not get another cell phone because his cell phone was tied up in -- you know, in a Bierer account.

Q Yes.

A And I told him, you know, if he needed a cell phone, "Just go get one," and he did. So, you know, he got a new cell phone, and it was -- it was disassociated from the Bierer account. And I -- I think we've tied that activity into, actually, some of his -- his -- his -- and since then, I think we've tied the -- the switch of that cell phone right into some of his corrupt activities --

Q Yes.

A -- the time -- the time frame in that. So, you know, that part could very well be true.

He also wanted to get a Gmail account. And here again, I've never operated on a Bierer Meter account. I've been operating on an AOL account since day one.

Q Yes.

A I don't really see anything wrong with having, you

know, a different account. You know, to me, you know, like a gun's no more dangerous than the guy who uses it, an e-mail account's no more dangerous or corrupt than the guy who uses it.

Q Yes.

A So I didn't really see any problem with him doing those things. But, here again, that appears as though that was his first step in -- in -- in -- in these statements here, wanting to disassociate himself from Bierer.

Q Is that paragraph true, that you allowed to be filed in this case?

A Well, there's a lot of parts to that paragraph. I would say the majority of it's true. There could be something, yeah. You know, I'd have to read and study each detail.

Q Take your time. Tell me if there's anything in there that's false.

A Okay. The -- the last question, you -- you could raise a question mark about it: "Kennerly began presenting himself to customers and others in the industry as essentially an independent marketing export -- expert or broker." That -- that appears to be what he did with -- with all of you guys: Trystar, Travis, ITW. That appears to be what he

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between him and Brent?

A That was like five or six years previous.

Q Right. And then in Paragraph -- let's see. If you'll go back to the amended complaint, Paragraph 42, would you read that for the benefit of the jury?

A "On July the 10th, 2018, Bierer and Associates discovered on the Internet an old announcement of an Institute of Electrical -- Electronic Engineers seminar in New Jersey. October the 24th, 2014, IEEE seminar featured Rick Kennerly of Travis as a speaker on the topic of personal protective fault current devises, a product that Bierer had invested many hundreds of thousands of dollars and hundreds of manhours in developing and testing." Okay. Is that --

Q All right. And so is that the moment, that July 10, 2018 -- you're saying that's the moment you discovered Kennerly's wrongdoing?

A July the 10th? Absolutely.

Q Because of that article that you saw?

A No. It was because Joe called Travis directly on the phone and asked him. So we had -- at that point, we had direct evidence.

Q And so once you became aware of that article, it

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was -- the only reasonable thing to do would be to call and check it out; is that fair?

A Say that again.

Q Once you became aware of that article from 2014, the only reasonable thing to do would be to call Travis and check it out, correct?

A I thought the most reasonable thing to do at the time was ask Mr. Kennerly about the validity of it.

Q Well, that's not what you did in 2018?

A No.

Q So once you found out about it, the -- the reasonable thing to do would be to call Travis, right?

A Once I found out about it?

Q Once you found out about the IEEE article, correct?

A No. Once I found out about it, the first thing to do would be to ask Mr. Kennerly about it.

Q And you did ask Mr. Kennerly about it?

A And he denied every bit of it.

Q And then you never called? you never followed up? you never did anything else?

A I trusted him.

Q If you'd go to Paragraph 45 in the complaint, would you read that for the benefit of the jury?

A Forty-five?

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conduct had been obvious to you for many years; is that true?

A In that -- in that any time he brought any person of significance into our building, he never chose to introduce me to them. So, you know, the only thing I can figure is he wanted to appear as though he was the kingpin.

Q Yes. And that's why you wrote that it was obvious to you, right?

A Yeah. And -- and, you know, he -- well, that's -- it seemed obvious to me that . . .

Q Were you blinded, in retrospect, by your affection for him?

A I -- my trust was a hundred percent up -- like I say, up until -- I had his back up until July the 10th.

Q In retrospect, were the warning signals clear that he was trying to separate himself and act like an independent entity?

A Only in what I said. You know, the only thing I could come up with if he didn't bother to introduce some dignitary to me, is that he wanted to act like he was the kingpin. And -- and, actually, you know, I've always tried to boost my employees' self-esteem in any way I can.

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Q Yes.
A And if that helps his self-esteem, I figured so be it.
Q And so you thought that allowing him to appear as an independent entity within the electrical utility industry for many years would boost his self-esteem, and that's why you let him do it?
A It -- yeah. As long as he's loyal to me, I -- I don't see any problem with him acting like that.
Q Well, this whole e-mail, the upshot of it is you saying, "I've known for a long time that you weren't loyal," correct?
A No. Unh-unh.
Q In fact, you list all of the reasons you should have known, right? For instance, you say, "You separated your phone in 2012."
A I gave you the reason for that.
Q What was the reason for that?
A I just told you; I'll tell you again. He claimed he lost his phone in Washington or Oregon and he couldn't get a new phone without separating his number from -- from the Bierer account. So I told him to go ahead and do it.
Q He separated his e-mail account around the same time, and you knew it, right?

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A In hindsight. He gave me a bogus story. He told me that Gmail was much more flexible. I don't do a lot of work on the cell phone myself. Okay. He said that the -- Verizon or whatever it was we had at the time for the corporation, he said it just was not up to his needs. He needed -- and -- and he -- he told me that the Gmail account was much more flexible storage space, blah-blah-blah. He gave me all these reasons.

Q "With few exceptions," you wrote, "you haven't turned in credit card receipts for 15 years."

A That's --

Q Is that what you wrote?

A That's true. And -- and we came up with a solution for that, that monthly he would turn -- he would just take his credit card receipts -- not receipts -- he would take his credit card statement and itemize it. And even though I approved that, the lady in charge of accounting down there, Dennyse, she didn't like it, and our accountant didn't like it. But I -- I did approve it, just because I wasn't the best at doing that type of thing myself.

Q The first sentence of your -- the e-mail that you wrote says, "It has been obvious to me that you have been trying to separate yourself from Bierer

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and appear as an independent entity." That's what you wrote, right?

A He was trying to appear as an independent entity.

Q And it had been obvious to you for some time, correct?

A It appeared -- what -- what exactly had been obvious to me?

Q That he had been trying to separate himself from Bierer and appear as an independent entity within the electric utility industry --

A Well, there --

Q -- for many years.

A Yeah. There's two things -- there's two things that, you know -- in there. You know, it appeared as though he was trying to be an independent entity in that -- here again, I'll go back to the -- the -- you know, his failure to introduce me to anyone.

Q You knew that he had been doing product development for other companies, correct? And that's why you wrote it here, correct?

A Where are we at? Still on the bottom line?

Q Bottom line.

A I was lamenting what I'd learned -- learned about earlier that day.

Q Had you learned about -- when did you learn about

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A -- what other businesses would do.
Q Well, that's what you did say here. You said, "No other business than Bierer would've tolerated this for any period of time." And then you wrote, "No more," exclamation point, right?
A That's right.
Q Okay. It was unreasonable for Bierer to have tolerated it, correct, in retrospect?
A It was unreasonable? Well, looking at how corrupt he totally was, it probably was unreasonable.
Q You should have sniffed -- in retrospect, sitting here now in 2022, you should've sniffed it out before you did, correct?
A Well, let's say this: You know, I think trust is a -- has a threshold on it. And you either trust somebody or you don't. And at some point, you know, you reach this threshold, and it's gone. In other words, like -- I guess it'd be just like if you caught your wife cheating on you. You know, at some point, it's over.
Q Yes.
A You know, you just -- it's irreconcilable, immediately. That's the point I reached, so --
Q So you had reached -- there was a gradual accretion of stuff over time that eroded your trust; is that

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fair?
A Yeah. But if -- you either trust somebody or you don't. And even if you start checking up behind somebody, that indicates you do not trust them anymore. In other words, if I just start asking around, you know, like, you know, "What are you doing here, Kennerly?" you know, like -- I should've asked him, possibly. But, you know, to go out and start -- you know, like we finally did -- you know, go out and start calling people and say, "What's" -- you know, "What's Kennerly doing for you?" --
Q Yes. In the succession plan that we looked at from March of 2018, he's the only non-family member who's there; is that right?
A That's right.
Q You treated him like a family member, right?
A I did.
Q Your affection for him, in retrospect, likely blinded you to things that you should've seen earlier; is that correct?
A I'm not sure I'd use the term "blinded" me. You know, like I said --
Q You -- you saw them, right?
A Like -- like you -- like you -- I said, you either

employment?

A That would mean that you're not telling them what they can do. If they want to babysit, or, you know, if they want to cook pies for somebody, they can do either as long as they tell us about it. We don't regulate outside employment.

Q It's Bierer's choice to say, "It's fine if people have other jobs as long as they tell me about them," right?

A Not exactly.

Q Say it in your own words.

A It -- it doesn't say that at all.

Q Say it in your own words.

A It says that if -- as long as there's no conflict of interest; it doesn't say they can have outside -- have outside jobs just because they tell me about it.

Q Right. And then --

A "There shall be no conflict of interest." I mean, that's about as clear as it can get.

Q That's right. And then the second -- if you turn the page, the second line says that -- "as long as that employment is noncompetitive in nature as determined by Bierer and Associates."

A That's right. That's what I said. If they wanted

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protective -- personal protective grounding business. He did some research. I know he poked around for probably months. I guess he knew of a previous clamp manufacturer that Salisbury had used. I think it turned out it was owned by an individual -- I forgot his name -- and I think that may have been the first one he visited. But at some point in there, this -- this guy maybe bought that -- Travis may have bought company.

Q Uh-huh.

A But, anyway, Travis -- I -- I'm not quite sure how he stumbled onto Travis, okay? But when he first stumbled onto them, Travis was -- was not -- didn't have anything to do, to my knowledge, with -- with developing clamps and selling clamps that related to personal protective grounding equipment.

Q Okay.

A They started -- Kennerly went there; spent months in, I think, according to his own e-mails, 2010-2011, on and off, for two years. They developed a complete line of clamps that we wanted for the -- for the utility industry.

Q Okay.

A Okay. They were all marked "Bierer." In other words, they had our name on them: Bierer.

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IEEE vTools EVENTS

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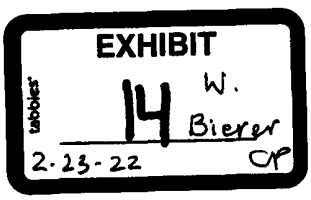
SUBSTATION CONNECTIONS AND PERSONAL PROTECTION FAULT CURRENT DEVICES - TRAVIS

Tweet Share

The PES and IAS Chapters will sponsor a technical seminar on the topic of Substation Connections and Personal Protection Fault Current Devices. The session will be held on Friday, October 24, 2014 at PSE&Gâ€™s Hadley Road Facility, 4000 Hadley Road, South Plainfield, NJ 07080-1192.

Topic:
The seminar will cover Substation Connections including:

â€¢ Connector Selection & Preparation
â€¢ Connection of Dissimilar metals
â€¢ Oxide Inhibitors, tin plating, etc.
â€¢ Recommended Design Specifications
â€¢ Corona considerations



â€¢ Bundling, Spacers, Welded Angles, etc.
â€¢ Industry standard material

The seminar will also cover Personal Protection Fault Current Devices including:

â€¢ Reactive safety process
â€¢ Evolution of PPG equipment
â€¢ ASTM qualification testing
â€¢ Most Common mistakes
â€¢ In service testing & maintenance

☐ DATE AND TIME
☐ LOCATION
☐ CONTACT
☐ REGISTRATION

Date: **24 October 2014**

Time: **09:00 AM to 02:00 PM**

All times are US/Eastern

Add to Google Calendar

4000 Hadley Road

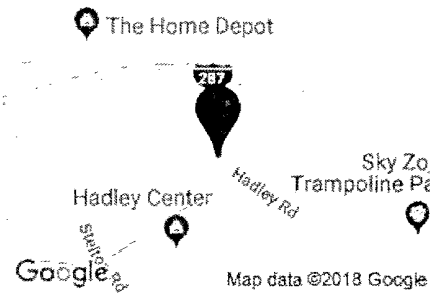
South Plainfield, New Jersey

United States 07080

Building: PSE&G - Hadley Road Facility

Room Number: Auditorium

Click here for Map



Email event contact

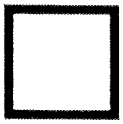
Registration closed

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SPEAKERS



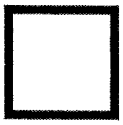
Dick Pelletier of Travis

Topic: Substation Connections

The seminar will cover Substation Connections including: â€¢ Connector Selection & Preparation â€¢ Connection of Dissimilar metals â€¢ Oxide Inhibitors, tin plating, etc. â€¢ Recommended Design Specifications â€¢ Corona considerations â€¢ Bundling, Spacers, Welded Angles, etc. â€¢ Industry standard material

Biography: Dick Pelletier started his career as an electrician with PSNH building substations and performing various maintenance functions in 1971. He moved to distribution standards specializing on connectors. Dick was utility product manager for a connector company again specializing on connectors including substation connectors. He currently serves as National Sales Manager for Travis PDU.

Email: rpelletier@pduinc.com



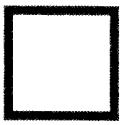
Rick Kennerly of Travis

Topic: Personal Protection Fault Current Devices

The seminar will also cover Personal Protection Fault Current Devices including: â€¢ Reactive safety process â€¢ Evolution of PPG equipment â€¢ ASTM qualification testing â€¢ Most Common mistakes â€¢ In service testing & maintenance

Biography: Rick Kennerly is an engineer graduate from the University of South Carolina. He has worked for Bierer Meters as an engineering and operations manager for 15 years and Travis UGD for 2 years. Rick has been a voting member of ASTM F18 for 10 years.

Email: rickkennerly@gmail.com

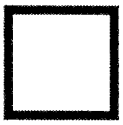


Dick Pelletier of Travis

Topic: Substation Connections

Biography:

Email: rpelletier@pduinc.com

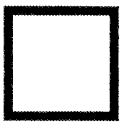


Rick Kennerly of Travis

Topic: Personal Protection Fault Current Devices

Biography:

Email: rickkennerly@gmail.com



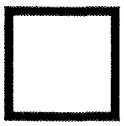
Dick Pelletier of Travis

Topic: Substation Connections

Biography:

Email: rpelletier@pduinc.com

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Rick Kennerly of Travis

Topic: Personal Protection Fault Current Devices

Biography:

Email: rickkennerly@gmail.com

Agenda

The seminar fee includes lunch, refreshments and handouts. Non-members joining IEEE within 30 days of the seminar will be rebated 50% of the IEEE registration charge.

Four hours of instruction will be provided. If desired, IEEE Continuing Education Units (0.4 CEUs) will be offered for this course - a small fee of $45 will be required for processing.

Please pay attention to the â€œRegistration Feeâ€ and choose the appropriate choice either with or without CEUs.

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Re: Conflict of Interest

18 messages

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 4:42 AM
To: Walter Bierer <wbierer@aol.com>

Walt,

I typed up this long email and decided not to send it because something like this should be discussed in person or at minimum on the phone. Please call me at your convenience or we can meet up Friday when I return from this trip.

I would like to learn the source of this accusation so I can have an opportunity to clear up this issue

Thank you

Sent from my iPhone

On Jul 10, 2018, at 1:48 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> This will serve as your employment termination notice effective Friday July 13th 2018.
> Conflict of Interest between Bierer & Associates, Inc. and Travis Patterson PDU, Inc. and others.
> Please return the company truck Friday where Kyle will have your separation check.
>
> Walt

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 5:01 AM
To: Walter Bierer <wbierer@aol.com>

Walt,

I would like to invite you to attend my meetings next week so you can personally see the value I bring to your company and no such conflict of interest exists. Please accept this as invitation for you only; I'm not interested in Joe or Brent attending as your replacement. Details for the meetings are high level PD800W discussions at Eversource on July 17 in Connecticut regarding a purchase order greater than $350,000 and high level PD25 discussions with PSE&G on July 19 in New Jersey regarding another purchase order of similar value.

Thank you for considering this.

Sent from my iPhone

On Jul 10, 2018, at 1:48 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> This will serve as your employment termination notice effective Friday July 13th 2018.

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Conflict of Interest between Bierer & Associates, Inc. and Travis Patterson PDU, Inc. and others.
Please return the company truck Friday where Kyle will have your separation check.

Walt

Walter Bierer <wbierer@aol.com> Wed, Jul 11, 2018 at 6:42 AM
To: rickkennerly@gmail.com

Rick,

Yesterday, after learning from the inter-net you were a Travis Paterson employee for two plus years. First call was to Travis Pattern PDU division.
John O'Conner said Rick was their representative for their for grounding products and readily gave me his cell #.

The second call was to Restore-lite SNC Manufacturing.
Ben Bloom said that Rick was their representative and readily gave me his cell #.

The third call was to Trystar Power Distribution Systems.
Dan said Rick was a consultant for them and readily gave me his cell #.

Three for three !

Walt
[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 7:26 AM
To: Walter Bierer <wbierer@aol.com>

In 2010-2011 I helped Travis develop a new line of grounding products under the label Travis UGD with the intention of them selling the products to Bierer exclusively which ended in 2015. In 2011 the PDU sales manager Dick Pelletier invited me to present the grounding products at LIPA at the IEEE meeting. Dick introduced me as the VP Bierer and working with Travis to develop clamps. The presentation was given on behalf of bierer as the distributor/assembler of Travis Clamps. You can visit their website at www.travisugd.com and click on ABOUT and you will see us listed with link. I have never worked for Travis PDU or any of their affiliates nor do I know a John O'Conner. Chris and myself deal with Alex Martin

SNC-I've already explained this relationship in a company meeting. The one product I invented does not conflict with any products we have. I do not represent this company in any regard. I have a 5% royalty agreement for every product sold exactly the same as we have with Emory Benson for the ST meters.

Trystar- guilty as charged. I entered into a consultation agreement with them December 2011 when we decided to quit selling grounding cable at low margins. I promoted that cable during presentations on behalf of bierer but I have never received any form of payment for cable bought by Bierer.

Again, I do not see any of this as a conflict that substantiates your decision for terminating one of your greatest financial asset so quickly. However, I understand you own the company and can do with it as you please. I ask you to take more time than you have to contemplate your decision and postpone the Friday termination.

Thank you

Sent from my iPhone

[Quoted text hidden]

Walter Bierer <wbierer@aol.com> Wed, Jul 11, 2018 at 10:06 AM
To: rickkennerly@gmail.com

Rick,

You say: "In 2010-2011 I (Rick) helped Travis develop a new line of grounding products under the label Travis UGD."
You admit to working with (for) Travis to develop not just a single product but a new line of products, being paid by Bierer?
Who is benefiting from your work now? Conflict !

How is it possible that in less than 5 seconds John O'Connor can give me your cell phone number and yet you have never heard of him?
When you answer your cell phone to answer questions about PDU products - Who are you working for at that moment? Conflict !

If you gave a talk in 2011, that means you have given more than one talk. In 2014 you were described as a speaker in the literature as a two year Travis employee. Conflict !

Regards to SNC. I have no idea of what product you invented. Were you being paid by Bierer when you invented this product and who's resources were you using to invent this product? Please explain?

If you are receiving royalty payments from SNC - maybe that explains why several of our Reps are now Representing SNC. Who set up our Reps to carry SNC? How does that work in the field when you are talking about Resto products? Are you representing SNC on Bierer's dime? Conflict !

Trystar - We never decided to stop selling grounding cable at low margins. In fact we still do! Conflict !
You say: "I have never received any form of payment for cable bought by Bierer".
The question remains: Have you ever received any form of payment for cable bought by others or other forms of payment from Trystar? Conflict !

Your responses are far more incriminating than my accusations.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 10:43 AM
To: Walter Bierer <wbierer@aol.com>

Walt,

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I have had no conversations or emails in my entire life with anyone named John at PDU. I have absolutely nothing to do with the Travis PDU line as the products are permanent substation connectors and has nothing to do with grounding.

The 2014 speech was what I was referring to in my last email. I did not write that statement, Dick Pelletier provided that information knowing that I developed the clamps and assumed I worked for Travis which I did not.

In the very beginning Travis did not make grounding clamps for anyone other than Salisbury through Bud nor did I know anyone at that time other than Bud Dygert. Bud put me in contact with BJ Sande and I worked with him to produce a line of grounding clamps exclusively for Bierer. The products were made and labeled UGD; shortly thereafter Alex Martin which is who Chris Watson and myself deal with on all products took over for BJ. If Alex calls me on my cell phone I'm working for Bierer.

SNC: the product is an autotransformer in a box for secondary power restoration. The idea goes way back if you recall putting a toroid in a box; you and I actually worked on this for a short stint and you decided not to pursue this. Several years passed by and a rep in New England named John Scherer got involved with a different company named Bridgeport Magnetics to make the unit; idea was for that company to private label the box for Bierer. John decided not to pursue this and he quit his rep job and became their national sales manager. Two years after that I run into SNC at a trade show and asked if they would be interested in making such a device; rest is history. I don't appoint their reps but if they ask I give them the people I know.

Trystar: I was using the statement to set the timeframe of when this occurred. I do receive small compensation for "consultation" on two products I developed, 1) portable power cables and 2) primary restoration carts. Trystar has their own network of reps that handle all the selling in which I have nothing to do with.

I have not used any Bierer time to develop these products, cell phone and usage has been paid by me since this began. I'm not trying to incriminate myself, I'm trying to give you the complete and honest information.

If you think these actions are impairing my ability to function properly in your organization then the following options are available:

1) I can end these agreements
2) I can transfer the payments to you
3) you can terminate my employment

Thank you

Sent from my iPhone
[Quoted text hidden]

Walter Bierer <wbierer@aol.com> Wed, Jul 11, 2018 at 3:40 PM
To: rickkennerly@gmail.com

Rick,

It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.

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You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!

There will be no meeting with Eversource or PSE&G next week. You should cancel the meetings ASAP or give me the contact information ASAP so I may contact the Reps or whoever to cancel the meetings.

I will be glad to meet with you at the office Friday. I am currently in Florida. Let me know what time.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
Sent: Wed, Jul 11, 2018 5:01 am
Subject: Re: Conflict of Interest

[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 4:56 PM
To: Walter Bierer <wbierer@aol.com>

Walt,

I've never created an alternative business card and have always put Bierer first and foremost 99%. Whereabouts for weeks I don't know what your talking about but the rest of your comments below are correct for reasons I have chose to keep away from you and will continue to do so because it's personal to me but I will say it's not monetary based as that's never been a problem; you can read between those lines.

In the email I sent to you earlier today if option 3 is your choice then on Friday I would like to discuss the possibility of future independent work as I've been trying to do for years to your point below (I've blatantly asked you twice). If this is not a possibility I don't want you to drive all that way just to say goodbye, we can do that some other time.

Next week is a pivotal point for the company and I strongly believe someone should be there to capture the sales opportunities. My flights have been booked and paid for already but if that's your final decision I will honor it as well.

On another note, this conversation internally must already be spread throughout the company as I had a customer call me today at 10am and started the conversation "I know you no longer work for Bierer but I was hoping you could help me.....". I was very disappointed to hear that in addition to my credit card was cancelled yesterday and my bierermeters.com email was also cancelled. This indicates to me that you are worried about me doing something ill will. If this is all true then it indicates your "last day Friday" comment was some sort of lie or perhaps you couldn't control your other internal employees.

I will await your reply before I cancel the meetings scheduled for next week.

Thank you

Sent from my iPhone

On Jul 11, 2018, at 3:40 PM, Walter Bierer <wbierer@aol.com> wrote:

Rick,

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.

You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!

There will be no meeting with Eversource or PSE&G next week. You should cancel the meetings ASAP or give me the contact information ASAP so I may contact the Reps or whoever to cancel the meetings.

I will be glad to meet with you at the office Friday. I am currently in Florida. Let me know what time.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
Sent: Wed, Jul 11, 2018 5:01 am
Subject: Re: Conflict of Interest

Walt,

I would like to invite you to attend my meetings next week so you can personally see the value I bring to your company and no such conflict of interest exists. Please accept this as invitation for you only; I'm not interested in Joe or Brent attending as your replacement. Details for the meetings are high level PD800W discussions at Eversource on July 17 in Connecticut regarding a purchase order greater than $350,000 and high level PD25 discussions with PSE&G on July 19 in New Jersey regarding another purchase order of similar value.

Thank you for considering this.

Sent from my iPhone

On Jul 10, 2018, at 1:48 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> This will serve as your employment termination notice effective Friday July 13th 2018.
> Conflict of Interest between Bierer & Associates, Inc. and Travis Patterson PDU, Inc. and others.
> Please return the company truck Friday where Kyle will have your separation check.
>
> Walt

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Walter Bierer <wbierer@aol.com> Wed, Jul 11, 2018 at 10:46 PM
To: rickkennerly@gmail.com

Rick,

I ask Dennyse to prepare your final separation check payable through Friday. I received and e-mail yesterday from American Express notifying me that someone had attempted to change the credit card password. I canceled the card myself.

If you would, please give me the contact information and I will handle the cancelation of the meetings.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Wed, Jul 11, 2018 at 10:59 PM
To: Walter Bierer <wbierer@aol.com>

Contact for PSE&G meeting:
Nardone Sales
Rich Nardone
richnardone@gmail.com
(201) 259-5845

Contact for Eversource meeting:
Powertech Sales
Rich Ellis
rellis@powertech-upsc.com
(508) 868-6014

Sent from my iPhone
[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Thu, Jul 12, 2018 at 8:17 AM
To: Walter Bierer <wbierer@aol.com>

Ok thank you. If your in town I will be there at 9:30am tomorrow. I would like to have one last discussion about this topic

Sent from my iPhone
[Quoted text hidden]

Billie <wbierer@aol.com> Thu, Jul 12, 2018 at 9:24 AM
To: Rick Kennerly <rickkennerly@gmail.com>

Okay. I will be there

Sent from my iPhone
[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Fri, Jul 20, 2018 at 4:51 PM
To: bpadget@finkellaw.com

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

See below

Sent from my iPhone

Begin forwarded message:

From: Rick Kennerly <rickkennerly@gmail.com>
Date: July 12, 2018 at 8:17:22 AM EDT
To: Walter Bierer <wbierer@aol.com>
[Quoted text hidden]

[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Mon, Jul 23, 2018 at 8:24 AM
To: bpadget@finkellaw.com

See below email string

Sent from my iPhone

Begin forwarded message:

From: Rick Kennerly <rickkennerly@gmail.com>
Date: July 11, 2018 at 10:43:10 AM EDT
To: Walter Bierer <wbierer@aol.com>
[Quoted text hidden]

[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Mon, Dec 17, 2018 at 4:08 PM
To: chiller@finkellaw.com

See below

Sent from my iPhone

Begin forwarded message:

From: Walter Bierer <wbierer@aol.com>
Date: July 11, 2018 at 6:42:57 AM EDT
To: rickkennerly@gmail.com
[Quoted text hidden]

[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Mon, Dec 17, 2018 at 4:09 PM
To: chiller@finkellaw.com

See below

Sent from my iPhone

Begin forwarded message:

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

From: Walter Bierer <wbierer@aol.com>
Date: July 11, 2018 at 10:06:18 AM EDT
To: rickkennerly@gmail.com
[Quoted text hidden]

[Quoted text hidden]

Rick Kennerly <rickkennerly@gmail.com> Mon, Dec 17, 2018 at 4:10 PM
To: chiller@finkellaw.com

See below

Sent from my iPhone

Begin forwarded message:

From: Walter Bierer <wbierer@aol.com>
Date: July 11, 2018 at 3:40:20 PM EDT
To: rickkennerly@gmail.com
Subject: Re: Conflict of Interest

Rick,

It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.

You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!

There will be no meeting with Eversource or PSE&G next week. You should cancel the meetings ASAP or give me the contact information ASAP so I may contact the Reps or whoever to cancel the meetings.

I will be glad to meet with you at the office Friday. I am currently in Florida. Let me know what time.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
Sent: Wed, Jul 11, 2018 5:01 am
Subject: Re: Conflict of Interest

Walt,

I would like to invite you to attend my meetings next week so you can personally see the value I bring to your company and no such conflict of interest exists. Please accept this as

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

invitation for you only; I'm not interested in Joe or Brent attending as your replacement. Details for the meetings are high level PD800W discussions at Eversource on July 17 in Connecticut regarding a purchase order greater than $350,000 and high level PD25 discussions with PSE&G on July 19 in New Jersey regarding another purchase order of similar value.

Thank you for considering this.

Sent from my iPhone

On Jul 10, 2018, at 1:48 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> This will serve as your employment termination notice effective Friday July 13th 2018.
> Conflict of Interest between Bierer & Associates, Inc. and Travis Patterson
> PDU, Inc. and others.
> Please return the company truck Friday where Kyle will have your separation check.
>
> Walt

Rick Kennerly <rickkennerly@gmail.com> Mon, Dec 17, 2018 at 4:11 PM
To: chiller@finkellaw.com

Sent from my iPhone

Begin forwarded message:

> **From:** Walter Bierer <wbierer@aol.com>
> **Date:** July 11, 2018 at 10:46:18 PM EDT
> **To:** rickkennerly@gmail.com
> [Quoted text hidden]

[Quoted text hidden]

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.

