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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 TWO**

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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.

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)

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO TRYSTAR LLC'S
MOTION FOR SUMMARY JUDGMENT**

Bierer and Associates, Inc. ("Bierer"), through undersigned counsel, submits its response in opposition to Trystar Inc.'s ("Trystar") motion for summary judgment. The Court should deny Trystar's motion because Bierer did not discover Trystar's wrongful conduct until after July 10, 2018, when Bierer's President Walter Bierer and its Vice-President Joe Bierer first learned that Trystar 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, ¶ 6, attached hereto as **Ex. B**.

Trystar concedes, as it must, that Bierer did not have actual knowledge of this wrongful conduct until sometime after July 2018. Nevertheless, Trystar contends that the statute of limitations began to run in 2013 when Bierer learned that Trystar was selling cable directly to customers who had purchased Bierer private label cable manufactured by Trystar.

Trystar's entire argument is based upon a misinterpretation of South Carolina law. According to Trystar, the statute of limitations began to run when Bierer knew it was losing sales to Trystar. This is not correct. Under the discovery rule, an action must be commenced within three years after Bierer knew, or through the exercise of reasonable diligence should have known, that Bierer had a cause of action against Trystar for wrongful conduct. Bierer did not have an exclusive arrangement with Trystar that prevented Trystar from competing against Bierer for cable sales, even to customers introduced to Trystar by Bierer. Thus, there was nothing "wrongful" about Trystar's conduct and Bierer did not have a cause of action against Trystar simply because Trystar sold cable to former customers who purchased Bierer private label cable.

Trystar's wrongful conduct was paying Kennerly, a Bierer officer and its national sales manager, to market Trystar cable directly to Bierer customers using Bierer's network of sales representatives. Bierer was not aware of this improper arrangement until after Bierer terminated Kennerly. Moreover, the evidence does not establish, as a matter of law, that Bierer should have known of this improper arrangement through the exercise of reasonable diligence. In fact, when Joseph Bierer complained to Trystar's Dan Moerke about selling direct to Bierer customers, Moerke did not inform Bierer that Kennerly was involved in these sales, nor did he ask Bierer if it authorized Kennerly to engage in such an obvious conflict of interest arrangement. *See* Dep. D.

Moerke, 59:1-65:23; 68:20-69:19, excerpts attached hereto as **Ex. C**. Trystar also fails to mention that Kennerly lied and deceived Bierer about his relationship with Trystar up to the day he was terminated by Bierer. Ex. A at ¶ 12 Ex. B at ¶ 11. Under South Carolina law, Kennerly's fraudulent concealment of this illegitimate relationship with Trystar tolls the statute of limitations until Bierer became aware of this wrongful conduct. The evidence relied upon by Trystar does not establish, as a matter of law, that Bierer's claims are barred by the statute of limitations. At most, Trystar raises a jury issue this affirmative defense. Accordingly, Trystar's motion should be denied.

I. FACTS

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 no time during Kennerly's employment with Bierer was Bierer ever aware that Kennerly was a sales representative for Trystar or any other third party. Ex. A at ¶¶ 6, 12; Ex. B at ¶¶ 6, 11; *see also* Dep. of W. Bierer (Feb. 24, 2022), 232:13-233:7, excerpts attached hereto as **Ex. D**.

Bierer was first introduced to Dan Moerke at the ICUEE trade show in Louisville, Kentucky in October 2009. Ex. B at ¶ 18. Joseph Bierer spoke with him at the show and then he, Kennerly, and Moerke had dinner that evening. Id. 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. Id. Joseph, Kennerly, and Mr. Moerke discussed the possibility of Trystar making ASTM F855 rated grounding cable for Bierer that would be private

labeled and resold by Bierer to Bierer customers. Ex. B at ¶ 18. At that point in time, it was unknown whether Trystar had the capability to produce such cable. Id.; *see also* Dep. of J. Bierer, (Aug. 31, 2022), 217:2-218:7, attached hereto as Ex. E.

During this discussion, Joseph 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. Ex. B at ¶ 18. In response to this concern, Mr. Moerke assured Joseph that Trystar had no interest in selling direct to Bierer customers because Bridgewater (Trystar) did not have the outside sales force. Id. 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. Id.

Effective January 2013, and unbeknownst to Bierer, Kennerly entered into an agreement with Trystar to receive commission for Trystar sales. *See* 2013 Trystar Sales Rep. Agrmt, attached hereto as Ex. F. Mr. Moerke testified that Kennerly informed Trystar he had Walter Bierer's permission to enter into this agreement. Ex. C at 63:21-64:1. Yet, almost four months after entering into the agreement, Mr. Moerke received an email from Joseph Bierer on April 9, 2013 complaining about Trystar selling direct to Bierer's customers despite the assurance Mr. Moerke had given to Joseph in 2009 that this would not occur. *See* Trystar Mot. Ex. 1; Ex. C at 60:1-61:23.

At the time Joseph sent this email, Bierer believed that Trystar was selling direct to those customers for which it received an address to drop-ship a Bierer order. Ex. B at ¶ 18. Bierer knew it did not have an exclusive agreement with Trystar which prevented this conduct; therefore, the most Bierer 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 Joseph Bierer in 2009. Ex. A at ¶ 18; Ex. B. at ¶ 18.

Mr. Moerke did not respond to this email. Id. Nor did he call Joseph, Walter, or any managerial employee at Bierer (other than Kennerly) to address these concerns. Ex. C at 63:21 – 65:23. This is true even though he acknowledges that the content of the email went against what Kennerly had told him was the case – that Walter Bierer approved of Kennerly’s sales relationship with Trystar. Id. Rather than calling the President of Bierer, he took the word of Kennerly – an individual who was proving profitable for Trystar – and chalked up the email as nothing more than a disconnect between father and son. Id.

Having received no response from Mr. Moerke to the April 2013 email that would indicate the lost sales were anything other than Trystar taking advantage of addresses provided for drop-ship orders, Bierer took steps internally to prevent Trystar from shipping cable directly to Bierer’s customers. Ex. A at ¶18; Ex. B at ¶¶ 18-19. This belief, as well as the remedial action being taken, is reflected in email correspondence dated December 5, 2013 wherein Joseph is surprised Trystar has been provided with a customer’s information to drop-ship a Bierer order. *See* Trystar Mot. Ex. 2.

Such correspondence is just one example of a time when Bierer 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?”); Ex. B at ¶ 19. 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.” Id.

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 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. 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.

On July 10, 2018, Bierer learned for the first time that Kennerly had a sales relationship with Trystar. On July 11, 2018, *after* Walter had learned of Kennerly's sales relationship with Trystar, Walter sent Kennerly an email setting forth his realization at that time that actions Kennerly had previously taken around 2012 (which Walter assumed were benign at the time given Kennerly's explanation to him when they occurred) were steps Kennerly surreptitiously took to distance himself from Bierer to conceal his business relationships with Trystar and other companies from Bierer. Ex. A at ¶ 8. 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 Trystar on July 10, 2018. Id.

Notably, even when confronted about his relationship with Trystar on July 11, 2018, Kennerley continued to lie about the true nature of his relationship with Trystar. While Kennerly admitted he was "guilty as charged" for having a secret sales relationship with Trystar, 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.” Ex. A at ¶ 12; Ex. B at ¶ 11. This was a lie. Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer. *See* Ex. C at 53:12- 54:10.

Kennerly was terminated by Walter Bierer effective July 13, 2018. Bierer filed its initial complaint in this action on September 11, 2018.

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 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 TRYSTAR

Bierer is suing Trystar for paying Bierer’s Vice President of Operations and National Sales Manager Rick Kennerly to market Trystar 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 Trystar and another company, Travis, in some capacity. Soon afterwards, Bierer discovered the nature¹ of Kennerly’s arrangement with Trystar, Travis, and a third company, ITW.

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,

¹ Bierer did not learn the extent and magnitude of Kennerly’s business arrangement with Trystar, Travis and ITW until Bierer obtained discovery from Kennerly and subpoena responses from these entities after filing the original complaint on September 11, 2018.

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.”

Dep. of W. Bierer (Feb. 23, 2022), 136:14- 137:14, excerpts attached hereto as **Ex. G.**

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 Trystar 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 Trystar. Trystar's counsel accepted service of the Third Amended Complaint on May 10, 2021. Thus under Rule 3(a), SCRCP, Bierer's action against Trystar was commenced on the date of filing, 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 evidence in the record illustrates that Bierer's actions against Trystar did not begin to accrue until July 10, 2018 at the earliest, which is well within the three (3) year statute of limitations. Since Kennerly's termination, Bierer has learned through discovery that Trystar and Kennerly entered into an exclusive agreement in 2013 wherein Kennerly

was getting paid a commission by Trystar to bypass Bierer and sell Trystar 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, Trystar's motion should be denied.

A. The statute of limitations was not triggered until July 10, 2018 at the earliest.

South Carolina law is clear that the statute of limitations does not begin to accrue until the claimant is aware that there was misconduct that led to the injury. Bierer's knowledge that Trystar was competing with Bierer is not what triggers the statute of limitations. Rather, the statute of limitations only begins to run when Bierer is aware that its lost business is a result of misconduct by Trystar – and not merely the result of above-board marketplace competition.

None of the evidence presented by Trystar illustrates that Bierer, prior to Kennerly's termination, had reason to suspect, much less knew of, Trystar's agreement with Kennerly to pay him commission for his use of Bierer's sales network to divert bulk cable sales from Bierer and sell directly to Bierer customers. To the contrary, the evidence illustrates that in 2013, Trystar knew Kennerly was a Bierer officer, and yet no one at Trystar ever reached out to Bierer to inquire if Bierer approved of the obvious conflict of interest created by the agreement in January 2013. Ex. C. at 63:21-65:23; 68:20-69:19. Moreover, Trystar knew that by entering into an agreement with Kennerly, it would have access to all of "Rick's subreps" to promote its sales. *See Id.* at 52:22 – 54:10 (acknowledging commission for sub reps likely built into commission structure in Trystar's agreement with Kennerly). Thus, Trystar opted to take the word of the Bierer employee that stood to financially benefit with Trystar pursuant to the agreement.

That Bierer was unaware of such agreement is evidenced by Joseph Bierer's email to Dan Moerke on April 9, 2013. *See Trystar Mot. Ex. 1.* As explained by Joseph, Bierer held the belief

that once Trystar was provided a Bierer customer's information to drop-ship an initial order placed through Bierer, Trystar was thereafter using that information to sell directly to the customer on future sales – thereby bypassing Bierer. Ex. A. at ¶ 18; Ex. B at ¶¶ 18-19. This was not an uncommon problem in the distributorship business – manufacturers selling around distributors. Ex. A at ¶ 18. Bierer recognized it did not have an exclusive agreement with Trystar and there was nothing it could do to prevent this from happening except refrain from providing Trystar with customer addresses to drop-ship cable. Ex. A at ¶ 18; Ex. B at ¶¶ 18-19.

Interestingly, while Trystar claims Bierer should have been or was on notice of its claim against Trystar, it fails to set forth the fact that Trystar did not respond to Joseph's April 9, 2013 email (which would not have been warranted had Bierer actually had knowledge of Kennerly's agreement with Trystar) or ever reach out to anyone at Bierer to disclose the existence of its sales representative agreement with Kennerly. Ex. C at 59:1-65:23; 68:20-69:19. Nor would it have been in Trystar's financial interest to do so given Trystar's agreement with Kennerly to use Bierer's national sales force. *Id.* at 34:17-36:23 (discussing knowledge that agreement with Rick Kennerly led to a decrease in Bierer bulk cable purchases from Trystar as Trystar began selling directly to Bierer's customers). Joseph Bierer's email went unanswered, and as a result, Bierer continued with its reasonable, yet mistaken, assumption that the direct sales were taking place when Bierer permitted Trystar to drop-ship to its customers- a practice Bierer took steps to stop following this email. Ex. A at ¶ 18; Ex. B at ¶¶ 18-19. The evidence is clear that Bierer did not know of Kennerly's relationship with Trystar.

Trystar's reliance on the December 5, 2013 email is also misplaced. *See* Trystar Mot. at 4, 11, & Ex. 2 thereto. It does not reflect knowledge by Bierer that Bierer knew Trystar had entered into an agreement with Kennerly in which he would receive sales commissions by utilizing

Bierer's sales reps to promote Trystar products to the detriment of Bierer. The email simply reflects Bierer's knowledge that Trystar was doing exactly what Mr. Moerke assured Joseph it would refrain from doing in 2009. Ex. B at ¶ 19. Again, without an exclusivity agreement, there was nothing Bierer could do to prevent this other than to instruct Kennerly that the reps he managed were to refrain from providing Trystar with addresses to drop-ship to Bierer customers. *Id.* There was never an indication, nor any facts, that would have led Joseph or any other member of the Bierer management team to believe at any time during Kennerly's employment that Trystar provided Kennerly, and the Bierer sales force Kennerly directed, with financial incentive to redirect business away from Bierer for Trystar's financial gain. Ex. A at ¶ 18; Ex. B at ¶ 19.

Trystar's citation to the October 25, 2015 email also falls short of meeting its burden. *See* Trystar Mot. at 5, 11, & Ex. 3 thereto. As clearly explained by Walter, the "outside activities" referenced therein had nothing to do with Trystar business. Rather 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 Trystar, Travis, 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 Trystar. *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 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. Ex. A at ¶ 16. 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.

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. Id. 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.

Finally, Trystar's reliance on a July 11, 2018 email as support for its argument Bierer was on notice of its potential claims against Trystar prior to July 10, 2018 is unwarranted. *See* Trystar Mot. at 5, 11, & Ex. 4 thereto. As explained by Walter Bierer, this email was sent to Kennerly *after* Walter learned of Kennerly's relationship with Trystar and 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 Bierer Monday management meetings each week, so Walter did not insist he write them up. *Id.* 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 Trystar on July 10, 2018. *Id.*

Again, this document, as well as the other portions of the record relied on by Trystar 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 Trystar and using Bierer's sales reps to receive commissions on sales made by bypassing Bierer.

B. Kennerly's Fraudulent Concealment Tolled the Statute of Limitations

Kennerly fraudulently concealed his illegitimate relationship with Trystar 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, 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 Trystar tolls Bierer’s claims against Trystar. Trystar, as a corporation, can only act through its officer, employees, and agents. Kennerly was Trystar’s exclusive sales agent for products marketed to those segments of the utility industry that Kennerly serviced on behalf of Bierer, and Trystar is liable for Kennerly’s fraudulent concealment even if Trystar 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 Trystar's motion for summary judgment.

Respectfully submitted,

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*Attorneys for Plaintiff, Bierer and Associates, Inc.,
and Third-Party Defendants, Walter Bierer, Brent
Jeffries, and Joseph Bierer*

December 28, 2022
Columbia, South Carolina

Exhibit A

Affidavit of Walter Bierer

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.

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)

AFFIDAVIT OF WALTER BIERER

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.

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

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

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.

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.

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

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

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

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
Walter Bierer
 Notary Public for the State of South Carolina
 My commission expires: 05/12/2024

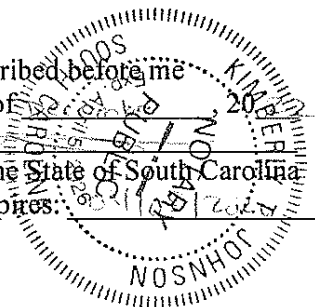


Exhibit B

Affidavit of Joseph Bierer

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Bierer and Associates, Inc.,
Plaintiff,

Civil Action No.: 2018-CP-40-04841
(In the Richland County Business Court)

v.

AFFIDAVIT OF JOSEPH BIERER

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.

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.

JSB

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

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

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,

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

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 Louisville, 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

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.

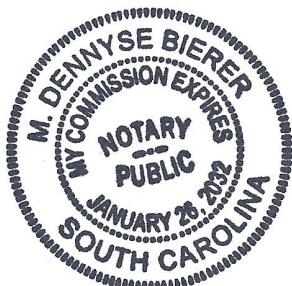
19. I have reviewed the email correspondence dated December 5, 2013. *See* Trystar Mot. at 4 & Ex. 2 thereto. This email illustrates the belief that I, as well as upper management held - that Trystar was undermining Bierer's distributor sales. Specifically, I believed that once Trystar was provided a 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

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.

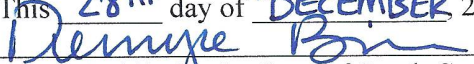




Joseph Bierer

Sworn to and subscribed before me

This 28TH day of DECEMBER 20 22



Notary Public for the State of South Carolina

My commission expires: JAN. 26, 2032

Exhibit C

Dan Moerke Deposition Excerpts
August 3, 2022

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND
3 -----

4 Bierer and Associates, Inc., Civil Action No.:
5 Plaintiff, 2018-CP-40-04841
6 v.

7 Jan F. Kennerly, Jr., Danielle Kennerly,
8 EUSA, LLC, J&D Farms, LLC, Trystar,
9 LLC; Travis Pattern & Foundry, Inc.;
10 Illinois Tool Works, Inc.; and David
11 Deinek,
12 Defendants.

13 Jan F. Kennerly, Jr.,
14 Defendant/Third Party
15 Plaintiff,
16 v.

17 Walter Bierer, Brent Jeffries, and Joseph
18 Bierer,
19 Third Party Defendants.
20 -----
21 -----

22 VIDEOTAPED DEPOSITION
23 OF
24 DANIEL MOERKE
25 -----

26 Taken August 3, 2022 By Christine M. Clark, RPR

1 with Bierer purchasing cable from Trystar, say up until
2 Mr. Kennerly leaving in summer of 2018, did the quantity
3 of Bierer and Associates purchases of Trystar cable, did
4 it remain fairly constant through that period of time?

5 MR. URSU: Object to form.

6 THE WITNESS: Can you repeat that?

7 Q. (MR. GRIFFIN) Sure. So from -- I guess, let's just say
8 ballpark 2010 or 2011, whenever Bierer first started
9 purchasing cable, up until 2018, was Bierer purchasing
10 the same or similar quantity?

11 MR. URSU: Same objection, and I'm going to
12 add an objection to foundation.

13 Q. (MR. GRIFFIN) To your knowledge.

14 A. Can you give me the timeline again?

15 Q. Yeah. 2010 to 2018.

16 A. Yeah.

17 Q. Well, let me ask a better question. Between 2010 and
18 2018, did you -- did you become aware of any significant
19 drop, decline in the purchases of cable, Trystar cable
20 by Bierer and Associates?

21 A. Yes.

22 Q. Okay. And when? Roughly, when was there a significant
23 drop in the purchases?

24 A. I'd have to go back and look at the numbers, but I don't
25 know. I don't know, but over that period of time, yes,

1 their sales decreased, purchases.

2 Q. And did you ever form a belief as to why the sales
3 decreased over the period of time?

4 A. Yes.

5 Q. And what was your belief?

6 A. Because we now have a rep agreement in place with Rick
7 Kennerly.

8 Q. And how did that cause the purchases of Trystar cable
9 for Bierer to decrease?

10 A. Are you asking how we established or why?

11 Q. No. You said you had a rep agreement --

12 A. Yes.

13 Q. -- with Kennerly.

14 A. Yep.

15 Q. And that that is your belief for the reason that the
16 Trystar -- I mean that the purchases by Bierer
17 decreased.

18 A. Mm-hmm.

19 Q. And my question is, what's your understanding of the
20 cause and effect? You had an agreement, and what --
21 that agreement, how did it -- how did that lead to a
22 reduction in Bierer purchases of Trystar?

23 MR. URSU: And I'm going to object to form
24 and foundation.

25 But you can answer, if you know.

1 A. The -- the reason for that is -- is because we put
2 together a rep agreement with Rick, based on Bierer
3 wanted to make margin on the product that we sold them
4 to be in line with the margin they were making on
5 meters. That's what I was told by Rick Kennerly, and
6 because of that, pricing would be out of line.

7 Q. Okay. And then you -- and then -- and then so what was
8 your understanding as to why Bierer slowed or decreased
9 the purchases of cable from Trystar?

10 A. Two reasons, price, and now having a rep agreement in
11 place with Rick.

12 Q. Okay. And you understood that Rick was an employee of
13 Bierer, correct?

14 A. Yes.

15 Q. Okay. And that -- and that when you had a rep agreement
16 then Rick was then -- I guess, was he selling directly
17 to the customers that Bierer had previously resold to?
18 Was that your understanding?

19 A. I -- I would assume so, yes.

20 Q. Okay. And do you think that's the reason that the
21 purchases of Trystar cable by Bierer decreased over
22 time?

23 A. Yes.

24 Q. Before Bierer entered into a rep agreement with --
25 excuse me. Before Trystar entered into a rep agreement

1 Q. Okay. So what -- but you said you already -- you were
2 selling into the utility industry --

3 A. Yep.

4 Q. -- before you entered into this agreement with Rick.

5 A. Yes.

6 Q. I guess, was Bierer one of the customers you were
7 selling into the electrical utility industry through?

8 A. We had -- well, yes, because we worked with Bierer
9 before.

10 Q. Right.

11 A. Yep.

12 Q. What other companies were you working with or selling to
13 into the electrical industry prior to January 2013?

14 A. Like names?

15 Q. Yes.

16 A. Company names?

17 Q. If you can remember.

18 A. Hi-Line Utility, Rohlinger, Brenco, Anixter, Irby, TVA.
19 I'm sure there's more.

20 Q. Okay.

21 A. But that's some of them.

22 Q. All right. And in your initial conversations with --
23 with Rick, did he tell you that he had his own sales
24 organization, sales reps that were -- that he had
25 available to promote Trystar cable sales in the

1 industry?

2 A. Our -- yeah. I don't recall if that was during this
3 time or not, but our agreement was with Rick, but, yes,
4 he did have some, like, sub reps.

5 Q. Right.

6 A. Yep. Underneath him.

7 Q. Was that a consideration that you took into account when
8 you concluded that this would be beneficial for Trystar
9 to enter into this relationship with Rick?

10 A. I -- I don't remember that. The -- it was his industry
11 expertise is kind of what is what we liked.

12 Q. Okay. Well, but you did at some point learn that he had
13 a group of sub reps?

14 A. Yep.

15 Q. If you will.

16 A. Yep. Yes.

17 Q. And that he was using those sub reps to rep Trystar
18 cable in the electric utility industry; is that correct?

19 A. Yes.

20 Q. And did you -- was that something that you learned or
21 were aware of at the -- at the beginning of the
22 relationship?

23 A. I don't know for sure. I -- but I believe -- I don't
24 know for sure.

25 Q. Well, there's -- there was an agreed upon, I guess,

1 commission percentage on certain product sales, correct?

2 A. Yep.

3 Q. And you learned that Rick would take the commissions and

4 then split some percentage --

5 A. Mm-hmm.

6 Q. -- with his subagents, right?

7 A. Yep. Yep.

8 Q. Did you -- was that something that was considered on the

9 front end, when Trystar set the percentage rate?

10 A. It could have been, yeah.

11 Q. So Rick -- just looking at a bunch of documents, a

12 number of products under this agreement and on through,

13 until very, very recently -- but let's just talk through

14 2018.

15 A. Mm-hmm.

16 Q. He was given him 5 percent commission on all --

17 MR. URSU: So, Jim, do you mean 2013, or...

18 MR. GRIFFIN: Up through 2018.

19 MR. URSU: Oh. Up through 2018. Yeah.

20 Q. (MR. GRIFFIN) Up through 2018, and even beyond,

21 frankly, but he's getting 5 percent commission on

22 certain product sales and 10 percent commission on

23 certain product sales, correct?

24 A. Mm-hmm.

25 Q. That's a yes?

1 Trystar?

2 A. I don't remember.

3 Q. Okay. And the government-owned utilities, I mean is
4 that a governmental-owned electric company?

5 A. Yes.

6 Q. Okay. And then investor-owned utilities, is that a
7 private electrical company?

8 A. Yes.

9 Q. Electric company. Okay. And then (e) is Rural Electric
10 Associations and Co-ops. I think that's pretty
11 self-explanatory, right?

12 A. Yes.

13 MR. GRIFFIN: Okay.

14 Now I'm -- do you know where this document is? We
15 had copies made, Exhibit 2.

16 MS. FOX: Yes.

17 MR. GRIFFIN: I'm going to mark Trystar
18 20390 as Exhibit 2.

19 (Exhibit 2 is marked for identification.)

20 (Discussion held off the record.)

21 MR. GRIFFIN: Nothing gets by her, nothing.

22 Q. (MR. GRIFFIN) Mr. Moerke, take your time reviewing this
23 document. I just want to ask you a few questions about
24 it.

25 A. Okay.

1 Q. This is a document that was produced by Trystar that
2 purports to be an email from Joe Bierer to
3 dan.moerke@trystar.com, on April 9th, 2013, at
4 4:03:16 p.m.

5 Do you recall receiving this document, this email?

6 A. Yeah. This refreshes my memory.

7 Q. Okay. And in this document it says, it references
8 cable/jumper sales. And it says, "Hi Dan, I hope all is
9 well with you, it's been a while since we last had a
10 chance to talk."

11 And it goes on to say, "It has come to our attention
12 over a period of time, after noticing a drop in
13 cable/jumper sales, emails from customers, etcetera,
14 that Trystar may possibly be circumventing our efforts
15 to establish and support new sales. I remember having
16 dinner with you and Rick in Louisville almost two years
17 ago and discussing this very topic. You had mentioned
18 that if we came to Trystar with new sales opportunities
19 that your company would not then start selling directly
20 to these customers, 'you did not want to have to deal
21 with all of these customers,' I believe that is how you
22 stated it."

23 I just want to stop there and ask, first, this --
24 what Joe is complaining about is in fact what you
25 described earlier in your testimony, right, that through

1 Rick Kennerly and this agreement that you're able to
 2 sell directly to Bierer's customers; is that correct?
 3 A. Sell to Bierer's customers?
 4 Q. Yes.
 5 A. Can you -- I'm sorry. Can you say it again?
 6 Q. Well, in this email, Mr. Joe Bierer is complaining about
 7 exactly what you had described earlier, that through
 8 your relationship with Rick that Trystar's able to sell
 9 directly to Bierer's customers without going through
 10 Bierer and sustaining their margin markup, correct?
 11 A. Yeah. We didn't have a, you know, distributor agreement
 12 with Bierer.
 13 Q. I understand. But you understand him to be complaining
 14 that it appears that Trystar is selling directly to
 15 Bierer's customers, correct?
 16 A. Mm-hmm. Yes.
 17 Q. So three months after -- well, a little over -- well,
 18 April the 9th, 2013, you received this email from Joe
 19 Bierer, which is three to four months after the
 20 January 2nd, 2013, agreement that you entered into --
 21 A. Yes.
 22 Q. -- with Rick, correct?
 23 A. Correct.
 24 Q. And Rick had told you, leading up to the January 22nd,
 25 2013, agreement, that he had Bierer and Associates'

1 permission to enter into a sales rep agreement, right?

2 A. Correct.

3 Q. And he told you that by entering into the sales rep
4 agreement that we will be able to sell into the market
5 without Bierer's markup and be more competitive with
6 Trystar products, right?

7 A. Correct.

8 MR. URSU: Object. Hold on. Objection to
9 form.

10 You can answer.

11 A. Correct.

12 Q. (MR. GRIFFIN) And that was a significant consideration
13 for Trystar to enter into this arrangement with Rick,
14 right?

15 MR. URSU: Objection; foundation and form.

16 You can answer.

17 A. Yes.

18 Q. (MR. GRIFFIN) Well, and it was certainly a significant
19 consideration for you to recommend to Mr. and Mrs. Dahl
20 that they enter into this agreement, right?

21 A. Yes.

22 Q. Okay. Yet, in April, you receive an email from Walter
23 Bierer's son, complaining about Bierer selling to its
24 customers directly; isn't that correct?

25 A. Yes.

1 Q. I'm sorry. That -- you get an email from Bierer
2 complaining that Trystar is selling directly to Bierer's
3 customers. That's what this is a complaint about?

4 A. Yes.

5 Q. And at the time, Bierer's employee, Rick Kennerly, is
6 getting at least 5 percent commission on these sales to
7 Bierer's customers?

8 A. Yes.

9 Q. And at the time, you may have known Rick Kennerly, met
10 him in person, perhaps, two times possibly, maybe three;
11 is that right?

12 A. I don't know the number, but I had met him.

13 Q. Well, clearly, there was a meeting and a dinner in
14 Louisville.

15 A. Mm-hmm.

16 Q. For some trade show, right?

17 A. (Witness indicating.)

18 Q. And then we talked about maybe he came to Trystar for a
19 plant tour before or after entering into the agreement?

20 A. Yes.

21 Q. Is that right? Okay. And this is -- this is a guy that
22 you just took his word at face value that he had Walter
23 Bierer's permission to enter into this independent rep
24 agreement. You took his word at face value, did you
25 not?

1 A. Yes.

2 Q. After you got this email from Walter Bierer's son
3 complaining about doing what Rick just contracted to do
4 with you and Trystar, did you give any consideration to
5 picking up the phone and calling Joe Bierer who you met
6 at dinner or his dad, Walter Bierer, and say, hey, guys,
7 I just want to be sure that Rick's not lying to me? Did
8 that cross your mind?

9 A. I think what crossed my mind was I wasn't sure how I was
10 going to handle this email, how to respond to it.

11 Q. Well, how did you respond to it?

12 A. I don't recall.

13 Q. Okay. So this email did not give you pause to think,
14 well, maybe Rick doesn't have permission to do what
15 we're doing?

16 A. Or Walter and Joe are not on the same page.

17 Q. Right. Okay. Did you discuss this email with Rick, to
18 your knowledge?

19 A. I don't remember the conversation, but I don't -- my
20 pattern, I don't think I would have let this email end
21 here.