1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905

(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # D120914 8:5:16 **12/9/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: Chris
Rick Kennerly UGD

(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	GCVG1-58T-CO	500	$15.30	$7,650.00
	GROUNDING CLAMP VICE GRIP 1" DIA 5/8-11 THRD (CASTING ONLY)			
01	GCVG1-58T	500	$30.30	$15,150.00
	GROUNDING CLAMP VICE GRIP 1" DIA 5/8-11 THRD W/ LOCKING PLIERS			

Ship Order: 2-3 WEEKS **After Receipt of Order** **Grand Total: $22,800.00**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

To: customer_service@bierermeters.com[customer_service@bierermeters.com]
Cc: Lindsey McCain[L.McCain@travispattern.com]; Rick Kennerly[rickkennerly@gmail.com]
From: Alex Martin[A.Martin@travispattern.com]
Sent: Mon 6/16/2014 12:38:12 PM Eastern Standard Time
Subject: 061614-DS1
Attachment: BIERER 061614 DS1.pdf

Lindsey,
Please write an order for David at Bierer & Associates for the attached quote.

PO number: 061614-DS1

Alex Martin
Travis Pattern & Foundry
Industrial Designer
(509) 466-3545
A.martin@travispattern.com

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905
(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # J061614 9:30:46 **6/16/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: David
Rick Kennerly UGD
(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	TPAUA	500	$8.40	$4,200.00
	TRAVIS PATTERN UNIVERSAL END ADAPTOR			

Ship Order: 1 WEEK **After Receipt of Order** **Grand Total: $4,200.00**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.

1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905

(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # O102814 13:13:41 **10/28/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: CHRIS
Rick Kennerly UGD

(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	TP125ACAT15	600	$32.75	$19,650.00
	C Clamp, 0 - 1.25 INCHES, Aluminum, Threaded, Eye Screw, Smooth			
02	HS12578C15	80	$120.65	$9,652.00
	HOT STICK, 1.25IN X 78" HEX,CAP TO AL C-CLAMP 1.5IN			

Ship Order: 3-4 WEEKS **After Receipt of Order** **Grand Total: $29,302.00**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.

1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905

(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # D120414 16:52:58 **12/4/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: Chris
Rick Kennerly UGD

(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	GCVG1-58T GROUNDING CLAMP VICE GRIP 1" DIA 5/8-11 THRD	400	$15.30	$6,120.00

Ship Order: 2-3 WEEKS **After Receipt of Order** **Grand Total: $6,120.00**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

To: Lindsey McCain[L.McCain@travispattern.com]
Cc: customer_service@bierermeters.com[customer_service@bierermeters.com]; rickkennerly@gmail.com[rickkennerly@gmail.com]
From: Alex Martin[A.Martin@travispattern.com]
Sent: Fri 8/29/2014 5:00:27 PM Eastern Daylight Time
Subject: FW: quote.
Attachment: BIERER 082914 C.pdf

Please write up a PO for the attached quote.
PO 082914 CHRIS

Alex Martin
Travis Pattern & Foundry
Industrial Designer
(509) 466-3545
A.martin@travispattern.com

From: Alex Martin
Sent: Friday, August 29, 2014 1:47 PM
To: customer_service@bierermeters.com
Subject: quote.

Hi Chris,
Please see the attached quote.

Alex Martin
Travis Pattern & Foundry
Industrial Designer
(509) 466-3545
A.martin@travispattern.com

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905
(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # A082914 13:27:43 **8/29/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: Chris
Rick Kennerly UGD
(803) 917-7296

Please email all purchase orders and quotes to UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	TP6ARA2T20-S	2	$131.80	$263.60
	TRAVIS PATTERN 6" ALUMINUM ROUND BAR CLAMP (SMOOTH)(2 X THREADED) 20 DEGREES W 1 1/2" GROUNDING STUD			

Ship Order: 1-2 days **After Receipt of Order** **Grand Total: $263.60**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

To: customer_service@bierermeters.com[customer_service@bierermeters.com]
Cc: Rick Kennerly[rickkennerly@gmail.com]
From: Alex Martin[A.Martin@travispattern.com]
Sent: Tue 8/5/2014 1:26:54 PM Eastern Daylight Time
Subject: QUOTE
Attachment: BIERER 080514 C.pdf

Chris,
Please see the attached quote.

Thank you,
Alex Martin
Travis Pattern & Foundry
Industrial Designer
(509) 466-3545
A.martin@travispattern.com

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.

1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905

(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # A080514 9:53:23 **8/5/2014**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: CHRIS
Rick Kennerly UGD

(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	TP15ABSC1T15-B Al 1 1/2" C-CLAMP 1" BALL SOCKET THREADED 15 DEG W/ BAYONET.	30	$53.15	$1,594.50
02	TP15AFBT15-ST TRAVIS PATTERN 1.5" AL FLAT BAR CLAMP (SERRATED) (THREADED) 15 DEGREES (SLIDING T-HANDLE)	30	$37.15	$1,114.50
03	TP-FLC FRONT LIVE CLAMP	6	$45.02	$270.12

Ship Order: 1-2 WEEKS **After Receipt of Order** **Grand Total: $2,979.12**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

BIERER_PROD_00048046 submitted to the Court in camera

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

BIERER_PROD_00048711 submitted to the Court in camera

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

BIERER_PROD_00050751 submitted to the Court in camera

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., PLAINTIFF, vs. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, DEFENDANTS.	)	Civil Action: 2018-CP-40-04841 **NOTICE OF FILING**
Jan F. Kennerly, Jr., DEFENDANT/ THIRD PARTY PLAINTIFF, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, THIRD PARTY DEFENDANTS.	)	

On September 28, 2022, Defendant Travis Pattern & Foundry, Inc. ("Travis Pattern") filed a Motion for Summary Judgment. Travis Pattern did not file Exhibits 5, 11, and 14 to the Motion as these documents were marked "Confidential" by Plaintiff during written discovery pursuant to the Consent Confidentiality Order filed in this case. Instead, given the confidential status of these exhibits, Travis Pattern submitted the documents to the court *in camera*. At this time, Travis Pattern and Plaintiff have reached a resolution of the confidential status of these exhibits such that they can be publicly filed in support of Travis Pattern's Motion with certain modifications. Specifically, Plaintiff has agreed to remove the confidential designation of documents within Exhibit 5, and agreed to redacted versions of Exhibits 11 and 14 for filing. Accordingly, Travis Pattern hereby files these previously-marked Confidential exhibits as a supplemental filing to its Motion.

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Respectfully submitted,

ADAMS AND REESE LLP

s/Lyndey R.Z. Bryant
Lyndey R.Z. Bryant
1221 Main Street, Suite 1200
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Facsimile: (803) 799-8479
lyndey.bryant@arlaw.com

Attorneys for Defendant Travis Pattern & Foundry, Inc.

October 6, 2022

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905
(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # M032316 7:33:30 **3/23/2016**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: Chris
Rick Kennerly UGD
(803) 917-7296

Please email all purchase orders and quotes to UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	TP6ARA2T20-S	3	$118.65	$355.95
	TRAVIS PATTERN 6" ALUMINUM ROUND BAR CLAMP (SMOOTH)(2XTHREADED) 20 DEGREES W 1 1.2" GROUNDING STD.			

Ship Order: 1-2 DAYS **After Receipt of Order** **Grand Total: $355.95**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Manufactured By:

TRAVIS PATTERN and FOUNDRY, Inc.
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99207-0905
(509) 466-3545
FAX (509) 467-6465

QUOTATION

QUOTE # O102616 8:24:34 **10/26/2016**

To BIERER & ASSOCIATES INC
EMAIL INVOICE
P.O. BOX 1047
BLYTHEWOOD SC 29016
Phone 803-786-4839 FAX 803-786-5457

ATTN: CHRIS
Rick Kennerly UGD
(803) 917-7296

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	BR125H-V BRONZE 1-1/4" HAWKBILL W/ V STYLE JAW	1000	$15.75	$15,750.00

Ship Order: 2-3 WEEKS **After Receipt of Order** **Grand Total: $15,750.00**

Submitted by: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

1

Travis Pattern & Foundry
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99217-0905

QUOTATION

Phone (509) 466-3545
FAX (509) 467-6465

QUOTE# M050118 13:56:05 **5/1/2018**

To: PG&E (UGD)

ATTN: JIM

Sales Agency: Rick Kennerly UGD

,

,
(803) 917-7296

Phone: **FAX:**

Please email all purchase orders and quotes to
UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	PG82060	3	$498.80	$1,496.40
PLASTIC GUARD 8" X 20" X 60"				

Ship Order: **After Receipt of Order** **Grand Total: $1,496.40**

Submitted By: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND — FIFTH JUDICIAL DISTRICT

BIERER & ASSOCIATES, INC., Plaintiff, vs. JAN F. KENNERLY, JR., DANIELLE KENNERLY; EUSA, LLC; J&D FARMS, LLC; TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC., and DAVID DEINEK. Defendants.	CIVIL ACTION NO. 2018-CP-40-04841
JAN F. KENNERLY, JR., Defendant/ Third-Party Plaintiff, vs. WALTER BIERER, BRENT JEFFRIES, and JOSEPH BIERER, Third-Party Defendants.	

VIDEOTAPED DEPOSITION OF SCOTT CHAFFIN

TRAVIS PATTERN & FOUNDRY RULE 30(b)(6)

Deposition upon oral examination of Scott Chaffin taken at the request of the Plaintiff and Third-Party Defendants, before Danelle Bungen, CSR, at Travis Pattern & Foundry, 1413 Hawthorne Road, Spokane, Washington, commencing at 10:00 A.M. on June 28, 2022, pursuant to the South Carolina Rules of Civil Procedure.

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

APPEARANCES:

FOR THE PLAINTIFF and THIRD-PARTY DEFENDANTS:

GRIFFIN DAVIS
Attorneys at Law
4408 Forest Drive
Columbia, South Carolina 29206
BY: JAMES F. GRIFFIN, ESQ.
MARGARET N. FOX, ESQ.
(803) 744-0800

FOR THE DEFENDANT TRAVIS PATTERN & FOUNDRY:

ADAMS & REESE
Attorneys at Law
1501 Main Street - 5th Floor
Columbia, South Carolina 29201
BY: JOHN F. BEACH, ESQ.
LYNDEY R.Z. BRYANT, ESQ.
(803) 343-1269

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FOR THE DEFENDANT ILLINOIS TOOL WORKS, INC.:

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Greenville, South Carolina 29602
BY: KURT M. ROZELSKY, ESQ.
(864) 906-7694

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

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Minneapolis, Minnesota 55402
BY: COURTNEY N. BAGA, ESQ.
(612) 766-7000

ALSO PRESENT:

Alex Martin

Joe Bierer

Rick Kennerly

A. No, there is not.
Q. Was that uncommon at Travis, not to have a written document with -- with --
A. For -- Go ahead.
Q. -- in this type of situation?
A. For Travis Garske, he's a hand-shake individual. He holds his word; he expects others to do the same.
Q. In 2012 was Travis Garske the -- I guess he wasn't the sole owner because you started acquiring an interest in '08. So who else owned the company in 2012?
A. The same owners, but at the time Travis was the majority shareholder.
Q. Okay. And do you know -- what -- What was the relationship that was entered into with Mr. Kennerly that started in, I guess, 2013, I believe; is that correct?
A. I believe that's when things started, yes.
Q. And what was the -- what was the business relationship?
A. Mr. Kennerly approached Travis Garske -- rather than using "Travis" as the company, Travis Garske -- and offered to be a rep for the UGD line of grounding cables.
Q. Was UGD even in existence in 2012?

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connection between Rick and Travis Garske.
Q. Okay. What was -- Do you know what -- whether Rick had an existing business relationship with any other entity in 2012 or 2013? Did Travis know -- Travis the entity or Mr. Garske -- know whether or not Rick had a business relationship with any other entity?
MR. BEACH: Object to the form.
THE WITNESS: I'm -- Can you rephrase the question. I don't know exactly what you're asking.
Q. (BY MR. GRIFFIN) Yeah. Let me get straight to it. Did -- did -- Travis, the company, were they aware that Rick Kennerly was the -- was an officer of Bierer and Associates in 2012?
A. I don't believe that we were aware of that, that he was an officer.
Q. Okay.
A. I don't believe so. I don't know.
Q. Okay. Was the company aware that he was employed by Bierer and Associates?
A. I believe that we knew that information, yes.
Q. And what do you believe -- well, what was your understanding, or do you know, what position Rick Kennerly held at Bierer and Associates in 2012?
A. I do not, no.
Q. What was the payment arrangement that was agreed to

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND FIFTH JUDICIAL DISTRICT

BIERER & ASSOCIATES, INC., Plaintiff, vs. JAN F. KENNERLY, JR., DANIELLE KENNERLY; EUSA, LLC; J&D FARMS, LLC; TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC., and DAVID DEINEK. Defendants.	CIVIL ACTION NO. 2018-CP-40-04841
JAN F. KENNERLY, JR., Defendant/ Third-Party Plaintiff, vs. WALTER BIERER, BRENT JEFFRIES, and JOSEPH BIERER, Third-Party Defendants.	

VIDEOTAPED DEPOSITION OF ALEX MARTIN

TRAVIS PATTERN & FOUNDRY RULE 30(b)(6)

Deposition upon oral examination of Alex Martin taken at the request of the Plaintiff and Third-Party Defendants, before Danelle Bungen, CSR, at Travis Pattern & Foundry, 1413 Hawthorne Road, Spokane, Washington, commencing at 12:00 P.M. on June 28, 2022, pursuant to the South Carolina Rules of Civil Procedure.

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APPEARANCES:

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MARGARET N. FOX, ESQ.
(803) 744-0800

FOR THE DEFENDANT TRAVIS PATTERN & FOUNDRY:

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Attorneys at Law
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Columbia, South Carolina 29201
BY: JOHN F. BEACH, ESQ.
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REMOTE APPEARANCES:

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P.o. Box 83
Columbia, South Carolina 29202
BY: WILLIAM R. PADGET, ESQ.
(803) 400-8277

FOR THE DEFENDANT ILLINOIS TOOL WORKS, INC.:

SPENCER FANE
Attorneys at Law
P.O. BOX 294
Greenville, South Carolina 29602
BY: KURT M. ROZELSKY, ESQ.
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BY: JOHN B. KELCHNER, ESQ.
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FOR THE DEFENDANT TRYSTAR:

FAEGRE DRINKER BIDDLE & REATH
Attorneys at Law
90 S. Seventh Street - Unit 2200
Minneapolis, Minnesota 55402
BY: COURTNEY N. BAGA, ESQ.
(612) 766-7000

ALSO PRESENT:

Scott Chaffin

Joe Bierer

Rick Kennerly

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building grounding sets, did -- did they -- I guess they had to purchase the cable from somewhere. Where was the cable being purchased from?

A. It would have been Trystar.

Q. Okay.

A. Yeah. You said Travis UGD?

Q. Yes.

A. Yeah.

Q. And then Travis UGD made the clamps, is that correct?

A. That's correct.

Q. And are there other components that go into a grounding assembly?

A. There's a few other components. There's clear heat shrink that's used, and then there's also ferrules crimped onto the cable along with oxide inhibitor that's applied to the connections.

Q. So did Travis do its own heat-shrinking?

A. We do.

Q. And in 2014, when UGD started in the grounding sets, did it make its own ferrules?

A. At what time frame?

Q. 2014, at the beginning.

A. We were purchasing ferrules.

Q. Who were you purchasing ferrules from?

A. Initially we were purchasing them from FMM, who was

buying them from Bierer. We later went directly to Bierer and purchased ferrules from Bierer.

Q. Why -- How long did you purchase through, was it, F -- was it FM&M?

A. Yes FMM.

Q. FMM, yeah.

A. Future Machine Manufacturing.

Q. How long a period of time did you purchase ferrules, Bierer ferrules, through FMM?

A. It would be -- I don't know exact dates, but probably a year or so.

Q. Okay. And then you say after that, you -- Travis began purchasing ferrules direct from Bierer?

A. Correct.

Q. And were you in charge of ordering the ferrules?

A. I either would cut the PO, or Lindsey McCain would cut the PO, but I would request the procurement to happen.

Q. Okay. And who would that PO be sent to?

A. It would either have been a gentleman, his first name's Chris -- on his e-mail, I've never seen his last name. It's under a Bierer -- I think it's purchasing@bierermeters.

Q. Right.

A. So I believe that's where the purchase orders would have been sent. That same account sends any orders to

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Travis as well.
Q. Why didn't Travis purchase the ferrules directly from Bierer at the beginning instead of going through FMM?
A. Travis currently, and at the time, owns FMM.
Q. I see.
A. So they had a line where they were selling and producing cables, and we wanted to support their business because it was at that time owned by Travis.
Q. Okay.
A. It still is owned by Travis.
Q. Okay. Does UGD sell any additional items currently besides the hot stick, the clamps of all types, and grounding assemblies?
A. You said -- Will you repeat the list one more time?
Q. So I've written down the hot stick.
A. Um-hmm.
Q. I've written down clamps, you have expanded the product line. And then the grounding assemblies, or grounding sets as you described them.

Does UGD manufacture or sell anything else?

A. We manufacture tools that will go on the hot sticks. So we kind of -- it's under the same --
Q. Does that come out of UGD?
A. Yes. And we manufacture single-point grounding locations, meaning studs to permanently attach to a

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Q. And did Kennerly ever tell you that his sub reps were also rep'ing Bierer products?
A. I don't recall any specific conversations. He wasn't hiding it, if that's what the question is.
Q. It's not the question, but I appreciate the information.
Did Kennerly ever hire -- hide his relationship with Bierer, to your knowledge?
A. Never with me.
Q. Okay.
A. Nor to my knowledge.
Q. And did you hide Kennerly's relationship with Bierer to superiors here at Travis?
A. I don't need to.
Q. What -- You said your interaction with Danielle was a very low frequency. Would you say once a month, or not even that frequent?
A. I'd say probably once a month for a while; less frequent, you know, after their kind of changeover. I am heavy into the design part and the manufacturing, you know, production, and communicating directly with customers and -- so I don't deal a lot with what she was dealing with.
Q. Did Rick Kennerly's services that he was performing, did they -- did they change in any manner after the

A. That's correct.
Q. Did -- You mentioned trade shows, and so forth, a while back. You have attended some -- some trade shows in the electrical utility industry?
A. I have, yes.
Q. And at times was Mr. Kennerly there?
A. Yeah, Rick has been there at times, yes.
Q. And were you at trade shows when Mr. Kennerly was employed by Bierer and Associates?
A. I believe so, one in particular. The rest, I'm not sure.
Q. At these trade shows, you've got other manufacturers; is that right?
A. That's correct.
Q. You've got other distributors?
A. Correct.
Q. And I presume you've got some representatives from some major customers.
A. That's correct.
Q. And in all of your observations of Mr. Kennerly at these trade shows, did he ever hide his relationship with Travis Pattern or with Bierer from anyone?
A. That act wasn't apparent at the shows.
Q. It was not apparent that he was hiding anything or if --

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A. Correct.
Q. -- people knowing that he was working with both?
A. Correct, that he was hiding anything.
Q. I'm sorry, you kind of broke up through the virtual transmission here. It was apparent that he was not hiding anything? Is that what you said?
A. That's correct.
Q. Okay. Thank you.

At any point in time did Mr. Kennerly ever ask you to be sure not to mention his role with Travis to anyone?

A. Never had that discussion with Kennerly.
Q. All of this was done out in the open in the electrical utility industry.
A. As far as our concern, yes.
Q. Do you have any specific knowledge, Mr. Martin, or does Travis, about the inner workings of EUSA or NESA, these other companies that Mr. Kennerly's been affiliated with since 2018?
A. Not specific knowledge other than the -- we have the record of where to send payment to those two -- well, that one entity now. But that would be the only information that I -- that we have.
Q. In most sales of the Travis UGD line, how often is it, just relatively speaking, is it that those sales

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND

BIERER AND ASSOCIATES, INC.,
Plaintiff,
vs. CASE NO. 2018-CP-40-04841
JAN F. KENNERLY, JR.; DANIELLE KENNERLY; EUSA, LLC; J&D FARMS, LLC; TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC.; and DAVID DEINEK,
Defendants.

JAN F. KENNERLY, JR.,
Defendant/Third-Party Plaintiff,
vs.
VOLUME I
WALTER BIERER, BRENT JEFFRIES, and JOSEPH BIERER,
Third-Party Defendants.

VIDEOTAPED
DEPONENT: JAN F. KENNERLY, JR.
DATE: April 4, 2022
TIME: 9:46 a.m.
LOCATION: Nexsen Pruet
1230 Main Street
Columbia, SC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: KIMBERLY T. POWER, CR

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APPEARANCES OF COUNSEL:

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APPEARANCES OF COUNSEL:
(Continued)

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ATTORNEYS FOR DEFENDANT DAVID DEINEK:

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ALSO PRESENT: WALTER BIERER
JOFSEPH BIERER
DANIELLE KENNEDY (VIA PHONE)
JOHN HAYNES (VIA PHONE)

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people's mind that you're an employee of their organization.

Q. I'm sure we'll get a chance to look at that document later. I just don't have it at my fingertips, but, really, I'm asking for your memory. What do you recall telling Walt about that brochure and your relationship with Travis?

A. I recall telling Walter that I worked with Travis Pattern & Foundry. There was no hiding that. It was public information. Hundreds of people, maybe thousands of people, know this.

Q. And what did --

A. There's no secret to that.

Q. And what did Walt say?

A. He already knew about it. I mean, I don't think there was any haste comment or anything like that.

Q. So if he already knew about it, Mr. Kennerly, why don't you remind him that he already knew about it in this e-mail when he's firing you?

A. I believe I'm explaining it right here again. Am I not?

Q. I don't see anywhere in this e-mail where you say, "Walt, remember, we discussed this."

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From: Rick Kennerly <rickkennerly@gmail.com>
To: Alex Martin <A.Martin@travispattern.com>
Subject: Fwd: BPA - PPG's
Date: Mon, 14 Sep 2015 15:27:53 -0400
Importance: Normal
Attachments: 54-10-5-20-15.doc; ATT00001.htm

Read below, see attached and advise please

Begin forwarded message:

From: Dave Yang <dyang@generalpacific.com>
Date: September 14, 2015 at 10:06:50 AM EDT
To: Bierer Account <rickkennerly@bierermeters.com>
Subject: BPA - PPG's

Rick,

I sent the following previously to you.

The first thing we need to do is to give BPA an understanding of how Travis UG fits in. I believe you said Travis does not have corporate literature showing all the companies that he owns, so use his web site. Look at Travis's web site at this link …… http://www.travispattern.com/Affiliates.php Notice how all his affiliates are listed, such as Pascor. Very important since BPA pretty much only uses Pascor.

1) Could you have them update their web site and add PDU? _____ BPA buys a lot of PDU substation connectors.
2) Could you have them add Travis UG? _____

Once this is done, then I can send the link to BPA. It then gives Travis UG huge credibility. Ohterwise it would be an uphill battle and we would have little chance to succeed.

Then the second step would be explaining to BPA how we would be setup. By that I mean …. I would tell them that:

A) At this time Travis UG is casting the heads, but subcontracting the assembly to Bierer Meters in South Carolina, who happen to make many of the linemen meters preferred by BPA such as the PD800W wireless phasing meter.
B) That with the BPA contract that Travis UG would move all manufacturing of BPA's PPG's to the Spokane location.
C) Travis UG can supply a written confirmation that Travis UG can fully comply with the attached spec, and/or whichever direction BPA plans to go.
D) That Travis UG will work with BPA to ensure that BPA is getting the "standard" items wherever possible.
E) It sounds like Travis and you do not feel Bud Dygert is doing very well, but he should still be regarded well by BPA and I would like to be able to say that the plant manager who was in place for Safety Line when BPA first awarded the contract to Safety Line is/would be overseeing all of the work for BPA's PPG's.

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The 3rd step, which might be combined with step 2, I would ask for a presentation/meeting with BPA so they could meet the key people from Travis UG and vice versa. It would be important for us to have very key people at the meeting …. more than just you and me. Contractually, Bud probably could not attend right? I think it would be huge if Travis Garske would attend. That would give us so much credibility. I would look at having our president/GM at the meeting.

OK? Get back to me on everything above. Does this look like a plan that Travis would support?

Would you be handling this as Travis' national sales manager or Bierer's or ?

Thanks.

Regards,

Dave Yang
Outside Sales

dyang@generalpacific.com
Cell: 503-784-2539
Toll Free: 800-547-9744, ext. 629
FAX: 503-489-2103

From: Goldsworthy,Christine E (BPA) - TESM-AMPN-2 [mailto:cegoldsworthy@bpa.gov]
Sent: Tuesday, August 4, 2015 10:33 AM
To: Dave Yang <dyang@generalpacific.com>
Subject: RE: PPG's
Importance: High

Hi Dave,

Our spec is very much in flux and we may be eliminating it entirely and just using what we call a BPA catalog ID which is basically just enough information to select a standard ground from the Honeywell/Salisbury catalog with reference to the standard ASTM F-855 and perhaps some detail for information to be put on a label like: Serial number, date of manufacture, clear heat shrink over the label and ferrule. Attached is a current specification that is in revision/draft that I am providing as a courtesy copy – it has all the current "doing business with BPA" language but the technical part has been pared down considerably. In the past we had clauses for doing a mechanical pull/tensile test and required a resistance test of the assembled ground. This later piece has been an issue of late since we buy the grounds (conductor with ferrules on both ends) without any clamps and the standard requires fully assemble ground with clamps to be tested. We use so many different types of clamps it just doesn't make sense to buy the cable and clamps together. The only grounds we buy with clamps on the ends are those used for pad mount metal enclosed equipment which have the insulated elbow connectors on one end.

We have been having some quality issues with grounding clamps "duck bill" style and if the company you represent makes those we would be very interested in taking a look at them and testing some out.

If we do go to just using a CAT ID basically "off the shelf" that might make things easier for a new company to do business with BPA. As you may recall there are many other hoops to jump through having more to do with financials, small business, made in the US, electronic file transfer, etc.

Take Care,

Christine

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Christine Goldsworthy - TESM/AMPN-2
Substation Maintenance & High Voltage Engineering

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☎ Tel : *360.418.2034*
Fax : *360.418.2958*
Cell: *360.607.8340*
e-mail: cegoldsworthy@bpa.gov

From: Dave Yang [mailto:dyang@generalpacific.com]
Sent: Friday, July 31, 2015 5:01 AM
To: Goldsworthy,Christine E (BPA) - TESM-AMPN-2
Subject: RE: from Dave Yang - PPG's

Hi Christine,

I am not sure this came through. Might I be able to get a copy of the latest BPA PPG spec's?

FYI ….. the discussion with my manufacturer is which company will be the "lead". I believe a decision was made this week. I am awaiting confirmation, and then I should be receiving a packet of information that I can forward to you.

Thanks. Hope you and Dan are staying "cool".

Regards,

Dave Yang
Outside Sales

dyang@generalpacific.com
Cell: 503-784-2539
Toll Free: 800-547-9744, ext. 629
FAX: 503-489-2103

From: Dave Yang
Sent: Monday, July 13, 2015 8:53 AM
To: 'Goldsworthy,Christine E (BPA) - TESM-AMPN-2' <cegoldsworthy@bpa.gov>
Subject: RE: from Dave Yang - PPG's

Thanks, Christine.

My manufacturer is preparing an email package for you with information about them, including their products.

In the meantime, could I have you email to me a copy of your existing PPG spec's?

Thanks.

Regards,

Dave Yang

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From: Goldsworthy,Christine E (BPA) - TESM-AMPN-2 [mailto:cegoldsworthy@bpa.gov]
Sent: Thursday, July 2, 2015 8:36 AM
To: Dave Yang
Subject: RE: from Dave Yang - PPG's

Thanks Dave, Looking forward to your reply. I am out of the office today with limited access – can't connect to the network drives where the spec is so will send that next week. Below is my contact info. Have a fun and safe 4th of July!

Christine

Christine Goldsworthy - TESM/AMPN-2
Substation Maintenance & High Voltage Engineering

Bonneville Power Administration
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☎ Tel : *360.418.2034*
🖷 Fax : *360.418.2958*
Cell: *360.607.8340*
✉ e-mail: cegoldsworthy@bpa.gov

From: Dave Yang [mailto:dyang@generalpacific.com]
Sent: Thursday, July 02, 2015 7:25 AM
To: Goldsworthy,Christine E (BPA) - TESM-AMPN-2
Subject: from Dave Yang - PPG's

Hi Christine,

It was good talking to you the other day.

I am getting our manufacturer organized so we can send you the relevant information so you can have a better understanding of who they are and their experience.

In the meantime, could you send me a copy of your current PPG spec?

Your email response will have all your current contact information, right?

Thanks.

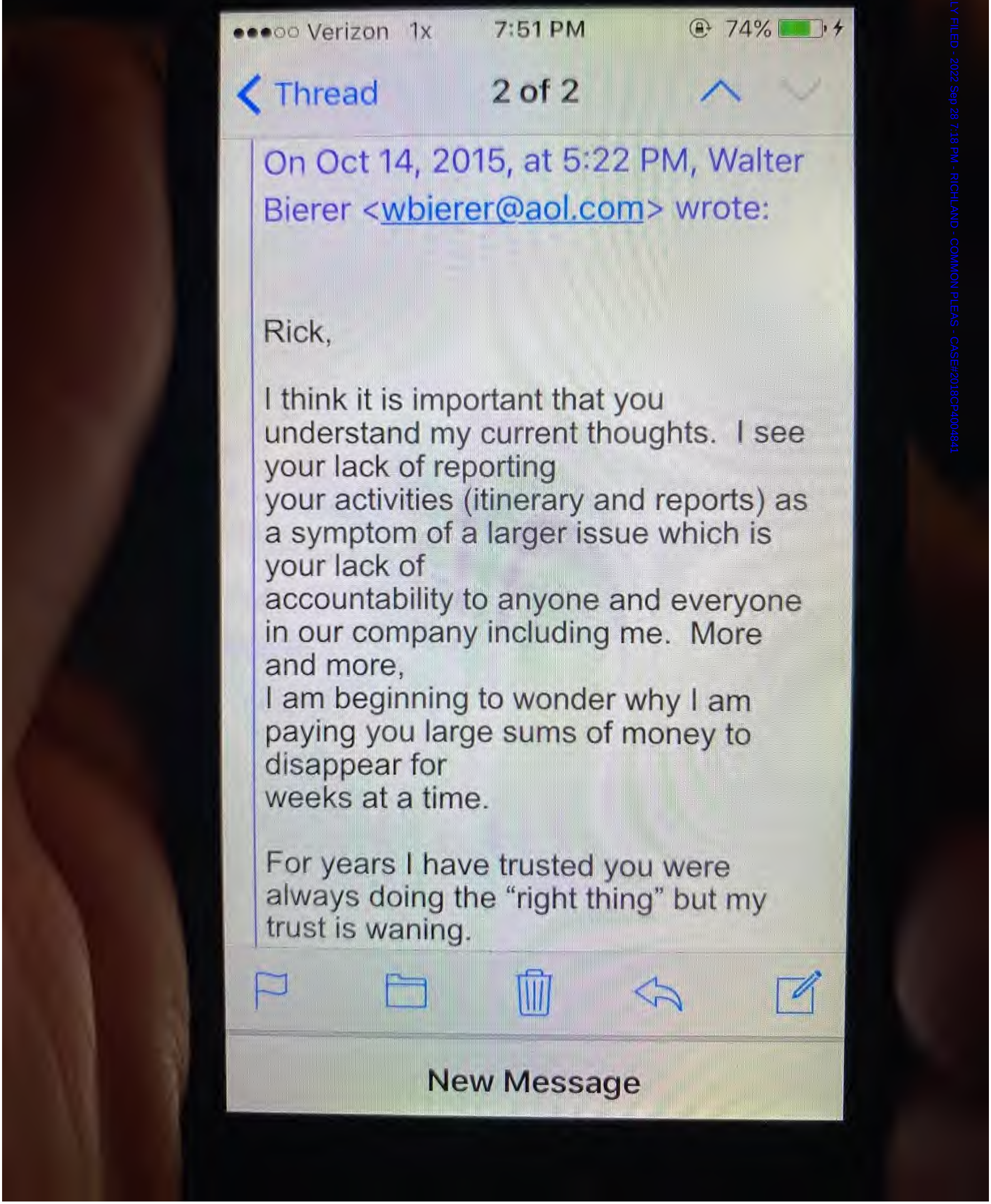
Regards,

Dave Yang

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Thread 2 of 2

For years I have trusted you were always doing the “right thing” but my trust is waning.
Your outside activities seem almost chaotic - in that almost everything you are currently
doing seems to put you at odds with everyone in our company about something. What
feedback I do get from the field, you have no respect for any of your fellow employees
and are quick to throw anyone of them under the bus as being incompetent and that you,
basically and single handily, run Bierer & Associates. While this may enhance your stature,
it demeans everyone else in our company including me.

You have purposely separated yourself from Bierer by maintaining private telephone and

New Message

from Bleier by maintaining private
telephone and
e-mail accounts which leads me to
wonder what other activities you may
be conducting
on my dime when you are gone for
weeks at a time with no reporting. As I
said before,
my trust is waning.

I think it may be time for you to begin
looking for employment elsewhere
unless you can
think of some way to resolve and
reverse all of the issues mentioned.
You do have many
wonderful traits and it may be that
you have simply outgrown our
company.

Carefully think over what I have said
and then I would like to hear your
thoughts on this.

Walt

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BIERER_PROD_00000061 submitted to the Court in camera

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., PLAINTIFF, vs. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, DEFENDANTS.	)	Civil Action: 2018-CP-40-04841 **NOTICE OF FILING**
Jan F. Kennerly, Jr., DEFENDANT/ THIRD PARTY PLAINTIFF, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, THIRD PARTY DEFENDANTS.	)	

On September 28, 2022, Defendant Travis Pattern & Foundry, Inc. ("Travis Pattern") filed a Motion for Summary Judgment. Travis Pattern did not file Exhibits 5, 11, and 14 to the Motion as these documents were marked "Confidential" by Plaintiff during written discovery pursuant to the Consent Confidentiality Order filed in this case. Instead, given the confidential status of these exhibits, Travis Pattern submitted the documents to the court *in camera*. At this time, Travis Pattern and Plaintiff have reached a resolution of the confidential status of these exhibits such that they can be publicly filed in support of Travis Pattern's Motion with certain modifications. Specifically, Plaintiff has agreed to remove the confidential designation of documents within Exhibit 5, and agreed to redacted versions of Exhibits 11 and 14 for filing. Accordingly, Travis Pattern hereby files these previously-marked Confidential exhibits as a supplemental filing to its Motion.

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Respectfully submitted,

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Attorneys for Defendant Travis Pattern & Foundry, Inc.

October 6, 2022

Exhibit 11

To: Bierer Account[rickkennerly@bierermeters.com]
Cc: joebierer@bierermeters.com[joebierer@bierermeters.com]; Brent Jeffries[brent@bierermeters.com]; wbierer@aol.com[wbierer@aol.com]
From: jamie@bierermeters.com[jamie@bierermeters.com]
Sent: Mon 11/16/2015 5:08:20 AM Eastern Standard Time
Subject: RE: This week report

Sounds good Rick.

Jamie

-----Original Message-----
From: "Bierer Account" <rickkennerly@bierermeters.com>
Sent: Thursday, November 12, 2015 11:35pm
To: joebierer@bierermeters.com, jamie@bierermeters.com, "Brent Jeffries" <brent@bierermeters.com>, wbierer@aol.com
Subject: This week report

Monday: [redacted]

Tuesday: [redacted]

Wednesday: [redacted]

Thursday: high current test lab at Powertech labs. Met with Alex Martin, Travis Pattern to assist lab testing on several items. Will share new material list with Brent and Chris Monday. 10:30 pm flight from Seattle to ATL to CAE, 9:30am arrival into Cola.

Have a good weekend, see you all Monday morning.

Rick Kennerly
Bierer & Associates Inc.
VP Engineering & Operations
10730 Farrow Road
Blythewood SC 29016
(P) 803.786.4839
(F) 803.786.5457
(M) 803.917.7296
www.bierermeters.com

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

Bierer and Associates, Inc., Civil Action No.: 2018-CP-40-04841

Plaintiff,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Defendants.

Jan F. Kennerly, Jr.,

Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

VIDEOTAPED DEPOSITION

OF

DANIEL MOERKE

Taken August 3, 2022 By Christine M. Clark, RPR

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

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By: William R. Padget, Esquire
(Appearing via videoconference)
For Defendant/Third-Party Plaintiff, Jan F. Kennerly, Jr.,
For Defendants Rick Kennerly, Danielle Kennerly, EUSA, LLC, and J&D Farms, LLC

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By: John W. Ursu, Esquire
CB Baga, Esquire
Adam J. Pabarcus, Esquire
For Defendant Trystar, LLC

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APPEARANCES:

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For Defendant Travis Pattern & Foundry, Inc.

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For Defendant Illinois Tool Works Inc.

TURNER, PADGET, GRAHAM & LANEY, P.A.
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Phone: 803.254.2200
Email: jkelchner@turnerpadget.com

By: John B. Kelchner, Esquire
(Appearing via videoconference)
For Defendant David Deinek

ALSO PRESENT:

David Jenkins, Legal Videographer

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MR. GRIFFIN: Thank you.

Q. (MS. BRYANT) In response to Mr. Griffin's questions earlier this afternoon, I believe you testified that you were aware that Mr. Kennerly was a sales rep for Travis Pattern. Am I recalling that correctly?

A. Yes.

Q. And do you know what products Mr. Kennerly was representing or selling for Travis Pattern?

A. Ferrules and clamps.

Q. Okay. Do you recall when you first learned that Mr. Kennerly was representing Travis Pattern products?

A. No, I don't recall.

Q. Do you know if Mr. Kennerly remains a sales representative for Travis Pattern to this day?

A. I'm not certain.

Q. Okay. Did Mr. Kennerly ever ask you to keep his role as a sales rep for Travis Pattern a secret from Bierer?

A. No.

Q. Has anyone at Travis Pattern asked you to keep Kennerly's role as a sales rep a secret from Bierer?

A. No.

Q. Would you say that Mr. Kennerly's role as a representative for Travis Pattern was open and obvious?

A. Yes.

MS. BRYANT: Okay. Thank you very much for

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC, Travis Pattern & Foundry, Inc., Illinois Tool Works, Inc., and David Deinek, Defendants. _____ Jan F. Kennerly, Jr. Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants,	Case No: 2018-CP-40-04841 VIDEO DEPOSITION OF Joseph Scott Bierer

Date: Wednesday, August 31, 2022
Time: 9:12 a.m.
Location: Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina

Reported by:
Darlene Pastel, CVR-CM

ELECTRONICALLY FILED - 2022 Sep 28 7:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

APPEARANCES

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Columbia, South Carolina

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*Blake A. McKie, Esq.
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Charleston, South Carolina

Also Present: Jan Kennerly, Walter Bierer, Brent Jeffries, Wes Munn, *John Hayes, *Billie Bierer, *Dennyse Bierer

(*via videoconference)

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A Yes.
Q And then going up, Brent responds to Jamie and to everyone and says, "I do not understand this, quote, 'off' time. Is this 'off' time on the company treasury in the least? 'Off' time means and justifies what actions?

"Monday through Thursday is a normal workweek. When traveling, it is expected that any professional with any company is a company man. From talking with Dave Deinek, Rick helps many people with other manufacturers' products including David. I did not ask if this was done, quote, on 'off' time, though, as I never realized that 'off' time was a factor."

Did I read that portion of the email correctly?
A Yes.
Q He goes on to say, "Also according to Jim Cook, Rick has demonstrated Restore-Lite to Duke Energy. Not sure if this is on 'off' time."
A Yes.
Q So at this time, in April 2016, Brent is emailing all of you indicating that from speaking with Dave Deinek "Rick helps many people with other manufacturers' products including David."

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My question is: Were you, were Brent, were Walt aware that Rick was promoting other manufacturers' products in April 2016?

MR. GRIFFIN: Object to the form.

A This promoted the SNC meeting, the Monday meeting. These type of actions, yes. Promoted the -- that meeting.

Q (MR. PADGET) So you're saying --

A Or prompted that meeting.

Q This preceded it?

A Yes.

Q And then later you had the meeting?

A Yes.

Q Now, going on in this email, Walt responds back to Brent. Says, "Brent, you should reserve comment on Rick's" -- before we get into that.

What does "off" time in quotes mean?

A So Jamie -- she's referring to his off time, and she's wanting to know if they're using their time efficient regarding Bierer. That's Jamie's question. That's the way I read her question.

Brent is a very efficient person. When Brent operates, he's always doing something. He has no off time. Brent doesn't understand the, quotation, "off." So in his idea -- "what are they doing?"

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So as Brent goes on, he's going back to the SNC device again. Because, again, we had a meeting over this, and, again, Rick explained it away as "it was a logical device to promote after our ST 800." Which if you think about it, electrically, when you troubleshoot, it is. It would come post our ST 800 in the troubleshooting process.

So that's not unusual. I mean, if you mention other manufacturers while you're training, that's not unusual. I've done that myself.

Q What about selling for other manufacturers in their booth?

A That's the problem. When you say -- when you use the word "sell," you're crossing a line. That's not what we did.

Q And your management team was made aware of that selling via Jamie's email in April 2016.

A That's not the way Rick explained it.

Q But that's the way it was originally reported to you all?

A Yes.

Q The meeting focused on SNC?

A That Monday meeting pretty much focused on the SNC.

Q What about this report of -- "from talking with

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-- where Rick is presenting at the conference. And it's described as on behalf of Travis?

A Well, it's on behalf of Bierer and Travis.

Q Yeah.

A Yes.

Q All right. Did -- when did you first learn about that?

A It was sometime after that publication was released, and it was very similar to the SNC. So, again, Rick was confronted with that. He explained it away as somebody wrote his biography incorrectly. He didn't write the biography. He actually says that in the emails to Walter after he was terminated. He basically restated that same thing, that somebody else wrote the biography.

Q You had been to the IEEE shows before prior to 2014?

A I've been to one, and that was in 2007, I believe. Or excuse me. Could have been 2008. They hold them essentially every year. So I'm not sure about the exact date. You could look back at the records. It was held in Chicago, whatever year that was.

Q And who all attends these IEEE events?

A So the IEEE is steered more towards engineers,

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Q Which was true; right?
A That's correct.
Q But do you know when he was actually presenting and speaking if he had affiliated himself with Travis?
A I have no idea. You have to assume that from the article.
Q Yeah. So my question, Mr. Bierer, is this: If Rick Kennerly was secretly conducting business with Travis without permission of anyone at Bierer, why in the world would he go and speak to hundreds if not thousands of people and represent himself on behalf of Travis at this major conference?
A So you're misusing the word "secret," and I've noticed you've done that in other depositions. There is no secret that Bierer is working with Travis.
Q Okay.
A So do you want to restate the question, or do you just want to live with that answer?
Q Why would Mr. Kennerly say he has worked for Travis for two years in that publication if --
A See, and then -- well, I don't mean to interrupt.
Q Go ahead.
A You're using the word "worked for." And that was the other thing that seemed to be a conflict in the

depositions is worked for or worked with.

There's no secret he's working with Travis. I mean, in his trip reports he's going up there to test clamps with Travis, to us. It's not a secret. The secret is -- PG&E. He gave a good example. The secret is: Where does the money go when the PO is sent out? That's the secret.

From what he tells us, like the PG&E, we got underbid. So the secret is: Where did the money go that PG&E -- when they bought those clamps, those assemblies, where did that money go? That's the secret. It went to him. It went to Travis and it went to Trystar.

Just like the long explanation he had that -- he actually formed our complaint much better than we ever did in his conversation with our attorney when he's talking about Duke Energy.

I'll let you finish there.

Q Go ahead.

A So he explains the inception, which we have it on emails. Duke invites him there and lists them: Bierer and Associates, Richard Rindone with Safety Test. He goes there to talk about high arcs or ours, fault currents, parallel grounds, triple grounds. You name it. As Bierer and Associates.

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That's not a secret.

Okay. If he sells grounds to these people, we know he has to say we're using Travis clamps, Trystar wire. All this stuff. That's not a secret. None of that is a secret. It's when -- like a year later or however long it took to get that $11 million purchase order -- and he explains it in his deposition in clear detail -- where did the PO go? That's the secret. That's the part we never knew.

But when you're talking about, you know, him -- you know, saying the Travis clamp or Trystar cable, that's not a secret. It's when the PO is sent. That's the secret. He always tells us we didn't get it. We got underbid. You know, something happened. Yeah, he outbid us. Our own employee, using these companies. That's the secret.

So working with and working for -- that's two different things. You work with somebody, you assume you're not getting paid by that company. You work for somebody, you're getting paid. So when he says in a trip report "I'm going up there to work with Travis, you know, on these clamps," that's not a secret. We read that and go on about

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our daily business. That's not a big deal.

Q The working with and working for distinction, you said it's -- it's about whether you're getting paid or not?

A That's correct.

Q I'm getting all my papers out of order here. Bob Coker. Do you know who he worked for?

A I believe he was an employee of HD Supply.

Q Being paid by, among others, whom?

A I'm not aware.

Q You were never aware that Bierer and Associates was paying --

A I believe --

Q -- paying Bob Coker money?

MR. GRIFFIN: Object to the form of the question.

A I assume you meant by employment. That's why I said I wasn't aware.

Q (MR. PADGET) Well, you're saying it's not right, the line is crossed when other companies are paying other companies' employees; right?

A Yes.

MR. PADGET: All right. You've been handed Exhibit 6.

(Defendants' Exhibit No. 6 marked for identification.)

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A I don't think it was the fact that I went back and looked at it. It was actually an IEEE article. And I want to say that was in the history. The IEEE article had to do with grounding, and that was still in the history. I believe it was. As I recall anyway.

Q Did you get any new information in 2018?

A Prior to his termination?

Q Yeah.

A No.

Q We looked at some emails in Walter's deposition, and I can pull it up, but you probably are familiar with them. Right around the time of the termination when Rick indicates he's got some potential POs, major purchase orders lined up from certain customers.

And your dad forwarded you that email and says, "This is the stuff we like," comments about Rick. And, again, this is post-termination.

A Yes.

Q In your email back, you said, "We need to seek counsel."

A I recall that, yes.

Q At that time -- I think we're around July 13, 2018 -- your dad is still looking for comments

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separated his email account from Bierer. Do you remember that testimony?

A I don't think I used the word "red flag."

Q How did you describe that? That was something that sort of put you on notice that something was up; is that fair?

A No. I don't recall that. Do you have that where I said that?

Q So we'll have the transcript later, and we can go through that.

A Okay. I don't recall using the word "red flag."

Q All right. Do you -- did you have firsthand knowledge of any of the things in this paragraph? So did you have firsthand knowledge that Rick had separated his phone from Bierer in 2012?

A Trying to think if I was involved in any of that or not. My wife would have had firsthand knowledge obviously because she paid the bill. So when I became aware of that, I can't say for certain.

Q Was -- did you have firsthand knowledge that around the same time that Rick separated his email account from Bierer?

A I think how that came about is Rick pushed the topic that the Bierer email's account was not user friendly --

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Q Yes.
A -- which caused him to force -- he was forced to use that on the road with mobile devices, the way I recall that.
Q Yes.
A So firsthand account, I don't think so. I think that was a group announcement more or less.
Q But you knew about it around 2012; is that fair?
A No. It would have been into 2013.
Q 2013?
A Yes.
Q Did you know that Rick wasn't turning in credit card receipts?
A From time to time, yes.
Q And did you know that until very recently there had been no trip reports, as your dad says?
A That would fall into the same category as trip -- or receipts. From time to time he would do trip reports. From time to time he would do receipts.
Q And did it trouble you at the time that he wasn't doing those on a regular basis?
A No.
Q Why?
A Why -- I don't understand the question. Why?
Q Why didn't it trouble you?

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A I wasn't Rick's boss. I was just a coworker, I mean.
Q That -- Walter Bierer was Rick's boss?
A Yeah.
Q So he would be the one who knows best; correct?
A As far as?
Q As far as whether he's submitting trip reports and credit card receipts.
A No. I was aware of that. But as far as doing something about it, that wouldn't be my position.
Q So you were aware at the time that he wasn't turning in regular credit card receipts or trip reports; is that fair?
A Yes. Again, from time to time he would do that.
Q Yes. Were you aware that he was doing product development for other companies for years before that?
A No. That's a post-statement by Walter. I believe it is. That's a Walter question.
Q Okay.
A Let me just say that. That's a question for Walter.
Q That's fair. Mr. Padget had asked you earlier about this business plan. And I don't know -- was this marked as an exhibit?

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Q Were you aware that Bierer was purchasing products from Travis?
A Yes.
Q And so you mentioned that the first purchase, you believe, was in 2011; correct?
A Yes. I believe it was June 2011, is when -- our first invoice from Travis.
Q Okay. And since that time, do you know how much money Bierer has paid to Travis for the products that it has purchased over the years?
A Yeah, we've -- we've done a financial accounting, but I don't recall the number.
Q Do you have an idea? I mean, is it 1 million? 2 million?
A It's north of 1 million.
Q Okay. Do you think it's south of 2 million?
A Again, I can't really answer that with certainty.
Q Okay. And who has done this analysis that you're talking about?
A I believe that was our previous counsel requested that.
Q Uh-huh. So I asked who did it.
A So we would have --
Q Not who requested it.
A Yes. So that is a QuickBooks accounting. So my

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BIERER_PROD_00032764-00032765 submitted to the Court in camera

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., PLAINTIFF, vs. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, DEFENDANTS.	)	Civil Action: 2018-CP-40-04841 **NOTICE OF FILING**
Jan F. Kennerly, Jr., DEFENDANT/ THIRD PARTY PLAINTIFF, vs. Walter Bierer, Brent Jeffries, and Joseph Bierer, THIRD PARTY DEFENDANTS.	)	

On September 28, 2022, Defendant Travis Pattern & Foundry, Inc. ("Travis Pattern") filed a Motion for Summary Judgment. Travis Pattern did not file Exhibits 5, 11, and 14 to the Motion as these documents were marked "Confidential" by Plaintiff during written discovery pursuant to the Consent Confidentiality Order filed in this case. Instead, given the confidential status of these exhibits, Travis Pattern submitted the documents to the court *in camera*. At this time, Travis Pattern and Plaintiff have reached a resolution of the confidential status of these exhibits such that they can be publicly filed in support of Travis Pattern's Motion with certain modifications. Specifically, Plaintiff has agreed to remove the confidential designation of documents within Exhibit 5, and agreed to redacted versions of Exhibits 11 and 14 for filing. Accordingly, Travis Pattern hereby files these previously-marked Confidential exhibits as a supplemental filing to its Motion.

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Respectfully submitted,

ADAMS AND REESE LLP

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Attorneys for Defendant Travis Pattern & Foundry, Inc.

October 6, 2022

ELECTRONICALLY FILED - 2022 Oct 06 12:01 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

To: wbierer@aol.com[wbierer@aol.com]; brent@bierermeters.com[brent@bierermeters.com]; jamie@bierermeters.com[jamie@bierermeters.com]
Cc: joe@bierermeters.com[joe@bierermeters.com]
From: Walter Bierer[wbierer@aol.com]
Sent: Tue 4/12/2016 7:44:02 AM Eastern Standard Time
Subject: Re: This week

You should not vent - No need. Rick is doing business.
m

-----Original Message-----
From: Walter Bierer <wbierer@aol.com>
To: brent <brent@bierermeters.com>; jamie <jamie@bierermeters.com>
Cc: joe <joe@bierermeters.com>
Sent: Tue, Apr 12, 2016 7:17 am
Subject: Re: This week

Brent,
You should reserve comment on Rick's activities until you understand what *(This week is ASTM in San Antonio)* means and how it effects the future of your company.

Walt

-----Original Message-----
From: brent <brent@bierermeters.com>
To: jamie <jamie@bierermeters.com>
Cc: Walter Bierer <wbierer@aol.com>; joe <joe@bierermeters.com>; brent <brent@bierermeters.com>
Sent: Tue, Apr 12, 2016 6:13 am
Subject: RE: Fwd: This week

I do not understand "off" time. Is this "off" time on the company treasury in the least? "Off" time means and justifies what actions? Monday through Thursday is a normal work week, when traveling it is expected that any professional with any company is a company man. From talking with David Deinek, Rick helps many people with other Manufacturer's products, including David, I did not ask if this was done on "off" time though, as I never realized that "off" time was a factor. Also, according to [redacted], Rick has demonstrated Restore Lite to [redacted], not sure if this is on "off" time. From my understanding Rick just returned from a cruise that the points from the company American Express probably had a large bite into personal costs, I would assume that this was considered "off" time as well as the very appreciated 3 day weekends.

I have not bothered to call [redacted] with Utility Sales Agency and his call asking for Rick and his help with Restore Lite for information and such. Why?

Just venting.....

Brent

-----Original Message-----
From: jamie@bierermeters.com
Sent: Tuesday, April 12, 2016 5:33am
To: "Walter Bierer" <wbierer@aol.com>
Cc: joe@bierermeters.com, brent@bierermeters.com
Subject: RE: Fwd: This week

Hi there.

I guess I only have one question. When Rick is traveling with Matt on his "off time". Is Matt promoting Bierer products?

Jamie
-----Original Message-----
From: "Walter Bierer" <wbierer@aol.com>
Sent: Monday, April 11, 2016 6:58pm
To: joe@bierermeters.com, jamie@bierermeters.com, brent@bierermeters.com
Subject: Fwd: This week

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: wbierer <wbierer@aol.com>
Sent: Mon, Apr 11, 2016 7:52 am
Subject: This week

Walt,

This week is ASTM in San Antonio however I'm traveling with Matt Tucker during my "off" time when nothing pertaining to us is going on. Today we're meeting with [redacted] and Wednesday I'm attending the SWESE conference (very similar to the SEE). I'll be returning to Columbia Thursday evening. The following I'm in the office and

will work on putting the [redacted] as discussed.

Sent from my iPhone

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Bierer and Associates, Inc.,

Plaintiff,

v.

Jan F. Kennerly, Jr.; Danielle Kennerly; EUSA, LLC; J&D Farms, LLC; Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Defendants.

Civil Action No.: 2018-CP-40-04841
(In the Richland County Business Court)

DEFENDANT TRYSTAR, LLC'S MOTION FOR SUMMARY JUDGMENT

Jan F. Kennerly, Jr.,

Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants

PLEASE TAKE NOTICE that after the tenth day following service hereof, or as soon thereafter as counsel may be heard, Defendant Trystar, LLC ("Trystar), by and through the undersigned, will move the Court for an Order granting summary judgment on the grounds that the statute of limitations has expired and due to laches pursuant to Rule 56 (c) of the South Carolina Rules of Civil Procedure. This motion is based on the following:

a) All of Plaintiff Bierer and Associates, Inc. ("Plaintiff") claims at law against Trystar are subject to a three-year statute of limitations which has expired;

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b) The statute of limitations expired five (5) years before Plaintiff filed suit;

c) Plaintiff's equitable claims are improper and subject to laches;

d) Plaintiff has not presented any fact to establish fraudulent concealment to toll the statute of limitations; and

e) For these reasons and all others set forth in a forthcoming Memorandum of Law filed in support of this Motion.

Accordingly, Trystar is entitled to summary judgement because the time period for Plaintiff to make a claim has expired. This motion will be supported by the pleadings in this action, South Carolina Rules of Civil Procedure, applicable law, oral argument of counsel, and a forthcoming Memorandum of Law to be filed.

Respectfully submitted,

/s/ Blake A. McKie

Brian Duffy (SC Bar No. 16247)
Blake A. McKie (SC Bar No. 80198)
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Charleston, SC 29401
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Attorneys for Defendant Trystar, LLC

October 26, 2022
Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendant. Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.	Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **TRYSTAR'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS**

INTRODUCTION

The Court should grant summary judgment to Defendant Trystar LLC ("Trystar") on all of the claims asserted by Plaintiff Bierer and Associates, Inc. ("Bierer"), for one primary reason: the statute of limitations bars its claims. Way back in 2013, years before Bierer brought this lawsuit, it was on notice of what it claims Trystar was doing wrong. The evidence is as clear-cut as you can get; the Court need look no further than the words of Bierer namesake Joe Bierer. In an email dated April 9, 2013, here is what Bierer wrote to Trystar's Dan Moerke:

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Message

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 4/9/2013 4:03:16 PM
To: dan.moerke@trystar.com
Subject: Cable/Jumper sales

Hi Dan,

I hope all has been well with you, it has been a while since we last had a chance to talk.

It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and Rick in Louisville almost two years ago and discussing this very topic.

(*See* ***Exhibit 1*** (yellow highlighting added).) Bierer was thus on notice, on April 9, 2013, of Trystar's (alleged) efforts to "circumvent" Bierer and establish its own "new sales." Those very (alleged) efforts are the wrongs that undergird all of Bierer's claims against Trystar. (*See* Third Amended Compl. ¶¶ 98(a), 98(b), 112, 123, 125, 127, 138, 167.)

Under well-established law, the statute of limitations begins running when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding Corp. v. Robinson*, 787 S.E.2d 485, 489 (S.C. 2016); *see* S.C. Stat. Ann. § 15-3-535. The statute runs even if the person does "not know the exact nature of the wrong" where the person is nevertheless "aware of their injuries." *Brown v. Pearson*, 483 S.E.2d 477, 482 (S.C. App. 1997). The April 9, 2013 email (among other evidence) shows Bierer's knowledge of its injuries and that "some claim against [Trystar] might exist." Bierer had years to investigate and bring a claim within the three-year statute, S.C. Ann. § 15-3-530(5), but did not do so. The statute of limitations expired on April 9, 2016, and Bierer did not bring a claim against Trystar until April 15, 2021, over five years later. The time has come to dismiss Bierer's stale claims and grant summary judgment to Trystar. *See, e.g.*, *Christensen v. Mikell*, 476 S.E.2d 692, 694 (S.C. 1997); *Brown*, 483 S.E.2d at

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482; *Abrasives-South, Inc. v. Korte*, 226 F. Supp. 3d 584, 586-89 (D.S.C. 2016).[1]

FACTUAL BACKGROUND

As the Court knows from its prior order, Trystar is a Minnesota company that manufactures and distributes a variety of products in the electrical utility industry, including electrical cable and electrical power panel distribution equipment. (*See* Third Am. Compl. ¶¶ 6, 28.) Bierer is a South Carolina company that also manufactures and sells equipment in the electric utility industry. (*See id.* ¶¶ 1, 13.) Both have a substantial footprint in South Carolina's electrical utility market. Bierer and Trystar were introduced over a decade ago by Jan Kennerly, a Bierer employee who was working to help Bierer enter the market. (*Id.* ¶¶ 27, 29.)