22 Q. Okay. If you were following your pattern, what do you
23 believe you did?

24 A. Probably reached out to Rick.

25 Q. And would -- would it be your normal practice with

1 something like this, and if you reached out to Rick,
2 that you would document in a file somewhere how Rick
3 responded? Would that have been your normal practice?

4 A. No.

5 Q. Would it have been your practice to advise Mr. and
6 Ms. Dahl about this issue?

7 A. I don't know if I would do that.

8 Q. Okay. But you feel like you would have addressed this
9 at least with Rick?

10 A. No, I don't know that.

11 Q. Okay. So is it possible you just turned a blind eye to
12 this email?

13 MR. URSU: Objection; form.

14 A. It's possible, but I doubt it. Most likely I had
15 reached out to Rick in regards to this email.

16 Q. Can we say with 100 percent certainty that you did
17 not reach out to Joe Bierer about this email?

18 A. I don't think I did.

19 Q. Okay. Can we say with 100 percent certainty that you
20 did not reach out to Walter Bierer about -- after
21 receiving this email about Trystar's new agreement with
22 Rick Kennerly?

23 A. I did not.

24 Q. Did you ever consider reaching out to Walter Bierer
25 about this agreement with Rick Kennerly, before or after

1 did you enter into an agreement with to be
2 simultaneously a sales rep for Trystar?

3 A. Zero.

4 Q. Well, Rick Kennerly was one, correct?

5 A. Well, yes.

6 Q. But no others besides Rick Kennerly?

7 A. No, not that I know of.

8 Q. And you've been in the sales business since -- I didn't
9 get the year you started. But it seemed like early
10 '90s.

11 A. Mm-hmm. '98.

12 Q. Well, '98 with Trystar?

13 A. Yep.

14 Q. But are you aware of any other circumstances in the
15 sales field, from your personal experience, where a
16 manufacturer has hired an employee of a distributor or
17 customer to be its sales rep at the same time?

18 A. The two -- my experience is with two other companies, I
19 was a salesperson.

20 Q. Yeah. Just your knowledge of the industry, your
21 experience in the last 30 years, however many years, are
22 you aware of any other instances like this where a
23 manufacturer hires an employee of a distributor or a
24 customer to be simultaneously a rep with a company?

25 A. Yeah. No.

1 Q. Okay. So is it fair to say what Rick proposed in
2 December 2012, January 2013, was, to your knowledge, a
3 one of a kind relationship; is that correct?

4 A. I don't know. We looked at it as a rep agreement.

5 Q. All right. And you knew of no other relationship in the
6 industry where a customer's employee was -- had a
7 similar agreement with a manufacturer?

8 A. I'm not aware of.

9 Q. Okay. Was there any suggestion by Mr. Dahl or Ms. Dahl
10 or anyone else within Trystar that before Trystar
11 entered into this agreement with Rick that you should
12 write a letter to Bierer and Associates to confirm that
13 Bierer and Associates agreed for Rick to enter into this
14 rep agreement?

15 A. I don't believe we had those conversations.

16 Q. Okay. And to your knowledge, no one at Trystar ever
17 wrote such a letter, confirmation letter to anyone at
18 Bierer; is that correct?

19 A. Not that I'm aware of, correct.

20 Q. Are you aware that Mr. Kennerly was terminated -- excuse
21 me -- in the summer of 2018 from Bierer and Associates?

22 A. Exact date, I don't know, but, yes, I was informed.

23 Q. And was there at any point in time, from January of 2013
24 until Mr. Kennerly's termination in summer of 2018, that
25 you ever told anyone at Bierer and Associates that

Exhibit D

Walter Bierer Deposition Excerpts
February 24, 2022

State of South Carolina)
)
County of Richland)
)
Bierer and Associates,) 2018-CP-40-04841
Inc.,)
)
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

1 manufacturing industry generally and shield his
2 wrongdoing activities from scrutiny. For example,
3 Bierer and Associates is informed and believes that
4 at some point while he was employed as an officer
5 of Bierer and Associates and without authorization,
6 Kennerly began presenting himself to customers and
7 others in the industry as essentially an
8 independent marketing expert or broker."

9 Q Was that allegation true when -- when you allowed
10 it to be asserted in this case?

11 A Well, here again, I didn't write that particular
12 thing, but as you say, I did -- I did approve it.
13 What -- what's -- what are you trying to make of
14 that? What's the issue there?

15 Q Well, my question: Is it -- is it true?

16 A Okay. "Kennerly's cell phone and e-mail switch was
17 one of the several steps he took to disassociate
18 himself." After reviewing all of the, you know --
19 well, we didn't have to review anything. That --
20 that appeared to be what was true, that part of it.
21 Okay. And, you know, he did it under -- under, I
22 guess you could say, "questionable" circumstances.
23 Like his cell phone, he called me from out on the
24 West Coast one time, Oregon, Washington State, I
25 don't remember. Seems like he was on the West

1 Coast.

2 Q Yes.

3 A Said he had lost his cell phone --

4 Q Yes.

5 A -- and that he could not get another cell phone
6 because his cell phone was tied up in -- you know,
7 in a Bierer account.

8 Q Yes.

9 A And I told him, you know, if he needed a cell
10 phone, "Just go get one," and he did. So, you
11 know, he got a new cell phone, and it was -- it was
12 disassociated from the Bierer account. And I -- I
13 think we've tied that activity into, actually, some
14 of his -- his -- his -- and since then, I think
15 we've tied the -- the switch of that cell phone
16 right into some of his corrupt activities --

17 Q Yes.

18 A -- the time -- the time frame in that. So, you
19 know, that part could very well be true.

20 He also wanted to get a Gmail account. And
21 here again, I've never operated on a Bierer Meter
22 account. I've been operating on an AOL account
23 since day one.

24 Q Yes.

25 A I don't really see anything wrong with having, you

1 know, a different account. You know, to me, you
2 know, like a gun's no more dangerous than the guy
3 who uses it, an e-mail account's no more dangerous
4 or corrupt than the guy who uses it.

5 Q Yes.

6 A So I didn't really see any problem with him doing
7 those things. But, here again, that appears as
8 though that was his first step in -- in -- in -- in
9 these statements here, wanting to disassociate
10 himself from Bierer.

11 Q Is that paragraph true, that you allowed to be
12 filed in this case?

13 A Well, there's a lot of parts to that paragraph. I
14 would say the majority of it's true. There could
15 be something, yeah. You know, I'd have to read and
16 study each detail.

17 Q Take your time. Tell me if there's anything in
18 there that's false.

19 A Okay. The -- the last question, you -- you could
20 raise a question mark about it: "Kennerly began
21 presenting himself to customers and others in the
22 industry as essentially an independent marketing
23 export -- expert or broker." That -- that appears
24 to be what he did with -- with all of you guys:
25 Trystar, Travis, ITW. That appears to be what he

1 Q Okay. And this was during a time that he had a
2 relationship with Bierer where he was actually a
3 director of -- of the company, correct?

4 A He was a vice president of engineering and
5 operations. And --

6 Q Okay.

7 A -- initially, it was more toward -- excuse me --
8 engineering. And as time went on, the engineering
9 portion dropped away, and it was more operations --
10 outside operations. And when that refers to
11 operation, that does mean outside operations. It
12 doesn't mean inside plant operations.

13 Q Okay. And yet, in spite of all this, you've
14 testified that during those many years prior to
15 July the 10th, 2018, neither you nor Bierer had any
16 idea that he was out --

17 A I will state that as clear as I can.

18 Q -- doing this?

19 A I had absolutely no knowledge that Kennerly had
20 developed schemes with Travis, Trystar, and ITW to
21 divert sales around -- you know, through my sales
22 channels.

23 Q Uh-huh.

24 A I had absolutely no knowledge of any of this --

25 Q Uh-huh.

1 A -- divert sales through my sales channels,
2 interface with the customer, choose who those sales
3 were going to go to either through his channels or
4 my channels. I had absolutely no knowledge of any
5 of that.

6 Q Okay.

7 A Absolutely none.

8 Q All right. So --

9 A And if I would have -- I mean, just think about it.
10 If this guy's cheating me out of millions of
11 dollars, I'm going to sit around and let him
12 continue to work for me? I mean, how --

13 Q Right.

14 A I mean --

15 Q Okay.

16 A -- it's almost -- it's almost ludicrous --

17 Q Okay.

18 A -- to even ask that question.

19 Q Okay. So --

20 A I mean, he -- he earned millions in sales
21 commissions --

22 Q Uh-huh.

23 A -- which should have been mine. So I'm going to
24 say, "Fine, go ahead and do that"? That's -- I'm
25 okay with that? I mean, I -- I don't know. The

Exhibit E

Joseph Bierer Deposition Excerpts
August 31, 2022

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Bierer and Associates, Inc.,) Case 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.)

VIDEO DEPOSITION OF

Joseph Scott Bierer

Jan F. Kennerly, Jr.)

)
Third-Party Plaintiff,)

)
v.)

)
Walter Bierer, Brent)
Jeffries, and Joseph Bierer,)

)
Third-Party Defendants,)

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

1 A No.

2 Q When did you meet Dan Moerke?

3 A Dan Moerke introduced himself -- he actually came
4 walking up to our booth at the ICUEE show in 2009,
5 October 2009.

6 Q Okay. And did you -- what was your conversation
7 with Dan Moerke at that time?

8 A So Dan was looking to expand Trystar business.
9 They were not in the utility market. That was the
10 part of the business he wanted to expand. We had a
11 pretty good conversation at the booth.

12 Q Uh-huh.

13 A Later went to dinner that evening -- Rick, myself,
14 and Dan --

15 Q Yes.

16 A -- and further discussed. They were not running
17 the correct stranding nor the correct insulation
18 for grounding cable.

19 Q Yes.

20 A As a matter of fact, all of our invoices from
21 Trystar said welding cable up until about 2011,
22 which they did produce welding cable.

23 So, again, as I mentioned to Mr. Padget, it
24 was some months -- we went through a process where
25 they were able to get the extrusion process down

1 correct, the thickness of the insulation correct.
2 There was a problem with the stiffness of the
3 insulation for some period of time. As a matter of
4 fact, we still have some of that cable to date.

5 And by -- January 2010 was our first invoice
6 from Bridgewater actually. It wasn't Trystar at
7 that time. It was Bridgewater.

8 Q Sure. And did you ever ask Trystar or Dan Moerke
9 at that time about having an exclusive business
10 relationship?

11 A I personally did not have that conversation with
12 them. The conversation that we had, again, that
13 evening at dinner, was more centered around is if
14 they could even make the cable. It was a little
15 bit of an unknown to them at the time.

16 Q Yes.

17 A So they had to get their machine set up properly to
18 do that extrusion process. And, again, it took
19 several months for them to -- I say master it.
20 Actually, they did not master it. The first cable
21 that we got was no good. We still have it. We
22 never could sell it.

23 So once they got that mastered, the
24 conversation was kicked around in Monday meetings
25 that possibly we could become an exclusive

Exhibit F

Trystar Sales Representative Agreement

SALES REPRESENTATIVE AGREEMENT

THIS SALES REPRESENTATIVE AGREEMENT (the "Agreement"), effective January 2, 2013 (the "Effective Date"), is entered into by and between Trystar, Inc., a Minnesota corporation with its principal place of business at 2917 Industrial Drive, Faribault, Minnesota 55021 ("Trystar"), and Jan Kennerly, Jr., an individual having its principal place of business at 444 Tap Harley Road, Swansea, SC 29160 (collectively "Kennerly").

RECITALS:

- A. Trystar is engaged in the business of manufacturing, marketing and selling industrial cables, electrical and power distribution equipment and power accessories.
- B. Kennerly desires to be appointed as an independent sales representative for Trystar to develop new customers and sales and solicit orders for Trystar's products within a certain geographical territory.

AGREEMENT:

In consideration of the mutual covenants contained herein and other goods and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Representation

1.1 Appointment.

Subject to the terms and conditions of this Agreement, Trystar hereby engages the services of Kennerly for the purpose of developing a market and soliciting orders for certain of Trystar's products listed on Schedule A attached hereto (the "Products") in the geographic territory identified on Schedule B attached hereto (the "Territory") specifically for the specialty markets and channels of distribution listed on Schedule C attached hereto (the "Channels of Distribution"), with each Schedule incorporated herein.

1.2 Choice of Products.

Trystar reserves the sole right to add, delete, amend or change periodically any one or more items or lines of Products, increase or decrease the Territory and any Channels of Distribution at its sole discretion without incurring any liability to Kennerly.

Trystar also reserves the sole right to determine which certain Products for which customers and in which locations in the Territory, on a case-by-case basis, shall be eligible for a commission or other financial compensation. Kennerly acknowledges that not all sales of the Products to customers in the Territories and in the Channels of Distribution will be eligible for financial compensation. The specific Products for each customer and each Channel of Distribution as well as each location and each commission rate shall

be identified and listed on a schedule in Schedule D attached hereto and incorporated herein (the "Matrix Schedule"), and shall evidence the commission for those specific Products by customer and by location that are eligible for such commissions; provided, however, that such sales must comply with any and all terms and conditions in this Agreement (collectively the "Eligible Sales"). Kennerly acknowledges that Trystar shall have the sole right to determine the Eligible Sales, including the sole right to add, delete, and change any one or more Products, customers, commission rates, individual locations, Territories and Channels of Distribution for the Eligible Sales at its discretion and without incurring any financial obligation or liability to Kennerly.

Kennerly further acknowledges (1) that Trystar has the sole right to review and approve each sales order and determine whether the order will become an Eligible Sale, and (2) that the Matrix Schedule evidences those Products by customers and by locations that are eligible for commissions. Trystar will maintain the Matrix Schedule and provide a copy of the Matrix Schedule on a regular basis, and upon reasonable requests from Kennerly.

Kennerly also acknowledges that (1) Trystar may produce certain lines that it will not include in the Products, and (2) Trystar sells into certain Channels of Distribution that will not be included for purposes of this Agreement. Trystar reserves the sole right to establish and change the pricing and other terms and conditions of sale.

2. Services

2.1 Sales. Kennerly agrees to vigorously promote the sale of and solicit orders for the Products within the Territory and the designated, specific Channels of Distribution covered by the Agreement and to devote its time, skill, knowledge and best efforts to the sale of such Products. Kennerly agrees not to represent or offer for sale any items of the same or of similar nature, or an item directly competitive to the Products during the life of this Agreement without Trystar's prior written approval.

2.2 Independent Contractor. For purposes under this Agreement, Kennerly's relationship to Trystar in the performance of this Agreement is that of an independent contractor with limited authority and not an employee, partner, agent, licensee or franchisee. Kennerly will conduct all its business in its own name and in such a manner as it may seem fit. Kennerly is responsible for all taxes, including, without limitation, federal, state and local personal, employment and business taxes and license fees arising out of Kennerly's activities. Kennerly is responsible for the selection and supervision of, the payment of compensation, fees and benefits to, its own employees, if any, who assist in the performance of its obligations. All financial obligations associated with Kennerly's business are the sole responsibility of Kennerly. In no event will Trystar have any obligation to, or authority over, Kennerly's employees. Kennerly has no authority to bind or obligate Trystar in any manner.

2.3 Operations. Kennerly will be responsible for maintaining an office and sales force that may be necessary to fulfill its obligations to promote the Products throughout the Territory. All of Kennerly's expenses of every kind, nature and description will be the sole obligation of Kennerly and will

be paid by Kennerly. Kennerly will also ensure that it is adequately insured and capitalized to maintain its operation on a financially sound basis in order to consistently promote the Products in the Territory.

2.4 Cooperation. Kennerly will cooperate with Trystar in regard to the promotion of all sales activities related to the Products. Such cooperation will include training and engineering expertise, attendance at and assistance with trade shows or other marketing events when reasonably requested in writing by Trystar. Kennerly will also contact all leads Trystar furnishes to Kennerly. Upon Trystar's reasonable request, Kennerly will accompany Trystar to meetings with customers and potential customers in the Territory. Further, Kennerly agrees to respond to requests by Trystar for market information related to the Products, the customers and the Channels of Distribution.

2.5 Customer Contact. Kennerly will identify potential customers and maintain regular and consistent contact with customers and potential customers and respond promptly to all inquiries. Further, Kennerly will provide Trystar with all appropriate sales and market information regarding customers, potential customers and competitors.

2.6 Assignment & Transfers. This Agreement is personal to Kennerly and may not be assigned or transferred.

3. **Orders**

3.1 Orders. Kennerly will forward all purchase inquiries, quotes and orders to Trystar. Trystar retains the sole right to (1) accept or reject any purchase orders and quotes for Products solicited by Kennerly and (2) determine which orders qualify as Eligible Sales. All sales of Products are subject to Trystar's Terms and Conditions of Sale and will not be subject to the terms and conditions contained in any purchase order of the customer, except insofar as any such purchase order or confirmation establishes (a) the quantity of the Products to be sold or (b) the requested shipment date of Products. All orders are subject to Trystar's approval and acceptance, and all quotations for sales made by Kennerly to customers or prospective customers must be expressly contingent upon Trystar's prior written approval.

3.2 Shipments. All shipments of the Products will be made directly from Trystar, F.O.B. Trystar's dock ("Shipping Point"), to the customers' specified shipping destination.

3.3 Payments. All payments will be made directly to Trystar.

3.4 Direct Sales. Trystar reserves the right to directly sell and solicit sales of the Products, including without limitation the Eligible Sales, to customers located within or outside the Territory without breaching this Agreement and without assuming any financial obligation to Kennerly; provided, however, that at the time Trystar accepts and approves an order for a sale of the Product, if that Product is listed next to a specific customer as an Eligible Sale on the Matrix Schedule, Trystar agrees to compensate Kennerly for that order pursuant to the commission rate listed on the Matrix Schedule.

4. **Competitive Products**

4.1 Competing Products. During the term of this Agreement, Kennerly will not either directly or indirectly, solicit, promote, sell, rent, purchase or represent other products which compete with or are similar to the Products in the Territory without Trystar's prior written consent.

5. **Confidentiality**

5.1 Definition. Kennerly acknowledges that it may receive information from Trystar which is the confidential property of Trystar. "Confidential Information" means any information or compilation of information which is proprietary to Trystar, including, but not limited to, trade secrets, information contained in or relating to product designs and specifications, formulas, manufacturing methods, processes, techniques, procedures, tooling, sales data, sales techniques, marketing plans or proposals, research and development work, supply sources, pricing and sales information, financial information, business expansions or acquisition, existing or potential customer lists and all other customer information, and any information which Kennerly should reasonably understand from the context to be confidential.

5.2 Nondisclosure. During the term of this Agreement and at all times thereafter, Kennerly agrees to hold in strictest confidence and to never disclose, furnish, communicate, make accessible to any person or use in any way for Kennerly's own or another's benefit any Confidential Information or permit the same to be used in competition with Trystar. Kennerly agrees to refrain from such acts and omissions which would reduce the value of the Confidential Information to Trystar. The duty not to disclose Confidential Information shall survive the termination of this Agreement.

6. **Intellectual Property**

6.1 Intellectual Property. All of Trystar's Intellectual Property (including, without limitation, trademarks, trade names, design marks, and patents) is and will remain the exclusive property of Trystar, or its subsidiaries or other affiliates. Kennerly acknowledges that Trystar is not by this Agreement granting any right or license whatsoever, by implication, estoppel or otherwise, to Kennerly to utilize any information, know-how, proprietary data, trademarks or patent rights which Trystar may have or may secure in the future relating to any of the Products. Kennerly may not use Trystar's trade name or trademarks in any manner that Trystar deems adverse to its interests. Kennerly will ensure that all merchandising, advertising, publicity material and promotional material, including, without limitation, trade show materials, catalogs, brochures, and websites used in the marketing, sales and use of the Products by Kennerly, its customers and the end-user customers will be subject to Trystar's prior written approval and will meet all specifications and standards as provided from time to time by Trystar.

7. Goodwill

7.1 Goodwill. Kennerly will refrain from committing any disparagement or other actions in the course of doing business, during the terms of this Agreement and thereafter, that would reflect adversely on the goodwill associated with Trystar, its name, business, trademarks, the Products, and its officers, directors, and employees.

Kennerly acknowledges and agrees that any breach of its obligations listed in Section 11.2 below and any breach of any other of its material obligations under this Agreement will materially impair the goodwill associated with Trystar's trademarks, trade name and logo.

8. Fees

8.1 Compensation. Trystar will pay Kennerly a commission for services performed based upon net invoiced shipments of the Eligible Sales according to the terms and conditions contained in this Agreement.

- (a) "Net Invoiced Shipments" shall mean the net amount billed by Trystar for Eligible Sales listed on the approved Matrix Schedule and shipped to the customer, less applicable discounts, credits, taxes, transportation and other specific charges that have been deducted.
- (b) Commissions. Commissions shall be determined based on the value of the Net Invoiced Shipments sold at full margin, commissioned prices, plus the commission rate for the Eligible Sales as listed on the approved Matrix Schedule, and shipped into Kennerly's assigned Territory on all orders, regardless of whether the orders are transmitted to Kennerly or Trystar, or received directly from the customer.

Trystar will send Kennerly a monthly statement listing all invoices on which a commission is being paid for shipments that occurred in that month (the "Commission Report"). Kennerly shall acknowledge and accept or reject each Commission Report in writing within five (5) business days of receipt of such Commission Report. If Kennerly does not acknowledge, accept or reject a Commission Report, Kennerly shall be deemed to have accepted that the Commission Report lists all commission earned and due to Kennerly for that month.

- (c) Commission Rates. Trystar has the sole right to determine the commission rates for each of the Eligible Sales. The commission rate shall be listed for each Product by customer, by location, by Territory and by Channel of Distribution on the Matrix Schedule in Schedule D.

Cable Product Pricing. The parties hereto acknowledge that, due to the fluctuating price of copper and other commodity-based components, the pricing structure for

Cable Products and other Products changes on a regular basis. The parties also acknowledge and agree that Trystar has the sole right to determine the fluctuating pricing structure required to determine what constitutes the full margin, list price for each and every Eligible Sale, quote and order. For purposes of this Agreement, the list price is defined as the most recent price quoted to Kennerly and approved in writing by Trystar for each Product (the "List Price"). All prices quoted are subject to the quote terms and must be approved in writing by Trystar in advance of any quote or sale.

- (d) Trystar will provide Kennerly with the List Prices for all Products, quotes and orders.

All commissions that become due and payable pursuant to this Section 8.1 shall be retroactive to the Effective Date of this Agreement.

- (e) Price Reductions. In the event that Trystar elects, at its sole option, to secure a purchase order for a Product at a purchase price that is less than Trystar's quoted current List Price (e.g. as incentive to secure an order), Trystar reserves the right to reduce the commissions for any such sale; provided, however, that any commission reduction is identified to Kennerly prior to acceptance of the order.

8.2 Payment. Commissions are earned upon Net Invoiced Shipments to creditworthy customers. Payment will be due forty-five (45) days after the month-end of the invoiced shipment month. If an order is not delivered by Trystar, no commission is due. The commissions described in this Agreement will be the only compensation paid to Kennerly for services under this Agreement.

8.3 Commission Adjustments For Delinquent Accounts. Trystar will, at Trystar's option, make offset adjustments to commission in the following circumstances: (1) returned goods; and (2) uncollected debt more than ninety (90) days past the invoice due date ("Uncollected Debt"). Adjustment amounts exceeding commissions due will be charged to Kennerly and Kennerly will remit payment to Trystar for any such adjusted amount within sixty (60) days after receipt of written notice.

8.4 Payment of Commission On Delinquent Accounts. If sums are received on any delinquent or previously classified Uncollected Debt, Trystar will pay Kennerly the percentage of commissions applicable at the time of the original sale less any and all costs of collection; provided, however, that (1) Trystar collects the full, original amount due on each invoice; and (2) such commissions have not already been paid (the "Delinquent Account Commissions"). Such Delinquent Account Commissions will be due and payable forty-five (45) days after receipt of the proceeds of such collections.

8.5 Spiffs. Trystar, at its sole option, may elect to offer Kennerly cash incentives ("Spiffs") for products not listed as an Eligible Sale on the Matrix Schedule or included in the Products or Channels of Distribution as defined in this Agreement. It is agreed by the parties that all factors relating to such Spiffs, including without limitation the cash amount, the payment terms, and the eligible products and

orders) will be determined solely by Trystar, on an individual, case by case basis. It is further agreed by the parties that Trystar reserves the right to discontinue or eliminate Spiffs for any and all products at any time and for any reason.

9. Expenses

9.1 Samples. Trystar will provide Kennerly, at Trystar's expense, with a reasonable quantity of Product samples each calendar year during for the duration of this Agreement. The Product samples, types, colors and quantities will be determined by Trystar, at its sole option.

9.2 Sales Collateral and Product Information. Trystar will provide sales collateral, including available brochures, catalogs Product specifications and other Product information, within reason, at Trystar's expense and at Trystar's option. Trystar will provide Kennerly with current prices for the Products. Any literature or samples which are not used, or other items belonging to Trystar, will be returned to Trystar at its request.

10. Term

10.1 Effective Date. This Agreement is effective upon acceptance and signing of the Agreement by both parties shall continue in full force and effect effective unless and until terminated pursuant to the terms and conditions of Section 11.

11. Termination.

11.1 Either party may terminate this Agreement with or without cause, for any reason whatsoever and at any time, by delivery of sixty (60) days written notice to the other party.

11.2 Trystar may terminate this Agreement for cause at any time with immediate effect by written notice of termination. For purposes of this Agreement, the term "for cause" includes, but is not limited to, the following:

- (a) any material changes in the business structure, ownership, or control of Kennerly without Trystar's prior written consent;
- (b) assignment, or attempted assignment, of this Agreement by Kennerly without Trystar's prior written approval;
- (c) insolvency of Kennerly or the filing of a petition in bankruptcy by or against Kennerly, the appointment of a receiver for Kennerly or Kennerly's property, or execution of an assignment by Kennerly for the benefit of creditors;
- (d) the voluntary abandonment of the business by Kennerly as determined by the totality of the circumstances;
- (e) committing any dishonest or illegal act, or violating any law relating to or having an adverse effect on Kennerly's or Trystar's business;

(f) any act of Kennerly which materially impairs the good will associated with Trystar's trademark, trade name, service mark, logotype, or other commercial symbol; and

(g) providing falsified data or information to Trystar.

11.3 It is expressly understood and agreed that the right of termination set forth in Section 11 herein is absolute, and that the parties have considered the possibility of such termination and the possibility of loss and damage resulting from termination in making expenditures related to the performance of this Agreement. It is the express intent and agreement of the parties that neither shall be liable to the other for damages or consequential losses by reason of termination of this Agreement.

12. **Effects of Termination**

12.1 Payment Obligations. Trystar shall promptly pay when due any commission owing to Kennerly for Net Invoiced Shipments of Eligible Sales in the Territory, solicited by and submitted to Trystar by Kennerly and accepted in writing by Trystar prior to the effective date of expiration or termination of this Agreement.

12.2 Pending Orders. Subject to the terms and conditions set forth in this Section 12.2, Trystar agrees to pay a commission to Kennerly for eligible Net Invoiced Shipments of Eligible Sales resulting from pending orders that have been submitted in writing by Kennerly and approved and accepted in writing by Trystar prior to the effective termination date.

Trystar shall have no obligation to pay a Pending Order Commission on eligible pending orders, and no such Pending Order Commission shall be due to Kennerly, unless and until the order ships and Trystar collects full payment for the invoiced shipments. Further, Kennerly agrees to cooperate with Trystar in an effort to facilitate a smooth transition after termination. In the event that Kennerly fails to cooperate, Trystar shall have no obligation to pay any Pending Order Commissions.

12.3 Order Information. Upon request, Trystar shall furnish Kennerly copies of orders and invoices for Net Invoiced Shipments of Eligible Sales on customer business for the Products in the Territory on which Kennerly has earned a commission under this Agreement until the date of the final commission paid to Kennerly.

12.4 Sales By Trystar. During any termination notification period required under this Agreement or as required under any applicable law or statute, Trystar shall have the right to (1) directly contact and sell the Products to any and all customers and potential customers in the Territory, and (2) engage the services of other representatives to solicit orders and market and sell the Products in the Territory. Trystar agrees to pay Kennerly commissions, on any Eligible Sales listed on the Matrix Schedule, which are solicited by Trystar and accepted from a customer in the Territory prior to the effective termination date of this Agreement, in accordance with the provisions in Section 8.

12.5 Return of Samples and Confidential Information. Upon expiration or termination of this Agreement, Kennerly shall immediately cease soliciting orders for the Products and using Trystar's collateral materials. Kennerly agrees to return all sample Products and copies of Product literature and materials and all documents or copies thereof containing any Confidential Information of Trystar within fifteen (15) business days after request by Trystar.

13. **Warranties**

13.1 Trystar has the sole authority to grant warranties with respect to the Products. Further, Trystar shall not be responsible for any warranties that Kennerly makes concerning the Products.

13.2 Trystar's liability shall, at all times, be limited as provided in Trystar's customary written warranty applicable to particular products, and in no event shall Trystar be liable for consequential loss or damages.

14. **Representations and Actions**

14.1 Trystar agrees to indemnify and hold Kennerly harmless against the liability, costs and expenses which Kennerly may incur, caused by any defective Products, which may result from Trystar's sale of the Products in which Kennerly was involved in its performance of this Agreement; provided, however, that Kennerly was not negligent, or has not misrepresented the Products or made any warranties concerning the Products in violation of this Agreement.

14.2 Any statements, representations, warranties, or advertisements concerning Products which exceed in scope or are different in meaning from the statements made by Trystar in its own literature shall be Kennerly's sole responsibility and Kennerly agrees to indemnify and hold Trystar harmless against the liability, costs, and expenses of any nature which Trystar may incur as a result of any actions, or any such activities, or any negligent or willful conduct by Kennerly or its employees or affiliates.