All the Court needs to know for purposes of this motion is that all of Bierer's allegations against Trystar revolve around Trystar's alleged efforts to work in "concert" with Kennerly to "divert orders from Bierer to Trystar for fulfillment." (Nov. 15, 2021 Order, at 4.) That is all the Court needs to know because the undisputed factual record now conclusively establishes that Bierer had actual knowledge of these (alleged) efforts nearly a decade ago. Again, in an email dated April 9, 2013, Joe Bierer wrote to Trystar's Dan Moerke as follows:

[1] In addition, as noted below, Bierer cannot assert equitable claims where its existing legal claims cover its alleged harms and where, in any event, those claims would be barred by laches given Bierer's extreme, nearly unprecedented delay in asserting them.

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Message

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 4/9/2013 4:03:16 PM
To: dan.moerke@trystar.com
Subject: Cable/Jumper sales

Hi Dan,

I hope all has been well with you, it has been a while since we last had a chance to talk.

It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and Rick in Louisville almost two years ago and discussing this very topic.

(*See* ***Exhibit 1*** (yellow highlighting added).) As explained below, this one email is sufficient to show notice to begin the running of the limitations period.

But there is more evidence too. Later in the year, Bierer specifically and candidly acknowledged being concerned about Trystar "cross[ing] another line" and "undermining" Bierer's business. Here is what Joe Bierer wrote in that December 5, 2013 email (*see* ***Exhibit 2*** (yellow highlighting added):

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 12/5/2013 2:37:04 PM
To: 'David Deinek' [david@bdlmi.com]; 'Rick Kennerly' [rickkennerly@bierermeters.com]
Subject: RE: Fwd: vendors

David,

It is obviously too late in this case, but yes, another line was crossed with Trystar.

You can chalk that business (First Energy) up as lost, at least for Bierer anyway. Trystar has a history (two other product lines) of undermining any and all business that Bierer has introduced them to by simply having product shipped directly to the customers location that Bierer foolishly supplied them, as in this case. We supposedly put a stop to this sometime ago, until now.

Please inform Bierer if you are ever required to contact one of our vendors.

Thanks,

Joseph S. Bierer
Bierer & Associates, Inc.
10730 Farrow Rd.
Blythewood, S.C. 29016

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These repeated communications throughout 2013 show that Bierer was aware of Trystar's (alleged) efforts to "undermin[e]" Bierer's business.

But not only was Bierer aware of what Trystar was doing—it also was suspicious of Kennerly's activities years before it filed suit. In an October 15, 2015 email, for example, Joe Bierer wrote to Rick Kennerly as follows: "You have purposely separated yourself from Bierer by maintaining private telephone and email accounts ***which leads me to wonder what other activities you may be conducting on my dime*** when you are gone for weeks at a time with no reporting. As I said before, ***my trust is waning***." (***Exhibit 3 at 4-5***) (emphasis added).

If that weren't enough, Bierer confirmed in 2018 that it had been aware of the facts underlying the claims for many years: (see ***Exhibit 4*** (yellow highlighting added)):

> **From:** Walter Bierer <wbierer@aol.com>
> **Date:** July 11, 2018 at 3:40:20 PM EDT
> **To:** rickkennerly@gmail.com
> **Subject: Re: Conflict of Interest**
>
> Rick,
>
> It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.
>
> You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!

By its own candid admission, Bierer was on notice of facts undergirding these claims—such as Kennerly's separating phone plans, using new email accounts, failing to turn in credit card receipts and trip reports—for "many years." Indeed, he candidly admitted: "No business other than Bierer would have tolerated this for any period of time." (*Id.*) Because Bierer decided to

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"tolerate" Kennerly's behavior for "many years," there is conclusive proof that the statute of limitations began running, and expired, long before Bierer filed its claims against Trystar.

All of Bierer's claims at law against Trystar—for aiding and abetting breach of fiduciary duty, tortious interference, unjust enrichment, unfair competition, and trade-secret misappropriation—are governed by a three-year statute of limitations. And its equitable claims—accounting and constructive trust—are subject to laches, if available at all. All these claims are based on a theory that Bierer had notice of nearly a decade ago. (*See* Third Amended Compl. ¶¶ 98, 112, 123, 125, 127, 138, 167.) The Court should thus grant summary judgment to Trystar on all of Bierer's claims against it.

SUMMARY JUDGMENT STANDARD

Under South Carolina Rule of Civil Procedure 56(c), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The South Carolina courts—both federal and state, trial and appellate—grant summary judgment when there is no reasonable dispute that the plaintiff knew or should have known of facts sufficient to put a "person of common knowledge and experience on notice that some claim against another party might exist" more than three years before the filing of the lawsuit. *Stokes-Craven Holding Corp.*, 787 S.E.2d at 489; *see Christensen*, 476 S.E.2d at 694 (affirming summary judgment on statute of limitations grounds); *Brown*, 483 S.E.2d at 482 (same, when plaintiffs "became aware of their injuries more than three years before bringing the present action," even if they did "not know the exact nature of the wrong at that time"); *Abrasives-South*, 226 F. Supp. 3d at 586-89 (granting summary judgment on similar claims

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based on plaintiff's candid admission in emails). These authorities apply here, and require summary judgment in Trystar's favor.

ARGUMENT

I. All of Bierer's Claims At Law Against Trystar Are Subject to a Three-Year Statute of Limitations.

Bierer's Third Amended Complaint pleads twenty claims, and eight of them name Trystar. Bierer raises six claims at law against Trystar:

(1) aiding and abetting breach of fiduciary duty (Count 3);

(2) tortious interference with an existing contractual relationship (Count 5);

(3) tortious interference with prospective contractual and business relations (Count 7);

(4) unjust enrichment (Count 9);

(5) unfair competition (Count 14); and

(6) violation of the South Carolina Trade Secrets Act (Count 15).

Each of these claims is subject to a three-year statute of limitations. For starters, the claim for unjust enrichment, although sometimes described as an equitable claim, sounds in contract for purposes of the statute of limitations, and is thus subject to the three-year statute in South Carolina Annotated Statutes § 15-3-530(1). *See Graham v. Welch, Roberts & Amburn, LLP*, 743 S.E.2d 860, 863 (S.C. App. 2013) (applying three-year statute of limitations to unjust-enrichment claim, and affirming summary judgment); *Wellin v. Wellin*, 2014 WL 234216, at *3 (D.S.C. Jan. 22, 2014) (similar).

The common-law tort claims in Counts 3, 5, 7, and 9 are likewise governed by the three-year statute of limitations in S.C. Ann. § 15-3-530(5), because they are all claims for "injury to the person or rights of another" that are "not arising on contract." *See, e.g.*, *Abrasives-South*, 226

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F. Supp. 3d at 586-89 (applying this statute to grant summary judgment on fiduciary-duty claims); *Burgess v. Elliott*, 2017 WL 9275203, at *3 (D.S.C. Feb. 24, 2017) (same, as to tortious-interference claims). The trade-secret misappropriation claim is governed by a different statute of limitations, but it is also three years. *See* S.C. Ann. § 39-8-70; *Abrasives-South*, 226 F. Supp. 3d at 586. No party has argued, and Trystar does not expect any party will argue, that any different statute of limitations, with any longer period, would apply.

II. The Statute of Limitations Ran Over Five Years Before Bierer Filed Suit, Because It Long Had Reason To Know A Claim Against Trystar Might Exist.

The simple question for this Court is whether the limitations period expired before Bierer brought its claims against Trystar. The answer to that question is an unequivocal *yes*.

The starting and ending point for this analysis is South Carolina's discovery rule, which applies to all of Bierer's claims against Trystar. *See* S.C. Ann. § 15-3-535. All actions subject to the statute "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Id.* Notably, the statute begins to run when a plaintiff learns of facts putting itself on notice "that some claim against another party ***might exist***." *Brown*, 483 S.E.2d at 482 (emphasis added). South Carolina courts do not wait until "after a full-blown theory of recovery has developed," because once a party is on actual or constructive notice that a claim "might exist," then it has three years to investigate and bring a claim. *Id.*

The South Carolina courts are unsympathetic to plaintiffs that bring late claims and argue that they did not know the "exact nature of the wrong," or the particular identity of the party committing it, or their precise legal theory. *See, e.g.*, *Brown*, 483 S.E.2d at 482 (when plaintiffs "knew their rights had been invaded," applying the statute of limitations on summary judgment

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even though they did not "know the exact nature of the wrong"); *Wiggins v. Edwards*, 442 S.E.2d 169, 170 (S.C. 1994) ("[T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer."); *Snell v. Columbia Gun Exch.*, 278 S.E.2d 333, 334-35 (S.C. 1981) (statute begins to run when a plaintiff is on notice "that some right of his has been invaded or that some claim against another party might exist," not when a "full-blown theory of recovery [is] developed"). The exercise of reasonable diligence requires "some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Majstorich v. Gardner*, 604 S.E.2d 728, 732 (S.C. App. 2004).

There are many cases in South Carolina granting and affirming summary judgment to defendants on statute-of-limitations grounds. Some do so on the basis of a plaintiff's *actual* notice of suspicious facts, and some even do so on the basis of *constructive* notice, because even if the plaintiff did not *actually* think about bringing a lawsuit, an objectively reasonable person would have done so. *See, e.g.*, *Dorman v. Campbell*, 500 S.E.2d 786, 789 (S.C. App. 1998) ("The date on which discovery should have been made is an objective rather than subjective question."). This case presents the most straightforward basis for summary judgment, because ***Bierer's own admissions show that it actually knew of Trystar's alleged actions back in 2013.***

The starting and ending point for that is the April 9, 2013 email. As shown in the screen shots captured above, in that email Joe Bierer himself identifies Trystar and raises concerns about its alleged efforts to "circumvent" Bierer and establish its own "new sales." (Ex. 1; *see also* Exs. 2, 3.) That is the same theory undergirding Bierer's claims. (*See* Third Am. Compl. ¶¶ 98(a) (complaining about Trystar's actions "diverting sales and profits away from Bierer"); *id.*

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¶ 125 (complaining about Trystar's "usurp[ing] business opportunities and sales from Bierer").

Because that email was sent on April 9, 2013, the three-year limitations period began running on that date. *See, e.g.*, S.C. Stat. Ann. § 15-3-535. The limitations period expired on April 9, 2016, more than five years before Bierer alleged claims against Trystar. The claims are thus time-barred, and summary judgment is therefore appropriate, as South Carolina's appellate courts have regularly concluded. *See, e.g.*, *Dean v. Ruscon Corp.*, 468 S.E.2d 645, 647 (S.C. 1996) (affirming summary judgment; "fact that the injured party may not comprehend the full extent of the damage is immaterial"); *Dorman*, 500 S.E.2d at 789-90 (same); *Brown*, 483 S.E.2d at 482 (same).

The case with the most factual similarities is *Abrasives-South, Inc. v. Korte*, 226 F. Supp. 3d 584, 586-89 (D.S.C. 2016), in which the court granted summary judgment on the same types of tort claims—for trade-secret misappropriation, unfair trade practices, and breach of fiduciary duty. In 2012, the plaintiff confronted the defendant "regarding suspicions that he had been providing information to other competitors and vendors." *Id.* at 585 (internal quotation omitted). The suspicions were documented in letters and emails, which were exchanged over the course of several years, including in connection with proceedings abroad. *Id.* at 586. But the plaintiff did not actually file the lawsuit in South Carolina court until 2016. Invoking the same statutes of limitations here, *see id.* at 586, the defendant argued the claims were time barred. The district court agreed, and granted summary judgment to the defendant. Its reasoning applies here:

> A reasonable person armed with these facts standing in Plaintiff's shoes would be on notice that a claim against [the defendant] might exist. That reasonable person may not know the precise contours of the potential claims, but this is precisely the type of circumstance that requires a plaintiff to "act with some promptness" in ascertaining the viability of and pursuing its claims.

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Id. at 588. Even under the most "plaintiff-friendly interpretation" of the facts, the plaintiff was on notice that it "might have had a claim" in 2013, more than three years before it filed suit. The plaintiff's claims were thus time-barred. *Id.* at 589.

The same analysis applies here. The April 9, 2013 email confirms that Bierer "notic[ed] a drop in cable/ jumper sales," such that "Trystar may possibly be circumventing our efforts to establish and support new sales." (Ex. 1.) Other emails confirm Bierer's knowledge in 2013 and 2015. (Exs. 2, 3.) In 2018, Bierer admitted it was "obvious" "for many years" that Kennerly had "been trying to separate [him]self from Bierer and appear as an independent entity." (Ex. 4.) Because Bierer filed suit years after the limitations period expired, its claims are time-barred.

III. Bierer's Equitable Claims Are Improper And Subject To Laches.

Bierer's remaining two claims—for an accounting and a constructive trust—are equitable claims that would only be available if Bierer had no adequate remedy at law. *See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 379 S.E.2d 119, 123 (S.C. 1989). Those claims should be dismissed on that basis alone, as any claims against Trystar are covered by Bierer's claims at law. Further, even if otherwise available, the equitable claims are barred by laches.

Bierer's accounting claim seeks "an equitable accounting of all sums wrongfully received by all Defendants, as a result of the wrongful activities set forth" in the complaint. (Third Am. Compl. ¶ 142.) In other words, Bierer is simply asking for a calculation of the damages incurred based on its other, substantive claims. But a claim for accounting has specific standards, and it is not an independent claim merely for calculating damages. Rather, the equitable doctrine of accounting allows a party to seek a court-ordered calculation of property or interests in a specific account or based on a specific relationship. *See Historic Charleston Holdings, LLC v. Mallon*,

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673 S.E.2d 448, 453 (2009) (defining accounting as "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due"); *Consignment Sales, LLC v. Tucker Oil Co.*, 705 S.E.2d 73, 77 (S.C. App. 2010) ("An accounting implies the defendant is responsible to the plaintiff for money or property as the result of a contract or some other fiduciary relationship"). But there is no specific account at issue with Trystar nor any fiduciary relationship between them governing specific property. There is simply nothing to "account" for between these parties, and Bierer cannot save his deficient damages claims by trying to convert them into a claim for accounting. *See Santee Cooper Resort*, 379 S.E.2d at 123 (barring equitable action where claim at law is "one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity").

Bierer's constructive trust cause of action fails for similar reasons. A constructive trust is not an independent equitable claim, but rather a remedy imposed for return of specific property. *See Hale v. Hale*, 694 S.E.2d 51, 57 (S.C. App. 2010). The South Carolina Supreme Court has explained, in affirming dismissal of a claim for constructive trust, that "[e]ven if [a plaintiff] had alleged circumstances more clearly reflecting a loss directly attributable to [a defendant's] activities, equitable relief is unnecessary when an adequate remedy for money damages is available at law." *Carolina Park Assocs., LLC v. Marino*, 732 S.E.2d 876, 879 (S.C. 2012). Since Bierer has numerous claims for monetary damages that would grant all the relief it seeks, it cannot convert those claims to an additional equitable claim for constructive trust.

Even if either of these claims were valid, they would be barred by laches. As explained above, all of Bierer's claims at law are barred by the statute of limitations, and the courts have made clear that a party cannot avoid dismissal of its claims merely by asserting parallel equitable

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claims to which the statute of limitations does not strictly apply. *See Nutt Corp. v. Howell Rd., LLC*, 721 S.E.2d 447, 450–51 (S.C. App. 2011) (collecting cases and stating that "the possibility the statute of limitations may have potentially barred the [plaintiff] from obtaining a legal remedy is no ground in itself for allowing the [plaintiff] to seek equitable relief.") In fact, in evaluating a laches defense, South Carolina courts may apply the statute of limitations by analogy. *See Thomerson v. DeVito*, 844 S.E.2d 378, 381 (S.C. 2020).

"In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 673 S.E.2d 448, 456 (S.C. 2009). The untimely assertion of amounts purportedly due from one party to the other constitutes such unreasonable delay. *Id.* Here, that is just the situation. Plaintiff is seeking, via its equitable claims, an accounting of amounts purportedly due to it and/or imposition of a constructive trust over those funds. But, as shown above, Bierer knew that Trystar was (allegedly) improperly taking profits on sales that should have gone to Bierer as early as 2013, but it did not bring its claims against Trystar until 2021. It is plainly unreasonable for Bierer to have delayed for that long, particularly where it is simply seeking funds that Trystar (allegedly) improperly received. Moreover, Trystar clearly suffered prejudice from that delay, as there is simply no way to account for or impose a trust over the specific funds at issue.

In short, if Bierer had a valid claim for damages, it would be entitled to pursue that claim—if not barred by the statute of limitations. But it cannot save those claims or avoid the impact of its delay by affixing equitable claims on top of its claims at law. Trystar is entitled to summary judgment on those claims as well.

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IV. Bierer Has No Facts To Establish Fraudulent Concealment Or Any Other Basis To Toll The Statutes of Limitations.

In its Third Amended Complaint, Bierer alleged that Kennerly's breaches of fiduciary duties were "fraudulently concealed from Bierer" through unexplained "fraudulent representations or intentional omissions." (Third Am. Compl. ¶ 100.) But evidence has not confirmed that Kennerly's activities were well known by both the industry and by Bierer itself.

Discovery on this topic has now occurred, and there is zero evidence that Trystar committed the type of fraudulent, bad faith, or deceptive acts that are necessary to show fraudulent concealment. *See, e.g., Crocker v. South Carolina Dep't of Health & Env. Control*, 831 S.E.2d 924 (S.C. App. 2019) (requiring "deceptive or bad faith attempts by [defendant] to conceal"); *Walbeck v. I'On Company, LLC*, 827 S.E.2d 348, 363 (S.C. App. 2019) (plaintiff failed to prove tolling where it could not show that he "reasonably relied on the words or conduct of [Defendant]"). The only material discussions between Trystar and anyone in the Bierer family were between Joe Bierer and Dan Moerke, and Joe Bierer testified unequivocally that Moerke never misled him:

> Q. . . . Mr. Moerke never said anything misleading to you, to the best of your knowledge; is that true?
>
> A. That would be correct, yes.

(***Exhibit 5***.)

Nor could the doctrine even apply given the unqualified statements in emails that it was "obvious" to Walt Bierer that Kennerly had been "trying to separate [him]self from Bierer and appear as an independent entity within the electric utility industry for years" (Ex. 4), going all the way back to April 9, 2013, when it came to Bierer's "attention" after noticing a "drop in

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cable/jumper sales" that Trystar "may possibly be circumventing our efforts to establish and support new sales." (Ex. 1.) Bierer cannot claim that it relied on any omissions in the face of these express statements. *See, e.g.*, *Walbeck*, 827 S.E.2d at 363.

In short, whatever Bierer may have alleged in paragraph 100 of its Third Amended Complaint, discovery completely negates that allegation. Trystar did nothing to conceal its actions in (allegedly) taking business from Bierer. Indeed, the change in business was obvious, and Bierer noticed it. There was no deliberate deception to conceal, and thus no basis to toll the statute of limitations.

CONCLUSION

For the foregoing reasons, Trystar respectfully requests that the Court grant summary judgment to it on each of Bierer's eight claims against it, because the statute of limitations expired no later than April 9, 2016, more than five years before Bierer alleged claims against Trystar.

Respectfully submitted,

/s/ Blake A. McKie
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Blake A. McKie (SC Bar No. 80198)
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96 Broad Street
Charleston, South Carolina 29401
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and

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Attorneys for Defendant Trystar, LLC

October 26, 2022
Charleston, South Carolina

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Exhibit 1

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Message

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 4/9/2013 4:03:16 PM
To: dan.moerke@trystar.com
Subject: Cable/Jumper sales

Hi Dan,

I hope all has been well with you, it has been a while since we last had a chance to talk.

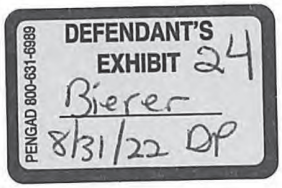
It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and Rick in Louisville almost two years ago and discussing this very topic. You had mentioned if we came to Trystar with new sales opportunities that your company would not then start selling directly to these very customers, you did not want to "have to deal with all of these customers", I believe is how you stated it. This is a very sensitive subject because it effects any company that does not manufacture goods that they are attempting to sell, we deal with this almost on a daily basis. What we (Bierer & Associates) have to do is establish some form of trust with these companies and not undermine their efforts of selling our products, obviously they would not want to do business with us in the future if we started selling directly to their customers since we know who their customers are via direct shipping.

It appears that Trystar has become our competitor with some of these very customers we initially acquired. We cannot completely blame Trystar for their actions, as this can obviously help maximize your profits, but this has become a discouraging reality and has caught us in a dilemma as to how we should proceed with new business opportunities.

Please feel free to contact me to discuss.

Regards,

Joe Bierer
Bierer & Associates, Inc.
(803) 786-4839



TRYSTAR0020390

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Exhibit 2

ELECTRONICALLY FILED - 2022 Oct 26 12:56 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

Message

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 12/5/2013 2:37:04 PM
To: 'David Deinek' [david@bdlmi.com]; 'Rick Kennerly' [rickkennerly@bierermeters.com]
Subject: RE: Fwd: vendors

David,

It is obviously too late in this case, but yes, another line was crossed with Trystar.

You can chalk that business (First Energy) up as lost, at least for Bierer anyway. Trystar has a history (two other product lines) of undermining **any** and **all** business that Bierer has introduced them to by simply having product shipped directly to the customers location that Bierer foolishly supplied them, as in this case. We supposedly put a stop to this sometime ago, until now.

Please inform Bierer if you are ever required to contact one of our vendors.

Thanks,

Joseph S. Bierer
Bierer & Associates, Inc.
10730 Farrow Rd.
Blythewood, S.C. 29016
Ph. (803) 786-4839
Fax (803) 786-5457
joe@bierermeters.com

From: ddeinek@gmail.com [mailto:ddeinek@gmail.com] **On Behalf Of** David Deinek
Sent: Thursday, December 05, 2013 7:32 AM
To: Rick Kennerly
Cc: joebierer@bierermeters.com
Subject: Re: Fwd: vendors

Rick,

Greg was asking for a #6 sample of cable for a drain tool in 2 days for a meeting I was attending. I had it shipped directly to Greg, otherwise we couldn't have made it happen. I opened the box at the meeting and Trystar had made a battery jumper. I will send a photo as soon as possible. You also had Chris ship a small green ground cable as well. Greg was very impressed that we were able to pull this off on such a short notice. First Energy is currently evaluating our assembled ground as a tool to code for draining ghost voltages.

Joe, I apologize if any lines were crossed.

Regards,

David Deinek
(248) 921-7162

NOTE: This E-mail message and attachments may contain privileged and confidential information. If you have received this message in error, please delete this E-mail.

On Dec 4, 2013 9:01 PM, "Bierer Account" <rickkennerly@bierermeters.com> wrote:
David,

See below, i remember this being a rush deal for Greg and you were meeting with him in that day or the next, what was done here?

Thanks,

Rick Kennerly
Bierer & Associates Inc.
VP Engineering & Operations
10730 Farrow Road
Blythewood SC 29016
(P) 803.786.4839
(F) 803.786.5457
(M) 803.917.7296
www.bierermeters.com

Begin forwarded message:

From: "Joe Bierer" <joebierer@bierermeters.com>
Date: December 4, 2013 at 6:07:26 AM CST
To: "'Bierer Account'" <rickkennerly@bierermeters.com>
Subject: vendors

Hey,

Any idea why Trystar is building (for us) and shipping assemblies directly to First Energy?

I thought we were all in agreement this wasn't going to continue to happen?

<image001.jpg>

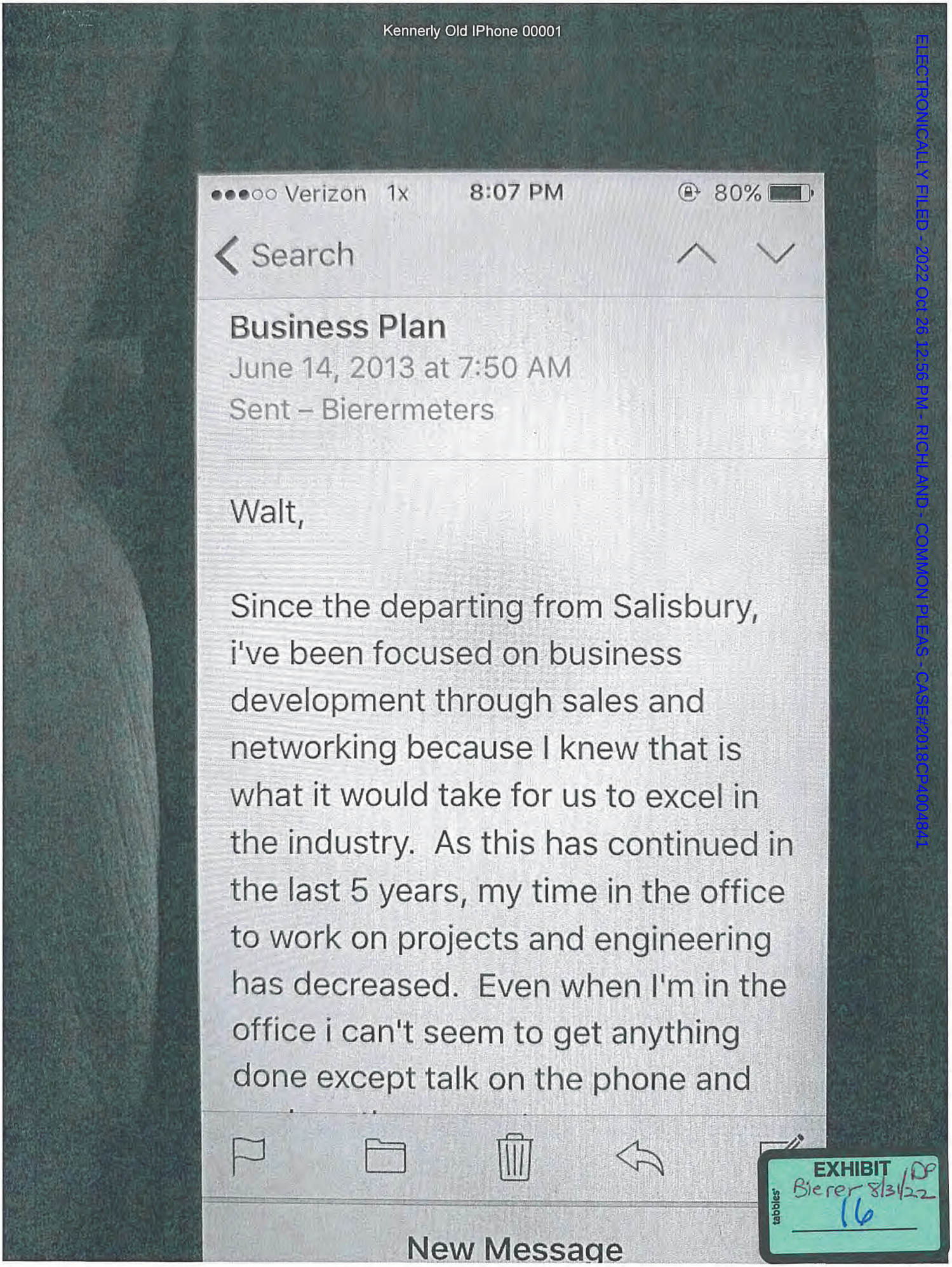
Joseph S. Bierer
Bierer & Associates, Inc.
10730 Farrow Rd.
Blythewood, S.C. 29016
Ph. (803) 786-4839
Fax (803) 786-5457
joe@bierermeters.com

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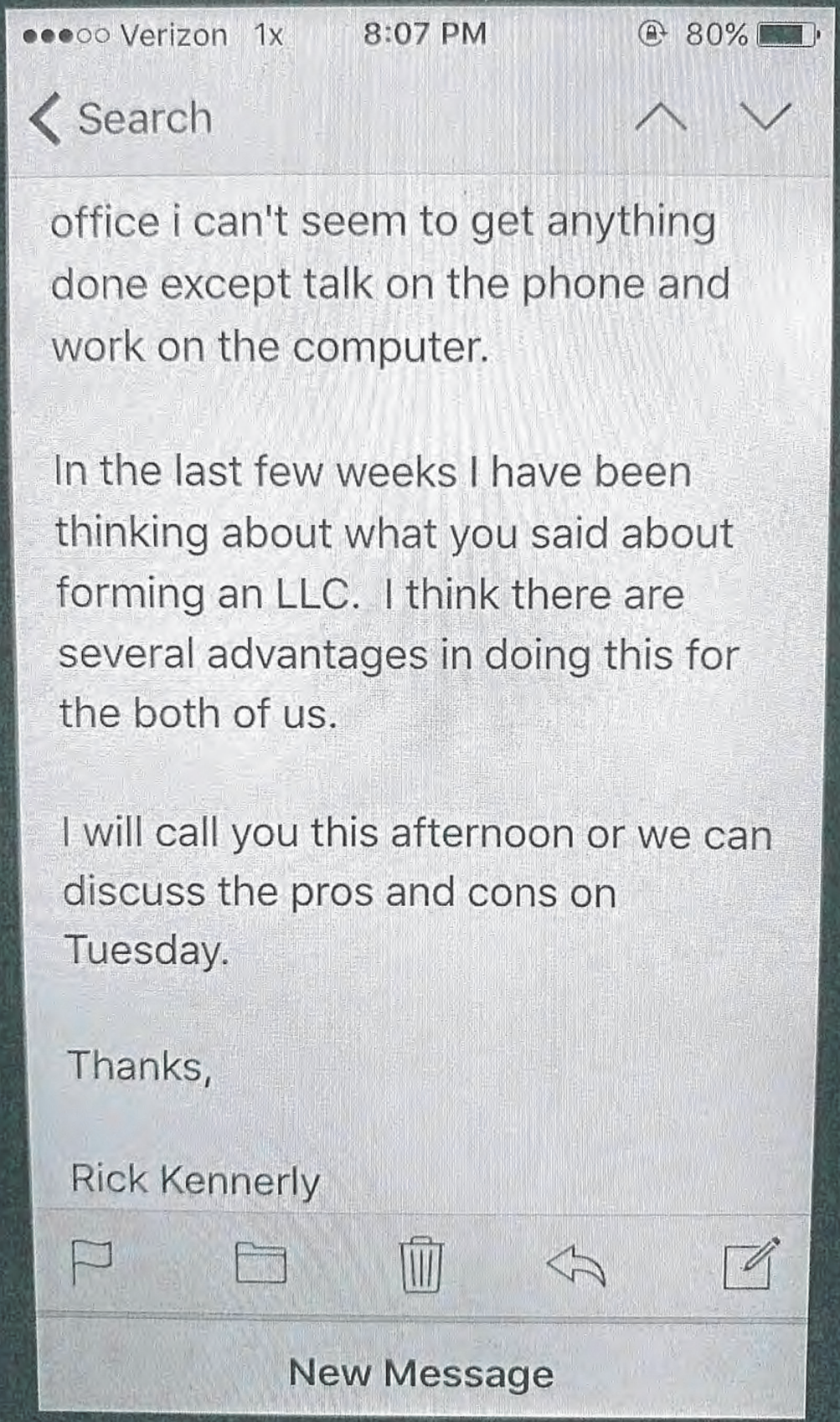
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Exhibit 3

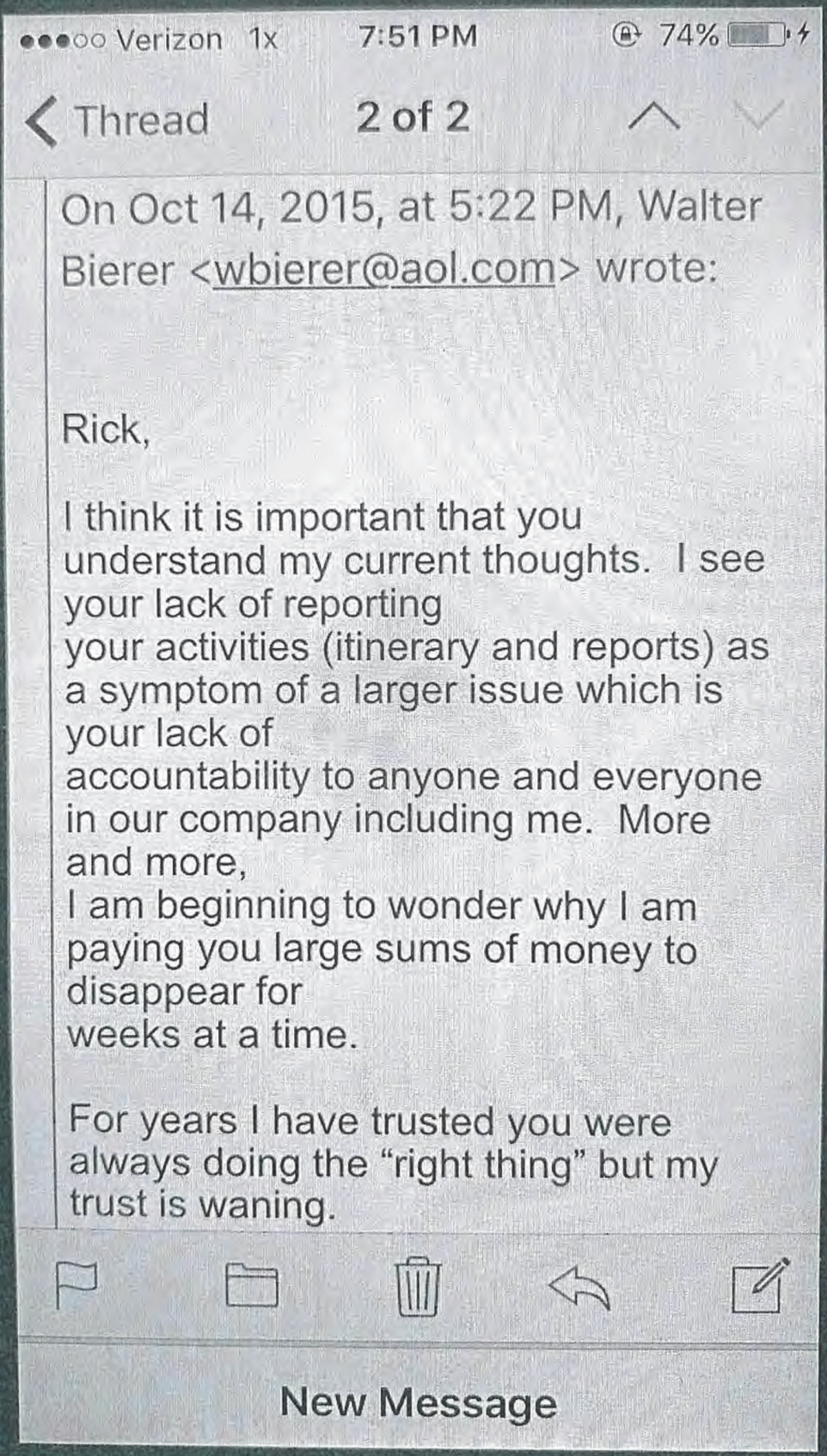
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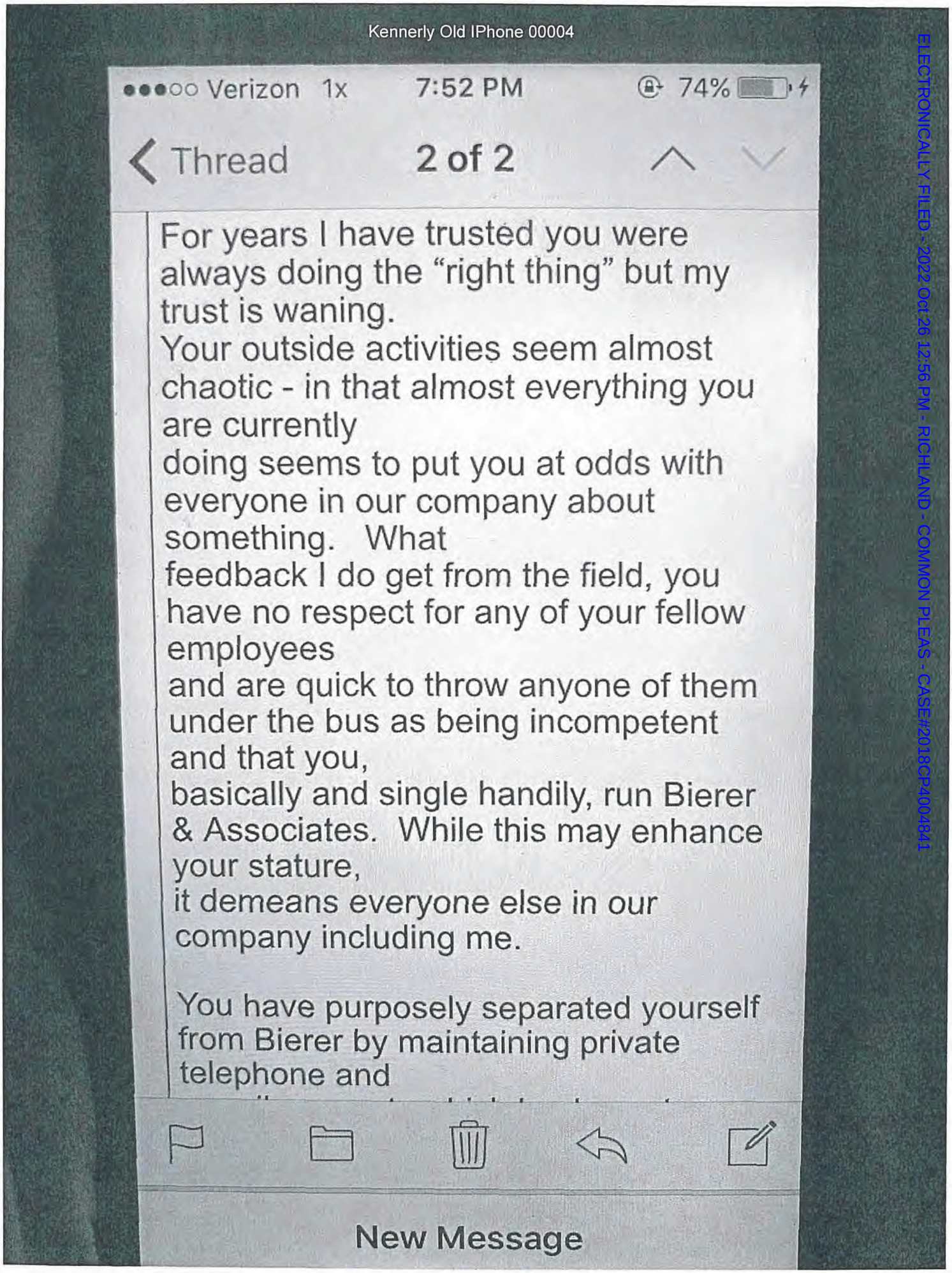
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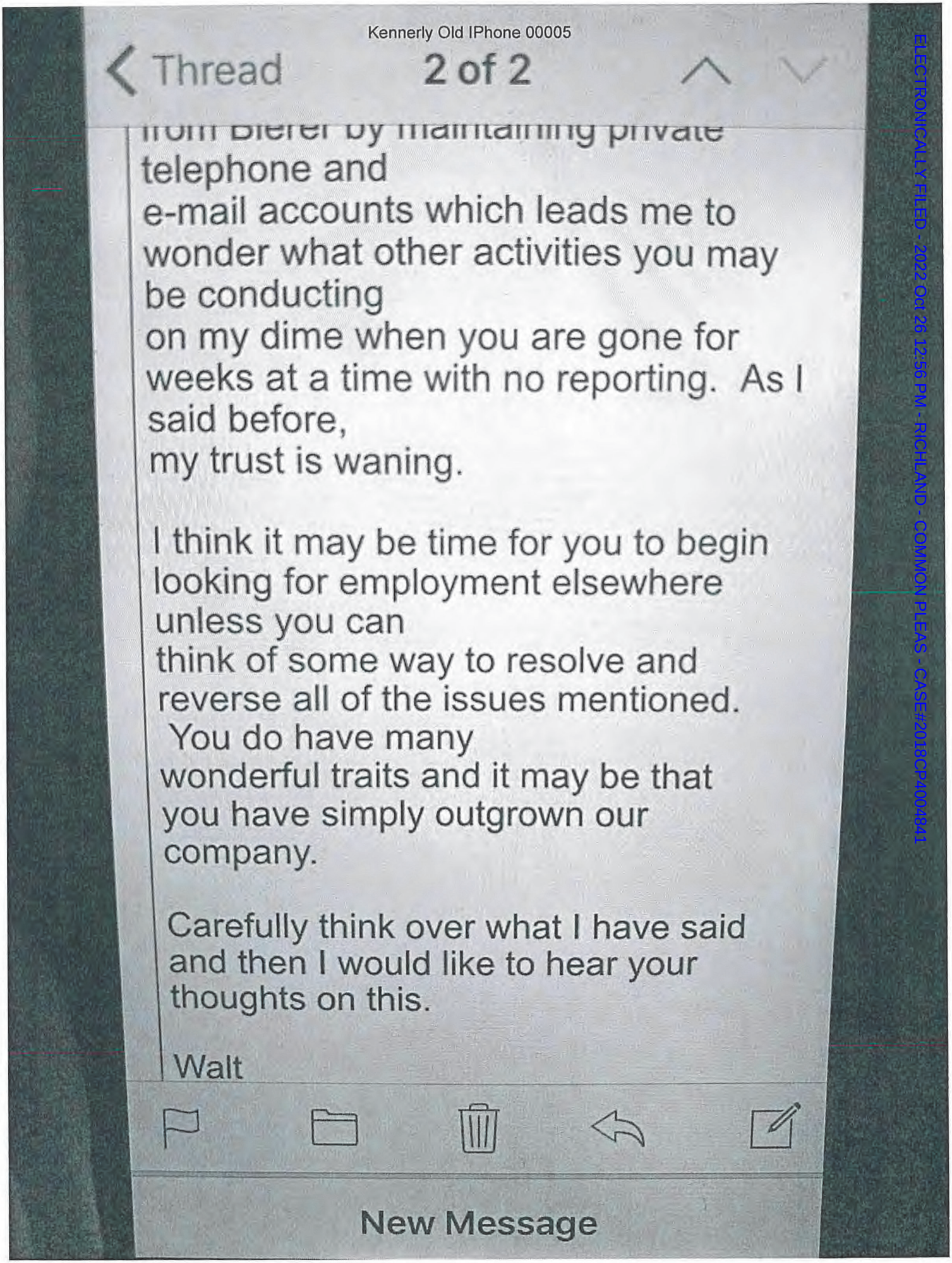


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Exhibit 4

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To: rickkennerly@gmail.com[rickkennerly@gmail.com]
From: Walter Bierer[wbierer@aol.com]
Sent: Wed 7/11/2018 10:46:18 PM Eastern Standard Time
Subject: Re: Conflict of Interest

Rick,

I ask Dennyse to prepare your final separation check payable through Friday. I received and e-mail yesterday from American Express notifying me that someone had attempted to change the credit card password. I canceled the card myself.

If you would, please give me the contact information and I will handle the cancelation of the meetings.

Walt

-----Original Message-----
From: Rick Kennerly <rickkennerly@gmail.com>
To: Walter Bierer <wbierer@aol.com>
Sent: Wed, Jul 11, 2018 4:57 pm
Subject: Re: Conflict of Interest

Walt,

I've never created an alternative business card and have always put Bierer first and foremost 99%. Whereabouts for weeks I don't know what your talking about but the rest of your comments below are correct for reasons I have chose to keep away from you and will continue to do so because it's personal to me but I will say it's not monetary based as that's never been a problem; you can read between those lines.
In the email I sent to you earlier today if option 3 is your choice then on Friday I would like to discuss the possibility of future independent work as I've been trying to do for years to your point below (I've blatantly asked you twice). If this is not a possibility I don't want you to drive all that way just to say goodbye, we can do that some other time.

Next week is a pivotal point for the company and I strongly believe someone should be there to capture the sales opportunities. My flights have been booked and paid for already but if that's your final decision I will honor it as well.

On another note, this conversation internally must already be spread throughout the company as I had a customer call me today at 10am and started the conversation "I know you no longer work for Bierer but I was hoping you could help me.....". I was very disappointed to hear that in addition to my credit card was cancelled yesterday and my bierermeters.com email was also cancelled. This indicates to me that you are worried about me doing something ill will. If this is all true then it indicates your "last day Friday" comment was some sort of lie or perhaps you couldn't control your other internal employees.

I will await your reply before I cancel the meetings scheduled for next week.

Thank you

Sent from my iPhone

On Jul 11, 2018, at 3:40 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.
>
> You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!
>
> There will be no meeting with Eversource or PSE&G next week. You should cancel the meetings ASAP or give me the contact information ASAP so I may contact the Reps or whoever to cancel the meetings.
>
> I will be glad to meet with you at the office Friday. I am currently in Florida. Let me know what time.
>
> Walt
>
> -----Original Message-----
> From: Rick Kennerly <rickkennerly@gmail.com>
> To: Walter Bierer <wbierer@aol.com>
> Sent: Wed, Jul 11, 2018 5:01 am
> Subject: Re: Conflict of Interest
>
> Walt,
>
> I would like to invite you to attend my meetings next week so you can personally see the value I bring to your company and no such conflict of interest exists. Please accept this as invitation for you only; I'm not interested in Joe or Brent attending as your replacement. Details for the meetings are high level PD800W discussions at Eversource on July 17 in Connecticut regarding a purchase order greater than $350,000 and high level PD25 discussions



with PSE&G on July 19 in New Jersey regarding another purchase order of similar value.

Thank you for considering this.

Sent from my iPhone

On Jul 10, 2018, at 1:48 PM, Walter Bierer <wbierer@aol.com> wrote:

> Rick,
>
> This will serve as your employment termination notice effective Friday July 13th 2018.
> Conflict of Interest between Bierer & Associates, Inc. and Travis Patterson PDU, Inc and others
> Please return the company truck Friday where Kyle will have your separation check.
>
> Walt

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Exhibit 5

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

- - -

Bierer and Associates, Inc.,	:	
	:	CIVIL ACTION NO.:
Plaintiff,	:	
	:	2018-CP-40-04841
vs.	:	
	:	
Jan F. Defendant Kennerly, Jr., Danielle Defendant Kennerly, EUSA, LLC, J&D Farms, LLC Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,	:	VOLUME II
Defendants.	:	
Jan F. Defendant Kennerly, Jr.,	:	
Defendant/ Third Party Plaintiff,	:	
vs.	:	
Walter Bierer, Brent Jeffries, and Joseph Bierer,	:	
Third Party Defendants.	:	

VIDEOTAPED DEPOSITION OF JOSEPH BIERER

DATE TAKEN: September 1, 2022

TIME BEGAN: 9:39 a.m.

TIME ENDED: 4:38 p.m.

LOCATION: Nexsen Pruet, LLC
1230 Main Street, 7th Floor
Columbia, South Carolina

REPORTED BY: Tami I. Watters
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202

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APPEARANCES:

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(843) 720-2044
bduffy@duffyandyoung.com
Representing Defendant Trystar, LLC
(Via Videoconference)

ALSO PRESENT:

ALAN METTS - CLVS
WALTER BIERER

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A But from my knowledge, now that I look back at it, some meters were rented, which does hurt our core business, and I believe Mr. Kennerly had a lot to do with that, because the rep actually told -- the rep actually told me Mr. Kennerly said it was okay to rent it. That does affect our core business.

Of course, Mr. Kennerly denied that.

Q And you don't have any other evidence of it. I'm still going back to the question I just don't think I've gotten an answer to, and that is: Why would Kennerly stay away from Bierer's core business?

A I just explained he did affect our core business.

Q He didn't sell your stuff.

A No. He rented it. He said it was okay to rent it to individuals. That does affect our core business.

Q You weren't involved in drawing any of those lines, were you?

A Define what a line is.

Q Products that Rick would sell on the side and not sell on the side. You weren't involved in any of those decisions, were you?

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A Was I involved in him being morally corrupt is the question?

Q No, that wasn't the question at all. My question is were you involved in drawing the lines as to what products Rick could sell outside of Bierer?

A Me personally, I didn't do anything.

Q You weren't involved in any of those decisions.

A No, sir.

Q Okay.

MR. PADGET: Want to take a quick break.

THE WITNESS: Okay.

THE VIDEOGRAPHER: Off the record at 15:31.

- - -

(Whereupon there was a recess in the proceedings from 3:31 to 3:46.)

- - -

THE VIDEOGRAPHER: We are back on the record at 15:46.

MR. PADGET: Mr. Bierer, thank you for your time this afternoon. I don't have any further questions.

THE WITNESS: Okay.

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- - -

EXAMINATION

- - -

BY MR. URSU:

Q Mr. Bierer, my name's John Ursu. We talked yesterday. I represent Trystar. I'm gonna keep this short as I can.

A Okay.

Q I do want to say, I've never been sitting in the chair where you're sitting. I think it takes a lot to sit there. So my -- it's hard to do this for many hours.

A I appreciate that.

Q This process is called discovery, and that's because we're trying to understand, and so that's why I'm asking you questions.

You spoke to Trystar -- when was the --

You spoke to Trystar in 2018, correct, when you called to find out about Rick's relationship with Trystar?

A That's correct.

Q And then when previously had you spoke with Trystar?

A Personally?

Q Yes.

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A Me personally? When you say speak, does that include e-mails?

Q Yes.

A I don't recall the exact time, but it does seem like I sent Dan Moerke some e-mail correspondence.

Q And I'm aware of an e-mail in 2013, the one we talked about earlier where you were concerned about --

A Yes.

Q -- Trystar diverting sales.

Are you aware of any e-mails after that?

A Like I say, there could have been some concerning shipping product. Just product-related questions.

Q And Mr. Moerke never said anything misleading to you, to the best of your knowledge; is that true?

A That would be correct, yes.

Q And did anyone else -- I'm sorry.

Did you speak to anybody else at Trystar at any point?

A I don't recall speaking to anyone else. I don't recall.

Q And did anyone, to the best of your

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **PLAINTIFF'S RESPONSE IN OPPOSITION TO TRAVIS PATTERN & FOUNDRY, INC.'S MOTION FOR SUMMARY JUDGMENT**
Jan F. Kennerly, Jr., Defendant/Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.	

Bierer and Associates, Inc. ("Bierer"), through undersigned counsel, submits it response in opposition to Travis Pattern & Foundry, Inc.'s ("Travis") motion for summary judgment. The Court should deny Travis' motion because Bierer did not discover Travis' wrongful conduct until after July 10, 2018, when Bierer's President Walter Bierer and its Vice-President Joe Bierer learned for the first time that Travis was paying Bierer's National Sales Manager, Rick Kennerly to market products through Bierer's sales channels to Bierer's electrical utility customers, in direct competition with Bierer. *See* Aff. of W. Bierer, ¶ 6, attached hereto as **Ex. A**; Aff. of J. Bierer, ¶

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6, attached hereto as **Ex. B.** Travis concedes, as it must, that Bierer did not have actual knowledge of this wrongful conduct until sometime after July 2018. However, Travis cherry-picks a few isolated emails, and other documents, out of literally millions of documents produced in this litigation to try and establish as a matter of law that Bierer should have known of this wrongful conduct prior to July 2018. Travis argues that because Bierer knew that Kennerly was legitimately working with Travis, on Bierer's behalf, to manufacture, develop and test clamps that were distributed by Bierer and used in Bierer's personal protective grounding products, that Bierer should have known that Travis was simultaneously and illegitimately paying Kennerly to compete against Bierer for the sale of these very same products. In addition, Travis fails to acknowledge the fact that Travis was aware Kennerly was a Bierer officer, yet no one at Travis ever reached out to Bierer to inquire if Bierer approved of this obvious conflict of interest. Travis' legal position, as expressed by its CEO Travis Garske, is that Mr. Bierer should keep better tabs on his corporate officer, and this is not Travis' problem.[1] *See* Dep. T. Garske, 25:21-27:15, 43:8 – 44:24, excerpts attached hereto as **Ex. C**. Travis does not cite any law for this illogical proposition.

Travis also fails to mention that Kennerly repeatedly lied and deceived Bierer about his relationship with Travis up to the day he was terminated by Bierer. Under South Carolina law, Kennerly's fraudulent concealment of this illegitimate relationship with Travis tolls the statute of limitations until Bierer became aware of this wrongful conduct. The evidence relied upon by Travis does not establish, as a matter of law, that Bierer's claims are barred by the statute of limitations. At most, Travis raises a jury issue for this affirmative defense.

[1] Garske also conceded that he too would have fired an employee who entered such an arrangement without his permission. *See* Ex. C.

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I. FACTS [2]

A. Kennerly's employment relationship with Bierer & Associates.

Walter Bierer founded Bierer in 1988. Ex. A at ¶ 3. He hired Kennerly as an employee in 2003 and Kennerly remained a full-time employee until he was terminated in July 2018. Id. at ¶ 4. While Kennerly initially started at Bierer as an engineer, he transitioned to the role of national sales representative for Bierer in 2009. Id. at ¶ 5; Ex. B at ¶¶ 4-5. In that role he was Bierer's interface and "eyes and ears" in the marketplace and charged with overseeing Bierer's sales force comprised of sales representatives under contract with Bierer. Id.

At the direction of Walter Bierer, Kennerly began working with Travis in 2011 to develop clamps for Bierer's grounding assemblies. Ex. A at ¶ 10; Ex. B at ¶ 9. Bierer purchased these clamps from Travis and understood Kennerly had a working relationship with Travis. At all times relevant, Bierer believed this relationship to be in furtherance of Bierer business. Ex. A at ¶¶ 10-11; Ex. B at ¶¶ 9-10. At no point in time during his employment with Bierer, did Kennerly disclose that he was working as a sales representative for Travis and receiving commissions. Ex. A at ¶¶ 6, 12; Ex. B at ¶¶ 6,11; *see also* Dep. of W. Bierer (Feb. 24, 2022), 230:14-23; 232:13-233:7, excerpts attached hereto as **Ex. D**.

When Bierer learned of these relationships on July 10, 2018, Walter Bierer terminated Kennerly effective July 13, 2018. Ex. A at ¶ 6, Ex. B at ¶ 6. It was not until after Bierer learned of Kennerly's deceit in July 2018, that it realized actions he had taken during his employment were in furtherance of his misconduct. Ex. A at ¶¶ 7-8; Ex. B at ¶ 7.

[2] For ease of reference, Plaintiff has mirrored its presentation of facts to address those set forth by Travis in its motion.

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B. Kennerly develops business relationship with Travis Pattern, ostensibly on behalf of Bierer.

During 2014-2016, Travis sent Bierer quotes containing the language "Rick Kennerly UGD." *See* Travis Mot. Ex. 5. However, Kennerly is not identified anywhere on these quotes as a Travis sales representative receiving commission for such orders. Ex. A at ¶ 9, Ex. B at ¶ 8. The evidence reflects that the management team was not aware of the language in these quotes until Travis was added to this lawsuit. Id. Such quotes were not sent to anyone on the management team (other than Kennerly). Id. Instead, they are directed to the "Attn" of two low-level employees. Id. As to the quote submitted in 2018, it does not appear to have been sent to anyone other than Kennerly and it is directed to the attention of a PG&E- not Bierer- employee. Id.

Bierer was aware that Kennerly maintained a relationship with Travis, ostensibly on behalf of Bierer, to test clamps and grounds for utility customers with the expectation that Bierer would get the business. Ex. A at ¶ 10; Ex. B at ¶ 9. When Walter Bierer questioned Kennerly about the status of such business, Kennerly told him that Bierer did not get the business because it was underbid. Id.; *see also* Dep. of W. Bierer (Feb. 23, 2022), 291:6-294:8, excerpts attached as **Ex. E**. At no point in time during Kennerly's employment with Bierer did Bierer know that Travis and Kennerly were the parties underbidding Bierer. Ex. A at ¶ 10; Ex. B at ¶ 9.

C. Kennerly had business interactions with Travis that were "open and obvious."

While employed with Bierer, Kennerly did have "open and obvious" business interactions with Travis. Ex. A at ¶ 11; Ex. B at ¶ 10. Bierer supported such interactions because it distributed Travis products and used Travis clamps in the personal protective grounds that Bierer assembled. Id. Bierer understood Kennerly's interactions with Travis to be on behalf of Bierer and that Kennerly was working with Travis in matters concerning the clamps and Bierer's grounding assemblies for Bierer's benefit. Ex. A at ¶ 11; Ex. B at ¶ 10.

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However at no point during Kennerly's employment was it "open and obvious" that Kennerly was receiving commissions from Travis to bypass Bierer and sell Travis products to the utility industry using Bierer sales representatives. Id.; Ex. D at 232:13-233:7; *see also* Dep. of J. Bierer (Aug. 31, 2022), 92:2-93:18, excerpts attached hereto as **Ex. F**. As an initial matter, Kennerly was the "eyes and ears" between Bierer management and sales activities occurring in the field. Ex. A at ¶ 5; Ex. B at ¶ 5. There is ample evidence in the record that Kennerly never disclosed his relationships with Travis or Trystar to Bierer. Even when confronted about his relationships on July 11, 2018, following notice of his termination, he continued to lie about the true nature of his relationship with Travis. *See* Travis Mot. Ex. 4 at Kennerly 011384. In his email communication, Kennerly stated he did not work for Travis in 2014. Id.; *see also* Ex. A at ¶ 12; Ex. B at ¶ 11. However, the record reflects that Travis was issuing Kennerly a 1099 for commission as early as 2013. *See* 2013 Travis 1099, attached hereto as **Ex. G**. Similarly, Kennerly's admission on July 11, 2018 that he was "guilty as charged" when confronted about his secret relationship with Trystar illustrates he had not informed Bierer of the same. *See* Travis Mot. Ex. 4 at Kennerly 011384; Ex. A at ¶ 12; Ex. B at ¶ 11. Moreover, Kennerly continued to be deceitful by stating Trystar "had its own network of reps that handle all the selling in which I have nothing to do with." Id. This was a lie. Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer. *See* Dep. of D. Moerke, 53:12- 54:10; excerpts attached hereto as **Ex. H**. Finally, Kennerly's assertion that it was public information that he worked with Travis is contradicted by the very industry individual, Bud Dygert, that introduced Kennerly to Travis Pattern when Bierer was looking to make a clamp for its grounding assembly. Mr. Dygert testified that he was not aware that Kennerly was a sales representative for Travis until he was informed of

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the same by Joseph Bierer – after Kennerly's termination. Dep. of B. Dygert, 15:19 – 16:21, excerpts attached hereto as **Ex. I**.[3]

That Kennerly continuously concealed his relationship with Travis is supported by the testimony of Walter and Joseph Bierer that when Kennerly was confronted with the 2014 IEEE brochure indicating he had been employed with Travis for two years, Kennerly lied and stated that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was working for Travis because Kennerly had assisted Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. *See* Ex. A at ¶ 13 & Ex. E at 243:7-244:1 (Walter Bierer); Ex. B at ¶¶ 12-13 & Ex. F at 86:22-87:15 (Joseph Bierer).