14.3 Kennerly hereby represents and warrants that Kennerly is in a position to perform his obligations under this Agreement. Kennerly further warrants and represents that he does not have any type of written or oral non-competition agreement or any other agreement which prevents him from entering into this Agreement with Trystar, and that Kennerly has not signed or entered into any written or oral confidentiality agreements, proprietary information agreements, or trade secret agreements which would prevent him from executing this Agreement.

15. **General Understandings**

15.1 Notices. Any notice requires to be given under this Agreement shall be in writing and shall be deemed to have been delivered when received, if hand delivered, sent by courier service, telex, telecopy or facsimile, e-mail or four (4) days after depositing, if placed in the U.S. Mail for delivery by first class mail. Notices shall be given, mailed or sent to the parties at the following addresses:

If to Trystar:

Trystar, Inc.
2917 Industrial Drive
Faribault, Minnesota 55021

Phone: 507.333.3990
Fax: 507.333.3991
Email: dan.moerke@trystar.com

If to Kennerly:

Jan Kennerly, Jr.
444 Tap Harley Road
Swansea, SC 29160

Phone: 803-568-5764
Cell: 803.917.7296
Email: rickkennerly@gmail.com

Either party may change the addresses by giving written notice pursuant to this Section.

15.2 Entire Agreement. This Agreement, together with the Schedules attached hereto and incorporated herein, constitutes the entire agreement between the parties and supersedes any and all prior and contemporaneous oral or written understandings between the parties.

15.3 Force Majeure Trystar assumes no liability and shall not be liable to Kennerly for any failure to fill, or any delay in filling, orders received and accepted by Trystar caused, in whole or in part, directly or indirectly, by strikes, lockouts, or any other labor troubles, fire, floods, acts of God, accidents, embargoes, war, riots, act or order of any government or governmental agency, delay in the delivery of raw materials, parts or completed goods by suppliers, outage of plant equipment or machinery, shortage of labor, or any other cause beyond the control of Trystar.

15.4 Applicable Law. At Trystar's option, any disputes between the parties shall be resolved before a court of general jurisdiction located in Minnesota, U.S.A., and jurisdiction is hereby conferred upon such court. In connection therewith, Kennerly hereby agrees to submit to the jurisdiction of such court and to waive any possible defense of lack of personal jurisdiction before such court.

15.4 Modification or Waiver. Amendments and modifications, if any, shall be in writing and valid only when signed by both parties. The waiver or failure of either party to enforce the terms of this Agreement in one instance shall not constitute a waiver of said party's rights under this Agreement with respect to other violations.

15.5 Remedies. The parties acknowledge that money damages may not be an adequate remedy for any breach of the provisions of this Agreement. In addition to any other relief afforded by law, Trystar shall have the right to enforce covenants contained in Sections 5, 6, 7, 13 and 14 hereof by specific performance and preliminary, temporary and permanent injunctive relief against Kennerly and any other

person concerned thereby. Damages, specific performance and injunctive relief are all proper modes of relief and shall not be considered alternative remedies.

15.6 Survival. The obligations of this Agreement under Sections 5, 6, 7, 13 and 14 hereof shall survive the expiration or termination of this Agreement.

15.7 Severability, Interpretation and Counterparts. In the event that any provision of this Agreement is held invalid, the remaining provisions shall remain in full force and effect as if such invalid provision had not been included herein.

The headings used herein are for convenience only and are not intended to define, limit or describe the scope of any provisions herein. The Agreement may be executed in one or more counterparts, each of which shall be executed by the parties. All counterparts taken together shall constitute but one and the same instrument.

[Signature Page Follows]

The parties have read and agreed to the terms and conditions set forth in this Agreement, effective as of the day and year first written above.

Jan Kennerly, Jr.

By: 
Name: Jan F Kennerly Jr.

Trystar, Inc.

By: 

Name: Dan Moerke

Its: Senior Vice President

Schedule A

Products

1. Utility cables and utility accessories including:
 - (a) clear ground cables (size # 6 – Size # 350MCM);
 - (b) colored ground cables (size # 6 – Size # 350MCM);
 - (c) jumper bypass cables (size # 2, #1/0, #2/0, #4/0, 15KV, 25KV, 35KV);
 - (d) utility cable reels, either manual crank or powered rewind;
 - (e) temporary service cable assemblies (size # 4/3, #2/3);
 - (f) utility cable assemblies with utility ferrules or clamps;
 - (g) loose utility ferrules; and
 - (h) loose utility clamps.

Prices for all quotes and sales of the Products must be provided in writing and prices and commissions approved by Trystar in advance of the quote and sale in order to be eligible for a commission.

Schedule B

Territory:

1. The United States
2. Canada
3. Mexico

Schedule C

Channels of Distribution:

1. Channels of Distribution for Utility Cables:
 - (a) Utility distributors (cable only);
 - b) Utility contractors (end-users for finished products;
 - (c) Government-Owned Utilities (GOU);
 - (d) Investor-Owned Utilities (IOU); and
 - (e) Rural Electric Associations and Co-ops (REA).

[illegible]

SCHEDULE ABOVE IS EFFECTIVE for commissions paid by Trystar Inc. to Kennerly:

Beginning	Ending

TRUSTAR INC.
SIGNED: _____
Name: _____
Date: _____

X = If no commissions are earned for a Product for a specific customer, the commission shall be marked X.
 * All information in the Matrix Schedule is subject to the terms and conditions of the Sales Representative Agreement.
 * Trystar has the sole right to approve and make any required changes to the Matrix Schedule on a monthly basis.
 * % commission is by customer, to be determined solely by Trystar

Exhibit G

Walter Bierer Deposition Excerpts
February 23, 2022

State of South Carolina)
)
County of Richland)

Bierer and Associates,) 2018-CP-40-04841
Inc.,)
)
Plaintiff,)
v.)
)
) Video Deposition
Jan F. Kennerly, Jr.,)
Danielle Kennerly, EUSA,) of
LLC, J&D Farms, LLC,)
Trystar LLC, Travis Pattern) Walter Bierer
& 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.)

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

1 he would be terminated on the 13th. He was out of
2 town somewhere.

3 Q Effective the 13th? I gotcha.

4 A Yeah. That's right.

5 Q But the notice was -- the decision was made on the
6 10th?

7 A Yep.

8 Q All right. What were your exact reasons at that
9 time for terminating him as an employee?

10 A I -- it turned out an obvious conflict of interest.

11 Q All right. Describe that.

12 A Boy, what a question: "Describe that." Let's just
13 say that it turns out -- a lot went on that day --
14 the day it -- okay. I determined that -- I had
15 been given information that Kennerly had been
16 working with three companies unbeknownst to me,
17 okay? And what became apparent real soon is that
18 Kennerly had hijacked and corrupted all of Bierer's
19 sales channels and allowed certain manufacturers
20 such as Trystar and Travis and ITW to leapfrog
21 right into our customers. They didn't use their
22 own sales channels, they used Bierer sales
23 channels. That's what became apparent to me.

24 And he was -- he was receiving profits,
25 payola, bribe money -- I'm not sure what the heck

1 it was. Why they paid him, I'll -- you know, it's
2 beyond me why they would pay -- you know, my
3 employee, my VP, my trusted employee, why they
4 would pay him, you know, is still a mystery to me,
5 other than that he gave -- he provided something to
6 them of value. And the only thing that I can come
7 up with that he provided of value is going through
8 our sales channels rather than their own. And if
9 you ask any one of these people -- Trystar, Travis,
10 ITW -- "Why didn't you go through your own sales
11 channels?" they'll have -- I'm not sure what
12 they'll come up with, but obviously, there was some
13 advantage to going through our sales channels and
14 giving Kennerly payout money.

15 Q When you say your "sales channels," are you
16 referring to the --

17 A The reps that --

18 Q -- sales reps --

19 A My sales channel -- my primary sales channel is
20 Rick Kennerly. He's vice president of national
21 sales, okay? I appointed him that with all that
22 trust in the world, okay? That's my primary sales
23 channel. The reps are secondary. I had contracts
24 with them, okay? He corrupted every damn one of
25 them.

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 REPLY IN SUPPORT OF
ITS MOTION FOR SUMMARY
JUDGMENT BASED ON THE STATUTE
OF LIMITATIONS**

INTRODUCTION

Under South Carolina law, “in determining when the limitations period begins to run, the proper focus is upon the date of discovery of the injury, ***not the date of the discovery of the wrongdoer.***” *Brown v. Pearson*, 326 S.C. 409, 418, 483 S.E.2d 477, 482 (Ct. App. 1997) (citing *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994)) (emphasis added). The test for determining whether a plaintiff “should have been aware of a potential claim” is objective, not subjective. *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 169-70. And by Walter Bierer’s own admission, “no business other than Bierer” would have tolerated Kennerly’s actions “for any

period of time.” (Trystar Ex. 4.) This case therefore presents the rare instance where plaintiff admitted in a contemporaneous writing that its conduct was objectively unreasonable. In such circumstances, there is nothing more for the Court to do than enter summary judgment.

ARGUMENT

I. Bierer’s Arguments About Lacking Actual Knowledge Are Irrelevant.

Bierer concedes that all claims are governed by a three-year statute of limitations. (*See, e.g.*, Opp. at 7, 9.) Bierer brought its claims against Trystar on April 15, 2021. The only remaining question is a purely legal one: whether what Bierer undisputedly knew and wrote in emails from 2013 and 2015 was enough to trigger the running of the statute of limitations. Bierer argues that it was not, but each of these arguments fail under controlling South Carolina law.

The first and most easily rejected of Bierer’s arguments is that it was “not aware” of certain facts until within the limitations period. (*E.g.*, Opp. at 2, 9.) Whether Bierer had *actual* knowledge of certain facts is irrelevant; what matters under South Carolina’s discovery rule is whether Bierer 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). As Trystar previously explained, the undisputed evidence—from Bierer’s own emails—establishes that it thought that “Trystar may possibly be circumventing [Bierer’s] efforts to establish and support new sales” (Trystar Ex. 1), and that Trystar was “cross[ing] another line” and “undermining” Bierer’s business (Trystar Ex. 2), back in 2013. Those emails were more than enough to “put a person of common knowledge and experience on notice that some claim against [Trystar] might exist.” *Stokes-Craven Holding Corp. v. Robinson*, 787 S.E.2d 485, 489 (S.C. 2016).

In short, Bierer cannot defeat summary judgment merely by arguing that it “did not have actual knowledge of [the alleged] wrongful conduct until sometime after July 2018.” (Opp. at 2.) Actual knowledge is not necessary. Constructive knowledge is sufficient.

II. Bierer’s Argument That It Did Not Know Enough To Trigger The Running Of The Limitations Period Lacks Merit.

Beyond arguing a lack of actual knowledge, Bierer argues that it lacked constructive knowledge because what it knew in 2013 was not enough to trigger the running of the limitations period. Bierer’s argument, in essence, is that its knowledge in 2013 that “Trystar may possibly be circumventing [Bierer’s] efforts to establish and support new sales” (Trystar Ex. 1), and that Trystar was “cross[ing] another line” and “undermining” Bierer’s business (Trystar Ex. 2), was not enough. In Bierer’s view, the fact necessary to trigger the limitations period was whether “Trystar paid Kennerly.” (Opp. at 1, 2-3, 8-9.) There are many problems with this argument.

The biggest problem is that South Carolina cases do not require that much knowledge to “put a person of common knowledge and experience on notice that some claim against [Trystar] might exist.” *Stokes-Craven*, 787 S.E.2d at 489. What matters, in other words, is “the date of discovery of the injury.” *Brown v. Pearson*, 483 S.E.2d 477, 482 (S.C. App. 1997). And *according to Bierer’s own words*, the injury was Trystar (allegedly) “usurp[ing] sales and customers from Bierer.” (Third Am. Compl. ¶98(b); *see also id* ¶¶ 123, 127; *see* Opp. at 8 (claiming the injury is “diverting” sales from Bierer “resulting in lost sales profits and other income to Bierer”).) When Joe Bierer wrote on April 9, 2013 (see Trystar Ex. 1) that Trystar “may possibly be circumventing our efforts to establish and support new sales” he discovered, in his own words, the injury he is now alleging in paragraphs 98(b), 123, and 127 of the complaint. Using the words of the South Carolina Supreme Court in *Christensen v. Mikell*, 476 S.E.2d 692, 694 (S.C. 1997), “even if [Bierer] 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.* It had three years to investigate from that date and file suit. But Bierer waited until 2021, which is far too long.

Under *Brown*, *Christensen*, and numerous other cases, summary judgment was therefore appropriate. *E.g.*, *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); *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). Trystar cited all of these cases in its opening brief, all of them granted summary judgment to the defendant, and tellingly, Bierer ignores all of them. Bierer has cited ***no case*** denying summary judgment on limitations grounds under similar circumstances.

Even assuming, moreover, that Trystar’s payments to Kennerly are what would trigger the statute of limitations clock (*see* Opp. 2-3), the question is whether what Bierer wrote in 2013 would “put a person of common knowledge and experience on notice” that Trystar was paying Kennerly. *Stokes-Craven*, 787 S.E.2d at 489. The answer to that question is yes, as confirmed by Bierer’s own words. According to Bierer, “no business other than Bierer” would have tolerated Kennerly’s actions “for any period of time.” (Trystar Ex. 4.) Hence, when Bierer learned in 2013 that Trystar “may possibly be circumventing” Bierer’s efforts to establish and support new sales (Trystar Ex. 1), any reasonable person in its shoes would have inquired further to determine if “some claim

against [Trystar] might exist.” *Brown*, 483 S.E.2d at 482. That Bierer chose to act like “no other business would” (Ex. 4) does not raise a fact question on summary judgment.

Bierer’s argument that there was “nothing wrongful” about Trystar’s 2013 conduct, and hence no reasonable person would have inquired further (Opp. at 2), is self-contradictory. The Court need only compare Trystar Exhibits 1 and 2 with paragraphs 98(b), 123, and 127 of the Third Amended Complaint (among others). Exactly what Bierer *now* alleges was wrongful is what it complained of to Trystar in 2013. Because Bierer claims Trystar’s actions were wrong *now*, it should have investigated *back then*. Again, Bierer cannot claim that it needed to know that *Kennerly* was the wrongdoer in 2013, because “in determining when the limitations period begins to run, the proper focus is upon the date of discovery of the injury, *not the date of discovery of the wrongdoer*.” *Brown*, 483 S.E.2d at 482 (emphasis added).

Nor can Bierer overcome summary judgment by (1) relying on statements offered in new, “sham” affidavits or (2) by focusing on how *Trystar* “did not respond” to the April 9, 2013 email. (See Opp. at 11.) As to the first point, South Carolina appellate courts properly exclude affidavits submitted that attempt to create fact issues on the statute of limitations. See, e.g., *McMaster v. Dewitt*, 767 S.E.2d 451, 454-58 (S.C. App. 2014). Bierer’s post-hoc explanations of emails he sent in 2013, 2015, and later are not what he said in depositions, and contrary to the plain meaning of the emails. As in *McMaster*, the Court should decline to consider these “sham” affidavits. *Id.* at 457-58.

And as to Trystar’s “not responding” to the April 9, 2013 email, that is a red herring. At that point, Bierer was *already on notice* of facts that would put a reasonable person on notice that a claim might exist. *Christensen*, 476 S.E.2d at 694. Its arguments about what Trystar did not do amount to an impermissible attempt to shift the burden to Trystar.

Bierer's constructive-notice argument—that even to start the limitations clock it needed to know that “Trystar had entered into an agreement with Kennerly in which he would receive sales commissions by utilizing Bierer's sales reps to promote Trystar products to the detriment of Bierer” (Opp. at 11-12)—mirrors the arguments South Carolina courts have repeatedly rejected. In constructive notice cases, parties can *always* argue that more was required to start the clock. The South Carolina courts are unsympathetic to such arguments, because they “confuse[] the event that triggers the running of the limitations period under the discovery rule.” *McMaster*, 767 S.E.2d at 456. What triggers the running of the limitations period is “the injury,” *id.*; a plaintiff need not know the “exact nature of the wrong.” *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 even though they did not “know the exact nature of the wrong”); *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). Under all of these cases, the “injury” was the loss of sales of Bierer customers, which Bierer complained of in two emails in 2013. (*See* Trystar Exs. 1 and 2.) That was enough to start the clock. Bierer had three years to investigate. But instead of bringing claims in 2014, 2015, or 2016, it waited until 2021. That is far too late. *See Abrasives-South, Inc. v. Korte*, 226 F. Supp. 3d 584, 586-89 (D.S.C. 2016) (granting summary judgment on materially similar facts); *Wiggins v. Edwards*, 442 S.E.2d 169, 170 (S.C. 1994) (rejecting an argument just like Bierer's, because “the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer”). Based on these authorities, summary judgment is required. Tellingly, Bierer does not cite a single case denying summary judgment on a comparable record.

III. Bierer's Fraudulent Concealment Argument Is Unsupported.

That leaves Bierer's last argument—that the doctrine of fraudulent concealment “tolls the statute of limitations.” (Opp. at 14-15.) This argument fails for lack of record support.

On this issue, the Opposition is most notable for what it does not say. Trystar noted in its opening brief that there is “zero evidence that Trystar committed the type of fraudulent, bad faith, or deceptive acts that are necessary to show fraudulent concealment.” Trystar challenged Bierer to come up with a single scintilla of evidence establishing that anyone at Trystar misled it into not filing suit until later. Bierer has cited *no record evidence* on this point. Without any act from Trystar to fraudulently conceal Bierer's claims, the fraudulent-concealment doctrine simply does not apply. *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”). *See also* Trystar Ex. 5 (“Q. Mr. Moerke never said anything misleading to you, to the best of your knowledge; is that true? A. That would be correct, yes.”).

Instead of pointing to any of *Trystar's* alleged fraudulent concealment, Bierer pivots to arguing that *Kennerly* committed fraudulent concealment which should be *imputed* to Trystar as its purported “agent.” (Opp. 14-15.) The problem with this argument, again, is a lack of any record evidence. Bierer cites *zero* evidence that anything Kennerly allegedly did to fraudulently conceal facts from Bierer was within the scope of any purported “agency relationship” with Trystar. There is none. Nor is there any evidence that Trystar took actions to cloak Kennerly in any apparent authority. There is none. To the extent that Bierer attempts to argue that an agency relationship may be established based on what *Kennerly* did, South Carolina law would not permit it: “[A]pparent authority must be established based upon manifestations by the principal, not the agent.” *Shropshire v. Prahalis*, 419 S.E.2d 829, 829-30 (S.C. App. 1992); *see also Roberson v.*

Southern Finance of S.C., Inc., 615 S.E.2d 112, 115 (S.C. 2005) (same); *Frasier v. Palmetto Homes of Florence, Inc.*, 473 S.E.2d 865, 868 (S.C. App. 1996) (similar); *Orphan Aid Soc. v. Jenkins*, 362 S.E.2d 885, 887 (S.C. App. 1987) (similar). Thus, Bierer’s citation to *West v. Serv. Life & Health Ins. Co.*, 66 S.E.2d 816, 817 (S.C. 1951) (*see* Opp. at 15), is inapposite. Unlike in *West*, Bierer cites no evidence that Kennerly was an agent of Trystar acting within the scope of his agency. It can’t, because he wasn’t.

In short, given the absence of any evidence that Trystar’s actions were “calculated to conceal from a potential plaintiff that he has a cause of action” (*see* Opp. at 15) (citing standard), and the lack of evidence supporting any agency relationship between Kennerly and Trystar, and the lack of any evidence that Kennerly was acting within the scope of any agency relationship when he purportedly misled Bierer, the doctrine of fraudulent concealment simply does not apply.

IV. Bierer Has Forfeited Any Argument About Equitable Claims.

Finally, summary judgment is also appropriate on Bierer’s equitable claims. In fact, Bierer has raised no defense about its claims against Trystar for a constructive trust (Count Ten) and an accounting (Count Thirteen). It has therefore forfeited any argument and the Court can enter summary judgment in favor of Trystar on those claims.

Trystar argued, in Part III of its summary judgment memorandum, that Bierer’s claims for an accounting and a constructive trust were equitable claims which—rather than being barred by the statute of limitations—were barred by the equitable doctrine of laches. Bierer has offered no response on that argument. Its opposition memorandum does not even use the word “laches.” Argument on these claims is thus forfeited. *See, e.g., Cunningham v. Anderson County*, 778 S.E.2d 884, 886-87 (S.C. 2015).

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 filed suit against Trystar.

Respectfully submitted,

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December 30, 2022
 Charleston, South Carolina

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 REPLY IN SUPPORT OF
 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.)

On September 28, 2022, Travis Pattern & Foundry, Inc. (“Travis Pattern”) filed a Motion for Summary Judgment showing that the applicable statutes of limitation bar all of Plaintiff’s claims against Travis Pattern in this lawsuit. Nothing in Plaintiff’s opposition, filed December 28, 2022, creates a genuine issue of material fact or alters the plain application of South Carolina law. Travis Pattern’s Motion must be granted.

Plaintiff’s arguments in opposition to Travis Pattern’s dispositive motion include:

- (1) Plaintiff lacked “actual knowledge” of facts to put it on notice of claims against Travis Pattern until 2018;
- (2) Plaintiff did not know *enough* to put it on constructive notice of claims against Travis Pattern until 2018; and

- (3) Kennerly fraudulently concealed from Plaintiff the facts of his alleged wrongdoing, including his business relationship with Travis Pattern, such that the statute of limitations against Travis Pattern was tolled.

Trystar filed a thorough Reply in Support of its, separate, Motion for Summary Judgment, also based on the statute of limitations, on December 30, 2022. Trystar's Reply sets forth the legal and factual reasons why all of Plaintiff's arguments miss the mark. For the same reasons as in Trystar's Reply and in the following memorandum, summary judgment must be granted to Travis Pattern.

ARGUMENTS

I. PLAINTIFF'S SHAM AFFIDAVITS MUST BE IGNORED.

Plaintiff's opposition relies heavily on carefully curated, post-hoc, affidavits of Plaintiff's principals, Walter Bierer and Joe Bierer.¹ While interesting in the number of new facts that have been created nearly five years into this dispute, these affidavits fail to create any genuine issues or material facts necessary to defeat summary judgment.

"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 affidavits of Walter Bierer and Joe Bierer created in an attempt to overcome summary judgment are "sham affidavits" in that they "contradict that party's own prior sworn statement[s]." *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (citations omitted). Accordingly, as a matter of law, these affidavits fail to "creat[e] an issue of fact for purposes of summary judgment[.]" *Id.*; see also Trystar Reply at p. 5. "The [Court] 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." *Main v. Corley*, 281 S.C. at 527, 316 S.E.2d at 407.

¹ See Plaintiff's Opposition at Exhibits A and B.

For example, Travis Pattern relied in its dispositive motion on Walter Bierer's October 14, 2015, email to Kennerly, as the basis for Travis Pattern's argument that Plaintiff knew or should have known as early as 2015 that it had claims against Travis Pattern. That email states:

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 come 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....²

Plaintiff's contention that this email "refer[s] to Kennerly's golf outings locally in South Carolina"³ is laughable. Nothing about this email references Plaintiff's concern that Kennerly was taking off too much time for leisure or that such activity distracted from Plaintiff's business. The additional argument in Plaintiff's opposition that this email "simply reflects Walter[] [Bierer'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" is unfounded and illogical.⁴ At no time during the multi-day depositions of Walter

² Travis Pattern Motion for Summary Judgment, Exhibit 10.

³ See Plaintiff's Opposition at p. 7.

⁴ *Id.* (emphasis added).

Bierer, Joe Bierer, or Brent Jeffries did anyone testify in support of this position. Instead, when asked whether Walter Bierer ever suggested to Kennerly in 2015 that he look for employment elsewhere due to his outside activities, Bierer testified: “I would have no reason to do that. I never – I liked Rick as an employee. I thought he was a valuable employee. ... That never happened. Absolutely not. Never happened. And if Rick told you that, that’s one more fabrication.”⁵

As a second example, Brent Jeffries, one of Walter Bierer’s sons and an upper level manager of Plaintiff’s company, emailed in 2016, saying: “From talking with [another sales representative], [Kennerly] **helps many people with other manufacturer’s products**. ... I never realized that ‘off’ time was a factor.”⁶ At this time, Mr. Jeffries was in charge of Plaintiff’s grounding and cabling department.⁷ In response, Billie Bierer (Walter Bierer’s wife) said: “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**.”⁸ Plaintiff claims this email “does not reflect [its] knowledge that Kennerly was doing anything other than conducting business in furtherance of [Plaintiff’s] business.”⁹ Plaintiff’s narrative that Brent Jeffries was not raising concerns about Kennerly selling other manufacturer’s competing products and, instead, was *supporting* Plaintiff’s business, is disingenuous. This email expresses, explicitly, a concern by one of Plaintiff’s managers that Kennerly was selling other manufacturer’s products (like Travis Pattern’s products) to customers.

⁵ Travis Pattern’s Motion, Exhibit 1, W. Bierer Depo. Trans. (Day 1) at 289:13-22.

⁶ See Travis Pattern’s Motion, Exhibit 14 (emphasis added).

⁷ B. Jeffries Depo. Trans. (Day 1), 25:10-15.

⁸ Travis Pattern’s Motion, Exhibit 14 (emphasis added).

⁹ Plaintiff’s Opposition at pp. 6-7.

II. PLAINTIFF’S “DISCOVERY” OF ITS CLAIMS IN 2018 IS UNSUPPORTED.

Plaintiff repeatedly contends it did not “discover” Travis Pattern’s wrongful conduct until after July 10, 2018.¹⁰ However, this is unsupported and undermined by the extant record. The following chart illustrates the reasons given by Plaintiff for terminating Kennerly in 2018 and when each of these reasons was known to Plaintiff:

Reasons for Plaintiff’s Termination of Kennerly	Evidence that Plaintiff Knew of These Reasons as Early as 2015
• “It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electrical utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time.”	<i>See</i> 2015 Email from Walter Bierer: “You have purposefully separated yourself from Bierer by maintaining private telephone and email accounts.”
• “Other than very recently, no trip reports.”	<i>See</i> 2015 Email from Walter Bierer: “You have purposefully separated yourself from Bierer by ... no[t] reporting”
• “Unknown whereabouts for weeks”	<i>See</i> 2015 Email from Walter Bierer: “I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time.”
• “Product development for other companies”	It is undisputed that in 2015 Kennerly reported to Plaintiff that he attended lab testing of Travis Pattern products. <i>See</i> Travis Pattern Motion, Exhibit 1, W. Bierer Depo. Trans. at 289:23-294:8. It is undisputed Plaintiff did not pay for any of this testing or product development. <i>Id.</i>
• “Product representation and financial arrangements with other companies”	<i>See</i> 2016 Email from Brent Jeffries: “[Kennerly] helps many people with other manufacturer’s products”

¹⁰ *Id.* at pp. 1, 2, 3, 8, and 10.

As Walter Bierer said at the time of Kennerly's termination: **"No business other than Bierer would have tolerated this for any period of time."**¹¹ Walter Bierer admitted in his deposition it was "probably . . . unreasonable" to tolerate Kennerly's actions as long as Plaintiff did and Plaintiff "should've asked" more questions about what was going on.¹²

Plaintiff conveniently submits that Travis Pattern "cherry picked" several documents from "literally millions" of pages produced in discovery. However, the only documents relied on by Travis Pattern were the documents that Plaintiff had at its disposal from 2012 to 2015, the periods of time in which Travis Pattern submits Plaintiff knew or, through the exercise of reasonable diligence, should have known that it had a potential claim against Travis Pattern. That Plaintiff has, since this litigation, subsequently gained access to "literally millions" of additional documents is beside the point. Plaintiff fails to dispute that the very documents Travis Pattern used as exhibits to its Motion are the documents Plaintiff had in its possession, custody, and/or control prior to litigation and on which Plaintiff knew or should have known of the existence of a cause of action.

III. PLAINTIFF'S CONSTRUCTIVE NOTICE ARGUMENTS MISS THE MARK.

Plaintiff argues that it was not on notice of a claim against Travis Pattern until July 2018 because it lacked actual knowledge that Travis Pattern "was paying" Kennerly a commission prior to that time.¹³ However, it is irrelevant under South Carolina law that Plaintiff was allegedly unaware of this precise additional fact for purposes of the statute of limitations. In any event, Joe Bierer's testimony forecloses this argument as to Travis Pattern.

¹¹ Travis Pattern Motion for Summary Judgment, Exhibit 4 (emphasis added).

Travis Pattern's principal, Travis Garske, expressed the same sentiment: Q: "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?" A: "I monitor everything that goes on [at my business] very closely and it wouldn't have lasted very long if it happened." Q: "And why would it not last long if it happened, Mr. Garske?" A: "Because I would terminate that person." *See* Plaintiff's Opposition, Exhibit C, Garske Depo. Trans at 26:19-27:15.

¹² *See* Travis Pattern Motion, Exhibit 68, W. Bierer Depo. Trans. (Day 2) at 160:7-10; 161:7-8.

¹³ *See* Plaintiff's Opposition Memorandum at pp. 1, 5, 10, 11.

“[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 an injured party may not comprehend the full extent of the damage is immaterial for purposes of the statute of limitations). Further, “[t]hat the injured party may not at that time ‘comprehend the full extent of the *damage* is immaterial.’” *Doe v. Crooks*, 364 S.C. 349, 352, 613 S.E.2d 536, 538 (2005) (quoting *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996)) (emphasis added).

As set forth in Travis Pattern’s Motion, Plaintiff was aware in 2012 that Kennerly was intentionally dissociating himself from Plaintiff’s business by using his personal cell phone and email address, failing to introduce customers to sales representatives, and substantially reducing his trip and credit card reports. This alone is sufficient under South Carolina law to trigger the discovery rule for purposes of the statute of limitations. Moreover, in 2014, Plaintiff, through its owners and upper level managers, learned of a publicly available industry seminar brochure and announcement promoting Kennerly as a spokesperson for Travis Pattern. This brochure explicitly said that Kennerly “worked for” Travis Pattern for two years (since 2012). Joe Bierer testified during his deposition that the phrase “working for” a company means you are being paid by them.¹⁴ In other words, by Joe Bierer’s own logic, Plaintiff knew or should have known by 2014 that Travis Pattern was paying Kennerly to represent Travis Pattern’s products.

¹⁴ “You work *with* somebody, you assume you’re *not getting paid* by that company. You work *for* somebody, you’re *getting paid*.” *See* Travis Pattern Motion, Exhibit 13, Joe Bierer Depo. Trans. (Day 1) at 91:24-25-92:1, 93:19-94:1 (emphasis added). By Joe Bierer’s own logic, Plaintiff had actual knowledge in 2014 that Travis Pattern was promoting Kennerly as “working for” Travis Pattern and Plaintiff knew or should have known that Travis Pattern was paying Kennerly for that work.

IV. KENNERLY'S PURPORTED FRAUDULENT CONCEALMENT DOES NOT TOLL PLAINTIFF'S CLAIMS AGAINST TRAVIS PATTERN.

That Plaintiff failed to investigate any of its claims until on or after July 10, 2018 because it trusted and/or relied on Kennerly's alleged misrepresentations is Plaintiff's (or Kennerly's) problem; not Travis Pattern's. Plaintiff cannot rely on Kennerly's purported misrepresentations as the basis for fraudulent concealment to toll the statute of limitations against Travis Pattern, particularly where there is no evidence that Kennerly was an *agent* of Travis Pattern. Kennerly was merely an independent contractor and Travis Pattern made clear that it wanted to publicly represent to everyone, including Bierer, that Kennerly was its sales representative.

Noticably absent from Plaintiff's Opposition is any evidence that *Travis Pattern* itself fraudulently concealed any alleged wrongful activity. Instead, every single reference to purported fraudulent concealment in Plaintiff's Opposition is by Kennerly.¹⁵ "Whether the defendant's [Travis Pattern's] 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 [Travis Pattern'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)). Here, there is no evidence that *Travis Pattern* concealed its relationship with Kennerly from Bierer.

All of the evidence Plaintiff puts forth relates to *Kennerly's* fraudulent concealment of his relationships with third parties. As to Travis Pattern, the record is clear that it considered its

¹⁵ See Plaintiff's Opposition at p. 2 ("Kennerly repeatedly lied and deceived Bierer about his relationship with Travis"); p. 2 ("Kennerly's fraudulent concealment of this illegitimate relationship with Travis..."); p. 16 ("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."); p. 17 ("Kennerly's fraudulent concealment of his relationship with Travis tolls Bierer's claims against Travis.").

relationship with Kennerly to be out in the open, to the electrical utility industry and to Bierer. This evidence includes, at a minimum: (1) a 2014 public announcement to the industry that Kennerly had “worked for” Travis Pattern for two years (since 2012); (2) submissions of quotations for products to Bierer on which Travis Pattern listed Kennerly as its sales agent (“Rick Kennerly UGD”); and (3) in July 2018 when Plaintiff asked Travis Pattern directly, Travis Pattern openly acknowledged, without hesitation or delay, that Kennerly was its sales representative. All of this evidence is plainly set forth in Travis Pattern’s Motion for Summary Judgment.

Moreover, unreasonable reliance on misrepresentations 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.*

The same legal analysis applies in South Carolina. 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. 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)).

Here, Plaintiff had multiple, independent, reasons to question Kennerly's work activities and on which to know of the existence of a potential claim against Travis Pattern as early as 2012. It is undisputed that Plaintiff was on notice and had actual knowledge, on multiple separate and distinct occasions, from 2012 to 2016, of Kennerly's potentially conflicting business affiliations with other companies, including Travis Pattern. "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.

CONCLUSION

Nothing in Plaintiff's opposition to Travis Pattern's Motion for Summary Judgment creates a genuine issue of material fact for trial on the running of the applicable statutes of limitation as to all of Plaintiff's claims in this case against Travis Pattern.

"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. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981)).

Plaintiff failed to exercise reasonable diligence. Plaintiff was on notice of potential claims against Travis Pattern as early as 2012. It failed to file a lawsuit against Travis Pattern until 2021, years after the statutes of limitation expired. Travis Pattern is entitled to a dismissal with prejudice.

Respectfully submitted,

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January 3, 2023.

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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.

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)

MOTION TO RECONSIDER

Plaintiff Bierer and Associates, Inc., through undersigned counsel, moves the Court pursuant to Rule 59, SCRPC, to reconsider its Order dated February 6, 2023 (the “Order”) granting Travis Pattern & Foundry, Inc. (“Travis”) and Trystar, LLC (“Trystar”) summary judgment as to Bierer’s claims against them based on the statute of limitations. The Court should grant the Motion because the affidavits of Walter and Joseph Bierer are not sham affidavits and a material issue of fact exists as to whether Bierer was or should have been on notice of its claims against Defendants prior to July 10, 2018. There also exists evidence from which the trier of fact could find that Kennerly was acting as an agent of the Defendants during the relevant time period, and thus, his

actions are properly imputed to the Defendants. Accordingly, the Court should vacate the Order and issue a new order denying Defendants' motions for summary judgment.

STANDARD OF REVIEW

A motion under Rule 59(e) has long been viewed as a "motion for reconsideration." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The Supreme Court has clarified that a party may file a motion to reconsider "when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780. "[C]onsequently, a party usually is allowed to ask the Court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Id.* at 22, 602 S.E.2c at 778-79.

ARGUMENT

Summary judgment in favor of Travis and Trystar on Bierer's claims is inappropriate in the present matter because the record, including the affidavits of Walter and Joe Bierer, when viewed in the light most favorable to Bierer – and drawing all reasonable inferences in its favor – create a material issue of fact as to whether Bierer was on notice of its claims against Travis and Trystar prior to July 2018. South Carolina law is clear that "when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for the jury to decide." *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 239-40, 743 S.E.2d 860, 863 (Ct. App. 2013); *see also Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000) ("[T]he determination of the date the statute [of limitations] began to run in a particular case [is a question] of fact for the jury when the parties present conflicting evidence."); *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("The jury must resolve conflicting evidence as to whether a claimant knew or

should have known he had a cause of action.”). Additionally, the affidavits of Walter and Joe Bierer are not sham affidavits and are properly considered by the Court in its determination of whether a genuine issue of material fact exists as to the accrual date of Plaintiff’s claims. Accordingly, Travis and Trystar are not entitled to summary judgment.

1. The October 15, 2015 email.

The affidavits of Walter and Joe Bierer do not contradict their prior sworn testimony; therefore, they are appropriately considered by the Court in ruling on Defendants’ motions for summary judgment. *See generally Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (setting forth facts a court may consider in determining whether an affidavit has been submitted to create a sham issue of material fact). At no point in time during his deposition was Walter Bierer shown the 2015 email and given a chance to explain its meaning.¹ In a case that involves tens of thousands of documents, to characterize his inability to remember a single email drafted 7 years prior to his deposition can hardly be characterized as testimony inconsistent with his affidavit. Walter Bierer provided the affidavit to explain a document he was never shown and questioned about in his deposition. As explained by Walter Bierer in his affidavit, the “outside activities” he referenced 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

¹ During argument before the Court, Trystar counsel referred to the fact that this document had not been produced by Plaintiff. *See* Ex. 3 to Trystar’s MSJ. As set forth in the status report to the Court on July 1, 2022, this was a result of a production issue with the document management system used by Nextra to house Plaintiff’s e-discovery. This gap in production was not intentional and it is disingenuous for opposing counsel to argue otherwise. Moreover, what is clear from the questioning at Walter Bierer’s deposition is that Defendant Kennerly had access to this document, his counsel was aware of its existence, and still refrained from presenting the same to the deponent. It was not until Kennerly produced such documents – just days after Walter’s deposition concluded – that Bierer was made aware of the existence of such document and went to Nextra to address its absence from Bierer’s email production.

was providing sales services to Trystar, Travis, or any third party. *See* Bierer RIO to Travis MSJ 7-8, 15-16, and Exs. A & B thereto; Bierer RIO to Trystar MSJ 6-7, 12-14, and Exs. A & B thereto. In addition, after Walter's October 2015 email admonishing Kennerly's behavior, Kennerly doubled down on his loyalty to Bierer, assuring Walter of his continued desire to fulfill his role at Bierer and Kennerly increased his efforts to make sure he connected with the Bierer management team more frequently. His affidavit creates a factual issue appropriate for consideration by a jury as to what he meant in the language used and whether or not his knowledge at that point should have put him on notice of cognizable claims. *See L & W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) (noting at the summary judgment stage of litigation "the judge does not weigh conflicting evidence with respect to a disputed material fact ...[n]or does the judge make credibility determination with respect to statements made in affidavits, ... or depositions") (quoted citation omitted)). Accordingly, summary judgment is inappropriate should have been denied.

2. The 2013 Emails.

The April 9, 2013 and December 5, 2013 email correspondence are not evidence of facts that would have put Bierer on notice that Trystar was using a trusted Bierer employee – Kennerly – to divert bulk cable sales from Bierer and sell directly to Bierer customers. Rather, they reflect Bierer's understanding that Trystar was engaging in legitimate, marketplace competition with Bierer by selling direct to some of Bierer's customers. As reflected in the affidavits, Bierer understood that Trystar was able to sell direct to those Bierer customers whose information Trystar obtained from Bierer to facilitate the drop-shipping of a Bierer cable order to a Bierer customer. In April 2013, it is clear Bierer assumed, mistakenly so, the sales figures referenced in the email were a result of commonplace, marketplace competition – a concept previously relied on by

Trystar in its briefing before this Court. *See* Trystar MIS Mot. to Dismiss at 12, filed Sept. 27, 2021.

Bierer recognized it did not have an exclusive agreement with Trystar that prevented Trystar from competing against Bierer for cable sales, even to customers introduced to Trystar by Bierer. Thus, there was nothing “wrongful” about Trystar’s conduct, and it would not have put Bierer on notice of a claim against Trystar for anything, much less for paying Bierer Vice President Kennerly to divert sales around Bierer. Understandably, the most Bierer thought it could do at the time to prevent this from happening was to refrain from providing Trystar with customer addresses to drop-ship cable. *See* Bierer’s RIO to Trystar MSJ at 4-5, 10-12, and Exs. A & B thereto.

Moreover, the evidence in the record is that Joe Bierer did reach out to Trystar when irregularities were noticed. When Bierer proactively reached out to Trystar, the email was admittedly ignored by Trystar – conveniently just three months after it had signed a sales representative agreement with Kennerly. The facts before the court are that Joseph Bierer’s email went unanswered by Trystar’s Vice President Dan Morke, and as a result, Bierer continued with its reasonable, yet mistaken, assumption that the direct sales were taking place when Bierer permitted Trystar to drop-ship to its customers – a practice Bierer took steps to stop. Furthermore, after implementing a policy to no longer drop-ship orders through Trystar, Joseph Bierer confronted Kennerly and its sales rep David Deinek (under Rick’s management) on December 5, 2013 as to why a Bierer order to one of Bierer’s largest customers was drop-shipped. Deinek was apologetic that “lines had been crossed,” and Kennerly expressed astonishment omitting the existence of his agreement with Trystar. This email further illustrates Joseph’s diligence in matters related to Trystar and exhibits his understanding in December 2013 that Trystar was gaining a competitive advantage over Bierer because of the customer information provided with drop-

shipping and Kennerly's omitting the existence of his agreement with Trystar. *See* Bierer's RIO to Trystar MSJ at 4-5, 10-12, and Exs. A, B, C & F thereto. Given the evidence previously submitted, a material issue of fact exists as to whether Bierer was on notice of its claims in 2013; therefore, summary judgment is not appropriate.

3. The 2014 IEEE Brochure.

Both Walter and Joseph Bierer testified that they confronted Kennerly about the brochure and were told it was a misprint. They testified that the explanation they were given seemed reasonable: 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. For them, this explanation made sense given the amount of time Kennerly was spending with Travis to purportedly develop clamps. In addition, when Walter was presented with the brochure – more than a year after its publication – annual cable sales using Travis and Trystar products were at their peak. Walter was pleased with the sales figures and had no reason to think his trusted employee was sabotaging his sales. *See* Bierer RIO to Travis MSJ 6-8, 14, and Exs. A, B, E & F thereto. Whether or not it was objectively reasonable for Walter to rely on the word of this long-time, trusted, managerial employee is a question of fact that precludes summary judgment on Bierer's claims on the basis of statute of limitations.

4. Kennerly is an agent of Defendants.

The record contains evidence from which a jury could find that Kennerly's fraudulent concealment of his relationships with Travis and Trystar from Bierer can be imputed to these defendants. *See West v. Serv. Life & Health Ins. Co.*, 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951) (finding a principal is 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) (finding that 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). Here, Travis and Trystar, as corporations, can only act through its officer, employees, and agents. Travis admittedly paid Kennerly to serve as Travis's 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. Trystar's admittedly retained Kennerly as its exclusive sales agent for products marketed to those segments of the utility industry that Kennerly serviced on behalf of Bierer and attributes its increased profitability to Kennerly's use of Bierer's sales force. The testimony of both Travis and Trystar illustrate knowledge on behalf of these corporations that they knowingly utilized Kennerly, a Bierer executive and employee, as well as the Bierer sales force he oversaw, to unfairly compete against Bierer. But for the fraudulent concealment, neither Travis nor Trystar would have had access to Bierer's sales channels. Moreover, the failure of Trystar to respond to the April 2013 email, as well as the admitted failure by both parties to ever reach out to Bierer – knowing they would not want their executives getting “kickbacks” - further exacerbated and assisted in the concealment. *See* Bierer RIO to Travis MSJ at 2, 16-17, and Exs. A, B, & C thereto; Bierer RIO to Trystar MSJ at 4-5, 14-15, and Exs. A, B, & C thereto. Accordingly, summary judgment is not appropriate because more than a scintilla of evidence exists from which the trier of fact could find Kennerly was acting as an agent of Travis and Trystar when he fraudulently concealed his conduct from Bierer. *See Huffman v. Sunshine*

Recycling, LLC, 426 S.C. 262, 271, 826 S.E.2d 609, 614 (2016) (“In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party ... [who] is the only required to submit a scintilla of evidence in order to withstand a motion for summary judgment.”) (quoting *Hancock v. Mid-S. Mgmt.*, 381 S.C. 326, 329-31, 673 S.E.2d 801, 802-03 (2009)).

5. Outstanding Issues.

The following arguments were raised by the Defendants in their briefing but were not ruled upon in the Court’s Order. Accordingly, Plaintiff requests the Court rule a material issue of fact exists as to whether Plaintiff was on notice of its claims against Defendants as to the remaining issues raised by Defendants and addressed by Plaintiff in its responses as follows:

- Plaintiff was not on notice of potential claims against Defendants as early as 2012. *See* Bierer RIO Travis MSJ at 12-13 & Exs. A, B, & D thereto.
- Plaintiff did not have notice of potential claims against Travis prior to July 10, 2018 based on quotations sent to lower level Bierer employees and Kennerly. *See* Bierer RIO Travis MSJ at 4, 13 & Exs. A, B, E & J.
- Plaintiff was not on notice of potential claims against Travis prior to July 10, 2018 based on Bierer’s sale of ferrules to Future Machines. *See* Bierer RIO Travis MSJ at 6, n.3 & Ex. F thereto.
- Plaintiff did not have notice of potential claims against Travis prior to July 10, 2018 based on the September 14, 2015 email from David Yang to Rick Kennerly. *See* Bierer RIO Travis MSJ at 6 & Exs. A & B thereto.
- Plaintiff did not have notice of potential claims against Travis prior to July 10, 2018 based on the April 12, 2016 email communication. *See* Bierer RIO Travis MSJ at 6-7 & Exs. A, B, & F thereto.
- The July 11, 2018 email did not put Plaintiff on notice of its claims against Defendants prior to July 10, 2018. *See* Bierer RIO Travis MSJ at 12-13 & Exs. A, B, & D thereto; Bierer RIO Trystar MSJ at 6, 13-14 & Exs. A & D.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court reconsider its order, vacate the same, and issue a new order denying Defendants' motions for summary judgment.

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February 16, 2023
Columbia, South Carolina

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 RESPONSE IN OPPOSITION TO
BIERER AND ASSOCIATES, INC.'S
MOTION TO RECONSIDER**

Jan F. Kennerly, Jr.,)
DEFENDANT/
THIRD PARTY PLAINTIFF,)
vs.)
Walter Bierer, Brent Jeffries, and Joseph)
Bierer,)
THIRD-PARTY DEFENDANTS.)

Plaintiff Bierer and Associates, Inc. (“Plaintiff”) asks the Court to reconsider its order of February 6, 2023, granting summary judgment to Defendants Trystar, LLC (“Trystar”) and Travis Pattern & Foundry, Inc. (“Travis Pattern”), collectively (the “Moving Defendants”), on the basis of the running of statutes of limitation and laches, pursuant to Rule 59(e), S.C. R. Civ. P. Plaintiff has not met its burden of showing any material fact or principle of law that has been overlooked, misunderstood, or erroneously applied. Consequently, Plaintiff’s Motion to Alter or Amend should be denied.

Although Rule 59(e), SCRCP, uses the language “alter or amend,” a “motion under Rule 59(e) long has been viewed as a “motion for reconsideration,” despite the absence of

those words from the rule.” *Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 779 (2004). The “purpose of [a motion under] Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to “reconsider matters properly encompassed in a decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). A motion to alter or amend is not an opportunity for a party to reargue its case. *See Collins Music Co., Inc. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. *See Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009); *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). Although South Carolina procedure does not clearly address the standard of review applicable to such a motion, the notes to Rule 59(e) state that South Carolina’s Rule “is substantially the Federal Rule.” SCRCP 59, Notes.

“Rule 59(e) of the *Federal Rules of Civil Procedure* provides a mechanism for an aggrieved party to petition the Court to alter or amend a judgment under certain limited circumstances. The purpose of a Rule 59(e) motion ‘is to allow the court to reevaluate the basis for its decision. Because of the interests in finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly. Thus, Rule 59(e) motions ‘are not at the disposal of an unsuccessful party to ‘rehash’ the same arguments and facts previously presented[.]’” *See Rouse v. Nielson*, 851 F. Supp. 717, 734 (D.S.C. 1994).

The Fourth Circuit has similarly said of Rule 59(e) motions that, “[i]n general ‘reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.’” *Pacific Ins. Co. v. American Nat’l Fire Assoc.*, 148 F.3d 396, 402 (4th Cir. 1998) (citation omitted). “A motion under Rule 59(e) is not authorized ‘to enable a party to

complete presenting his case after the court has ruled against him.” *Id.* at 403 (citing *In re: Reese*, 91 F.3d 37, 39 (7th Cir. 1996)). “Rule 59(e) . . . may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.” *Id.* (citing *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)).

The South Carolina District Courts and the Fourth Circuit have held that “while the Rule itself provides no standard for when a district court may grant such a motion, we have previously recognized that there are three grounds for amending an earlier judgment: (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). *See also EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993); *Rouse*, 851 F.Supp. at 734; *Liberty Mut. Ins. Co. v. Employee Res. Mgmt., Inc.*, 176 F. Supp. 2d 510, 529 (D.S.C. 2001).

In Plaintiff’s Motion to Reconsider, Plaintiff has offered nothing to justify reconsideration of the Court’s ruling under the three recognized Rule 59(e) factors. There has been no change in the law or offering of new evidence, nor is there an error of law that needs correcting. All of the points made in Plaintiff’s motion were contained in Plaintiff’s Memoranda in Opposition to Trystar’s and Travis Pattern’s Motions for Summary Judgments and were addressed at the January 4, 2023, hearing.

The Court already considered, and rejected, the affidavits of Walter and Joe Bierer as creating any genuine issue of material fact to overcome summary judgment based on the running of statute of limitations or laches. Further, the Court has considered, and rejected, Plaintiff’s argument that the 2013 emails and 2014 IEEE seminar brochure did not put Plaintiff on notice of

a potential claim (because Plaintiff's owner and managers relied on Kennerly's "explanations" of the documents). Likewise, the Court already considered, and rejected, that Kennerly was acting as the Moving Defendants' "agent" when allegedly misleading or fraudulently misrepresented his relationship with the Moving Defendants.

For these reasons, and for all other factual and legal reasons previously set forth in the Moving Parties' briefing and oral argument, the Court's February 6, 2023, order granting summary judgment to the Moving Defendants should be upheld. Plaintiff's Motion to Reconsider should be denied.

Respectfully submitted,

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February 23, 2023.

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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 RESPONSE IN
OPPOSITION TO PLAINTIFF’S
MOTION TO RECONSIDER**

INTRODUCTION

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 existing of potential claims against the Moving Defendants.” (2023-02-06 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 year before Plaintiff filed claims” and that “Plaintiff failed to conduct a reasonable investigation.” (*Id.*) As a result, all of Plaintiff’s legal claims are barred by South Carolina’s three-year statute of limitations and its equitable claims by laches.

Plaintiff now asks the Court to reconsider its ruling. But Plaintiff does not offer any new facts or arguments that were not already put before the Court and properly rejected. Rather, Plaintiff offers the same litany of reasons why it allegedly *subjectively* was not aware of all the details of its claims. But those excuses are invalid under well-established South Carolina law, which asks *objectively* whether the plaintiff knew or should have known about its injuries. The objective evidence shows that this test was met. Accordingly, the Court properly granted summary judgment and now should reject Plaintiff’s request for reconsideration.

ARGUMENT

Plaintiff’s motion for reconsideration is based on a contention that there is conflicting evidence about when Plaintiff knew or should have known the facts underlying its claims. But the facts cited – primarily in the self-serving affidavits Plaintiff submitted with its original opposition – do not show such facts. Rather, as the Court properly held, and as Plaintiff’s motion implicitly acknowledges, the objective facts show that Plaintiff knew the facts that put it on notice of its potential claims long before it filed its suit in this claim, well outside the limitations period.

I. Motions for Reconsideration Are Granted In Limited Circumstances.

Plaintiff’s motion cites to the South Carolina Supreme Court’s decision in *Elam v. S.C. Dep’t of Transp.*, for the proposition that “a party usually is allowed to ask the Court to reconsider its decision even it means rehashing all or part of an argument previously presented.” 361 S.C. 9,

22 602 S.E.2d 772, 778-79 (2004). The *Elam* decision, however, did not provide any guidance on the standard this Court should use to evaluate Plaintiff's motion, because the issue in *Elam* was whether the Rule 59(e) motion stayed the deadline for filing an appeal. *Id.*, 361 S.C. at 14, 602 S.E.2d at 774.

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 does not try to satisfy the first two conditions, putting forward no change the law or new evidence in its motion. And, as shown below, there is no clear error of law or manifest injustice here, where the Court properly considered and rejected the same evidence and arguments Plaintiff re-raises in its motion.

II. 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." *Stoke-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

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, 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).

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).

Plaintiff’s motion tries to avoid this issue by citing a number of cases for the propositions that the Court must view all facts in the light most favorable to Plaintiff, as the non-moving party, and that any issues of fact related to when a claim accrues should be decided by the jury. (Pl. Mot. at 2-3.) But those general propositions do not aid Plaintiff here. In fact, Plaintiff’s cases show that summary judgment is appropriate where the undisputed, objective facts demonstrate that claim accrued outside the limitations period. For example, in *Graham v. Welch, Roberts and Amburn, LLP*, the South Carolina Court of Appeals affirmed an order granting summary judgment on statute of limitations grounds. 404 S.C. 235, 239-40, 743 S.E.2d 860, 863 (Ct. App. 2013). In *Graham*, as here, the plaintiff submitted an affidavit claiming that the facts did not put him on notice of the alleged claim, but the court reviewed the objective written evidence showing that “a reasonable person of common knowledge and experience” would have been on notice of the claim, and therefore the statute of limitations began to run. *Id.* Similarly, in *Maher v. TieTex Corp.*, the South Carolina Court of Appeals reversed a jury verdict in favor of a plaintiff, finding as a matter of law that the claim had accrued when the plaintiff was on notice of the objective facts showing that “some right of [the plaintiff’s] has been invaded” 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998). The Court of Appeals noted that “South Carolina’s statute of limitations requires very

little to start the clock.” *Id.* (internal quotation omitted).²

Applying these standards, it is clear that the Court’s grant of summary judgment was correct. As shown below, the Court properly rejected the same arguments Plaintiff presents in its reconsideration motion.

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

Plaintiff 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 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 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 correctly held that they were.

Plaintiff’s argument that Bierer’s affidavit is not a “sham” affidavit is therefore beside the point. The point is that the email shows that Bierer was objectively on notice of Kennerly’s lack

² Plaintiff’s other case, *Moriarty v. Garden Sanctuary Church of God*, simply has no bearing here. In that case, 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. 341 S.C. 320, 333, 534 S.E.2d 672, 679 (2000). There is of course no such claim here, which involves the objective facts about what Plaintiff knew about the alleged damage that forms the basis of its claims.

of accountability, outside activities, and distancing himself from Plaintiff's business. That objective knowledge was sufficient to start the statute of limitations clock.

B. The 2013 emails show further 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 in 2013 merely show that Plaintiff was upset with 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. (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. (Order at 8.)

Again, the subjective statements in the affidavits Plaintiff submitted in opposition are not sufficient to create a material question of fact. South Carolina law is clear that a party has three years to investigate and bring a claim once it is on notice of the objective facts showing some of its injury and the potential that a claim may exist. (*Id.* (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996); *Dorman*, 500 S.E.2d at 789-90); *Brown*, 483 S.E.2d at 482).) There is no question that Plaintiff was on notice of its injury in 2013.

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

As the Court held, in 2014, Plaintiff became aware of brochure for a seminar, which was advertised in a Institute of Electrical Engineers (“IEEE”) newsletter. (Order at 4.) That brochure expressly stated that Jan Kennerly had worked for Travis [Pattern] for 2 years.” Plaintiff makes the argument, as it did in opposition to Travis Pattern’s motion for summary judgment, that it was entitled to rely on Kennerly’s claim 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 Court properly held that this evidence also supported summary judgment.

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

Plaintiff next repeats its arguments 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 makes this argument because, as the Court properly found, there are no allegations that either Trystar or Travis Pattern directly concealed any conduct. (Order at 11-12.)

Plaintiff’s argument fails as an initial matter because it is simply immaterial. As the Court found (and as described above), the record shows that “Plaintiff has 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.” (Order at 11.) The Court further held that any alleged reliance on Kennerly’s concealment would have been unreasonable. (Order 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 is a red herring.

Notably, Plaintiff does not challenge that ruling in its motion for reconsideration. Instead, it jumps to its argument about Kennerly's alleged agency relationship. As the Court held, however, Plaintiff had not pointed to any "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." (Order at 12.) In its reconsideration motion, Plaintiff still points to no such evidence. Instead, it offers conclusory assertions that Kennerly must have been acting as an agent. But such assertions are not evidence, and Plaintiff therefore 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, of course, require reconsideration of the Court's order because they all 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. (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.

CONCLUSION

For the foregoing reasons, Trystar respectfully requests that the Court deny Plaintiff's motion for reconsideration.

Respectfully submitted,

/s/ Brian C. Duffy

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Attorneys for Defendant Trystar, LLC

February 23, 2023

Charleston, South Carolina

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)

**SUPPLEMENT TO MOTION TO
RECONSIDER**

Jan F. Kennerly, Jr.,

Defendant/Third-Party
Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph
Bierer,

Third-Party Defendants.

Plaintiff Bierer and Associates, Inc., through undersigned counsel, submits this supplemental slide deck that was presented by counsel for Bierer during the hearing held on March 30, 2023.

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Jeffries, and Joseph Bierer*

March 31, 2023
Columbia, South Carolina

Supplement to Motion to Reconsider

Bierer & Associates, Inc. v. Kennerly, et al.

Presentation of Plaintiff Bierer and Associates, Inc.

Motion to Reconsider Hearing
March 30, 2023

This Court's Order Granting Summary Judgment Fails to Consider the Affidavits of Walter and Joe Bierer as to the following:

- 2013 Emails
- 2014 IEEE Brochure
- 2015 Email

2013 TRYSTAR EMAILS

THE 2013 TRYSTAR EMAILS DO NOT ESTABLISH AS A MATTER OF LAW THAT BIERER WAS ON NOTICE THAT IT HAD ANY LEGAL CLAIM AGAINST TRYSTAR.