Given Kennerly's propensity for dishonesty to Bierer, it is not surprising that Bierer management was unaware of the September 14, 2015 email from David Yang, an employee of General Pacific. Ex. A at ¶ 14; Ex. B at ¶ 14. The only Bierer employee this was sent to in 2015 was Kennerly and it was sent to his Bierer Meters email account. Id. Kennerly was a member of the management team and thus his emails would not have been monitored by other management team members. Id. Both Walter and Joe Bierer state that this email was never brought to their attention, and to the best of their knowledge, anyone else's attention at Bierer. Id. Having not seen the email, members of Bierer management (other than Kennerly) would not have been put on notice of Kennerly's secret relationship with Travis.

Additionally, the email chain dated April 12, 2016 does not reflect Bierer's knowledge that Kennerly was doing anything other than conducting business in furtherance of Bierer's business

[3] Contrary to the assertion by Travis that Bierer sold ferrules to Travis (*see* Travis Mot. at 9, n.41), these ferrules were sold to Future Machines, a company purchased by Travis from Bud Dygert. They were not purchased directly by Travis. Furthermore, at the time of these sales, Bierer was told by Kennerly that Bud Dygert was running Future Machines and that Mr. Dygert was using them for repair work on grounding assemblies. *See* Ex. F at 261:1-262:19.

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interests. Bierer was aware that Kennerly, in his capacity as national sales manager, interfaced with sales representatives concerning other manufacturer's products that complimented Bierer products. Ex. A at ¶ 15; Ex. B at ¶ 15. For example, after promoting a Bierer meter, it would be logical for the SNC product - Restore Light – to be brought up as a supplemental product for Bierer meter customers to use in a troubleshooting capacity. Id. Both Walter and Joe Bierer believed a demonstration of knowledge of Bierer products, as well as those that could be used in conjunction with the same, would enhance the stature of Bierer in the industry. Id. Thus, the concerns raised in Exhibit 14 by other members of the management team - that Kennerly would be discussing another manufacturer's product, which did not compete with a current Bierer product but instead could be used in conjunction with the Bierer product being presented, did not raise a red flag concerning his deceit. Id.; *see also* Ex. F at 14:14-15:11, 18:17-19:24. Again, Bierer management trusted Kennerly and thus, when Walter questioned him about his activities on the road, such as those set forth in the April 12, 2016 email, and he assured Bierer management that his conduct was above board, they believed him. Ex. A at ¶ 15; Ex. B at ¶ 15. Nothing about this email could have or did alert Bierer to Kennerly's employment or secret relationship with another manufacturer.

D. Walter Bierer emailed Kennerly about in-state, "outside-activities" in 2015 and questioned Kennerly again about the 2014 IEEE brochure in 2018 in conjunction with his notice of termination of employment from Bierer.

On October 14, 2015, Walter sent an email to Kennerly raising concerns about Kennerly's "outside activities" which refer to Kennerly's golf outings locally in South Carolina. Ex. A at ¶ 16. This email was sent in relation to Kennerly's apparent growing interest with the business and political connections he was allegedly making on these trips and his simultaneous failure to fulfill certain aspects of his role at Bierer. Id. The email merely set forth Walter's observations and

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concerns, and simply reflects Walter's curiosity surrounding whether Kennerly was exploring and/or had more interest in working for Eddins Electric Co. or someone with connections to Jerry Eddins than continuing his employment with Bierer. Ex. A at ¶ 16. Furthermore, in response to this email, Kennerly assured Walter of his desire to continue in his role at Bierer and Kennerly subsequently increased his efforts to make sure he connected with the Bierer management team more frequently. Id.

Similarly, the trip report submitted by Kennerly to the management team in November 2015 indicating he had done testing with Alex Martin from Travis Pattern would not have put Bierer on notice of his secret relationship with Travis. At this point in time, November 2015, Kennerly's participation in such testing did not raise any red flags for the Bierer management team. Ex. A at ¶ 17; Ex. B at ¶ 16. Kennerly had been tasked with developing new clamps with Travis for use in Bierer grounding assemblies. Id. While the testing was usually paid for by utility companies that were considering purchasing Bierer personal protective grounds, Bierer, at its own expense, routinely sent grounds to the labs to be tested in conjunction with Travis clamps. Id.; *see also* Ex. E. at 294:1-4. Additionally, Bierer was not aware of, nor had it seen, the sign-in sheet for the PG&E testing in which Kennerly signed in as a Travis employee. Both Walter and Joseph Bierer became aware of that document after Kennerly was terminated. Ex. A at ¶ 17; Ex. B at ¶ 16.

On July 10, 2018, Bierer learned of Kennerly's sales relationship with Travis and Trystar and Walter Bierer terminated Kennerly effective July 13, 2018. Bierer filed its initial complaint in this action on September 11, 2018.

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II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.,* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–31, 673 S.E.2d 801, 802–03 (2009). Furthermore, a party moving for summary judgment asserting that the Plaintiff's claims are barred by the applicable statute of limitations has the burden of proof, and when testimony is conflicting on the question, it becomes an issue for the jury to decide. *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519–20, 827 S.E.2d 348, 361 (Ct. App. 2019).

III. DISCOVERY RULE

All of Bierer's claims are governed by the discovery rule for purposes of determining when the statute of limitations began to accrue. Under the discovery rule, the action must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. S.C. Code Ann. § 15-3-535; *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence"); *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) ("Under the discovery rule, the

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statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.")

IV. BIERER'S CLAIMS AGAINST TRAVIS

Bierer is suing Travis for paying Bierer's Vice President of Operations and National Sales Manager Rick Kennerly to market Travis products that were developed for use in Bierer's personal protective grounding assemblies, to the electrical utility industry, using Bierer's network of national independent sales representatives and diverting such sales from Bierer, resulting in lost sales profits and other income to Bierer. Bierer terminated Kennerly effective July 13, 2018 after learning on July 10, 2018 that he was also working for Travis and another company, Trystar, in some capacity. Soon afterwards, Bierer discovered the nature[4] of Kennerly's arrangement with Travis and Trystar.

Bierer's President, Walter Bierer, who also owns the company with his wife, explained what he discovered following Kennerly's termination:

> I had been given information that Kennerly had been working for three companies unbeknownst to me, okay? And what became apparent real soon is that Kennerly hijacked and corrupted all of Bierer's sales channels and allowed certain manufacturers such as Trystar and Travis and ITW to leapfrog right into our customers. They didn't use their own sales channels, they used Bierer sales channels. That is what became apparent to me. And we was---he was receiving profits, payola, bribe money---I'm not sure what the heck it was. Why they paid him, I'll---you know , it's beyond me why they would pay---you know, my employee, my VP, my trusted employee, why they would pay him, you know, is still a mystery to me, other than that he gave---he provided something to them of value. And the only thing that I can come up with that he provided of value is going through our sales channels rather than their own. And if you ask any one of these people—Trystar, Travis, ITW—"why didn't you go through your own sales channels?" they'll have---I'm not sure what they'll come up with, but obviously, there was some advantage to going through our sales channels and giving Kennerly payout money."

Ex. E at 136:14- 137:14.

[4] Bierer did not learn the extent and magnitude of Kennerly's business arrangement with Travis and Trystar until Bierer obtained discovery from Kennerly and subpoena responses from Travis and Trystar after filing the original complaint on September 11, 2018.

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After terminating Kennerly effective July 10, 2018, Bierer filed an initial Complaint naming Kennerly and a business owned by him on September 11, 2018. After conducting discovery, and obtaining documents from Travis and other companies through out of state subpoenas, Bierer filed its Third Amended Complaint against Travis, Trystar and ITW on April 15, 2021. Bierer's Third Amended Complaint alleges claims of aiding and abetting breach of fiduciary duty, tortious interference with existing contractual relations, tortious interference with prospective business arrangements, unjust enrichment, common law unfair trade practices and violation of the South Carolina Unfair Trade Practices Act. Bierer also seeks equitable remedies of accounting and constructive trust against Travis. The Third Amended Complaint was served on Travis via Federal Express delivery to Travis Garske on April 21, 2021. Thus under Rule 3(a), SCRCP, Bierer's action against Travis was commenced on April 15, 2021.

V. BIERER'S CLAIMS ARE NOT TIME-BARRED

The undisputed evidence in the record is that Bierer was not aware Kennerly was a sales representative for Trystar, Travis, or any third party at any time during his employment with Bierer. Instead, when examined in context, the "facts" cherry-picked by Travis in support of its motion, illustrate that Bierer's actions against Travis did not begin to accrue until July 10, 2018 at the earliest, which is well within the three (3) year statute of limitation. Since Kennerly's termination, Bierer has learned through discovery that Travis and Kennerly entered into an exclusive agreement in 2013 wherein Kennerly was getting paid a commission by Travis to bypass Bierer and sell Travis products to the utility industry using Bierer sales representatives. Kennerly concealed this relationship, and his use of the Bierer sales representatives to further such relationship, through a continuous pattern of lying and deceit to Bierer management. Accordingly, Travis' motion should be denied.

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A. Plaintiff did not have notice of potential claims against Travis Pattern as early as 2012.

Plaintiff was aware that Kennerly had frequent business interactions with Travis in 2012; however, Bierer justifiably assumed Kennerly was working with Travis, on behalf of Bierer, in matters concerning the clamps and Bierer grounding assemblies. Ex. A at ¶ 10-11; Ex. B at ¶¶ 9-10. However, Bierer management was unaware during Kennerly's employment that any of his interactions with Travis were not solely on behalf of and in furtherance of his work for Bierer. Id. Bierer never knew that Kennerly was getting paid a commission by Travis to bypass Bierer and sell Travis products to the utility industry using Bierer sales representatives until Kennerly was terminated. Id.

Travis' reliance on a July 11, 2018 email as support for its argument Bierer was on notice beginning in 2012 of its potential claims against Travis is unwarranted. *See* Travis Mot. at 5, 14 (referencing Ex. 4 thereto). As explained by Walter Bierer, this email was sent to Kennerly *after* Walter learned of Kennerly's relationship with Travis. Ex. A at ¶ 8. Walter sent this email setting forth his realization that actions Kennerly had taken around 2012 were steps Kennerly surreptitiously took to distance himself from Bierer and his employment at Bierer. Id. At the time the events took place, Walter accepted Kennerly's benign explanation for the occurrence of each. Id. As to his phone, Kennerly told Walter that he lost his company phone on the West Coast and so he'd had to replace it using his personal information to have it set up while on the road. Id.; *see also* Ex. D at 115:16-117:10. As to establishing a Gmail account, Walter approved that based on Kennerly's explanation that Gmail was more user friendly than the bierermeters.com domain. Id. As to receipts, Kennerly complained that the receipts were hard to keep up with, so Walter compromised and agreed Kennerly could just itemize his monthly company credit card statements. Ex. A at ¶ 8. Finally, as to trip reports, Kennerly gave these to the management team orally at

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Bierer Monday management meetings each week, so Walter did not insist he write them up. Ex. A at ¶ 8. However, when Kennerly began missing these meetings, Walter insisted he turn in written reports, which Kennerly eventually did towards the latter part of his employment. Id. It did not become clear to Walter that these actions were all taken in furtherance of Kennerly's deception until Walter learned of Kennerly's relationship with Travis on July 10, 2018. Id.

B. Plaintiff did not have notice of potential claims against Travis Pattern in 2014.

Contrary to the assertion of Travis, the quotes sent to low-level Bierer employees, as well as Kennerly, do not time bar Plaintiff's claims against Travis. *See* Travis Mot. 6, 17 (referencing Ex. 5 therein). The Travis quotations submitted in Exhibit 5 for the years 2014-2016 are directed to the attention of Chris & David – low level, non-managerial employees in Bierer's purchasing and customer service department. Ex. A at ¶ 9; Ex. B at ¶ 8. Additionally, those quotations do not state that Kennerly is a sales representative for Travis. Id.; *see also* Ex. 5 to Travis Motion. Nothing about these documents discloses that Kennerly is getting a commission on sales to Bierer. Id. Nor do they disclose his efforts to sell Travis products around Bierer and directly to Bierer customers. Id. Furthermore, the information on these quotations that Travis claims identifies Kennerly as a UGD sales representative was never brought to the attention of Bierer management at any time until after Travis was added to the lawsuit. Ex. A at ¶ 9; Ex. B at ¶ 8. As to the quotation dated May 1 2018 (BIERER_PROD_00050751), this quote does not appear to have been sent to anyone at Bierer other than Kennerly. *See* Email 5.1.18, attached hereto as **Ex. J** (transmitting quotation set forth in BIERER_PROD_00050751). As is evident from the document, it is sent to PG&E and directed to the attention of a PG&E employee ("Jim"). Ex. A at ¶ 9; Ex. B at ¶ 8; *see also* Ex. 5 to Travis Motion.

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Similarly, the 2014 IEEE brochure relied on by Travis did not put Bierer on notice in 2014 of Kennerly's employment relationship with Travis. *See* Travis Mot. 8, 18-19 (referencing Ex. 3 thereto). When the brochure was initially brought to Walter Bierer's attention, Walter did confront Kennerly about the language in the IEEE brochure during a company meeting. Ex. A at ¶ 13; Ex. B at ¶ 12. In response, Kennerly told Walter that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because he had assisted Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. Id. Kennerly assured Walt that he was not employed by Travis UGD and laughed off the situation as a simple misunderstanding. *See* Ex. A at ¶ 13 & Ex. E at 243:7-244:1 (Walter Bierer); Ex. B at ¶¶ 12-13 & Ex. F at 86:22-87:15 (Joseph Bierer).

This explanation seemed reasonable to Walter and Joseph Bierer at the time because of Bierer's extensive relationship with Travis. Ex. A at ¶ 13; Ex. B at ¶ 12. At the time they accepted this explanation from Kennerly, they believed Kennerly was one of Bierer's most trusted and valuable employees. Ex. A at ¶ 13; Ex. B at ¶ 13. Walter had worked with him for over a decade, Joe for close to a decade, and both believed Kennerly was an honest person. Id. Walter had even included Kennerly in my Last Will and Testament. Ex. A at ¶ 13. Because of this trust, Bierer accepted Kennerly's explanation. Ex. A at ¶ 13; Ex. B at ¶ 12-13. Moreover, Walter did not go behind Kennerly's back and continue to inquire about the brochure with Travis because it would have demonstrated to Kennerly that Walter did not trust Kennerly. Ex. A at ¶ 13. Additionally, such action by Walter would have caused significant morale problems if the statement in the brochure was in fact just a misstatement as Kennerly explained. Id.

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C. Bierer did not have notice of potential claims against Travis in 2015.

Contrary to the argument of Travis, (*see* Travis Mot. 10-11, 22-23 (referencing Ex. 10 thereto)), the "outside activities" referenced by Walter in the email of October 14, 2015 were strictly related to Kennerly's in-state outings and were in no way related to or evidence of a suspicion on his part that Kennerly was providing sales services to Travis, Trystar, or any third party. Ex. A at ¶ 16. In 2015, Bierer sales using Travis and Trystar products were at their peak and Bierer had no reason to suspect Kennerly of any wrong-doing pertaining to Travis. Id. Walter's concerns with Kennerly were generated from Kennerly's activities locally in South Carolina. Id.

Around this time, Kennerly, with Walter's permission, had taken time away from work to go on several golfing trips to Myrtle Beach, SC under the pretext that they were family events for the male members of his extended family. Id. Kennerly's sister was married to the son of, what appeared to be, an extremely successful businessman in the electrical contracting business, Jerry Eddins. Id. It was clear to Walter that Kennerly idolized him. Id. At one point Kennerly boasted of Eddin's award of a large multi-million dollar government electrical contract to wire and install the lighting on the Ravenel Bridge in Charleston, South Carolina. Id. As time progressed, Kennerly returned from these trips- which Walter had been told were merely family outings- talking about meeting "SC big business" and political figures during these and other golfing outings around the Columbia, SC area. Id. It was apparent to Walter that Kennerly was enamored with the business and political connections he was allegedly making. Id. Simultaneously, Kennerly began displaying an abrasive and demeaning attitude toward his fellow employees at work and as more and more of Kennerly's attention was directed to these in-state family/political outings, he began to fall short of fulfilling the responsibilities in his role at Bierer. Id.

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Thus, the October 14, 2015 email merely set forth Walter's observations and concerns, and requested Kennerly evaluate whether he wanted to continue his employment with Bierer. Ex. A at ¶ 16. This email simply reflects Walter's curiosity surrounding whether Kennerly was exploring and/or had more interest in working for Eddins Electric Co. or someone with connections to Jerry Eddins than continuing his employment with Bierer. Id. Furthermore, in response to this email, Kennerly assured Walter of his desire to continue in his role at Bierer and Kennerly subsequently increased his efforts to make sure he connected with the Bierer management team more frequently. Id.

Again, this document, as well as the other portions of the record relied on by Travis do not present a scenario in which Bierer knew, or by the exercise of reasonable diligence should have known, that Kennerly was a sales representative for Travis and using Bierer's sales reps to receive commissions on sales made by bypassing Bierer.

D. Kennerly's Fraudulent Concealment Tolled the Statute of Limitations

Kennerly fraudulently concealed his illegitimate relationship with Travis by directly lying about the existence of the relationship, and by failing to disclose this relationship in violation of his fiduciary duty. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) (Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction). Under the doctrine of fraudulent concealment, deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations. *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014). The fraudulent concealment doctrine "applies in situations 'where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.' Under this doctrine,

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because of the defendant's wrongful acts of concealment, the plaintiff is not aware of the facts giving rise to his claim within the limitations period." *Harrell v. BMW of N. Am., LLC,* 517 F. Supp. 3d 527, 537 (D.S.C. 2021) (internal citation omitted).

Kennerly's fraudulent concealment of his relationship with Travis tolls Bierer's claims against Travis. Travis, as a corporation, can only act through its officer, employees, and agents. Kennerly was Travis' exclusive world-wide sales agent for all of Travis UGD products, and Travis is liable for Kennerly's fraudulent concealment even if Travis did not authorize such behavior. The South Carolina Supreme Court ruled in *West v. Serv. Life & Health Ins. Co.,* 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951) that a principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent in the scope of his agency, although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. *See also E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.,* 818 F. Supp. 910, 912 (D.S.C. 1993) (Questions of agency and an agent's authority ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship or authority).

VI. CONCLUSION

Based on the foregoing, Bierer requests the Court deny Travis' motion for summary judgment.

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Respectfully submitted,

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December 28, 2022
Columbia, South Carolina

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Exhibit A

Affidavit of Walter Bierer

ELECTRONICALLY FILED - 2022 Dec 28 8:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **AFFIDAVIT OF WALTER BIERER**
Jan F. Kennerly, Jr., Defendant/Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.	

Personally appearing before me, Walter Bierer, after being duly sworn, deposes and states as follows

1. I submit this affidavit in conjunction with the response in opposition of Bierer & Associates, Inc. ("Bierer") to the motions for summary judgment filed by Travis Pattern & Foundry, Inc. ("Travis") and Trystar, LLC ("Trystar").

2. This affidavit is based upon my personal knowledge and the statements made herein are true and correct to the best of my knowledge and belief.

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3. I founded Bierer in 1988. I am currently its President and my wife and I are co-owners of Bierer.

4. I hired Rick Kennerly ("Kennerly") as a full-time employee in 2003 and he remained a full-time employee with Bierer until his termination in July 2018.

5. Kennerly was initially hired as an engineer. In 2009, he transitioned to the role of national sales representative for Bierer. In this position, he was Bierer's interface and "eyes and ears" in the marketplace and charged with overseeing Bierer's sales force comprised of sales representatives under contract with Bierer.

6. At no point in time during his employment, was I aware that Kennerly was a sales representative for Trystar, Travis, or any third party. Upon learning of these concealed, outside relationships on July 10, 2018, I terminated Kennerly effective July 13, 2018.

7. Since his termination, I have learned through discovery that Kennerly concealed these relationships, and his use of the Bierer sales representatives to further such relationships, through a continuous pattern of lying and deceit to myself, as well as the rest of Bierer management.

8. On July 11, 2018, *after* learning of Kennerly's relationships with Travis and Trystar, I sent Kennerly an email setting forth my realization that actions he had taken around 2012 were steps he surreptitiously took to distance himself from Bierer and his employment with Bierer. At the time the events took place, I accepted Kennerly's benign explanation for the occurrence of each. As to his phone, Kennerly told me he lost his on the West Coast and so he'd gotten a new one. As to establishing a Gmail account, I approved that based on his explanation that Gmail was more user friendly than the bierermeters.com domain. As to receipts, Kennerly complained that the receipts were hard to keep up with, so we compromised and agreed he could just itemize his

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monthly company credit card statements. Finally, as to trip reports, Kennerly gave these to the management team orally at our Monday meetings each week so I did not insist he write them up. However, when he began missing these meetings, I insisted he turn in written reports, which he eventually did towards the latter part of his employment. It did not become clear to me that these actions were all taken in furtherance of his deception until I learned of his relationships with Travis and Trystar on July 10, 2018. *See* Travis Mot. at 5 & Ex. 4 thereto; Trystar Mot. at 5 & Ex. 4 thereto.

9. The Travis quotes submitted in Exhibit 5 for the years 2014-2016 are directed to the attention of Chris & David – low level, non-managerial employees in Bierer's purchasing department. The quotes do not state that Kennerly is a sales representative for Travis. Nothing about these documents discloses that Kennerly is getting a commission on sales to Bierer. Nor do they disclose his efforts to sell Travis products around Bierer and directly to Bierer customers. Furthermore, the information on these quotes that Travis claims identifies Kennerly as a UGD sales representative was never brought to my attention by anyone at any time until after Travis was added to the lawsuit. As to the quote submitted in 2018 (BIERER_PROD_00050751), this quote does not appear to have been sent to anyone at Bierer other than Kennerly. As is evident from the document, it is sent to PG&E and directed to the attention of a PG&E employee ("Jim").

10. In my capacity as President, I instructed Kennerly to develop clamps with Travis for use in Bierer's grounding assemblies. Because of this, I was aware that Kennerly maintained a relationship with Travis, ostensibly on behalf of Bierer, to test clamps and grounds for utility customers with the expectation that Bierer would get the business. When I questioned Kennerly about the status of such business, he told me that Bierer did not get the business because it was

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underbid. While I am now aware that Travis and Kennerly were the parties underbidding Bierer, I did not have this knowledge while Kennerly was an employee of Bierer.

11. While employed with Bierer, I was aware that Kennerly had "open and obvious" business interactions with Travis, which I supported because Bierer distributed Travis products and used Travis clamps in the personal protective grounds that Bierer assembled. I understood that Kennerly was working with Travis, on behalf of Bierer, in matters concerning the clamps and Bierer grounding assemblies. What I was unaware of during Kennerly's employment was that his interactions with Travis were not solely on behalf of his work for Bierer. I never knew that Kennerly was getting paid a commission by Travis to bypass Bierer and sell Travis products to the utility industry using Bierer sales reps until he was terminated.

12. At no point during his employment did Kennerly tell me he was working as a sales representative for Travis or Trystar. Kennerly concealed these relationships throughout his employment. Even when confronted about his relationships on July 11, 2018, following notice of his termination, he continued to lie about the true nature of his relationship with Travis. In his email communication he stated he did not work for Travis in 2014. (Travis Mot. Ex. 4, Kennerly 011384). However, through discovery, I know now that Travis was issuing Kennerly 1099s for commission as early as 2013. Similarly, Kennerly's admission on July 11, 2018 that he was "guilty as charged" when confronted about his secret relationship with Trystar illustrates he had not informed me of the same. *Id.* Moreover, he continued to be deceitful by stating Trystar "had its own network of reps that handle all the selling in which I have nothing to do with." This was a lie. I now know, Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer.

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13. Around 2015 or 2016, the 2014 IEEE Brochure was brought to my attention. *See* Travis Mot. Ex. 3, Bierer 000910. The brochure indicated that as of 2014, Kennerly had worked for Travis UGD for two years. I confronted Kennerly about this brochure in a management meeting. He told me that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because he had assisted Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. He assured me that he was not employed by Travis UGD and laughed off the situation as a simple misunderstanding. This explanation seemed very reasonable to me because of Bierer's extensive relationship with Travis.

I am aware that Travis is now claiming that I should have done more to investigate whether Kennerly was lying to me about the IEEE Brochure. However, at the time I believed Kennerly was one of our most trusted and valuable employees. I personally worked with him for over a decade and believed he was an honest person. I even included him in my Last Will and Testament. Because I trusted him, I accepted his explanation, and it did not occur to me that Kennerly would ever betray my trust and simultaneously work for Bierer and Travis, or any other company. Looking back on it, I would have done the same thing given my knowledge of the situation at that time. If I had gone behind Kennerly's back and continued to ask questions about this brochure, it would have demonstrated to Kennerly that I did not trust him and that would have caused significant morale problems if the statement in the brochure was in fact just a misstatement as he told me. Upon termination, he doubled-down on this lie – "Dick Pelletier provided that information knowing that I developed the clamps and assumed I worked for Travis which I did not." *See* Travis Mot. Ex. 4, Kennerly 011384. Again, it has become evident in discovery Kennerly began receiving compensation from Travis as early as 2013.

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14. I have reviewed the email from David Yang, an employee of General Pacific, dated September 14, 2015. *See* Travis Mot. at 9 & Exhibit 9 thereto. The only Bierer employee this was sent to in 2015 was Kennerly and it was sent to his Bierer Meters email account. Kennerly was a member of the management team and thus his emails would not have been monitored by other management team members. This email was never brought to my attention, and to my knowledge it was not brought to anyone else's attention at Bierer. Thus, this email would not have put me on notice of his secret relationship with Travis.

15. With respect to Exhibit 14 of Travis' Motion, I was aware that Kennerly, in his capacity as national sales manager, interfaced with sales representatives concerning other manufacturer's products that complimented Bierer products. For example, after promoting a Bierer meter, it would be logical for the SNC product - Restore Light – to be brought up as a supplemental product for Bierer meter customers to use in a troubleshooting capacity. As president, I believed a demonstration of knowledge of Bierer products, as well as those that could be used in conjunction with the same, would enhance the stature of Bierer in the industry. Thus, the concerns raised in Exhibit 14 - that Kennerly would be discussing another manufacturer's product, that did not compete with a current Bierer product but instead could be used in conjunction with the Bierer product being presented, did not raise a red flag concerning his deceit. As I have maintained from the beginning, I trusted Kennerly implicitly and thus, when I questioned him about his activities on the road, such as those set forth in Exhibit 14, and he assured me his conduct was above board, I believed him. There is nothing in Exhibit 14 that that could have or did alert me to Kennerly's employment or secret relationship with another manufacturer.

16. I have reviewed the email correspondence dated October 14, 2015, between myself and Kennerly. *See* Travis Mot. at 10-11 & Ex. 10, Kennerly Old Iphone 00003-5; Trystar Mot. at

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5 & Ex. 3 (same). In October of 2015, I had absolutely no reason to suspect Kennerly of any wrong doing pertaining to Travis and Trystar. Bierer annual cable sales using Travis and Trystar products were at their peak. My concerns with Kennerly were generated from his activities locally in South Carolina. Around this time, Kennerly, with my permission, had taken time away from work to go on several golfing trips to Myrtle Beach, SC under the pretext that they were family events for all of the male members of his extended family. Kennerly's sister was married to the son of, what appeared to be, an extremely successful businessman in the electrical contracting business, Jerry Eddins. It was clear to me that Kennerly idolized him. At one point he boasted of Eddin's award of a large multi-million dollar government electrical contract to wire and install the lighting on the Ravenel Bridge in Charleston, South Carolina. As time progressed, Kennerly returned from these trips- which I had been told were merely family outings- talking about meeting "SC big business" and political figures during these and other golfing outings around the Columbia, SC area. It was apparent to me that he was enamored with the business and political connections he was allegedly making. Simultaneously, Kennerly began displaying an abrasive and demeaning attitude toward his fellow employees at work and as more and more of his attention was directed to these in-state family/political outings, he began to fall short of fulfilling the responsibilities in his role at Bierer.

Thus, I sent the email on October 14, 2015, to Kennerly advising him of my observations and concerns, and asking him to evaluate whether he wanted to continue his employment with Bierer. I began to wonder whether Kennerly was making plans to leave Bierer and go to work with Eddins Electric Co. The "outside activities" I was referring to in this email were strictly related to his in-state outings and were in no way related to or evidence of a suspicion on my part that Kennerly was providing sales services to Travis, Trystar, or any third party. At the time I drafted

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this email, I was simply curious whether Kennerly was exploring and/or had more interest in working for Eddins Electric Co. or someone with connections to Jerry Eddins than continuing his employment with Bierer.

Furthermore, upon receipt of this email, Kennerly and I had a meeting where he assured me of his desire to continue in his role at Bierer and increased his efforts to make sure he connected with me and the rest of the management team more frequently. Kennerly did not disclose any outside employment activities with any party.

17. In November 2015, Kennerly submitted a trip report to the management team indicating he had gone to the "high current test lab at Powertech labs" and that he "[m]et with Alex Martin [of] Travis Pattern to assist [with the] lab testing on several items." *See* Travis Mot. at 11 & Exhibit 11. At this time, his participation in such testing did not raise any red flags for me or anyone else on the management team. I tasked Kennerly with developing new clamps with Travis for use in Bierer grounding assemblies. Bierer, at its own expense, routinely sent grounds to the labs to be tested in conjunction with Travis clamps. The testing was usually paid for by utility companies that were considering purchasing our personal protective grounds. Additionally, I was not aware of, nor had I ever seen, the sign-in sheet for the PG&E testing in which Kennerly signed in as a Travis employee. I became aware of that document after Kennerly was terminated.

18. With respect to email correspondence from 2013 between my son Joe Bierer and Dan Moerke of Trystar, these communications do not reflect a knowledge on my part that Trystar was paying Kennerly to divert cable sales around Bierer, using Bierer's sales representatives. *See* Trystar Mot. at 3-4. These communications simply illustrate Bierer was aware that Trystar was selling direct to some of Bierer's customers. Bierer did not have an exclusive agreement with Trystar which prevented this conduct. Therefore, the most we could do was complain to Trystar

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and remind Mr. Moerke that he indicated that Trystar was not interested in selling direct when he first met with Joe Bierer and Kennerly. I do not believe that Mr. Moerke responded to this email or agreed to alter this conduct. As a result, we took steps internally to prevent Trystar from shipping cable directly to Bierer's customers, because Bierer believed that this was the manner in which Trystar was then able to sell direct to its customers. This was not an uncommon problem in the distributorship business and there was nothing to prevent Trystar from doing this. However, we tried to have all bulk cable sales shipped to Bierer, rather than direct shipped from Trystar to Bierer's customer, to prevent Trystar from cutting Bierer out of future sales. Never in my wildest imagination did I believe that Trystar was using my own trusted employee to divert bulk cable sales from Bierer and sell directly to Bierer customers. I did not learn that this was happening until after I terminated Kennerly and received documents and information in the lawsuit we filed against Kennerly.

FURTHER AFFIANT SAYTHETH NOT.

Walter Bierer

Sworn to and subscribed before me
This 28th day of December, 2022

Notary Public for the State of South Carolina
My commission expires: 10/11/2023

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Exhibit B

Affidavit of Joseph Bierer

ELECTRONICALLY FILED - 2023 Jan 03 11:04 AM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants.	Civil Action No.: 2018-CP-40-04841 (In the Richland County Business Court) **AFFIDAVIT OF JOSEPH BIERER**
Jan F. Kennerly, Jr., Defendant/Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.	

Personally appearing before me, Joseph Bierer, after being duly sworn, deposes and states as follows

1. I submit this affidavit in conjunction with the response in opposition of Bierer & Associates, Inc. ("Bierer") to the motions for summary judgment filed by Travis Pattern & Foundry, Inc. ("Travis") and Trystar, LLC ("Trystar").

2. This affidavit is based upon my personal knowledge and the statements made herein are true and correct to the best of my knowledge and belief.

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3. I began working as a full-time employee at Bierer in 2005 where I have remained employed. I am currently a Vice President at Bierer and part of the management team.

4. When I began work at Bierer, Rick Kennerly ("Kennerly") was already employed full-time with Bierer as an engineer. Kennerly remained a full-time employee with Bierer until his termination in July 2018.

5. In 2009, Kennerly transitioned to the role of national sales representative for Bierer. In this position, he was Bierer's interface and "eyes and ears" in the marketplace and charged with overseeing Bierer's sales force comprised of sales representatives under contract with Bierer.

6. At no point in time during his employment, was I aware that Kennerly was a sales representative for Trystar, Travis, or any third-party. Upon learning of these concealed outside relationships on July 10, 2018, Walter Bierer terminated Kennerly effective July 13, 2018.

7. Since his termination, I have learned through discovery that Kennerly concealed these relationships, and his use of the Bierer sales representatives to further such relationships, through a continuous pattern of lying and deceit to myself, as well as the rest of Bierer management.

8. The Travis quotations submitted in Exhibit 5 for the years 2014-2016 are directed to the attention of Chris & David – low level, non-managerial employees in Bierer's purchasing department. The quotations do not state that Kennerly is a sales representative for Travis. Nothing about these documents discloses that Kennerly is getting a commission on sales to Bierer. Nor do they disclose his efforts to sell Travis products around Bierer and directly to Bierer customers. Furthermore, the information on these quotations that Travis claims identifies Kennerly as a UGD sales representative was never brought to my attention by anyone at any time until after Travis was added to the lawsuit. As to the quotation submitted in 2018 (BIERER_PROD_00050751), this

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quotation does not appear to have been sent to anyone at Bierer other than Kennerly. As is evident from the document, it is sent to PG&E and directed to the attention of a PG&E employee ("Jim").

9. Walter Bierer instructed Kennerly to develop clamps with Travis for use in Bierer's grounding assemblies. Because of this, I was aware that Kennerly maintained a relationship with Travis, ostensibly on behalf of Bierer, to test clamps and grounds for utility customers with the expectation that Bierer would get the business. When Kennerly was questioned about the status of such business, he told the management team that Bierer did not get the business because it was underbid. While I am now aware that Travis and Kennerly were the parties underbidding Bierer, I did not have this knowledge while Kennerly was an employee of Bierer.

10. While employed with Bierer, I was aware that Kennerly had "open and obvious" business interactions with Travis, which I supported because Bierer distributed Travis products and used Travis clamps in the personal protective grounds that Bierer assembled. I understood that Kennerly was working with Travis, on behalf of Bierer, in matters concerning the clamps and Bierer grounding assemblies. What I was unaware of during Kennerly's employment was that his interactions with Travis were not solely on behalf of his work for Bierer. I never knew that Kennerly was getting paid a commission by Travis to bypass Bierer and sell Travis products to the utility industry using Bierer sales reps until he was terminated.

11. At no point during his employment did Kennerly tell me he was working as a sales representative for Travis or Trystar. Kennerly concealed these relationships throughout his employment. Even when confronted about his relationships on July 11, 2018, following notice of his termination, he continued to lie about the true nature of his relationship with Travis. In his email communication he stated he did not work for Travis in 2014. (Travis Mot. Ex. 4, Kennerly 011384). However, through discovery, I know now that Travis was issuing Kennerly 1099s for

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commission as early as 2013. Similarly, Kennerly's admission on July 11, 2018 that he was "guilty as charged" when confronted about his secret relationship with Trystar illustrates he had not informed me of the same. *Id.* Moreover, he continued to be deceitful by stating Trystar "had its own network of reps that handle all the selling in which I have nothing to do with." This was a lie. I now know, Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer.

12. Around 2015 or 2016, Kennerly was confronted during a management meeting about the 2014 IEEE Brochure. *See* Travis Mot. Ex. 3, Bierer 000910. The brochure indicated that as of 2014, Kennerly has worked for Travis for two years. Kennerly stated that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because he had assisted Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. He steadfastly denied working for Travis and laughed off the situation as a simple misunderstanding. This explanation seemed very reasonable to me because of Bierer's extensive relationship with Travis.

13. I am aware that Travis is now claiming that Bierer management should have done more to investigate whether Kennerly was lying to us about the IEEE Brochure. However, at the time Kennerly was one of our most trusted and valuable employees. I personally worked with him for close to a decade at that point in time and trusted him completely. Because I trusted him, I accepted his explanation, and it did not occur to me that Kennerly would ever betray my trust, or Bierer, and simultaneously work for Bierer and Travis, or any other company. Looking back on it, I would have done the same thing given my knowledge of the situation at that time. Upon termination, he doubled-down on this lie – "Dick Pelletier provided that information knowing that I developed the clamps and assumed I worked for Travis which I did not." *See* Travis Mot. Ex. 4,

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Kennerly 011384. Again, it has become evident in discovery Kennerly began receiving compensation from Travis as early as 2013.

14. I have reviewed the email from David Yang, an employee of General Pacific, dated September 14, 2015. *See* Travis Mot. at 9 & Exhibit 9 thereto. The only Bierer employee this was sent to in 2015 was Kennerly and it was sent to his Bierer Meters email account. Kennerly was a member of the management team and thus his emails would not have been monitored by other management team members. This email was never brought to my attention, and to my knowledge it was not brought to anyone else's attention at Bierer. Thus, this email would not have, and did not, put me on notice of his secret relationship with Travis.

15. With respect to Exhibit 14 of Travis' Motion, I was aware that Kennerly, in his capacity as national sales manager, interfaced with sales representatives concerning other manufacturer's products that complimented Bierer products. For example, after promoting a Bierer meter, it would be logical for the SNC product - Restore Light – to be brought up as a supplemental product for Bierer meter customers to use in a troubleshooting capacity. I have done this myself during training exercises in the Bierer booth at shows. I believe a demonstration of knowledge of Bierer products, as well as those that could be used in conjunction with the same, enhance the stature of Bierer in the industry. Thus, the concerns raised in Exhibit 14 - that Kennerly would be discussing another manufacturer's product, that did not compete with a current Bierer product but instead could be used in conjunction with the Bierer product being presented, did not raise a red flag concerning his deceit. As I have maintained from the beginning, I trusted Kennerly and thus, when Kennerly was questioned about his activities on the road, such as those set forth in Exhibit 14, and he assured myself and the rest of the management team his conduct

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was above board, I believed him. There is nothing in Exhibit 14 that that could have or did alert me to Kennerly's employment or secret relationship with another manufacturer.

16. In November- 2015, I, along with other members of the management team, received a trip report from Kennerly indicating he had gone to the "high current test lab at Powertech labs" and that he "[m]et with Alex Martin [of] Travis Pattern to assist [with the] lab testing on several items." *See* Travis Mot. at 11 & Exhibit 11. At this time, his participation in such testing did not raise any red flags for me or anyone else on the management team. Walter Bierrer tasked Kennerly with developing new clamps with Travis for use in Bierer grounding assemblies. Bierer, at its own expense, routinely sent grounds to the labs to be tested in conjunction with Travis clamps. The testing was usually paid for by utility companies that were considering purchasing our personal protective grounds. Additionally, I was not aware of, nor had I ever seen, the sign-in sheet for the PG&E testing in which Kennerly signed in as a Travis employee. I became aware of that document after Kennerly was terminated.

17. I have reviewed my email to Dan Moerke of Trystar dated April 9, 2013. *See* Trystar Mot. at 4 & Ex. 1 thereto. This communication does not reflect knowledge on my part that Trystar was paying Kennerly to divert cable sales around Bierer, using Bierer's sales representatives. Instead, it simply illustrates that I was aware that Trystar was selling direct to some of Bierer's customers.

18. I met Dan Moerke of Trystar at the ICUEE trade show in Lousiville, Kentucky in October 2009. I spoke with him at the show and then he, Kennerly, and I had dinner that evening. Mr. Moerke indicated that Trystar was not in the utility market at that time and that Trystar was not running the correct stranding or insulation for ASTM F855 rated grounding cable. We discussed the possibility of Trystar making ASTM F855 rated grounding cable for Bierer that

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would be private labeled and resold by Bierer to Bierer customers. At that point in time, it was unknown whether Trystar had the capability to produce such cable.

During this discussion, I also raised a concern with Mr. Moerke that if Bierer helped Trystar develop such cable and Bierer sourced cable from Trystar, Bierer did not want Trystar direct sourcing to Bierer's customers. In response to this concern, Mr. Moerke assured me that Trystar had no interest in selling direct to Bierer customers because Bridgewater (Trystar) did not have the outside sales force. After helping Trystar develop cable suitable for grounding, Bierer began to order private-labeled cable from Trystar in January of 2010 to provide to its customers.

As set forth in my April 2013 email, a combination of factors led Bierer to believe that Trystar was "circumventing [Bierer's] efforts to establish and support new sales" by selling directly to Bierer customers. *See* Trystar Ex. 1. At that time, Bierer did not have an exclusive agreement with Trystar which prevented this conduct; therefore, the most we could do was complain to Trystar and remind Mr. Moerke that he indicated that Trystar was not interested in selling direct when he first met with me in 2009.

Mr. Moerke did not respond to this email nor alter his conduct. As a result, we took steps internally to prevent Trystar from shipping cable directly to Bierer's customers, because Bierer believed that this was the manner in which Trystar was then able to sell direct to its customers. We tried to have all bulk cable sales shipped to Bierer, rather than direct shipped from Trystar to Bierer's customer, to prevent Trystar from cutting Bierer out of future sales. At no time did I believe, or was aware, that Trystar was using a trusted Bierer employee to divert bulk cable sales from Bierer and sell directly to Bierer customers. I did not learn that this was happening until after Kennerly was terminated and I received documents and information in the lawsuit we filed against Kennerly.

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19. I have reviewed the email correspondence dated December 5, 2013. *See* Trystar Mot. at 4 & Ex. 2 thereto. This email illustrates the belief that I, as well as upper management held - that Trystar was undermining Bierer's distributor sales. Specifically, I believed that once Trystar was provided a Bierer customer's information to drop ship an initial order placed through Bierer, Trystar thereafter began selling directly to that customer on all future sales – bypassing Bierer in the transaction. Again, Bierer did not have an exclusive agreement with Trystar and there was nothing Bierer could do to prevent this from happening except refrain from providing Trystar with customer addresses to drop ship cable.

As reflected in my email, Bierer implemented a policy to refrain from providing such information and I was surprised when I saw that in December of 2013 this had occurred. This is just one example of a time when we questioned Kennerly about why Kennerly or the sales team he managed provided Trystar with Bierer customer addresses for direct shipments. *See* Trystar Mot. Ex. 2 ("I thought we were all in agreement this wasn't going to continue to happen?"). As was par for the course, and occurred in this instance, Kennerly, individually or in conjunction with a Bierer sales representative, would provide a justification for the conduct such as it being a "rush order." *See Id.*

The 2013 email correspondence relied on by Trystar in its Motion simply reflects Bierer's knowledge that Trystar was doing exactly what Mr. Moerke assured me it would refrain from doing in 2009. Again, without an exclusivity agreement, there was nothing Bierer could do to prevent this other than to instruct Kennerly that he and the reps he managed were no longer to provide Trystar with addresses to drop-ship to Bierer customers. There was never an indication, nor any facts, that would have led me to believe at any time during Kennerly's employment that Travis, Trystar, and other third parties had provided him and the Bierer sales force with financial

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incentive to redirect business away from Bierer for their financial gain. Unfortunately, Bierer did not begin to learn of this deceitful conduct until July 2018.

FURTHER AFFIANT SAYTHETH NOT.



Joseph Bierer

Sworn to and subscribed before me
This 28TH day of DECEMBER, 2022
Notary Public for the State of South Carolina
My commission expires: JAN. 26, 2032

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Exhibit C

Travis Garske Deposition Excerpts
September 29, 2022

ELECTRONICALLY FILED - 2022 Dec 28 8:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND

BIERER AND ASSOCIATES, INC.,
Plaintiff,
vs.
JAN F. KENNERLY, JR., DANIELLE KENNERLY, EUSA, LLC, J&D FARMS, LLC, TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC.; AND DAVID DEINEK,
Defendants.
_____/

C.A. No.: 2018-CP-40-04841
(In the Richland County Business Court)

JAN F. KENNERLY, JR.,
Defendant/Third-Party Plaintiff,

vs.

WALTER BIERER, BRENT JEFFRIES, AND JOSEPH BIERER,
Third-Party Defendants.

VIDEOTAPED DEPOSITION OF TRAVIS GARSKE

DATE TAKEN: Thursday, September 29, 2022

TIME START: 12:07 p.m.

TIME END: 1:42 p.m.

LOCATION: Conducted via Videoconference

REPORTED BY: SHERI L. BYERS, RPR
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803.212.0012

grounding assembly.

Q. Yeah, he was not selling Bierer's grounding assembly, is your understanding, correct?

A. No, he wasn't.

Q. Bierer continued to purchase private-label clamps from Travis for use in Bierer's grounding assemblies, correct?

A. Correct.

Q. And so you understood from that that Bierer was selling grounding assemblies to its customers, correct?

A. I understood that Salisbury was selling them, and Future Machine was selling them, Hastings was selling them.

Q. And during the period of time until Rick Kennerly was terminated by Bierer and Associates, he was employed by Bierer. You were aware that he was employed by Bierer in some capacity?

MS. BRYANT: Object to the form.

BY MR. GRIFFIN:

Q. Were you aware -- okay. Let me start over.

Mr. Garske, were you aware that from the date Mr. Kennerly began repping the UGD product line worldwide for Travis selling grounding assemblies, that up until July of 2018, he was employed by

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Bierer?

A. That was none of my business.

Q. Okay. Why did you not think that was any of your business?

A. Because I run my own business. I don't keep track of Mr. Bierer's employees. I keep track of my employees and when Mr. Bierer kept placing orders with us, I had to assume he thought we were a great supplier.

Q. Yes, sir, Mr. Garske, this lawsuit is not about whether your product was inferior or not. No one's claiming that whatsoever.

Do you think it would be appropriate if one of your employees was also a sales rep for another company that made similar product lines as yours?

MS. BRYANT: Object to the form.

THE WITNESS: Am I still talking?

BY MR. GRIFFIN:

Q. Yes, sir. My question, Mr. Garske, is: Do you think it would be appropriate for one of your employees to be a sales rep for a competitor of yours?

MS. BRYANT: Object to the form.

But you can answer, if you have an answer.

THE WITNESS: Well, first of all, I don't

really have outside sales people, and I monitor everything that goes on very closely and it wouldn't last very long if it happened.

BY MR. GRIFFIN:

Q. And why would it not last long if it happened, Mr. Garske?

A. Because I would terminate that person.

Q. You would terminate them because -- because why?

A. Because why?

Q. Yes, sir.

A. I have no control over what he does after he puts in his eight hours with me. But I wouldn't like the fact that he was competing with me, so I would let him go.

Q. Was Travis -- to your knowledge, was Travis competing for the same customers in the grounding assembly as Bierer was competing for?

A. I would have no way of knowing that. They don't send me records of who they sell to.

Q. Were you aware that Mr. Kennerly had agreements with sub reps that -- that he brought to the table to sell the Travis UGD product line?

A. That, I really wasn't aware of it, but it makes no difference to me.

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about everyone's business other than my own.
BY MR. GRIFFIN:
Q. And what do you consider to be a kickback, Mr. Garske?
A. What do -- some financial benefit in some way from the business that's being sent to the supplier.
Q. Okay. And earlier I asked you whether you were aware that Mr. -- whether Mr. Kennerly was getting a commission on products that Bierer purchased from Travis, and I think you said you didn't think so; is that right?
A. I didn't think so.
Q. If, in fact, he is getting -- or was getting commission on products purchased by Bierer from Travis, would you consider that a kickback?
A. For sure.
Q. Okay. And would you consider that to be improper?
A. I would consider it Mr. Bierer's job to figure that out, not mine.
Q. Well, would you want your company paying an employee of another company a kickback?
A. I wouldn't, but I can't speak for Mr. Bierer.

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Q. Well, would you want anybody within Travis to pay a kickback to Mr. Bierer's employee?

A. If they were -- first of all, I can't answer for them. I don't know what they're thinking.

Q. Well, you're -- I'm talking about Travis, the company --

A. What you're trying to do is put me in the wrong here. I wasn't the guy in the wrong. It was Rick.

Q. Okay. Well, you would agree it is wrong to pay a kickback, correct?

A. I don't think it's good business practice. Do people get put in jail for that? I don't know if there's a term for that kind of --

Q. Okay.

A. -- thing.

Q. And you wouldn't -- you wouldn't want your employees to pay a kickback because it's not good business practice, right?

MS. BRYANT: Object to the form.

MR. GRIFFIN: You can answer it, Mr. Garske.

THE WITNESS: I wouldn't like my employees doing that behind my back.

BY MR. GRIFFIN:

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Exhibit D

Walter Bierer Deposition Excerpts
February 24, 2022

ELECTRONICALLY FILED - 2022 Dec 28 8:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

State of South Carolina)
)
County of Richland)
)
Bierer and Associates, Inc.,) 2018-CP-40-04841
Plaintiff,)
v.) Continuation of
)
Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC, Travis Pattern & Foundry, Inc., Illinois Tool Works, Inc., and David Deinek,) Video Deposition
of
Walter Bierer
Defendants.)
_____)
Jan F. Kennerly, Jr.)
)
Third-Party Plaintiff,)
v.)
)
Walter Bierer, Brent Jeffries, and Joseph Bierer,)
)
Third-Party Defendants.)

Date: February 24, 2022

Time: 9:31 a.m.

Location: Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina

Reported by
Cindy H. Patterson

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manufacturing industry generally and shield his wrongdoing activities from scrutiny. For example, Bierer and Associates is informed and believes that at some point while he was employed as an officer of Bierer and Associates and without authorization, Kennerly began presenting himself to customers and others in the industry as essentially an independent marketing expert or broker."

Q Was that allegation true when -- when you allowed it to be asserted in this case?

A Well, here again, I didn't write that particular thing, but as you say, I did -- I did approve it. What -- what's -- what are you trying to make of that? What's the issue there?

Q Well, my question: Is it -- is it true?

A Okay. "Kennerly's cell phone and e-mail switch was one of the several steps he took to disassociate himself." After reviewing all of the, you know -- well, we didn't have to review anything. That -- that appeared to be what was true, that part of it. Okay. And, you know, he did it under -- under, I guess you could say, "questionable" circumstances. Like his cell phone, he called me from out on the West Coast one time, Oregon, Washington State, I don't remember. Seems like he was on the West

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Coast.

Q Yes.

A Said he had lost his cell phone --

Q Yes.

A -- and that he could not get another cell phone because his cell phone was tied up in -- you know, in a Bierer account.

Q Yes.

A And I told him, you know, if he needed a cell phone, "Just go get one," and he did. So, you know, he got a new cell phone, and it was -- it was disassociated from the Bierer account. And I -- I think we've tied that activity into, actually, some of his -- his -- his -- and since then, I think we've tied the -- the switch of that cell phone right into some of his corrupt activities --

Q Yes.

A -- the time -- the time frame in that. So, you know, that part could very well be true.

He also wanted to get a Gmail account. And here again, I've never operated on a Bierer Meter account. I've been operating on an AOL account since day one.

Q Yes.

A I don't really see anything wrong with having, you

know, a different account. You know, to me, you know, like a gun's no more dangerous than the guy who uses it, an e-mail account's no more dangerous or corrupt than the guy who uses it.

Q Yes.

A So I didn't really see any problem with him doing those things. But, here again, that appears as though that was his first step in -- in -- in -- in these statements here, wanting to disassociate himself from Bierer.

Q Is that paragraph true, that you allowed to be filed in this case?

A Well, there's a lot of parts to that paragraph. I would say the majority of it's true. There could be something, yeah. You know, I'd have to read and study each detail.

Q Take your time. Tell me if there's anything in there that's false.

A Okay. The -- the last question, you -- you could raise a question mark about it: "Kennerly began presenting himself to customers and others in the industry as essentially an independent marketing export -- expert or broker." That -- that appears to be what he did with -- with all of you guys: Trystar, Travis, ITW. That appears to be what he

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unclear as to you saying that's not correct, or it is correct. I -- I'm confused as to the answer, if you don't mind.

MR. BEACH: Okay.

Q Explain your answer, if you would. Why is that not correct?

A Because I didn't know.

Q You did not know?

A I did not know.

Q Okay.

MR. BEACH: So you were right, Jim. He misunderstood my question.

MR. GRIFFIN: Right. Right.

Q So I'm going to ask it again. In -- in spite of all of this, is it correct that you did not know until July 10th of 2018 that Mr. Kennerly was acting as a sales representative to sales -- to sell Travis's grounding products?

A I absolutely did not know of his activities with Travis as -- as -- as receiving commissions and having contracts -- possible contracts with them and receiving money. I knew absolutely nothing of that. Absolutely nothing.

Q Okay.

A And -- and here again, the inference is that I

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Q Okay. And this was during a time that he had a relationship with Bierer where he was actually a director of -- of the company, correct?
A He was a vice president of engineering and operations. And --
Q Okay.
A -- initially, it was more toward -- excuse me -- engineering. And as time went on, the engineering portion dropped away, and it was more operations -- outside operations. And when that refers to operation, that does mean outside operations. It doesn't mean inside plant operations.
Q Okay. And yet, in spite of all this, you've testified that during those many years prior to July the 10th, 2018, neither you nor Bierer had any idea that he was out --
A I will state that as clear as I can.
Q -- doing this?
A I had absolutely no knowledge that Kennerly had developed schemes with Travis, Trystar, and ITW to divert sales around -- you know, through my sales channels.
Q Uh-huh.
A I had absolutely no knowledge of any of this --
Q Uh-huh.

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A -- divert sales through my sales channels, interface with the customer, choose who those sales were going to go to either through his channels or my channels. I had absolutely no knowledge of any of that.

Q Okay.

A Absolutely none.

Q All right. So --

A And if I would have -- I mean, just think about it. If this guy's cheating me out of millions of dollars, I'm going to sit around and let him continue to work for me? I mean, how --

Q Right.

A I mean --

Q Okay.

A -- it's almost -- it's almost ludicrous --

Q Okay.

A -- to even ask that question.

Q Okay. So --

A I mean, he -- he earned millions in sales commissions --

Q Uh-huh.

A -- which should have been mine. So I'm going to say, "Fine, go ahead and do that"? That's -- I'm okay with that? I mean, I -- I don't know. The

Exhibit E

Walter Bierer Deposition Excerpts
February 23, 2022

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State of South Carolina)
)
County of Richland)

Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC, Travis Pattern & Foundry, Inc., Illinois Tool Works, Inc., and David Deinek, Defendants.)
2018-CP-40-04841

Video Deposition

of

Walter Bierer

Jan F. Kennerly, Jr. Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants.

Date: February 23, 2022

Time: 10:40 a.m.

Location: Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina

Reported by
Cindy H. Patterson

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he would be terminated on the 13th. He was out of town somewhere.

Q Effective the 13th? I gotcha.

A Yeah. That's right.

Q But the notice was -- the decision was made on the 10th?

A Yep.

Q All right. What were your exact reasons at that time for terminating him as an employee?

A I -- it turned out an obvious conflict of interest.

Q All right. Describe that.

A Boy, what a question: "Describe that." Let's just say that it turns out -- a lot went on that day -- the day it -- okay. I determined that -- I had been given information that Kennerly had been working with three companies unbeknownst to me, okay? And what became apparent real soon is that Kennerly had hijacked and corrupted all of Bierer's sales channels and allowed certain manufacturers such as Trystar and Travis and ITW to leapfrog right into our customers. They didn't use their own sales channels, they used Bierer sales channels. That's what became apparent to me.

And he was -- he was receiving profits, payola, bribe money -- I'm not sure what the heck

it was. Why they paid him, I'll -- you know, it's beyond me why they would pay -- you know, my employee, my VP, my trusted employee, why they would pay him, you know, is still a mystery to me, other than that he gave -- he provided something to them of value. And the only thing that I can come up with that he provided of value is going through our sales channels rather than their own. And if you ask any one of these people -- Trystar, Travis, ITW -- "Why didn't you go through your own sales channels?" they'll have -- I'm not sure what they'll come up with, but obviously, there was some advantage to going through our sales channels and giving Kennerly payout money.

Q When you say your "sales channels," are you referring to the --

A The reps that --

Q -- sales reps --

A My sales channel -- my primary sales channel is Rick Kennerly. He's vice president of national sales, okay? I appointed him that with all that trust in the world, okay? That's my primary sales channel. The reps are secondary. I had contracts with them, okay? He corrupted every damn one of them.

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A Exactly.
Q It's in the national newsletter?
A That's right. And just about every --
Q I assume you didn't know about it?
A No. I did. Just about everybody in our office saw this.
Q Okay. And what happened?
A Yeah. We -- we review that. In our Monday morning meeting, I brought it to Rick. I said, "Rick, what's all this about?"

He said, "I didn't have anything" -- he laughed it off. He laughed it off. And he used almost exactly the same words in his e-mail to me after I terminated him -- after I sent him his termination notice. "I didn't have anything to do with that." Whatever his name in here -- "wrote that for me." He laughed it off.

At that point I still had lots of faith and trust in Kennerly, so I believed him, and everybody in the office believed him. He didn't have anything to do with it. It was a misprint. That's what -- it wasn't a misprint, it was he didn't have anything to do with it. Rick said that, you know, "Since I'd been working there, you know, for a couple of years developing these clamps, that he

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just assumed," or whatever.

Q Are you aware of any minutes from that meeting or --

A But --

Q -- recording of that meeting --

A -- let -- let me say this: You know, when he denies that, he is a liar. He is a liar, okay? And if we go through this, I'm going to point out time and time again, this is the most productive liar you will ever run into in your life. He's a very cunning liar. He lies with purpose and without remorse. And that's what you'll find as we go through this, because he just lies and lies. And everything in hindsight now, he's the biggest liar, probably of -- certainly of anybody in this room.

Q The -- at this point, within this national newsletter, you would agree that at least the IEEE was aware that Rick was working with Travis; they put it in their newsletter?