- *SOL RUNS WHEN FACTS AND CIRCUMSTANCE OF INJURY WOULD PUT A PERSON OF COMMON KNOWLEDGE AND EXPERIENCE ON NOTICE THAT SOME CLAIM AGAINST ANOTHER PARTY MIGHT EXIST.
ORDER P. 7*

***MFG. SELLING DIRECT TO DISTRIBUTOR'S CUSTOMERS
AFTER LEARNING IDENTITY IS COMMON PRACTICE IN
INDUSTRY WHEN THERE IS NOT AN EXCLUSIVITY
AGREEMENT***

DROP SHIP FULFILLMENT vs BIERER IN-HOUSE FULFILLMENT

"DROP-SHIP FULFILLMENT"

*Trystar has Bierer customer info after first order and can sell directly to Bierer customer for future cable orders thereby cutting out Bierer from those sales

Bierer Customer places cable order with Bierer

Bierer places order for cable with Trystar to fulfill the Bierer customer order

Bierer provides Trystar with Bierer customer information so Trystar can drop-ship order on behalf of Bierer

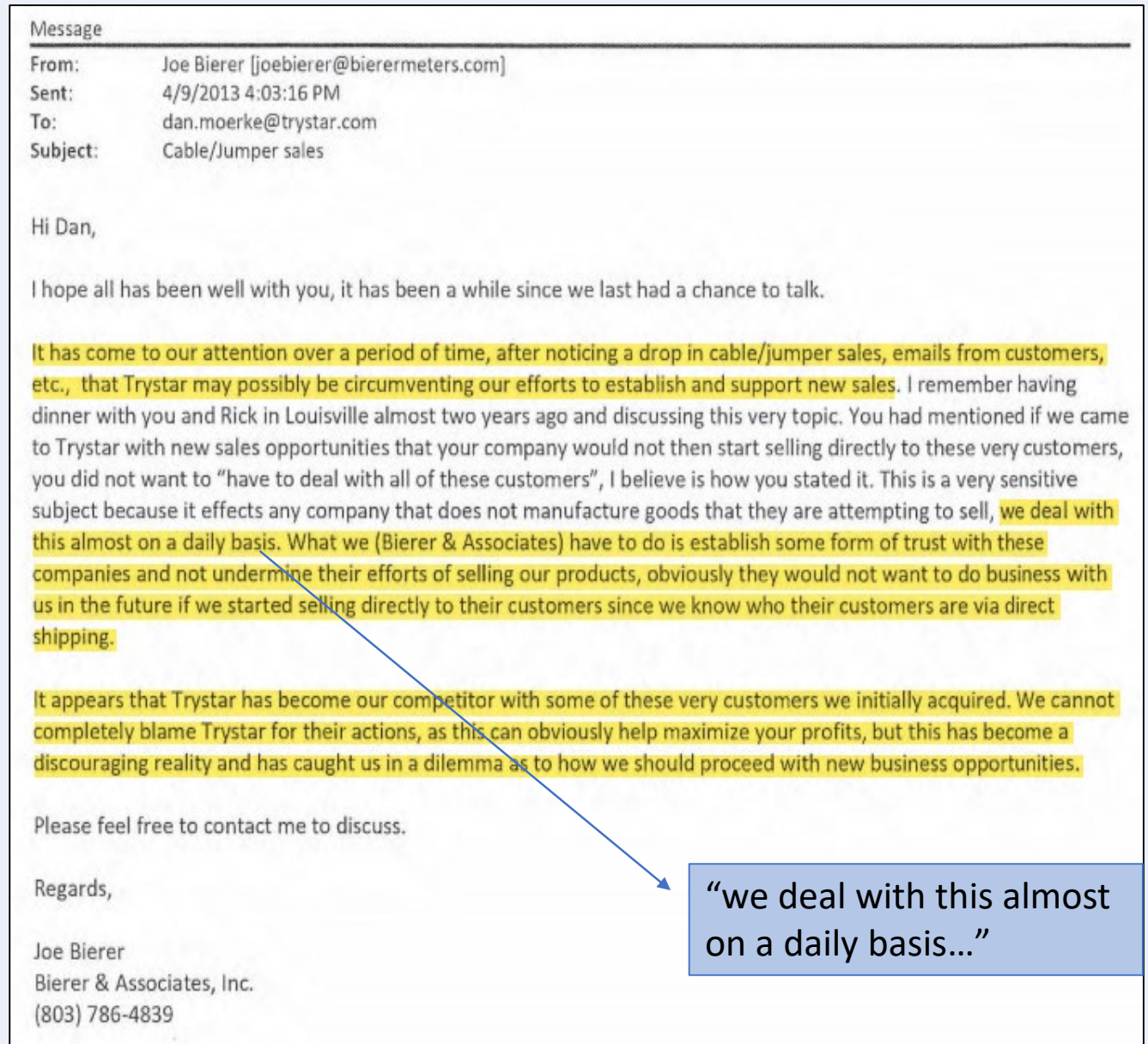
"BIERER IN-HOUSE FULFILLMENT"

*Trystar is not provided with Bierer customer information so all orders must go through Bierer

Trystar sends cable to Bierer and Bierer sends cable to Bierer customer

no Bierer customer information provided on PO to Travis

- In 2013, Bierer assumed, mistakenly so, that the decline in cable sales was a result of Bierer's use of "Drop-Ship Fulfillment." **Bierer did not have an exclusive agreement with Trystar that prevented Trystar from competing against Bierer for cable sales, even to customers introduced to Trystar by Bierer through "Drop-Ship Fulfillment."**
- Thus, **the most Bierer 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 interested in selling directly to Bierer customers and to stop Bierer's use of the "Drop-Ship Fulfillment Scenario" for future orders**
- 2013 emails and testimony of Walter and Joseph Bierer support the same



- Bierer did not have an exclusive agreement with Trystar and therefore rightfully believed Trystar was engaging in legitimate, marketplace competition by using the customer information Bierer provided when it utilized “Drop-Ship Fulfillment”

Joseph Bierer’s Testimony re: April 9, 2013 Email to Trystar

- See J. Bierer Aff. ¶¶ 17-18, at 6-7

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 Louisville, 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

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.

Walter Bierer's Testimony re: April 9, 2013 Email

See W. Bierer Aff. ¶18, at 8-9

"This was not an uncommon problem in the distributorship business.."

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 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.

Trystar did **NOT** respond to Joseph Bierer's email. This is true in spite of the fact that Trystar knew Kennerly was a Bierer employee when it entered into the agreement with him effective January 2, 2013, and that such an arrangement- a manufacturer (Trystar) hiring an employee of a distributor or customer (Bierer)- is not standard in the industry.

12 Q. Okay. And you understood that Rick was an employee of
13 Bierer, correct?
14 A. Yes.

SALES REPRESENTATIVE AGREEMENT

THIS SALES REPRESENTATIVE AGREEMENT (the "Agreement"), effective January 2, 2013 (the "Effective Date"), is entered into by and between Trystar, Inc., a Minnesota corporation with its principal place of business at 2917 Industrial Drive, Faribault, Minnesota 55021 ("Trystar"), and Jan Kennerly, Jr., an individual having its principal place of business at 444 Tap Harley Road, Swansea, SC 29160 (collectively "Kennerly").

Jan Kennerly, Jr.

By: 

Name: Jan F Kennerly Jr.

Trystar, Inc.

By: 

Name: Dan Moerke

Its: Senior Vice President

20 Q. Yeah. Just your knowledge of the industry, your
21 experience in the last 30 years, however many years, are
22 you aware of any other instances like this where a
23 manufacturer hires an employee of a distributor or a
24 customer to be simultaneously a rep with a company?

25 A. Yeah. No.

1 Q. Okay. So is it fair to say what Rick proposed in
2 December 2012, January 2013, was, to your knowledge, a
3 one of a kind relationship; is that correct?
4 A. I don't know. We looked at it as a rep agreement.
5 Q. All right. And you knew of no other relationship in the
6 industry where a customer's employee was -- had a
7 similar agreement with a manufacturer?
8 A. I'm not aware of.

- See Dep. of D. Moerke at 36:12-14; 68:20-69:8

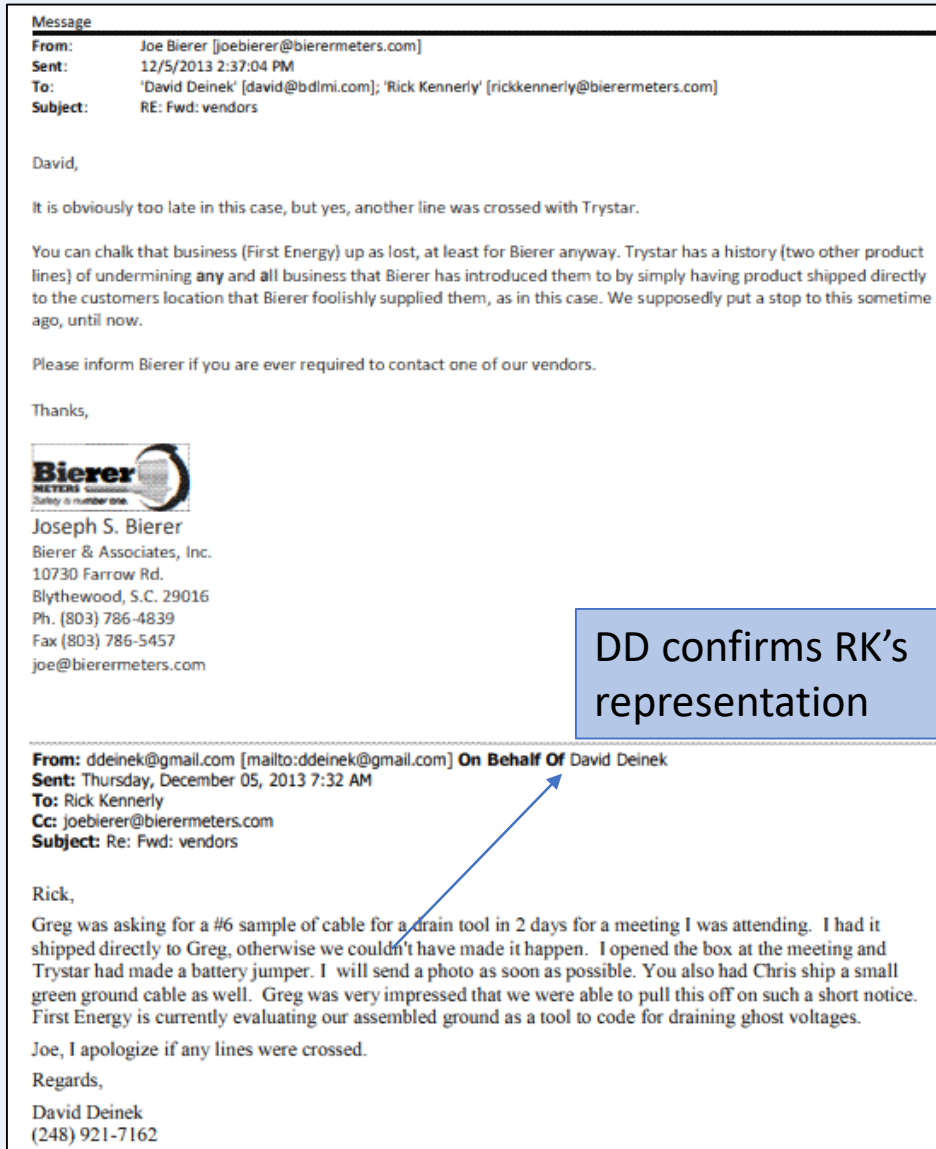
Trystar can say *at best* that upon receiving the April 9, 2013 email, Moerke addressed it with Kennerly (the Bierer employee benefiting from the arrangement), who then continued lying and concealing the relationship from Bierer

2 Q. After you got this email from Walter Bierer's son
3 complaining about doing what Rick just contracted to do
4 with you and Trystar, did you give any consideration to
5 picking up the phone and calling Joe Bierer who you met
6 at dinner or his dad, Walter Bierer, and say, hey, guys,
7 I just want to be sure that Rick's not lying to me? Did
8 that cross your mind?
9 A. I think what crossed my mind was I wasn't sure how I was
10 going to handle this email, how to respond to it.
11 Q. Well, how did you respond to it?
12 A. I don't recall.
13 Q. Okay. So this email did not give you pause to think,
14 well, maybe Rick doesn't have permission to do what
15 we're doing?
16 A. Or Walter and Joe are not on the same page.
17 Q. Right. Okay. Did you discuss this email with Rick, to
18 your knowledge?
19 A. I don't remember the conversation, but I don't -- my
20 pattern, I don't think I would have let this email end
21 here.
22 Q. Okay. If you were following your pattern, what do you
23 believe you did?
24 A. Probably reached out to Rick.

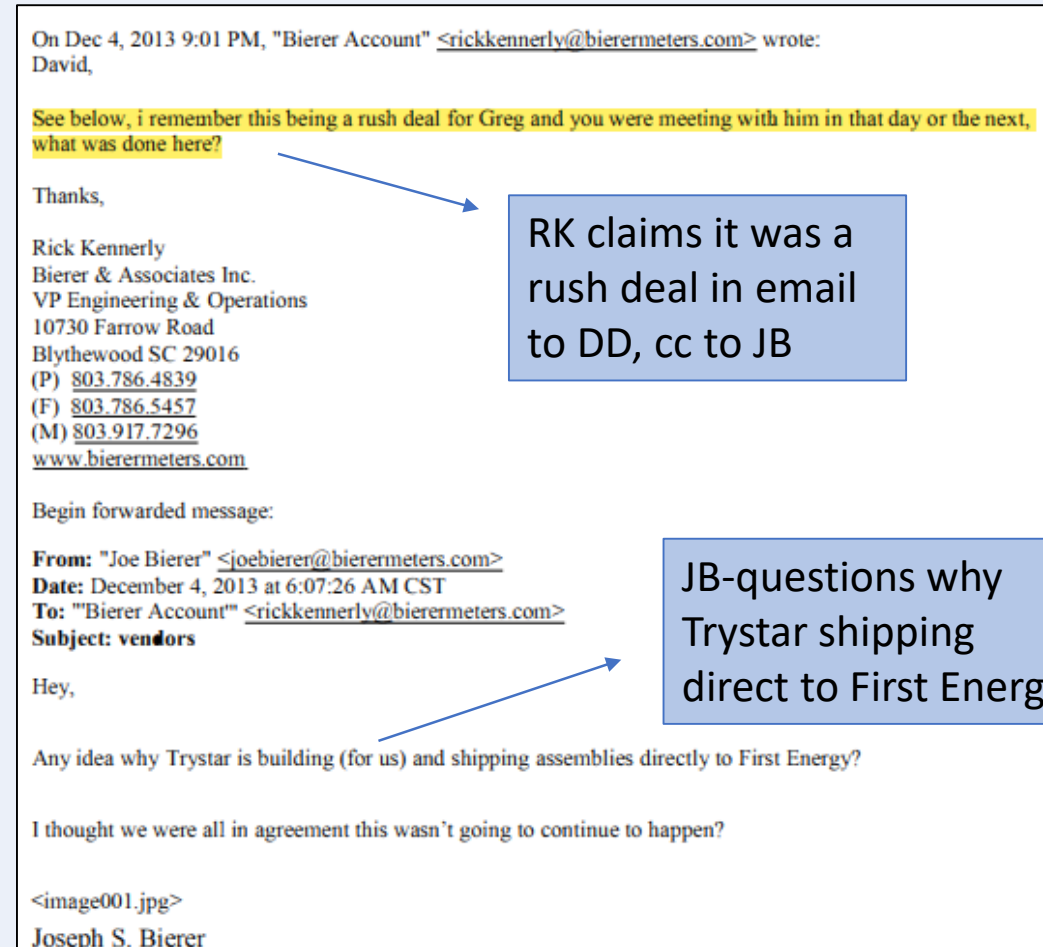
8 Q. Okay. But you feel like you would have addressed this
9 at least with Rick?
10 A. No, I don't know that.
11 Q. Okay. So is it possible you just turned a blind eye to
12 this email?
13 MR. URSU: Objection; form.
14 A. It's possible, but I doubt it. Most likely I had
15 reached out to Rick in regards to this email.
16 Q. Can you we say with 100 percent certainty that you did
17 not reach out to Joe Bierer about this email?
18 A. I don't think I did.
19 Q. Okay. Can we say with 100 percent certainty that you
20 did not reach out to Walter Bierer about -- after
21 receiving this email about Trystar's new agreement with
22 Rick Kennerly?
23 A. I did not.

- See Dep. of D. Moerke at 64:2-24; 65:8-23

- Following the April 2013, Bierer took steps internally to refrain from using Trystar for “Drop-Ship Fulfillment” of Bierer customer orders, thereby cutting off the possibility of Trystar learning Bierer customer information from Bierer POs.



- This December 2013 email further reflects Joseph Bierer's belief that when Trystar was provided with a Bierer customer information, Trystar would take the business from Bierer.



Joseph Bierer's Testimony regarding the December 5, 2013 Email

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 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.

- *See* Aff. of J. Bierer ¶ 19, at 8-9

- There is nothing in the 2013 emails that put Bierer on notice that **the sales figures referenced in the email were a result of anything other than commonplace, marketplace competition between a manufacturer and a distributor of the manufacturer's products**
- **Absent an exclusive agreement, Bierer recognized there was nothing "wrongful" about a competitor (Trystar) competing for Bierer's customers.**

- Legitimate, marketplace competition is a concept previously recognized and relied on by **Trystar** in its briefing before this Court. *See Trystar MIS MtoD at 12-13.* 

Furthermore, it is a fundamental principle of law that an act done in the exercise of a legal right cannot be treated as wrongful and actionable. *See, e.g., S. Contracting, Inc. v. H.C. Brown Constr. Co.*, 450 S.E.2d 602, 604 (S.C. Ct. App. 1994) (citing *McMaster v. Ford Motor Co.*, 111 S.E. 244, 246 (S.C. 1921)). "Business rivalry that promotes lower prices, better products, or more efficient services is justified[.]" *Waldrep Bros. Beauty Supply, Inc.*, 992 F.2d at 63. A competitor's conduct is protected under tortious interference law because a party is pursuing an absolute right to it holds to compete—a right equal or superior to the right invaded. *See S. Contracting, Inc.*, 450

- The evidence in the record is that when Bierer noticed irregularities, Joseph Bierer asked questions of Trystar, Kennerly, and Dienek.
 - The April 2013 email was ignored by Trystar— just 3 months after it entered into an agreement with Kennerly that Trystar admits was not commonplace in the industry
 - Moerke says he would have spoken to Kennerly about it
 - Kennerly clearly continued to conceal and lie about the Trystar relationship
 - The December 2013 email reflects JB’s continued belief that Trystar gained a competitive advantage when Bierer used “Drop-Ship Fulfillment” with its Trystar orders.
- There is nothing in the 2013 emails that would have put Bierer on notice of any cognizable legal claim against Trystar, much less for paying Bierer Vice President Kennerly to divert sales around Bierer.

2014 IEEE BROCHURE

THE 2014 TRAVIS BROCHURE DID NOT PUT BIERER ON NOTICE THAT IT HAS A ANY LEGAL CLAIM AGAINST TRAVIS.



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.

- Both Walter and Joseph Bierer testified in their depositions, and subsequently reaffirmed in their affidavits, that they confronted Kennerly about the brochure at a weekly meeting
- Kennerly “laughed off” the language and said that it was a misprint
- For them, this explanation made sense given the amount of time Kennerly was spending with Travis to purportedly develop clamps

Walter Bierer's Testimony regarding the IEEE Brochure

7 Q Okay. And what happened?

8 A Yeah. We -- we review that. In our Monday morning
9 meeting, I brought it to Rick. I said, "Rick,
10 what's all this about?"

11 He said, "I didn't have anything" -- he
12 laughed it off. He laughed it off. And he used
13 almost exactly the same words in his e-mail to me
14 after I terminated him -- after I sent him his
15 termination notice. "I didn't have anything to do
16 with that." Whatever his name in here -- "wrote
17 that for me." He laughed it off.

18 At that point I still had lots of faith and
19 trust in Kennerly, so I believed him, and everybody
20 in the office believed him. He didn't have
21 anything to do with it. It was a misprint. That's
22 what -- it wasn't a misprint, it was he didn't have
23 anything to do with it. Rick said that, you know,
24 "Since I'd been working there, you know, for a
25 couple of years developing these clamps, that he

1 just assumed," or whatever.

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.

- See Dep. of W. Bierer (2/23/22) 243:7-244:1

- See Aff. of W. Bierer ¶ 13, at 5

16

Joseph Bierer's Testimony regarding the IEEE Brochure

22 Q And I know obviously part of this case came from
23 what was alleged to be your discovery of an IEEE
24 publication from 2014 --
25 A That's correct.

1 Q -- where Rick is presenting at the conference. And
2 it's described as on behalf of Travis?
3 A Well, it's on behalf of Bierer and Travis.
4 Q Yeah.
5 A Yes.
6 Q All right. Did -- when did you first learn about
7 that?
8 A It was sometime after that publication was
9 released, and it was very similar to the SNC. So,
10 again, Rick was confronted with that. He explained
11 it away as somebody wrote his biography
12 incorrectly. He didn't write the biography. He
13 actually says that in the emails to Walter after he
14 was terminated. He basically restated that same
15 thing, that somebody else wrote the biography.

- See Dep. of J. Bierer (2/23/22) 86:22-87:15

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, Kennerly 011384. Again, it has become evident in discovery Kennerly began receiving compensation from Travis as early as 2013.

- See Aff. of W. Bierer ¶¶ 12-13, at 4-5

Summary Judgment Order Incorrectly Rules as Matter of Law that Bierer Failed to Exercise Reasonable Care by Confronting Kennerly about the IEEE Brochure and Accepting his Explanation- Order pp. 7-8

- Whether Bierer acted reasonably under the circumstances is a jury question.
 - ***No different that any negligence case, where jury determines whether person's conduct was reasonable under the circumstances.***
- Cannot simply view this single incident in isolation, without evaluating Kennerly's position in the company and his role working with Travis on Bierer's behalf to develop clamps for use in personal protective grounding equipment

OCTOBER 2015 EMAIL

THE EMAIL SENT BY WALTER BIERER IN OCTOBER 2015 DOES NOT ESTABLISH THAT BIERER WAS ON NOTICE THAT IT HAD ANY COGNIZABLE LEGAL CLAIM FOR DAMAGES AGAINST TRYSTAR, TRAVIS, OR ANY OTHER THIRD PARTY.

At no point during his deposition was Walter Bierer shown the October 2015 email and given a chance to explain its meaning, including what he meant by the phrase “outside activities” on which Travis and Trystar rely heavily in their briefing.

On Oct 14, 2015, at 5:22 PM, Walter Bierer <wbierer@aol.com> wrote:

Rick,

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 purposely 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 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

Additionally, while it is true a technical glitch in the discovery software utilized by Plaintiff omitted this document from production prior to Walter’s deposition, it is also true it was in possession of defense counsel at the time of the deposition based on the line of questioning.

- The testimony in the record is that the “outside activities” Walter Bierer referenced in the email were strictly related to Kennerly’s in-state outings.

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 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. Kennerly’s conduct improved after meeting with Walt. This demonstrates the reasonableness of Walt’s actions. Kennerly was directed to these in-state family/political responsibilities in his role at Bierer.

Kennerly’s conduct improved after meeting with Walt. This demonstrates the reasonableness of Walt’s actions

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 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.

- See Aff. of W. Bierer ¶ 16, p. 8-9

Tolling SOL-Kennerly's Fraudulent Concealment

- Bierer is not relying upon the doctrine of apparent authority
- Irrefutable evidence establishes that Kennerly was the national sales representative of Trystar
- Irrefutable evidence establishes that Kennerly was the national and international sales representative for Travis UGD
- Trystar and Travis, as corporations, can only act through their agents
- *Pro Slab, Inc. v Argos USA*-involved attempt to impute misrepresentations to Cook and Baird, who are individuals.
- *Pro Slab, Inc.* also applied federal anti-trust law, not SC law
- Trystar-when confronted by JB about selling direct to Bierer customers, ***“would have reached out to Rick.”*** Dep. of D. Moerke 65:14-15

Summary Judgment Standard of Review

- 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).
- 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).

RECEIVED

May 09 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

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.

Jan F. Kennerly, Jr.,

Defendant/Third Party
Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

NOTICE OF APPEAL

Bierer and Associates, Inc. (Bierer) appeal the February 6, 2023 Order of the Honorable R. Lawton McIntosh granting Travis Pattern & Foundry, Inc.'s and Trystar, LLC's Motions for Summary Judgment (attached) and the May 5, 2023 Order denying Bierer's timely filed Motion to Reconsider the February 6, 2023 Order (attached). Bierer received electronic notice of entry of the Order Denying the Motion to Reconsider on May 5, 2023.

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May 9, 2023
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SC Court of Appeals

Exhibit 1

February 6, 2023 Order

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**

RECEIVED
May 09 2023
SC Court of Appeals

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.

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), SCRCF. 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

must determine whether a verdict for that party would be reasonably possible under the facts.”

Bloom v. Ravoir, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (quotation omitted).

FINDINGS OF FACT¹

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.

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.

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.

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

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).

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

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

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

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*

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

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.

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.

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

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.”).

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



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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May 09 2023

SC Court of Appeals

Exhibit 2

May 5, 2023 Order

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.

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 DENYING PLAINTIFF'S
MOTION TO RECONSIDER**

RECEIVED

May 09 2023

SC Court of Appeals

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

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,

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. Ravoir*, 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 Carolina 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,

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).

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.

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

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

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

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



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

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May 09 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

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.

Jan F. Kennerly, Jr.,

Defendant/Third Party
Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

PROOF OF SERVICE

I, Jaime Harmon, legal assistant to the attorney for the Appellant, Griffin Davis LLC, located at 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206, hereby certify that on May 9, 2023, I did serve by placing in the U.S. Mail, first class postage affixed thereto (with a courtesy copy sent electronically), the following document to the below mentioned individuals:

Document: Notice of Appeal

Served: John F. Beach
Lyndey R. Z. Bryant
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, SC 29201

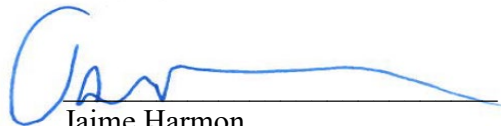
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Jaime Harmon

State of South Carolina	)	
	)	Circuit Court
County of Richland	)	2018-CP-40-04841

Bierer and Associates, Inc.)
vs.) Transcript of Record
Jan F. Kennerly, Jr. et al.)

January 4, 2023
Richland, South Carolina

B E F O R E:

The Honorable R. Lawton McIntosh, Judge

A P P E A R A N C E S (All present by video or telephone):

James M. Griffin, Esq.
Attorney for the Plaintiff

John Ursu, Esq.
Attorney for the Defendant

Sara Iskimov
Transcriber

1 THE DEPUTY CLERK: Hello, everyone. I just want to make
2 sure everybody can hear me. Everyone can see me. Don't have
3 no trouble with any audio or video for anyone.

4 MR. GRIFFIN: We hear you in Columbia.

5 MR. URSU: Pretty snowy here in Minnesota, but we hear
6 you well, too.

7 THE DEPUTY CLERK: Okay. Well, I'll let the Judge know
8 that I think everyone's on. You know, we'll get him on in
9 just a moment. Okay?

10 MR. GRIFFIN: Great.

11 MR. URSU: Thank you.

12 (Pause.)

13 THE COURT: All right, guys. I've read through all of
14 the submissions. I just got one a few minutes ago. I have
15 not read that, in all candor, but I've read everything else.
16 I'll be glad to have Trystar go first. Then we'll go from
17 there.

18 MR. URSU: Sure. And thank you, Your Honor. My name is
19 John Ursu. I'm here under the close custodial supervision of
20 Brian Duffy and beaming in from Minnesota.

21 Trystar was named in this lawsuit in 2021. The lawsuit
22 itself was commenced in 2018, and there had been a
23 complaint -- an amended complaint, -- and second amended
24 complaint. And then they brought Trystar in. And you know,
25 anyone who has sat through all the discovery in this case

1 knows why they were never named in any of the first three of
2 these pleadings, and that's because Trystar didn't do anything
3 wrong.

4 We will be happy to prove that in whatever form we would
5 need to. But the fact is this case is too late, and it's too
6 late under controlling South Carolina law. And I'll walk
7 through it.

8 I have a presentation, Your Honor. Would you be willing
9 to look at that? It's just helpful to see some of the
10 documents and a timeline.

11 THE COURT: Absolutely.

12 MR. URSU: All right. Thank you. This will test my
13 abilities here. Share. All right. And are you able -- let's
14 see now -- to see this?

15 THE COURT: I see it now.

16 MR. URSU: Okay. Thank you. You know, the rule, of
17 course, in South Carolina is that the date the plaintiff
18 discovers the injury, not the date that they discover the
19 wrongdoer, is what triggers this. And really, it's a
20 practical, objective test, which is if they know they had some
21 claim against somebody, that's when the statute ought to run.

22 It's been hard to find a case in South Carolina with as
23 many red flags as are present here. And I'm going to walk
24 through those just so that you can see why this is squarely in
25 the zone of what ought to -- of where there ought to be a

1 grant of summary judgment.

2 The amended complaint, third amended complaint, was filed
3 in April 2021. We accepted service of it in May. And so, you
4 know, April 2021 is the -- is the operative moment. What they
5 have claimed is that they discovered this fraud in -- or this
6 whatever Mr. Kennerly was doing, in 2018, in July, and then
7 later on in September filed that first complaint against him.

8 And really, so the question becomes, you know, did Bierer
9 know or should they have known before 2018 -- that's three
10 years before they sued Trystar, but they had been damaged in
11 that they had a claim against, you know, anybody. And what we
12 see is that they ignored these red flags for years and years.
13 I'm going to walk through five. There are more, but these are
14 the ones I think that are most relevant.

15 What Mr. -- what the undisputed evidence is, is that Mr.
16 Kennerly told Trystar in early 2013 that he had -- that Walt
17 Bierer had said it would be just fine for him to start being
18 an independent agent for Trystar and that they started working
19 on that.

20 Trystar received in April a note from Joe Bierer, who is
21 the son of Walter Bierer, and it said, "It's come to our
22 attention over a period of time after noticing a drop in cable
23 and jumper sales and emails to customers that Trystar may be
24 circumventing our efforts to support new sales."

25 So as of April 2013, there is an injury, and the statute

1 of limitations starts running. And so that's red flag number
2 one. And you'll see that's, you know, whatever, five years
3 before they filed suit against -- or they claim they
4 discovered it.