A What -- what exactly does it say here? Does it say he's an employee or it just says he's working with them? You know, working with somebody and being employed by them and receiving money's two different things. What page were we on?

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exhibit is this?

MR. ROZELSKY: Twenty-four.

MR. KELCHNER: Twenty-four.

MR. PADGET: Twenty-four.

MR. BEACH: Twenty-four. Thank you.

Q This e-mail from -- it says "Bierer Account," which is "rickkennerly@bierermeters.com." You agree that's Rick's email address at Bierer's, correct?

A Yes. That's correct.

Q And on Thursday, November 12th, 2015, he e-mailed Joe, Jamie, Brent, and you, wbierer@aol.com, his week -- weekly report for activities.

A Yeah.

Q You see that?

A Uh-huh.

Q Now, down at the very last paragraph, he said, "Thursday: High current test lab at Powertech labs. Met with Alex Martin, Travis Pattern to assist lab testing on several atoms (verbatim)" -- "items."

A Uh-huh.

Q "Will share new material list with Brent and Chris Monday," and then his flight schedule. Do you see that?

A Uh-huh.

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Q So Rick was informing everybody at Bierer that he was meeting Alex Martin, Travis Pattern to assist in testing on several items. Do you see that?
A Yes.
Q And so he notified everybody of that --
A Uh-huh.
Q -- in November of 2015?
A On at least one test, yeah.
Q And were there others where he notified you about that?
A Not that I recall.
Q He wasn't hiding that he was working with Travis in the lab?
A I instructed him to. I instructed him to. We were developing new clamps, you have to test them. As I recall the conversation on the testing -- and -- and actually, I saw all this material on -- on -- on his computer, he showed it to me. The test results, okay, that -- that PG&E -- he told me that PG&E was conducting all the tests. We sent them tens of thousands of grounds, okay? We sent them to PG&E for test purposes. Kennerly said that he was going to -- that PG&E was going to conduct those tests themselves, okay? -- that -- excuse me -- PG&E was going to conduct them. I didn't ask

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him where.

Q Do you know what year that was that you're referring to?

A Probably 2013/'14, somewhere in there.

Q Well, when you go to a test lab, it's expensive to use it, right?

A Yes. That's right.

Q Do you -- you know, I mean, these things can cost 10/15/$20,000 to use the labs.

A A day, yeah.

Q Now, Rick's mentioning that he's in test lab with Travis.

A Yeah.

Q Does that mean it's associated with a 15/$20,000 expense to be Bierer --

A No.

Q -- for testing your clamps?

A No.

Q So --

A I -- I don't remember which deal this is, but he told me that PG&E was -- in -- in one of the major tests that we sent them all the grounds to test, he told me PG&E was going to pay for it.

Q So PG&E was going to pay the test your grounds?

A That's right.

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Q Is that something that's routine in the industry?
A I would say so. In other words, we coughed up, you know, at least 10/$15,000 worth of grounds, you know, and -- and they test them.
Q And then you sell them to them?
A That's right. But we never did, Kennerly did. Or I would say he received -- if you want to call it that -- "commissions."

MR. PADGET: I'm at a good stopping point right now.

MR. GRIFFIN: Great.

MS. FOX: Perfect.

MR. GRIFFIN: I think it's a long day for everybody.

MR. PADGET: Before -- before we go off, let me just put something on the record real quick. Mr. Bierer, we're going to conclude the deposition for today; we're going to continue tomorrow. (To all counsel) What time do we want to start? Nine or ten?

MR. ROZELSKY: I'd rather start at nine.

MR. PADGET: Let's do it at nine. Is that okay with y'all?

MR. ROZELSKY: If that works for y'all?

MR. GRIFFIN: Let's say 9:30.

Exhibit F

Joseph Bierer Deposition Excerpts
August 31, 2022

ELECTRONICALLY FILED - 2022 Dec 28 8:18 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004841

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Bierer and Associates, Inc., Plaintiff, v. Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC, Travis Pattern & Foundry, Inc., Illinois Tool Works, Inc., and David Deinek, Defendants. _____ Jan F. Kennerly, Jr. Third-Party Plaintiff, v. Walter Bierer, Brent Jeffries, and Joseph Bierer, Third-Party Defendants,	Case No: 2018-CP-40-04841 VIDEO DEPOSITION OF Joseph Scott Bierer

Date: Wednesday, August 31, 2022
Time: 9:12 a.m.
Location: Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina

Reported by:
Darlene Pastel, CVR-CM

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My question is: Were you, were Brent, were Walt aware that Rick was promoting other manufacturers' products in April 2016?

MR. GRIFFIN: Object to the form.

A This promoted the SNC meeting, the Monday meeting. These type of actions, yes. Promoted the -- that meeting.

Q (MR. PADGET) So you're saying --

A Or prompted that meeting.

Q This preceded it?

A Yes.

Q And then later you had the meeting?

A Yes.

Q Now, going on in this email, Walt responds back to Brent. Says, "Brent, you should reserve comment on Rick's" -- before we get into that.

What does "off" time in quotes mean?

A So Jamie -- she's referring to his off time, and she's wanting to know if they're using their time efficient regarding Bierer. That's Jamie's question. That's the way I read her question.

Brent is a very efficient person. When Brent operates, he's always doing something. He has no off time. Brent doesn't understand the, quotation, "off." So in his idea -- "what are they doing?"

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So as Brent goes on, he's going back to the SNC device again. Because, again, we had a meeting over this, and, again, Rick explained it away as "it was a logical device to promote after our ST 800." Which if you think about it, electrically, when you troubleshoot, it is. It would come post our ST 800 in the troubleshooting process.

So that's not unusual. I mean, if you mention other manufacturers while you're training, that's not unusual. I've done that myself.

Q What about selling for other manufacturers in their booth?

A That's the problem. When you say -- when you use the word "sell," you're crossing a line. That's not what we did.

Q And your management team was made aware of that selling via Jamie's email in April 2016.

A That's not the way Rick explained it.

Q But that's the way it was originally reported to you all?

A Yes.

Q The meeting focused on SNC?

A That Monday meeting pretty much focused on the SNC.

Q What about this report of -- "from talking with

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again, I'm not going to state the manufacturers, but I've stated other manufacturers that can assist in troubleshooting using the ST 800. So that would be a logical sequence of events to state that device.

Q Did --

A So that's what -- when I say approval, that's what I'm approving, is Walter has that same opinion. He stated that in the meeting. So I'm just agreeing with his opinion.

Q Are you aware of any meeting minutes from this -- for this meeting?

A No.

Q That's not one of those that got put down on paper or in an email and circulated amongst the company?

A I'm not aware of a document.

Q So you had the meeting, asked Rick about SNC, and asked him about selling products at SNC's booth.

And how did he respond?

A Just as I stated a moment ago. So in the meeting -- again, the products aren't being brought up in a selling capacity. The products are being brought up in a troubleshooting capacity.

So in a troubleshooting capacity, the SNC device, again, logically, makes sense. If you're

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trying to restore power in a home, you use the ST 800 device first. Then you use the Restore-Lite, assuming the power was determined bad by some means or another. That's a logical device to use.

Q Did you confront Rick about Mr. Scherer's report that someone at Bierer was selling the Restore-Lite product?

A Yes. That's all part of the meeting.

Q And what was Rick's response to that?

A That he was just talking about the device, using it after the ST 800.

Q What was the product that was on the table in these photographs that you're referencing?

A I don't know.

Q Do you have the document? Not convenient. We might come back to that one then.

What did your mom mean by "Rick is doing business"?

A I don't know. You would have to ask her that.

Q What did you understand that she meant?

A Just what I said a moment ago. She's agreeing with Walter, in my opinion, as far as logical, using the device after the ST 800.

Q Was any further investigation taken to follow up on

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think -- right around in '13 or '15, he either did not attend -- there was one of those years he did not attend. I may have the dates wrong. But those are all odd years.

Q Uh-huh.

A But for the most part, the majority of the time, yes, we attended those together. I only attended one IEEE prior to his termination. That was held in Chicago, and we were together then.

Q You didn't -- are you an IEEE member?

A No.

Q Do you get any of their publications?

A We do.

Q They send out newsletters?

A That's correct.

Q And Bierer gets those?

A We do.

Q And you have for the duration of this?

A I still see them from time to time, but I can't answer that with 100 percent certainty. We get them on a regular basis.

Q And I know obviously part of this case came from what was alleged to be your discovery of an IEEE publication from 2014 --

A That's correct.

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Q -- where Rick is presenting at the conference. And it's described as on behalf of Travis?
A Well, it's on behalf of Bierer and Travis.
Q Yeah.
A Yes.
Q All right. Did -- when did you first learn about that?
A It was sometime after that publication was released, and it was very similar to the SNC. So, again, Rick was confronted with that. He explained it away as somebody wrote his biography incorrectly. He didn't write the biography. He actually says that in the emails to Walter after he was terminated. He basically restated that same thing, that somebody else wrote the biography.
Q You had been to the IEEE shows before prior to 2014?
A I've been to one, and that was in 2007, I believe. Or excuse me. Could have been 2008. They hold them essentially every year. So I'm not sure about the exact date. You could look back at the records. It was held in Chicago, whatever year that was.
Q And who all attends these IEEE events?
A So the IEEE is steered more towards engineers,

depositions is worked for or worked with.

There's no secret he's working with Travis. I mean, in his trip reports he's going up there to test clamps with Travis, to us. It's not a secret. The secret is -- PG&E. He gave a good example. The secret is: Where does the money go when the PO is sent out? That's the secret.

From what he tells us, like the PG&E, we got underbid. So the secret is: Where did the money go that PG&E -- when they bought those clamps, those assemblies, where did that money go? That's the secret. It went to him. It went to Travis and it went to Trystar.

Just like the long explanation he had that -- he actually formed our complaint much better than we ever did in his conversation with our attorney when he's talking about Duke Energy.

I'll let you finish there.

Q Go ahead.

A So he explains the inception, which we have it on emails. Duke invites him there and lists them: Bierer and Associates, Richard Rindone with Safety Test. He goes there to talk about high arcs or ours, fault currents, parallel grounds, triple grounds. You name it. As Bierer and Associates.

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That's not a secret.

Okay. If he sells grounds to these people, we know he has to say we're using Travis clamps, Trystar wire. All this stuff. That's not a secret. None of that is a secret. It's when -- like a year later or however long it took to get that $11 million purchase order -- and he explains it in his deposition in clear detail -- where did the PO go? That's the secret. That's the part we never knew.

But when you're talking about, you know, him -- you know, saying the Travis clamp or Trystar cable, that's not a secret. It's when the PO is sent. That's the secret. He always tells us we didn't get it. We got underbid. You know, something happened. Yeah, he outbid us. Our own employee, using these companies. That's the secret.

So working with and working for -- that's two different things. You work with somebody, you assume you're not getting paid by that company. You work for somebody, you're getting paid. So when he says in a trip report "I'm going up there to work with Travis, you know, on these clamps," that's not a secret. We read that and go on about

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A We never sold anything directly to Travis Pattern.
Q Did you not sell ferrules to Travis Pattern?
A No.
Q Did you sell ferrules to -- you say not directly.
Did you sell ferrules indirectly to Travis Pattern?
A I'm aware of us selling ferrules to Future Machine.
Q Future Machine. Okay. But you don't believe
Bierer sold any ferrules to Travis Pattern
directly?
A I'm not aware of a single invoice from Travis
Pattern -- or excuse me -- an invoice from us to
Travis Pattern. I'll get that correct.
Q Okay. If Travis Pattern had been purchasing
ferrules from Bierer, does that imply that -- well,
let me ask you this. You learned at some point
that Travis Pattern was actually making grounding
assemblies and selling them itself; correct?
A Post-termination.
Q Post-termination.
A That's correct.
Q Okay. And you say that Bierer -- that you're
unaware of Bierer selling ferrules to Travis
Pattern pretermination; correct?
A Correct. We never sold Travis anything.
Q Okay. You sold ferrules to Future Machine?

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A That's correct.
Q Regularly?
A I wouldn't say regularly. I wouldn't describe it as that. To me that insinuates like on a weekly basis or something. So no.
Q Enough to support an assembly process for grounding --
A We were told by Kennerly that Bud Dygert -- he ran Future Machine.
Q Yeah.
A That he was using them for repairs, local repairs, as I recall, or some of the utilities around that area. Like he was doing repair work for -- on grounding assemblies. Something to keep his business moving or going or whatever.
Q Okay. And the volume of ferrules that you sold to Future Machine would have been consistent with Kennerly's story on that?
A It looked logical.
Q Okay. It wasn't enough to support a manufacturing or assembly process where a company was making money selling grounding assemblies?
A I would agree with that, yes.
Q Okay. All right. You may not know this. But do you have a feel for how much -- either dollar-wise

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Exhibit G

Travis Pattern & Foundry, Inc.’s 2013 1099

9595 ☐ VOID ☐ CORRECTED

PAYER'S name, street address, city, state, ZIP code, and telephone no.	1 Rents	OMB No. 1545-0115	Miscellaneous Income
TRAVIS PATTERN & FOUNDRY INC P O BOX 6325 SPOKANE WA 99217-0905	$ .00	2013	
	2 Royalties $ .00	Form 1099-MISC	
	3 Other income $ .00	4 Federal income tax withheld $	Copy A For Internal Revenue Service Center
PAYER'S federal identification number 91 - 0873570	RECIPIENT'S identification number Redaction	5 Fishing boat proceeds $	6 Medical and health care payments $	File with Form 1096.
RECIPIENT'S name JAN KENNERLY	7 Nonemployee compensation $ 26,332.28	8 Substitute payments in lieu of dividends or interest $	For Privacy Act and Paperwork Reduction Act Notice, see the 2007 General Instructions for Forms 1099, 1098, 5498, and W-2G.
Street address (including apt. no.) 444 TAP HARLEY RD	9 Payer made direct sales of $5,000 or more of consumer products to a buyer (recipient) for resale ▶ ☐	10 Crop insurance proceeds $	
City, state, and ZIP code SWANSEA SC 29160	11	12	
Account number (see instructions) 2nd TIN not. ☐	13 Excess golden parachute payments $	14 Gross proceeds paid to an attorney $	
15a Section 409A deferrals $	15b Section 409A income $	16 State tax withheld $ $	17 State/Payer's state no.	18 State income $ $

Form 1099-MISC Cat. No. 14425J Department of the Treasury - Internal Revenue Service

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Exhibit H

Dan Moerke Deposition Excerpts
August 3, 2022

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

Bierer and Associates, Inc., Civil Action No.: 2018-CP-40-04841

Plaintiff,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar, LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Defendants.

Jan F. Kennerly, Jr.,

Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

VIDEOTAPED DEPOSITION

OF

DANIEL MOERKE

Taken August 3, 2022 By Christine M. Clark, RPR

industry?
A. Our -- yeah. I don't recall if that was during this time or not, but our agreement was with Rick, but, yes, he did have some, like, sub reps.
Q. Right.
A. Yep. Underneath him.
Q. Was that a consideration that you took into account when you concluded that this would be beneficial for Trystar to enter into this relationship with Rick?
A. I -- I don't remember that. The -- it was his industry expertise is kind of what is what we liked.
Q. Okay. Well, but you did at some point learn that he had a group of sub reps?
A. Yep.
Q. If you will.
A. Yep. Yes.
Q. And that he was using those sub reps to rep Trystar cable in the electric utility industry; is that correct?
A. Yes.
Q. And did you -- was that something that you learned or were aware of at the -- at the beginning of the relationship?
A. I don't know for sure. I -- but I believe -- I don't know for sure.
Q. Well, there's -- there was an agreed upon, I guess,

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commission percentage on certain product sales, correct?
A. Yep.
Q. And you learned that Rick would take the commissions and then split some percentage --
A. Mm-hmm.
Q. -- with his subagents, right?
A. Yep. Yep.
Q. Did you -- was that something that was considered on the front end, when Trystar set the percentage rate?
A. It could have been, yeah.
Q. So Rick -- just looking at a bunch of documents, a number of products under this agreement and on through, until very, very recently -- but let's just talk through 2018.
A. Mm-hmm.
Q. He was given him 5 percent commission on all --
MR. URSU: So, Jim, do you mean 2013, or...
MR. GRIFFIN: Up through 2018.
MR. URSU: Oh. Up through 2018. Yeah.
Q. (MR. GRIFFIN) Up through 2018, and even beyond, frankly, but he's getting 5 percent commission on certain product sales and 10 percent commission on certain product sales, correct?
A. Mm-hmm.
Q. That's a yes?

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Exhibit I

Bud Dygert Deposition Excerpts
September 29, 2022

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STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND

BIERER AND ASSOCIATES, INC.,
Plaintiff,
vs.
JAN F. KENNERLY, JR., DANIELLE KENNERLY, EUSA, LLC, J&D FARMS, LLC, TRYSTAR, LLC; TRAVIS PATTERN & FOUNDRY, INC.; ILLINOIS TOOL WORKS, INC.; AND DAVID DEINEK,
Defendants.
_____/

C.A. No.: 2018-CP-40-04841
(In the Richland County Business Court)

JAN F. KENNERLY, JR.,
Defendant/Third-Party Plaintiff,

vs.

WALTER BIERER, BRENT JEFFRIES, AND JOSEPH BIERER,
Third-Party Defendants.

VIDEOTAPED DEPOSITION OF BUD DYGERT

DATE TAKEN: Thursday, September 29, 2022

TIME START: 2:04 p.m.

TIME END: 2:26 p.m.

LOCATION: Conducted via Videoconference

REPORTED BY: SHERI L. BYERS, RPR
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803.212.0012

grounding assembly?

A. Yes.

Q. And where did where Future Machine and Manufacturing obtain cable?

A. We were purchasing cable at that time from Ball Wire in California and Coleman Cable.

Q. Okay. Where you purchasing your ferrules?

A. From the ferrule design belonged to Salisbury, and the manufacturer was Best Metals in Chicago.

Q. Okay. Did -- did -- before '09, did Future Machine and Manufacturing ever purchase ferrules from Bierer and Associates?

A. I do not -- well, I know that they were getting into the grounding division or to the grounding business and we did purchase some ferrules from them to test, but I do not recall what year that was.

Q. Okay. Did you introduce Mr. Kennerly to Travis Garske?

A. Yes.

Q. And for what purpose did you introduce Mr. Kennerly to Travis Garske?

A. Rick approached me, told me that Bierer was getting into the grounding business and wanted to buy

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clamps, but the product line that we were -- that Future Machine was making belonged to Salisbury, so I could not sell him any of the product that we were making but told him that I knew someone that could make him clamps. And I introduced him to BJ Sande.

Q. And did you introduce him solely for the purpose of Bierer and Associates purchasing or obtaining clamps from Travis?

A. Yes.

Q. Did you ever have any conversation with Mr. Kennerly about -- ever have any conversation with Kennerly about his desire to do independent rep business for Travis?

A. No.

Q. Did you ever learn that he was an independent sales rep for Travis?

A. Did I ever learn that?

Q. Yes, sir.

A. Not for -- it was always my understanding that Rick was working for Bierer. I was kind of removed from what they were doing.

Q. Okay. When did you first learn that Rick was working for Travis in some capacity?

A. I believe Joe Bierer probably called me in 2000 -- I want to say it was 2018 or 2019 and wanted

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Exhibit J

Email, May 01, 2018

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Message

From: Tim Rosser [tim.rosser@SuppliesandSolutions.com]
Sent: 5/1/2018 9:29:37 PM
To: Alex Martin [A.Martin@travispattern.com]
CC: Kristen Henington [kristen.henington@SuppliesandSolutions.com]; Rick Kennerly [rickkennerly@bierermeters.com]
Subject: FW: Can you make this cover?
Attachments: New Cover 2018.pptx; PG82060.pdf; PG&E 050118 J.pdf

Alex,

Can you please provide a quote for S&S?

Best Regards,
-Tim

Tim Rosser
Utility Sales – PG&E / SMUD / NV Energy
Grounding Manager

S and S Supplies & Solutions
N. California & N. Nevada
Cell (916) 212-7165 |
Email tim.rosser@suppliesandsolutions.com

From: Patchen, James <JEPq@pge.com>
Sent: Tuesday, May 01, 2018 2:22 PM
To: Kristen Henington <kristen.henington@SuppliesandSolutions.com>; Tim Rosser <tim.rosser@SuppliesandSolutions.com>
Subject: FW: Can you make this cover?

I need an open quote for these special covers

From: Alex Martin [mailto:A.Martin@travispattern.com]
Sent: Tuesday, May 01, 2018 1:59 PM
To: Patchen, James
Cc: rickkennerly@gmail.com
Subject: FW: Can you make this cover?

*****CAUTION: This email was sent from an EXTERNAL source. Think before clicking links or opening attachments.*****
Jim,
Please see the attached quote and drawing. Product will be ready to ship tomorrow.

Alex Martin
Travis UGD
509-466-3545
A.martin@travispattern.com
www.travisugd.com

From: Patchen, James <JEPq@pge.com>
Sent: Friday, February 16, 2018 3:05 PM
To: Rick Kennerly <rickkennerly@gmail.com>; Alex Martin <A.Martin@travispattern.com>
Subject: Can you make this cover?

Jim Patchen
Substation M&P
jepq@pge.com
510 504 7339

Click on links below to see Substation Procedures

Protective Grounding Manual

SM&C Manual

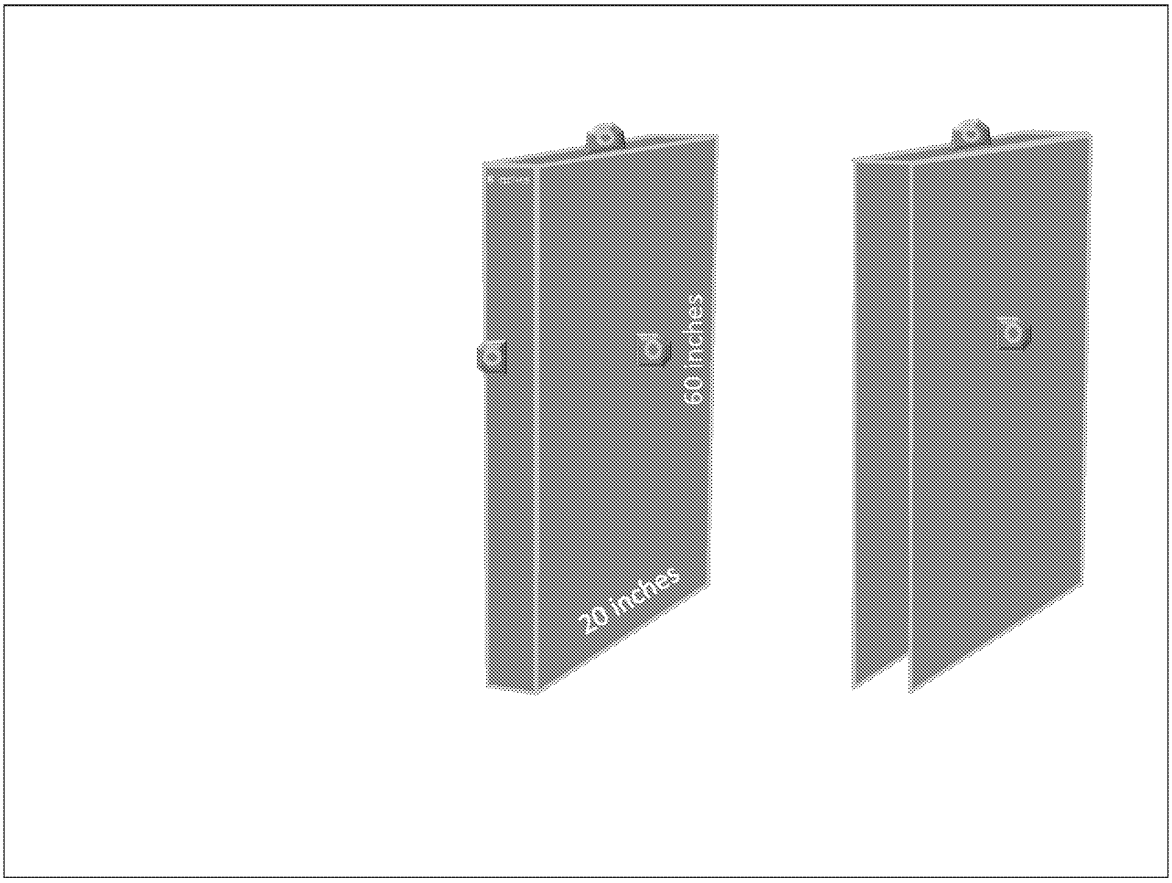
Subforeman's Manual

Once D2 Opens Look to the right to see this graphic



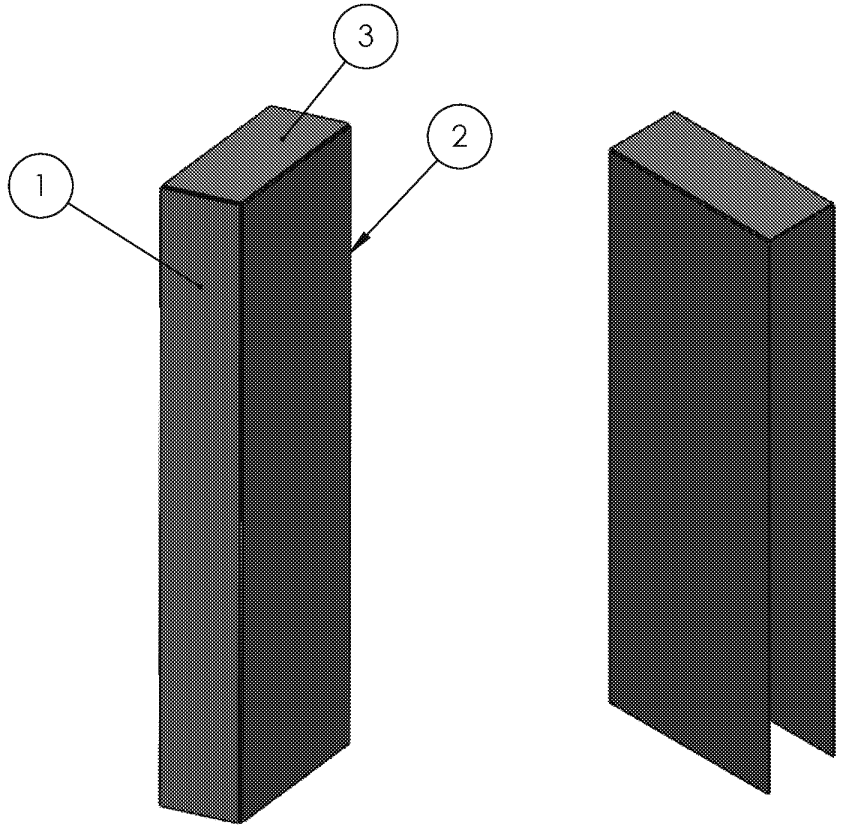
Double Click On This Graphic to see
the contents of the manual

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ITEM NO.	PART NUMBER	DESCRIPTION	QTY.
1	PG860	PLASTIC GUARD 8" x 60"	1
2	PG2060	PLASTIC GUARD 20" x 60"	2
3	PG820	PLASTIC GUARD 8" x 20"	1

Part Number:
PG82060

DESCRIPTION:
PLASTIC GUARD 8" X 20" X 60"

TRAVIS
PATTERN & FOUNDRY, INC

PROPRIETARY AND CONFIDENTIAL
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THIRD ANGLE PROJECTION

UNLESS OTHERWISE SPECIFIED:
DIMENSIONS ARE IN INCHES
TOLERANCES:
FRACTIONAL ± 1/32"
ANGULAR: 1.5 DEG
TWO PLACE DECIMAL ±.01
THREE PLACE DECIMAL ±.005

	NAME	DATE
DRAWN	CB	5/1/2018
CHECKED		
SCALE: 1:16	MATERIAL:	FINISH

SIZE A | SHEET 1 OF 1 | REV A

5 4 3 2 1

Travis Pattern & Foundry
1413 E. Hawthorne Rd.
P.O. Box 6325
Spokane, WA 99217-0905

QUOTATION

Phone (509) 466-3545
FAX (509) 467-6465

QUOTE# M050118 13:56:05 **5/1/2018**

To: PG&E (UGD)

ATTN: JIM

Sales Agency: Rick Kennerly UGD

,

Phone:

,
(803) 917-7296

FAX:

Please email all purchase orders and quotes to UGD@travispattern.com

ITEM	PART	QTY	PRICE EACH	TOTAL PRICE
01	PG82060	3	$498.80	$1,496.40
PLASTIC GUARD 8" X 20" X 60"				

Ship Order: **After Receipt of Order** **Grand Total: $1,496.40**

Submitted By: Alex Martin

SHIPPING WILL BE PREPAID AND ADDED TO ALL INVOICES

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Dec 28 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000780
Case No. 2018-CP-40-04841

Bierer and Associates, Inc., Appellant,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Of whom, Trystar LLC and Travis Pattern & Foundry Inc. are Respondents.

AND

Jan F. Kennerly, Jr.,

Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

By: *s/ James M. Griffin*

James. M. Griffin, SC Bar No. 9995
Margaret N. Fox, SC Bar No. 76228
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
T: (803) 744-0800
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Attorneys for Appellant Bierer and Third Party Defendants Walter Bierer, Joseph Bierer, & Brent Jeffries

December 28, 2023
Columbia, South Carolina