5 In December that same year, they say another line was
6 crossed with Trystar. Trystar has a history of undermining
7 all -- any and all business. And again, a lost sale, and so
8 more injury. They've had damages now, and they're aware of
9 those damages. In 2014, Rick Kennerly presented to the IEEE
10 conference -- that's sort of the World Series of this
11 industry -- and his bio said that he had worked for Bierer
12 Meters and Travis and -- Bierer Meters for 15 years and Travis
13 for two.

14 That phrase "working for" is pretty meaningful, at least
15 in the testimony and for Bierer. And they are absolutely
16 clear of what it meant to them, which is, that if you work for
17 somebody, you're getting paid. So they had this information
18 in front of them in 2014, 2015, certainly. They confronted
19 Rick with it, and Rick, at least according to them, denied
20 that he was working for -- denied that he was working for
21 Travis.

22 But -- and I think this is important -- this is exactly
23 the same information. They had no more information in 2018,
24 ultimately, that when they decided to start calling companies
25 and see if they can figure it out. So that's red flag three.

1 In 2015, there's an exchange with Walter Bierer where he
2 says, "I'm beginning to wonder why I'm paying you these large
3 sums of money to disappear for weeks at a time." This is to
4 Rick Kennerly, and he notes a bunch of things that, "You are
5 maintaining a private telephone and email account, and that
6 leads me to wonder what other activities you may be conducting
7 on my dime when you're gone for weeks at a time with no
8 reporting."

9 So he's saying he's suspicious. What's out there? You
10 know, he's suspicious of Rick that he is -- had damage and
11 other -- you know, and they know that they've lost sales at
12 least to Trystar during this period. So that's red flag
13 number four.

14 And then, you know, this is number five. This is Brent,
15 who is a family member, and Brent sort of comes in and starts
16 working for human resources. And he talks to Dave Deinek.
17 Dave is another Defendant in this case and comes back and
18 reports what he heard, which is that Dave Deinek told Brent
19 that Rick helped many people with other manufacturers'
20 products in his off time. And in his off time, he is, you
21 know, out there talking about other manufacturers' product,
22 and Brent is concerned about it.

23 Walt, the patriarch of the family, says, look, you should
24 reserve comment until you understand exactly what he's doing
25 there. And so as of 2016, they know that he's out there, you

1 know, helping many people with other manufacturers' products
2 in his off time.

3 This is a -- this is pretty clear -- you know, they claim
4 then, well, we didn't discover this until July of 2018. But
5 of course, what they found in July of 2018 was exactly the
6 same thing they found in 2014, 2015, which is that Rick, it
7 said, was working for Bierer Meters and Travis USG -- or UGD,
8 and working for them, which to them making money. That's
9 exactly the same thing they've learned. They testified that
10 they had no further information.

11 And that was, you know, sufficient for them to place
12 three phone calls, to call Travis, to call ITW, and to call
13 Trystar, all of whom said readily that he was an independent
14 agent for them. and that is -- and so they got that
15 information right there. All they had to do was place one
16 call, and all they had to do was -- and they had exactly the
17 same information to place those calls that they did in 2014
18 and 2015.

19 You know, the law privileges, you know, the present, you
20 know, sense utterances, things that people say just right when
21 they find out something. This is given more evidentiary
22 weight because it, of course, doesn't have lawyers working all
23 over it and everything else. They're saying, you know,
24 they're -- it's an excited utterance. They're saying what's
25 on their mind.

1 And this is what Walt Bierer wrote to Rick Kennerly then.
2 And you'll note it's almost exactly the same thing he wrote in
3 2015, "It has been obvious to me that you have been trying to
4 separate yourself from Bierer and appear as an independent
5 entity within the electric utility industry for many years."

6 Then he goes through the same laundry list of things:
7 "You separated your phone. You separated your email account.
8 You haven't turned in credit card receipts until recently. No
9 trip reports, unknown whereabouts, alternative business cards,
10 product development, product representation. No other
11 business other than Bierer would have tolerated this for any
12 period of time. No more."

13 And so it's -- you know, I read Walter Bierer's
14 declaration that he submitted in connection with this. This
15 is a man who had been deposed, you know, 15, 16 hours and then
16 also then sort of tried to go back and revise his testimony.
17 I think what's interesting, though, is he had nothing to say
18 about that it had been obvious to him and that no business
19 other than Bierer would have tolerated it. And that's because
20 it's true.

21 And so let's go back to our question from the beginning,
22 you know, did Bierer know or should have known before 2018
23 that it had been damaged allegedly and had a claim against
24 someone? And I think we have the answer here, you know, right
25 from Walter Bierer. It had been obvious to him and no other

1 business than Bierer would have tolerated it.

2 And really, these red flags are just overwhelming. It is
3 hard to find a case with similar facts given the number of
4 opportunities that they had. In 2012, he separated his phone
5 and email from Bierer. I promise you, there is not a lawyer
6 at my law firm who does not have this Faegre Drinker email.
7 So he's running around with a Gmail address. He has his own
8 phone.

9 They knew about lost sales in 2013. They knew he was
10 working for, which meant he was getting paid by Travis in
11 2015, that he had outside activities and was disappearing for
12 weeks at a time. And in 2016 that he helped many people with
13 other manufacturers' products.

14 All of this they knew and all of this they knew before
15 their alleged discovery in 2018. There is a few different
16 limitation statutes that are at play here. The differences
17 aren't relevant here. It's all three years. And they note,
18 you know, it's really three years after the person knew or by
19 the exercise of reasonable diligence should have known that he
20 had a cause of action.

21 And this is not -- and so here they had to do all they
22 had to do was call. They had the same information in 2014,
23 2015 that he had -- was working for Travis UHG (sic), and they
24 didn't call. They did -- and once they did, they called
25 Travis, they called Trystar, and they called ITW. It was

1 sufficient for them. This was sufficient information for them
2 to learn everything that they needed to know.

3 You know, here's the -- the legal standard. The exercise
4 of reasonable diligence means that they must act with some
5 promptness where the facts and circumstances place a
6 reasonable person, with common knowledge and experience on
7 notice. In other words, it's -- it's not whether the
8 particular plaintiff knew, but rather, whether the
9 circumstances of the case would put a person on notice that
10 some right had been evaded -- invaded.

11 And really, all you have to do is take Walter Bierer's
12 word for it. This is, you know, again, what he wrote at the
13 time, right? No other business than Bierer would have
14 tolerated it. It's unreasonable in Walter's own -- own
15 saying.

16 You know, this is a case where there's a number of red
17 flags. This is -- we cite this in our reply, the Abrasives-
18 South v. Korte case. And even in this, they're really working
19 off of one email in order to, you know, get at these issues
20 around fiduciary duty and otherwise.

21 So even this, which is sort of the most obvious case
22 where there are a number of red flags, doesn't come close to
23 what we have here. So really, you know, I mean, it was -- as
24 Travis has said open and obvious. No other business would
25 have tolerated it. And that summary judgment is appropriate.

1 And the reason summary judgment is appropriate, it would
2 be a terrible policy decision to allow people to sit on their
3 rights and some -- in this case for something like a decade
4 while they're trying to, you know, suss things out and figure
5 things out.

6 We've had all kinds of problems getting evidence in this
7 case. We've had all kinds of problems getting emails. And of
8 course, the reason is is because they're so old. It is -- it
9 is -- you know, so the statute of limitations has a good
10 purpose, but one of them is really diligence, which is that we
11 want, you know -- Bierer needs to do this work if they want to
12 have a claim. You know, they -- very little time spent in
13 their brief on fraudulent concealment, and they do not cite a
14 single piece of record evidence, not one.

15 In order to even allege fraudulent concealment, you would
16 need to comply with Rule 9, which would be the who, what,
17 where, when and why. Here at summary judgment, their job
18 would be to put forth record evidence on each of these points,
19 and they don't have a single thing. There's no -- it's
20 undisputed that there's no fraudulent concealment by Trystar.
21 And they haven't put anything in about, you know, agency or
22 the scope of the agency and how that might possibly include
23 this.

24 And under all circumstances, they knew, right? I mean,
25 they knew or for gosh darn sake, they should have known. And

1 you see that in 2015, 2016, when Walter's laying out the same
2 stuff that ultimately he lays out again in 2018.

3 You know, our -- the last point I'll make is that, of
4 course, they have claims. They have many claims. Two of them
5 are equitable for accounting in a constructive trust, and they
6 don't have any response of any kind on that. They don't even
7 say latches.

8 And so that's our story, and we're sticking to it. If
9 the Court has questions, I'm happy to answer them. I thank
10 you for being willing to sit through a presentation, which is
11 not -- it's designed to be of aid to the Court, but it's
12 certainly not something that we always do.

13 THE COURT: Thank you, sir.

14 Mr. Griffin, I'd be glad to hear from you, if you're up.

15 MR. GRIFFIN: Yeah. Thank you, Your Honor. Mr. Ursu
16 just jumped right into it, and I think we all just jumped
17 right into it in our briefs. And I do want to step back. I
18 know you're familiar with the case, but I want to give you
19 just sort of a thumbnail sketch of -- of what the case is
20 about before I dive into summary judgment arguments.

21 Bierer and Associates, Judge McIntosh, was started by
22 Walter Bierer in 1988 in a barn adjacent to his personal
23 residence that he lived in with his wife. He had invented and
24 manufactured meters that are used by electrical utility
25 linemen in the industry.

1 Originally, Bierer marketed and sold those meters on a
2 private label agreement with a company called Salisbury, and
3 they did that for many, many years. The first employee --
4 employee of Bierer and Associates, Judge, was Walter and Billy
5 (phonetic) Bierer's daughter, Jamie (phonetic). The second
6 employee of Bierer and Associates was Rick Kennerly, and he
7 was retained in 2003.

8 In 2008, this private label agreement with Salisbury,
9 where all of Bierer meters were being sold under the Salisbury
10 flag expired thereabout 2008. And then Bierer Meters started
11 marketing their own meters under the Bierer Meters trade name.

12 Also, during that period of time, Walter Bierer wanted to
13 expand the product offerings of Bierer and Associates to
14 include the product called personal protective grounding
15 equipment. And what this equipment is used by utility linemen
16 as a safety mechanism. And then when they're working on high
17 powered electrical lines, they -- they ground it using this
18 grounding cable, if you will, so that if some reason the line
19 they're working on is accidentally charged, electricity going
20 through there, that it would -- it would be grounded and not
21 electrocute the utility worker.

22 There's this personal protective grounding gear in the
23 market. Salisbury had a line that they -- they were selling
24 and -- and so while Bierer was in on an agreement and -- and
25 contract with Salisbury, they couldn't provide that.

1 So -- so in 2009, Walter Bierer asked Rick Kennerly to go
2 out and find component manufacturers for this product.
3 Personal protective grounding gear consists of basically three
4 things. One's cable, one -- one is a clamp, and the third is
5 a mechanism called ferrule that essentially connects the cable
6 to the clamp.

7 And -- and so Rick Kennerly, on behalf of Bierer and
8 Associates, went to and located Trystar, who was a cable
9 manufacturer, and discussed with them manufacturing cable for
10 protective grounding equipment. Rick Kennerly went on behalf
11 of Bierer and associates to Travis, which is a foundry and
12 located in Spokane, Washington, to see about manufacturing
13 clamps for use in this protective grounding equipment.

14 And ultimately, Bierer and -- and Mr. Kennerly, on behalf
15 of Bierer, worked with Travis to design clamps suitable for
16 protective ground and gear, worked with Trystar to come up
17 with a cable that met the ASTM standards for use and
18 protective grounding gear.

19 And Trystar started supplying cable to Bierer under the
20 Bierer private label that Trystar was manufacturing. And
21 initially Travis was supplying clamps to Bierer under it --
22 using a Bierer label on the Trystar manufacturing clamps.

23 Also during 2009, because Bierer was marketing products
24 under its own name, Mr. Kennerly took on the responsibility of
25 the national sales manager for Bierer. His formal title

1 was -- was made that in spring of 2018, but up until that
2 point, he was -- he was vice president of operations and
3 engineering.

4 In any event, around 2010 is when Bierer started buying
5 cable from Trystar, the clamps from Travis, and ferrules from
6 another source, and assembling these protective grounding
7 equipment and marketing them, you know, along with the other
8 products.

9 And the way that Bierer marketed their products was
10 through a nationwide network of sales representatives who were
11 under contract with Bierer. They all worked commission, and
12 each sales reps' commission contract basically said that they
13 would not -- they would not market products that competed with
14 Bierer and Associates' products.

15 In any event -- and also it's important to note that
16 these sales reps receive the commission on every Bierer and
17 Associates' sales in their territory whether they had anything
18 to do with the sale or not. And so it was Bierer Meter sales,
19 their grounding sales and other products.

20 The scheme that -- that -- that was developed and,
21 frankly, that Bierer and Associates, Walter Bierer never
22 learned of until the summer of 2018 was -- and it started in
23 2012, 2013. Mr. Kennerly entered into commission sales
24 agreements with both Trystar and Travis to market the cable
25 and clamps that were originally developed for Bierer directly

1 to the utility market using Bierer's national network of
2 independent reps.

3 The reps who were supervised by Kennerly and they were
4 doing so under Kennerly's supervision and direct competition
5 with Bierer, that -- that is the scheme. That is the wrongful
6 conduct that we sued Kennerly over, that we've sued -- that
7 we've sued Travis over, and that we've sued Trystar over, is
8 that --

9 And it's Mr. Bierer, in his own words in the deposition
10 that we cited in the -- and in our response essentially says
11 Travis and Trystar in conjunction with Kennerly hijacked their
12 sales channels, and Madison-TryStar were paying Kennerly, who
13 was then also paying these other disloyal reps, to sell
14 products in competition with Bierer around Bierer. That is --
15 that is the wrongful conduct. That is the claim, and that --

16 And what we've learned in the course of litigation,
17 Judge, is that from July 2013 -- excuse me, from some -- from
18 2013 until July of 2018, Travis paid Kennerly approximately
19 \$1.4 million. From 2013 to July 2018, Trystar paid Kennerly
20 approximately \$850,000. And during this same period of time,
21 Bierer paid Kennerly approximately \$1.5 million in
22 compensation.

23 On July 10th, 2018, Bierer discovered for the first time
24 that Kennerly was working for Travis and Trystar. Don't think
25 there's any dispute about that. They don't argue that -- that

1 Bierer actually knew before 2018, I don't believe. And -- and
2 Mr. Ursu brought up this IEEE brochure that -- that was for a
3 conference sometime in 2014.

4 And the evidence on the record is clearly that sometime
5 after that brochure was released, it came to the attention of
6 Walt Bierer, Joe Bierer and others at Bierer and Associates.
7 And they had a meeting where they discussed it with -- with
8 Mr. Kennerly and brought it to his attention.

9 And then during that meeting, and it's supported in the
10 record we've submitted here and in Mr. Bierer's affidavit and
11 Walter Bierer's affidavit and Joe Bierer's affidavit, that --
12 that Mr. Kennerly says that the language in the bio was a
13 misstatement prepared by Dick Pelletier -- Pelletier of Travis
14 PUD, which is a different division -- and that Mr. Pelletier
15 was confused because Rick Kennerly worked with Travis to
16 develop clamps on behalf of Bierer for personal protective
17 grounds.

18 And they were speaking at this IEEE conference about
19 personal protective gear. And so during this meeting, Rick
20 Kennerly -- who was a second employee at Bierer; he'd been
21 working there for at least ten years, probably longer -- said
22 that was a mistake, and Mr. Walter Bierer accepted his word
23 for that.

24 And in his affidavit, he explains why he didn't go behind
25 his back because he believed it was a misstatement. And it

1 was reasonable that it was a misstatement because of the
2 efforts that Bierer and Associates, Rick Kennerly on behalf of
3 Bierer and Associates, had put with Travis to develop
4 suitable clamps for the personal protective grounding gear.
5 And so it was a reasonable explanation, it was accepted,
6 and -- and it was -- it was the end of it.

7 And around July 13th, 2018, this brochure was -- pops up
8 again on the internet like it was rediscovered or something/
9 And -- and that's really unclear on the record. but the bottom
10 line is that Joe Bierer brought this IEEE publication back up
11 to -- to Walt Bierer and said this -- this was never
12 corrected.

13 And Walt was somewhat frustrated that this issue has come
14 up because he thought it had been put to bed, and he said,
15 okay, we'll just call Travis. and you know, and let's just put
16 this to bed once and for all. And -- and as Walt says in his
17 deposition and in the affidavit, much to his dismay and
18 chagrin, Travis said, yeah, he works for us.

19 And that is when they discovered that Rick Kennerly was
20 being compensated by Bierer and Associates -- excuse me, by
21 Travis. They then followed up and started investigating, and
22 they learned quickly that -- that he had -- they called
23 Trystar and learned quickly that he had a relationship with
24 Trystar. Did not really know the extent and the magnitude of
25 the relationship until after they got into discovery in the

1 civil case.

2 And -- and Bierer and Associates did not sit on their
3 hands once learning this. They filed suit in October and
4 immediately served subpoenas. And Your Honor knows from, you
5 know, October '19 -- and then 2020, we had COVID, and it was a
6 shut down for a year and --

7 THE COURT: Let me ask you this, Mr. Griffin, looking at
8 the October 14th, 2015, email where your client says, "I'm
9 beginning to wonder why I'm paying you", et cetera, et cetera.

10 MR. GRIFFIN: Right.

11 THE COURT: It seems regardless of the prior red flags as
12 Mr. Ursu says, but regardless, to me at that point, it seems
13 like your client was on an inquiry notice and that he needed
14 to go do some digging and figure out what was going on and
15 didn't do it. Any explanation as to why he didn't or why that
16 shouldn't be treated in that regard?

17 MR. GRIFFIN: Well, he did, Your Honor. And he addresses
18 that in his affidavit, and -- which they contend it's a sham
19 affidavit, but --

20 THE COURT: Not read his affidavit. I will. But
21 according to what I'm hearing, it's a sham.

22 MR. GRIFFIN: It's not. So in order to be a sham
23 affidavit, Your Honor, it has to contradict the sworn
24 testimony. And so what I'll tell you is that Mr. Bierer,
25 Walter Bierer was never asked in his deposition about this

1 2015 email to Rick Kennerly. He was never asked about it. He
2 was never asked about it.

3 And he was asked in his deposition, it said, "Did you
4 ever email Rick to discuss with him concerns about his
5 activities before July 2018?"

6 And he says, "I never. I had no idea it was outside
7 activities. Absolutely none."

8 "He never raised any concerns to Rick before then?"

9 "No, absolutely not."

10 And that was the first day of his deposition, at page
11 282, lines 5 through 12.

12 And at page 289, lines 13 through 25, again, he's asked,
13 "Did you ever suggest to Rick back in 2015 that he should
14 consider looking for employment elsewhere due to his outside
15 activities?"

16 And then Mr. Bierer says, "I would have no reason to do
17 that. I never. I like Rick as an employee. I thought he was
18 a valuable employee."

19 And he says, "So you're saying that never happened?"

20 And he says, "That never happened. Absolutely not."

21 And again, that's page 289, lines 13 through 25.

22 What they did not do in his deposition is showing that
23 email. They -- they produced that email after his deposition,
24 and -- and they have never asked him about it. In his dep --
25 in his -- in his affidavit, Your Honor, let me find the

1 paragraph. His (indiscernible) will tell me exactly what
2 paragraph I'm looking for.

3 The -- let's see. Give me one second. He says -- in his
4 affidavit, he says, "I reviewed the email correspondence dated
5 October 14th, 2015, which is between myself and Mr. Kennerly.
6 In October 2015, I had absolutely no reason to suspect
7 Kennerly of any wrongdoing pertaining to Travis and Trystar.
8 Bierer annual cable sales using Travis and Trystar products
9 were at their peak. My concern with Kennerly were generated
10 from his activities locally in South Carolina.

11 "Around this time, Kennerly, with my information, had
12 taken time away from work to go on several golfing trips to
13 Myrtle Beach under the pretext they were family events for all
14 of the male members of his extended family. Kennerly's sister
15 was married to the son of what appeared to be an extremely
16 successful businessman in the electrical contracting business,
17 Jerry Eddins."

18 A side note, Your Honor. He was federally prosecuted and
19 went to prison.

20 "It was clear to me that Kennerly idolized him. At one
21 point, he boasted of Eddins' award of large multimillion
22 dollar governmental electrical contracts to wire and install
23 the lighting on the Ravenel Bridge in Charleston.

24 "As time progressed, Kennerly returned from these trips,
25 which I've been told were merely family outings, talking about

1 meeting S.C. big business and political figures during these
2 and other golfing outings around the Columbia area. It was
3 apparent to me that he was enamored with this business and
4 political connections he was making.

5 "Simultaneously, Kennerly began displaying an abrasive
6 and demeaning attitude toward his federal employees, his
7 fellow employees at work. And as more and more of his
8 attention was directed to these family political outings, he
9 began to fall short of fulfilling his responsibilities. Thus,
10 I sent the email on October 14th, 2015, advising him of my
11 observations and concerns and asking him to evaluate whether
12 he wanted to continue with his employment.

13 "I began to wonder whether Kennerly was making plans to
14 leave Bierer and go to work with Eddins Electric Company. The
15 outside activities I was referring to in this email were
16 strictly related to his in-state outings, were not related to
17 evidence or suspicion on my part that Kennerly was providing
18 (indiscernible) to Travis, Trystar or any third-party."

19 And then he goes on to say, Your Honor, that, "Upon
20 receipt of this email, Kennerly and I had a meeting where he
21 assured me of his desire to continue his role at Bierer and
22 increase his efforts to make sure he connected with me and the
23 rest of the management team more frequently. Kennerly did not
24 disclose any outside employment activities with any party."

25 So they've taken that email and a number of other emails

1 out of context and attributing meaning to them with without
2 asking -- without asking Mr. Bierer in his deposition what did
3 you mean? And that -- and that's one example.

4 Another example is -- is the email of April 12th, 2016,
5 where there is some discussion about, you know, helping other
6 manufacturers, and what do you do on your time off? And there
7 again, Your Honor, the Mr. -- Mr. Bierer addresses that.

8 And -- and the bottom line is, it was encouraged at
9 Bierer and Associates for their -- their folks to assist
10 customers and other manufacturers with their products because
11 it gave prestige to Bierer and Associates. It also -- it also
12 allowed them to -- to use and market products that were
13 complementary to them, that -- that would result in sales of
14 their products.

15 And Mr. -- Mr. Beirer addressed that in his -- he
16 addressed that in his affidavit. And again, Your Honor, to be
17 a sham affidavit, it has to contradict sworn testimony, and
18 they haven't identified anything that -- that has been
19 contradicted by his affidavit. The reason why we did it by
20 affidavit, Your Honor, is because we -- we have it all in one
21 place.

22 There's nothing wrong with that affidavit. Under Rule
23 56, it says submit affidavits in opposition to motions for
24 summary judgment within 48 hours before the hearing. I mean,
25 so it contemplates affidavits. And there's no rule that says

1 you can't submit an affidavit after your client has given
2 deposition testimony. And frankly, we cite to the deposition
3 testimony a number of places in the affidavit.

4 The -- and so, Your Honor, the 2015 email, he was never
5 asked about it. He has given his answer if he would have been
6 asked about it by way of affidavit. And Your Honor, under the
7 discovery rule, the statute of limitations begins to run from
8 the date the injured party either knows or should have known
9 the exercise of reasonable diligence that a cause of action
10 exists for wrongful conduct.

11 And again, another exercise of reasonable diligence
12 simply means that the injured party must act with some
13 promptness where the facts and circumstances of an injury
14 would have put a person of common knowledge and experience
15 that some right of his has been invaded or some claim against
16 another party might have been -- might --

17 THE COURT: Let me stop you there for a second, Mr.
18 Griffin, and get back to Mr. Ursu. You mentioned about two or
19 three times in your presentation that all the -- all the
20 Plaintiff needed to do was to pick up the phone and call, and
21 he could have found out.

22 MR. URSU: Yes.

23 THE COURT: Other than allegedly these Defendants saying,
24 you know, okay, this guy's doing stuff for us. If -- if the
25 Plaintiff had undertaken some type of investigation in October

1 of 2015, what independent evidence or facts out there is there
2 that he could have discovered to find out that Mr. Kennerly
3 was, in fact, engaged in this type of activity?

4 MR. URSU: Right. It's pretty striking in Walter
5 Bierer's affidavit that he says that he had no reason prior to
6 that to think about this because, of course, there was the
7 IEEE brochure from 2014. In the discovery, Your Honor, we
8 listed and I walked through with Joe Bierer, I think, 20
9 individuals who they claim knew all about this, including
10 their sales -- independent sales reps who worked with them to
11 many of their customers.

12 The -- you know, all of the Defendants in this case and a
13 range of other folks that they didn't quite get around to
14 suing -- everybody knew. And so all, for instance, Brent
15 Jeffries needed to do in 2016 was talk to Dave Deinek, and
16 Dave Deinek told them about this. So you know, all it -- it
17 didn't really require an investigation. All you had to do was
18 ask.

19 And the most -- you know, my client asked me at one
20 point, they said, why bother doing all of this? Why would
21 Rick Kennerly have cared, right? I mean, he had -- was making
22 plenty of money with Bierer. Why did he care about doing this
23 stuff on the side? And the answer is, you know, as far as I
24 can tell is he was an incredibly hard worker with lots and
25 lots of connections, who made lots of money for Bierer and did

1 it for years and years and years.

2 The -- the 2015 email, I just want to be clear about one
3 thing, it wasn't -- there were millions -- there have been
4 millions of documents produced in this case. Many -- you
5 know, at least well more than 100,000 by Bierer itself. They
6 never produced the 2015 email. Never. They produced so many
7 documents from Walter Bierer from all around that era, and
8 before that, they never bothered to produce it.

9 And so anyway, when we were sitting there at the
10 deposition, this is now you're seeing it, in a print from a
11 phone, a screenshot from a phone. You know, that's what we
12 have. And of course, if we have to ask him about it more, we
13 will. I think these words speak for itself.

14 And the other thing I'll just note is that the -- he
15 doesn't -- you know, the most notable things are what he
16 doesn't respond to. He says here, "I'm beginning to wonder
17 why I am paying you large sums of money to disappear for weeks
18 at a time." That is him wondering. And at least the law says
19 that a person ought to -- if it's an objective standard, ought
20 to then inquire, go do some things, call up any of these --

21 THE COURT: I've got that. I've got that, Mr. Ursu, and
22 I appreciate that.

23 Mr. Griffin, are you finished?

24 MR. GRIFFIN: No, sir, not hardly. And the -- so one
25 thing that I would point out as to the standard, Your Honor,

1 if there's conflicting testimony on the issue, obviously, on
2 summary judgment, then summary judgment should be denied. And
3 that, you know, we're being criticized because we have a side
4 of the case where a court has denied summary judgment under
5 similar circumstances. And frankly, as you know, you can't
6 appeal a decision of denial from summary judgment.

7 The -- they cited this Judge Gergel's decision,
8 *Abrasives-South v. Korte*, K-O-R-T-E, 226 F. Supp. 3d 584. And
9 I really would urge the Court to read this opinion and compare
10 the facts of this opinion to the facts of our case. And the
11 facts of this opinion, there are some similarities. An
12 employee was working for, you know, a supplier at the same
13 time and working for the employer distributor and appeared to
14 have been doing receiving payment and providing, you know,
15 favoritism to that -- to that company.

16 Judge Gergel did not -- did not grant summary judgment on
17 the basis of the portion cited by Mr. Ursu in his PowerPoint
18 that says, "In March 12, 2012, defendant left plaintiff's
19 employee at this time. Plaintiff confronted defendant
20 regarding suspicions he had been providing information to
21 other competitors and vendors."

22 But what -- what triggered the statute of limitations was
23 in January of 2015, that the company admitted paying the
24 employee, and -- and so it's not about was it -- was the
25 employee not a good employee? Were there suspicions about the

1 employee's behavior? What triggered the statute of
2 limitations is when the defendant AWUKO -- in this instance,
3 it would be Trystar -- explicitly admitting to -- in writing,
4 making substantial payments to the employee.

5 I would encourage you, that is the standard, and it is
6 when some right has been invaded. And you can have a
7 situation, Your Honor, where an employee is not doing his job.
8 The employee is out, not -- you know, not doing the work that
9 he's paid to do, and an employer can complain about that.

10 But that doesn't mean that the employee's rights are
11 invaded, and the employee (sic) has a cause of action against
12 an employee for not being respectful or -- or trying to
13 distance themselves from the employer and -- and receive
14 substantial sums of money.

15 The -- and so, Your Honor, the question is, what facts
16 did Bierer and Associates know that would have put them --
17 that would have alerted them that they've been injured by
18 wrongful conduct? In the case cited, there's a negligence
19 supervision case that they filed with regard to sexual
20 harassment.

21 Well, you know when you've been sexually harassed and you
22 know there's probably claims of sexual harassment. They cite
23 a case where a gun went off unexpectedly without any
24 explanation. And -- and that's within the statute of
25 limitation because you were injured by a gun that went off,

1 and it should not have gone off. And so you'd be looking into
2 it.

3 But having an employee who -- who's wayward, who you
4 think is looking for another job, spending more time looking
5 for another job than working on the job I'm paying you to do,
6 doesn't give rise to a claim that -- doesn't put someone on
7 notice that their rights are being invaded.

8 I mean, and then you know the IEEE and -- and this is a
9 classic case of a practical question as to whether there is
10 sufficient basis to trigger, you know, an inquiry and what it
11 would have found.

12 But -- but secondly, it is a fraudulent concealment case.
13 And Mr. Bierer's affidavit and Joe Bierer's affidavit, replete
14 with information about lies and covers-up by Mr. Kennerly, and
15 we've cited in our brief the case law that says that that
16 fraudulent concealment tolls statute of limitations, and
17 fraudulent concealment includes judgment -- I cited the
18 case -- failure to disclose information that the fiduciary
19 duty requires you to disclose.

20 And here you have an officer of the company competing
21 against his employer through an agreement with Trystar and
22 Travis, competing with Travis, and he had a fiduciary duty to
23 disclose that. I mean, basic fiduciary duty law. But beyond
24 that, he lied about it. He lied about it in the email on July
25 2018, Judge, when he says, Trystar, guilty as charged, I'm

1 getting paid for some product that I helped them develop, but
2 I don't market it. Trystar has their own route to market it.
3 Why? Why?

4 I mean, so what -- what Trystar is asking you is to set a
5 standard where you cannot go to the officer of your company
6 when you have questions. You have to go behind that -- behind
7 your officer's back and start undermining that officer's
8 authority, undermining the trust between the officer and the
9 company and start asking. You can't rely upon the officer to
10 tell you the truth. And if he lies to you, then -- then the
11 statute of limitations is triggered. If you don't know, it's
12 a lie. And that's where we find ourselves.

13 That's all I have. Thank you, Your Honor.

14 THE COURT: Thank you. All right.

15 MS. BRYANT: Your Honor.

16 THE COURT: Yes, ma'am.

17 MS. BRYANT: My name is Lyndey Bryant, and I represent
18 Travis Pattern and Foundry. My client's name has been
19 mentioned a lot over the last hour, and we do have a similar
20 motion for summary judgment. And so I would just like an
21 opportunity to be heard on -- on these issues without
22 retreading the ground that Mr. Ursu has already -- has already
23 gone through with the Court.

24 THE COURT: I'll be glad to let you do that. I was
25 actually heading to Mr. Duffy, but if you want to go ahead,

1 doesn't matter to me. Go ahead.

2 MS. BRYANT: Okay. Your Honor, as we've set forth in our
3 motion for summary judgment, a lot of this -- the exact same
4 facts and circumstances that have put Plaintiff on notice of a
5 claim or a potential claim against Trystar are the identical
6 facts and circumstances that should have put a reasonable
7 person in the Plaintiff's position on notice of a claim
8 against Travis Pattern.

9 And Your Honor, I just want to connect a few of those
10 pieces to my client specifically. The evidence is clear, and
11 none of the Bierers dispute, that as early as 2012 they knew
12 that Kennerly was using his personal email account, his
13 personal cell phone, failing to submit travel reports and
14 travel expenses to the company. They've said repeatedly prior
15 to this litigation and during this litigation that that was
16 obvious to them.

17 Around that exact same period of time, the Plaintiff
18 established a business relationship with Travis Pattern, where
19 the Plaintiff was purchasing from my client various products,
20 including clamps, as has been discussed by Jim Griffin in his
21 background summary of the facts.

22 And so this is not -- I think it's important to note that
23 this is not a situation as -- as Mr. Ursu insinuated, where
24 you don't know that there's a third-party impairing your
25 rights.

1 There was a business relationship between Plaintiff and
2 Travis Pattern, between the Plaintiff and Trystar. They were
3 purchasing products from one another, and those sales of
4 products went both ways. Travis Pattern purchased products
5 from Bierer, and Bierer purchased products from Travis
6 Pattern.

7 There should have been an open dialogue. And so any kind
8 of implication that, you know, it would have been hard to pick
9 up the phone and just ask what Kennerly was doing at Travis
10 Pattern or Trystar, you know, is not unreasonable.

11 The other facts that we've set forth in Travis Pattern's
12 motion is that the Plaintiff knew that Kennerly would be gone
13 for, as Walter Bierer testified, months at a time with Travis
14 Pattern.

15 My client is based in Spokane, Washington. There was lab
16 testing for products in Canada. There's no dispute whatsoever
17 that the Plaintiff did not pay for that testing. All of that
18 cost -- and it's a substantial cost, Your Honor, hundreds of
19 thousands of dollars of lab testing for these products, which
20 was borne by my client. And Mr. Kennerly was there. The
21 Plaintiff knew that.

22 So again, to connect these dots, the Plaintiff knows
23 there is this dissociating that Mr. Kennerly has done in 2012.
24 In 2013, he's reporting to the Plaintiff that he's going for
25 months at a time for testing with my client.

1 In 2014, the Plaintiff receives an industry-wide
2 publication that promotes Mr. Kennerly as working for -- in
3 Joe Bierer's testimony -- being paid by my client for Travis
4 Pattern products, as a representative of its products.
5 Developing those products and working for my client at an
6 industry conference representing those products.

7 In 2015 is the Walter Bierer email, where he expresses
8 concern about outside activities, being gone for months at a
9 time and raising these concerns, suggesting that Kennerly find
10 employment elsewhere, And then in 2016 is when Brent Jeffries
11 says, I'm being told by third parties that Kennerly is helping
12 other people with other manufacturers' products.

13 And so Your Honor, I think of all of this as a -- as a
14 puzzle. From 2012 to 2016, the Plaintiff is receiving pieces
15 to a puzzle. By 2016, it has every single piece to the puzzle
16 and yet it refuses or fails to put the puzzle together until
17 2018. And Mr. Griffin kind of alludes to this. The -- the
18 2014 industry publication just mysteriously pops up in 2018.

19 I would argue, Your Honor, that they knew all along, and
20 it wasn't until 2018 that they actually put all of these
21 different pieces together because they were finally fed up
22 with, as Walter Bierer says, "No company would have put up
23 with this for any period of time."

24 Your Honor, finally, I just -- I know there's been some
25 discussion of fraudulent concealment, and I really want to

1 focus on that particular piece since we haven't completely
2 covered the ground on that. The -- the Plaintiff's position
3 is that Kennerly fraudulently concealed his relationship with
4 Trystar and Travis Pattern from the Plaintiff. There's no
5 allegation, no evidence, and no argument at all that Travis
6 Pattern or Trystar themselves fraudulently concealed that
7 relationship. And that is --

8 THE COURT: Well, let me ask you this, Ms. Bryant.

9 MS. BRYANT: Yes.

10 THE COURT: How could they have done so without acting
11 through some of their agents or employees or directors? I
12 mean, they --

13 MS. BRYANT: Sure.

14 THE COURT: -- the corporation acts for its people,
15 right?

16 MS. BRYANT: Well, sure. And Your Honor, in 2018, when
17 they called Travis Pattern, they immediately acknowledged that
18 Kennerly was working for them. My client publicly promoted in
19 an industry-wide brochure that Kennerly worked for them. And
20 so you know, the question, Your Honor -- let me just back up.

21 You have to assume that Mr. Kennerly's fraudulent
22 concealment can be imputed to my client, and Your Honor, that
23 law does not exist. There are two cases that Mr. Griffin's
24 client cites in their opposition brief, and those stand for
25 the proposition that an agent's fraud -- that their fraudulent

1 conduct can be substantively imputed to the employer.

2 Here, Mr. Kennerly was not an employee of my client. And
3 not only that, Your Honor, but those two cases don't arise in
4 statute of limitations or fraudulent concealment tolling
5 context. And Your Honor, I want -- I planned to send this
6 case to Your Honor by email. But there's a 2021 South
7 Carolina federal court case. Judge Bruce Hendricks decided
8 it. It is Pro Slab. v. Argos USA.

9 And Your Honor, in that case, Judge Hendricks
10 specifically found that one defendant's fraudulent concealment
11 cannot be imputed to another defendant. And Your Honor, I
12 will read to you what the judge held in that case. "To invoke
13 the doctrine of fraudulent concealment, a plaintiff must
14 establish that the party pleading the statute of limitations
15 was the one who fraudulently concealed the facts."

16 Judge Hendricks goes on to say, and again, I quote, "The
17 plaintiff must point to affirmative acts of fraudulent
18 concealment by these defendants and not by any other
19 defendant." And as Mr. Ursu pointed out, that evidence must
20 be with the degree of particularity required by Rule 9. And
21 so Your Honor --

22 THE COURT: Again, Ms. Bryant, there's no reason to
23 dispute that, but that conduct would have to have been engaged
24 in by one of the employees, agents or directors of one of
25 these --

1 MS. BRYANT: Sure.

2 THE COURT: -- corporations, correct? Otherwise, it
3 cannot act. So without them doing that, they can't -- the
4 corporation can't do it by itself, right?

5 MS. BRYANT: Well, yes, Your Honor, but -- but Kennerly
6 is not an officer -- there's no evidence that he's an officer
7 of Travis Pattern. No evidence --

8 THE COURT: I didn't say he was an officer. But from
9 what I understood, that he was working for them as an agent.

10 MS. BRYANT: Right. But Your Honor, the representation
11 should be imputed, under any theory, has to be in the course
12 and scope of the agency or the course and scope of their
13 employment.

14 And I would submit to the Court that my client -- the
15 course and scope of Kennerly's agency with my client is to
16 publicly represent and publicly sell my client's products.
17 It's not within the course and scope of his agency, even if
18 you assume that that exists for these fraudulent
19 misstatements, to deny the very existence of the relationship.

20 And so Your Honor, just substantively speaking, there's
21 not enough there to connect Mr. Kennerly's misstatements to my
22 client, even if the law recognized imputing these
23 misstatements to another defendant, which the law does not
24 recognize.

25 Finally, Your Honor, and we do point this out in our

1 reply brief, the fraudulent concealment doctrine is an
2 equitable tolling of the statute of limitations. And so it is
3 an equitable theory that the party asserting it needs to have
4 acted reasonably. They need to truly be innocent. We've
5 cited case law that says that the reliance on the
6 misrepresentation had to be reasonable.

7 As Your Honor knows, in a negligent misrepresentation
8 case, the plaintiff has to show that their reliance was
9 justifiable. And here, it's not -- it's simply not
10 justifiable for the Plaintiff to rely on numerous
11 misstatements by Mr. Kennerly over a period of years when they
12 have multiple, multiple occasions on which they had notice of
13 a potential claim and did nothing about it other than ask Mr.
14 Kennerly.

15 As Mr. Ursu pointed out, and -- there are multiple
16 different people that the Plaintiff could have inquired with
17 on this -- and I'll use the 2014 IEEE brochure as just one
18 example. In that brochure, it is stated that Travis Pattern
19 has worked -- has basically worked -- Kennerly has worked for
20 Travis Pattern since 2012.

21 First, Bierer could have called Travis Pattern. Second,
22 this is an IEEE publication, an industry conference, just like
23 the South Carolina Bar would be if I was doing a presentation
24 for the Bar that said, I worked for Adams and Reese.

25 The Plaintiff could have called anyone at the IEEE. This

1 presentation was for a common customer, PG&E. The Plaintiff
2 could have called PG&E. The co-presenter for that speaker was
3 a gentleman named Dick Pelletier. He is a sales
4 representative that the Plaintiff could have called. The
5 Plaintiff didn't call any of these people.

6 And so you know, it just -- it begs the question, Your
7 Honor, of whether their reliance on these misrepresentations
8 was reasonable, and we would submit that it was not. Your
9 Honor, courts in other jurisdictions have recognized the same
10 thing. We've cited it in our -- in our briefs.

11 And just respectfully, Your Honor, I think there's a
12 number of flaws with this fraudulent concealment theory,
13 but -- but the reality is, Mr. Kennerly's misrepresentations,
14 his repeated misrepresentations over years is not imputed to
15 my client. It was not reasonable for the Plaintiff to rely on
16 it.

17 And I think it has been said multiple times, there --
18 even if you rely on all those things, nothing changed between
19 2016 and 2018. Joe Bierer testified there was no new evidence
20 in 2018 that they did not have before. The last piece to this
21 puzzle that the Plaintiff had, it had in 2016.

22 And so just waiting two more years to conveniently
23 rediscover something you had knowledge -- actual knowledge of
24 before does not mean that the statute of limitations is
25 delayed by that period of time.

1 And so I'd be happy to address any other issue. I don't
2 want to refile ground that we've already gone through. But
3 Your Honor, we feel very confident that the evidence here was
4 more than enough to put a reasonable person -- an objective
5 standard and a reasonable person on notice of a potential
6 claim.

7 And the subjective unreasonableness of the Plaintiff here
8 is not an excuse. It's doesn't give them permission when
9 they're asking the Court to exercise its equity jurisdiction
10 to toll the statute of limitations.

11 Thank you for your time, and especially after hearing
12 arguments from everybody else, I appreciate the patience.

13 THE COURT: Thank you.

14 And Mr. Duffy, I'm sorry, I mistakenly said that I've
15 called you out. But Mr. Griffin, I'll be glad to hear any
16 response you may have to Ms. Bryant's arguments.

17 MR. GRIFFIN: Sure, Your Honor. I think she misspoke
18 when she said that -- that Kennerly was gone for months on end
19 with Travis doing testing. I don't think that's evidence of
20 the record. Clearly, Kennerly went to testing at labs where
21 Travis attended, Kennerly attended. Bierer thought Kennerly
22 was attending on behalf of Bierer. The testing was paid for
23 by, I think, PG&E.

24 And so -- and again, it's all addressed in the
25 affidavits. Their understanding was that all that was on

1 behalf of Bierer trying to land a big contract, a purchase
2 with PG&E, and they -- and that Bierer sent out, you know, a
3 lot of product for those testing. And it turns out they lost
4 the bid. They were underbid unbeknownst to them. Who
5 underbid them but Rick Kennerly and Travis UGD. And so
6 that's -- that's the evidence in the record about that.

7 And that was always the pattern that -- but -- and again,
8 it goes back to the distinction between working with and
9 working for. Working for is compensation. Working with is
10 expected in Mr. Kennerly's job role at Bierer and Associates.

11 This IEEE brochure, Your Honor, is a -- it's -- the best
12 way to deal with that is just read what Rick Kennerly said.
13 And it's their Exhibit 4, and I'll just -- I'll just publish
14 it.

15 And he wrote this on July the 11th, 2018, when Walter
16 Bierer sent him an email and says, "You're fired. We called
17 Travis. They said you're working for him." He still denied
18 it. He still denied it.

19 And as to this publication, he says in 2010, 2011 -- I'm
20 reading his words -- "I helped Travis develop a new line of
21 grounding products under the label Travis UGD with the
22 intention of them selling the products to Bierer exclusively,
23 which ended in 2015.

24 "In 2011, the PDU sales manager, Dick Pelletier, invited
25 me to present the grounding products that LIPA at the IEEE

1 meeting. Dick introduced me as the VP at Bierer and working
2 with Travis to develop clamps. The presentation was given on
3 behalf of Bierer as the distributor of Travis clamps. You can
4 visit their website at TravisUGD.com and click 'About', and
5 you will see us listed with a link. I have never worked for
6 Travis PDU or any of their affiliates."

7 That's what he says, and that's -- that's what -- that's
8 what he says on the day after he's been told he's fired,
9 and -- and again, that is fraudulent concealment. And -- and
10 there are factual questions buried in what the scope of the
11 agency is acting within the agency.

12 We've cited in our brief West v. Service Life & Health
13 Insurance. It says, "A principal is held liable to third
14 person for civil frauds, deceits, concealment,
15 misrepresentations, although the principal did not authorize
16 or justify or participate in or indeed know of such
17 misconduct."

18 And -- and again, we also cite Prince Son. "Questions of
19 agency and an agency's authority ordinarily should not be
20 resolved by summary judgment where there are any facts giving
21 rise to an inference of an agency relationship or authority."

22 And Mr. Travis Garske said in his deposition, I kept
23 asking him -- and he is the Walter Bierer of Travis Pattern
24 and Foundry, Travis Garske. And I kept saying, well, Mr.
25 Kennerly was a national sales rep -- because he keeps saying,

1 national sales rep, he's our worldwide sales rep. I mean,
2 there was no -- there was no -- he was their only sales rep.
3 He -- he -- part of that UGD division, he was their only
4 outside agent. He was their only outside agent.

5 And in order for him to continue doing that, he had to
6 lie to his employer and to fraudulently conceal his behavior,
7 and he did so time and time again.

8 Your Honor, that is all that I have. Thank you.

9 THE COURT: Thank you. All right. Anyone have any final
10 closing arguments? I will finish reading and make a decision
11 by the, hopefully, week's end. But if not, I've heard plenty
12 today.

13 But I'll give -- Mr. Ursu, do you want five minutes, I'll
14 give it to you. Same, Ms. Bryant.

15 MR. URSU: Sure.

16 THE COURT: You don't need to take it unless you just
17 absolutely need it.

18 MR. URSU: No, I don't need it. Thank you. Thank you
19 for your time.

20 THE COURT: All right. Thank you.

21 Ms. Bryant.

22 MS. BRYANT: Your Honor, I have nothing further to add.
23 I will send you or your law clerk by email Judge Hendricks'
24 decision that I -- that I referenced as to the fraudulent
25 concealment being imputed to another defendant.

1 THE COURT: All right. Thank you, guys. Appreciate your
2 submissions. Appreciate your arguments. I'll give you my
3 decision as soon as I'm -- get through reading all your
4 submissions.

5 MR. GRIFFIN: Thank you.

6 MS. BRYANT: Thank you.

7 THE COURT: Take care. All right. Have a good day.

8 MS. BRYANT: You as well.

9 (End of Transcript of Record)

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State of South Carolina)
)
County of Richland)

I, SARA ISKIMOV, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 4th day of January, 2023.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

June 28, 2023


Sara Iskimov, CDLT-125
Transcriber

State of South Carolina)
)
County of Richland) Court of Common Pleas
2018-CP-40-04841

Bierer and Associates, Inc.,)
Plaintiff,)
) Transcript of Record
v.)
)
Jan F. Kennerly, Jr., et al.,)
Defendants.)
)

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

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

March 30, 2023
Richland, South Carolina

B E F O R E:

The Honorable R. Lawton McIntosh, Judge

A P P E A R A N C E S (All present by video or telephone):

James M. Griffin, Esq.
Attorney for the Plaintiff, Bierer and Associates, Inc.,
and Third-Party Defendants, Walter Bierer, Brent
Jeffries, and Joseph Bierer

John W. Ursu, Esq.
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John F. Beach, Esq.
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Inc.

Kurt M. Rozelsky, Esq.
Attorney for the Defendant, Illinois Tool Works, Inc.

Molly Bugher
Transcriber



1 THE COURT: This is a motion to reconsider. Do we have
2 everybody here?

3 MR. GRIFFIN: I believe so, Your Honor.

4 THE COURT: Jim, is this your motion?

5 MR. GRIFFIN: It is.

6 THE COURT: All right, I'll be glad to hear from you,
7 buddy.

8 MR. GRIFFIN: Yeah. Thank you. I'm going to hopefully,
9 if I have share ability, share this PowerPoint. It worked so
10 well with John Urso (sic) last time -- Ursu.

11 John, sorry.

12 Can you see that, Judge McIntosh?

13 THE COURT: I can.

14 MR. GRIFFIN: So this is Bierer and Associates' motion to
15 reconsider the Court's order granting summary judgment to
16 Travis and Trystar on grounds of statute of limitations, Your
17 Honor, and I appreciate you giving us opportunity to have an
18 argument on this. And I'm going to go through this
19 PowerPoint. And my goal is twofold: to point out some things
20 that we don't think are addressed in the order and I'm not
21 sure the Court considered them; and then then also hopefully
22 do a little better job of explaining our position this go
23 round than I did last go round.

24 And I appreciate everyone's patience.

25 But Your Honor, initially the order doesn't address --

1 and it mentioned in a footnote one portion of the affidavits
2 of Joe and Walter Bierer, and we think that the substance of
3 the affidavit -- and we're going to show later in this
4 PowerPoint how the substance of the affidavits essentially
5 match the testimony given in depositions. And it was simply,
6 you know, a summary of the information that was previously
7 deposed over multiple depositions and multiple days for Walt
8 Bierer and Joe and others.

9 But the in Your Honor's order, there are essentially
10 three key documents that the Court relies upon to make a
11 determination that Bierer was on notice of claims against
12 Travis and Trystar. And as Your Honor knows, millions of
13 documents have been produced. It's been narrowed down to
14 three, and in one -- well, three categories. There are two
15 emails in 2013 dealing with Trystar and Trystar selling direct
16 around Bierer to customers.

17 There's this IEEE brochure, Your Honor, which is a Travis
18 document, or it relates to Travis where Travis -- and was --
19 generally was presenting at IEEE and there was a bio and it
20 referenced that Kennerly worked for Travis and worked for
21 Bierer. And then there was a 2015 email from Walter Bierer to
22 Kennerly, essentially reprimanding him for his outside
23 activities. And so those are the key three categories of
24 documents that the Court relies upon.

25 And I want to just address them. You know, in our view,

1 Your Honor, just starting with the 23 -- 2013 Trystar emails,
2 that they do not, as a matter of law, establish that Bierer
3 was on notice that it had a legal claim against Trystar, and
4 that is -- that's critical for statute of limitations -- is
5 that facts and circumstances are such that it puts a person of
6 common knowledge and experience on notice that some claim
7 against another party might exist.

8 And here the issue is that the manufacturer selling --
9 and the manufacture here would be Trystar selling direct to
10 distributor's customers. The distributor here in this
11 instance is Bierer and Associates. And after learning the
12 identity's common practice in the industry when there's not an
13 exclusivity agreement, and there was not here. And the manner
14 in which it happened is really there are two mechanisms by
15 which Bierer would get customer orders for Trystar cable. It
16 was probably labeled for Bierer.

17 One way would be drop-shipped fulfillment where it would
18 go directly from Trystar to the customer. And the other way
19 would be, it would go to Bierer and then Bierer would send it
20 out to the customer. And this is just sort of a diagram as to
21 how that would happen. But on the left side of this
22 PowerPoint is where Trystar would get the information as to
23 the customer identity and then what Bierer believed was then
24 Trystar was selling directly to the customer and cutting
25 Bierer out of the mix.

1 And as I mentioned, it's not an uncommon issue. And this
2 is not something that Jim Griffin is saying. This is
3 something that's in the email, Your Honor, that the Court
4 relies upon to find that they were on notice of statute
5 limitations. And I've got highlighted in the middle -- it
6 says -- and this is a Joe Bierer email to Dan Moerke -- and
7 Dan Moerke's a Trystar guy -- and in the middle you see where
8 I have a block here. It says, we deal with this almost on a
9 daily basis. So it's a common issue. And then what we at
10 Bierer have to do is establish some form of trust with these
11 companies and not undermine their efforts of selling our
12 products. Obviously, they would not want to do business with
13 us in the future if we started selling directly to their
14 customers, since we know who their customers are via direct
15 shipping.

16 So what we're talking about here is not -- I mean, it's
17 an industry issue, but it's not an issue that gives rise to a
18 lawsuit when there's not an exclusivity agreement. And there
19 was not here, and there's no dispute that there was not here.

20 Let's see, the next slide simply is setting forth Joe
21 Bierer's affidavit, on paragraph 17 and 18, where he discusses
22 these issues that Bierer did not have an exclusive agreement
23 with Trystar and therefore rightfully believed Trystar was
24 engaging in legitimate marketplace competition as a result of
25 learning the address of the customers through direct drop

1 shipping.

2 And so what -- and then the highlighted section of this
3 affidavit, you know, this is where Joe explains what he was
4 doing. He was, you know, raising this issue with Mr. Moerke
5 and said, you know, you told us when we first met to go down
6 this road that that was not something that y'all were
7 interested in doing. But you know, it looks like now you are
8 and we've got to reevaluate. And what Bierer did -- and it's
9 not like Bierer did not do anything, but what Bierer does is
10 institute internal controls to prevent this drop shipping from
11 being -- the customers getting shipped Trystar products
12 directly from Trystar and instead wanting -- directing it to
13 Bierer and then shipped out.

14 And again, as I said, this is not an uncommon problem.
15 This is Walter Bierer's deposition -- excuse me, this was his
16 affidavit. And he said, this was not an uncommon problem in
17 the distributorship business and there was nothing to prevent
18 Trystar from doing this. Again, there was no exclusivity
19 provision that prohibited Trystar from doing this.

20 What we think is important, Your Honor, is that Trystar
21 did not respond to Joe Bierer's email. And this was true in
22 spite of the fact that they were well aware that this was a
23 highly unusual situation where one company, Trystar, is paying
24 another company's employee, an officer of another company.
25 And this portion -- and we have is clearly -- and we'll get to

1 this a little bit later, but here's a sales rep agreement
2 where Kennerly signed this agreement and that -- and again, on
3 the on the right side of the screen, Your Honor, is Mr.
4 Moerke's deposition testimony where he says he knows of no
5 other relationship in the industry such as this. And it --
6 and it was highly unusual.

7 When asked -- when Mr. Moerke was asked, what did you do
8 in response to this email, you know, he hedged. He was vague,
9 but -- and so then I said, so it's possible you just stuck
10 your head in the sand? And he go, well, it's possible, but I
11 doubt it. Most likely I would have reached out to Rick in
12 regards to this email. And we think that's -- you know, so we
13 think that's very important when you consider, you know, the
14 reasonableness of (audio interference) and the response by
15 Trystar. They didn't respond to Joe Bierer, didn't respond to
16 Walt Bierer. They reached out to Kennerly.

17 And going forward, this was the other email that the
18 Court relies upon. This is the December 2013 email. And
19 again, what's happened here is -- and just as email threads
20 work, you follow it from the bottom and work your way up. So
21 we'll start at the righthand bottom where it says, "Hey, any
22 idea why Trystar's building for us and shipping assemblies
23 direct to FirstEnergy? I thought we were all in agreement
24 this wasn't going to happen."

25 So Joe Bierer's, you know, directing to Rick Kennerly,

1 hey, I thought we agreed not to do this anymore. Rick
2 Kennerly then responds, Judge, and says -- well, he responds.
3 He sends an email to David -- and David is David Deinek, the
4 defendant in this case -- and he says, they claim it was a
5 rush deal, and he copied -- he says, see below. I remember
6 this being a rush deal for Greg and you were meeting with him
7 that day or the next on what was to be done here.

8 And then carrying over and David Deinek confirms the
9 representation of Kennerly. Now, I don't know if it was a
10 rush deal or not or they're just making up something. But the
11 fact of the matter is, this December 4th, 2013, email, this
12 thread essentially says, up until -- and then Joe says, well,
13 you can chalk that up. We lost another customer because we
14 gave the direct billing to Trystar.

15 But what you see here is what (audio interference) what
16 Bierer is being told as to how this happened. That
17 FirstEnergy was a rush deal, their sales rep, David Deinek,
18 working on behalf of Bierer said we had to get it out. And
19 then, you know, Joe's saying, well, you know, since they've
20 been taking our business -- you know, had previously taken our
21 business on direct shipment, I guess that's what's going to
22 happen here.

23 And again, the -- and here's the affidavit of Joe Bierer
24 in paragraph 19, which basically says that. And that, you
25 know, once again, there's no exclusivity agreement. They

1 had -- you know, had an understanding in place, they weren't
2 going to do this. And the explanation given to Joe Bierer was
3 this was a one-off. This was a rush deal, and that's the only
4 reason we did it like this.

5 And Your Honor, we don't think that that puts Bierer on
6 notice or that's evidence that Bierer was on notice that they
7 had a claim against Trystar. What is happening here is
8 whether it is a rush deal or these guys were covering up
9 again, but still, it doesn't put them on notice of a claim.
10 And the best authority, Judge McIntosh, that we have for this
11 is Trystar's memorandum in support of their motion to dismiss,
12 where they point out, as a fundamental principle of law, that
13 an act done in exercise of legal right cannot be treated as
14 wrongful and actionable. Business rivalry that promotes lower
15 prices, better products, or more efficient services is
16 justified. A competitor's conduct is protected under tortuous
17 interference law because a party is pursuing the absolute
18 right it holds to compete.

19 This is what Trystar came to court and argued in
20 Anderson, Judge, and frankly this is what the information that
21 Bierer had in 2013 is what they were doing. They were getting
22 client and customer information. There was no exclusivity
23 agreement, and they had every right in the world, as Trystar
24 came to court to tell you, to compete. And that's all Joe
25 Bierer says in December is -- in the first email, he says, you

1 know, look like we're competing now.

2 And Your Honor, competition doesn't give rise to a legal
3 claim, and that's why we believe that the 2013 emails between
4 Bierer and Trystar, Mr. Moerke, and then internally are not
5 evidence that Bierer was on notice that they had a claim for
6 damages. It didn't matter what the theory of liability is
7 when it's just a claim for damages. They did not -- there was
8 no fact that they had, because there's no exclusivity
9 agreement, and the fact that they were aware that Trystar was
10 selling direct to customers is -- I mean, they were exercising
11 their legal right. And as Trystar told the Court, that can't
12 be wrongful or actionable. Yet now that they're arguing on
13 the statute of limitations, they're going, oh, well, it was
14 wrongful, it was actionable, but it's not.

15 And I guess another point is, the evidence in the record
16 is, when Bierer noticed these irregularities, it's not that
17 they didn't do anything, Your Honor. I mean, the question is
18 at that point time did they act reasonable? And so what they
19 did was they contacted Moerke, and he -- and then Moerke says,
20 you know, I didn't call them back. But what I would have done
21 is told Kennerly. And then what we know is Kennerly continued
22 to conceal and lie about his relationship with Trystar.

23 And again, I'm repeating myself, but the 2013 emails
24 don't put Bierer on notice of any cognizable legal claim
25 against Trystar for anything, much less for paying Kennerly

1 money to divert sales around Bierer, because there's no whiff
2 of that whatsoever in those correspondence.

3 The next key document that the summary judgment order
4 relies upon, Your Honors, the IEEE brochure. And again, this
5 document didn't put Bierer on notice that it had any legal
6 claim against Travis. Your Honor's order doesn't really focus
7 as much on the IEEE brochure, but it is included in the
8 decision.

9 And as you'll recall, in, I guess it was 2014, Mr.
10 Kennerly went to speak at a IEEE convention. There was a bio
11 of him in the materials. It referenced -- it represents that
12 he's a -- you know, he's of Travis and he worked for Travis,
13 and he worked for Bierer Meters for fifteen years, Travis UGD
14 for two years. And both Walter Bierer and Joe Bierer
15 testified in their depositions and reaffirmed in their
16 affidavits that they confronted Kennerly about the brochure.
17 Kennerly laughed it off and said the language was a misprint.

18 For them, this explanation -- I mean, not a misprint, but
19 you know, the guy who wrote the bio was confused about Rick's
20 relationship with Travis since Kennerly was working with
21 Travis to develop clamps for use in personal protective
22 grounding gear that were being sold by Bierer. And so that
23 explanation made sense. You know, we have the deposition
24 testimony that we've cited, and I'm just -- and what really
25 the point here is comparing the deposition testimony of Mr.

1 Bierer on the left to Mr. Bierer's affidavit, and they're
2 completely consistent.

3 The only inconsistency that the defendants have pointed
4 out is what year did Mr. Bierer and Joe Bierer confront Rick
5 about or see this. The affidavit says 2015, 2016.
6 Apparently, he says in one part of his deposition that we
7 overlooked is 2014. But those issues are immaterial because
8 it was 2016. And Your Honor says that triggers the statute,
9 then it triggers the statute and it's still beyond three
10 years. So the one minor inconsistency is immaterial to the
11 substance of what happened here.

12 And that was, Rick laughed it off, said it was, you know,
13 an error, and that was his explanation. And Joe Bierer, his
14 affidavit and his deposition say the same thing. What Your
15 Honor's order does, Your Honor -- and with all due respect, we
16 believe it incorrectly rules on a matter of law that Bierer
17 failed to exercise reasonable care by simply confronting
18 Kennerly about the brochure and accepting his explanation.

19 Now, I understand this is an objective standard, but I
20 also point out here in this presentation that so is the
21 negligence standard. Negligence is objective, as a reasonable
22 person would do. So the question is, did Bierer act
23 reasonably under the circumstances? And we believe that's a
24 jury question. We don't think the Court can take it out of
25 the hands of the jury at summary judgment when you're supposed

1 to give all inferences, view all evidence and inferences in
2 the light most favorable to the nonmoving party.

3 You can't just simply view this incident in isolation
4 without a jury evaluating Kennerly's position with the company
5 for over 15 years, his role with Travis on Bierer's behalf to
6 develop clamps for use in personal protecting grounding
7 equipment, and everything else was going on at that time. And
8 what's happened is -- and these are excellent lawyers on the
9 other side, Your Honor, but they have they have pulled out,
10 you know, bits and pieces here, and they're making a mountain
11 of a molehill. Which I would be doing the same thing if I'm
12 them. But you can't take it out of context. And I know it's
13 an objective standard, but as I point out, so is negligence
14 being objective standard.

15 And so we don't believe that it is a matter of law in
16 this instance that confronting Kennerly, whose name is in the
17 bio, and accepting his explanation was unreasonable under the
18 circumstances. And I don't think that -- I think that's a
19 jury (audio interference) question, Your Honor.

20 And then then the last key document the Court relies upon
21 is this 2015 email that Walt Bierer sent in October, that he
22 is complaining of Rick not being accountable, concerned about
23 his outside activities. And herein, Your Honor, Walter Bierer
24 was never questioned in his deposition or never presented the
25 document in his deposition. And the document had not been

1 produced by us at the time of his deposition because of the
2 technical glitches we hear in the discovery software.

3 But it was clear that at least counsel for Kennerly had
4 had the document because they questioned him. When I say him,
5 I'm talking about Mr. Walter Bierer. They questioned him
6 about did you ever suggest to Mr. Kennerly that he should look
7 for employment elsewhere? And he said, no, I don't think I
8 would have ever done that. Well, turns out he did in this
9 email that was produced.

10 And again, what's important here is -- and you can't view
11 this email without understanding what they're talking about.
12 And here that's -- this is -- and the only evidence of context
13 of this is Walter Bierer's affidavit. And in his affidavit,
14 which we submitted in support of our opposition to the motion
15 for summary judgment, is this (audio interference) he's
16 referring to Rick Kennerly spending a lot of time with Jerry
17 Eddins. And Jerry Eddins is some relative through marriage.
18 Jerry Eddins had this hugely successful electrical contracting
19 company. They did work on the Ravenel Bridge, and he was, you
20 know, a big mover and shaker. And I think I mentioned before,
21 ultimately, Mr. Eddins got in a lot of legal trouble for
22 essentially using minority contractors as straw contractors
23 and that he was federally prosecuted. But that's -- really
24 doesn't have anything to do with this case.

25 But what -- as Mr. Bierer says in this affidavit, it

1 appeared that that he was -- that Rick was looking to try to
2 go into business with Jerry Eddins. And that's what this
3 affidavit says, Your Honor. You can't not ignore -- you can't
4 ignore this affidavit. You have to accept it for purposes of
5 summary judgment and view it in a light most favorable to
6 Bierer and Associates.

7 And I guess one of the most important points here is here
8 at the bottom where it says, "Upon receipt of this email
9 Kennerly and I had a meeting where he assured me of his desire
10 to continue his role at Bierer and he increased his efforts to
11 make sure he connected with me and the rest of the management
12 more frequently."

13 So the point here is Kennerly responded to this email.
14 They had a meeting. Kennerly vowed to, you know -- that he
15 wanted to continue working there. And he did better. He did
16 better. I mean, that's -- and so, again, there's nothing in
17 this email that triggers anything about Travis or Trystar.
18 It's about Kennerly. He's sort of acting (audio interference)
19 doesn't want to be accountable. He's called down and he says,
20 I'll do better. And he did do better.

21 And Your Honor, this, in our view was not a trigger
22 and/or evidence that Bierer -- I mean, you know, once Bierer
23 is supposed -- how they're supposed to follow up here when,
24 you know -- I guess they could contacted Eddins' electric
25 company. I mean, but there was nothing going on there with

1 Eddins' electric company. But that that's really the issue
2 here. So this is really not relevant to the inquiry in front
3 of the Court, we believe.

4 And then the last ground, Your Honor, rejected our
5 arguments on tolling statute limitations based upon Kennerly's
6 fraudulent concealment. In the order, it talks about apparent
7 authority. We're not relying upon apparent authority. The
8 evidence is refutable -- irrefutable that Kennerly was a
9 national sales rep for Trystar and a national sales rep for
10 Travis.

11 Travis and Trystar's corporations can only act through
12 their agents. Your Honor, it relies upon the Pro Slab v.
13 Argos U.S.A case. And there it's the reverse situation. Two
14 individuals, Cooke and Baird, the plaintiffs, were seeking to
15 impute fraudulent concealment conduct from a corporation onto
16 individuals, not individuals' conduct onto the corporation.
17 And more importantly, Pro Slab is a federal antitrust law, and
18 it applies federal antitrust law, not South Carolina law, when
19 it comes to tolling.

20 And more factually, specific here as to what Kennerly's
21 authority was, you have to go back to -- when Trystar was
22 confronted by Joe Bierer about selling direct to Bierer's
23 customers, what did they do? Well, the only thing we know
24 that they did is, well, he said, I would have talked to Rick.
25 So does that not -- is that not evidence that Rick was their

1 point person on dealing with Bierer and Associations on
2 questions that Bierer had about this relationship?

3 And of course, it is when you view the evidence in the
4 light most favorable to Bierer. And then what do we know? Is
5 that Kennerly continued to lie and lie and conceal, all the
6 way up until he was finally terminated. And these are just
7 the standards for the statute of limitations, Your Honor. And
8 I appreciate you hearing me out on that.

9 But that is -- we strongly believe that when you consider
10 the affidavit and all the evidence in context, and that the
11 Court should reconsider its decision. I know it's unusual,
12 but this is an unusual case; and deny the motion for summary
13 judgment. Thank you.

14 THE COURT: Thank you, sir, if you would, Jim, would you
15 forward me that presentation so I can read it?

16 MR. GRIFFIN: Absolutely, I'll send it to everybody.

17 THE COURT: All right. Thank you.

18 All right, Mr. Ursu, are you up next?

19 MR. URSU: I am. And you know, for these motions to
20 reconsider, I always think of the Elvis song, "Reconsider,
21 Baby." Well, I'll say, with all due respect to my friend Mr.
22 Griffin, that if it didn't work for Elvis, it ought not to
23 work for him.

24 The -- you know, he said, of course, what fine lawyers we
25 all are. And that goes for Mr. Griffin and Ms. Fox too. This

1 was not a problem of advocacy. This was not a problem that
2 they did not make the right arguments. Lawyers are presented
3 with the facts that they have. And Jim and Maggie were
4 presented with the facts that they have. And of course,
5 they're doing everything that they can with them. But the
6 only problem for them is that, by themselves, these facts
7 compel summary judgment on the limitations issue. This case
8 was too little, too late, I said last time, and that's true
9 based on the facts, not on the advocacy.

10 I don't have a long presentation today, but I do have
11 just a short one. And if the Court is willing, I would like
12 to put one or two documents in front of it again.

13 THE COURT: Yes, sir.

14 MR. URSU: Thank you. And so I'm going to do this.
15 Let's see. Are you now able to see this cover page?

16 THE COURT: Yes.

17 MR. URSU: Yeah. All right. You know, Mr. Griffin
18 mentioned -- and it's true -- that this is an objective
19 standard. And so the fact is it doesn't matter in the end
20 what the -- what Mr. Bierer says that he knew or didn't know.
21 It's what the exercise of reasonable diligence would have --
22 where, you know, the exercise of reasonable diligence means
23 that an injured party must act with some promptness where the
24 facts and circumstances of an injury would put a person of
25 common knowledge and experience on notice that some right of

1 his has been invaded or some claim against another might
2 exist.

3 And so you know, in that 2013 email, it shows that they
4 believe that some right of theirs -- that they were injured,
5 that they were losing sales, and that they're -- that some
6 right had been invaded or a claim against another party might
7 exist. Now, what I heard Mr. Griffin say is, well, we thought
8 that that was just fine, right? But at least they knew they
9 were losing (audio interference) at that point.

10 Here -- and it doesn't matter that they knew it against
11 Travis or Trystar or Kennerly; all they have to know is that
12 it's the date of the injury, not the discovery of the identity
13 of the alleged wrongdoer. If you know it as to one, you know
14 it as to all.

15 Here's the email that Your Honor pointed out last time.
16 This is the one that showed up after Walter Bierer's
17 deposition. And I think what's most notable about Mr.
18 Bierer's affidavit or declaration is that all the things he
19 can't explain about this. Right? He's saying, "It's a
20 symptom of a larger issue. And I am beginning to wonder why I
21 am paying large sums of money to disappear for weeks at a
22 time." And what he's also saying is, look, I'm seeing this is
23 a breach of fiduciary duty case. He's saying, "Almost
24 everything you are doing currently seems to put you at odds
25 with everyone in our company. You have purposefully separated

1 yourself from Bierer by maintaining private telephone and
2 email accounts, which leads me to wonder what other activities
3 you may be conducting on my dime. My trust is waning."

4 You know, this ends up being almost something that you
5 would see in a law school exam. It has basically all of the
6 points in it that says that a reasonable person would be on
7 inquiry notice, which is exactly what the judge -- what you
8 said, sir, in the last hearing that we had. It "leads me to
9 wonder," right? That's what Mr. Bierer said. You know, Mr.
10 Bierer didn't mention it, but it's important to note. This is
11 in Travis's -- oh, I'm sorry. This is in Travis's Exhibit 14,
12 that says Trystar Exhibit 4 on the bottom. That's not
13 correct. It was Travis's Exhibit 14 in connection with the
14 summary judgment motion.

15 But this is what somebody from Bierer Meters, Brent
16 Jeffries, said on April 12th, 2016: "From talking to David
17 Deinek, Rick helps many other people with other manufacturers'
18 products." So they know that they're losing money to Trystar.
19 They know that their trust with Rick is waning and that he's
20 disappearing for weeks at a time. And they know that Rick
21 helps people in his off time with other
22 people's/manufacturers' products.

23 And the response from that, from Billy Bierer and Walt
24 Bierer, is absolutely crystal clear, head-in-the-sand stuff
25 that summary judgment on statute of limitations is made for.

1 "Brent, you should reserve comment on Rick's activities until
2 you understand what that means." So they're saying, I need to
3 understand what it means. And again, above that, but no --
4 "You should not vent. No need. Rick is doing business."

5 I mean, so that is about as clear as it could be. And if
6 it weren't, if that weren't enough, we have what they said,
7 you know, their excited utterance when they rediscovered this
8 IEEE brochure, you know, from 2014 in 2018, where they had
9 exactly that same information. It has been obvious to me that
10 you had been trying to separate yourself and appear as an
11 independent entity within the electric utility industry for
12 many years. No other business would have tolerated it for any
13 period of time. No more.

14 That's game, set and match. It's really not an advocacy
15 question. It's just a question of what do the facts say? And
16 in this instance, the facts say that they were on an inquiry
17 notice of this, that the injury -- they knew that they were
18 injured as of 2013, that they knew, certainly as of 2014,
19 2015, that Rick was working -- you know, working for Travis,
20 which they testified means he was getting paid by them, and
21 they knew that he was disappearing for weeks at a time. Their
22 trust was waning. And it said it made them wonder what other
23 activities he's conducting on his dime.

24 So again, this isn't college moot court. If it was, Jim
25 would win every time. But this is -- these are just the

1 facts.

2 You know, I just -- I appreciate the Court's willingness
3 to find a date for this that accommodated my travel schedule.
4 I just got back from Rome, and I would say that I think I
5 think the patron saint of lost cause is St. Jude. I would
6 petition the Pope to make it Mr. Griffin and Ms. Fox. I think
7 they're fine, fine lawyers. They did everything they could
8 here, but this is -- the Court was right the first time. And
9 again, it's just about the facts. So thank you.

10 THE COURT: All right. Mr. Ursu, would you also send me
11 your presentation so I can read through it as well?

12 MR. URSU: I will. Absolutely. I know Mr. Beach and Mr.
13 Duffy may have something to say too.

14 THE COURT: Mr. Beach or Mr. Duffy, who would like --
15 either one of you want to go next?

16 MR. BEACH: Your Honor, I --

17 Brian, do you want to go? And then I'll go.

18 MR. DUFFY: Well, thank you.

19 I'll just -- I'm riding along with Mr. Ursu on this one
20 and I think he covered everything, perfectly, so I'll bow out.

21 THE COURT: Thank you.

22 MR. DUFFY: Thank you.

23 MR. BEACH: Your Honor, thank you. It's John Beach, and
24 as you know, we, along with Lyndey Bryant, we represent Travis
25 Pattern in this case.

1 We are completely identically re-plowing the same ground
2 that we plowed in the motion for summary judgment, Your Honor.
3 And these are all documents, and this is all information, and
4 these are all arguments that have already been made to the
5 Court. And with due respect to Mr. Griffin -- and again, like
6 Mr. Ursu, I admire him for his tenacity and his ability to try
7 and articulate the best possible argument as to why the
8 Court's ruling was incorrect, but on, I guess, sort of a
9 technical level, those are not grounds for granting
10 reconsideration under Rule 59(e). The courts have made it
11 very clear that those grounds are to accommodate an
12 intervening change in controlling law, which we don't have
13 here; to account for new evidence not available at trial or
14 during the previous hearing, which again, we don't have here;
15 and to correct a clear error of law or prevent manifest
16 injustice. And we clearly don't have that here either,
17 because, again, we are looking at the Court's view of evidence
18 that has been placed before the Court, and we are now
19 relooking at that same evidence.

20 And what Mr. Griffin, again -- with respect to him and
21 his abilities, what he's trying to do here is trying to
22 convince the Court to change the Court's ruling based on
23 exactly the same evidence and essentially the same arguments
24 that were made in response to our motion for summary judgment.

25 I will note two things, though. And these are things

1 that, again, are actually reflected in the Court's order. And
2 they are also -- it's duplicative, but it is responsive to
3 what Mr. Griffin has argued here, and that is that the Court's
4 view of the October 14th, 2015, email, which again, was not --
5 there were no questions to Mr. Bierer. That was an email that
6 Mr. Bierer sent out, by the way. And it is true that Mr.
7 Bierer was not questioned on that email when his deposition
8 occurred.

9 But as Mr. Griffin pointed out, even though that was an
10 email that was sent by Mr. Bierer through Bierer's email
11 system, they had not produced it at that time. So I think
12 it's kind of hard to argue that no one asked him about that
13 email at the time of the deposition when they had failed to
14 produce it for whatever reason. And I'm not suggesting that
15 they withheld it or saw that it was problematic and didn't
16 provide it. I have heard the explanation that there was some
17 sort of a technical glitch, and I honor Mr. Griffin's honesty,
18 and I accept that.

19 But it doesn't matter because you can't -- you can't say
20 you didn't ask my client questions about this at a deposition
21 when it was your document and you hadn't produced it prior to
22 the deposition. However, that -- the email speaks for itself,
23 and one reason it does speak for itself is, if you look at
24 that email and you look at the list of items in there that
25 were concerns of Walt Bierer at that time and then you look at

1 the email that Mr. Bierer sent to Kennerly two or three days
2 after termination -- and Judge, I'm sorry, but I don't have
3 a -- I don't have a document number for that second email, but
4 it would have been sent somewhere within a day or two
5 following the termination, which occurred July of 2018. It is
6 not just the exact same list of concerns. It is almost worded
7 the same way. It's almost -- it's uncanny how Mr. Bierer
8 managed to conjure up the exact words that he had used in 2015
9 when he sent this email to Kennerly.

10 And remember, this is the email that he sent to Kennerly,
11 which was explaining to Kennerly why Bierer was terminating
12 him. It's the exact same list of concerns. And the thing
13 that is interesting about it is, and I would say completely
14 material to the Court's current ruling, is that there is
15 absolutely nothing that Mr. Bierer or anyone at Bierer had
16 learned between 2015 and that email in July of 2018 that would
17 have changed the way they felt about any of those things.
18 That same list that they said in October of 20 -- I'm sorry.
19 Okay. And now Lyndey has just handed this to me. It's
20 actually Kennerly 011389. And it is an email from Walt Baird
21 to Rick Kennerly on July the 11th of 2018. It's the same
22 list. And he says, look, this is why we're terminating you
23 and here are the reasons. It's the exact same list of reasons
24 worded almost identically to the ones that he gave back in
25 2015, which remember, he said at that time, was -- and I'm

1 trying to see if I can find -- I can't actually find the email
2 here. But he said he felt that this was -- it might be time
3 to terminate their relationship.

4 So it wasn't just the same list of things that caused him
5 to terminate Kennerly in 2018. In 2015, it caused him to have
6 the same concern, which is he thought it might be time to part
7 company and for Kennerly to leave Bierer. So that's a very,
8 very important point.

9 The other important point -- and again, this is in your
10 order, and I hate to re-plow the same ground, but this is in
11 response to Mr. Griffin's argument -- is, remember, the
12 testimony is that in 2014 around the time of this IEEE
13 conference in a management committee meeting at Bierer in
14 person, that Walter Bierer had confronted Rick Kennerly about
15 this brochure in which it was represented that Rick Kennerly
16 had worked for Travis for two years. Now, again, that --
17 fast-forwarding to around July of 2018, that was apparently,
18 again, the document that caused Walter Bierer to call Travis
19 and say, oes Rick Kennerly work for you? And they said, he's
20 our national sales manager. And that was the -- that was the
21 factor, apparently, the thing that occurred that caused them
22 to terminate him in 2018. So -- and it's also important --
23 and again, this is referenced in your order -- that Joe
24 Bierer, who also was one of the management -- managers of this
25 company, testified that in his mind, when you work for a

1 person -- and he was distinguishing the words "work for" for
2 "working with," Your Honor. And he was asked specifically,
3 what does work for mean, in his deposition. And what he said
4 was "work for" always means that you are getting paid by
5 whoever it is you're working for. And so the notion that they
6 didn't know -- they didn't know in 2014 that "work for" at
7 least gave them some reasonable notice that he was being paid
8 by Travis Pattern is completely, completely contradicted by
9 Joe Bierer's own testimony in which he says, the words "work
10 for" to him have always meant you're getting paid.

11 So when they saw that -- and he was in the room,
12 remember, in 2014, in the management committee meeting when
13 they had this discussion with Kennerly back then and
14 confronted him about this brochure. So the synchronicity of
15 those two things, the emails in 2015 versus 2018 and the
16 brochure and then the -- in 2014 and then the very same
17 brochure in 2018 -- which by the way, the way they learned
18 that he did actually have some relationship with Travis was to
19 give Travis a call and apparently not even not even identify
20 themselves. They just said, does Rick Kennerly work for you?
21 And then Travis was very upfront and straight with them and
22 said, he is our national sales manager.

23 And so you know, I think it's completely within the
24 Court's province to take information that is that abundantly
25 clear and say that all of this sort of self-serving language

1 in these affidavits that were done after the fact does not
2 change the fact that the statute of limitations ran more than
3 three years before they filed this lawsuit, because the facts
4 very clearly establish that Bierer knew or should have known,
5 had some duty to explore the fact that it had claims against
6 both Trystar and Travis. And of course, their emails
7 involving Trystar from the 2013-2014-2015 time frame that are
8 equally clear.

9 So Judge, again, I'm sorry to go down that road. I was
10 hoping that we wouldn't be arguing about the substance of
11 this, because, again, that is identical to the discussions
12 that we've already had before the Court. But I just want to,
13 you know, be sure that the Court feels that we've addressed
14 Mr. Griffin's argument in full, and so that's -- we believe
15 that all of that very strongly calls for a denial of the
16 motion for reconsideration.

17 THE COURT: Thank you, sir.

18 Mr. Griffin, you want -- anything you want to --

19 Mr. Rozelsky, are you arguing today? From the --

20 MR. ROZELSKY: Your Honor, I'm not arguing on this
21 motion. I have a separate motion I want to address with you.
22 We're not going to argue that motion today, but I want some
23 clarification.

24 THE COURT: Okay. All right.

25 So Mr. Griffin, then I'm glad to hear some response.

1 MR. GRIFFIN: Yes, sir, briefly.

2 Mr. Ursu identified Travis Exhibit 14 as an email about
3 Rick helping other manufacturers on his off time. Billy
4 Bierer emails that you need to understand what it means. And
5 again, just throwing it out there, and what it means is, in
6 and of itself, means nothing. They want -- they want the
7 Court to accept their version of what it means and not infer
8 and accept what the standard requires, Bierer's version of
9 what that means.

10 And the evidence in the record that we submitted
11 previously is that it assisted Bierer and their products to
12 promote complementary products manufactured by other
13 manufacturers. It was the service they provided to the
14 industry and was overall good for Bierer. So this is just a
15 perfect example of the defendants putting their spin on it,
16 ignoring the legal standard applicable to the motion where we
17 are, where you view it in light most favorable to the
18 defendant.

19 With regard to the 2015 email, it wasn't produced. We're
20 not blaming them for not asking, but what we're saying is,
21 Judge, they can't take a 2015 email that he's never been
22 questioned about and put their spin on it and ignore his
23 affidavit where he -- where he explains what he's talking
24 about. Once again, it's not an either/or. It's you got to
25 take the defense -- I mean, you've got to take the nonmoving

1 party's position and view it in the light most favorable to
2 them.

3 If they wanted to take his deposition and question him
4 about that email and what he meant by that, they were free to
5 do so. We reopened depositions. We still have depositions
6 open. But no, what they wanted to do is put this email before
7 the Court and put their spin on it, not the inference in the
8 light most favorable to defendant, and ignore completely
9 Walter Bierer's affidavit where he explains what that means.

10 And then, you know, lastly, they rely upon the
11 termination emails. And really, the whole summary judgment
12 motion does boil down to this, Your Honor. It is -- it is
13 Bierer on notice that Kennerly was chafing at control, chafing
14 at supervision, wanted to appear to be independent, or what
15 have you. You know, that's what they say is clear from the
16 record. And so Bierer should know that. But the question
17 becomes more than that. It is was Bierer's actions in
18 response to what information they had reasonable?

19 Did they exercise reasonable diligence in following up
20 with that information? And here is an objective standard.
21 It's like a negligence standard. And the question is -- going
22 to the guy, going to Rick Kennerly and confronting him about
23 these issues, and he gives an explanation that is satisfactory
24 to the company. Was that as a matter of law unreasonable? We
25 don't think the Court can make that ruling. We think that's a

1 jury question.

2 And that at this stage, you've got to give the inference
3 in the light most favorable to Bierer, the nonmoving party.
4 And we think that issue is critical for summary judgment.
5 Because they do not tell you Bierer didn't do anything. What
6 they tell you is, oh, they should have done more than just ask
7 Rick Kennerly. They should have done more than just rely on
8 what Rick Kennerly told them. And they should have done more
9 than just email Moerke and, you know -- and not get a
10 response. I mean, they should have done more. They should
11 have done more.

12 And that's a jury question, Your Honor. Whether their
13 conduct was reasonable or not, classic jury question. Every
14 day in the Anderson County courthouse trying a wreck case,
15 were the driver's actions reasonable? That's an objective
16 standard. And that's the standard that governs this motion
17 for summary judgment. And we respectfully request that the
18 Court vacate its order and put us all back on track and gets
19 this case resolved. Thank you.

20 THE COURT: Thank you, sir. If you would, again -- if
21 you would submit to me your presentation so I can read through
22 them and I'll give you my response the first of next week.

23 All right. Mr. Rozelsky, what kind of issue do you have,
24 buddy?

25 MR. ROZELSKY: Well, Your Honor, when I saw that you were

1 going to be out for a period of time, out of respect for Mr.
2 Griffin and Ms. Fox, who took an extended vacation down in
3 Walterboro, I did not file my "me too" motion. Although I
4 have now filed on behalf of ITW a motion that is in essence
5 nearly identical to Mr. Ursu and Mr. Beach's motions.

6 My client, Illinois Tool Works -- when I spoke with Mr.
7 Griffin and Ms. Fox last week, we presumed it would not be
8 heard on this. And I really -- my question for you is how do
9 you want us -- how and when do you want us to brief that?
10 What I don't want to have happen is if Your Honor is inclined
11 to deny the motion for reconsideration and the plaintiff's
12 appeal that my motion is somehow staggered long after theirs.

13 THE COURT: Right. Well, let me say this. I am getting
14 a total knee done April the 11th. They tell me I'm going to
15 be out six weeks, but that doesn't mean I won't have my
16 computer with me. And it doesn't mean, after a week or two,
17 when I get back off the medications, I guess, that I can hear
18 a motion then. I would think, if you would go ahead and --
19 just go ahead and brief it now, and I'll look at it. If you
20 feel like you need to have more argument on it, just let me
21 know and we can do it probably while I'm out and just do it on
22 online.

23 Seems to me like that --

24 MR. ROZELSKY: Thank you.

25 THE COURT: -- especially towards the end of it for sure.

1 MR. ROZELSKY: Sure.

2 THE COURT: And just as long as it works with your
3 schedule, certainly I won't have a whole lot on my plate for
4 that time period, so it will be good.

5 MR. ROZELSKY: Thank you.

6 THE COURT: All right, guys. Thank you a lot.
7 Appreciate it. Take care.

8 UNIDENTIFIED SPEAKER: All right. Thank y'all.

9 THE COURT: Yeah, man.

10 MR. GRIFFIN: Thank you, Your Honor.

11 MR. URSU: Good luck with the surgery, Judge.

12 UNIDENTIFIED SPEAKER: Yeah.

13 UNIDENTIFIED SPEAKER: Thank you, Judge.

14 (End of Transcript of Record)

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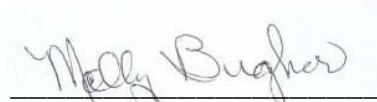
CERTIFICATE OF TRANSCRIBER

State of South Carolina)
)
County of Richland)

I, MOLLY BUGHER, a court-approved transcriber, do hereby
certify that the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative to
appeal, in the Court of Common Pleas for Richland County,
South Carolina, on the 30th day of March, 2023.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

June 24, 2023



Molly Bugher, CDLT-161
Transcriber

TRYSTAR'S OPPOSITION TO MOTION TO RECONSIDER

Bierer and Associates, Inc. v. Jan F. Kennerly, Jr., et al.

March 30, 2023

Would a Reasonable Person Know He Or She Had a Claim?

MYRTLE WIGGINS, Appellant,

v.

Terry Lee EDWARDS, d/b/a Island
Tree Service, Respondent.

No. 24021.

Supreme Court of South Carolina.

Heard Jan. 18, 1994.

Decided March 7, 1994.

S.C.Code Ann. § 15-3-535 (Supp.1992) requires that an action for personal injury "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."

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. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). This is an objective determination. *Wilson v. Shannon*, 299 S.C. 512, 386 S.E.2d 257 (Ct.App.1989).

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No. 24021.

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Heard Jan. 18, 1994.

Decided March 7, 1994.

The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

October 14, 2015

On Oct 14, 2015, at 5:22 PM, Walter Bierer <wbierer@aol.com> wrote:

Rick,

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.

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

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.

Walt

Trystar Ex. 3

April 12, 2016

-----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

Travis Ex. 14

April 12, 2016

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

Travis Ex. 14

July 11, 2018

"Discovery"

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

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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!

check.

Wait

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Trystar Ex. 4; Travis Ex. 4

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

RECEIVED

Dec 28 2023

SC Court of Appeals

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,

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*Attorneys for Appellant Bierer and Third Party
Defendants Walter Bierer, Joseph Bierer, & Brent
Jeffries*

December 28, 2023
Columbia, South Carolina